IN THE EAST AFRICAN COURT OF JUSTICE

FIRST INSTANCE DIVISION

AT ARUSHA

(Coram: Johnston Busingye, PJ, Stella Arach-Amoko, DPJ, John Mkwawa, J, Jean-Bosco Butasi, J, Benjamin P. Kubo, J)

REFERENCE No. 1 OF 2010

HON. SITENDA SEBALU ---------- APPLICANT

VERSUS

1. **THE SECRETARY GENERAL OF }**
   THE EAST AFRICAN COMMUNITY }

2. **THE ATTORNEY GENERAL OF }**
   THE REPUBLIC OF UGANDA }
   (Sued in representative capacity) }--------- RESPONDENTS

3. **HON. SAM K. NJUBA }**
   }
4. **ELECTORAL COMMISSION OF }**
   UGANDA }

DATED 30TH JUNE, 2011

JUDGMENT OF THE COURT

Background

This Reference was brought before the East African Court of Justice (EACJ) by way of Notice of Motion under Articles 6, 7(2), 8(1)(c), 23, 27(1) (*sic*) and 30 of the Treaty for the Establishment of the East African Community ("the Treaty") and Rules 1(2) and 21 of the EACJ Rules of Procedure ("the Rules"). The Notice of Motion filed on 14th June, 2010 and amended on 27th October, 2010 prayed for the following Orders:-

a) That the act of the 1st Respondent to delay to convene the Council of Ministers as stipulated under Article 27 of the Treaty to create The East African Court (*sic*) *as* an appellate court is an infringement of Articles 7(2), 8(1)(c) and 6 of the Treaty for Establishment of The East African Community.
b) That the inaction of the 1st Respondent is in itself an infringement of the Fundamental principles of good governance, including adherence to the principles of democracy, **the rule of law**, social justice **and the maintenance of universally acceptable standards of human rights** which are enshrined in those Articles of the Treaty of the Community in particular regard to peaceful settlement of disputes.

c) That the inaction and the loud silence by the 1st and 2nd Respondents is an infringement of Articles 6, 27, 29 and 30 of the Treaty for the Establishment of the East African Community.

d) That quick action should be taken by the East African Community in order to conclude a protocol to operationalise the extended appellate jurisdiction of the East African Court of Justice under Article 27 of The Treaty to enable the Applicant and other interested litigants "preserve" their right of appeal to the East Court of Justice (*sic*) under Articles 6, 7(2), 8(1)(c), 23, 27(1) and 30 of the Treaty for the Establishment of the East African Community and Rules 1(2) and 21 of the East African Court of Justice Rules of Procedure and subsequently file their appeals.

e) That costs of the Reference be provided for.

The Notice of Motion is supported by the Affidavit of the Applicant also filed on 14th June, 2010.

Grounds of the Reference

The grounds upon which the Notice of Motion is based are essentially as follows:-

i. The Respondents herein are sued jointly and/or severally for declarations that the Applicant has a right of appeal to the EACJ under the Articles alluded to in prayer (d) above.

ii. The Applicant filed Election Petition No. 25 of 2006 in the High Court of Uganda against Hon. Sam K. Njuba and Electoral Commission of Uganda (3rd and 4th Respondents herein, respectively) and lost.

iii. The Applicant then filed Election Petition Appeal No. 1 of 2008 in the Court of Appeal of Uganda against the High Court decision. The Appeal was dismissed with costs to the respondents in the petition appeal.

iv. Still dissatisfied with the decisions of the first two Ugandan superior courts, the Applicant filed a second appeal, being Election Petition Appeal No. 6 of 2009 in the Supreme Court of Uganda (highest court in the land) against the Court of Appeal decision. The second appeal too was dismissed with costs to the respondents in the petition appeal.

v. The Applicant being also dissatisfied with the decision of the highest court in Uganda then came to the EACJ to register his desire to further appeal to the EACJ as an Appellate Court since, in his view, despite the Ugandan Supreme Court Judgment, he still has a right of appeal to the EACJ under Articles 6, 7(2), 8(1)(c), 23, 27(1) and 30 of the Treaty for the Establishment of the East African Community and Rules 1(2) and 21 of the EACJ Rules of Procedure.

vi. The Applicant complained that although Article 27(2) of the Treaty provides for conferment on the EACJ of such other original, ***appellate,*** human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date, none of those additional limbs of jurisdiction has been conferred on the EACJ by the Council as yet.

vii. The Applicant invited the Court through the current Reference to interpret Articles 5, 6(d), 7(2) and 8(1)(c) of the Treaty so as to determine the contention that the delay to vest the EACJ with appellate jurisdiction is a contravention of the doctrines and principles of good governance, including adherence to the principles of democracy, "**the *rule of law*"**, social justice ***"and the maintenance of universally***

acceptable standards of human rights" which are enshrined in the Treaty which the East African Community Partner States undertook to abide by.

viii. The Applicant contended that the rule of law requires that public affairs are conducted in accordance with the law; that the decisions of the courts can be appealed against; *and that* ***"the continuous delay to establish the East African Court of Appeal as stipulated by Article 27 of the Treaty is a blatant violation of the rule of law and contrary to the Treaty and East African integration."***

ix. The Applicant's complaint against the 1st Respondent vide ground 21 was that the 1st Respondent being the Chief Executive Officer of the Community is mandated to convene the Council of Ministers of East African Community to conclude a protocol to operationalise the extended jurisdiction of the East African Court of Justice in order to handle appeals from the final Appellate Courts of the Partner States and that Protocol has been pending action since 4th May 2005 as A Draft Protocol to Operationalise The Extended Jurisdiction of The East African Court of Justice.

x. The Applicant finally averred in ground 22 that this Court is seized with jurisdiction to handle this matter by virtue of Articles 6, 7(2), 8(1)(c), 23, 27(1) and 30 of the Treaty and Rules 1(2) and 21 of the East African Court of Justice Rules of Procedure as there are serious questions for determination by this Court of "***the legality of any Act, regulation directive, decision or action of a Partner State or institution of the Community on grounds that such Act, regulation, directive,***

decision or action is unlawful or an infringement of the provisions of the Treaty."

Representation of the Parties

The Applicant was represented by learned Counsel, Messrs Chris J. Bakiza and Justine Semuyaba. The 1st Respondent was represented by learned Counsel, Mr. Wilbert Kaahwa; the 2nd and 4th Respondents were represented by learned Counsel, Ms. Christine Kaahwa and Mr. Eric Sabiiti; while the 3rd Respondent was represented by learned Counsel, Mr. Daniel Wandera Ogalo.

