IN THE EAST AFRICAN COURT OF JUSTICE
APPELLATE DIVISION AT ARUSHA

(Coram: E. Ugirashebuja, P.; L. Nkurunziza, VP.; E. Rutakangwa; A. Ringera; and G. Kiryabwire, JJ.A)

APPEAL NO.2 OF 2015

BETWEEN

THE ATTORNEY GENERAL OF THE UNITED REPUBLIC OF TANZANIA ..... APPELLANT

AND

ANTHONY CALIST KOMU .....RESPONDENT

(*Appeal from the Judgment of the First Instance Division at Arusha, Jean Bosco Butasi, PJ; Isaac Lenaola, DPJ; and, Faustin Ntezilyayo, J; Dated 26th Day of September 2014, in Reference No. 7 of 2012*)

25TH NOVEMBER, 2016

JUDGMENT

INTRODUCTION

1. The United Republic of Tanzania, the Appellant in this matter, appeals certain issues of law and legal interpretations developed in the First Instance Division of the East African Court of Justice (hereinafter the "Trial Court") in their Judgment dated the 26th day of September, 2014 in Reference No. 07 of 2012.

2. The dispute before the Trial Court arose in connection with the application of Article 50 of the Treaty for the Establishment of the East African Community (hereinafter the "Treaty") by the Parliament of the United Republic of Tanzania (hereinafter "Tanzania") in conducting the impugned elections of members of the East African Legislative Assembly (hereinafter "EALA").

3. To properly appreciate this Appeal, it is necessary to refer to the relevant provision of the Treaty.

4. The Treaty in its Article 50 provides:

   "Election of Members of the Assembly

   1. The National Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State, in

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accordance with such procedure as the National Assembly of Each Partner State may determine.

2. *A person shall be qualified to be elected a member of the Assembly by the National Assembly of a Partner State in accordance with paragraph 1 of this Article if such a person:*
   a. *...;*
   b. *is qualified to be elected a member of the National Assembly of that Partner State under its Constitution;*
   c. *...*
   d. *...*
   e. *..."*

BACKGROUND TO THE DISPUTE

5. The background leading to the present controversy is discernible in the Supplementary Record of the Appeal especially in the "Extract of the Translated Official Records of the Proceedings of the National Assembly (*Hansard)* of its Seventh Meeting held at Dodoma, Tanzania, on 17th April, 2012 (Election of Members of the East African Legislative Assembly, Guidance of the Speaker).

6. For the purpose of this Judgment it may be summarized as follows:

7. On17th April 2012, the Tanzania National Assembly held elections aimed at electing Members of the EALA.

8. On the same day, prior to the elections, the Hon. Speaker of the National Assembly issued Guidance on the voting procedures for electing the Members of EALA, as per Rule 11(4) of the East African Legislative Assembly Election Rules (Third Schedule to Parliamentary Standing Orders, 2007 Edition).

9. In the Guidance, the Speaker explained to the Members of the National Assembly that the elections of members of EALA is conducted in accordance with the requirements of Article 50(1) of the EAC Treaty, which was domesticated by Act No. 4 of 2001 (The Treaty for Establishment of the East African Community Act, 2001, No. 4 of 2001, as well as with the Parliamentary Standing Orders.

10. The Speaker further explained, in the Guidance cited in para. 6 above, that:

"For the purpose of realizing the representation required under Article 50(1), that is; various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups, under the political environment of the United Republic of Tanzania, Rule 5(5) and 11(3) of the East African Legislative Assembly Election Rules (Third Schedule to the Parliament Standing Orders), provides the interpretation of that representation to be ***representation by groups*** *as follows:*

(a) Group A: Women;

(b) Group B: Zanzibar;

(c) Group C: Opposition Parties;

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(d) Group D: Tanzania Mainland".

11. The Speaker further elaborated that in the light of the threshold of representation provided for under Article 50 (1) of the EAC Treaty which provides "as much as possible" as well as the "political environment of the United Republic of Tanzania": Group A would be reserved for women candidates "*from the ruling party and the opposition parties and also other political parties with permanent registration from both parts of the Union*"; Group B would be reserved "for candidates from Zanzibar (men and women) from the ruling party and opposition parties and also other political parties with permanent registration"; Group C would be reserved for *"candidates from opposition parties in the National Assembly (men and women) from both sides of the Union";* and, finally, Group D would be reserved for "candidates from Tanzania Mainland (men and women), from the ruling party, opposition parties and other political parties with permanent registration".

12. In the midst of the Guidance from the Speaker, one Hon. John Mnyika, Member of Parliament for Ubungo Constituency presented certain proposals.

13. The proposals by Hon. Mnyika were as follows:

"

(a) Rule 12 be amended by deleting the phrase, "proportionality of the number of Members of the Parliament from various political parties

represented in the National Assembly" and substituting for them the phrase "shades of opinion and special groups in the society", between the words "gender "and "representation, from both sides of the Union".

