IN THE EAST AFRICAN COURT OF JUSTICE

APPELLATE DIVISION

AT ARUSHA

(*Emmanuel Ugirashebuja,P.,Liboire Nkurunzinza,V.-P.James Ogoola, Edward Rutakangwa and Aaron Ringera, JJ.A)*

APPEAL NO. 1 OF 2015

BETWEEN

UNION TRADE CENTRE LIMITED (UTC)…….....APPELLANT

AND

THE ATTORNEY GENERAL OF RWANDA…….....RESPONDENT

Appeal from the Judgment of the First Instance Division
(Jean Bosco Butasi, P.J., Isaac Lenaola and Monica Mugenyi, JJ.)
Dated 27th November, 2014 in Reference No. 10 of 2013.

JUDGMENT

A. INTRODUCTION

(1). This is an Appeal against the Judgment of this Court's First Instance Division ("the Trial Court") dated 27th November, 2014 in Reference No. 10 of 2013 by which the Trial Court dismissed the Reference and ordered the parties to bear their own costs.

(2). Union Trade Centre Ltd ("the Appellant") is a Company Limited by Shares legally registered under the Rwanda Companies Act.

(3). The Respondent is the Attorney-General and Minister of Justice of Rwanda and was sued in a representative capacity for and on behalf of the Republic of Rwanda.

B. THE REFERENCE TO THE TRIAL COURT

(4). On 22nd November, 2013, the Appellant lodged a Reference before the East African Court of Justice (EACJ) under Articles 5 (3) (g), 6 (d), 8 (1) (a), (b)and (c), 27 and 30 of the Treaty for the Establishment of the East African Community ("The Treaty"); Rules 1 (2) and 24 of the East African Court of Justice Rules of Procedure ("the Rules") and the inherent powers of the Court. In the Reference, the Appellant sued the Attorney General of the Republic of Rwanda ("the Respondent") on behalf of the Government of Rwanda for the actions of the Kigali City Abandoned Property Management Commission ("the Commission"), a government body.

(5). The Appellant pleaded in the Reference that it was incorporated by its current shareholders principally to run and manage the Union Trade Centre Mall ("UTC Mall") in Kigali.

(6). The Appellant further pleaded:

(a) That on or about the 21st day of October,2013, the Commission, a body belonging to the Respondent, ordered it to present to the Commission-

(i) The building's land title.

(ii) A list of its shareholders and their respective shares.

(iii) The Applicant's loan and/or mortgage agreements/contracts with all its creditors.

(iv) Loans and/or Mortgage payment schedule(s).

(v) The details of how it manages its personnel.

(vi) Details of how it spends its money.

(b) That it obliged and presented the said documents to the Commission.

(c) That after submitting the said documents to the Commission, the Appellant did not receive any formal response from the Commission or any Government institution indicating whether it was in breach of any statutory obligations under any law.

(7). The Appellant further pleaded that on the 2nd day of October, 2013, it was surprised to see a copy of a letter written to its tenants by the Commission ordering them to pay their monthly rentals into the Commission's Account No. 011 1000 407 held with FINA Bank with effect from the 1st October, 2013.

(8). The Appellant further pleaded that:

(a) The actions of the Respondent had caused some tenants to remit their monthly rentals into the Commission's account to the detriment of the Appellant who at all times was the lawful landlord and proprietor of UTC mall.

(b) Since the said demand was issued, there had been disorganization in its business and some tenants had opted not to pay but seek for guidance from the Respondent.

(c) The actions of the Respondent have caused the Appellant great difficulty and distress in meeting its obligations towards a mortgage with the Bank of

Kigali because it has forcefully diverted her income from the monthly rentals paid by its tenants.

(d) Through its lawyers, the Appellant wrote to the National Ombudsman, the Prosecutor General, the Governor of Kigali City, the Mayor of Nyarugenge, and the President of the Commission both at National level and Nyarugenge District level informing them of the grave injustice and seeking their intervention but all in vain.

