IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Isaac Lenaola, DPJ, & Fakihi A. Jundu, J)

REFERENCE NO.11 OF 2013

BETWEEN

1. SIMON PETER OCHIENG
2. JOHN TUSIIME ..... APPLICANTS

VERSUS

THE ATTORNEY GENERAL OF
THE REPUBLIC UGANDA..... RESPONDENT

7TH AUGUST, 2015
JUDGMENT OF THE COURT

A. INTRODUCTION

1. This Reference was brought under Articles 6(d), 7(2), 27(1) and 30(1) of the Treaty for the Establishment of the East African Community (hereinafter referred to as 'the Treaty), as well as Rules 24 (1), (2) and (3) of the East African Court of Justice Rules of Procedure, 2013 (hereinafter referred to as 'the Rules').

2. It is premised on the Applicants' contention that the refusal by the President of the Republic of Uganda to appoint judges to Uganda's Supreme Court, Court of Appeal and High Court contravenes Articles 6(d) and 7(2) of the Treaty in so far as it amounts to interference with the independence of the Judiciary; violates the right to a fair hearing as guaranteed by Article 28 of the Ugandan Constitution, which includes a right to a speedy trial; violates the fundamental rights and freedoms guaranteed by the Ugandan Constitution because the said rights and freedoms cannot be protected by the courts, and stifles the Judiciary's execution of its constitutional mandate under Article 50(1) of the Ugandan Constitution.

3. At the hearing of the Reference, the Applicants were represented by Mr. Ladislaus Rwakafuuzi while Ms. Christine Kaahwa, Mr. Jimmy Oburu Odi and Ms. Clare Kukunda appeared for the Respondent.

APPLICANTS' CASE

4. The gist of the Reference is that the number of judges in the Supreme Court, Court of Appeal and High Court of Uganda is established by law;

the refusal by the President of Uganda to fill the positions available in the respective courts is unconstitutional, illegal and a breach of Articles 6(d) and 7(2) of the Treaty, and the said refusal has suffocated the efficacy of the Judiciary through lack of coram, work overload on available judges, delayed adjudication of cases and abuse of the relief of bail so as to avert lengthy period of remand for suspected criminals.

5. The Applicants sought the following Declarations:-

a. **That the refusal by the President of Uganda to appoint Justices of the Supreme Court and Court of Appeal, and judges of the High Court of Uganda as demanded by law is a breach of the Treaty in Articles 6(d) and 7(2) that enjoin Partner States to adhere to the rule of law and good governance;**

b. **That the refusal by the President of Uganda to appoint Justices of the Supreme Court and Court of Appeal, and judges of the High Court of Uganda as required by law is an interference with the independence of the Judiciary, which interference is a breach of the Treaty in Articles 6(d) and 7(2) that enjoin Partner States to adhere to the rule of law and good governance;**

c. **That the refusal by the President of Uganda to appoint Justices of the Supreme Court and Court of Appeal, and judges of the High Court of Uganda as provided by law violates the right to a fair hearing guaranteed in Article 28 of the Constitution of Uganda and thereby breaches the Treaty**

in Articles 6(d) and 7(2) that enjoin Partner States to adhere to the principles of good governance, rule of law and the maintenance of universally accepted standards of human rights;

d. **The refusal by the President of Uganda to appoint Justices of the Supreme Court and Court of Appeal, and judges of the High Court of Uganda as required by law violates the fundamental rights and freedoms guaranteed by the Constitution of Uganda and this is contrary to Articles 6(d) and 7(2) of the Treaty which enjoins all Partner States to protect human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights; and**

e. **The refusal by the President of Uganda to appoint Justices of the Supreme Court and Court of Appeal, and judges of the High Court as demanded by law stifles the capacity of the Judiciary to exercise its jurisdiction under Article 50(1) of the Constitution, for the protection of fundamental rights and freedoms, because of lack of the required manpower resources as required by Objective V of the Constitution of Uganda and thereby breaches Article 6(d) and 7(2) of the Treaty.**

RESPONDENT'S CASE

6. The Respondent contested the alleged refusal by the President of the Republic of Uganda to appoint judges or the purported interference with

the independence of the Judiciary, as asserted by the Applicant. On the contrary, it was the Respondent's contention that the President had effected the appointments of six (6) judges of the Supreme Court, four (4) of whom were appointed in acting capacity; nine (9) judges of the Court of Appeal, as well as 17 judges of the High Court, and the appointment of 4 additional High Court judges awaited Parliamentary approval. The Respondent argued that the foregoing appointments had enhanced the independence of the Judiciary to effectively perform its dual constitutional role of administration of justice and ensuring the rule of law. In addition, the Respondent contended that whereas the appointment of the Chief Justice could not be concluded before the determination of **Gerald Kafureka Karuhanga vs. Attorney General Const. Petition No. 39 oF 2013**, which had challenged the process thereof, the process of appointing a Deputy Chief Justice, as well as a judge to replace a deceased judge of the Court of Appeal (Justice Amos Twinomujuni) had commenced. The Respondent did also contend that there was no Parliamentary Resolution increasing the number of judges of the High Court from 50 to 82, as had been alleged; rather, the High Court was presently fully constituted with 52 judges.