1st Respondent's Response to the Reference

In his response filed on 2nd August, 2010 and amended on 10th November, 2010 the 1st Respondent contended that the Applicant's reference to breaches of Articles 6, 27, 29 and 30 of the Treaty was misconceived, frivolous and vexatious, essentially on the grounds:-

i. That pursuant to Articles 4 and 67 of the Treaty, the 1st Respondent is the Principal Executive Officer of the Community and his responsibilities include-
   a) Facilitating the functioning of the Community, the Council of Ministers ('the Council') and the Community's Secretariat;
   b) Convening the Council's meetings in accordance with Article 15 of the Treaty and the Rules of Procedure of the Council.

ii. That pursuant to Article 14(3) the Council at its first meeting held on 13th January, 2001 established a Sectoral Council on Legal and Judicial Affairs ('the Sectoral Council') which is the Council of Ministers' technical arm on the implementation of the Community's programmes on co-operation in legal and judicial affairs.

iii. That at its meeting held on 24th November, 2004 the Sectoral Council decided that in view of the growing scope of the East African Community integration process, the jurisdiction of the EACJ be extended.

iv. That the Secretariat under the 1st Respondent's guidance prepared a draft protocol (zero draft).

v. That in the discharge of his obligations and with reference to the draft protocol, the 1st Respondent convened the following meetings –

a) Meeting of the Sectoral Council held on 8th July, 2005 at which the zero draft protocol was adopted and a decision made to subject the draft protocol to a wide consultative process;

b) 10th Meeting of the Council held on 9th August, 2005 at which progress on the draft protocol was noted;

c) Meeting of the Sectoral Council held on 5th – 10th June, 2006 at which progress on the consultative process was noted;

d) Meeting of the Sectoral Council held on 4th August, 2006 at which progress on the consultative process was further noted;

e) 12th Meeting of the Council held on 25th August, 2006 at which progress reports of the Sectoral Council were noted;

f) 6th Meeting of the Sectoral Council held on 24th January, 2009 at which the Partner States sought more time for consultations on the draft protocol;

g) 7th Meeting of the Sectoral Council held on 27th April, 2009 at which the Secretariat's report on the Partner States' consultative process was noted;

h) 9th Meeting of the Sectoral Council on Legal and Judicial Affairs [held on 8th October, 2010] at which recommendations for further consultative were made (*sic*).

vi. That the 1st Respondent has discharged and continues to discharge the role expected of him as the Community's Principal Executive Officer on the matter of the draft protocol and in particular to convene the relevant *policy-making meetings*; that from the initial zero draft the 'protocol' has consistently undergone improvement; that, therefore, the 1st Respondent cannot be accused of inaction, delayed *conclusion* of the draft protocol *or infringement of* Articles 6, 7(2), 8(1)(c), 27 or any other provision of the Treaty; and that the 1st Respondent cannot be accused of loud or any silence on the development and finalisation of the draft protocol.

vii. That the EACJ has no appellate jurisdiction and that the Applicant's insistence on breaches of Article 6 does not disclose any cause of action on how the 1st Respondent infringed the provisions of that Article.

viii. That the Applicant's insistence on a right of appeal is presumptuous as the Council has not yet determined the extent of extended jurisdiction of the EACJ.

ix. That Article 29 on which the Applicant relies does not apply because no Partner State has failed to fulfil an obligation or infringed a provision of the Treaty to necessitate a Reference by the 1st Respondent to the EACJ.

x. That Article 30 on which the Applicant relies does not apply because the pleading does not allege the illegality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community that is unlawful or infringes the Treaty.

xi. That the granting of declaratory orders does not arise and that the Reference be dismissed with costs.

2nd and 4th Respondents' Response to the Reference

The response of the 2nd and 4th Respondents filed on 18th November, 2010 to the Reference was basically along the lines and in support of the 1st Respondent's response; it chronicled various consultative workshops convened by the 1st Respondent between October, 2005 and January, 2009 plus the outcomes of those Workshops. The 2nd and 4th Respondents' response was supported by the affidavits of Sam Rwakoojo and Caroline Bonabana from Uganda's Electoral Commission and Attorney General's Chambers, respectively.

The thrust of the 2nd and 4th Respondents' response was that the workshops recorded certain concerns which were said to point to a need for further consultations by Partner States on the draft protocol and that the

consultations were on-going. We address the reported concerns later in this Judgment.

The 2nd Respondent averred that he had not infringed Articles 6, 27, 29 and 30 of the Treaty. He reported that at the 9th Meeting of the Sectoral Council on Legal and Judicial Affairs (held on 8th October, 2010) the Republic of Uganda, which he represents, expressed the need for further consultations and requested for a three-month extension; and that the Sectoral Council extended the time for submission of comments in writing on the draft protocol to operationalise the extended jurisdiction of the EACJ to ***31st December, 2010***.

Like the 1st Respondent, the 2nd and 4th Respondents prayed for dismissal of the Reference with costs.

3rd Respondent's Response to the Reference

In his response filed on 3rd August, 2010 to the Reference, the 3rd Respondent essentially contended as follows:-

i. That the acts complained of and the interpretation of the Treaty sought are all in respect of actions and/or omissions of the 1st Respondent and not of the 3rd Respondent, thus the Reference does not disclose a cause of action against the 3rd Respondent and he should be struck off with costs.

ii. That in respect of the 1st and 5th grounds of the Reference, the Applicant has a right of appeal to the EACJ and that he desires to

further appeal to the EACJ. The 3rd Respondent averred further that no appeal by the Applicant lies against him to the EACJ under Articles 6, 7(2), 8(1)(c), 23, 27(1) and 30 of the Treaty.

iii. That the Reference does not contain a concise statement of facts and law relied upon, but a rather lengthy narrative of irrelevancies, reproduction of contents of provisions of the Treaty and arguments and as such is scandalous, frivolous, an abuse of court process and should be struck off with costs.

iv. That, in the alternative and without prejudice to the foregoing, the 3rd Respondent admitted that the Council of Ministers over the past 10 years neglected and/or failed to set a date for the extended jurisdiction of the EACJ as required by the Treaty and therefore held back the integration process to the detriment of the people of East Africa; but that, that notwithstanding, until the Council does so, the EACJ has no appellate jurisdiction.

v. That the deliberate delay to implement Article 27(2) by the Council of Ministers has a negative effect on good governance, democracy, rule of law and human rights in East Africa as stated by the Applicant, but that the delay and/or refusal to extend jurisdiction cannot be cured by a decision of the EACJ.

vi. That in view of the foregoing, the Reference be dismissed as against the 3rd Respondent, with costs.

Applicant's Reply to the Respondents' Responses to the Reference

In his affidavit in reply filed on 27th September, 2010, the Applicant essentially made the following rejoinder to the Respondents' responses to the Reference:-

i. That much as the Sectoral Council and Partner States of the East African Community have engaged in wide consultations on the development of the draft protocol to operationalise the extended jurisdiction of the EACJ, the inaction and delayed conclusion of the draft protocol constitutes an infringement of the provisions of the Treaty.

ii. That the failure of the 1st and 2nd Respondents to ***fast-track*** the process of achieving the full extent of the extended appellate jurisdiction of the EACJ, much as it may be a shared responsibility, has left the Applicant and the rest of the Ugandan people aggrieved for failure to enjoy the full rights of good governance, democracy, rule of law and human rights in Uganda and that the failure constitutes a cause of action against the 1st and 2nd Respondents.

iii. That the cause of action equally affects the 3rd and 4th Respondents, being nominal Respondents.

iv. That whereas, according to records supplied by the 1st Respondent, issues pertaining to the establishment of the EACJ were discussed in the Meeting of Attorneys General of the Member States on 31st May, 2000, no serious action or follow-up on the matter was made by the 1st Respondent until 24th November, 2004 when the 1st Respondent convened a Sectoral Council Meeting to consider the zero draft protocol to operationalise the extended jurisdiction of the EACJ.