(9). The Appellant stated that the above actions of the Respondent were a blatant contravention of Articles 5 (3) (g), 6 (d), 7 (1) (a) and (2), 8 (1) (a) (b) and (c) of the Treaty and also contrary to the Respondent/Partner State's obligations, duty, or undertakings under the Treaty to do or abstain from doing or engaging in certain acts or to observe certain standards of behavior that may have the effect of defeating the objects and purposes for which the Community was established, such as the mandatory obligation to enhance and strengthen partnership with the Private Sector and Civil Society in order to achieve sustainable socio-economic and political development.

(10). Attached to the Reference were annexures "A" to "K" which consisted of the Appellant's incorporation particulars, list of its Directors and Shareholders, copy of its title deeds, a photograph of its mall, correspondence between the Commission and the Appellant, a tenancy agreement between itself and a corporate tenant, a letter from Nakumatt Rwanda Ltd. to the Commission, a mortgage deed, and a letter to various Rwandan Authorities. All the annextures were certified true copies of the original by Miriam Zacharia Matinda, Advocate, Notary Public and Commissioner for oaths, on 22nd November,2013.

(11). In the Premises, the Appellant sought against the Respondent:-

(i). A Declaration that the actions of the Respondent in taking over the Appellant's property contravene Articles 5 (3) (g), 6 (d), 7 (1) (a) and (2), and 8 (1) (a), (b) and (c) of the Treaty;

(ii). An Order that the Respondent be restrained from further interference with the business and management of the Appellant's property, UTC Mall;

(iii). An Order that the Respondent pays general damages to the Appellant and costs of and incidental to the Reference;

(iv). Such further or other orders as may be just and necessary in the circumstances.

(12). On the 20th March, 2014, the Respondent lodged a Response to the Reference and contemporaneously therewith a Notice of Preliminary Objections to the Reference.

(13). In the Response, the Respondent generally traversed the averments in the Reference and pleaded that:-

(i) The Court had no jurisdiction to entertain the Reference because the acts complained of by the Appellant were not acts of a Partner State or an Institution of the Community contrary to the Provisions of Article 30 of the Treaty.

(ii) The Respondent was wrongly sued in the Trial Court as the acts complained of by the Appellant were committed by the Commission which under Rwandan law has a distinct legal personality and can sue and be sued in the name of the Mayor of Kigali.

(iii) The Reference was filed out of time and it should be struck out for the reason that the acts complained of by the Appellant took place on 1st August, 2013, while the Reference was filed on 22nd November, 2013- one month and 21 days outside the time set by Article 30 (2) of the Treaty.

The Response was supported by the affidavit of JOHNSTON BUSINGYE, Minister of Justice and Attorney General of the Republic of Rwanda, sworn on 18th March, 2014, at Kigali. In that affidavit, the deponent deposed to various provisions of Rwandan internal laws and the fact that the Appellant was neither a Partner State nor an Institution of the community, and concluded

that, on the basis thereof, the Respondent could not be sued for acts or omissions of the Commission. He also deposed that he had read from the Reference that the acts complained of took place on 1st August, 2013 while the Reference was filed on 22nd November, 2013, one month and 21 days outside the limitation period prescribed by the Treaty.

(14). The Respondent prayed the Court to:

(a). Find that-

(i) The Court had no jurisdiction to hear and determine the Reference.

(ii) The Respondent was wrongly sued.

(iii) The Reference was filed out of time.

(b). Declare that the Reference was an abuse of the Court process, frivolous, vexatious and unwarranted.

(c). Dismiss the Reference with costs.

(15). The points of Preliminary objection stated in the Notice thereof were to the same effect as the pleadings summarized in Paragraph (13) above.

(16). (a) In a joint Scheduling Memorandum filed with the Court at the Scheduling Conference of the Trial Court on 12th June, 2014, the parties framed the issues for trial as-

(i). Whether the acts complained of were acts of a Partner State or Institution of the Community or whether the Attorney General of Rwanda was properly sued before the Court.

(ii). Whether the Reference was time barred and should be struck off the record.

(iii). Whether the action of taking over the Applicant's mall by the Commission was inconsistent with and/or in contravention of Articles 5, 6, 7 and 8 of the Treaty.

(iv). Whether the parties were entitled to the remedies sought.

