

30 February 2007

Reference No. 1 of 2006

EAST AFRICAN COURT OF JUSTICE

PROF. PETER ANYANG NYONG'O, ABRAHAM KIBET CHEPKONGA, FIDLEIS MUEKE NGULI, HON. JOSEPH KAMOTHO, MUMBI NGARU, GEORGE NYAMWEA, DR. PAUL SAOKE, HON. GILBERT OCHENG MBEO, YVONNE KHAMATI AND HON. ROSE WARUHIU

v.

ATTORNEY GENERAL OF KENYA, CLERK OF THE EAST AFRICAN LEGISLATIVE ASSEMBLY AND SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY

RULING

BEFORE: PRESIDENT: Moiyo M. Ole Keiwua

VICE – PRESIDENT: J. N. Mulenga

JUDGES: Kasanga – Mulwa, Mary Stella Arach-Amoko; Harold R. Nsekela

Citation: Anyang Nyong'o v. Attorney General of Kenya, Ref. No. 1 of 2006, Ruling (EACJ, Feb. 6, 2007)

Editor's Note: INTERVENERS 1: Abdirahin Haita Abdi, Sara Godana Talaso, Christopher Nakuleu;

INTERVENER 2: Reuben Onserio Oyondi;

INTERVENERS 3: Safina Kwekwe Tsungu, Cathrine Ngima Kimura, Clerkson Otieno Karan, Augustive Chemonges Lotodo, Gervase Buluma Kafwa Akhaabi;

INTERVENERS 4: Hon. Uhuru Kenyatta, Hon. William K. S. Ruto and Hon. Billow Kerrow

[1] This is a reference under Article 30 of the Treaty for the Establishment of the East African Community (the Treaty), in which the above named claimants seek to invoke this Court's jurisdiction under Article 27 of the Treaty. They contend that the process in which the above named 1st, 2nd and 3rd interveners were deemed to be elected as Kenya's nine members of the East African Legislative Assembly (the Assembly), and the rules made by the Kenya National Assembly and invoked for effecting the said process infringe the provisions of Article 50 of the Treaty. They make diverse prayers, but we need refer to only the pertinent ones with which this judgment is concerned and which we would paraphrase as follows, -

(a) That this Court interprets and applies Article 50 of the Treaty to the said process and rules and declares them to be void;

(b) That costs of the reference be awarded to the claimants.

We consider the rest of the prayers are not maintainable under Article 30.

BACKGROUND

[2] Under Article 2 of the Treaty, the contracting parties, namely the United Republic of Tanzania, the Republic of Kenya and the Republic of Uganda, (the Partner States) established among themselves an East African Community (the Community) and under Article 9 established diverse organs and institutions of the Community. One of the eight organs established under the Treaty is the East African Legislative Assembly (the Assembly), which is the legislative organ of the Community. It consists of twenty-seven elected members and five ex officio members.

[3] Article 50 of the Treaty provides that the National Assembly of each Partner State shall elect nine members of the Assembly in accordance with such procedure as it may determine. The Article also stipulates that the elected members shall, as much as feasible, be representative of specified groups, and sets out the qualifications for election.

[4] When the first Assembly was due to be constituted in 2001, the National Assembly of Kenya, “in exercise of the powers conferred by Article 50(1) of the Treaty» made The Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001» (the election rules). The first nine members of the Assembly, whose term expired on 29th November 2006 were elected under those rules.

[5] On 25th and 26th October 2006, pursuant to the election rules, the House Business Committee of the National Assembly deliberated upon lists of names presented to it as persons that were nominated by the three parliamentary political parties entitled to nominate candidates for election to the Assembly. The parties are the Kenya African National Union (KANU), the Forum for the Restoration of Democracy – People (FORD – P), and the National Rainbow Coalition (NARC). All together, five lists were presented to the Committee. Two lists, of three nominees each, were from KANU; one list of one nominee only, was from FORD – P. Each of the other two lists contained five nominees of NARC. One was submitted by the party leader through the Clerk to the National Assembly as provided by the election rules. The other was presented to the Committee, in its afternoon session on 25th October, by the Government Chief Whip.

[6] The Committee unanimously approved the only nomination from FORD – P. In the course of the deliberations, KANU withdrew one of its lists and the Committee approved, also unanimously, the three nominees on the remaining list. Finally, with regard to the nominations from NARC, the Committee considered the two lists and then, according to its minutes,

[7] “resolved to consider the list submitted by the Government Chief Whip for purposes of nomination...»

[8] Although it is not expressly stated in the minutes, and no reasons therefor were recorded, the Committee thereby impliedly rejected the nominees on the list submitted by the party leader of NARC, except for one Gervase Buluma Kafwa Akhaabi who was on both lists.

[9] On 26th October 2006, the Committee, after amending the previously approved list of

KANU nominees, approved –

1. Tsungu Safina Kwekwe,
2. Kimura Catherine Ngima,
3. Karan Clarkson Otieno,
4. Lotodo Augustine Chemonges,
5. Akhaabi Gervase,
6. Bonaya Sarah Talaso,
7. Nakuleu Christopher,
8. Abdi Abdirahin Haither, and
9. Reuben Onserio Oyondi

[10] as “duly nominated to serve» in the Assembly and “further resolved that the list be tabled before the House» in accordance with the Election Rules.

[11] The list was accordingly tabled in the National Assembly on that day in a Ministerial Statement by the Vice President of the Republic of Kenya, as Leader of Government Business in the National Assembly and Chairman of the House Business Committee. Thereafter the names were remitted to the 3rd Respondent as members of the Assembly elected by the National Assembly of Kenya.