v. That during that period of inaction, the 1st Respondent convened other Sectoral Council Meetings to consider other matters of integration but not the matter of the extended jurisdiction of the EACJ.

vi. That according to the Rules of Procedure for the Council of Ministers, especially Rule 7(5) adopted on 13th January, 2001, the 1st Respondent may, under special circumstances, at any time, add items to the provisional agenda of the Meeting of the Council provided that Partner States shall be notified forthwith.

vii. That whereas the issue of the extended jurisdiction of the EACJ has at all material times been a critical matter for achieving meaningful integration of the East African Community, the 1st Respondent ignored and/or neglected his statutory obligation without any reasonable explanation.

viii. That the 1st Respondent is clearly responsible for the delays in operationalisation of the extended jurisdiction of the EACJ.

ix. That the 2nd Respondent, who represents the Republic of Uganda, is also responsible for grave inaction in this area.

x. That according to the records of the Consultative Session of Deputy Attorneys General of the Member States held on 19th March, 2010, it was clear that Uganda had never submitted its written comments on the operationalisation of the protocol and Uganda was urged to submit the same by 30th September, 2010.

xi. That no reasonable explanation has been given by the 2nd Respondent for that inaction for such a long time.

xii. That given the historical position of Uganda in the affairs of the East African Community integration process, it cannot be said that the 2nd Respondent has acted expeditiously as was required of Member States; and thus the delay has been an impediment to the expedition of the operationalisation of the protocol.

xiii. That the Treaty for the Establishment of the East African Community authorises the Council of Ministers to set a definite date for implementation of the draft protocol and, to that extent, the 2nd Respondent shares in the breach of that responsibility to the prejudice of the people of Uganda.

xiv. That the 3rd Respondent, rightly, admits that there is a delay to implement Article 27(2) by the Council of Ministers and that the delay has a negative effect on good governance, democracy, rule of law and human rights in East Africa as stated by the Applicant.

Issues for Determination

A Scheduling Conference was held on 26th October, 2010 where the issues for determination by the Court were framed as follows:-

1. Whether or not the Reference discloses a cause of action.
2. Whether Article 27 of the Treaty confers appellate jurisdiction on the East African Court of Justice (EACJ) over the decision of the Supreme Court of Uganda in Election Petition Appeal No. 6 of 2009, **Hon. Sitenda Sebalu –vs- Hon. Sam K. Njuba and Electoral Commission of Uganda.**

3. Whether the 1st Respondent and the 2nd Respondent have discharged their respective obligations regarding the conclusion of a protocol to operationalise extended jurisdiction of the EACJ.
4. Whether the delay to extend appellate jurisdiction of the EACJ contravenes the fundamental principles of good governance, democracy, rule of law, social justice and human rights stipulated in the Treaty.
5. Whether the 3rd and 4th Respondents are nominal respondents.
6. Whether or not the parties are entitled to remedies.

Consideration of Rival Pleadings and Submissions

The parties filed written submissions which they adopted at the hearing of the Reference on 30th March, 2011. The submissions are, not unnaturally, in support of the parties' respective pleadings.

We have given due consideration to the rival pleadings and submissions of the parties and to the authorities cited in support thereof. We proceed to consider below the issues in the order in which they were framed.

Issue No. 1:

Whether or not the Reference discloses a cause of action

As already noted, the Reference under consideration was brought under Articles 6, 7(2), 8(1)(c), 23, 27(1) and 30 of the Treaty and Rules 1(2) and 21 of the EACJ Rules of Procedure. The Reference seeks the prayers recorded and on the grounds stated hereinabove.

In Reference No. 1 of 2006, **Prof. Peter Anyang' Nyong'o & Others –vs- Attorney General of Kenya and Others**, the EACJ had occasion to consider what constitutes a cause of action under common law and also what constitutes a cause of action under statute or other legislation.

As for a common law cause of action, the EACJ cited with approval the conceptualisation of such cause of action in **Auto Garage –vs- Motokov** (No. 3) [1971] E.A. 514 where Spry, Vice-President of the then Court of Appeal for Eastern Africa had, *inter alia*, this to say:

> ***"... if a plaint shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable, then, in my opinion, a cause of action has been disclosed .... If, on the other hand, any of those essentials is missing, no cause of action has been shown ...."***

The EACJ, however, proceeded in the **Anyang' Nyong'o** case (*supra*) to observe that a cause of action created by statute or other legislation does not necessarily fall within the same parameters. The Court noted that the action in the **Anyang' Nyong'o** case was not seeking a remedy for violation of the claimant's common law rights but an action brought for enforcement of provisions of the Treaty through a procedure prescribed by the Treaty. The Court observed that the Treaty provides for a number of actions that may be brought to the EACJ for adjudication and that Articles 28, 29 and 30 virtually create special causes of action.

Among the articles relied on in the said **Anyang' Nyong'o** case was Article 30, which, *inter alia*, provides:

"***30(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 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."***

We note that the matters complained of by the Applicant herein include actions or omissions of a Partner State, namely, the Republic of Uganda, represented in this Reference by the 2nd Respondent. Of the three Articles cited in the **Anyang' Nyong'o** case (*supra*), including Article 30(1), the EACJ had this to say:

"It is important to note that none of the provisions in the three Articles requires directly or by implication the claimant to show a right or interest that was infringed and/or damage that was suffered as a consequence of the matter complained of in the reference. We are not persuaded that there is any legal basis on which this Court can import or imply such requirement into Article 30."

Article 27 to which Article 30 is subject, *inter alia*, confers upon the EACJ initial jurisdiction over the interpretation and application of the Treaty; while

Article 23 , also cited by the Applicant in the present Reference, makes the EACJ a judicial body to ensure the adherence to law in the interpretation and application of and compliance with the Treaty.

We note from the current Reference, essentially:-

i. That the Applicant lays blame on the 1st Respondent, on behalf of the Community, for delaying to convene the Council of Ministers to operationalise the extended jurisdiction of the EACJ;

ii. That the Applicant also lays blame on the 2nd Respondent, on behalf of the Republic of Uganda, a Partner State, for contributing to the delay in operationalisation of the extended jurisdiction of the EACJ by delaying to submit to comments on the draft protocol.

iii. That the Applicant contends that ***"the inaction and the loud silence"*** by the 1st and 2nd Respondents is an infringement of the Treaty; and

iv. That the Applicant urges this Court to so interpret the Treaty and make appropriate orders.

On the other hand, the 1st Respondent contends that the present Reference does not disclose a cause of action under Article 30 of the Treaty; that the 2nd and 4th Respondents contend that the Applicant does not have a cause of action; while the 3rd Respondent says it was difficult to discern what cause of action the Applicant has against him since he has no role in the process of developing the protocol to extend the jurisdiction of the EACJ.