(b) The parties had only one agreed fact, namely, that the Appellant was a Company Limited by shares and legally registered under the Rwandan Companies Act.

(c) As regards the nature of the evidence to be adduced at the trial of the Reference, the parties agreed that it shall be by way of affidavits.

The Trial Court's Determination

(17). Upon considering the pleadings, the annextures thereof, and Counsel's written and oral submissions the trial Court found and held –

(i). The Respondent's responsibility for the alleged misconduct of the Commission was duly established, and, accordingly, the Reference was properly instituted against the Respondent.

(ii). The Reference was filed within the two (2) months time frame prescribed by Article 30 (2) of the Treaty, and was, accordingly, not time barred.

(iii). The Commission's actions in question had not been proven to have contravened Rwanda's internal laws (which issue the Court had no jurisdiction to determine), and, therefore, the Court was unable to draw a conclusion that due process had been violated, or the principles enshrined in Articles 6 (d) and 7 (2) had been breached. In the result, the Appellant had not established a Treaty violation attributable to the Respondent;

(iv). The Appellant was not entitled to prayers (a) and (b) in the Reference, or to general damages as sought in prayer (c).

(v). As the issues in the Reference were novel and of great importance to the Community and Partner States, each party would bear its own costs.

C. THE APPEAL TO THE APPELLATE DIVISION

(18). Dissatisfied with the above Judgment, the "Appellant" (who was the Applicant in the Reference), appealed to this Division. It proffered the following three grounds of Appeal, namely:

(1). That the Learned Justices of the First Instance Division erred in law when they held that the Court's jurisdiction was restricted to the interpretation of the Treaty, but declined to interpret the provisions of Articles 5 and 8 of the same Treaty on the grounds that those provisions deal with the internal policy of the State of Rwanda.

(2). That the Learned Justices of the First Instance Division erred in law in holding that the Abandoned Property Management Commission was not a *de jure* organ of the State of Rwanda and neither are its acts attributable to the State of Rwanda.

(3). That the Learned Justices of the First Instance Division erred when they held that the Applicant had not established a Treaty violation attributable to the Respondent.

(19). The Appellant asked the Court:

(a). To set aside that part of the Judgment of the First Instance Division complained of.

(b). To declare that:

(i). The Kigali City Abandoned Property Management Commission is an organ of the State of Rwanda;

(ii). The actions of the Commission are attributable to the State of Rwanda;

(iii). The actions of the Commission of taking over the Applicant's property contravened Articles 5(3) (g), 6 (d), 7(1) (a) and (2) and 8 (1) (a), (b) and (c) of the Treaty and constitute an internationally wrongful act of the State of Rwanda under international law, namely, a breach of Rwanda's international obligations under the said Articles of the Treaty;

(iv). The internationally wrongful actions of the State of Rwanda entail its international responsibility and this in turn gives rise to new legal consequences/relations as between it and the Applicant.

(c). To make such further orders as may be just and necessary in the circumstances.

(20). The Attorney General of the Republic of Rwanda ("the Respondent") was also aggrieved by parts of the said Judgment. He consequently gave a notice of Cross-Appeal under Rule 94(4). In the said notice, the Respondent indicated that at the hearing of the Appeal, he will contend that part of the Decision of the First Instance Division should be varied or reversed and that part of that decision should be affirmed on grounds other than or in addition to those relied upon by the First Instance Division, namely-

(a). The acts complained of by the Applicant are not attributable to the Respondent as they are not acts of a Partner State.

(b). The Respondent is not properly sued before this Court as Kigali City has a legal personality to sue and be sued in the name of its Mayor.

(c). That Reference No. 10 of 2013 was filed out of time in breach of Article 30 (2) of the Treaty for the establishment of the East African Community.

(d). The taking over of management of UTC mall by Kigali City Abandoned Property Management Commission does not breach Articles 5,6,7,8 (1) of the EAC Treaty as it was done in accordance with Rwandan law.

(21). The Respondent proposed to ask the Court for Orders that:-

(1) The acts complained of by the Applicant are not acts of a Partner State or an Institution of the Community and thus the Court has no jurisdiction to entertain the Appeal.