[12] On 9th November 2006, nearly three weeks before the 2nd Assembly was due to commence, the claimants filed the reference in this Court with an ex parte interlocutory application for an interim injunction to prevent the said nine persons from taking office as members of the Assembly until determination of the reference. By order of the Court the interlocutory application was heard inter partes on 24th and 25th November 2006. The Court delivered its ruling on the application and on two objections raised therein on 27th November 2006, in which inter alia, it granted the interim injunction restraining the 3rd and 4th respondents from recognizing the nine nominees as duly elected members of the Assembly until disposal of the reference.

PARTIES TO THE REFERENCE

[13] All the claimants are resident in Kenya. In the reference, the 1st and 2nd claimants are stated to be suing as officials of the Orange Democratic Movement (ODM) and the 4th and 5th claimants are stated to be suing as officials of the Liberal Democratic Party (LDP). The 3rd, 6th and 7th claimants are stated to be suing as officials of NARC, Democratic Party (DP) and Forum for Restoration of Democracy in Kenya (FORD – K) respectively. But despite highlighting the stated official capacities in the pleading, nothing significant turned on them during the trial and therefore, in this judgment, we consider the said claimants in the same individual capacities as the 8th, 9th, 10th and 11th claimants. It should be mentioned, however, that the 3rd, 9th, 10th and 11th claimants were the NARC nominees on the list submitted by the party leader, which was inexplicably rejected by the House Business Committee.

[14] Six respondents were initially cited in the reference. At the hearing of the aforesaid interlocutory application the 2nd, 5th, and 6th respondents objected to their being joined to the case, and the Court upheld the objection in its ruling delivered on 27th November 2006, on the ground that the only matters whose legality the Court had to determine were those done by Kenya as a Partner State through its National Assembly. They were struck out,

leaving the three respondents named above.

[15] Following the interim injunction, which took immediate effect, the nine affected nominees and the KANU party filed separate applications under Article 40 of the Treaty and r.35 of the Court Rules, for leave to intervene in the reference. By a consolidated consent order dated 17th January 2007, leave to intervene limited to supporting the respective cases of the claimants or the respondents was granted. The 1st interveners are the three KANU nominees, the 2nd is the nominee of FORD – P and the 3rd interveners are the five persons approved by the House Business Committee as the NARC nominees. The 4th interveners are officials of KANU party.

PLEADINGS AND ISSUES

[16] There are numerous averments in the reference, many of which are unnecessary, notwithstanding counsel's explanation that their purpose is to show the full context of the claimants' case. With due respect to learned counsel, we are constrained to observe that much of the "over-pleading" has led to some degree of confusion in regard to the jurisdiction of this Court and the claimants' cause of action. Be that as it may, in our view, the claimants' core pleading that leads to the prayers we referred to at the beginning of this judgment is captured in two paragraphs, which read thus –

“29. It is the contention of the claimants that the whole process of nomination and election adopted by the National Assembly of Kenya was incurably and fatally flawed in substance, law and procedure and contravenes Article 50 of the East African Community Treaty in so far as no election was held nor debate allowed in Parliament on the matter.

30. The claimants also contend that any such rules that may have been invoked by the Kenya National Assembly which do not allow election directly by citizens or residents of Kenya or their elected representatives is null and void for being contrary to the letter and spirit of the Treaty”.

[17] In a nutshell, the response of the 1st respondent is premised on the following four propositions as basic pleas, namely, that –

- In 2001, the Kenya National Assembly, pursuant to Article 50 of the Treaty, determined its own procedure for election of the nine members of the Assembly in form of the election rules, which embody the democratic principle of proportional representation.

- In October 2006, the National Assembly, acting through its House Business Committee, in accordance with its Standing Orders and the election rules, went through the process of electing the nine members to the 2nd Assembly.

- Neither the election rules nor the process of electing the nine members constitute an infringement of the Treaty or are otherwise unlawful.

- The reference does not disclose a cause of action.

[18] The 3rd and 4th respondents plead jointly that no cause of action is disclosed against them as they were not privy to the activities of the Kenya National Assembly about which the reference complains. In the alternative they plead that the cause of action, if any, ceased when they obeyed the interim injunction, which had been the purpose for their being made parties in the case.

[19] Out of these pleadings, the Court framed the following three broad issues –

1. Have the complainants disclosed any cause of action within the meaning of Article 30 of the Treaty?
2. Was an election undertaken within the meaning of Article 50 of the Treaty?
3. Do the Kenya Election Rules i.e. The Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001, comply with Article 50 of the Treaty?

EVIDENCE

[20] The main facts relied on by all the parties, most of which are outlined in the background section of this judgment, are not in controversy. Only one witness, Yvonne Khamati, the 10th Claimant, gave oral evidence and was cross-examined at length by counsel for all the parties. We hasten to observe, however, that the lengthy questioning of the witness appeared to be more for eliciting from her some desired evidence than for challenging the veracity of her testimony. Even the uncommon mode of adducing evidence of a speech made by Hon. Norman Nyagah, the Government Chief Whip, through her producing a DVD recording of the speech, for the Court to view and hear, was not challenged. The rest of the evidence was adduced by affidavits.

[21] At the scheduling conference, it was intimated that the 1st respondent would object to the Hansard copies annexed to the reference being used in evidence. This appears to have prompted the claimants to adduce affidavits from Members of Parliament who participated in the proceedings reported in the said Hansard copies. During the trial, however, the course of objecting to the use of Hansard was not pursued, and counsel for all the parties, including the 1st respondent, referred to the copies annexed to their respective pleadings without objection.