We observe that in the instant Reference, like in the **Anyang' Nyong'o** case (*supra*), the Applicant is not seeking a remedy for violation of his common law rights but has brought an action for interpretation and enforcement of provisions of the Treaty through the requisite procedure prescribed by the Treaty. In the premise, we have no hesitation in reiterating what this Court said in **Anyang' Nyong'o** (*supra*) about the import of Article 30(1) of the Treaty, namely, that a claimant is not required to show a right or interest that was infringed and/or damage that was suffered as a consequence of the matter complained of in the Reference in question. It is enough if it is alleged that the matter complained of infringes a provision of the Treaty in a relevant manner. In the present case, it is instructive that in addition to the Applicant's complaint of infringement of the Treaty by the main players, namely, the 1st and 2nd Respondents, there is averment in the pleadings of the 3rd Respondent, an Advocate of the High Court of Uganda who, according to his Counsel, has about 40 years experience at the Bar that the delay of the Council of Ministers has a negative effect on good governance, democracy, rule of law and human rights in East Africa**.** This averment supports the existence of a cause of action.

Accordingly, we answer Issue no. 1 in the affirmative.

Issue No. 2:

Whether Article 27 of the Treaty confers appellate jurisdiction on the EACJ over the decision of the Supreme Court of Uganda in Election

Article 27 is framed in the following terms:

> **"27(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 such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.**
>
> **(2). The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, Partner States shall conclude a protocol to operationalise the extended jurisdiction."**

The term 'jurisdiction' is defined in **Words and Phrases Legally Defined** (2nd Edition, Volume 3), *inter alia*, to mean:

"***... the authority which a court has to define matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by the like means ...."***

We adopt this definition of 'jurisdiction'.

The Applicant seems to have adopted an ambivalent position as to whether there is a right of appeal from a decision of the highest courts of Partner States to this Court. In his prayer (d) he urges that quick action should be taken by the Community in order to conclude a protocol to operationalise the extended appellate jurisdiction of the EACJ, which implies acknowledgement by him that the subject appellate jurisdiction does not as yet reside in the EACJ. However, the very first of the grounds on which his Reference is based seeks from this Court a declaration that he has a right of appeal to this Court under Articles 6, 7(2), 8(1)(c), 23, 27(1) and 30 of the Treaty. Among the latter Articles, only Article 23 has anything to do with appellate jurisdiction; but such appellate jurisdiction is internal within the EACJ itself, namely, from the First Instance Division to the Appellate Division, not any other type of appellate jurisdiction as Article 27(2) envisages.

A plain reading of Article 27(2) clearly reveals, *inter alia*, that the provision for appellate jurisdiction relates to the future via the mechanism of a protocol, which is yet to be concluded.

In the circumstances, it is this Court's finding that Article 27 of the Treaty does not confer appellate jurisdiction on the EACJ over the decision of the Supreme Court of Uganda in Election Petition Appeal No. 6 of 2009, **Hon. Sitenda Sebalu –vs- Hon. Sam K. Njuba and Electoral Commission of Uganda**.

Accordingly, we answer Issue No. 2 in the negative.

Issue No. 3:

Whether the 1st and 2nd Respondents have discharged their respective obligations regarding the conclusion of a protocol to operationalise the extended jurisdiction of the EACJ

Article 67(3) of the Treaty designates the 1st Respondent as the principal executive officer of the Community. By virtue of Article 4(3), he/she is the person who represents the Community. Article 29 mandatorily requires the 1st Respondent:

a) if he/she considers that a Partner State has failed to fulfil an obligation under the Treaty or
b) if he/she considers that a Partner State has infringed a provision of the Treaty,

to submit his/her findings to the Partner State concerned for the Partner State to submit its observations on the findings. If the Partner State does not submit its observations within four months, or if it submits unsatisfactory observations, the 1st Respondent must refer the matter to the Council which shall decide whether to resolve the matter itself or to refer the matter to the EACJ.

The position of the 1st Respondent with regard to Issue No. 3 is that Article 29 of the Treaty on which the Applicant relies does not apply because no Partner State has failed to fulfil an obligation of the Treaty or infringed

a provision of the Treaty to necessitate Reference by the Secretary General to this Honourable Court.

The 1st Respondent added that the Applicant's insistence on a right of appeal is presumptuous as the Council has not yet determined the extent of the extended jurisdiction of the EACJ.

The 1st Respondent also contended that because:

(a) under his guidance a draft protocol was prepared;

(b) the draft protocol was adopted by the Sectoral Council Meeting held on 8th July, 2005 and a decision made to subject the draft to a wide consultative process;

(c) he caused various workshops to be held to consider the draft;

(d) he convened the relevant policy-making meetings on the matter and

(e) discussions on the draft protocol are still on-going among some stakeholders, he cannot be accused of inaction, delayed conclusion of the draft protocol or infringement of Articles 6, 7(2), 8(1) (c), 27 or any other provision of the Treaty

The 2nd Respondent's response to the accusation that he has not discharged his obligations regarding the conclusion of a protocol to operationalise the extended jurisdiction of the EACJ is basically as follows:-

a) He denied inaction and loud silence on his part and associated himself with the submissions of the 1st Respondent.

b) He contended that the Republic of Uganda and other Partner States have in pursuance of Article 27 made a draft protocol on extended jurisdiction of the EACJ and several steps have been taken by them to have the protocol concluded as can be seen from Minutes of the Sectoral Council.

c) He argued that appellate jurisdiction of the EACJ is provided for in Article 35A; that what is before the EACJ is a draft protocol which to-date has not been concluded and is work in progress; that the result of that work in progress may or may not confer extended jurisdiction on the EACJ; and that one cannot derive any rights under an intended contract.

d) He submitted that it is fallacious for the Applicant to sue for breach of a right not yet conferred; and submitted that Article 30(3) does not confer appellate jurisdiction on the EACJ as in his view that jurisdiction has been reserved by the Constitution of Uganda to the Supreme Court of Uganda, being the last appellate court in that country.

e) He pointed out that Uganda is not the only Partner State that has not yet made written comments or given a position on the draft protocol for extended jurisdiction of the EACJ; and that even if the EACJ were to make declaratory orders, that would not cure the 'inaction' of the other defaulting Partner State.

f) He proceeded to submit that he has made progress towards enactment of the protocol and that even though no conclusions have

been achieved since the work is still in progress, he has **diligently** discharged his obligations.

g) His contention was that there has been no delay to extend appellate jurisdiction of the EACJ; that Article 27(2) gives no timeframe for extension of EACJ's jurisdiction; and that if there has been any delay, it does not contravene the principles of good governance.

