IN THE EAST AFRICAN COURT OF JUSTICE
AT ARUSHA
APPELLATE DIVISION

(Coram: E. Ugirashebuja, P; L. Nkurunziza, V.P; J.M. Ogoola, JA;
E. M. Rutakangwa, JA; and A. Ringera, JA)

APPEAL NO.3 OF 2014

BETWEEN

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

AND

AFRICAN NETWORK FOR ANIMAL WELFARE.....RESPONDENT

[Appeal from part of the Judgment of the First Instance Division at Arusha; Jean Bosco Butasi, PJ; Isaac Lenaola, DPJ; and John Mkwawa, J; dated 20th June, 2014 in Reference No. 9 of 2010]

29TH JULY, 2014

JUDGMENT

A. INTRODUCTION

1. This is an Appeal brought before this Appellate Division of the East African Court of Justice (EACJ) by the Attorney General of the United Republic of Tanzania (the "Appellant") against the Judgment of the First Instance Division of this Court ("the Trial Court"), which the African Network for Animal Welfare ("ANAW" or the "Respondent"), won; but with which the Appellant (then, the Respondent) was aggrieved.

2. At the heart of this Reference (the first of its kind in this Regional Court), was the delicate and precarious balance; pitting the aspirations of the State for accelerated socio-economic development of the Country, against the concerns of the Civil Society for the conservation, preservation and protection of the Natural Environment. At the centre of this epic battle, was the fate of the iconic Serengeti Nature Reserve, straddling the International borders of Kenya and Tanzania.

3. As stated above, the Appeal arises from the Judgment of the Trial Court dated 20th June 2014. In his Memorandum of Appeal dated 25th August, 2014, the Appellant canvassed the following four grounds of appeal:-

"1. That the first Instance Court erred in law and fact in entertaining the reference based on a mere proposal to upgrade the road which in law was incapable of being challenging (sic) in the Court of Law.

2. That the first instance Court erred in law and fact by holding that it is proper to enforce Article111-114 of the East African Treaty which is yet to be negotiated, agreed, signed and ratified by all East African countries.

3. That the first instance Court erred in law by holding that, it has jurisdiction to entertain dispute (sic) of the alleged violation of

international Conventions and Declarations regardless the same (sic) having specific forum to enforce the dispute emanating from those conventions or Declarations.

4. *That the First instance Court erred in law by holding that it has power to grant permanent injunction against any of the partner state(sic) under the Treaty."*

4. In the same Memorandum of Appeal, the Appellant prayed this Court to order:-

(i) that the Judgment of the Trial Court be set aside;
(ii) that the Appeal be allowed with costs; and
(iii) make any other orders which this Court deems just and equitable.

5. On 8th October, 2014, at the Scheduling Conference of this Appeal, it was agreed to constitute the above four grounds of appeal (with minor modifications of language) into the Four Agreed Issues for the consideration of this Appellate Division. Additionally, a fifth issue was included to read as follows:-

"(v) Whether the Parties are entitled to the remedies sought?."

6. At the same Scheduling Conference, Counsel for both Parties agreed to make written submissions, which they would then briefly highlight at the oral hearing of the matter on a date to be notified by the Court.

A. THE APPELLANT'S SUBMISSIONS

7. Learned Principal State Attorney, Mr. Gabriel Pascal Malata, representing the Appellant, took the following stands on each of the above Agreed Issues:-

(i) **Whether the Trial Court erred in law in entertaining a "Mere Proposal"**?

8. In his view, there was neither Tanzania Government decision nor action capable of being challenged before a court of law. All there was, was a **mere proposal**. Therefore, the Trial Court erred in entertaining a "mere *proposal, a mental idea which was yet to be decided .... [after] the outcome of the feasibility study conducted by M/S Inter-consult Ltd. to see if the idea to have such a project would be visible or not given the environmental impact assessment gathered by the above Consultant."*

(ii) **Whether the Trial Court erred in law in enforcing Articles 111-114 of the EAC Treaty?**

9. Learned Counsel Malata contended that in the absence of the Protocol required under Article 151 of the EAC Treaty to "operationalize" Articles 111-114 of the Treaty (regulating Environmental matters), those Articles have not yet been implemented and cannot, therefore, be enforced. Accordingly, it was improper for the Trial Court to entertain them.

(iii) **Whether the Trial Court erred in considering International Environmental Conventions as a basis for resolving the instant dispute?**

10. Mr. Malata found error and impropriety in the Trial Court's recourse to the standards and principles established by various International Environmental Conventions and Declarations, as a basis for resolving the instant EAC-based dispute.

11. In his view, the Conventions and Declarations have their own separate mechanisms and fora for dispute resolution. Moreover, only States (not

private persons such as ANAW) are allowed ***locus standi*** under the provisions of those Conventions and Declarations.

(iv) Whether the Trial Court erred in law in granting a Permanent Injunction against a Sovereign State?

12. Counsel contended that the Trial Court had no powers to grant a permanent injunction (which is absolute in nature) under the EAC Treaty – nor, indeed under *"UNESCO Convention or Declaration, or African Convention or Declaration."* To that extent, the Trial Court violated Articles 5(3) (c), 8(1) (c), 111(2) and 114(1) of the EAC Treaty.