7. Finally, the Respondent raised a point of law in respect of the Applicants' pleadings, asserting that they were vague, argumentative, scandalous and speculative in nature, and should be struck out. However, the Respondent did not file a Notice of Preliminary Objection in that regard as prescribed by Rule 41 of the Court's Rules. It is therefore presumed that the point of law raised was not intended to be raised as a preliminary objection. In fact, as it transpired, this issue was not canvassed in the Respondent's submissions at all.

B. **SCHEDULING CONFERENCE**

8. Pursuant to Rule 53 of the Court's Rules, a Scheduling Conference was held on 9th September 2014 and the Parties framed the following issues for determination:-

   i) **Whether the Reference raised a matter for interpretation by this Court pursuant to Article 30 of the Treaty;**

   ii) **Whether the Parliament of Uganda has ever resolved to increase the number of High Court Judges to 82 and, if so, whether the President of the Republic of Uganda refused to appoint judges of the High Court as prescribed by Parliament and recommended by the Judicial Service Commission;**

   iii) **Whether the President of the Republic of Uganda has declined to appoint judges of the Court of Appeal and Supreme Court as prescribed by the Laws of Uganda; and**

   iv) **Whether the alleged refusal of the President to appoint judges is a breach of Articles 6(d) and 7(2) of the Treaty.**

C. **ISSUE NO.1: WHETHER THE REFERENCE RAISED A MATTER FOR INTERPRETATION BY THIS COURT PURSUANT TO ARTICLE 30 OF THE TREATY**

APPLICANTS' SUBMISSIONS

9. It was the Applicants' contention that in so far as they sought a Court Declaration that a Partner State was acting in violation of the Treaty by refusing to appoint judges as by law required, the Reference did disclose

a cause of action and was properly before this Court. The Applicants relied on this Court's decision in the case of **Hon. Sitenda Sebalu vs. The Secretary General, East African Community & Others EACJ Ref. No. 1 of 2010** as reproduced below:-

> **"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."**

10. The Applicants argued that in so far as they had alleged the violation of Articles 6(d) and 7(2) of the Treaty by the Respondent's actions above, the Reference did disclose a cause of action that was justiciable by this Court.

RESPONDENT'S SUBMISSIONS

11. It was argued for the Respondent that whereas Article 30 of the Treaty did cloth this Court with jurisdiction on Treaty interpretation, the Applicants' allegation that the refusal by a Partner State to appoint

judges as by law prescribed violated Articles 6(d) and 7(2) of the Treaty could not be sustained as the Respondent had complied with the legal regime for appointment of judges in Uganda.

12. This Court was referred to the case of **Gerald Kafureka Karuhanga vs. Attorney General** (supra) that delineated the appointment of judges as a tripartite process involving the President, the Parliament of Uganda and the Judicial Service Commission; as well as the affidavit evidence of the Secretary to the Judicial Service Commission, one Kagole E. Kivumbi, and the Secretary to Judiciary, one Dorcas Okalany, in support of the preposition that the Respondent had duly complied with all the legal provisions pertaining to appointment of judges. We were also referred to this Court's decision in **Henry Kyarimpa vs. Attorney General of Uganda EACJ Ref. No. 4 of 2013** where it was held that where a Partner State acted in accordance with its national legal framework, this Court would not make a finding of Treaty violation.

COURT'S DETERMINATION

13. Articles 27(1) and 30(1) of the Treaty do explicitly confer upon this Court the jurisdiction for the interpretation and application of the Treaty. We reproduce the said Articles for ease of reference:-

ARTICLE 27(1)

> **"The Court shall have jurisdiction over the interpretation and application of this Treaty."**

ARTICLE 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 .... on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty."**

14. Therefore, for a matter to be justiciable before this Court the subject matter in question must be an Act or statute, or a regulation, directive, decision or action. Further, it must be one, the legality of which is in issue viz the national laws of a Partner State, or one that constitutes an infringement of any provision of the Treaty.

15. In the present case, the Reference raises issues of due process in the appointment of judges and the implication of in-action in that respect to the effective administration of justice and, indeed, the function of the Judiciary in the national governance structure. The subject matter that gives rise to a cause of action herein would be the inaction by the President with regard to the appointment of judges despite the recommendations of the Judicial Service Commission. Stated differently, the matter in issue presently is the 'decision' by the President not to act on the recommendations of the Judicial Service Commission. It is this decision that is construed by the Applicants as a refusal to effect judicial appointments as recommended.

16. Further, the Reference raises questions to do with the President's compliance with the legal regime of Uganda, on the one hand; as well as

whether or not his decision as described above is in compliance with the principles outlined in Articles 6(d) and 7(2) of the Treaty.

17. The provisions that are alleged to have been contravened by the Respondent's purported refusal to appoint judges to the respective Ugandan Courts are Articles 6(d) and 7(2) of the Treaty. They provide as follows:-

ARTICLE 6(d)

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

ARTICLE 7(2)

> "**The Partner States shall undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.**"

18. The in-action complained of by the Applicants herein does raise connotations of legality with regard to Uganda's legal regime, as well as good governance and rule of law as stipulated in Articles 6(d) and 7(2) hereof. This would be a justiciable matter within the precincts of Articles 27(1) and 30(1) of the Treaty in so far as it entails a decision not to act immediately upon the recommendations of the Judicial Service Commission. It necessitates a determination of the legal regime on the appointment of judges in Uganda and whether it has been complied with by the President of the Republic of Uganda; as well as an interpretation of the principles rule of law and good governance, and a determination as to whether or not the course of action adopted by the President is in compliance with those principles of the Treaty.