The essence of the Applicant's submissions on the above contention by the 1st Respondent is as follows:-

a) That despite acknowledgement by Counsel for the 1st Respondent that the Sectoral Council at the meeting held on 24th November, 2004 decided that in view of the growing scope of the Community integration process, the jurisdiction of the EACJ be extended, six years have elapsed without the said jurisdiction being extended.

b) That although the 9th Meeting of the Sectoral Council (held on 8th October, 2010) had given the Partner States which had by then not completed their consultations (the Republic of Uganda and the United Republic of Tanzania) up to **31st December, 2010** to complete consultations and submit written comments on the draft protocol, the said States had not done so; yet the 1st Respondent had not taken any action despite the filing by the Applicant of this Reference in June, 2010.

c) That vide Article 8(1)(c) the Partner States undertook to abstain from any measures likely to jeopardize the achievement of the objectives of the Community stipulated in Article 6, or the implementation of the provisions of the Treaty; that the fact that the EACJ's jurisdiction has

not yet been extended is an infringement of Article 6 and contrary to the principles of the Community set out therein and a contravention of the doctrines and principles of good governance, etc. and in particular regard to peaceful settlement of disputes.

d) That by 10th November, 2010 when Counsel for the 1st Respondent filed response to the Reference, no mention was made by him of the discharge of the responsibilities of the defaulting 2nd Respondent and the other defaulting Partner State (the United Republic of Tanzania). Similarly, no comments were forthcoming from the 2nd Respondent on the matter.

e) That the *acts of delay* are continuous and that the 1st Respondent was under a duty to take action against the defaulting 2nd Respondent, plus the other defaulting Partner State, in line with Article 29 but the 1st Respondent has not shown that he discharged that responsibility.

f) That consultative meetings are not ending as they have taken over a decade without concrete results and the EACJ should intervene as it is an integral part of the Community's integration process.

g) That the EACJ is an international court, which heightens the expectations of East Africans on its performance.

h) That the delay to extend the appellate jurisdiction in the circumstances of the present case has contravened the fundamental principles of good governance, freedoms and rights, thereby infringing the Treaty.

The Court observes from the submissions and evidence on record that:-

a) At its meeting held on 24th November, 2004, the Sectoral Council decided that in view of the growing scope of the East African Community integration process, the jurisdiction of the EACJ be extended.

b) The EAC Secretariat, under the guidance of the 1st Respondent prepared a draft protocol (zero draft); that at the Sectoral Council Meeting of 8th July, 2005 the draft protocol to operationalise the extended jurisdication of the EACJ was adopted; and that the 1st Respondent has since organized, or caused to be organized, various consultative meetings to consider the draft.

c) The 1st and 2nd Respondents contended that the Applicant's insistence on a right of appeal is presumptuous as the Council has yet to determine the extent of the extended jurisdiction of the EACJ.

d) Vide ground 6(d) of the 1st Respondent's Response to the Amended Reference, he averred that Article 29 of the Treaty on which the Applicant relies does not apply because no Partner State has failed to fulfil an obligation of the Treaty or infringed a provision of the Treaty to necessitate Reference by the Secretary General to this Honourable Court.

e) Annex XII to the 1st Respondent's Response to the Reference, being a Report of a Consultative Session of Deputy Attorneys General, Solicitors General and Permanent Secretaries of the Partner States held on 19th March 2010 records, *inter alia*, that the session was informed that the Republic of Uganda, represented by the 2nd Respondent herein, was one among the three Partner States

(including the United Republic of Tanzania and the Republic of Burundi) which had not yet submitted their comments on the draft protocol; that the session considered the urgency to conclude the preparation of the protocol but noted the need to have in place comments by all Partner States which would enable the Secretariat to prepare and circulate a matrix of comments to assist in preparation of a revised protocol; and that the 2nd Respondent and the other defaulting Partner States were given up to 30th September, 2010 to submit written comments on the draft protocol.

f) A Report of the Sectoral Council Meeting held on 8th October, 2010 noted that the 2nd Respondent and the United Republic of Tanzania had still not submitted comments on the draft protocol; that the compliant Partner States expressed the view that since the consultations had been going on from April, 2009, a three-month extension would be sufficient for any further consultations; and that the Sectoral Council:

i. urged the 2nd Respondent and the other defaulting Partner State to submit the requisite written comments by **31st December, 2010**;

ii. directed the 1st Respondent to prepare a matrix of the comments and revise the draft protocol for circulation to all Partner States;

iii. directed the Secretariat to convene an Extra-ordinary Meeting of the Sectoral Council to consider the revised draft protocol after receiving comments from the 2nd Respondent and the other defaulting Partner State.

g) As at the hearing of this Reference on 30th March 2011, neither the 1st Respondent nor the 2nd Respondent gave any update that either

the 2nd Respondent or the other defaulting Partner State had met the **31st December, 2010** deadline. The 1st Respondent had also not furnished any evidence of the matrix of comments by all Partner States on the draft protocol as directed.

h) Article 8(1)(c) obligates Partner States to abstain from measures likely to jeopardise the achievement of the objectives or the implementation of the provisions of the Treaty.

The Court finds that :-

a. It has taken over six years since the consultative process on the draft protocol began after adoption of the draft but the outcome of that process is yet to be made manifest notwithstanding acknowledgement by the Sectoral Council way back in 2004 that in view of the growing scope of the Community's integration process, the jurisdiction of the EACJ ought to be extended.

b. The delay by the 2nd Respondent to submit written comments on the draft protocol to operationalise extended jurisdiction of the EACJ constitutes measures likely to jeopardise the achievement of the objectives of the Community stipulated in Article 5 or the implementation of the Treaty within the meaning of Article 8(1)(c); and that the said delay is an act of non-compliance by the 2nd Respondent with obligations regarding the conclusion of the protocol in question. This state of affairs frustrates the Applicant's legitimate expectation of expedition in the matter and constitutes an infringement of the Treaty.

c. Submitting that the appellate jurisdiction of the EACJ is already provided for under Article 35A is erroneous since that Article, read with Article 23, relates to internal appeals within the EACJ from the First Instance Division to the Appellate Division but not from national courts to the EACJ.

d. By contending that there has been no or undue delay in concluding the protocol since Article 27(2) gives no timeframe for extension of EACJ's jurisdiction, the 2nd Respondent has laid his country open to accusations by the Applicant that it intends to indefinitely hold back the process of granting any appellate jurisdiction to the EACJ over decisions of national courts.

e. The 2nd Respondent's argument that what is before the EACJ is a draft protocol which **may or may not** confer extended jurisdiction on the EACJ further betrays a possible hidden agenda by his country to indefinitely hold back the process of extending any appellate jurisdiction of the EACJ as Article 27(2) envisages.

f. The 2nd Respondent's argument that the Republic of Uganda is not the only Partner State which has not yet made written comments or given a position on the draft protocol for the extended jurisdiction of the EACJ, and that even if the EACJ were to make the declaratory orders sought it would not cure the inaction of the other defaulting Partner State, does not hold water since the 2nd Respondent cannot plead the inaction of a non-party to the Reference against his own country's inaction.

g. The 2nd Respondent's submission that the Republic of Uganda has diligently discharged its obligations towards enactment of the

subject protocol merely because it has held consultative meetings is untenable since in the absence of any written comments by that country on the draft protocol, there is nothing to enable anyone to gauge the outcome of those "**consultations**" to the subject at hand.

h. There is no plausible explanation for the 1st Respondent's failure to ensure that the 2nd Respondent met the 31st December, 2010 deadline or to report the issue to the Council of Ministers as mandated by Article 29 of the Treaty and by Rule 7(5) of the Rules of Procedure of the Council of Ministers.

