IN THE EAST AFRICAN COURT OF JUSTICE
APPELLATE DIVISION AT ARUSHA

(Coram: L. Nkurunziza, VP.; E. Rutakangwa; And A. Ringera, JJ.A.)

APPEAL NO. 1 OF 2016

BETWEEN

ALICE NIJIMBERE .... APPELLANT

AND

THE SECRETARY GENERAL OF THE
EAST AFRICAN COMMUNITY .... RESPONDENT

[Appeal from the Judgment of the First Instance Division at ARUSHA sitting in judgment Justices Monica K. Mugenyi, Principal Judge; Isaac Lenaola,Deputy Principal Judge; Faustin Ntezilyayo, Judge; Fakihi A. Jundu, Judge; And Audace Ngiye, Judge; dated the 23rd day of March, 2016 in Reference No. 7 of 2015]

JUDGMENT OF THE COURT

INTRODUCTION

1. The Appellant was aggrieved by the decision of this Court's First Instance Division ("the Trial Court") dated 23rd March, 2016, dismissing in its entirety her Reference No. 7 of 2015 ("the Reference").
2. In the Reference, the Appellant was complaining against the Respondent's decision of, allegedly *"unprocedurally and illegally"* depriving her *"of a deserved opportunity to be interviewed for the position of Registrar at the EAST AFRICAN COURT OF JUSTICE."* The Respondent categorically denied this allegation.
3. The Trial Court, after a full trial, found the Appellant's complaint unsubstantiated and wanting in merit. It accordingly dismissed the Reference, ordering each party to bear her/his own costs, hence this Appeal ("the Appeal").

BACKGROUND

4. The essential undisputed background to the Reference and this Appeal is as follows:-
5. Sometime in June, 2015, a vacancy announcement for the post of Registrar of the East African Court of Justice ("the Post"), was published. Only candidates from the East African Community ("the Community") Partner States of Burundi, Kenya and Uganda were eligible to apply for the Post.
6. The Appellant sent her application on 6th July, 2015. The application letter, which was ANNEX 1 to the Appellant's Affidavit sworn on 1st

December, 2015, shows that as of that date she was residing in Bujumbura, Burundi.

7. On 23rd September, 2015, the Appellant was informed by Ms. Ngeze Mariapia of Deloitte and Touche Consulting Tanzania Ltd ("the Interlocutor") that she had been shortlisted for interview for the Post as a "*Burundian candidate*". She was further informed that the interviews for the Post were scheduled to take place on Monday 28th September, 2015, at the offices of the Ministry of the East African Community Affairs in the selected candidates' respective countries. The Appellant was accordingly advised to report at the said offices *"in Bujumbura at 13h 15 Burundi time"*, ready for the interview. She was further advised to make her *"own travel arrangements by the most economic direct route to"* Bujumbura, where she would have been reimbursed the travelling costs and *"a maximum of two nights hotel full board accommodation"*, subject to *"production of receipt/ticket and boarding pass used"*.
8. Reacting to the interview invitation, the Appellant, on 24th September, 2015, at 10:37 a.m, informed the Interlocutor by email, that she would be unable to travel to Bujumbura. She, instead, requested to be granted a "*special dispensation*" to attend the interview in Arusha, as she had been "*informed that the interview panel will be seated at the EAC Headquarters using teleconference services.*"
9. The sought dispensation was not granted by the Respondent. The interviews took place as scheduled for the other shortlisted candidates in Nairobi and Kampala. The Post was filled. The Appellant was not happy. She accordingly accessed the Trial Court under Article 30 of the Treaty for the Establishment of the East African Community ("the Treaty").

10. In the Reference, the Appellant was seeking the following orders and reliefs:-

(a) An annulment of the decision taken by the East African Community Secretariat (EACS) in its meeting held on 28th September 2015, rejecting her request for a dispensation to be interviewed in Arusha;

(b) An interim order suspending the process of recruiting the Registrar until the pleadings were closed;

(c) A declaration that the decision of the EAC Secretariat was null and void;

(d) The re-launching of the interview process to be done by a different interview panel; and

(e) Costs.

11. In his response to the Statement of the Reference, the Respondent unequivocally posited that the Appellant had been "*given opportunity to be interviewed for the position of Registrar of the East African Court of Justice but did not utilise the same*". It was his further contention that having required all eligible candidates to go to their Capital Cities for interviews, it would have been not fair to "*thereafter bend the rules to interview the Applicant in Arusha*".

12. The Respondent further pleaded that interviews had to be conducted at the candidate's own home capital cities, as there was a requirement of making preliminary verifications of their nationalities and stated qualifications, which could not be easily done in Arusha.

13. On the above premise, the Respondent denied having breached any of the provisions of the Treaty as alleged by the Applicant/Appellant.

AGREED ISSUES AT THE TRIAL AND SUBMISSIONS THEREON

14. At the Scheduling Conference in the Trial Court, the following issues were agreed upon by the Parties:-

"*(i) Whether the conduct of the Respondent in refusing to interview the Applicant in Arusha as she had requested breached Article 6 (d), (e) and (f) and 71(h) of the Treaty and Regulation 20(7) and (8) EAC Staff Rules and Regulations.*

(ii) Whether the Respondent abused his administrative powers by communicating the decision rejecting the request of dispensation, which he received on a Saturday and responded just one hour before the interview time on the following Monday contrary to Article 71(h) of the Treaty.

(iii) Whether the Respondent breached the provisions of Regulation 20(7) of the EAC Staff Rules and Regulations 2006 by requesting the Applicant to pay on her own means of travel and accommodation expenses contrary to Article 6(d) of the Treaty.