(2) The Respondent is not properly sued before this Court.

(3) The Reference is time barred and should be dismissed.

(4) The taking over of management of UTC mall by Kigali City Abandoned Property Management Commission does not breach Articles 5,6,7,8 (1) of the EAC Treaty.

(22). At the scheduling conference of the Appeal, the above grounds of Appeal and the Cross-Appeal were consolidated into the following issues:

(1) Whether the Trial Court erred in law in finding that the Respondent was properly sued.

(2) Whether the Trial Court erred in law in determining whether the cause of action was time barred.

(3) Whether the Trial Court declined to interpret and apply the provisions of the Treaty.

(23). After the scheduling conference, the parties in compliance with this Court's Directions filed their written submissions.

(24). On the 20th July, 2015, both parties appeared before the Court and highlighted those written submissions at considerable length.

The Appellant's Case

(25). Mr. Francis Gimara, learned Counsel for the Appellant, prayed the Court to uphold the Trial Court's finding that the Respondent was responsible for the Commission's act of wrongfully and illegally taking over the Appellant's mall, but rectify what he contended were anomalies inherent in the Trial Court's analysis and conclusions on the status of the Commission as an organ of the Respondent State. He also prayed that the Trial Court's finding that the Reference was not time barred be upheld.

(26). On the merits of the Reference, namely, whether in finding that there was no proven Treaty violation by the Respondent, the Trial Court declined to interpret and apply the provisions of the Treaty, Counsel for the Appellant submitted that the Trial Court adopted the wrong approach in determining whether the Respondent's actions violated the Articles of the Treaty under which the Appellant's complaint was grounded, with the result that it erred in its findings. According to Counsel, the proper approach would have been first, to establish whether the Commission was an organ of the Respondent state; second, to establish whether the conduct of the Commission was attributable to the Respondent State; thirdly, to determine whether the Commission's conduct constituted a breach of the Respondent State's international obligations under the Treaty, and, if so, whether it engaged the international responsibility of the Respondent State; and fourthly, to determine what legal consequences of the Respondent State were flowing from its international responsibility.

(27). Counsel submitted that "to answer those questions or address the legal dispute before it, "the Court would have to objectively interpret and apply the provisions of the Treaty in relation to the facts and evidence before it. It would, however, have to make its own determination of the facts and evidence and then apply the relevant rules of international law to the facts which it finds to have existed" .

[Underlining ours].

The Respondent's Case

(28). Mr. Malaala Aimable, Learned Counsel for the Respondent, urged us to find that as a matter of international law, the municipal law of Rwanda, and the Treaty, the Respondent was not properly sued. On whether the cause of action was time barred, Counsel submitted that the Trial Court reached an erroneous conclusion as a result of ignoring the Respondent's material evidence (minutes of a meeting between the Appellant and the Commission on 29th July,2013) which clearly established that the cause of action occurred on that particular date. Counsel admitted that those minutes were annexed to the Respondent's written submissions but contended that those submissions and the annextures thereto have never been expunged from the Court records, and, in the circumstances, it was disturbing to hear the Court say that they were not part of the Court record. Counsel urged this Court to rely on the said minutes and find that the Reference was filed out of time.

(29). On the merits of the Reference, Counsel prayed the Court to uphold the findings of the Trial Court that there was no Treaty violation by the Respondent.

The Court's Determination

(30). After considering the written submissions and the highlights thereof by Counsel for the parties, this Court was perturbed. We were perturbed by the emphasis on facts and evidence in this Appellate Division which is not a trier

of fact. Mr. Gimara recognized that the substantive dispute between the parties could not be resolved except by the application of facts found by the Court to the provisions of the Treaty. And Mr. Malaala decried the Court's refusal to consider the Respondent's evidence which, he believed, was part of the Court record.

(31). The above situation impelled us to scrutinize the entire Record of Appeal, and, in particular, the Reference, the Response to the Reference, the proceedings at the scheduling conference of the Trial Court, and the Judgement appealed against, with especial care.

(32). What we found out from the above confounded us all the more as will soon be evident.