[22] In view of our finding that the evidence material to the issues for determination is not contentious, it is unnecessary to discuss it in any detail. Where necessary, we shall consider the evidence that is not reflected in the background section of the judgment, as we discuss the framed issues.

[23] The Advocates for the claimants, the 1st respondent and the 1st interveners filed written submissions. In addition, the respective counsel for all the parties as well as for the amicus curiae made oral submissions at the hearing.

Applicable principles

[24] The Treaty describes the role and jurisdiction of this Court in two distinct but clearly related provisions. In Article 23, the Treaty provides –

“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.”

[25] It then provides thus in Article 27(1) –

“The Court shall initially have jurisdiction over the interpretation and application of this Treaty.”

[26] The Treaty, being an international treaty among three sovereign states, is subject to the international law on interpretation of treaties, the main one being “The Vienna Convention on the Law of Treaties”

[27] The three Partner States acceded to the Convention on different dates; (Uganda on 24 June 1988, Kenya on 9 November 1988 and Tanzania on 7 April 1993). The Articles of the Convention that are of particular relevance to this reference are Article 26 that embodies the principle of *pacta sunt servanda*, Article 27 that prohibits a party to a treaty from invoking its internal law as justification for not observing or failing to perform the treaty and Article 31, which sets out the general rule of interpretation of treaties. Article 31 reads –

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.”
(Emphasis is added)

[28] Learned counsel for the claimants urged that in addition to seeking guidance from the Vienna Convention in interpreting the Treaty, the Court should, in respect of Article 50 of the Treaty, apply what he referred to as the principle of equivalence, which ensures that in the interpretation and application of rights and obligations created under a treaty there is equivalence in the states that are bound by the treaty. In other words, treaty provisions must be uniformly interpreted and applied in the states that are parties to the treaty.

[29] For the 1st respondent on the other hand, the Court was urged to exercise its jurisdiction with care bearing in mind the historical perspective of the Treaty with particular reference to the recitals in its preamble in which the Partner States recall the causes of the collapse of the former East African Community in 1977 and in which they resolve to act in concert to strengthen their cooperation adhering to fundamental and operational principles set out in the Treaty. In apparent support of this submission learned counsel for the 3rd interveners stressed the fundamental principle in international law of sovereign equality of states, under which any matter over which a state does not expressly relinquish sovereignty, remains within its sovereignty. A state cannot lose sovereignty over any matter by implication of international law.

SUBMISSIONS ON ISSUE NO.1

[30] The claimants' submission on the first framed issue is that the averments in the reference show a cause of action within the meaning of Article 30 of the Treaty. They argue that the claimants are competent to make the reference since they are legal and natural persons resident in East Africa. The reference and the supporting documentary evidence, show that the contentious nominations were made pursuant to Article 50 of the Treaty as were the election rules under which the nominations were done. The election rules and the process of the nominations and approval of the nominees as members of the Assembly are "regulations, decision and action" of a Partner State whose legality is contestable under Article 30. In the reference, the claimants ask the Court to interpret Article 50 relative to the said process and rules and to determine if the process and the rules infringe the Article. They contend that this is therefore, a justiciable cause of action. They also reiterate that this Court has jurisdiction to determine the reference and to grant the prayers made therein.

[31] On the other hand the 1st respondent submits that the claimants have not disclosed any cause of action under Article 30 of the Treaty. In order to establish a cause of action, a litigant must have locus standi. The litigant must have sufficient interest in the subject matter upon which a court is to adjudicate. Secondly, the litigant must be seeking a remedy in respect of a legal right, which has been infringed or violated.

[32] According to the 1st respondent there are two view points of the issue of locus standi in the instant reference. First, from a strict perspective, since the subject matter of the reference, namely whether the election of Kenya's members of the Assembly was undemocratic and unlawful, is a matter of public interest, the only person that has locus standi as the protector of public interest, is the Attorney General of the Republic of Kenya. Secondly, from a broader perspective, the 1st, 4th and 7th claimants, being members of the National Assembly, may claim to have locus standi on the ground that they have personal interest to ensure that the National Assembly elects strictly in accordance with Article 50. That approach, however, should be avoided as it would make a mockery of democracy to allow them to refer to the Court an issue that they lost to the majority in a democratic debate in the House.

[33] The 1st respondent also maintains that the claimants failed to show that they have a right conferred by the Treaty, which was contravened. Article 30 does not confer any right on any of the claimants. It is only a procedural provision for enforcing rights conferred under other provisions of the Treaty. If Article 30 is interpreted to confer a right on every resident of the Partner State, the Court would be turned into an institution of resolving philosophical discussion and speculation and cease to be a court of law. Since under Articles 34 and 52 the Treaty vests interpretation jurisdiction in the national courts also, the substance of the reference should be dealt with by the High Court of Kenya under Article 52. If this Court rules on the legality of the contentious election it would be usurping the power of the High Court of Kenya.

[34] In support of the foregoing submissions, learned counsel for the 3rd interveners, also contended that the claimants do not have a cause of action maintainable in this Court, which is an international court. Their grievance raises whether the 3rd interveners were elected to the Assembly. The Treaty expressly provides in Article 52 that when that question arises, it shall be determined by the relevant institution of the Partner State. The claimants did not seek remedy from the High Court or other institution of the Republic of Kenya. Under

the principles of international law, they cannot access this Court before exhausting the local remedy provided by the Treaty itself.