(b) The third Schedule to the Parliamentary Standing Orders be amended deleting rules 5(5) and 11(3)".

14. In responding to the proposals, the Hon. Speaker stated:

"The Standing Rules Committee observed that, there is a wrong conception that the nine vacant seats in the East African Legislative Assembly are supposed to be filled by way of distribution amongst political parties represented in the National Assembly, in consideration of the number of Members of Parliament of each political party in the National Assembly is the basis of the share of each Political Party, and due to that wrong perception, political parties represented in the National Assembly have already predetermined their share of representation amongst themselves even before the election. This perception is contrary to Article 50(1) of the Treaty for the Establishment of the East African Community, which insists that, the Members of the East African Legislative Assembly to be elected by each Partner State, to represent, ***as much as it is possible, political parties represented in the National Assembly, shades of opinion, gender and other special interest groups".***

On that basis, the Standing Orders Committee resolved that there is no need for making the amendments which were proposed by Hon. Mnyika, and instead, the Committee decided that, the elections have to

be conducted in accordance with the to (sic) existing Parliamentary Standing Orders. The decision as to (sic) from which party a candidate should be elected, remains in the hands of the voters in accordance with Article 51(1) of the Treaty for the Establishment of the East African Community, as translated by Rule 5(5) to the Parliamentary Standing Orders of the United Republic of Tanzania).

15. Following the above statement by the Speaker, Hon. Mnyika sought further guidance on the basis that Standing Order 12 *"which is principal to the Third Schedule"* provides: *"the election of the Members of the East African Legislative Assembly will be conducted in accordance, with as much as it is possible, the proportionality of the number of Members of Parliament of various Political Parties in the National Assembly".*

16. He further inquired why the Guidance of the Speaker was not in consonant with the Standing Order, the former Speaker's Ruling and the jurisprudence of the EACJ.

17. The Speaker responded that Order 12 of the Standing Order and the Ruling of the East African Court of Justice in the *Anyang'Nyong'o Case (EACJ Application No. 1 of 2006)* provide that proportionality *"may fit or it may not fit depending on the circumstances of a country"* and that if it is considered that representation is only reserved for political parties represented in the House, it would be a contravention

of Article 50(1) taking into consideration the circumstances of Tanzania.

18. After extended debates in the Parliament on the Guidance of the Speaker, elections were conducted.

19. The Respondent, Mr. Anthony Calist Komu unsuccessfully contested for the position of Member of EALA under Group C which was categorized "Opposition Parties Groups".

20. Aggrieved by the outcome of the elections and the mode of elections employed by the National Assembly, which, according to him, did not adhere to the spirit of Article 50 of the EAC Treaty, Mr. Komu, on the 15th of June 2012, lodged a Reference in the Registry of the Court for determination by the First Instance Division of this Court.

21. Prior to lodging the abovementioned Reference, Mr. Komu had filed an election petition in the High Court of Tanzania at Dodoma on the 12th of May, 2012 under the Treaty for the Establishment of the East African Community, The East African Legislative Assembly Election Rules, The Parliamentary Standing Orders, 2007 Edition, The National Elections Act (CAP 343) and The National Elections (Election Petitions) Rules 2010. The Petitioner sought the following prayers:

(a) *A declaration that the election for all the members of the East African Legislative Assembly done on the 17/4/2012 is null and void.*

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(b) *A new and properly conducted election be ordered after proper electoral rules have been made establishing the formula to be used in allocating seats to the groups so established.*

(c) *Costs for this petition".*

ACTIONS BEFORE THE TRIAL COURT AND THE JUDGMENT UNDER APPEAL

22. By a Reference lodged at the Registry of the Court on the 15th of June 2012, Mr. Komu pleaded for the following prayers and orders:

"

(I) ***DECLARATION*** *that the election for members of the East African Legislative Assembly conducted by the Parliament of Tanzania on 17/4/2012 was in flagrant violation of Article 50 of the Treaty for the Establishment of the East African Community.*

(II) ***DECLARATION*** *that in obtaining the representatives from group C and D article 50 of the Treaty for the establishment of the East African Community envisages,* ***inter-alia,*** *the observance and compliance of the principle of promotional (sic) representation.*

(III) ***ORDER*** *prohibiting the Parliament of Tanzania form(sic) further violation of Article 50 of the Treaty for the establishment of the East African Community by not complying which (sic) the principle of proportional representation and allowing candidates from political parties which are not represented in the national assembly.*

(IV) ***ORDER*** *that costs of this reference be met by the respondent.*

(V) *THAT this honourable court be pleased to make such further or further orders(sic) as may be necessary in the circumstance.*

23. On 26th February 2013, invoking Rule 98 of the EACJ Rules of procedures (hereinafter, "Rules of the Court"), the Attorney General of Tanzania in turn submitted a Notice of Preliminary Objection advancing three distinct grounds: first, the Reference before the First Instance Division was *"frivolous, vexatious, and an abuse of due process and court funds"*; second, that the case was wrongfully before the First Instance Division and was contrary to the Rules of the Court; Finally, the Reference had no *"merit and should be dismissed for being res sub-judice"*.