(iv) Whether the Applicant is entitled to the prayers sought."

15. The Parties' also agreed that the hearing would proceed on the basis of affidavital evidence, written submissions and oral highlights on the latter.

16. Regarding the first Issue, the Appellant had submitted that the Respondent had *"breached the principles of social justice, gender equality, the promotion of Human and Peoples' Rights in accordance with the provisions of the African Charter on Human and Peoples' Rights"* as well as the Australian Anti-Discrimination Act, 1991. She was of this firm view because "*she was denied special dispensation*

merely because she was a mother of a sick infant and the only shortlisted candidate from the Republic of Burundi."

17. In response, the Respondent contended that the *"principle of good governance enshrined in Article 6 (d) of the Treaty was properly applied"* as he had *"treated all interviewees equally."* He further contended that inability of the Appellant to participate in the interview because her child was sick could not be casually equated to a violation of Article 6(d) of the Treaty.

18. Denying the charge of gender discrimination, the Respondent strongly argued that it was untenable as *"other women who had been shortlisted to attend the interview did so, and were interviewed in the Partner States."*

19. After adverting its attention to the provisions of Article 6(d) of the Treaty and the universally accepted attributes of the concepts of social justice, gender equality, equal opportunity and discrimination as well as re-visiting the facts leading to the impugned decision, the learned Trial Justices answered the first Issue in the negative.

20. The learned Justices of the Trial Court found the complaint providing the basis of the second Issue totally wanting in merit. It was their conclusive finding that this complaint was a result of an afterthought, having "*no basis in either the Reference itself nor in the events prior to the filing of the Reference*". This Issue, too, was similarly answered in the negative.

21. The third Issue was answered in the negative as well by the Trial Court, as, first, the Appellant had not demanded *"advance payment for travel and accommodation*", and more tellingly:

    "Regulation 20(7) does not state that the payment must be in advance of the interview..."

22. In disposing of the matter before it, the Trial Court, in view of its findings on issues one to three, found itself enjoined by law not to grant any of the reliefs sought in the Reference including compensation for alleged losses, which had been belatedly and unprocedurally raised in the Appellant's Written Submissions.

THE APPEAL

23. The Appellant was not amused at all by the Trial Court's findings, holdings and its ultimate determination of the Reference. She accordingly duly instituted this Appeal under Article 35A of the Treaty and Rule 86(1) of the East African Court of Justice Rules of Procedure, 2013 ("the Rules").

24. The Appellant's Memorandum of Appeal lists six (6) grounds of complaint against the decision of the Trial Court. They are as follows:-

"1. That the Hon. Learned Justices of the First Instance Division in law wittingly in (sic) dispensing a judgment against the East African Community Secretariat, while the case was against the Secretary General of the East African Community;

2. That the Hon. Learned Justices of the First Instance Division erred in law by issuing a judgment in contravention of the (sic) Rule 68(5) of the East African Court of Justice Rules of Procedure 2013, especially sub sections (sic) (e), (f), (g), (h) and (i);

3. That the Hon. Learned Justices of the First Instance Division erred in law by not considering Applicant's case as an issue of public order and good governance, and have not therefore interpreted

properly Article 6 (d), (e), of the Treaty Establishing the East African Community; they even declined to interpret Regulation 20(7) of the Staff Rules and Regulations, 2006 and Article 71(h) of the Treaty Establishing the East African Community. Thus their attitude should be considered as a denial of justice;

4. *That the Hon. Learned Justices of the First Instance Division erred in law by not considering all evidence and all submissions filed by Appellant as well as oral pleadings by the Appellant; and thus, have decided in transgression of the legal principle governing the profession of judges in their worthy assignment of rendering a fair justice. They reasoned in favour of the Respondent who did not provide any evidence to support his case; (**No litigation could be rendered secundum allegata et probate**);*

5. *That the Hon. Learned Justices of the First Instance Division committed a procedural irregularity by deciding the matter on facts which were not true and which were not investigated and proved prior to the decision;*

6. *The Honourable Judges of the First Instance Division erred in law by not considering the issue of damages for the Appellant since by being shortlisted she had legitimate expectations of being interviewed."*

ISSUES IN THE APPEAL

25. On the basis of the above grounds of appeal, at the Scheduling Conference, the following Issues were agreed on:-

1. Whether the Secretary General of the East African Community is a proper Respondent in this Appeal.
2. If the answer in issue number one is in the affirmative, the question is whether the Judgment of the First Instance Division contravenes Rule 68(5) (f), (g), (h) and (i) of the Rules.
3. Whether the First Instance Division erred in law in finding that by refusing to interview the Applicant in Arusha, the Respondent did not breach Article 6 (d) and (e) and Article 71 (h) of the Treaty and Regulation 20(7) of the Staff Rules.
4. Whether the First Instance Division erred in law in the evaluation of the evidence thereby occasioning a failure of justice.
5. Whether the First Instance Division erred in law by not considering the Appellant's claim to damages.
6. What remedies are the Parties entitled to?

LEGAL REPRESENTATION

26. Both at the Scheduling Conference and the hearing of the Appeal, the Parties' appearances were as follows: The Appellant, a self-confessed highly qualified practising lawyer and jurist, appeared fending for herself. For the Respondent, Dr. Anthony L. Kafumbe, learned Counsel to the Community, appeared.

THE COURT'S DETERMINATION ON THE ISSUES

ISSUE NO. ONE: Whether the Secretary General of the East African Community is a proper Respondent in this Appeal.

27. After perusing the record of proceedings in the Trial Court, we are increasingly of the view that this issue need not detain us at all. It is

common ground between the Parties that the issue of the right person to be sued was properly resolved by the Trial Court on 24th November, 2015.