   On the contrary, the 1st Respondent averred that no Partner State has failed to fulfil an obligation of the Treaty or infringed a provision of the Treaty. This is a clear failure by the 1st Respondent to discharge his obligation.

i. There was failure by the 2nd Respondent to meet the 31st December, 2010 deadline for submitting written comments on the draft protocol to operationalise the extended jurisdiction of the EACJ.

j. The Republic of Uganda which the 2nd Respondent represents is a Partner State against which action may be taken under Article 30 and that it has rightly been sued before this Court.

k. No reasonable explanation was offered by the 2nd Respondent for the aforesaid failure or inaction and that in so failing, the 2nd Respondent must be deemed, on behalf of the Republic of Uganda, not to have fully discharged his obligation regarding the

conclusion of the protocol to operationalise the extended jurisdiction of the EACJ.

l. By failing to take action against the 2nd Respondent under Article 29, the 1st Respondent, too, has not fully discharged his obligations regarding the conclusion of the protocol.

m. Whereas the records presented before this Court by the 1st Respondent show that there have been consultative meetings from 2005 – 2010 on the draft protocol and whereas the meetings were a necessary part of the process, it is clear that all those meetings have not culminated in achieving the objective for which they were convened, namely, to conclude a Protocol to Operationalise Extended Jurisdiction of the East African Court of Justice**.**

n. There is no evidence that the 1st Respondent invoked any of the powers vested in him by the Treaty to cause the issue of EACJ's extended jurisdiction to be brought to a conclusion.

It is the view of the Court that the mere holding of endless consultative meetings without tangible results is counterproductive.

Accordingly, we find that the 1st and 2nd Respondents have not fully discharged their respective obligations regarding the conclusion of a

protocol to operationalise extended jurisdiction of the EACJ and we answer Issue No. 3 broadly in the negative.

Issue No. 4

Whether the delay to extend appellate jurisdiction of the EACJ contravenes the fundamental principles of good governance, democracy, rule of law, social justice and human rights stipulated in the Treaty

The Applicant's case is basically that there has been unjustified delay in extending the jurisdiction of the EACJ**,** *inter alia*, to include appeals from the decisions of the highest courts in the Community's Partner States. Arising from his dissatisfaction with that delay, and, in particular, his specific dissatisfaction with the decision of the Supreme Court of Uganda in Election Petition Appeal No. 6 of 2009, **Hon. Sitenda Sebalu –vs- Hon. Sam K. Njuba and Electoral Commission of Uganda**, the Applicant sought to invite this Court to determine his further contention that once there is further delay to vest the EACJ with appellate jurisdication, then there is contravention of the doctrines and principles of good governance including the various ingredients specified under that expression in the Treaty.

The bottom line of the pleadings and submissions of the Respondents is that the question of delay in concluding a protocol is not contested. Even the manner in which Issue No. 4 was framed by the parties demonstrates that delay is admitted. What is contested is whether the delay contravenes the Treaty.

The expressions "**good governance**" and "**principles of good governance**" are recurrent themes in this Reference. They are not legal terms. Although the said expressions also recur in the Treaty, they are not defined there. They seem to be used interchangeably in the Treaty. The only hint one gets from the Treaty, in particular Article 6 (d), as to what the usage of the expression "**principles of good governance**" in the Treaty entails is that the said principles include adherence to the principles of democracy, rule of law, social justice and maintenance of universally accepted standards of human rights. To widen understanding of the concept of "governance", it may be helpful to look at a couple of definitions from non-legal sources.

Habitat for Humanity, in a write-up entitled "**The Global Campaign for Good Urban Governance"** (Draft 3 of 1st December, 1999), instructively, described the term **governance** as both "**complex and controversial**". The same write-up gave a definition of good governance in an urban context as under:

> **"Good [urban] governance… can be defined as an efficient and effective response to [urban] problems by accountable [local] governments…"**

According to a United Nations Development Programme (UNDP) Report entitled **'Governnance for Sustainable Growth and Equity: Report of the Growth and Equity of the International Conference'** (New York: United Nations, 1997), **governance** refers to:

> "**the exercise of political, economic and administrative authority in the management of a country's affairs at all levels… it incorporates the complex mechanisms, processes and institutions through which the citizens and groups articulate their interests, mediate their rights and obligations"**

Simply put, **governance** refers to the organization of society and management of its affairs. Governance can be good or bad. The expression *"**good governance***" appears to be a fundamentally political, philosophical and elastic subject, it connotes sound management of societal affairs and what that entails.

This Court notes that the issue of extended jurisdiction of the EACJ did not come as an afterthought. It was acknowledged as an important complement of the Court right at the inception of the Community, the Court being recognized as a vital component of good governance which the Community Partner States undertook to abide by as Article 7(2) of the Treaty clearly demonstrates.

The Applicant has pointed out that the Treaty obliges Partner States vide Article 8(1)(c) to abstain from any measures likely to jeopardize the achievement of the objectives or the implementation of the provisions of the Treaty. The Court further notes that the objectives of the Community are given in Article 5 as including the development of policies and programmes aimed at widening and deepening co-operation among Partner States in legal and judicial affairs.

The Court hears the Applicant to be saying that the fundamental principles that govern the achievement of the objectives of the Community are stipulated in Article 6 and that, by virtue of Article 6(d), include ***good governance***. We understand the Applicant to say in his Ground 1 of this Reference that ***notionally*** he has a right of appeal to the EACJ under Articles 6, 7(2), 8(1)(c) , 23, 27(2) and 30; and that he is calling upon the Community to take quick action to conclude the protocol in order , *inter alia* to enable him and other interested litigants "preserve" their right of appeal to the EACJ under the aforementioned Articles.

To the extent that the Applicant purports to speak for other prospective appellants from decisions of national courts to the EACJ, we find his claim to be exaggerated since the present Reference was not brought as a representative suit. The Applicant can legitimately only speak for himself.

It is clear from the Applicant's pleadings and submissions that he had hoped that the anticipated extended jurisdiction of the EACJ would include appellate jurisdiction over the decisions of the Partner States' highest courts even in electoral matters, so that he could, for instance, appeal against the decision of the Supreme Court of Uganda in Election Petition Appeal No. 6 of 2009, **Hon. Sitenda Sebalu – vs – Hon. Sam K. Njuba and Electoral Commission of Uganda**.

The Applicant says his above legitimate expectation has been frustrated, *inter alia* , by the delay of the 2nd Respondent, representing the Republic of Uganda, in submitting written comments on the draft protocol. As we understand it, the Applicant believe that the 2nd Respondent has contributed significantly to the delay in conclusion of the protocol on extended jurisdiction of the EACJ by holding back requisite written comments on the zero draft thereby contravening the principles of good governance under Article 6(d) of the Treaty.

In their joint response filed on 8th November, 2010 to the Reference, the 2nd and 4th Respondents, both Ugandan entities, gave eight reasons as justification for further consultations which revolved around the following: –

a) The impact of the extension of the country membership of the East African Community to include the Republic of Burundi and the

Republic of Rwanda, both of whose legal systems differ from other Partner States' common law systems;

(b) The reconstitution of the EACJ following amendments in 2006 of Chapter Eight of the Treaty (creating a First Instance Division and an Appellate Division);

(c) The need to make the EACJ a permanent institution of the Community in view of the Court's growing role as a regional judicial forum and the extended jurisdiction;

(d) A proposal that pending the attainment of a political federation, original and appellate jurisdiction in matters of human rights should be a primary obligation of national courts and the same be left at national level;

(e) Granting appellate jurisdiction to the EACJ may necessitate amendment of some of the Partner States' constitutions and other relevant national laws;

(f) The fact that some Judges currently serving on the EACJ would be considering on appeal, matters they had already considered in their national courts;

(g) The EACJ's lack of capacity given the fact that by virtue of Article 140(4) of the Treaty, the Judges are serving on *ad hoc* basis;

(h) The need to clarify the role of the Commissions for Human Rights vis-a-vis the East African Community's programmes on good governance, promotion and protection of human and people's rights; in this regard, these Commissions' access to the EACJ, whether as *amicus curiae* or otherwise, needs to be determined**.**

The Court notes from the Report of the Consultative Session of the Deputy Attorneys General, Solicitors General and Permanent Secretaries held on 19th March 2010 (Annex XII to the 1st Respondent's Response to the Reference) paragraph 2.4.1 that the majority of those concerns alluded to above had been raised way back in January, 2009.