(33). From the pleadings, we noted that whereas the Appellant stated that the cause of action arose on 2nd October,2013, the Respondent averred that it arose on 29th July,2013. We also noted that the Appellant did not comply with Rule 24 (d) of the Court's Rules which requires that a Statement of Reference shall state the nature of any evidence in support. The Respondent too did not comply with Rule 30 (c) of the Rules which similarly requires that the Response to the Reference shall state the nature of the evidence in support where appropriate. We also noted that although the annextures to the Reference were notarized before a Notary Public on 22nd November,2013, they were not deposed to in an affidavit in support of the Reference. Indeed there was no affidavit in support of the Reference. We further noted that although the Response to the Reference was supported by the affidavit of the Attorney General of Rwanda, that affidavit contained no annextures, not even on the contentious issue of when the cause of action arose. On that point, the deponent contented himself by merely swearing that;

> "*I have read from the Reference that the acts complained of by the Applicant took place on 1st August, 2013, while the Reference was filed on 22nd November, 2013, one month and 21 days outside the limit set by Article 30 (2) of the Treaty. That I*

believe therefore that it was filed out of time and should be dismissed with costs".

We note in passing that in fact, there was no such averment in the Reference.

(34). From the Judgment of the Trial Court, a number of things were noted. First, the Court very correctly recognized that limitation was a matter of fact. It found that the Appellant's contention on the point was substantiated by annexures "G" to the Reference – a letter from the Commission to tenants of the Appellant dated 21st October, 2013 asking them to remit rents to a specified bank account of the Commission. The Court held that the Respondent's evidence in support of its contention (the letter dated 29th July, 2013 from the Commission to the Appellant referred to in Paragraph 33 above) could not be relied on in determining the issue of limitation, for it was not properly before the Court, as it was annexed to the Respondent's submissions in the case, and not to the Reference itself, or to the Replying Affidavit. Secondly, the Court recognized that in the pleadings there was a contention between the parties as to whether the Commission took over the management of the UTC Mall or simply assumed the management of a shareholders 'abandoned' equity therein. Thirdly, the Court found that the Applicant had not established a Treaty violation attributable to the Respondent.

(35). From the Record of the Scheduling Conference, there was an all-round acknowledgment that evidence shall be produced at the trial. The following dialogue at P. 321 of the Memorandum and Record of Appeal illustrates the point:

The Principal Judge (Hon. Justice Butasi):
"*We are going to give you the time frame under which you are going to file your written submissions. First of all, the Applicant, how many days do you want? <u>You are going to file affidavits</u>*"

The Deputy Principal Judge (Hon. Justice Lenaola):

"*First of all, had you filed your affidavits or you intend to file others?"*

Mr. Gimara:
"*My Lords, I seek this Court's guidance. It is my view that under Rule 24, I must not file an affidavit. So, if that is the understanding of the Court, I need not to file".*

(36). The Trial Court did not dignify Counsel Gimara's interjection with a response. The joint scheduling memorandum filed by the parties' Advocates at the end of the Scheduling Conference was however clear on the matter: Evidence shall be by Affidavits.

(37). From the above recorded observations, it is clear beyond per adventure that both Counsel for the parties and the Trial Court expected the Reference to be determined on the basis of application of affidavit evidence to the law.

(38). We next ask ourselves whether there was evidence placed before the Trial Court to aid it in the determination of the pertinent issues.

(39). We start from the point that it is trite law that pleadings in Court (whether in the form of Reference, Response to the Reference, Motion on Notice, Statement of Claim or by whatever other name called) are not evidence. They are averments the proof of which is submitted to the trier of fact. Evidence on the other hand is the means by which those averments are proved or disproved. Proof is essential unless the matter is admitted, or is one of which judicial notice may be taken, or there is an applicable presumption (rebuttable or irrebuttable) in favour of the matter averred, or the burden of proving such a matter is by law shifted to the adverse party; or an estoppel operates to exclude proof of such matter. The proof may take the form of testimonial evidence (oral or affidavit), documents produced in Court, or things (real evidence). Needless to state, submissions are not evidence.