[35] Learned counsel for the 3rd and 4th respondents, stressed that both under the pleadings and in the evidence no claim was made against either of the two respondents. They were not alleged to be persons whose activities gave rise to the reference. They were not shown to have infringed a right conferred on the claimants by the Treaty. No nexus was established linking the 3rd and 4th respondents to the activities complained of in the reference. The claimants did not disclose, let alone prove, any cause of action entitling them to a claim and an award against the two respondents. Although, in the interlocutory application for injunction they were properly joined, they ought to have been discharged after compliance with the injunction order.

[36] Further, the 3rd and 4th respondents contend that they cannot be party to the reference because they are neither a Partner State nor an institution of the Community whose acts or regulations are referred to the Court under Article 30.

FINDING ON ISSUE NO.1

[37] From the submissions, we discern the following five grounds upon which the contention of non-disclosure of a cause of action is based, i.e that –

- the claimants failed to show the essential elements of a cause of action, namely, that their rights or interests were violated or infringed upon;
- Article 30 does not create any right; it creates a forum for adjudication of rights vested by other provisions of the Treaty;
- The substantial question raised in the reference, whether the 3rd interveners are elected members of the Assembly, is not within this Court's jurisdiction;
- the claimants have not exhausted the local remedy provided by the Treaty; and
- in the case of the 3rd and 4th respondents, it is not shown that they are reliable for the matters, which are subject of complaint in the reference.

[38] A cause of action is a set of facts or circumstances that in law give rise to a right to sue or to take out an action in court for redress or remedy. In *AutoGarage vs. Motokov*, (No.3) (1971) EA 514, a decision of the Court of Appeal for East Africa, *Spry V.P.*, described a common law cause of action at p.519 D thus –

“if a plaintiff shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be amended. If on the other hand, any of those essentials is missing, no cause of action has been shown and no amendment is permissible.”

[39] That description sets out the parameters of actions in tort and suits for breach of statutory duty or breach of contract. However, a cause of action created by statute or other legislation does not necessarily fall within the same parameters. Its parameters are defined by the statute or legislation which creates it.

[40] This reference is not an action seeking remedy for violation of the claimants' common law rights. It is an action brought for enforcement of provisions of the Treaty through a procedure prescribed by the Treaty. The Treaty provides for a number of actions that may be

brought to this Court for adjudication. Articles 28, 29 and 30 virtually create special causes of action, which different parties may refer to this Court for adjudication. Under Article 28(1) a Partner State may refer to the Court, the failure to fulfill a Treaty obligation or the infringement of a Treaty provision by another Partner State or by an organ or institution of the Community. Under Article 28(2) a Partner State may also make a reference to this Court to determine the legality of any Act, regulation, directive, decision or action on the ground that it is ultra vires or unlawful or an infringement of the Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power. Under Article 29 the Secretary General may also, subject to different parameters, refer to the Court failure to fulfill a Treaty obligation, or an infringement of a provision of the Treaty, by a Partner State.

Article 30 provides –

“Subject to the provisions of Article 27 of this Treaty, any person resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.”

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

[42] In the 1st respondent's written submissions, and in the supplementary oral submissions by the learned Deputy Solicitor General of Kenya a number of authorities were cited in support of the contentions that the claimants had no locus standi and/or had not disclosed a cause of action. Unfortunately no copies were availed to the Court despite undertaking to do so. One that we are able to comment on is the decision of the High Court of Kenya in *Jaramogi Oginga Odinga vs. Zachariah R. Chesoni & Attorney General*, Misc. Appl. No. 602 of 1992, a copy of which was availed by counsel for the 6th respondent at the hearing of the interlocutory application. In that case, the High Court of Kenya held that section 60 of the Constitution of the Republic of Kenya does not confer any right to a litigant nor create a cause of action. By way of analogy, it is argued that Article 30 ought to be interpreted in the same way. We do not need to discuss the decision in any detail. We respectfully agree with that interpretation. But we hasten to point out that the provisions of section 60 of the Constitution of Kenya are not similar or comparable to the provisions of Article 30 of the Treaty. The section only vests jurisdiction, albeit unlimited jurisdiction, in the High Court of Kenya. The court held –

“The court's unlimited powers ought to be and are used with judicial restraint and only in situations where ends of justice may be defeated by failing to exercise them. To use these inherent or residual powers, the court must be satisfied on grounds placed before it that the powers should indeed be used. That, in our opinion, is what section 60(1) provides for. It does not create causes of action or courses to follow in those actions.”

[43] In Article 30, however, the Treaty confers on any person resident in a Partner State the right to refer the specified matters to this Court for adjudication and as we have just said, by the same provision it creates a cause of action.

[44] Section 60 of the Kenya Constitution, is comparable to provisions of the Treaty that only vest jurisdiction without creating causes of action, like Articles 27, 31 and 32, which respectively vest in this Court jurisdiction to interpret the Treaty, to hear and determine disputes between the Community and its employees and to hear and determine arbitration disputes in specified circumstances. We find a more plausible comparison with Article 30 of the Treaty to be in Article 137 of the Constitution of the Republic of Uganda, which in clause (1) vests in the Constitutional Court the jurisdiction to interpret the Constitution and in clause (3) confers on any person the right to petition that court on an allegation that any Act of Parliament or other law, or any act or omission by any person or authority is inconsistent with, or contravenes the Constitution, for a declaration to that effect. The Supreme Court of Uganda has in several decisions held that the Article thereby creates a cause of action. (See *Ismail Serugo vs. Kampala City Council & Attorney General*; Constitutional Appeal No.2/98).