B. THE RESPONDENT'S SUBMISSIONS

13. Learned Counsel, Mr. Kanchory Mbalela Saitabao (appearing for the Respondent) answered the Appellant's above contentions, issue by issue, as follows:-

(i) **Whether the Trial Court erred in law in entertaining a "Mere Proposal"?**

14. The Appellant's contention is belated; is not supported by the evidence on the record; and was never raised or canvassed in the original pleadings. It should not be raised now, on appeal. In any event, the Trial Court found as a matter of fact that there was, indeed, a decision to upgrade the disputed part of the road to bitumen standard and to open the same to public use – which **decision** was subsequently reviewed following the concerns of, among others, UNESCO. In summary, Counsel characterized the Appellant's contentions as a matter of mere "*semantics".*

(ii) **Whether the Trial Court erred in law in enforcing Articles 111-114 of the EAC Treaty?**:

15. Mr. Saitabao stressed that the Appellant's contention on this issue was **r*es judicata***, given the earlier Judgment of the Appellate Division of this Court, dated 15th March, 2012, wherein this Court firmly and categorically established its jurisdiction to entertain environmental matters. The Court affirmed that the jurisdiction in question derives from Articles 5(2) & (3)(c); 8(1)(c); 111(1)(b) & (d) 112(1); and 114(1) of the EAC Treaty. Accordingly, the learned Counsel contended "*it is worrying if not simply absurd*" for the Appellant to argue that Articles 111 to 114 of the EAC Treaty are *"….. yet to be negotiated, agreed, signed and ratified by all the East African Countries and are therefore, currently unenforceable."*

(iii) **Whether the Trial Court erred in considering International Environmental Conventions as a basis for resolving the instant dispute?**:

16. Counsel Saitabao's submission on this issue was quite simple – namely, that the Trial Court "**DID NOT** *take into account the International Instruments cited in arriving at its findings",* as alleged by the Appellant. Indeed, the Trial Court grounded its Judgment *"not [on] the alleged violations of the cited International Declarations and Conventions per se, but [on] infringement of Chapter Ninenteen of the [EAC] Treaty…"*

(iv) **Whether the Trial Court erred in Law in granting a Permanent Injunction against a Sovereign State?:**

17. On this, Counsel Saitabao found ample authority in the EAC Treaty for this Court to grant permanent injunctions – namely, Article 23(1) empowering the Court to issue such order(s) as may be necessary to achieve the Court's principal role of ensuring adherence to the law in its interpretation and application of, and compliance with, the Treaty. Additionally, the Court has inherent jurisdiction under Rule 1(2) of its own Rules of Procedure, to grant

such orders and reliefs as are ordinarily granted by courts of law "to meet the ends of justice". Likewise, Counsel relied on Article 39 of the Treaty and Rule 21 of the Court's Rules of Procedure to find authority for the Court's issuance of interim orders as well as, necessarily, permanent injunctions.

18. On Issue No.5 (**the Available Reliefs to the Parties**), Counsel for both Parties said little, if anything – leaving it all to the Court's discretion.

C. THE COURT'S ANALYSIS OF THE ISSUES

ISSUE NO.2: Whether the Trial Court Erred in Law in Enforcing Articles 111-114 of the EAC Treaty When those Articles are yet to be Negotiated, Agreed, Signed and Ratified by all Partner States, through an Appropriate Protocol?

19. In his written submissions, Counsel for the Appellant clarified that:-

> *"It is undisputed that the East African Community Treaty is in place, however, the implementation of a number of objectives and Chapters of the Treaty are yet to be enforced as the same are still waiting for the Partner States to legalize, agree and ratify the same through Protocol."*

20. In Counsel's understanding, these Chapters and Provisions (notably, Chapter Ninenteen: Articles 111 through 114) of the Treaty, remain dormant (i.e. unimplemented and unimplementable), until the Partner States negotiate, agree, sign and ratify the operationalizing Protocol envisaged under Article 151 of the Treaty. It is such a Protocol that would spell out the objectives, scope and mechanisms required in this environmental area of State cooperation. In this regard, learned Counsel conceded that:-

> *".....if the Partner States have agreed to conclude a Protocol on some of the areas of co-operation under the Treaty, then that part of the*

Treaty shall not be operative until the Protocol has been signed and ratified by all Partner States."

21. In reply, Learned Counsel for the Respondent raised a number of points. First and at the outset, Counsel contended that enforceability of Chapter Ninenteen (Articles 111-114) of the EAC Treaty is *res judicata,* as *"this self-same matter between the same Parties herein [were litigated and determined in] the Judgment of [this Appellate Division of] the Court dated 15th March, 2012"* in an earlier Interlocutory Appeal (No.3 of 2011).

22. We agree. Indeed, our Judgment in Appeal No.3 of 2011 did clearly and categorically state that:-

"It is quite evident that all the provisions of Articles 5(3)(c); 8(1)(c); 111(1) (b)& (d) , 111(1) & (2); and 114(1) impose on the Partner States one obligation or another; one duty or another; and one undertaking or another with regard to their mutual cooperation in the environmental field. The Applicant's position was simply this: Let the Court, which is the guardian of the Treaty, interpret these various Articles; apply them and establish whether the Partner State (namely, the United Republic of Tanzania) has or has not complied with its obligations under each and everyone of those Treaty Provisions."

23. Implicit in the above quoted language of our Judgment of 15th March, 2012, are two critical concepts: One, all those provisions of the Treaty (Articles 5(3)(c) through 114(1), are live and vibrant provisions of the Treaty, capable of being interpreted and applied by the Court, pursuant to the Court's primary role of interpretation and application under Article 27(1), as well as being implemented and enforced under the Court's duty to ensure compliance with the provisions of the Treaty under Article 23(1). There can be no bar or fetter whatsoever against the Court's carrying out its duty to

interpret the provisions of the Treaty; apply them; and ensure that Partner States adhere to and live by the objectives, duties, undertakings and standards which they, as full-fledged Sovereign States, did directly, deliberately, freely and voluntarily assume under the provisions of their Treaty – a Treaty which, even Counsel for the Appellant readily admits, was negotiated, signed and duly ratified by all the Partner States.

24. The omission to conclude a Protocol on the Environment and Natural Resources has nothing to do with the capacity of the Court to interpret the existing provisions of the Treaty – inasmuch as **interpretation** under Article 27(1) entails the **declaration** of what obligations, undertakings, standards and duties, contained in those provisions, bind the Partner States. Similarly, the Court's function to **apply** the provisions of the Treaty cannot be deterred by the absence of a Protocol – inasmuch as application under Article 27(1) entails the judicial **pronouncement** as to whether or not particular provisions of the Treaty apply to a particular Party or to a given set of circumstances.