24. As it appears from the Record of Appeal, the preliminary objection raised by the Appellant (who was then the Respondent) was not independently disposed of. The grounds raised in the Notice of Preliminary Objections were joined with other issues for determination at the trial during the Scheduling Conference.

25. At the Scheduling Conference in the Trial Court, eight issues were framed on which the Parties were at variance. The following were the issues:

i. Whether or not the Reference before this Court is frivolous, vexatious and an abuse of the Court process;

ii. Whether or not the Reference is wrongfully before the Court and is contrary to the Rules of Procedure of the Court;

iii. Whether or not, the Reference has no merit and should be dismissed for being res sub-judice;

iv. *Whether or not, the Parliament of the United Republic of Tanzania violated Article 50 of the Treat (sic)for the Establishment of the East African Community by formulating groups of categories for contestants, namely:*

a) Group A- Gender

b) Group B- Tanzania Zanzibar

c) Group C- Opposition Political Parties

d) Group D- Tanzania mainland;

v. *Whether or not, the election of Members of the East African Legislative Assembly on the basis of groups C and D categories violated the Principle of Proportional Representation as provided for under Article 50 of the Treaty for the Establishment of the East African Community;*

vi. *Whether or not, the failure of CHADEMA to get a single representative in the East African Legislative Assembly was caused by non-compliance with Article 50 of the Treaty for the Establishment of the East African Community;*

vii. *Whether or not, Article 50 of the Treaty for the Establishment of the East African Community provides a right for representatives of the Official Opposition Party in Parliament to an automatic chance of representation in the East African Legislative Assembly; and*

viii. *Whether or not, the Parties are entitled to the remedies sought.*

26. The Trial Court delivered a comprehensive Judgment on the issues as framed in the Scheduling Conference. In particular, the First Instance Division found that:

(1)The Reference as was framed and argued raised triable issues properly within the mandate and jurisdiction of the Court and was neither frivolous, vexatious nor an abuse of the Court process. Hence the first Preliminary Objection was overruled.

(2)The wider interests of justice necessitated the Court to accept and admit the Hansard Report of the National Assembly of Tanzania as part of the evidence for consideration by the Court.

(3)Even though the general subject matter before the Division and the High Court of Tanzania was the election of 17th April 2012, the competence of the two courts would exclude the principle of *res sub-judice.* Similarly, the doctrine of *res judicata,* would not apply as neither of the two courts has conclusively determined any aspect of the subject matter of the dispute. Hence, the third preliminary objection as framed was overruled.

(4)By formulating Standing Order No, 12 and Rule 5(5) whose effect was to predicate an election under Article 50 (1) of the Treaty on representation by political parties only and therefore creating categories as elsewhere set out, the National Assembly of Tanzania violated Article 50 (1) of the Treaty.

(5)To the extent only that Rule 5(5) creates the singular criteria as that of representation of political parties, then the further creation of categories C (Opposition Political Parties) and D (Tanzania Mainland) was an act in violation of the Treaty. Further, it was a violation of the Treaty for TADEA, a party with no representation in the National Assembly of Tanzania to field a candidate.

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(6) No group under Article 50 (1), including any political party, is guaranteed automatic representation in the EALA. Hence CHADEMA had no such guarantee.

(7) There was no guarantee of automatic representation of the official opposition party by Article 50 (1) of the Treaty.

(8) Prayer (i) was granted; Prayer (ii) was dismissed; Prayer (iii) was granted; and the applicant was awarded a quarter costs of the Reference.

THE APPEAL

27. The Attorney General of Tanzania put forward eleven grounds of appeal which are:

(1) That the Honourable Lordships of the First Instance Division erred in law by failing to rule that the Respondent failed to comply with the provisions of Article 34 of the Treaty for the Establishment of the East African Community and therefore the reference was wrongly before the Court.

(2) That the Court erred in law by failing to correctly interpret the Treaty for the Establishment of the East African Community by disregarding the provisions of the Treaty, with regard to Domestic Court in the State Party and National Assembly procedures and law, and by entertaining an unlawfully obtained records of Parliamentary proceedings (Hansard Report) which was annexed as evidence to the Treaty.

(3) That the Court erred in fact and law in holding that the matter before it was not res- subjudice.