[45] Turning back to the claim in this reference, we note that the claimants make no secret of the fact that they were prompted to bring this reference by what they claim to be unlawful substitution of the 3rd interveners for the 3rd, 9th, 10th and 11th complainants as the NARC nominees and the resultant deeming of the former as elected members of the Assembly. Those circumstances per se raise the question whether the 3rd interveners are elected members of the Assembly and the question is squarely within the parameters of Article 52(1), which provides –

“Any question that may arise whether any person is an elected member of the Assembly or whether any seat on the Assembly is vacant shall be determined by the institution of the Partner State that determines questions of the election of members of the National Assembly responsible for the election in question.”

[46] Needless to say, this provision also creates a cause of action under the Treaty. However, it is the one cause of action under the Treaty over which this Court has no jurisdiction. Obviously, that is why the 1st respondent persistently seeks to strait-jacket this reference into the parameters of Article 52(1), to cushion the initial argument that this Court has no jurisdiction over the reference, and additionally to contend that no cause of action triable by this Court is disclosed.

[47] We should mention at this juncture that the same argument is reiterated in submissions on the second framed issue, presumably in an effort to show that it is a non-issue. There, it is argued that the fact of the election is not disputable, and that the substantive dispute arises from the two lists of nominees submitted by NARC's party leader and party whip, respectively. Four of the nominees on the party leader's list who were not elected, claim that they were the rightful nominees who should have been elected instead of the 3rd interveners who were on the party whip's list. That dispute is not within the ambit of Article 30. Basically, it is a dispute on who should have submitted the NARC party nominees, which dispute should have been solved through the internal party mechanism. Outside the party, it is, at most, a dispute as to whether the 3rd interveners were lawfully elected and should have been referred to the High Court of Kenya under Article 52.

[48] But, under whatever context, the arguments turn round to one central theme, namely that the Court ought not to determine this reference. In our view, the subtle variation introduced in submissions by learned counsel for the 3rd interveners that the Court had

jurisdiction to grant the interim injunction and to hear the reference but has no jurisdiction to grant the remedies prayed for, makes no material difference. We shall dispose of the said theme here and will not return to it under any other framed issue.

[49] We agree that if the only subject matter of the reference were those circumstances surrounding the substitution of the 3rd interveners for the said four claimants, this Court would have no jurisdiction over the reference. In paragraphs 29 and 30 of the reference, however, the claimants have referred to the Court two other issues, which we consider to be the core and material pleadings for purposes of the reference. It is those pleadings that disclose the special causes of action, which evoke this Court's jurisdiction under the Treaty. And it is only those pleadings that will be subject of adjudication in this reference. While it is apparent that the reference of the two issues is an afterthought, in our considered opinion it is not tantamount to abuse of court process as submitted by the 1st respondent.

[50] In the ruling delivered on 27th November 2006, we held that the Court has jurisdiction to hear and determine the reference. We find no reason to review that decision. Whatever we say on the matter hereafter is to provide the details of our reasons for the decision as we undertook to do in the said ruling.

[51] Under Article 33(2), the Treaty obliquely envisages interpretation of Treaty provisions by national courts. However, reading the pertinent provision with Article 34 leaves no doubt about the primacy if not supremacy of this Court's jurisdiction over the interpretation of provisions of the Treaty. For clarity, it is useful to reproduce here, the two Articles in full. Article 33 provides –

“1. Except where jurisdiction is conferred on the Court by the Treaty, disputes in which the Community is a party shall not on that ground alone, be excluded from the jurisdiction of the national courts of the Partner States.

2 Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of the national courts on a similar matter.
(Emphasis is added)

[52] And Article 34 provides –

“When a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question.”

[53] The purpose of these provisions is obviously to ensure uniform interpretation and avoid possible conflicting decisions and uncertainty in the interpretation of the same provisions of the Treaty.

[54] Article 33(2) appears to envisage that in the course of determining a case before it, a national court may interpret and apply a Treaty provision. Such envisaged interpretation, however, can only be incidental. The Article neither provides for nor envisages a litigant directly referring a question as to the interpretation of a Treaty provision to a national court. Nor is there any other provision directly conferring on the national courts jurisdiction to interpret the Treaty. Article 30 on the other hand, confers on a litigant resident in any Partner

State the right of direct access to the Court for determination of the issues set out therein. We therefore, do not agree with the notion that before bringing a reference under Article 30, a litigant has to “exhaust the local remedy». In our view there is no local remedy to exhaust.

[55] We would express reservations about the supplementary or alternative notion that a litigant who fails to secure relief from the national courts under Article 52 would have recourse to this Court to seek the same relief.

[56] Lastly, the 3rd and 4th respondents were not joined for being privy to the actions of the Republic of Kenya or for any wrong they did. They were joined, as learned counsel rightly concedes, because of the relief sought by the claimants, namely the prayer that they be restrained in the terms set out not only in the interlocutory application but also in the reference. The submission would have made more sense if it came prior to the hearing of the reference.

[57] Accordingly we answer issue no.1 in the affirmative.

SUBMISSIONS ON ISSUE NO.2

[58] The main thrust of the claimants’ submissions on the second and third issues is that no election, within the meaning of Article 50 of the Treaty, was undertaken and that the election rules do not provide for election. The process provided for by the election rules and what actually transpired amount to the antithesis of an election.