19. Quite clearly, the Respondent's contention that there was compliance with the legal regime for the appointment of judges in Uganda and therefore the Reference did not raise a matter for Treaty interpretation is a question of fact that must be established. Indeed, that is the gist of the residual issues in this Reference, to which we shall revert shortly.

20. In the result, we are satisfied that the Reference does raise complaints of illegality and infringement of Treaty provisions by the Respondent, as well as matters for interpretation by this Court. We do, therefore, resolve Issue No. 1 in the affirmative.

D. ISSUE NO. 2: WHETHER THE PARLIAMENT OF UGANDA HAS EVER RESOLVED TO INCREASE THE NUMBER OF HIGH COURT JUDGES TO 82 AND, IF SO, WHETHER THE PRESIDENT OF THE REPUBLIC OF UGANDA REFUSED TO APPOINT JUDGES OF THE

HIGH COURT AS PRESCRIBED BY PARLIAMENT AND RECOMMENDED BY THE JUDICIAL SERVICE COMMISSION

APPLICANTS' SUBMISSIONS

21. As quite rightly submitted by the Applicants, there are 2 aspects to this issue; first, the question of whether or not the designated number of High Court judges had indeed been increased to 82 and, secondly, whether the President had refused to act in compliance with that designation to appoint the said number of High Court judges.

22. It was argued for the Applicants that, acting within Article 138(1) of the Constitution of Uganda, the Parliament of Uganda had passed a Resolution that increased the designated number of High Court judges to 82. A recommendation to that effect as stated in the Report of the Legal and Parliamentary Affairs Committee on the Ministerial Policy Statement for the Financial Year 2009/10 (Annexure D) was availed to this Court. The recommendation reads:

> **"The Committee adopts the recommendation of the Judiciary that Supreme Court judges should be increased from 7 to 11, Court of Appeal from 8 to 15 and High Court from 50 to 82."**

23. On the other hand, the Legal and Parliamentary Affairs Committee Report in which the said recommendation was made (Annexure D) outlined the mandate of the said Committee as follows:-

- "**Discuss and review the estimates of the revenue and expenditure;**
- **Examine and comment on policy matters ; and**

- **Evaluate the previous financial performance of institutions listed in the scope below, and make recommendations to Parliament."**

24. On the second leg of this issue, it was conceded by the Applicants that the Judicial Service Commission should have complied with the said Resolution and recommended to the President for appointment, the number of judges as had been approved by Parliament; but it did not make the requisite recommendation therefore the President did not refuse to appoint judges as recommended by the said Commission. Nonetheless, the Applicants' sought to hold the Respondent responsible for the Commission's omission on the premise that it was part of the Executive arm of Government and therefore this Court should find that the Respondent had arbitrarily refused to appoint judges of the High Court as allegedly resolved by Parliament.

RESPONDENTS' SUBMISSIONS

25. In turn, it was the Respondent's contention that whereas a recommendation had indeed been made for the number of High Court judges to be increased from 50 to 82, Parliament had not made a resolution to give effect to that recommendation. The Respondent relied on the affidavit evidence of Mr. Kivumbi, Ms. Okalany and one Paul G. Wabwire, the Deputy Clerk to Parliament in charge of Parliamentary Affairs, in support of this position.

26. Paragraph 9 of Mr. Kivumbi's affidavit dated 10th May 2014 reads:-

> **"That I know that there is no resolution of Parliament varying the number of High Court judges from 50 to 82, and the current**

establishment of judges of the High Court is 52 and the High Court is fully constituted."

27. In the same vein, paragraphs 4 – 6 of Mr. Wabwire's affidavit dated 3rd December, 2014 read as follows:-

> **4. That I know that the Sectoral Committee on Legal and Parliamentary Affairs of the Parliament of Uganda did adopt recommendations of the Judiciary in the Ministerial Policy Statement of the financial year 2009/2010 of the Ministry of Justice and Constitutional Affairs to increase the number of High Court judges from 50 to 82. (Attached hereto is a copy of the Committee's Report marked Annexure "B").**
>
> **5. That I know the said recommendations were presented to the Whole House of Parliament of Uganda by the Committee mentioned in paragraph 4 above and the House adopted the said recommendations on the 4th day of September 2009. (Attached hereto is a copy of the Hansard marked as Annexure "C").**
>
> **6. That after the adoption of the recommendation by the Whole House of Parliament it is incumbent upon the responsible government department in this case the Attorney General to present a motion for the resolution of Parliament to effect the recommendations as in this case to increase the number of judges of the High Court.**

28. Finally, paragraphs 6 and 7 of Ms. Okalany's affidavit of 21st November, 2014 read:-

> **6. That I know that the adoption of the said recommendations by Parliament has not yet crystallized into a resolution of Parliament to increase the number of High Court judges from 50 to 82.**
>
> **7. That for the adopted recommendation to crystallize into a resolution of Parliament, the Ministry of Finance, Planning and Economic Development has to first issue a certificate of financial implication to indicate that funds will be available to facilitate the recruitment of judges.**

COURT'S DETERMINATION

29. We have carefully considered the documentation before us in respect of the alleged decision of Parliament to increase the Uganda High Court judges from 50 to 82 in number. It seems quite clear to us that the decision in Annexure D to the Reference that the Applicants sought to rely upon was a Recommendation not a Resolution of Parliament. With regard to the Recommendation of the Whole House of Parliament, whereas Mr. Wabwire did depone to the House having adopted the recommendation of the Committee on Legal and Parliamentary Affairs, this is not borne out by Annexure C to his affidavit. That document is an incomplete copy of the Hansard of 4th September 2009 that omits the actual adoption of the Committee's Report.