25. The second concept, implicit in the above quoted position of our Judgment of 15th March, 2012, was the notion that Articles 111 through 114 of the EAC Treaty are **self-executing** provisions – requiring no special act, process, proceeding, or procedure to operationalize them (i.e. to breathe into them the breath of legislative life to make them "a*live").* No; not at all. They live by the mere fact of their existence as an integral part of a Treaty, whose provisions have "**come into force**", without a reservation, caveat or similar kind of condition (see Paragraphs 29 through 31 below). Indeed, Articles 111 through 114 are some of the provisions in the Treaty which create special causes of action. This special attribute is, in itself, clear testimony that these provisions are wholly and truly implementable and enforceable in their current state. In this connection, this Appellate Division, in the same **Appeal No.3 of 2011** (*supra*), did explain as follows:-

"These Treaty provisions do not only prescribe the Partner States' obligations, they themselves (read together with the provisions of Articles 28, 29 and 30 of the Treaty), do in effect, constitute the cause of action – with the consequence that a claimant or an aggrieved party does not have to demonstrate a personal tort, right, infringement, injury or damage specific to himself in order to refer the matter to this Court for adjudication. The mere fact of the Treaty breach, is itself the cause of action – see this Court's holding in ***Prof. Peter Anyang' Nyong'o & 10 Others vs. Attorney General of Kenya & 5 Others*** *(EACJ Reference No.1 of 2006, Judgment of 30th March, 2007) on special causes of action created by EAC Treaty."*

26. The Appellant raised yet another objection, namely that:-

"It is a legal position under the Treaty ---- that if the Partner States have agreed to conclude Protocol (sic) on some of the areas of cooperation under the Treaty, then that part of the Treaty shall not be operative until the Protocol has been signed and ratified by all Partner States."

27. The Appellant's above quoted position begs the question of what is a Protocol, at any rate under the regime of the East African Community Treaty. A critical consideration here is this; if, as the Appellant contends, the provisions of the Treaty themselves are inoperative, then on what base or foundation would an envisaged Protocol stand? From what provision will the Protocol derive its authority? Secondly, and equally critically, what is the nature of a Protocol under our Treaty? Article 1(1) of the Treaty defines the word "**Protocol**" as follows:-

*" '**protocol**' means any agreement that supplements, amends or qualifies this Treaty."*

28. From its definition, a Protocol under our Treaty merely amends (i.e. adds to, subtracts from), clarifies, modifies or adds details to provisions that already exist in the Treaty. Absent a specific and express statement to that effect, it is not the normal function of a Protocol to operationalize the existing provisions of the Treaty. In this regard, the EAC Treaty has no reservations or similar constraints to the full and effective operation of any and all of its provisions. There is nothing at all in the EAC Treaty (and the Appellant has provided none) that stops, bars, fetters, hinders, or suspends the effective and effectual operation of the existing provisions of the Treaty (including Articles 111 through 114), unless and until the Partner States have signed and ratified a Protocol on the Management of the Environment and Natural Resources.

29. In this regard, the inclusion of Article 27(2) [on the future extended jurisdiction of the Court] is immensely instructive – namely, that when the venerable framers of the Treaty purposed to give a particular Protocol the function of **operationalizing** selected provisions of the Treaty, they did so expressly and concisely leaving nothing to the conjecture, imagination, or speculation of the reader. That Article of the Treaty provides as follows:

> *"27 (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, the Partner States shall conclude a protocol to operationalise the extended jurisdiction****".* [Emphasis added].

30. In identical fashion, when the same framers of the Treaty intended to include inchoate provisions in the Treaty whose effect would be made **operative** only later at a subsequent date, they did so explicitly and unambiguously – such as in Articles 75 (on Customs Union), 76 (on Common Market), and 123 (on Political Affairs), whose paragraph 5 provides as follows:

> *"5. The Council shall determine when provisions of paragraphs 2, 3 and 4 of this Article shall* ***become operative*** *and shall prescribe in detail how the provisions of this Article shall* ***be implemented****."* [Emphasis added].

31. Articles 111 through 114 as they stand now, do prescribe a set of responsibilities, obligations and standards in the environmental field, which each of the Partner States has solemnly undertaken to observe pursuant to the Fundamental Objectives of Article 5(3)(c), and the Operational Principles of Article 8(1)(c) of the Treaty. The Respondent's claim and contention in the Reference, concerns the interpretation of these manifold responsibilities, obligations and undertakings under the Treaty **(as is),** not the detailed minutiae and the trifling nitty gritties of the obligations and mechanisms **as they will be** fleshed out with clinical precision in any future Protocol on the matter.

32. The interpretation and application of the Treaty (now called for by the Respondent), is totally possible, and is effectively covered under Article 27(1) of the Treaty. Equally, the Court's power to ensure the Partner States' adherence to and compliance with the law, as thus interpreted and applied by the Court, is fully provided for under Article 23(1) of the Treaty. On these two Articles, hang all the claims and all the contentions of the Applicant in the instant Reference. Even the Respondent to that Reference (now Appellant in this Appeal), readily conceded to the "*operational effectiveness*" of the present Articles of the Treaty.

33. In our view, therefore, the Appellant's quibbling over the operationalization of certain Articles of the Treaty (notably Articles 111 through 114) by prior recourse to conclusion of a Protocol, is totally irrelevant to the issue now before this Court – namely: the Court's

interpretation and application of the provisions of those Articles. It is at best an attempt to derail and to divert the Court from considering the real issue before it. At worst, we dare say, this quibbling is a terrible waste of time, if not a calculated abuse of this Court's process.