(4) *That the Court misdirected itself by holding that, the National Assembly of the United Republic of Tanzania violated Article 50 (1) of the Treaty by formulating Parliamentary Standing Order No. 12 and Rule 5 (5) of the East African Legislative Assembly Election Rules (i.e. Third Schedule to the Parliamentary Standing Order).*

(5) *That, the Court misdirected itself by holding that, Rule 5 (5) of the Third Schedule to the Parliamentary Standing Orders creates only one group as a basis for an election under Article 50 (1), and that the further creation of categories C (Opposition Political Parties) and D (Tanzania Mainland) was an act of violation of Article 50 (1) of the Treaty.*

(6) *That, the Court erred in law by issuing a declaratory order to the effect that, the election of members of the East African Legislative Assembly of Tanzania on 17th April, 2012 was in violation of Article 50 (1) of the Treaty.*

(7) *That, the Court erred in law by holding that, the election of members of the East African Legislative Assembly by the National Assembly of Tanzania was to be conducted by voting for candidates represented in the National Assembly only, in disregard of candidates from other group (sic) envisaged in Article 50 (1) of the Treaty.*

(8) *That, the Court erred in law by issuing a declaration against the National Assembly of the United Republic of Tanzania that, by allowing a political party without representation in the National Assembly (TADEA) to filed (sic) a candidate in the election for representatives to the EALA, it was in violation of Article 50 (1) of the Treaty.*

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(9) *That, the Court erred in law by failing to give the interpretation of the representation envisaged in Article 50 (1) of the Treaty as contained in the words, "shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State".*

(10) *That, the Court erred in law by failing to give the interpretation of Article 50 (1) of the Treaty which was cole (sic) issue and fundamental purpose of the Reference, for future guidance on the conduct of elections of members of the East African Legislative Assembly.*

(11) *That, the Court misdirected itself by ordering a quarter of the costs of the Reference.*

28. At the Scheduling Conference which was held pursuant to Rule 99 of the Rules of the Court on the 22nd February 2016, the Appeal came down to five issues, namely:

i. *Whether or not, the National Assembly of the United Republic of Tanzania violated Article 50 (1) of the Treaty for the Establishment of the East African Community?*

ii. *Whether or not, the National Assembly of the United Republic of Tanzania was bound to follow the wording of Standing Order 12 of the Parliamentary Standing Orders with regard to proportional representation or the Wording of the Treaty for the Establishment of the East African Community which states "as much as feasible"?*

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iii. *Whether or not the National Assembly of the United Republic of Tanzania adhered to the word, spirit and purport of Article 50 of the Treaty for the Establishment of the East African Community by formulating the groups envisaged in Rule 5(5) of the Third Schedule of the Parliamentary Orders, considering the nature of the Union between Tanganyika and Zanzibar?*

iv. *Whether or not, the Court had the mandate to give declaratory Orders against the National Assembly of the United Republic of Tanzania?*

v. *Whether or not the parties are entitled to costs?*

29. In its written submissions, the Appellant elected to consolidate issues i. ii, and iii, for purposes of "convenience". The Respondent, in his Written Submission pursued the same path.

30. In taking this approach, a broad spectrum of matters was brought to the fore by both parties, which will require our special attention in the proper resolution of this Appeal.

31. Prominent among the issues raised in the Written Submissions was the question as to whether this Court has jurisdiction to determine whether there was any breach whatsoever of Article 50 (1) of the Treaty by the National Assembly of Tanzania in the conduct of elections of EALA members of parliament.

32. The Attorney General of Tanzania brought to the fore the argument that it is "the national courts" which have "the competence

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and jurisdiction to determine the matter on interpretation and application of Article 50 (1) of the Treaty". The argument of Tanzania was premised on the principle of *res sub-judice*.

33. The Respondent refuted the argument on the basis that this Court has Jurisdiction to entertain the matter, and that, the application of the principle of *res sub-judice* was misplaced in this matter as had been illustrated in the judgment of the Trial Court.

34. Due to the importance of the question of Jurisdiction in the resolution of disputes (see, **Attorney General of Tanzania v. African Network for Animal Welfare (ANAW)** [EACJ Appeal No. 3 of 2011]), and the way it was perfunctorily dealt with in the Parties' Written Submissions, this Court directed the Parties to canvass the question deeply in Supplementary Written Submissions. In order to be properly addressed on this question, this Court framed the following issues:

(i) *Whether in view of Article 30 (3) of the Treaty for the Establishment of the East African Community the Trial Court had jurisdiction to entertain the Reference?*

(ii) *What is the nexus between Article 30(3) and 50 (1) of the Treaty?*

(iii) *Whether in the light of Article 30 (1) of the Treaty the Respondent has standing in the Case?*

35. The above three issues can be summarized in one issue which is "whether in the light of Article 30(3) and 50 of the Treaty for the Establishment of the East African Community (in relation to Actions,

Decisions, Regulations and Acts) the Court has Jurisdiction to entertain the Reference".