Our comments on the above reasons are as hereunder:-

As to the reasons in (a) and (e), the Court observes that the founding member countries of the Community with common law legal systems voluntarily formed the Community. The member countries with civil law legal systems which came on board later voluntarily joined a going concern. It is reasonable to assume that the member countries, as Sovereign States, considered it beneficial to join the Community, which is governed by the Treaty establishing it. As this Court observed in **Anyang'' Nyong'o** *(supra)*:

"While the Treaty upholds the principles of sovereign equality, it must be acknowledged that by the very nature of the objectives they set out to achieve, each Partner State is expected to cede some amount of sovereignty to the Community and its organs albeit in limited areas to enable them play their role."

In this regard, attention is drawn to Article 8(2) which obligates each Partner State, within twelve months from the date of signing the Treaty, to secure the enactment and effective implementation of such legislation as is necessary to give effect to the Treaty. It is, therefore, a natural

consequence that national activities of Partner States touching or impacting on the Community have of necessity to accord due reverence to the Treaty, which constitutes East African Community law.

Reason (b) seems to be tied up with the 2nd and 4th Respondents' submissions suggesting that appellate jurisdiction is already provided for under Articles 35A; that in the case of Uganda, the Supreme Court is the last appellate court in that country; that an appeal is a creature of statute and that no statute has been cited to show where the Applicant derives his purported appellate right from.

The short answer to the above submissions, as indicated earlier, is that the appellate jurisdiction provided for by Article 35A relates to internal appeals within the EACJ itself, from the First Instance Division to the Appellate Division; and that such appeals are limited to points of law, grounds of lack jurisdiction, or procedural irregularities. The said appellate jurisdiction has nothing to do with appeals from national courts, which are not catered for in the Treaty at the moment.

Reasons in (c) and (g) revolve on the Court's capacity to deliver on its mandate. In this regard, the Court wishes to place on record that the situation on the ground is that litigation before the EACJ has been building up but cases cannot be heard as they come, precisely because the Judges serve on *ad hoc* basis while otherwise being engaged on full-time assignments in their respective Partner States.

The Judges' *ad hoc* status at the EACJ is neither of the Court's making nor is it cast in stone. It is also our reading Article 140 (4) of the Treaty that the Court's *ad hoc* status was a temporary measure which would be reviewed to ensure that it does not become an impediment to the Court's proper discharge of its mandate. It does not, therefore, make sense to use the Judges' *ad hoc* status as a ground to delay the issue of the extended jurisdiction of the Court.

With regard to reason (d), this Court wishes to draw attention to Article 6(d) of the East African Community Treaty which urges the Partner States, *inter alia*, to recognize, promote and protect human and people's rights in accordance with the provisions of the African Charter on Human and People's Rights. National courts have the primary obligation to promote and protect human rights. But supposing human rights abuses are perpetrated on citizens and the State in question shows reluctance, unwillingness or inability to redress the abuse, wouldn't regional integration be threatened? We think it would. Wouldn't the wider interests of justice, therefore, demand that a window be created for aggrieved citizens in the Community Partner State concerned to access their own regional court, to wit, the EACJ, for redress? We think they would.

As regards reason (f), this Court does not see this as a significant or unsurmountable problem since there is an established judicial tradition for such Judges to disqualify themselves in appropriate circumstances.

Finally, reason (h) registered the need to determine the mode and extent of access by national commissions on human rights to the EACJ on matters pertaining to good governance, promotion and protection of human and people's rights. It is important for such determination to be made. That must be one reason why opportunity was afforded for the series of consultative workshops alluded to by the 1st Respondent. The workshops have so far been inconclusive.

The Applicant is questioning the indecisiveness of and procrastination by the 2nd Respondent and the other defaulting party, thereby delaying or frustrating the declared objective of extended jurisdiction of the EACJ. This Court finds the Applicant's concerns justified as the delay not only holds back and frustrates the conclusion of the Protocol but also jeopardizes the achievement of the objectives and the implementation of the provisions of the Treaty and amounts to an infringement of Article 8(1)(c) of the Treaty.

When delay like the one the Applicant complains about persists at the instance of some Partner States and the 1st Respondent, representing the Community, takes no effective corrective measures, such as invoking Article 29 of the Treaty, justification arises for a complainant to seek alternative legal means of obtaining redress. The EACJ is a legitimate avenue through which to seek redress, even if all the Court does is to make declarations of illegality of the impugned acts, whether of commission or omission. It would be well to remember that the court is a primary avenue through which the people can secure not only proper interpretation and application of the Treaty but also effective and expeditious compliance therewith.

In the written submissions by the 1st Respondent it was contended that:

"*The extension of appellate jurisdiction for the East African Court of Justice is an on-going executive function which ought to be left within the work and programmes of the Council as required by Article 27 of the Treaty*."

The argument implies that a function vested in the executive is the exclusive concern of the executive and nobody should question the manner of its implementation or lack of it. Fortunately, that era is gone. Article 6(d) of the Treaty requires Partner States, *inter alia*, to adhere to the principle of accountability as part of good governance. The import of accountable governance is that the people can hold those holding public office to account for the manner in which they exercise the function of their office or for lack of exercise or for improper exercise of those functions.

In the present case, the Applicant is questioning the inaction or delay by the concerned organs of the Community in concluding or causing to be concluded a protocol on the extended jurisdiction of the EACJ. He has a right to do so; and doing it peacefully through the EAC's judicial forum is in the Court's view preferable to taking recourse to emotive methods, such as civil disobedience, which have the potential for disrupting peace.

In view of the foregoing, we have no hesitation in finding that the delay to extend the jurisdiction of the EACJ contravenes the principles of good governance as stipulated in Article 6 of the Treaty.

Accordingly, we answer Issue No. 4 in the affirmative.

Issue No. 5:

Whether the 3rd and 4th Respondents are Nominal Respondents

The Applicant contended that it was impossible to raise the present Reference before the EACJ without bringing the 3rd and 4th Respondents on board because they were always respondents in the previous proceedings before the superior courts of Uganda. In his view, the 3rd and 4th Respondents are nominal respondents because the outcome of the decision of this Court will have a bearing on their rights or liabilities arising under the cases decided by the superior courts of Uganda between the Applicant and Hon. Sam K. Njuba and Electoral Commission of Uganda, hence the need for the latter two to participate in this Reference as nominal respondents.

The 1st Respondent's response to the Applicant's contention was that in law, a nominal defendant is included in a law suit because of a technical connection with the matter in dispute and who is necessary for the court to decide all issues and make a proper finding and judgment.