34. Before we conclude this matter, we would wish to address the general question of the **commencement** of Treaties and, in particular, the commencement and effectiveness of the provisions of the EAC Treaty. Article 139 of the EAC Treaty recapitulates and posits the essential history for a clear understanding of how that Treaty came into being and how the effectiveness of its provisions is to be better understood. That Article recapitulates, so to speak, the fact that the 1999 Treaty ("the current Treaty", as subsequently amended) was a successor to the earlier EAC Integration effort of the Permanent Tripartite Commission established by the Tripartite Commission Agreement of November, 1993, and it's Secretariat Protocol of November, 1994. It is with this background in mind, that Article 139 of the current Treaty then provides that:-

> ***"Upon the coming into force of this Treaty, hereinafter referred to as 'the appointed day', the Tripartite Commission and [its] Secretariat for Co-operation between the Republic of Uganda, the Republic of Kenya and the United Republic of Tanzania, shall both cease to exist."***

35. The Treaty, as signed by the original three Partner States of Uganda, Kenya and Tanzania on 30th November, 1999, entered into force on the appointed day - namely, 7th July, 2000 when, pursuant to Article 152, all the three Partner States had duly ratified the Treaty, and deposited their instruments of ratification with the Secretary General. Upon the occurrence of that momentous event of the **"appointed day",** the Transitional Provisions of Article 140 of the Treaty ensured that there would be a smooth transit from

the old regime of the Tripartite Commission and its Secretariat, into the new dispensation of the East African Community under the current Treaty - in particular, as regards the "transfer" of the former Commission Secretariat and staff, Council of Ministers' procedures, staff rules, and the terms and conditions of both the East African Court of Justice (EACJ), and the Legislative Assembly (EALA).

36. Most importantly, as regards the issue of the pending Protocols, Article 140 of the Treaty speaks volumes. Paragraph 6 of that Article ensures that no gap, of the kind feared by the Appellant in this Appeal, is left unattended. That paragraph categorically provides that:-

> *"6. until the adoption of Protocols referred to in Article 151(1), the Council may make regulations, issue directives, take decisions, make recommendations and give opinions in accordance with the provisions of this Treaty."*

37. It is more than evident from the above-quoted provision that:-

(i) there is no, and there can be no, lacuna in the law of the Treaty of the kind and to the extent now postulated by the Appellant in the Reference, inasmuch as the Council of Ministers is empowered to fill any gaps left, pending the conclusion of any Protocol envisaged under Article 151(1) of the Treaty; and

(ii) the Council of Ministers, in carrying out its function of filling any such temporary gaps, is enjoined to do so *"in accordance with the provisions of the Treaty."* Implicit in that command is the message and the understanding that on the *"**appointed day**",* all the provisions of the Treaty came into force. All the provisions, without exception – and, particularly so, those provisions (such as Articles 111 through 114) requiring no express implementing Protocols.

38. We are greatly fortified in our views expressed above, by the position taken by the VIENNA CONVENTION ON THE LAW OF TREATIES 1969, whose Article 24(1) states that:-

> *"A Treaty enters into force in such manner as it may provide or as the negotiating States may agree."*

In the instant case of the EAC Treaty, Article 139 read together with Articles 152 and 153 expressly and specifically **appointed** a day on which the Treaty was to come into force – namely, the day when all the [original Three] Partner States will have deposited with the EAC Secretary General, their instruments of ratification. That day came to pass on **7th July, 2000** [as now inscribed on the cover page of the Treaty].

39. In conclusion, we answer **Issue No.2** in the **Negative**. The Trial Court committed no error in enforcing Chapter Ninenteen (Articles 111 through 114 of the Treaty, pending the conclusion of any Protocol for the Partner States' co-operation on Natural Resources and the Environment.

ISSUE NO. 3: Whether the Trial Court erred in law by entertaining the Reference by recourse to complaints emanating from International Conventions and Declarations on Environmental matters regardless of the Same Having their Own Specific Dispute Resolution Mechanisms:

40. As we understood it, the Appellant's grievances on this score arose from his contention that the Trial Court, moved by the Applicant in the Reference (now Respondent), considered alleged violations by the United Republic of Tanzania of a long list of International Environmental Conventions and Declarations (such as the **African Convention on the Conservation of Nature and Natural Resources, 2003; the Rio Declaration, 1992; the Stockholm Declaration; the UN Convention on Migratory Species of Wild**

Animals, 1979; the UN Convention on Biodiversity (CBD), 1992; the UN Declaration on the Environment and Development, 1992).

41. To the Appellant's mind, consideration by this Court of violations of the provision of any such Conventions and Declarations would constitute an error of law, in as-much-as each Convention and Declaration has its own dispute resolution mechanisms and institutions specific to the particular circumstances of every such Convention and Declaration. In this regard, the Appellant cited a number of examples, including the example of the African Convention on the Conservation of Natural Resources. Article XXX (1) of that Convention refers the settlement of disputes arising therefrom to *"the Court of Justice of the African Union*", whose decision "*shall be final and not subject to appeal.*"

42. The Respondent, in answer to the Appellant's above position, made short shrift of the Appellant's allegations. In the words of the Learned Counsel for the Respondent:

> *"31.... [the allegations] leave one wondering whether the Appellant is indeed appealing against the right Judgment and if so, whether it has taken the time to fully appreciate the Judgment it now seeks to challenge.*
>
> *32 ... I say this because a simple reading of the Judgment appealed from would show that the Trial Court* ***DID NOT take into account*** *the International instruments cited in arriving at its findings."*

43. We agree. A careful reading (indeed, any reading) of the Trial Court's Judgment in this matter leaves no doubt whatsoever about that Court's stand. In paragraphs 48 and 49 of that Judgment, the Court reiterating its holding in another case (**Reference No.2 of 2013: Democratic Party Vs. EAC**

Secretary General: Judgment of the First Instance Division (dated 29th November, 2013), affirmed that:-

> *".....this Court cannot purport to operate outside the framework of the EAC Treaty and usurp the powers of other organs created for the enforcement of obligations created by other instruments including the African Charter and Protocol."*

44. The above **Democratic Party** case was subsequently, appealed to this Appellate Division (**EACJ Appeal No.1 of 2014**), wherein the Judgment of the First Instance Division (including the above-quoted affirmation) was discussed in detail – see paragraph 49 below.