[59] The claimants maintain that the expression “shall elect” as used in Article 50 can only mean “shall choose by vote». That is the ordinary meaning as defined in several dictionaries, and as it is understood and practiced not only in all three Partner States, but also in international democratic practice worldwide. Under the Constitution and electoral laws of Kenya that govern the elections of the President, and of the Speaker, Deputy Speaker and Members of Parliament, election means election through voting. The provision in the Treaty that “the 23 National Assembly “shall elect” therefore, does not import a concept that is unknown to or that differs from that envisaged and practiced by the Republic of Kenya.

[60] The affidavit evidence shows that three parliamentary political parties, namely NARC, KANU and FORD-K, submitted to the House Business Committee names of persons nominated for election as members of the Assembly. On 26th October 2006, the Chairman of the House Business Committee simply tabled in the National Assembly a list of names of nine persons stated to be nominated by the said political parties. That list did not include the names of the 3rd, 9th, 10th and 11th claimants who had been validly nominated as NARC nominees because at the initiative of Hon. Norman Nyagah, the Government Chief Whip, the House Business Committee had replaced them with the names of the 3rd interveners. As stipulated by the election rules, the nine persons were thereby deemed to be elected by the National Assembly.

[61] Significantly, when introducing the nine names to the House, the Vice-President, who is also Leader of Government Business, said, as his predecessor had said on the equivalent occasion in 2001, that the nine persons were “appointed». Both leaders knowing the difference between “elected” and “appointed”, used the latter word because what had transpired in the House Business

[62] Committee was not an election but an appointment of the nine persons. Besides, this was consistent with what the said Government Chief Whip said in his speech recorded on the DVD, bragging immediately prior to the process, that only he would name those to be sent to the Assembly. All that goes to show that what transpired was not an election by the National Assembly, but was at best “an appointment» by the Government controlled House Business Committee.

[63] The submissions on this issue, for the 1st respondent and the supporting interveners, may be summarised as follows. The words “election” and “elect” as used in Article 50 do not necessarily connote choosing or selecting by voting. They are not defined in the Treaty. Black’s Law Dictionary defines “election” as –

“the process of selecting a person to occupy an office (usually a public office)”

[64] Furthermore, though under Article 6 of the Treaty the Partner States are committed to adhere to “democratic principles”, no specific notion of democracy is written into the Article or the Treaty. Besides, while Article 50 provides for the National Assembly of each Partner State to elect nine members of the Assembly, it gives no directions on how the election is to be done, except for the stipulations that the nine must not be elected from members of the National Assembly and that as far as feasible, they should represent specified groupings. Instead, it is expressly left to the National Assembly of each Partner State to determine its procedure for the election. This is in recognition of the fact that each Partner State has its peculiar circumstances to take into account. The essence of the provision in Article 50 is that “the National Assembly of each Partner State shall elect ... nine members of the Assembly ... in accordance with such procedure as [it] may determine.”

[65] Learned counsel for the 1st interveners, supplements this submission with the argument that the power and discretion of the National Assembly under Article 50(1) is so unfettered that the National Assembly may determine a procedure of election that excludes itself from actual or physical voting. In exercise of that power and discretion, the Kenya National Assembly determined its procedure in 2001 by making the election rules, which must be respected.

[66] It is not in dispute that only entitled parliamentary political parties nominated candidates for election and submitted their names to the House Business Committee. Being satisfied that they were qualified to be elected and that they complied with the terms of Article 50, the House Business Committee approved nine of the nominees on 26th October 2006 and on the same day tabled their names before the National Assembly. Thereupon, by virtue of the election rules, the nine nominees were deemed to be elected by the National Assembly. The Speaker confirmed that the process was conducted in accordance with the election rules. The process is a mode of democratic election by proportional representation as practiced not only in Kenya but also in several other democratic countries.

[67] The question that the Court should have been appropriately asked to consider is whether the process conforms to the conditions stipulated in Article 50. However, the question did not arise since it was neither alleged, let alone proved, that any of the nine elected persons was not qualified nor that the specified representations, namely representations of various political parties, shades of opinion, gender and other special interest groups were not achieved.

[68] Learned counsel for the 2nd intervener supplemented the submissions in support of an affirmative answer to the second framed issue, with the contention that a proper interpretation of Article 50 is not to consider the meaning of the expression «to elect» in isolation but as one with the procedure that Article 50 empowers the National Assembly to determine. For the purpose of Article 50 as set out in the election rules. If the Court undertakes the task of giving dictionary meaning to the expressions «to elect» and «an election» it will be assuming the role of making rules of procedure, which is the preserve of the National Assembly.

FINDING ON ISSUE NO.2

[69] The first step towards answering the second framed issue is to resolve the conflict of two basic concepts on the import of Article 50 that underlie these submissions. One concept is that the Article imposes on each National Assembly the function of electing nine members of the Assembly from the respective Partner States, with a discretionary power to determine the procedure it will follow in executing that function. The other concept is that the Article confers on the National Assembly of each Partner State the responsibility, with unfettered discretion, to determine how the nine members of the Assembly from the respective Partner States are to be elected. To find out which of the two concepts reflects the correct object and purpose of Article 50 as intended by the parties to the Treaty, we have to consider the provisions of the Article in the context of the Treaty as a whole.

[70] However, in view of paragraph 3(b) of Article 31 of the Vienna Convention, it is necessary to consider first if Kenya's practice in its application of Article 50 since 2001, establishes any agreement of the parties regarding the interpretation of that Article. No evidence was adduced on the practice by the other two parties in their application of Article 50. However, from the differences between the election rules and the equivalent rules of procedure adopted by the National Assemblies of Tanzania and Uganda, copies of which were available to the Court in the course of oral submissions by counsel, it is evident, and we are able to conclude, that no agreement of the parties regarding interpretation of Article 50, can be inferred from the said practice. On the surface, the Tanzania rules provide for elaborate elections by the National Assembly, while the Ugandan rules are silent on the issue of election, save that in rule 2 «election» is defined as «a process of approval of names nominated by political parties and presented to the House by the Speaker», and in rules 10 and 11 they provide for the Speaker to announce to the House the «nominations» of members of the Assembly and for the publication in the Gazette of the names of the «elected members» as soon as the Speaker announces them. Clearly, there is glaring lack of uniformity in the application of Article 50.