30. Be that as it may, in paragraph 6 of his affidavit, Mr. Wabwire explicitly explains how Resolutions of Parliament are generated. In paragraph 3

of his affidavit, the same Deponent attaches a Resolution of Parliament dated 18th September, 2003 in respect of the increment of the number of High Court judges from 30 to 49. This document is akin to a similar Resolution availed to this Court by the Applicants as Annexure C to the Reference. Clearly, the documentation in proof of the Committee's Recommendations for the increment of the number of High Court judges from 50 to 82 is a far cry from the certified, formal and binding Resolution of Parliament that underscored the increase in the number of High Court judges in 2003.

31. It was erroneous and misleading, therefore, for learned Counsel for the Applicants to refer to the Committee's recommendation as a Resolution of Parliament. In the absence of a formal Resolution to that effect, the Applicants fell short on proof of their allegations with regard to the number of High Court judges. Consequently, we find no Resolution on record for the increment of the number of judges of the High Court to 82. What is on record is a recommendation of the Committee on Legal and Parliamentary Affairs that was adopted by the Whole House.

32. With regard to the second leg to this issue, we have carefully scrutinized the Reference herein and find no averment whatsoever in respect of the purported omission by the Judicial Service Commission to recommend to the President for appointment such number of High Court judges as had been recommended by Parliament. That position was never raised in the Applicants' pleadings and therefore was not in issue herein.

33. Rule 37(1) of this Court's Rules provides:-

"**Subject to the provisions of this Rule and Rules 40, 41 and 42, <u>every pleading shall contain a concise statement of material facts upon which the party's claim or defence is based</u> ....**" *(our emphasis)*

34. Rule 40(1) of the same Rules provides:-

"**No party may, in any pleading, make an allegation of fact, or raise any new ground of claim inconsistent with that party's previous pleading in the same case.**"

35. The term 'pleading' is defined in Rule 2 of the said Rules to include '**any document lodged by or on behalf of a party relating to a matter before the Court.**'

36. It seems quite clear that Rule 37(1) places an obligation upon all Parties to matters before this Court to explicitly and concisely state the material facts upon which their claim or defence is premised. It is couched in mandatory terms and must, therefore, be complied with. In the case of **<u>Union Trade Centre (UTC) vs. Attorney General of the Republic of Rwanda EACJ Ref. No. 10 of 2013</u>**, this Court did have occasion to address a similar issue as follows:-

"**The rationale behind that Rule is to avert trial by ambush. Parties must be furnished with sufficient material by way of pleadings to enable them effectively respond to matters in contention between them. This cardinal rule of legal process was well articulated in the case of <u>*Captain Harry Gandy vs. Caspair Air Charter Ltd (1956) 23 EACA 139*</u> as follows:**

'**The object of pleadings is of course to ensure that both parties shall know what are the points in issue between them so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent**'."

37. In any event, Rule 40(1) expressly prohibits Parties' departure from their pleadings. In our considered view, the definition of pleadings as stated above does include Written Submissions as lodged in Court on behalf of Parties. Throughout the Reference it was the alleged inactions of the President of the Republic of Uganda that were in issue. Therefore, the Applicants' attempt to depart from the contents of their Reference by introducing omissions by the Judicial Service Commission is untenable and is hereby disallowed. Consequently, as conceded by the Applicants, we are satisfied that there was no refusal by the President of the Republic of Uganda to appoint the number of judges purportedly approved by Parliament. In the result, we do hereby answer both legs of Issue No. 2 in the negative.

E. ISSUE NO.3: WHETHER THE PRESIDENT OF THE REPUBLIC OF UGANDA HAS DECLINED TO APPOINT JUDGES OF THE COURT OF APPEAL AND SUPREME COURT AS PRESCRIBED BY THE LAWS OF UGANDA

F. ISSUE NO.4: WHETHER THE ALLEGED REFUSAL OF THE PRESIDENT TO APPOINT JUDGES IS A BREACH OF ARTICLES 6(d) AND 7(2) OF THE TREATY

38. It was the finding of this Court under Issue No. 2 above that the President of the Republic of Uganda did not refuse to appoint judges of

the High Court as contended by the Applicants. Therefore, the only refusal that is in issue in Issue No. 4 would be the alleged refusal by the President to appoint judges of the Supreme Court and Court of Appeal. This is the thrust of Issue No. 3 hereof. We do, therefore, deem it prudent to address Issues 3 and 4 together.