36. We propose to deal with the question of Jurisdiction first before examining the merits of the Appeal.

THE COURT'S JURISDICTION

The Appellant's Submission

37. In his Supplementary Written Submissions, the Appellant's primary argument is that reading Article 27 together with Article 30 and Article 50(1) the Respondent does not have *locus standi* in a claim of this nature.

38. The Appellant relies largely on the content of Article 30 (3) of the Treaty which provides that: "The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State".

39. The Appellant further alleges that Article 50 (1) of the Treaty has reserved the action of election of EALA members to the National Assembly (ies) of Partner State(s) Institution(s) of the Partner State(s)- hence, this Court has no jurisdiction as per Article 30 (3) of the Treaty.

The Respondent's Submission

40. On his part, the Respondent argued that the Appellant had foregone the opportunity to address the Court on the specific points of law which the Court sought further clarification on the basis that the Appellant's Submissions were submitted late. The Respondent contends that as per the Court Order of 25th August 2016, the Appellant delayed in submitting his Submissions by one day without having been granted extension of time by this Court as is required by Rule 4 of the Rules of Procedure.

41. The Respondent further submits that Article 30 (3) should be read together with Articles 27 and 30 (1) which spells out the role of this Court *"to ensure adherence of the law on the interpretation, application and compliance of the Treaty".*

42. The Respondent contends in paragraph 10 of his Supplementary Submissions:

"We are in agreement with the view of the Appellant as regards the nexus between Article 30(3) and Article 50(1) of the Treaty but we differ as to the resultant consequences of that nexus. In our view and hearing (sic) in mind that the jurisdiction of this court under the Treaty is threefold namely, interpretation, application and compliance which inevitably include the powers to query the legality of an Act, regulation, directive, decision or action of an institution of a partner state in the

context and spirit of Article 50 (1) in the sense exemplified earlier herein above regarding Prof. Anyang Nyongo's case (underlining ours). The said powers of this court may be referred to as inherent in its supervisory role in so far as interpretation, application and compliance of the Treaty is concerned (underlining ours).

43. The Respondent goes on to conclude that an individual has standing when an act complained of has been committed by an institution of a Partner State. In arriving at this conclusion, the Respondent heavily relies on the **Anyang' Nyong'o** case which was lodged by individuals.

Court Findings

Admissibility of late Written Submissions

44. Before we delve into the question of jurisdiction, we are going to address the issue raised by the Respondent with regards to the tardiness in submitting the Supplementary Written Submissions of the Appellant.

45. We do agree with the Respondent that the Supplementary Submissions were submitted one day beyond the deadline established in the above mentioned Court Order. It is not in the habit of this Court to condone the behavior of breaching its Orders by Parties before it. As a Court we would have no difficulty whatsoever in striking out submissions which do not conform to deadlines established by our

Orders. This rule is invoked with a near religious fervor. However, general rules generally have exceptions as is the case here.

46. We may exceptionally consider late Written Submissions in the interest of substantial justice especially in cases of interest to the Community such as the present one or where substantial matters such as the question of jurisdiction is to be determined. Rule 1 (2) of the Rules of the Court gives the Court the inherent power *"to make such orders as may be necessary for the ends of justice..."* without hiding behind the veil of the Rules at the expense of dispensing substantive justice.

47. The Appellant belated Submissions deal with the question of jurisdiction as directed by the Court and the resolution of this Case has far reaching ramifications to the Community beyond the United Republic of Tanzania since it involves elections of Members of EALA who are elected in each and every Partner State of the Community.

48. In the light of the above, the Court decides to admit retrospectively the Supplementary Submissions of the Appellant lodged a day beyond the prescribed date.

<u>On Jurisdiction</u>

49. To succeed on a claim for lack of jurisdiction of this Court, a party must demonstrate that there is absence of any of the three jurisdictions-

ratione personae/locus standi, ratione materiae, and ratione temporis. See Alcon International LTD and the Standard Chartered Bank, The Attorney General of Uganda, The Registrar, High Court of Uganda, [Appeal No. 3 of 2013, para.] 58.[unreported]

50. What is in question in the present case is the *locus standi (jurisdiction ratione personae)* of the Respondent in this particular case. The contention of the *locus standi* of the Respondent was triggered by the provisions of Articles 23 (1), 27 (1), 30 (1) and (3) and 50 (1) which we will restate here.

"Article 23: Role of the Court

1.The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty.

Article 27: Jurisdiction of the Court

1. The Court shall initially have jurisdiction over the interpretation and application of this Treaty:
Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States. (underlining ours).

Article 30: Reference by Legal and Natural Persons

1. Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by

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the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.