The 3rd Respondent submitted that it is difficult to discern what cause of action the Applicant has against him since he (3rd Respondent) has no dealings with the process of extension of the protocol to extend the

jurisdiction of the EACJ. The 3rd Respondent's view was that if the Applicant's intention is that should his contention to the effect that he has a right of appeal to the EACJ succeed he will file an appeal, such appeal would of necessity have to be against the 3rd and 4th Respondents in the present Reference; and that it would be at that stage when the 3rd Respondent may legitimately be brought on board as a respondent, but not now. The 3rd Respondent added that since the Applicant is not seeking enforcement of any provision of the Treaty as against him (3rd Respondent), no cause of action exists against the 3rd Respondent. He drew our attention to Article 40 which permits a resident of a Partner State who is not a party to a case before the EACJ to seek the Court's leave to intervene in such a case and make submissions limited to evidence supporting or opposing the arguments of a party to the case. The 3rd Respondent further submitted that whereas he and the 4th Respondent would themselves have been able, with the leave of the Court, to come on board as interveners through Article 40, it was improper for them to be brought in purportedly as nominal respondents.

The 3rd Respondent referred the Court to the English cases of **Semler-vs-Murphy** (1967) 1Ch.183 and **White & Another-vs-Butt** (1909) 1KB 50 in support of his contention that a nominal plaintiff is a mere shadow, a party with no beneficial interest. It was the 3rd Respondent's contention that he would have a beneficial interest in the Applicant's intended appeal in that if it was dismissed he (3rd Respondent) would retain his Membership of the Uganda Parliament for a full term, while if the appeal was allowed, he would have to vacate his seat. As far as the present Reference is

concerned, however, the 3rd Respondent contended he is not a nominal respondent; that he was wrongly brought before the EACJ; and that the Reference should be dismissed with costs as against him.

Counsel for the 4th Respondent submitted that it appeared that the 3rd and 4th Respondents were joined as parties to the Reference because they were parties to the suits filed in the courts of judicature in the Republic of Uganda. Counsel observed that if the EACJ were to decide the Reference in favour of the Applicant, he would be given leave to file his appeal in the relevant Division of the EACJ wherein he would state his reasons for dissatisfaction with the decision of the Supreme Court of Uganda. He further submitted that it was not necessary for the Applicant to join the 4th Respondent to the present Reference as a respondent, nominal or otherwise; that 4th Respondent has incurred costs in defending this matter, which should be reimbursed to him whether the EACJ dismisses or allows the Reference.

This Court notes that the Reference contains no prayers against the 3rd and 4th Respondents. No wrong-doing is alleged against them in the Reference. The Applicant averred in his first ground that he sued the 3rd and 4th Respondents alongside the 1st and 2nd Respondents for a declaration that he (Applicant) has a right of appeal to the EACJ. While there are substantive prayers against the 1st and 2nd Respondents, there are none against the 3rd and 4th Respondents as already noted.

These latter two Respondents have no role regarding extension of EACJ's jurisdication.

In Semler's case (*supra*) which discussed what a nominal plaintiff is, Lord Denning opined that a nominal plaintiff is a man who is plaintiff in name but who in truth sues for the benefit of another. And in Butt's case (*supra*), Lord Justice Buckley also described a nominal plaintiff as one put forward by another for purposes of suing but who has no beneficial interest in the subject matter of the litigation. We adopt the above broad description of a nominal plaintiff, which, by analogy, conversely also describes a nominal defendant. In the present Reference, the question is whether the 3rd and 4th Respondents are nominal defendants.

While both the 3rd and 4th Respondents would be directly and immediately interested in any appeal proceedings that might be brought before the EACJ against the decision of the Supreme Court of Uganda in Election Petition Appeal No. 6 of 2009 if the EACJ found the Applicant herein to have such right of appeal, that stage has not yet been reached and may actually not come as long as this Court's negative finding on Issue No. 2 stands. Being substantively interested in the outcome of the aforesaid appeal, the 3rd and 4th Respondents would not be nominal respondents in such appeal if it materialised. In the present Reference, however, whatever interest that might be ascribed to them would only be peripheral and distant. Whereas they themselves might conceivably have been entitled to seek to come on board as interveners in this Reference, we consider their

joinder as Respondents to the Reference at the instance of the Applicant premature.

Accordingly, we answer Issue No 5 in the negative.

Issue No. 6

Whether or not the parties are entitled to remedies

The Court has found that the Applicant has a cause of action against the 1st and 2nd Respondents based on their failure by them to fully discharge their respective obligations under the Treaty.

It follows, therefore, that the Applicant is entitled to the remedy of quick action by the East African Community to conclude a protocol to operationalise the extended jurisdiction of the EACJ.

In arriving at this conclusion, we are fortified by the following pertinent sentiments expressed at the East African Legislative Assembly's 14th Sitting – First Assembly: First Meeting – Second Session held on Tuesday 11th February, 2003:

> Question to Chairperson of the Council of Ministers by Harrison Mwakyembe (Tanzania)**:**
>
> ***"Is he (Chairperson of the Council) aware that the people of East Africa, during public discussions preceding the***

establishment of the East African Community very clearly and loudly wanted an apex Regional Court with a broader jurisdiction?"

Chairperson, Council of Ministers (Mr. Wapakhabulo):

"....I am one of those East Africans who was pushing for the East African Court of Appeal....

The East African Court of Appeal was a definite Court in the earlier Community. It made good contributions to our jurisprudence. Up to today, most of the prominent decisions that we refer to in Courts are from that Court. And that is what the Treaty envisages. As we integrate more and more, that will be easier. But this is an area where members of the legal fraternity should push through so that we can move in that direction."

Accordingly, we answer Issue No. 6 broadly in the affirmative.

Final Orders

Consequent upon the foregoing, we make declaratory orders as follows:-

1. We grant prayers (a) and (b) in an amended form and declare that the failure or delay by the 1st Respondent to refer the matter of the delay or failure by the 2nd Respondent to submit comments on the draft Protocol to operationalise the extended jurisdiction of the EACJ to the Council of

Ministers is an infringement of Articles 29, 7(2), 8(1) (c) and, particularly, 6 (d).

2. We grant prayer (c) in an amended form and declare that the inaction by the 2nd Respondent is an infringement of Articles 6 (d), 7 (2) and 8(1)(c) of the Treaty.
3. We grant prayer (d) in an amended form and declare that quick action should be taken by the East African Community in order to conclude the protocol to operationalise the extended jurisdiction of the East African Court of Justice under Article 27 of the Treaty.
4. We award the Applicant costs as against the 1st and 2nd Respondents.
5. We strike off the 3rd and 4th Respondents from the Reference and direct that the Applicant shall pay their costs.

It is so ordered.

<u>Appreciation</u>

The Court wishes to record its appreciation to Counsel for the parties for their industry, good research and insightful presentations which were of great assistance to the Court.

Dated at Arusha this ..... day of ....., 2011

JOHNSTON BUSINGYE

PRINCIPAL JUDGE

MARY STELLA ARACH-AMOKO

DEPUTY PRINCIPAL JUDGE

JOHN MKWAWA

JUDGE

JEAN BOSCO BUTASI

JUDGE

BENJAMIN PATRICK KUBO

JUDGE