APPLICANTS' SUBMISSIONS

39. It was the Applicants' case that the Judicature Act of Uganda (as amended) prescribes the number of judges of the Supreme Court and Court of Appeal as 11 and 15 judges respectively. This fact is not in dispute, having been conceded by both Parties at the Scheduling Conference. On the basis of a letter from the Secretary to the Judicial Service Commission, Mr. Kagole Kivumbi, dated 12th November, 2013 and appended to the Reference as Annexure B; it was argued for the Applicants that given the President's refusal to appoint the legally prescribed number of judges as recommended by the Judicial Service Commission, the Government of Uganda (by implication, the Respondent) exercised a discretion that was not available to it and, therefore, acted illegally, arbitrarily and in contravention of Articles 6(d) and 7(2) of the Treaty.

40. In support of his argument that the exercise of legitimate authority must be done in accordance with the law, short of which it amounts to a breach of the Treaty; learned Counsel for the Applicants cited the following text from **Halsbury's Laws of England, 4th Edition, Vol. 1**:

"**The principle of legality. The exercise of governmental authority directly affecting individual interests must rest on legitimate foundations**."

41. Mr. Rwakafuuzi did also rely on the case of **FIDA Kenya & 5 Others vs. Attorney General of Kenya & Others Petition 102 of 2011** in support of his argument that judicial appointments must be made in accordance with the law, and the law in Uganda as interpreted by the Constitutional Court in the case of **Gerald Kafureka Karuhanga vs Attorney General** (supra) was that when making judicial appointments the President of Uganda was legally bound to act within the recommendations of the Judicial Service Commission. Learned Counsel did also make mention of the case of **Muslim for Human Rights (MUHURI) & 2 Others vs. Attorney General of Kenya Petition No. 7 of 2011** where it was reportedly held that there cannot be a vacuum for the seats of Chief Justice and Deputy Chief Justice. This authority was not availed to the Court.

42. On the other hand, questions from the Bench on this issue canvassed the following areas: why the Applicants did not verify with the Office of the President its receipt of the recommendations of the Judicial Service Commission as it had done with the latter entity; when silence from the President becomes refusal; when would a breach occur when an appointment process is ongoing, as well as what, in his view, was the import of the certificate of financial implication that had been appended to the affidavit of Ms. Okalany.

43. In response to the foregoing questions, Mr. Rwakafuuzi argued that silence for a reasonable time was acceptable but when it went beyond 3

months it became tantamount to a refusal to act. On the issue of confirmation of receipt of the recommended names by the Office of the President, learned Counsel argued that whereas the said office received recommendations from numerous offices, the Judicial Service Commission was the most competent body to advise on recommendations on judicial appointments; and, in any event, the Respondent herein had not rebutted the fact of the recommendations. Similarly, on the question of the financial implications of judicial appointments, Mr. Rwakafuuzi argued that the President had not indicated that his silence on the matter was owing to lack of finances; rather, the judges that were eventually appointed as Chief Justice and Deputy Chief Justice had been in the Judiciary all along. In any event, Mr. Rwakafuuzi contended that by the time the Cabinet approved the increment of the number of Supreme Court and Court of Appeal judges as prescribed in the Judicature Act (as amended), it would have considered the financial implications of such judicial appointments. Without citing a specific constitutional provision, learned Counsel argued that it was only such laws as were brought under a Private Members' Bill that would require a certificate of financial implications. Finally, we understood Mr. Rwakafuuzi to argue that even where a process was on-going the time frame within which it was concluded should be reasonable.

RESPONDENT'S SUBMISSIONS

44. It was the Respondent's contention that the Reference fell short on proof that recommendations for judicial appointments had been sent to the President and he had refused to effect the said appointments. It was

argued for the Respondent that the recruitment of judges was on-going and it was expected to be complete by June 2015, but was subject to budgetary constraints; therefore the President could not be said to have refused to effect judicial appointments. Citing the case of **Katabaazi & 21 Others vs. Secretary General of EAC & Another EACJ Ref. No. 1 of 2007**, learned Counsel for the Respondent contended that the notion of 'rule of law' entailed compliance with the governing legal framework of a given Partner State. Ms. Kaahwa argued that no evidence had been adduced by the Applicants to show that there had been a departure from the prevailing legal framework in Uganda on appointment of Judges.

45. At the onset of oral highlights in this matter, learned Counsel for the Respondent produced a letter from the Judicial Service Commission that was, with consent from opposite Counsel, admitted on the Court record. The said letter relayed the (then) current status of judicial appointments in Uganda to wit the Chief Justice and Deputy Chief Justice had since been appointed, and the process for the appointment of four (4) judges of the Supreme Court, seven (7) judges of the Court of Appeal and sixteen (16) judges of the High Court was still ongoing following the conclusion of interview of prospective appointees in November and December 2014, and March 2015 respectively.

46. Ms. Kaahwa argued that, contrary to the Applicants' assertion, there had been no refusal by the President to appoint judges but, rather, the appointment process involved different entities; starting with the recommendation of appointees by the Judicial Service Commission, and consideration and consultations by the President in respect thereof. It was Ms. Kaahwa's contention that non-appointment of the names as

submitted does not amount to a refusal on the part of the President. She argued that, owing to budgetary constraints, the appointment of judges had been effected in a phased manner. Ms. Kaahwa cited this Court's decision in **Katabaazi & 21 Others vs. Secretary General of EAC & Another** (supra) where it was held that it was not the role of the Court to superintend the Republic of Uganda in its Executive or other functions.