28. It is true that initially, the Reference was instituted in the names of Alice Nijimbere as Applicant and the East African Secretariat as the Respondent. For sure, there is no institution or legal person in the Community known as the "EAC Secretariat". But, as the Appellant pointed out in her Written Submissions [page 5, lines 36-7], this *"lapsus calamy"* was redressed by the Trial Court on 24th November, 2015 (see pages 204 – 5 of the Record of Appeal).

29. On that particular day, the Appellant, as Applicant, orally applied to have the Pleadings amended and the name of the "*Secretary General of the East African Community" be* substituted for *"the East African Community Secretariat"* as the Respondent. The application was granted without any objection.

30. However, in its Judgment, the Trial Court appears to have reversed itself. It revived the issue of whether or not a proper person had been sued as the Respondent (see paras 26 to 29). It ended this travail holding thus:-

> *"30. The Secretariat is an organ of the EAC under Article 1(g) of the Treaty and it seems to us that it can only be sued through the Secretary General and not directly as a Respondent. As we know it, where a wrong party in law has been sued, no orders should be issued against it. That is all we should say on that issue – see also* ***Ref. No. 3 of 2007, East African Law Society v. Attorney General of Kenya and 3 Others."***

31. We respectfully hold that this was an issue which was improperly and unnecessarily raised *suo motu* by the Trial Court at the stage of composing its Judgment. We say improperly because the Parties could not have been heard on the issue at that stage. It was unnecessary because following the amendment of the Pleadings on 24th November, 2015, it was no longer a live issue at all. A proper legal person had been substituted in the place of a non-existing person and not merely "*a wrong party in law*". In our considered opinion, therefore, had there been no such prior amendment, the entire Reference would have been rendered incompetent. No competent proceedings can be brought against a non-existing legal entity. This is settled law.

32. Since the Secretary General of the Community was properly impleaded or brought on record as the Respondent by the Trial Court on 24th November, 2015, we answer the first Issue in the affirmative in line with the urging of both the Appellant and Dr. Kafumbe.

ISSUE NO. TWO: If the answer in Issue number one is in the affirmative, the question is whether the Judgment of the First Instance Division contravenes Rule 68(5) (f), (g), (h) and (i) of the Rules.

33. The basis of this issue is the second ground of appeal in which the Appellant is reproaching the learned Trial Justices with contravening the clear and mandatory provisions of Rule 68(5) (e), (f), (g), (h) and (i) of the Rules.

34. Rule 65(5) of the Rules provides as follows:-

"The judgment of the Court shall contain –

(a)the date on which it is read;

(b)the names of the judges participating in it;

(c)the names of the advocates and agents of the parties;

(d)a concise statement of the facts;

(e)the points for determination;

(f) the decision arrived at;

(g)the reasons for such decision;

(h)the operative part of the judgment, including the decision as to costs".

35. We wish to make it absolutely clear at once that we entertain no flicker of doubt in our minds that in our jurisdiction, failure on the part of the judge or judges to comply with the mandatory requirements of law, be it wittingly or otherwise, amounts to an error of law. Its consequences in law would depend on the nature and seriousness of the infraction in question in each particular case.

36. In her bid to substantiate this particular complaint, the Appellant adamantly maintains that the impugned Judgment is legally wanting in sufficiency. This is because the Trial Court "*did not make a concise statement of the facts.*" Instead, she is arguing:

"The Hon. Learned Justices reported on:

- *Applicant's case,*
- *Respondent's case in Rejoinder,*
- *Scheduling Conference,*
- *And ended by*
- *The issues for determination."*

37. Advancing her argument further, the Appellant is insisting that the Trial Court did not refer not only to her affidavits and Written

Submissions but also her "*Rejoinder which as drafted on 6 pages has been summarised in three paragraphs.*"

38. On the issue of "*points for determination*," the Appellant submits without clear elaboration, that the "*Hon. Learned Justices of the First Instance Division have been so much hazy and faltering in their motivation*", because they failed to appropriately interpret Articles 6 (d), (e) and (f), 71(h) of the Treaty, as well as Regulation 20(7) of the Staff Rules. We should pause to point out here that Article 6(f) is not a subject of complaint in the Appeal.

39. The Appellant further faults the Trial Court, for arriving at its decision, in what she claims to be a "*transgression of the legal principles governing the profession of judges in their worthy assignment of rendering justice.*" It is her contention here that the decision arrived at was not based "*on the grounds of allegations of the parties and evidences (sic) provided by each party.*"

40. She concludes her submission on this Issue registering her bewilderment as to why no explanation was given on why no order for costs was made. We shall take the liberty of quoting her verbatim lest we be misunderstood. She argues:-

> "*It was therefore difficult to know who lost and who won the case, because the Party who normally lose the case is supporting (sic) the costs. Anyone could believe that the Hon. Justices of the First Instance Division have been lenient towards the Applicant on that aspect!!!! (sic).*"

41. The Submission of Dr. Kafumbe on this Issue is, admittedly, succinct.

42. He contends that the impugned Judgment of the Trial Court meets all the requirements of Rule 65 (5) of the Rules. The merits of the judgment aside, he defends it from the perspective that it contains the facts of the entire Reference, the points for determination and the decisions and reasons thereon based on a proper appreciation of the evidence on record, as well as the operative part. All these, he asserts, are captured in Paras 6, 7-14, 25, 71 (a), (b) and (c). He is, accordingly, urging us to answer the second Issue in the negative.