45. Indeed, in paragraph 49 of its Judgment, the Trial Court took pains to clarify that:-

> *"... in the instant Reference, the gravamen of the Applicant's case is not alleged violations of the cited International Declarations and Conventions per se, but infringement of Chapter Ninenteen of the Treaty, a matter well within the mandate of this Court; and the Applicant has locus standi under Article 30(1) of the Treaty to bring proceedings in that regard."*

46. This, indeed, is the acceptable position at International Law. Had the Trial Court done otherwise – namely, entered into an **evaluation** or an **assessment**, of whether the United Republic of Tanzania had violated or infringed the provisions of these **other** International Conventions and Declarations, then the Court would have transgressed its mandate and boundaries, and **encroached** into the jurisdictional space of these other Conventions and Declarations [see the **Corfu case** and the **Ambatioles case** of the ICJ.

47. It is patently obvious that the Trial Court NEVER took into account any alleged violations of the International Conventions and Declarations. It was

for this reason that the Trial Court (in paragraph 50 of its Judgment) dismissed "*the second and third limbs*" of the Preliminary Objection raised before it - to the effect that the "Applicant had no *locus standi* to institute a Reference premised on an alleged violation of International Conventions and Declarations." With this in mind, therefore, we are once more constrained to conclude that the Appellant is once again engaged in a diversionary argument.

48. But even if the Trial Court had in fact considered aspects of these International Instruments (as otherwise alleged by the Appellant) we, for our part, would not have been unduly alarmed. By being signatories to these other International Conventions and Declarations, the EAC Partner States, do subscribe to the various standards, norms and values of those Conventions - which standards, norms and values are also gleaned from the general principles of law recognized by the comity of Nations [**see HALSBURY'S LAWS OF ENGLAND, 4th Edition Vol.8, Para 1402**].

49. It was for that reason that in the recent Appeal of the above **Democratic Party case** [Appeal No. 1 of 2014, Judgment of 28th July, 2015], this Appellate Division held that:-

> *"…nothing can preclude the East African Court of Justice from referring to the relevant provisions of the African Charter for Human and Peoples' Rights, its Protocol, and the 1969Viena Convention on the Law of Treaties, in order to interpret the EAC Treaty. In as far as Articles [6(d), 7(2) and 8(1) (c)] of the EAC Treaty, especially Article 6(d), recognize the African Charter's relevance in the promotion and protection of human and peoples' rights, then compliance with those provisions of the African Charter become* ***ipso jure*** *an obligation imposed upon the Partner States under the EAC Treaty ….. We are, therefore, of the view that the East African Court of*

Justice has jurisdiction to interpret the African Charter on Human and People's Rights ***in the context of the EAC Treaty****."* [Emphasis added].

Hence, our answer to Issue No.3 is also in the **Negative.**

ISSUE NO.4: Whether the Trial Court erred in aw in holding that it has the Powers to Grant a Permanent Injunction against a Sovereign Partner State Under the Treaty?:

50. The Appellant contended that the Court's jurisdiction – derived from Articles 27, 30, 31, 32 and 37 of the Treaty - confers on the Court only the power to deliver judgments, issue orders, interpret and give directions, plus temporary orders without the power to grant permanent injunctions against any sovereign member State of the Community. According to the Appellant, the "*Sanctions*" specified in Article 143 of the Treaty for defaulting member States, do not embrace the judicial remedy of a permanent injunction as those sanctions are the privilege of the Summit of the Heads of State to impose, after the recommendation of the Council of Ministers.

51. On the face of it, the Appellant's contentions seem unassailable. Upon closer scrutiny, however, they are quite porous. Indeed, as the Respondent argues, the Treaty is the wrong place to look for the basis of the Court's power to grant permanent injunctions. The rationale for this omission is the fact that *"Injunctions being an equitable remedy, are available not at law [such as a Treaty or Statute], but in equity."* We agree. We would only add that in the case of our Court, this equitable remedy is indeed encapsulated even within the body of the Treaty itself [Article 23(1)], as well as within the corpus of the Court's Rules of Procedure [Rule 1(2)], which Rules derive their life and authority from Article 42 of the Treaty.

52. In that regard, Article 23(1) of the Treaty provides that:-

"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."

53. In our view, the Court which was expressly created to be a **"judicial body"** must necessarily be clothed with all the attributes, powers, authority and stature ordinarily vested in similar judicial bodies. Such is necessary for the achievement of its fundamental objective, namely: ***to ensure adherence to the [law]…and compliance with th[e] Treaty*** **–** which tenet is indisputably paramount in the roster of reasons for the very existence of this Court of Justice***.***

54. To put the seal of finality on this matter, so to speak, the inclusion of Rule 1(2) of this Court's Rules of Procedure was a deliberate and well-thought out act. That Rule provides as follows:-

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

55. Concerning the above Rule, Learned Counsel for the Respondent got it right: *"inherent jurisdiction is inbuilt in every court of law."* Stated differently, "*inherent jurisdiction is that jurisdiction which enables the Court to fulfill itself properly and effectively*" [**See HALSBURY'S LAWS OF ENGLAND 4th Edition, Vol.37, Para 14 at p.23.**

56. Accordingly, our answer to Issue No.4 is also in the **Negative**. Therefore, the Appellant fails on that score.

57. We now turn to the First Agreed Issue (**No.1**), which we have kept for the last.

ISSUE NO.1: Whether the Trial Court erred in Law in Entertaining the Reference Based on a Mere Proposal to Upgrade the Serengeti road?