[71] As we said earlier in this judgment, the Treaty creates eight organs of the Community. It prescribes the composition of each organ and how its membership is to be constituted. Memberships of four of the organs, namely, the Summit, the Council, the Co-ordination Committee and Sectoral Committees are principally constituted by specified ex officio members and additional members determined by the Partner States from time to time. They are all serving officials of the Partner States. The membership of the Court, the judicial organ of the Community, consists of judges appointed by the Summit on recommendations of the Partner States. The Secretariat, the executive organ of the Community is also constituted by appointees. The Secretary General is appointed by the Summit upon nomination by a Head of State. The Deputy Secretaries General are appointed by the Summit

on recommendation of the Council. And the Counsel to the Community is appointed on contract.

[72] The Assembly is differently constituted. Its composition is prescribed in Article 48. It is the only organ composed of two categories of membership, namely, 27 elected and 5 ex officio members. In Article 50, the Treaty prescribes how the first category of membership is to be constituted, and qualifications of members. Article 50 is titled –

“Election of Members of the Assembly»

[73] and the full text reads –

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

2. A person shall be qualified to be elected a member of the Assembly by the National Assembly of a Partner State in accordance with paragraph 1 of this Article if such a person:

(a) is a citizen of that Partner State;

(b) is qualified to be elected a member of the National Assembly of that Partner State under its Constitution;

(c) is not holding office as a Minister in that Partner State;

(d) is not an officer in the service of the Community; and

(e) has proven experience or interest in consolidating and furthering the aims and objectives of the Community.

[74] Clearly, the overriding object and purpose of Article 50 is to prescribe a special mode of constituting the first category of membership of the Assembly. This is done by providing in express, unambiguous and mandatory terms that the section of the Assembly comprising 27 members shall be constituted by members elected severally by the National Assemblies of the Partner States, each of which is entitled to elect nine members. We should observe that this is a notable departure from provisions of Articles 56 and 57 of the 1967 Treaty for East African Co-operation, under which each Partner State was mandated to “appoint nine» of the “twenty-seven appointed members» of the Legislative Assembly.

[75] It is also significant that unlike in respect of the other organs, the Treaty does not leave it to each Partner State to appoint or nominate for appointment or otherwise determine the members of the Assembly. In our view, according to the ordinary meaning of the expression “the National Assembly of each Partner State shall elect nine members of the Assembly», the National Assembly of each Partner State is unconditionally assigned the function of electing nine members of the Assembly. In other words Article 50 constitutes the National Assembly of each Partner State into “an electoral college» for electing the Partner State’s nine representatives to the Assembly. We think that there can be no other purpose of naming the National Assembly in this regard other than to constitute it into an electoral college.

[76] The rest of the provisions of Article 50 do not add to or subtract from that assignment. They only serve to leave two matters in the National Assembly’s discretion. First, while the Article provides that the nine elected members shall as much as feasible be representative of

the specified groupings, by implication³⁰ it appears that the extent of the feasibility of such representation is left to be determined in the discretion of the National Assembly. Secondly, the National Assembly has the discretion to determine the procedure it has to follow in carrying out the election.

[77] In our considered view, the decision to constitute the National Assembly of each Partner State into an electoral college was a deliberate step towards establishing a legislature comprising people's representatives. The National Assembly, being an institution of people's representatives, is next to the people themselves, the second best forum for electing such representatives. We are therefore not persuaded by the submission of counsel for the 1st interveners that the discretion of determining the procedure of electing the representatives includes an option for the National Assembly to assign the function to any other body. That submission has the effect of extending the discretion beyond what is provided in Article 50. It also offends the well established principle articulated in the maxim:

“Delegata potestas non potest delegari» (a delegated power cannot be delegated).

[78] The next step towards answering the second framed issue is to consider what is meant by the words “election» and “elect» in the setting they are applied in Article 50 and in the context of the Treaty as a whole. The 1st respondent and the supporting interveners capitalise on the absence of any definition of those words in the Treaty and on the fact that the words are capable of bearing meanings other than choosing by vote. However, neither fact leads to any material consequence. The absence of any definition of the words in the Treaty is not ground to contend that the parties to the Treaty attached no meaning to them. The phenomenon of double or even multiple meanings of words is a³¹ common occurrence but does not prevent a court giving the word interpretation in the context it is used. In *International Law and Order* by Prof. Georg Schwarzenberger, (Stevens & Sons, London 1971), under the Chapter on Treaty Interpretation, the learned author, commenting on Article 31 of the Vienna Convention on the Law of Treaties, which we reproduced earlier in this judgment, says at p.121 –

[79] “In accordance with the general rule on interpretation in the Vienna Convention, the object of treaty interpretation is to give their “ordinary» meaning to the terms of the treaty in their context and in the light of its object and purpose. Unfortunately, almost any word has more than one meaning. The word “meaning» itself has at least sixteen different meanings. Thus if parties are in dispute on any term of a treaty, each one of them is likely to consider the meaning it attaches to a particular word as the ordinary meaning in the context and in the light of the object and purpose of the treaty.»