43. In resolving this Issue, we have found ourselves constrained to begin by stating that we have painstakingly studied the Trial Court's faulted Judgment which is found on pp.237 to 260 of the Record of Appeal, the latter having been lodged by the Appellant herself. Not wishing in any way, to appear being discourteous to the Appellant, we should point out immediately that the Judgment bears out the assertion of Dr. Kafumbe and belies the Appellant's protestations that it is not in conformity with the mandatory requirements of Rule 65(5) of the Rules.

44. We have found the Judgment to contain a concise statement of the facts of the Reference (see paragraphs 6 to 23) and this is unwittingly conceded by the Appellant in her Written Submissions (see paragraph 36 above). Fortunately, the Appellant is a seasoned lawyer, who is currently *"a Senior Advocate of the Burundi Bar Association"* and *"a Managing Partner of an International Law Firm …in Bujumbura"* (see her Letter of Application). In our respectful opinion, therefore, she ought to have realized that what both the Common Law and Civil Law systems of justice require is not a reproduction of the pleadings and evidence but *"a concise statement of the facts"*, as can be objectively gleaned from the pleadings and evidence of both sides.

45. It is our considered view that the word *"concise"* as used in Rule 68 (5) (e) of the Rules, must be given its ordinary and plain meaning. Viewed from this perspective, it should mean:-

(a) giving only the information that is necessary using few words (i.e., brief in form but comprehensive in scope): Oxford Advanced Learner's Dictionary, 8th Edition at page 310; or

(b)free from all elaboration and superfluous detail: found at www.merriam-website.com/dictionary/concise:

From this view point, we hold without any demur that the learned Trial Justices, fully complied with Rule 65 (5) (e).

46. We have found the requirement of showing "*the points for determination*" to have been met by the Trial Court. For the benefit of the Appellant, what the law demands is an early and clear indication in the judgment, of the issues the Court is being called upon to resolve. For the purposes of Rule 68(5) (f), **these are nothing but the issues agreed upon at the Scheduling Conference held under Rule 53 (1) of the Rules**. These "points for determination" are clearly spelt out in paragraph 25 of the Trial Court's Judgment, and as shown in para.26 of that Judgment, the Trial Court undertook "*to deal with each issue separately after summarising the submissions made by the Parties"*.

47. Alive to its duty, the Trial Court, in a critical evaluation of all the material before it, and rendering its interpretation of the relevant provisions of the Treaty and Staff Rules, dealt with each issue separately and made its reasoned determinations thereon. This is reflected in paragraphs 31 to 73, contained in pages 11 to 24 of its Judgment, found on pages 247 to 260 of the Record of Appeal.

48. We, therefore, hold that we have found the impugned Judgment to have been articulate and succinctly composed, and, gladly, in very plain language. The decision on every issue for determination was not only explained lucidly but was justified by reasons. The Trial Justices may be, might have arrived at wrong **conclusions**, but that cannot translate to being "*hazy and faltering in their motivation*". All courts, short of being actuated by fear, ill will, affection or favour, have the jurisdiction to be wrong, hence the existence of appellate jurisdictions.

49. We accordingly find no merit in the second ground of appeal which we dismiss, and proceed to answer the second Issue in the negative.

ISSUE NO. THREE: Whether the First Instance Division erred in law in finding that by refusing to interview the Applicant in Arusha, the Respondent did not breach Article 6(d) and (e) and Article 71(h) of the Treaty and Regulation 20(7) of the Staff Rules.

50. In her wide-ranging Submission on this Issue, the Appellant is claiming that the learned Trial Justices erred in law in not holding that the Respondent breached Articles 6 (d) and (e) and 71(h) of the Treaty and Regulation 20(7) of the Staff Rules in rejecting her request for a special dispensation to be interviewed in Arusha and/or making her entitlement to travel and accommodation expenses conditional to appearing for the interview in Bujumbura.

51. The Appellant begins by stating the obvious. This is that the Respondent as head of the Community's Secretariat (the administrative organ) has a duty "*to comply on a daily basis, with the fundamental principles that govern the achievement of the objectives of the Community by the Partner States.*" We should admit forthwith that we are in full agreement with her on this unarguably correct statement of

fact. She is borne out, as far as this issue is concerned, by Article 6 (d) and (e) of the Treaty.

52. These two provisions of Article 6 of the Treaty provide thus:-

> *"6. The fundamental principles that shall govern the achievements of the objectives of the Community by the Partner States shall include:*
>
> *(d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.*
>
> *(e) equitable distribution of benefits."*

53. Furthermore, Article 71(h) reads as follows:-

> *"71. The Secretariat shall be responsible for:*
>
> *(h) the general administration and financial management of the Community."*

Regulation 20(7) of the Rules, on the other hand, prescribes that:

> *"The Community shall pay travel and accommodation expenses for the shortlisted candidates for the posts advertised."*

54. With these provisions in mind, the Appellant submits that the Respondent in handling her case breached all the tenets of good governance, "*from the date of notification of her short listing until the date of notification of the final decision complained of*".

55. After defining "**good governance**" as "*the process of decision making by which decisions are implemented (or not implemented)*", the Appellant argues that the Respondent breached the following "*characteristics of good governance*":-

(a) Responsiveness: the Respondent belatedly informed her of her shortlisting on top of requesting her to travel to Bujumbura on her own means and never responded to her "*administrative complaint.*"

(b) Transparency: the Respondent failed to show the authority on which his action of contacting the shortlisted candidates was based, and also "*failed to prove how other shortlisted candidates were contacted for the purpose of the interview.*"

(c) Rule of Law: under this head the Appellant is requesting us "*to insure (sic) if Appellant case was not a sensitive one which could have retained the attention and the compensation of the decision makers*" and concludes arguing that the issue of level ground relied on by the Respondent was not relevant.