47. In a nutshell, it was the case for the Respondent that there had been no breach of the Treaty; judicial appointments were an ongoing process to which the Government of Uganda was committed; there were no time limits within which the process should be concluded, and it was not true that it was only Private Members' Bills that required certificates of no objection. However, in response to questions from the Bench, learned Counsel for the Respondent was unable to satisfactorily address the Court on why, in the absence of a formal Resolution of Parliament, there was an ongoing process to appoint 68 judges of the High Court – a number well beyond the 50-judge limit that had been set by the formal Resolution of Parliament that was appended to the reference as Annexure C.

APPLICANTS' SUBMISSIONS IN REPLY

48. In a brief reply, Mr. Rwakafuuzi contended that by advising on the availability of funds for judicial appointments and thus determining the rate of judicial appointments, the Ministry of Finance, Planning and Economic Development was assuming powers that it did not possess; and stifling the operations of one arm of Government. We understood it to be learned Counsel's contention that the Ugandan Constitution did

not provide for a certificate of financial implications, neither had any such certificate been sought in 2003 when the number of High Court judges was increased to 49; therefore, once Parliament made a Resolution for number of judges it was incumbent upon the Executive to look for the funds to facilitate the recommended appointments.

49. Finally, Mr. Rwakafuuzi argued that constraining the resources (particularly human resources) available to the Judiciary was a violation of the Treaty. He prayed for costs to the Applicants whichever way the Reference was decided as, in his view, they had forced the Respondent to take action on the matters raised therein and the matter had been brought in public interest.

COURT'S DETERMINATION

50. We have carefully considered the submissions of both Parties on this issue. As we did state earlier in this Judgment, the in-action complained of by the Applicants does raise questions of legality, rule of law and good governance.

51. We find the extract from **Halsbury's Laws of England** (supra), to which this Court was referred by learned Counsel for the Applicants, very pertinent to the issues under consideration presently in so far as it aptly posits the functionality of, as well as the interface between the principles of legality, rule of law and good governance. *See footnote 1 thereto*. For completion we reproduce the entire text from which the Applicants' extract was derived:

> "**The Principle of Legality. The exercise of governmental authority directly affecting individual interests must rest on**

legitimate foundations. For example, powers exercised by the Crown, its ministers and central government departments must be derived, directly or indirectly, from statute, common law or royal prerogative; and the ambit of those powers is determinable by the courts save insofar as their jurisdiction has been excluded by unambiguous statutory language. The Executive does not enjoy a general or inherent rule-making or regulatory power, except in relation to the internal functioning of the central administrative hierarchy … Nor, in general, can state necessity be relied on to support the existence of a power or duty, or to justify deviations from lawful authority. Moreover, in the absence of express statutory authority, public duties cannot normally be waived or dispensed with by administrative action for the benefit of members of the public."

52. The foregoing legal jurisprudence hinges the exercise of governmental authority upon legitimate or legal foundations such as statute, common law and royal prerogative. We hasten to point out that, within the context of the EAC jurisdiction, Partner States would be governed by their national constitutions rather than royal prerogative, which is unique to the English constitutional order. Stated differently, the Executive must be able to demonstrate a lawful authority for its actions, whether common law or statutory law.

53. **Halsbury's Laws of England** (supra) does also highlight 2 important footstools of the rule of law: that as a general rule the Executive does not enjoy the prerogative to create rules that would negate statutory obligations or applicable common law practices; neither can expediency

or necessity be sufficient reason for the State to justify deviations from legal authority, statute and established common law practice. It does, however, recognise that the Executive may formulate rules or regulations '**in relation to the internal functioning of the central administrative hierarchy.**'

54. The present Reference raises questions about the legality of ongoing judicial appointments to the High Court, as well as the constitutionality of the certificate of financial implications. It is quite apparent that whereas no Parliamentary Resolution has ever been made increasing the number of High Court judges to 82, there is an ongoing process to increase the said number to 68. It is not even clear under what legal authority the number was raised from 49, as prescribed in the Resolution of 18th September 2003, to 52 as it stands today. Similarly, whereas extensive reference was made to the need for a certificate of financial implication from the Ministry of Finance, Planning and Economic Develoment (MFPED) prior to making judicial appointments, the legal basis for such certificate was not readily apparent.

55. As quite rightly asserted by learned Counsel for the Respondent, in **Katabaazi & 21 Others vs. Secretary General of EAC & Another** (supra) this Court did hold that, provided that there was compliance with the legal regime of a Partner State, the Court had no mandate to superintend such State on how it exercised its Executive functions. In the instant Reference, where the legal basis for the increment in the number of High Court judges to 68 has not been duly established before us, we find that the Respondent is operating outside the legal framework that it explicitly posited herein; is, to that extent, operating outside its

own legal rules; and is demonstrably in contravention of the rule of law principles articulated in **Halsbury's Laws of England** (supra). We are aware that this matter was not in issue before us but take the considered view that, it having come to our attention, it is incumbent upon this Court to make the observations it does hereby make in that regard.

56. On the other hand, the constitutionality of the certificate of financial implications referred to in this Reference is in issue herein. As highlighted in **Halsbury's Laws of England** (supra) above, as a general rule the Executive does not enjoy the prerogative to create rules that would negate statutory obligations or applicable common law practices. However, this rule is tapered by the proviso that the Executive may formulate rules or regulations with regard to the internal functioning of the central administrative structure.