2. ...
3. *The Court shall have no jurisdiction under this Article where an Act, Regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner States(underlining ours)*

Article 50: Election of Members of the Assembly

1. *The National Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State may determine.* **"**

51. We recall that the contraction of the jurisdiction of the Court in both Articles 27 and 30 came in the form of an amendment to the original Treaty. It is widely believed that the amendments were a prompt and considered Partner States' response to the outcome of the *Anyang'Nyong'o* Case. (see., *The East African Law Case,* 2007, p. 3-5; A. Possi, *The East African Court of Justice: Towards Effective Protection of Human Rights in East African Community,* Thesis, University of Pretoria, 2014 pp. 193- 209; Van der Mei, (2009), *69*

Heidelberg Journal for International Law, 419; J. Gathii, "Mission Creep or A search for Relevance: The East African Court of Justice's Human Rights Strategy" (2013), *24 Duke Journal of Comparative and International Law 249,* at p. 268.).

52. It is also important to note at this juncture that the legality of the above-amendments to the Treaty was questioned before this Court in the *East African Law Society Case* (2007). This Court declined to invalidate the amendments.

53. The principles and procedures of treaty making are familiar to all who practice in the area of international law. When states submit to the jurisdiction of a court (such as this), they do so under a specified set of conditions and expectations of court's power. In the case of this Court, the conditions are established by the Treaty. The Court is expected to restrict itself to boundaries prescribed by the Treaty.

54. The extent of the jurisdiction of any regional or international court is delineated by the constitutive agreement establishing the Court. By way of example, the International Court of Justice is an interstate court, meaning that natural persons have no *locus standi* before the Court. The *locus standi* of direct actions by persons in the Court of Justice of the European Union is restricted to persons who can show that a contested act has a direct and individual concern (Article 230 of the Treaty Establishing the European Community). The Southern African Development Community Tribunal was relegated to a Tribunal that settles disputes between member states and excluded the standing of

persons in the 2012 SADC Summit of Heads of States. There is the requirement of exhaustion of local remedies by persons who wish to commence proceedings before the Court of Justice of the Common Market for Eastern and Southern Africa (COMESA) (Article 26 of the Treaty Establishing COMESA). Individuals and Non-Governmental Organisations can only bring complaints to the African Court of Human and Peoples' Rights where the State which the complaint is brought against has made a declaration under Article 5 (3) of that Court's Protocol accepting the competence of the court to receive such complaints (only eight (8) of the thirty (30) States Parties to the Protocol have made the declaration recognizing the competence of that Court to receive cases from NGOs and individuals).

55. We noted a short while ago that the main rationale for the amendments was to erode the Court's jurisdiction specifically where cases are introduced by persons (both legal and natural). Two restrictions were incorporated in Article 30- the time limitation restriction- and, lack of *locus standi* for natural and legal persons "where an Act, Regulation, Directive, Decision or Action has been reserved under this Treaty to an institution of a Partner State".

56. It is axiomatic to note that when the Court such as ours finds the terms of the Treaty provision unambiguous then our role becomes that of application of the Treaty rather than its interpretation. This is anchored in the wording of Article 27 of the Treaty which provides that the jurisdiction of the Court is twofold; "interpretation and application.

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According to *Ehrilich,* interpretation constitutes the process of "determining the meaning of a rule" *whereas application is the process of determining the consequences which the rule attaches to the occurrence of a given fact" (Case Concerning the Factory at Chorzow* [claim for indemnity- jurisdiction] [Dissenting Opinion of Judge Ehrilich], PCIJ Report Series A No. 9 [1927], 39).On his part, Arnold McNair states that:

[t]he words "interpret", interpretation"; are often used loosely as if they include "apply, application". Strictly speaking, when the meaning of the treaty is clear, it is "applied" not "interpreted". Interpretation is a secondary process which only comes into play when it is impossible to make sense of the plain terms of the treaty, or when they are susceptible of different meanings.' (see, A. McNair, *The Law of Treaties* [Clarendon Press, Oxford, 1961], 365). In other words, Treaty interpretation is a process of discovering the proper meaning of treaty terms through various interpreting methods; whereas treaty application is the process of identifying a source of law and applying it.

57. Admittedly, in most cases, we are likely to first determine what a treaty provision means and then proceed to apply it. Interpretation in a majority of the cases becomes part of the process of the application of a provision in contention. Judge Higgins succinctly opines that the phrase "application or interpretation" in a treaty *'contains two distinct elements which may form the subject-matter of a reference to the Court. All too frequently, they are treated compendiously'* (*Oil Platforms [Islamic Republic of Iran v. United States of America]* [Preliminary

Objection][Dissenting opinion of Judge Higgins], 1996, ICJ Rep. para. 3).