(d) Accountability: she claims to have been discriminated against by the Respondent, a complaint not investigated by the Trial Court.

(e) Equity and Inclusiveness: the Respondent failed to treat her "*case as a fortuity (sic)*" one and to note that she, "*the Burundian candidate who she (sic) was in a critical situation... should have been treated as a vulnerable individual*". As a result, she is arguing, she was denied "*her right to be interviewed with no legal reason*", thereby violating the African Charter on Human and Peoples' Rights.

(f) Participation: she is claiming that the unreasonable short notice given to her by the Respondent denied her participation in the interview.

(g)Consensus oriented: the failure of the Respondent to accede to the offer of an out-of-court settlement occasioned what she believes would have been an otherwise avoidable dispute.

(h)Effectiveness and Efficiency: allowing a mother who had an acceptable excuse to be interviewed in Arusha would not only have been a humane act, but would also have "*saved the Community from incurring expenses related to Applicant accommodation and ticket*", she is contending.

56. On the basis of the above contentions, the Appellant is asking the Appellate Division to:

> "*conclude that Article 6 (d) and (e) of the Treaty has been breached by the Respondent in view of his attitude in treating the Appellant case since 23rd September.....until 28th September 2015.*"

57. On Article 71(h) of the Treaty, she is contending that the Respondent breached it by, firstly, not providing the legal basis upon which the giving of short notice was based. Secondly, not responding promptly to her request for special dispensation and thirdly, wrongly reporting that she had declined the invitation to travel to Bujumbura for the interview.

58. Regarding Regulation 20(7) of the Staff Rules, the Appellant is arguing that the Respondent violated it by requiring her to travel to Bujumbura on her own means and meeting her accommodation expenses.

59. On his part, Dr. Kafumbe strongly denies the alleged breaches of Articles 6 (d) and (e), and 71 (h) of the Treaty and Regulation 20(7) of the Staff Rules.

60. It is his submission that none of the basic tenets of good governance as enumerated by the Appellant was breached by the Respondent in the entire process of recruiting the Registrar of the Court.

61. Dr. Kafumbe is urging us to hold that the Respondent acted transparently such that none of the other shortlisted candidates for the Post who attended the interview raised any complaint. He is arguing, and very correctly, that the Respondent had no legal duty to cite Rules and Regulations enabling him to give the shortlisted candidates a short notice and how they were contacted. His smoking gun, in our considered opinion, is that the *"Appellant's request to be interviewed in Arusha was only a request for a favour which cannot constitute a legal right"*, and going by the Staff Rules, the *"Respondent did not owe the Appellant any duty of care to the extent of facilitating her travel to the venue of the interview in advance."*

62. Regarding Responsiveness and Participation, Dr. Kafumbe posits that as *"the Appellant communicated her inability to travel on a Saturday…it was not possible to generate a response until Monday, which was the next working day."*

63. Dr. Kafumbe concludes his Submission on the alleged breach of Article 6(d) stressing, firstly, that the Trial Court rightly upheld:

> *" the Respondent's decision as he had no legal obligation to grant the Appellant any favours. Secondly, if the sought favour had been granted, it would have been prejudicial to other candidates who made efforts to attend at their capitals Cities. Thirdly, it would not have been reasonable to compel the Community to incur high costs on account of one candidate, who had no good reason for failing to travel to Bujumbura."*

64. Regarding Article 6 (e), Dr. Kafumbe is contending that the complaint of the Appellant is untenable as matters relating to equitable distribution of benefits has been accommodated through the adoption of the quota system which regulates employment in the Community. We outrightly agree entirely with him on this. This accounts, we believe, for the exclusion of Rwanda and Tanzania candidates.

65. Dr. Kafumbe finds no merit in the Appellant's complaint based on Article 71 (h) of the Treaty. It is his position that, this provision which relates to the general administration and financial management of the Community was not breached. This is because, and we are inclined to agree with him, sound administration of the Community also requires that all interviewees are treated equally and as such it would have been a breach of the same if the Secretariat had opted to favour one candidate at the expense of the rest.

66. His other attractive argument, which was not refuted, is that the extra costs that were to be incurred to hire video conference facilities elsewhere in Arusha and hire people to verify that the Applicant was of Burundi nationality, and, her academic and professional skills, before she could do the interview, were costs that were not provided for in the budget of the Respondent. Accordingly, using resources outside the approved budget would have violated the very provisions of Article 71(h).

67. On Regulation 20(7), it is Dr. Kafumbe's submission that it was not breached as the Respondent did not refuse to refund the costs had the Appellant travelled to Bujumbura.

68. The Appellant's Rejoinder Submissions raised nothing new other than re-emphasizing what she had submitted on in her main submission.

69. It is incumbent upon us now to determine whether or not the Respondent breached the above mentioned provisions of the Treaty and Staff Rules.

70. Fortunately, the Issue under scrutiny constituted Issues No. 2 and 3 in the Trial Court.

71. After re-visiting the facts as contained in the Parties' Pleadings and affidavital evidence as well as the Treaty and Staff Rules provisions, the Trial Court found the following germane facts either undisputed or satisfactorily established:-

(a) In the Appellant's initial e-mail of Thursday, 24th September, 2015, sent at 10:37 a.m., she never gave any reason as to why she wanted to be personally interviewed in Arusha and not in her home country.

(b) It was the Respondent who took the initiative of seeking the reason for the requested change of venue. When thus pressed, the Appellant, in her e-mail of Firday, 25th September, 2015 sent at 11:36 a.m. gave only one reason: her daughter was sick and at that very moment she was in hospital.