(40). In the matter before us, apart from the admitted fact that the Appellant is a Company Limited by shares and incorporated in Rwanda, every other averment in the Reference and the annexures thereto (including the Appellant's averment that it discovered the fact of the takeover of its mall by the Respondent on 2nd October, 2013) were matters of which proof was essential. But the record discloses that there was no affidavit from the Appellant or anyone else with knowledge of the matter in support of any of the averments in the body of the Reference. And the annexures to the Reference, though notarized, were neither annexed to an affidavit nor produced orally at the hearing in the Trial Court as exhibits. We state categorically that any annextures to a document unless the document is an affidavit and they are annexed thereto, or the same are produced at the trial as exhibits, are not evidence. With respect to the Response to the Reference, the affidavit in support thereof did not annex any documents that the Respondent relied on. We have seen in Paragraph 13 herein that the said affidavit did only two things: first, the deponent thereof deposed as to matters of law and affirmed on the basis thereof that the Respondent was wrongly sued; and, secondly, the deponent swore that from his reading of the Reference, the cause of action arose on 29th July, 2013.

(41). In short, neither the Reference nor the Response thereto as they stood before, during and after the Scheduling Conference was substantiated by any evidence as to matters of fact averred in them.

(42). We have seen in Paragraph 35 that at the Scheduling Conference, it was agreed and minuted that the case would be tried on the basis of affidavit evidence. Be that as it may, an ill wind appears to have blown over both the Trial Court and the learned Advocates for the parties with the result that no directions were sought, or given, with respect to the time frame for filing the affidavit evidence. The only directions given were on the time table for filing written submissions. This is the point where the locomotive of justice derailed and crashed into the thick thicket of injustice.

(43). The unfortunate consequence of the procedural failure to give directions on when the affidavit evidence would be filed was three fold: First, the Appellant did not file any affidavit; secondly, the Respondent filed together with its submissions an affidavit in purported support of the Response and annexed to its aforesaid submissions laws and documents in proof of its case; and third, and most grievously, the Trial Court proceeded with the Trial on the basis of written submissions which were not founded on any admissible evidence.

(44). The irregularity of proceeding to trial and judging the case without evidence, in a situation where factual evidence was clearly called for, and recognized as imperative, by both the Court and Counsel appearing, naturally occasioned a most grave injustice to both parties – none of them could prove or disprove, their cases before the Court as required by law.

(45). We have considered whether to proceed and dispose of the Appeal despite the above irregularity. We have come to the conclusion that to do so would be to condone and perpetuate, nay, participate in an irregularity which has occasioned an irreparable injustice to the parties. That is not a path which a Court of Justice should tread, and we unequivocally decline to do so.

(46). In the circumstances, we think this is an appropriate case for the invocation of the Court's inherent power under Rule 1 (2) which provides–

> "Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

In the exercise of that power, we now remit the Reference back to the Trial Court for consideration *de novo* in accordance with the applicable law and the Rules of the Court.

(47). As regards the costs of the Appeal, we have said enough to show that the lapse on the part of the Trial Court itself apart, Counsel appearing were not virtuous virgins either. They failed in their duty to seek and press for

appropriate procedural directions. In those circumstances, we think that the just order to make is that each party should bear its own costs of the appeal.

(48). This Appeal illustrates the aphorism that although speed is good, justice is even better. And, oftentimes, justice hurried is justice buried.

(49). The upshot of our consideration of this matter is that-

(a). The Reference subject matter of the Appeal is remitted back to the Trial Court for hearing de *novo* after the parties have been afforded an opportunity for due presentation of such relevant evidence as they may have in support of their respective cases, in accordance with such Directions as the Court may give.

(b). Each party shall bear its own costs of the Appeal.

It is so ordered.

DATED, DELIVERED AND SIGNED AT ARUSHA THIS _____DAY OF NOVEMBER, 2015

Emmanuel Ugirashebuja
PRESIDENT

Liboire Nkurunzinza
VICE-PRESIDENT

James Ogoola
JUSTICE OF APPEAL

Edward Rutakangwa
JUSTICE OF APPEAL

Aaron Ringera
JUSTICE OF APPEAL