57. Further, in **Gerald Karuhanga vs Attorney General of Uganda** (supra), an Article by Lord Justice Gross, '**The Judiciary: The Third Branch of the State**' **(April 2014),** was cited with approval. We find the position advanced therein pertinent to a better understanding of the principle of good governance as encompassed in the doctrine of separation of powers; and the interface between the different arms of Government in that regard. It reads:-

> **"The proper and effective functioning of any State committed to the rule of law depends on its branches understanding and being respectful of each other's respective roles and functions. Understanding is the basis from which the branches can work together within a framework of separation of powers to maintain … the rule of law."**

58. Upon due consideration of the persuasive positions advanced in the foregoing jurisprudence, we take the view that not only is it important for the internal functioning of any Central Government that the different branches thereof are understanding and respectful of each other's respective functions, as posited by Lord Justice Gross above; it is critical that they appreciate the limitations and constraints within which they each operate. Against that background, it seems to us that the emergence of the practice of certificates of financial implication in Uganda was to engender the smooth internal functioning of the Ugandan Central Government's administrative structure, giving due regard to the country's budgetary constraints.

59. Indeed, paragraph 8 of Ms. Okalany's affidavit, as well as the documentation in Annexure D thereto, highlight the financial implications of each judicial appointment to the Higher Bench (Supreme Court, Court of Appeal & High Court). As quite rightly submitted by Ms. Kaahwa, it would be futile for the Executive to effect judicial appointments then fail to provide the funds required for such appointments to take effect. Contrary to Mr. Rwakafuuzi's contention, the fact that the now appointed Chief Justice and Deputy Chief Justice were serving judicial officers at the time of their elevation as such does not suggest that their appointment to those offices had no financial implications. The financial and other emoluments due to holders of those 2 offices are much higher than such as are due to a judge of the Supreme Court or Court of Appeal, the capacity in which the Chief Justice and Deputy Chief Justice respectively previously served.

60. We are satisfied, therefore, that the rule and practice of certificates of financial implications falls within the ambit of the internal functioning of Uganda's central administrative function. Consequently, it falls within the exception to the general rule that the Executive does not enjoy the prerogative to create rules that would have the effect of circumventing the legal regime of a Partner State.

61. In the same vein, we were addressed by learned Counsel for the Respondent on the need for the President to undertake consultations on persons recommended for appointment to the higher Bench. On the other hand, learned Counsel for the Applicants referred us to the Uganda Constitutional Court's decision in **Gerald Karuhanga vs Attorney General of Uganda** (supra) that essentially constrained the President to act within the recommendations of the Judical Service Commission. In that case it was held (Tibatemwa JCC):-

> **"Under Article 142, the Constitution provides for a tripartite procedure in which the Judicial Service Commission is required to compose a list of nominees and submit the list to the President. The President then makes appointments from this list and sends the names to Parliament for approval. The President can only appoint a Judicial Officer from a list that the Judicial Service Commission provides. It is therefore my considered opinion that the President cannot initiate the process of appointing any particular individual to judicial office. To allow such a process would be to undermine the independence of the Commission and in a way subject it to the**

direction or control of the Executive Arm of Government, contrary to Article 147 of the Constitution."

62. In the foregoing case, it was the majority position that the Judicial Service Commission was the body responsible for compiling a list of nominees for appointment to judicial office, from which list the President was obliged to make a choice of appointees for submission to Parliament. It also fronted the good governance doctrine of separation of powers, holding that the Judicial Service Commission was a body that should operate independently of the Executive and Legislature.

63. As stated earlier herein, we find persuasive direction from the position advanced by Lord Justice Gross that '**understanding is the basis from which the branches** (of Government) **can work together within a framework of separation of powers to maintain the rule of law.**' That jurisprudence suggests that the interdependence of each branch of Government for the internal functioning of the State does not negate the doctrine of separation of powers but is, on the contrary, important for the manifestation of the rule of law.

64. In **Phillips, O. H. & Jackson, P., 'Constitutional and Administrative Law', Sweet & Maxwell, 2001. 8th Edition, p.12** it was opined:-

"A complete separation of powers, in the sense of a distribution of the three functions of government among three independent sets of organs with no over-lapping or co-ordination, would (even if theoretically possible) bring government to a stand-still. What the doctrine must be taken to advocate is the

prevention of tyranny by the conferment of too much power on any one person or body, and the check of one power by another."

65. Indeed, even with regard to the US (United States) Constitution, which arguably goes further than any other in applying the doctrine of separation of powers, in the case of **Youngstone Sheet & Tube Co. vs. Sawyer 343 U.S 579 (1952)** as reported in **Schwartz, B., American Constitutional Law, Chap. 7**, it was observed:-

"The problem that may have to be faced before long is whether the draftsmen of the constitution, in their zeal to prevent too great a concentration of power, did not provide restraints that unduly hamper the working of government."

66. In our considered view, the question that must occupy a constitutional lawyer (and by extension a constitutional court) is whether and to what extent such a separation actually exists in any given constitution. A purposive interpretation that obliterates the possibility of absurdity is of paramount importance. This position is in part informed by the existence of a school of thought that defines the Executive branch of government to include all state or public officials who are neither legislators nor judges. By implication this would extend to the composition of a Judicial Service Commission such as that in Uganda, which performs a public function. See **Phillips, O. H. & Jackson, P., 'Constitutional and Administrative Law'** (supra).