(c) The undisputably seven-year old child had been "*suffering from periodical fever, nausea and vomiting for the previous five days*" and on that day she had been attended and not admitted but was "*required to return for observation after one week.*"

(d) The Appellant/Applicant had not from the outset given the issue of her indisposed child as the reason for seeking a special dispensation.

(e) The Respondent had set up a level playing ground for all candidates "*to be treated equally in all aspects of the interview process.*"

(f) The Appellant had been shortlisted for the interview because she was qualified for the Post and not principally because she hailed from Burundi.

(g) No single interviewee with a sick child was treated differently from the Applicant/Appellant by the Respondent.

(h) At no time did the Applicant/Appellant complain about the short notice given. She sought dispensation on the basis of one reason: her sick child.

(i) If the Appellant was indeed convinced that the call for the interview had been given at short notice, she never requested the Respondent to push forward the interview date. Instead, she stuck to her preferred position to be interviewed in Arusha on 28th September, 2015.

(j) The communication between the Appellant, the Interlocutor and the Respondent took place between 23rd September, 2015 and 28th September 2015. As two of these days fell on a weekend, the Respondent could not respond immediately to the request prior to Monday, 28th September, 2015, which was the first working day and the interview day.

(k) The complaint based on Regulation 20 (7) of the Staff Rules was an afterthought as the Applicant/Appellant in her e-mail of 24th September, 2015, had unreservedly expressed her gratitude for "*Deloitte's willingness to reimburse*" her travel and accommodation costs in Bujumbura.

72. We hope it will be immediately appreciated that all these are findings of fact which we are precluded from questioning on appeal under Article 35A of the Treaty. All the same, we are not barred from observing that all these facts which formed the core of the Trial Court's decision are readily discernible from the Pleadings and affidavital evidence. It has not been proved to us by the Appellant that they were predicated on a misapprehension of the Pleadings and/or evidence on record by the Trial Court.

73. In our determination of this Issue, therefore, we have found ourselves in full agreement with the Trial Court that the Respondent did not breach Regulation 20(7) of the Staff Rules. This particular provision as produced in full in paragraph 53 above, is self explanatory and calls for no interpolations. As correctly held by the Trial Court, a view shared by Dr. Kafumbe, this Regulation does not prescribe that the Respondent must make these payments in advance of the interview.

74. Indeed, the Appellant had all along so understood this proper interpretation of the Regulation. This view gains credence from her acknowledgement e-mail to the Interlocutor alluded to in paragraph 71(k) above.

75. We accordingly dismiss the Appellant's complaint based on Rule 20(7) of the Rules.

76. Coming to Article 71(h) of the Treaty, it is the Appellant's claim that it was breached inasmuch as the Respondent:-

(i) failed to state the Rule or Regulation followed when inviting her for the interview on short notice;

(ii) did not respond promptly to her "special dispensation request";

(iii) *"gratuitously accused"* her *"of having declined the invitation of travelling to BUJUMBURA for the interview"*;

(iv) had failed in his duty by informing her *"about the interview process within less than one week, while we know that people are not supposed to be stuck at home"*.

77. We shall answer these accusations one after the other.

78. We have already shown that the Respondent was not barred by any law or even policy statement from giving the so-called "*short notice*". The Appellant has not referred us to any such requirement, be it statutory or an administrative circular, etc. The Trial Court's finding that the Respondent acted prudently given the exigencies of the then prevailing situation, remains solidly unchallenged.

79. Going by the evidence before it, the Trial Court was satisfied that the Respondent acted with all necessary promptitude on the Appellant's request. This was a finding of fact based, in our considered opinion, on a proper appreciation of the evidence. We have no legal mandate, therefore, to interfere with it, regardless of the Appellant's displeasure. We accept that to be her own prerogative.

80. It is true that the Respondent reported at the meeting of the Finance and Administration Committee that the Appellant had *"declined to travel to BUJUMBURA to be interviewed"*. We have found nothing revolting in this to justify the charge that it was "*wrong and offending*". Given the facts narrated above, it was made in good faith and it could not have been more forthrightly put.

81. We are in full agreement with the Appellant that people, even those who have applied for jobs, "*are not supposed to be stuck at home*". This concession, however, does not, in our view, help to advance the

Appellant's cause. As she has admitted, when writing and lodging the application for the Post, she was in Bujumbura. She unequivocally stated therein that she "*is presently working as a Managing Partner of an International Law Firm established in BUJUMBURA*". At no given time in between July, 6th, 2015, and September 23rd, 2015, did she inform the Respondent that she had relocated, either permanently or temporarily, from Bujumbura to Arusha or any other place. She should, therefore, not look for a scapegoat.

82. In view of the above, we are of the firm view that the Appellant totally failed to demonstrate that the Respondent abdicated, in any way, his Treaty responsibilities under Article 71(h) of the Treaty.

83. On the basis of the above discussion, we find ourselves on a firm footing to provide our conclusive answer to the Issue under scrutiny.

84. We are settled in our minds that the Respondent responded positively to the Appellant's application for the Post. He found her to have the requisite qualifications for the Post and also qualified for the interview as a candidate from one of the three Partner States whose citizens were only eligible to apply. She was accordingly shortlisted and invited to attend the interview at Bujumbura.

85. For reasons peculiarly within her personal knowledge, she sought a special dispensation to be interviewed in Arusha. In order to make an informed decision, the Respondent requested her to support the request with reasons. At that juncture and for the first time, she informed the Respondent that she could not travel as her daughter was sick. Her own evidence shows that the daughter had been feeling unwell for the last four (4) days (then), but had not bothered to take her to hospital at all.