58. The Appellant quoted a dictionary definition of the word "proposal" to the effect, among others, that a proposal is ***"an idea or plan that you mention for somebody else to think about."***

59. Pitted against the above-quoted dictionary definition of a "proposal "the Trial Court was faced with a number of facts and factors in this Reference.

In its Judgment of 20th June, 2014, the Trial Court fully addressed this very issue and made the following findings of fact:

- *Para 57: Without belabouring the point... there is little difference in the evidence presented by both the Applicant and Respondent because, one fact is obvious; namely that, the Respondent intends to upgrade the Natta Mugumu-Tabora B - Kleins Gate-Loliondo Road from its current status.*
- *Para 58: The answer to both issues [(i) whether Government intends to upgrade, tarmac, pave, re-align create and/or commission a trunk road … across the World famous Serengeti; and (2) whether the disputed road exists and is in use] in the totality of all the evidence placed before [the Trial Court] can only therefore be in the affirmative*;
- *Para 62: From the foregoing [i.e. concerns of UNESCO's World Heritage Committee] and from the evidence on record, there is no doubt that the United Republic of Tanzania had* ***initially*** *intended to construct a* ***bitumen r****oad from Natta through Mugumu to Tabora B Gate at Serengeti and 53 kms of it would have had to go through the Park to Kleins Gate and onwards to Loliondo. ……. According to the report by Inter-Consult Ltd, "…..* ***an all-weather road linking the district town of Mugumu and Loliondo to the regional capitals of Musoma and Arusha and thereby***

stimulating socio-economic growth of 2.3 million people living in the districts of Serengeti and Ngorongoro... [whose respective capitals of Mugumu and Loliondo will be] served by <u>bituminized</u> road."

- *Para 63: [the Inter-Consult] report is dated 17th January 2011 and took into account the protestations by environmental based groups, including the Applicant [now Respondent in this Appeal];*

- *The same report acknowledges that the road would have grave negative impacts to mitigate [which] ....53 kms stretch of the proposed road that passes through Serengeti would be constructed to* ***"gravel standards only."***
- *Para 70: With that background, the Government of the Republic of Tanzania, as can be seen from the UNESCO reports, seems to have taken into account the concerns raised ... and has not started construction of the proposed road;*

- *Para 71: But, that is not the end of the matter because the Applicant is seeking declaratory and injunctive orders that the project as initially conceptualized and if implemented would have grave and irreparable negative consequences to the Serengeti and that fact alone is sufficient to warrant a finding that the Respondent is in violation of the Treaty; and*

- *The point here is that all parties now agree that if the* ***initial proposal*** *is implemented, then the adverse effects would not be mitigated by all the good that the road was intended to bring to the 2.3 million people residing in the affected areas of Mugumu-Loliondo.*

60. We have reproduced above, the Trial Court's findings of fact in enormous detail. We have done so for a number of reasons. First, and most importantly, to demonstrate the primacy in our EAC system of law on the First Instance

Division's role as the fact-finder *per excellence.* Second, to show that in its appreciation of the facts, the Trial Court established no definitive Government "action" in this matter, beyond the initial "proposal" to build the Serengeti Super Highway. As emphasized above, fact-finding in disputes brought before the East African Court of Justice is entrusted by the EAC Treaty in the sole and capable hands of the First Instance Division. The Appellate Division of our Court has no role in evaluating, assessing, ascertaining and making findings of fact. Article 35A of the Amended EAC Treaty, and the identical Rule 77 of the Court's Rules of Procedure, prescribe the scope of the Appellate Court's role and the boundaries of its jurisdiction in the following categorical terms:-

> ***"35A: An appeal from the judgment or any order of the First Instance Division of the Court shall lie to the Appellate Division on:-***
>
> ***(a) points of law;***
>
> ***(b) grounds of lack of jurisdiction; or***
>
> ***(c) procedural irregularity."***

61. Appeals on points of **fact** are excluded. Conversely, however, the same Amendment to the Treaty which introduced the above-quoted Article 35A, did also provide for a new paragraph 3 to Article 23 of the Treaty, to the effect that:

> ***"3. The First Instance Division shall have jurisdiction to hear and determine at first instance, subject to a right of appeal to the Appellate Division under Article 35A, <u>any matter</u> before the Court in accordance with this Treaty."*** [Underlining added].

62. It is quite evident from the above formulation that the First Instance Division (unlike the Appellate Division) is free to hear and determine any matter brought before it. It matters not, whether the matter is one of law, or

fact or of jurisdiction, or procedural irregularity. As against that, the Appellate Division's jurisdiction is restricted only to the three matters (of *law, jurisdiction* and *irregularity*) which are enumerated in Article 35A.

63. Given the above, the issue now before this Appellate Division concerning whether the Respondent's Reference before the Frist Instance Division was one involving a "mere proposal", without **action** or **decision** of the Government of the United Republic of Tanzania, must be deferred to the findings of fact that were made by the First Instance Division, acting in its capacity as the Trial Court. Those findings have been set out above *in extenso* – the sum total of which is that, the Trial Court was hard put to find any action(s) or decision(s) taken by the Government to implement the proposed Serengeti road.

64. The Trial Court's findings of fact [to the effect] that the Government commissioned Inter-Consult to do a report on the Strategic Environment Assessment (SEA) for the Northern road means no more than that the Government was merely exploring the **feasibility** of constructing that road. Indeed, the Government also received, considered and heeded UNESCO's concerns (such as the Report of the Decisions Adopted by the 34th Session of the World Heritage Committee in Brasilia, 2010). Nonetheless, all these, and more, were indicia not of any concrete action to construct the road; nor of **decisions** of the Government of the United Republic of Tanzania, taken in the furtherance of the plan to construct the Serengeti Super Highway. Rather, they were indicia of the Government's indecision, if one may say so, about implementing its intentions and its plans to construct the road – especially in the face of the formidable opposition of both the Respondent (ANAW), and the UNESCO's reports. Little wonder then that the Trial Court's Judgment concludes with repeated references to the Government's "initial plan", or "initial proposal". Nowhere in its above Judgment did the Trial Court come

out clearly with a decision or ruling on whether or not the threshold, under Article 30 of the Treaty, for justiciable "action" was ever reached in this case.