67. The foregoing notwithstanding, as this Court held in its decision in **East African Civil Societies Organisation Forum (EACSOF) vs. Attorney**

General of Burundi & 2 Others EACJ Application No. 5 of 2015, we are aware that the interpretation of Partner States' national constitutions does not fall within our jurisdiction, neither does this Court have the jurisdiction to inquire into the legal soundness the decisions of Partner States' Constitutional Courts.

68. Be that as it may, for present purposes it would appear from the decision in **Gerald Karuhanga vs Attorney General of Uganda** (supra) that the President is obliged to select nominees for appointment to judicial office from a list of nominees that is compiled and forwarded to him by the Judicial Service Commission. It seems to us that such selection process would by necessity be premised on and informed by some sort of criteria. Against that background, Ms. Kaahwa's submission on the appointment process comprising of consultations by the President prior to making judicial appointments is neither outlandish nor far-fetched. It entails an internal management mechanism of a nation's appointment process and is the prerogative of any appointing authority.

69. Consequently, we take the view that due diligence checks and other consultations undertaken prior to judicial appointments fall within the purview of the internal functioning of a country's central administrative structure. We do not consider these pre-appointment procedures to be within the domain of this Court to superintend. Most certainly, the practice of due diligence checks cannot be said to violate the principles of rule of law or good governance as stipulated in Articles 6(d) and 7(2) of the Treaty. In fact, it seems to entrench the principle of good governance by ensuring that only appointees of most impeccable

intergrity and competence are appointed to the Higher Bench in Uganda. Similarly, in the absence of statutorily prescribed time frames, it is not the duty of this Court to superintend the time frames within which the Executive implements its duties.

70. Most importantly, there was no evidence adduced in this matter that the in-action that has translated into a delay by the President to effect the judicial appointments in issue does, in fact, amount to a refusal by him to perform his duty as alleged by the Applicants. The onus lay with the Applicants to establish this for a fact. Unfortunately, save for sweeping allegations that the President's purported refusal to effect judicial appointments had violated different variants of the rule of law and good governance, the Applicants did not adduce cogent and credible evidence that established the delay in effecting the judicial appointments in issue as a refusal by the President.

71. In the result, we find no evidence of refusal to appoint judges to the Supreme Court and Court of Appeal by the President of the Republic of Uganda. We would, therefore resolve Issue No. 3 hereof in the negative. Having so found, save for our observation on the absence of a legal basis for the elevation of the number of High Court judges to 82 (which was not in issue before us), we find no contravention of Articles 6(d) and 7(2) of the Treaty as pleaded by the Applicants. We do, therefore, resolve Issue No.4 in the negative.

G. **CONCLUSION**

72. As depicted earlier in this Judgment, the Declarations sought from this Court hinged on the alleged refusal by the President of the Republic of

Uganda to appoint judges to the Supreme Court, Court of Appeal and High Court of Uganda. We note that the Prayer in paragraph (a) has been exhaustively addressed by this Court, it being a reference to the alleged refusal to effect judicial appointments occasioning a breach of the principles of rule of law and good governance in general terms. We carefully considered the principles of good governance and rule of law in our determination of the preceding issues, and found that the President's preferred course of action did not violate the said principles.

73. However, in Prayers (b), (c), (d) and (e) the Applicants specifically attributed the President's alleged refusal to interference with the independence of the Judiciary; violation of the right to a fair hearing; violation of fundamental rights and freedoms guaranteed by the Ugandan Constitution, and stifling of the Ugandan Judiciary's capacity to fulfil its constitutional mandate. Having found, as we have, that the fact of refusal has not been established before this Court, we did not deem it necessary to delve into the question as to whether or not the unproven refusal did in fact manifest the specific violations complained of therein. Perhaps more importantly, the Applicants did not address us on these specific allegations at all.

74. With respect, therefore, we are unable to grant the Declarations sought by the Applicants.

75. We note that although costs were prayed for by the Applicants, there were never in issue in the Joint Scheduling Memorandum agreed upon by both Parties. We do appreciate that ordinarily costs should follow the event, however, we take the considered view that the present

Reference did clarify issues of public interest and administrative importance with regard to the process of judicial appointments.

76. We are respectfully guided by the approach of the Appellate Division of this Court which, in the case of **Attorney General of Tanzania vs. African Network for Animal Welfare EACJ Appeal No. 3 of 2014**, held:-

> **"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 and preservation of a natural resource which (in this particular case), is truly a rare 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."**

77. Similarly in the case of **Barclay (Guardian *ad litem*) vs. British Columbia 2006 BCCA 434** (CanLii) matters of public interest were identified as exceptions to the general rule. It was held (per Mackenzie JA):-

> "**The strictures of the general rules in private litigation are modified to some degree in litigation which engages a broader**

public interest beyond the pecuniary interests of the particular plaintiffs who pursue the action."

78. With respect, therefore, we do hereby dismiss the Reference and order each party to bear its own costs. It is so ordered.

Delivered, Dated and Signed this 7th Day of August, 2015 at Arusha.

.....
MONICA K. MUGENYI
PRINCIPAL JUDGE

.....
ISAAC LENAOLA
DEPUTY PRINCIPAL JUDGE

.....
FAKIHI A. JUNDU
JUDGE