86. The Appellant took the child to hospital two days after she had received the interview call and a day after being required to furnish a reason or reasons for her request. Even, then, the child was only attended and not admitted. On the basis of these undisputed facts which were, unarguably, unfavourable to the Appellant's case, the Respondent refused to accede to the special request to avoid unfairly changing the set rules of the game at the last hour. The Appellant then decided not to report for the interview.

87. The Trial Court, in the light of these facts, posed to itself this germane question in its Judgment : was the Respondent's decision *"unreasonable"* and a *"breach of the right to social justice, equal opportunity and gender equality?"*

88. The Trial Court answered the posed pertinent question in the negative. That, in our considered opinion, was the appropriate answer. We are equally settled in our minds that the reason put forward by the Appellant as an excuse for her inability to travel to Bujumbura was a specious one. It lacked cogency. May be she would have been taken seriously if she had produced an iota of evidence to show that prior to Wednesday September, 23rd, 2015, she had taken the child to hospital and/or had offered that reason in her request for a special dispensation. Furthermore, she even failed to provide evidence to show that the child was too sick to travel. If she wanted to be believed and draw the sympathy of the Respondent and have her request for a favour or preferential treatment favourably considered, she had a duty to do so. In the circumstances, therefore, the Respondent cannot be condemned for refusing to grant an undeserved favour.

89. In view of the above, we are increasingly of the view that the Appellant was not at all discriminated against. She voluntarily opted out of the interview exercise. We shall, therefore, be failing in our duty to fairly interpret and apply the Treaty, if we hold that the decision of the Respondent was an infringement of Article 6 (d) and (e) of the Treaty. The third Issue is accordingly answered in the Negative.

ISSUE NO. FOUR: Whether the First Instance Division erred in law in the evaluation of the evidence thereby occasioning a failure of justice.

90. It is the Appellant's contention that the Trial Court failed to evaluate the evidence before it, thereby occasioning a failure of justice.

91. We take it to be settled law that in judicial decisions, a proper evaluation of evidence involves an objective scrutiny of the entire evidence proffered by the parties, be it oral, documentary, real or demonstrative, with a view to reaching balanced conclusions of facts and/or reasonable inferences of fact and applying them to the governing law(s). In the instant case the Reference was prosecuted and determined on the basis of affidavital and documentary evidence.

92. The over-arching issue was whether the Appellant had made up a good case for her failure to travel to Bujumbura for the interview and the Respondent had for no good reason, rejected her request for "**a special dispensation,**" thereby illegally denying her, her Treaty right to be interviewed and recruited as the Registrar of the Court.

93. We have carefully read the Appellant's brief submission pressing us to fault the Trial Court for failing to conduct "*an investigation at the Hospital where the child was treated to verify if her status could have allowed her*" to leave it behind and proceed to Burundi. We have found

this to be a strange submission, to say the least. That is why we accede to Dr. Kafumbe's contention that the Trial Court had no such obligation in law. It would have been highly monstrous for the Trial Court to do so.

94. For the above reasons, we reject the Appellant's reproach of the learned Trial Justices that they failed to "*comply with the legal principle governing the profession of judges in their worthy assignment of giving a ruling **'infra petita'** for the Appellant, and **'ultra petita'** for the Respondent.*" We are minded here to let the Appellant know that in administering justice, judges are enjoined by law to remain impartial throughout. In our case, Article 24 (1) of the Treaty is of special significance.

95. The above observations notwithstanding and in all fairness to the Appellant, we take cognisance of her strong contention that she:

> "*never said that her child was **in Hospital**...*" but "*that she was **at the Hosipital.** Grammatically, being at the Hospital does not mean being hospitalized*". [Emphasis supplied].

96. Grammatically, we entirely agree with her. But does this justify the accusation that the Trial Court erred in law in the evaluation of the evidence thereby leading to a failure of justice? We believe not. We shall let the Trial Court vindicate itself.

97. Dealing with the issue of the child's sickness, the Trial Court logically guided itself thus:-

> "*46. In her initial e-mail of 24th September, 2015, at 10:37 a.m (and we have deliberately stated the times that the e-mails were exchanged) she gave no reason why she wanted to be interviewed in Arusha and not Bujumbura. When pressed to explain her*

reasons, she responded on 25th September at 11:36 a.m. to say that her daughter was sick and at that moment, she was in hospital.

47. We have in that regard seen an AAR Insurance Claim Form dated 25th September, 2015 which indicates that the child had been suffering from periodical fever, nausea and vomiting for the previous five days and was treated on that day and required to return for observation after one week. On 24th September 2015, the child was therefore not in hospital and had not been treated and that explains the Applicant's e-mail of 25th September 2015; that she was in hospital at the time she sent the e-mail. She has not however explained why on 24th September 2015 she never gave any reason for her plea to be interviewed in Arusha but we presume that it was on account of the sick child.

48. The Respondent, having seen that form, took the view that since the child was not admitted in hospital, then the Applicant was in a position to travel to Bujumbura for her interview. Is that an unreasonable decision in breach of the right to social justice, equal opportunity and gender equality? We think not."

98. We have found force in this reasoning which justifies the conclusion arrived at by the Trial Court. We fully subscribe to it and hold that the Trial Court's decision was not based on a misapprehension, real or apparent, of the evidence. It was a result of a balanced analysis of all the material before it. It is the Appellant who, in her eagerness to find fault with others, totally misunderstood the reasoning of the Trial Court, for it was addressing itself to the situation obtaining on **Thursday, 24th**

September, 2015. We accordingly answer the fourth Issue in the Negative.

ISSUE NO. FIVE: Whether the First Instance Division erred in law by not considering the Appellant's claim to damages.