58. However, in a case such as this, all that one has to question is whether there is a prohibition from accessing the Court, and who is prohibited to access the Court, and for what (the subject matter). This is a pretty straight forward exercise, which is subsequently followed by applying the requisite provision allowing the person (legal and/or natural) to either proceed with the merits of the matter or disqualify the person on the basis that their access to the Court is forbidden on a given subject matter. This exercise does not involve interpretation of the law, but rather, its application, and as a result judicial inquiry is complete. Judge Rosalyn Higgins eloquently remarked that a dispute over the "application" of a treaty, for purposes of jurisdiction, refers to grounds of jurisdictional objections based on among other things, *ratione temporis* inapplicability. We would also add *ratione personae* inapplicability to the list of jurisdictional objections. Judge Higgins further opines that where a treaty involves "non-applicability" of *ratione materiae* then the treaty will inevitably fall 'for "interpretation" in a jurisdictional context..." (*Oil Platforms [Islamic Republic of Iran v. United States of America]* [Preliminary Objection][Dissenting opinion of Judge Higgins], 1996, ICJ Rep. paras 4-6.

59. A careful examination of Article 30 (3) makes it clear that persons access to this Court (*locus standi/jurisdiction ratione personae*) is prohibited "where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner

State". Article 30 bears the title; Reference by Legal and Natural Persons.The first point of determination is whether a petitioner to this Court is a "legal or natural person". The wording of Article 30 (3) that *[t]he Court shall have no jurisdiction under this Article..."* bars any references by persons (both legal and natural) on any of the abovementioned subject matter. It is incontrovertible that the present petition was filed by one Mr. Komu (a natural person).

60. The second point we have to determine is whether the determination of Mr. Komu's Reference concerns *"the legality of any Act, regulation, directive, decision or action of a Partner State... on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of this Treaty".* The subject-matter of this case can be discerned from the prayers sought by the Applicant (now Respondent) in the First Instance Division of this Court as discussed below:

(i) The first prayer sought a declaration from this Court that *"the elections for members of the EALA conducted by the Parliament of Tanzania on 17/4/2012 was in flagrant violation of Article 50 of the treaty for the establishment of the East African Community."* By challenging the "elections" for members of EALA, the Claimant (as he was then) is challenging the "action" of "election" as was undertaken by the Parliament of Tanzania as an "infringement" of the Treaty.

(ii) The second prayer sought a declaration *"that in obtaining the representatives from Group C and D Article 50 of the Community,*

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envisages, ***inter alia,*** *the observance and compliance of the principle of proportional representation".* As we may recall, the categorization of groups for purposes of elections of Members of EALA by the Parliament of Tanzania was effected in the form of Standing Order No, 12 and Rule 5(5) of the East African Legislative Assembly Election Rules (i.e. Third Schedule to the Parliamentary Standing Order). It is clear here that the Claimant then (now Respondent) is advancing the argument that the "regulations" formulated for the purposes of conducting the elections for EALA members by the Parliament of Tanzania were an infringement of the provisions of Article 50 of the Treaty.

(iii) In a nutshell, it is crystal clear that the Claimant, all along challenged the legality and infringement of Article 50 of the Treaty in the election ("action") of the EALA members and "regulations" employed in undertaking the elections.

61. The third and final point of determination is whether the "action" and "regulations" discussed above have "been reserved" under the Treaty "to an institution of a Partner State". In order to determine this, it is imperative to review the provisions of Article 50 (1) of the Treaty which is at the centre of this contention. Article 50 (1) provides: *'The National Assembly of each Partner State shall elect... nine members of the Assembly (EALA)...in accordance with such procedure as the National Assembly of each Partner State may determine".* This Article clearly illustrates that the action of electing members of EALA and the enactment of an enabling regulation for the elections have been

reserved for an institution of a Partner State which is the National Assembly of Tanzania in this case.

62. In light of the above, the Court comes to the conclusion that the Claimant (now Respondent) did not qualify to institute the proceedings in this Case. The Claimant (as he was then) was consequently devoid of *locus standi* before this Court. Hence, this Court had no jurisdiction *ratione personae* to entertain this matter as per Article 50 (1) read together with Article 30(3). The Court can exercise its judicial function only in respect of those parties who have lawful access to it in given matters. The reliance on the Anyang' Nyong'o case by the Respondent does not resuscitate his case. Before the Anyang' Nyong'o case, persons had unlimited *locus standi* in matters such as this. It is the post-*Anyang Nyong'o case,* that amendments introduced limit the standing of persons in this Court in matters such as the present one.

63. Where the Court such as ours finds a manifest lack of jurisdiction, considerations of sound administration of justice dictate that the case is inadmissible.

64. The Court concludes from all of the foregoing considerations that the Respondent does not possess the requisite *locus standi* of lodging a case of this nature before this Court. Since it has no jurisdiction to entertain the Reference, the Court is precluded to rule on the merits of the case.