A disturbing element of this Reference was the timing of the Appellant's belated raising of this critical point – one which the Appellant (as the Respondent then), never raised earlier– neither as a challenge before the First Instance Division, nor as a response to the Reference in his own pleadings. In the view of Counsel, Saitabao, one then wonders:-

> *"6. Why the Appellant despite raising numerous preliminary objections and having had such ample time and opportunity in the 4 long years the matter was in Court, never raised this decisive point;*
> *7. Despite the Reference specifically making mention of the action complained [of] and the same being the main issue in contention, not once did the Appellant either in its pleadings or evidence rebut this fundamental point."*

65. On these technical aspects of the matter, we agree with Counsel Saitabao. These are brand new points which had not been pleaded nor, indeed, been canvassed in the Trial Court at all. They must not be raised now on appeal – see **Ex Parte Firth** [1882] 19 Ch. Div.419; **North Staffordshire Railway Co. vs. Edge** (1920) AC 254; **"The Tasmania"** [1890] AC 223**; Tanganyika Farmers Association Ltd vs. Unyamwezi Development Corporation Ltd** [1960] EA 620; **Alwi A. Saggaf vs. Abedi Ali Algeredi** [1961] EA 767.

66. Moreover, all these *"new*" points, being **matters of fact**, there is the substantive aspect of our EAC Treaty Law (discussed in paragraphs 60, 61, 62 and 65 of this Judgment), which effectively creates a bar against this Appellate Division of the Court from entertaining substantive points of fact, irrespective of whether such facts are *"new"* or "*old*".

67. In view of the above belated challenge, therefore, we would conclude that the Trial Court did not err in entertaining the Reference, inasmuch as that Court did not have before it any challenge to the "m*ere proposal*" to upgrade the Serengeti Road. Nonetheless, in the interests of administering justice to all, it was incumbent upon the Trial Court to assure itself that it was dealing with a real live dispute before it – and not a mere abstract proposition or theortical hypothesis for constructing a road whose only tangible "action" was the Government's commissioning of a feasibility study. In this regard, the Court (like other courts elsewhere), has repeatedly emphasize the importance of a Court of law abstaining from entertaining mere hypothetical cases.

68. In our recent Judgment of **Alcon International Ltd vs. Standard Chartered Bank of Uganda, *et el*** [EACJ Appeal No. 3 of 2013, Judgment of 27th July, 2015], we discussed the question of hypothetical cases at some length. We held that:

> "*.. the doctrine of mootness or academic adventure of the Courts of Justice is well known. The* ***raison d'etre*** *of Courts of justice is to give binding decisions on live disputes …. If there is no live dispute for resolution … a Court of Justice would be wasting the public resources of time, personnel and money by engaging in a futile and vain exposition of the law."*

69. In that **Alcon case** (supra), we cited with approval the holding in **Borowski v the Attorney General of Canada** [1989] SCR 342 to the effect that:-

> *"The doctrine of mootness is an aspect of a general policy practice that a Court may decline to decide a case which raises merely a hypothetical or abstract question."*

70. Equally, in **Legal Brains Trust (LBT) vs. Attorney General of Uganda**, [EACJ Appeal No. 4 of 2012, Judgment of 19th May, 2012], this Appellate

Division addressed the issue of hypothetical/speculative cases at very great length. The case involved the election of EALA Members in a prospective "election" which at the time of the litigation had not as yet been "called, announced, or even scheduled". We examined exhaustively the jurisprudence of, among others, the Court of Justice of the European Union, the Supreme Court of Nigeria, and the United States Supreme Court – see in particular the following cases: **Societe d' Importation Edouard Leclerc-Siplec vs. TFI Publicite' SA and M6 SA** [Case C – 412/93, European Court Reports 1995, p. I-00179]; **Robards vs. Insurance Officer,** Case 149/82 [1983] ECR 171; **C. D. Olale vs. G.O. Ekwelendu**, [1989] LPELER – SC, 54/1988; **Alhaji Yar'adua & Anor. vs. Alhaji Abubakar & Others,** Nigeria Weekly Reports, SC 274/2007**; Re Pacific R. Commission**, 32 Fed. 241, 225 (US Supreme Court); **Muskrat vs. US,** 219 US 346(1911) quoting **Marbury vs. Madison; Steel Co. aka Chicago Steel & Picking Co. vs. Citizens for a Better Environment**, 532 US 83 (1998); and **Aetna Life Ins. Co. vs. Haworth**, 300 US 227.

71. In the above cases, the message is strong, comprehensive, and clear:

- The function of courts is to contribute to justice in concrete disputes, not to give opinions on general hypothetical questions;
- Jurisdiction is conferred on courts not to deal with hypothetical, academic or political questions;
- The court must not deal in matters that are clearly lifeless, spent, academic, speculative or hypothetical; and
- Judicial power is the right to determine actual controversies arising between adverse litigants.

Accordingly, in the **Legal Brains Trust** case (*supra*), we concluded that the question raised was clearly hypothetical, academic, abstract, conjectural

and speculative –neither capable nor suitable of being entertained by the Court.

72. From all the above, to transform the instant Serengeti Reference from the abstract into being a live dispute, it was necessary to establish the threshold needed for an **"action"** under Article 30 of the Treaty (see paragraphs 75 – 79 below).

73. Notwithstanding the doctrine of mootness, discussed in paragraph 70 above, the Trial Court (in the instant Reference) did not err in granting (as it did) an injunction to restrain the United Republic of Tanzania from ever implementing its proposal to construct the Serengeti Super Highway as "initially planned". In our view, the grant of the injunction was proper and justified – given the imminent risk of irreversible damage inherent in any attempt to implement the "initial plan."