99. This Issue, in our considered opinion, can be satisfactorily answered after having recourse to the reliefs which the Appellant was seeking in the Reference and the agreed Issues at the Trial. The former, were stated in full in paragraph 10 above, while the latter are to be found in paragraph 14 above. It is clear from both that the issue of damages does not feature at all. There is no gainsaying that the claim for damages was raised (and not pleaded) for the first time by the Appellant in her final Submissions, without effecting any amendment to her Pleadings. The Appellant admitted that much in her response to the Trial Court's questions at the hearing of the Reference on 28th January, 2016.

100. At the hearing, the Appellant is on recording saying:

> *"In the Statement of Reference, I didn't develop these various compensations."*

101. To the question on whether, being an advocate, she was "*aware of the principle that a party or litigant is bound by his or her pleadings?,* she replied:

> *"Yes, I am aware that a party is bound by his pleadings."*

102. Despite this admission, she did not deem it worthwhile to seek leave to amend her Pleadings. She had such a right under Rule 48 (c) of the Rules. So, until the time of Judgment, the Pleadings remained unamended and Damages not formally pleaded.

103. In its Judgment, the Trial Court briefly and understandably held that since the prayer for "compensation" was introduced in the Appellant's Written Submission, it could not delve into it at all. This was because, it held, the claim was unprocedurally introduced and, "*where a matter is not pleaded and the other Party has no opportunity to respond to it, the ends of Justice would not be met if a court were to determine it.*"

104. We take this holding to be a correct position of the law. Apart from being settled law that Parties are bound by their Pleadings, it is equally trite law that a Court has no jurisdiction to grant a relief not specifically pleaded. In spite of the Appellant's long and discursive submission in support of an affirmative answer to this Issue, Dr. Kafumbe did not directly address himself to it but responded on the assumption that the Trial Court had rightly rejected the claim for compensation on account of lack of merit. This lapse notwithstanding, we are convinced that the Trial Court rightly rejected the Appellant's claim for "compensation" (damages). We, therefore, find ourselves constrained to answer this Issue in the Negative.

ISSUE NO. SIX: What remedies are the Parties entitled to?

105. The Appellant accessed this Appellate Division seeking the reversal of the impugned Judgment of the Trial Court. From our elaborate discussion on the four preceding Issues, it is evident that she has totally failed to persuade us to hold that the said Judgment was flawed by errors of law and/or procedural irregularities to justify our intervention. We are in agreement with Dr. Kafumbe that the "*sound well-reasoned Judgment of the First Instance Division of the Court… be upheld*", as we hereby do. Therefore, save for our holding on the first non-contested

ground of appeal, we hereby dismiss the other grounds of appeal as encapsulated in Issues No. Two to Six.

CONCLUSION

106. To recap briefly, the Appellant had applied for the Post of Registrar of the East African Court of Justice. From a host of applicants, she was one of the lucky six (6) who were shortlisted for interview. The interview was slated for September 28th, 2015. It was to be carried out by way of video conferencing. The candidates/interviewees were to be interviewed at the offices of the Ministry of East African Community Affairs in their respective countries. The Appellant was, therefore, to appear for the interview at the said offices in Bujumbura.

107. The Appellant, at first and for no apparent reason, sought from the Respondent a "**special dispensation**" to be interviewed at Arusha. When pressed by the Respondent, she claimed (2 days later) that she was taking care of her sick 7-year old daughter. The Respondent took the view that since the daughter was not hospitalised in order "*to accord all candidates a level playing field,*" there "*could be no exception for any candidate".* The request was accordingly rejected. The Appellant took offence of this decision and did not travel to Bujumbura. The interviews proceeded as scheduled and a new Registrar was duly recruited.

108. Believing that the Respondent's decision denying her special dispensation was illegal, in that it was an infringement of Articles 6 (d), (e), and (f) and 71(h) of the Treaty, the Appellant, instituted the Reference under Article 30(1). She sought for the annulment of the Respondent's decision and a re-launch of the entire "*process of interview and organise a different interview panel".*

109. The Trial Court found the Respondent to have acted reasonably in refusing to grant the special dispensation. It also found the extravagant request of relaunching the interview process incapable of achievement. It accordingly dismissed the Reference, ordering each Party to bear her/his own costs.

110. Only the Appellant was dissatisfied with the entire decision, hence this contested Appeal.

In the Appeal, the Appellant is praying for:

> *"an order to reverse the decision appealed against and the decision of the First Instance Division be dismissed in its entirety with costs."*

She is, however, silent on what further orders the Court should make in the event the impugned Judgment is reversed. In view of the decision we have arrived at, this is only a by the way.

111. On our part, having dispassionately considered the Pleadings, evidence, the governing provisions of the Treaty and the Rules, the impugned Judgment and Parties' Submissions before us, we are settled in our minds that this Appeal has been lodged without any sufficient ground of complaint. There is nothing perverse in that Judgment to justify our reversing it or even varying it. It is as balanced and clear as it is reasoned. It can only be upheld in its entirety, as we hereby do.

112. All said and done, we dismiss the Appeal. As the Respondent did not appeal the Trial Court's order on costs, we make no order as to costs.

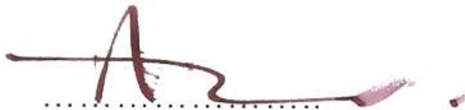
Delivered, Dated and Signed at Arusha this 2nd day of December, 2016.

Liboire Nkurunziza

VICE PRESIDENT

Edward Rutakangwa

JUSTICE OF APPEAL



Aaron Ringera

JUSTICE OF APPEAL