Other important Questions Raised by the Respondent

65. The Respondent posed an important scenario which requires our attention. He ponders: *"Now, suppose, as was in the case of Anyang' Nyong'o case,(sic) instead of* ***"electing",*** *those members as was entrenched under Article 50(1), they decided to* ***"appoint"*** *those members purporting to exercise powers conferred to them under Article 50(1) of the Treaty".*

66. The Court will begin by reaffirming that the primary obligation of States in international law is to abide by obligations imposed upon them by an agreement they have freely entered into. However, it is one thing to determine the obligations imposed by a given agreement such as the EAC Treaty, and another to have a dispute settlement mechanism (such as a court) in place to determine whether that obligation has been violated. The Court observes that the violation of a treaty provision and possessing the jurisdiction to decide on the violation are two different things and that the mere fact that the breach of a treaty provision may be at issue in a dispute would not automatically give this Court the jurisdiction to entertain that dispute. The Court has jurisdiction in respect of disputes only to the extent that the Treaty has granted the jurisdiction. For instance, this Court cannot exercise jurisdiction over a dispute, however, manifest or gross the violation is, if the matter is time barred or where the person instituting the case has no *locus standi* as we have determined in this case.

67. In the scenario posed by the Respondent as illustrated in paragraph 65 above, it is important to note two things. First, the Anyang' Nyong'o case determined definitively that Article 50 (1) provides for an "election" by the National Parliament of Members of EALA. Any other mode of putting in place of members of EALA other than "election" is a breach of the Treaty. This Court has not departed from that determination. Hence, in the instance that a case challenging the mode of procuring members of EALA other than "elections" before the national courts of the Partner States, then the National courts have no choice but to abide by the ruling of the Anyang' Nyong'o on the sole mode of procuring EALA members which is "elections" by National Parliaments. We are fortified in this view by the provisions of Article 8 (4) of the Treaty which provides that "Community organs, institutions and laws shall take precedence over similar ones on matters pertaining to the implementation or the application of this Treaty" as well as Article 33(2) which provides that "Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter". Therefore, as long as the ruling in the ***Anyang Nyong'o*** case has not been departed from by this Court, it would supersede any decision of any National Court to the contrary.

68. Second, it is important to note that even though we have determined that Mr. Komu did not have the *locus standi* to institute the case, it does not translate to the Court not having the jurisdiction over the subject matter. The architecture of the Treaty allows individuals to institute proceedings of the nature of the present case before national courts (see Article 34 of the EAC Treaty). In deed the Respondent

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brought proceedings in the High Court of Tanzania (see, *supra* para.22). Where a case such as this is before a national Court of a Partner State, and a question of interpretation of the Treaty arises, as has arisen in this case, then it (the national court) **must** refer the question to this Court for interpretation. In the *Kyahurwenda* case, this Court held *that "...once a national court or tribunal considers an interpretation to be necessary, then it has no option but to refer the question to this Court..."*(*The Attorney General of the Republic of Uganda v. Tom Kyahurwenda,* Reference for a Preliminary Ruling Article 34 of the Treaty made by the High Court of the Republic of Uganda, *Case Stated No.1of 2014,* para. 56). Reading Article Articles 27, 33 and 34 of the Treaty together leads to the conclusion that *"this Court has **exclusive** (underlining ours) jurisdiction on the interpretation of the Treaty and invalidation of Community Acts, directives, regulations or actions"* (*Kyahurwenda, supra,* at para. 61).

COSTS

69. This Court has on numerous occasions followed the general rule that costs follow the event. However, where a case has been instituted by a public spirited person and it is arguable and raises significant issues as to the interpretation and future application of the Treaty provisions, this Court has exercised its jurisdiction not to award costs against this kind of litigant when he/she loses the reference.

70. It is the view of this Court therefore, that this Case was arguable and raised challenging issues pertinent to the proper interpretation and application of Articles 23, 27, 30 and 50 of the Treaty.

71. In the result, we order that each Party bears his own cost.

OPERATIVE PART

72. For the reasons we have set out above, THE COURT HEREBY RULES THAT:

(i) The Trial Court had no jurisdiction to entertain the Reference.

(ii) The Judgment of the First Instance Division is SET ASIDE.

(iii) Each Party shall bear its own costs here and below.

It is accordingly so ordered.

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DELIVERED, DATED AND SIGNED AT ARUSHA THIS 25th DAY OF NOVEMBER 2016

.....
Emmanuel Ugirashebuja
PRESIDENT

.....
Liboire Nkurunziza
VICE PRESIDENT

.....
Edward Rutakangwa
JUSTICE OF APPEAL

.....
Aaron Ringera
JUSTICE OF APPEAL

.....
Geoffrey Kiryabwire
JUSTICE OF APPEAL