74. In this regard, it is quite evident that were the authorities of the Government of the United Republic of Tanzania to take any measures to activate their "initial plan" to construct the Super Highway through the Serengeti, as originally conceived, they would have, without a doubt, fallen foul of Tanzania's above-mentioned undertakings of Articles 6(d), 7(2) and 8 (1) (c) of the Treaty, read together with other provisions of the same Treaty (in particular, Articles 111-114). On this, the Trial Court did, indeed, make a specific finding, thus:

> "The *point here is that all parties now agree that if the initial proposal is implemented, then the adverse effects would not be mitigated by all the good that the road was intended to bring to the 2.3 million people residing in the affected areas of Mugumu-Loliondo*" – see last bullet of paragraph 59 of this Judgment.

75. Article 30 of the Treaty, under which the instant Reference was brought to this Court, opens the doors of this Court to permit any person(s) resident in

East Africa, to challenge the legality of an *"Act, regulation, directive, decision or action"* of a Partner State or an institution of the Community on the grounds that it is unlawful or an infringement of the Treaty. Implicit in that Article, is the notion that the challenge – if it is a challenge against an "action" (i.e. in contrast, for instance, to an "omission" or "inaction" of a State) – must be in regard to an accomplished, full-fledged "**action"**. In the instant Reference, there was no action at all on the part of the Government of the United Republic of Tanzania. All there was (as effectively established by the Trial Court), was a mere plan or proposal, a wish without more, to construct a road someday, in the future, through the Serengeti – see paragraphs 63, 64 and 65 (*infra)***.** To be operative, the "action "must be ripe. To be ripe, it must be beyond a mere intention, inception, or conception to do or abstain from doing something. That extra something; that additional something that makes the action ripe, is what is needed to actualize or fossilize a mere intention into a concrete "action"; an action that meets the threshold of Article 30 of the Treaty.

76. To meet the threshold of the kind of "action" contemplated in Article 30 of the Treaty, each case would have to be considered and analyzed on the content of its own unique circumstances. Nonetheless, as a general rule of thumb, the "action" must constitute more than a mere abstract idea, hypothetical plan, or academic postulate, or a dreamer's wish on the part of the potential actor. In the instant Reference, for instance, for the initial idea or plan to transform into objective action, the Government needed to have in place among many others, the following:-

- Agreed architectural plans and drawings;
- Bills of Quantities;
- Cabinet approval of the Project;

- Appropriate Budget, endorsed or approved by Parliament;
- Commencement of the Loan process(es) for financing the Project, where necessary;
- Commencement of the Procurement process (whether by public or private bidding), as appropriate;
- Practical manifestation of actual commencement of the engineering works (e.g. official field surveys, breaking ground, delivery of construction machinery and materials on the site, etc).

77. In our view, to pass the bar of Article 30 of the Treaty, the above accompaniments – whether singly or in multiples; and whether separately or in combination(s) – would signal the manifestation of an "**action**" or a series of "**actions**" on the part of the Government to actualize its plans to construct the impugned Super Highway.

78. In the case of a challenge to an "**omission**" or "**inaction**", on the other hand, the requisite ingredients and profile of the threshold would be quite different from the above. As underscored in paragraph 76 of this Judgment, each case would need to be assessed and determined strictly in accordance with its own particular and unique exigencies. For instance in this Court's case of **Attorney General of Kenya v Independent Medical Legal Unit,** [EACJ Appeal No1of 2011], (the "**IMLU case"**) the Government of Kenya was alleged to have "omitted":

- to arrest the perpetrators of a rebellious massacre of 3000 citizens in the Mt. Elgon area of Kenya;
- to investigate their cases;
- to charge the suspects; prosecute them in the courts of law; and
- generally to ensure that justice is done; etc, etc.

79. It is quite evident to us that in a Reference, such as the above **IMLU case**, the ingredients of the threshold for "omissions" of the State would have to be gleaned from, among others, the kinds of omissions or non-actions listed above.

80. Accordingly, our answer to **Issue No.1 is** in the **Affirmative**. Therefore, the Appellant succeeds on that issue.

ISSUE NO.5: Whether the Parties are entitled to the Remedies Sought

81. The Appellant has failed on three of the four issues canvassed in this Appeal. It has been a long, complex and harrowing judicial odyssey to bring the Reference to closure. The judicial road travelled by many to interrupt the grand plans for the Serengeti Super Highway, has been long and arduous, strewn at every junction of the road with all manner of twists and turns; and trials and tribulations. The Applicants have, against all formidable odds, partially triumphed in their quest (in this, the first Environmental Case of its kind to be brought before this Court). They brought the Reference and have prosecuted it not out of any wish for personal, corporate, or private gain; but out of the public spirited interest of the noblest kind – namely conservation, preservation and protection of a natural resource which (in this particular case), is truly a gem of a heritage, one-of-a-kind for all mankind. It is only fair, therefore, that neither Party be condemned to pay the costs of the other in this litigation, both here and in the Trial Court below. Rather, each Party should bear its own costs. We so order.

82. In the result:-

(i) The Appeal is allowed as regards Issue No.1, but is dismissed as regards Issues No. 2, 3 and 4.

(ii) Except in respect of Issue No.1, the Judgment and Orders of the First Instance Division in the Reference, including the power of the Court to grant Permanent Injunction, are upheld;

(iii) Each Party shall bear their own costs of the Reference, both here and below.

It is so ordered.

Dated, delivered and signed at Arusha this …… day of July, 2015.

……
Emmanuel Ugirashebuja
PRESIDENT

……
Liboire Nkurunziza
VICE PRESIDENT

……
James Ogoola
JUSTICE OF APPEAL

……
Edward Rutakangwa
JUSTICE OF APPEAL

……
Aaron Ringera
JUSTICE OF APPEAL