[80] Fortunately, the words that are under consideration do not bear a multiplicity of meanings. It is common ground that the ordinary meanings of the words “election» and «to elect» are “choice» and “to choose» respectively; and that in the context of Article 50 the words relate to the National Assembly choosing or selecting persons to hold political positions. What is in contention is whether the parties to the Treaty intended the choice or selection to be done through a process of voting or through any other process to be determined by each of the three National Assemblies.

[81] The phenomenon of multiple meanings of words makes interpretation of documents a very difficult task; but the task is not insurmountable. Rules of interpretation have been

designed to ease the burden, hence the need to invoke them. Indeed, in the instant case, the contention revolves more on the intention of the parties to the Treaty than on the meaning of the words. Two trite rules of international law, which emanate from the principle of *pacta sunt servanda*, are of particular relevance here. One is that treaty provisions are presumed to have meaning and must not be construed as void for uncertainty, in the way contracts between private persons may be construed at municipal law. The other is that the parties to a treaty cannot be taken to have intended an absurdity. (See *Manual of Public International Law* Edited by Prof. Max Sorensen, Uganda Publishing House Ltd. 1968; para. 4.30 and 4.31).

[82] In our view, it would lead to unnecessary uncertainty, if not to absurdity, if Article 50 were construed to mean that the parties to the Treaty intended to attach no meaning to the words “election” and “to elect” used in Article 50, leaving it to each National Assembly to adopt its preferred meaning of the words through the rules of procedure it determines. Counsel for the 1st interveners advanced a theory that the matter was intentionally left open-ended because of differences in the level of political development of the Partner States, and in support of the theory relied on the inclusion of the principle of asymmetry among the operational principles of the Community set out in Article 7 of the Treaty. With due respect to learned counsel, we find no legal or factual basis for his perception or speculation that at the time of entering into the Treaty the Partner States were at different levels of political development. To our understanding, the operational principle of asymmetry he cited in support of his argument, relates to the acknowledged economic imbalances for whose rectification the parties have, by appropriate protocol, set a formula and time-frame. It is not applicable to any imagined uneven political development of the Partner States.

[83] We think that Articles 5 and 6 have a bearing on the subject at hand. By the Treaty, the Partner States established themselves into the Community, for the achievement of elaborate objectives set out in Article 5. For purposes of this judgment it suffices to say that the overall objective is developing and strengthening co-operation in specified fields for the mutual benefit of the Partner States; and further establishing among themselves into several stages of integration up to a Political Federation, in order to attain inter alia raised standard of living and improved quality of life for their populations. Article 6 outlines five sets of fundamental principles that the parties chose to govern their achievement of the Community objectives. Again for the purpose of this judgment it suffices to highlight only (a) and (d), namely the principles of –

- mutual trust, political will and sovereign equality;
- good governance including adherence to the principles of democracy...

[84] Two other facts are worthy of taking into account. Ordinarily a reference to a democratic election of persons to political office is understood to mean election by voting. Secondly, in all three Partner States, the National Assembly has the function of electing its Speaker and Deputy Speaker. It executes that function by voting in one form or another.

[85] The Constitution of the Republic of Kenya provides in sections 37 and 38 that the Speaker and the Deputy Speaker, respectively, shall be elected by the National Assembly. Those provisions are reiterated in the Standing Orders, which then set out elaborate procedure of conducting the election by ballot. In contrast, Order 154 provides that Members and the Chairman of any select committee shall be “nominated” by the House Business Committee unless³⁴ nominated by the House on setting up the select committee. Under

Order 155, the House Business Committee may “appoint» in place of a member whose membership has ceased or who is absent, another member to act. In these scenarios under Orders 154 and 155, no voting is envisaged.

[86] In view of all the foregoing, we find it very unlikely that in adopting Article 50, the parties to the Treaty contemplated, let alone intended, that the National Assembly would elect the members of the Assembly other than through voting procedure. Needless to say, an election through voting may be accomplished using such diverse procedures as secret ballot, show of hands or acclamation. The electoral process may or may not involve such preliminaries as campaigns, primaries and/or nominations. An election may be contested or uncontested. In our considered view, the bottom line for compliance with Article 50 is that the decision to elect is a decision of and by the National Assembly.

[87] The evidence before us leads to only one conclusion, namely that the National Assembly of Kenya did not undertake or carry out an election within the meaning of Article 50 of the Treaty.

SUBMISSIONS ON ISSUE NO.3

[88] On the third issue specifically, the claimants contend that the election rules do not meet the threshold set by Article 50, and to that extent have no bearing on the Article. In formulating the election rules, the Kenya National Assembly disregarded the limits of its discretion under Article 50. This is particularly borne out by the evidence from the Hansard reports of the debate in the 35th National Assembly in 2001. The evidence clearly indicates that the rules were adopted notwithstanding that their inconsistency with Article 50 was articulated by a number of contributors to the debate. In that connection, during the proceedings of 26th October 2006, in the course of ruling that the National Assembly was bound by the election rules it adopted against his advice in 2001, the Speaker observed that the Kenya National Assembly was living a lie with regard to election of members of the Assembly and urged the House to re-look at his rejected draft rules as it had a right and duty to amend inter alia rules that are not in consonance with the expectations of the public.

[89] Learned counsel for the claimants urged that in interpreting the Treaty relative to the election rules, the Court must bear in mind the principle of equivalence, which requires that the Treaty be applied uniformly among the Partner States; and the principle of primacy of Community law in case of conflict with national law.

[90] The 1st respondent on the other hand submits that the election rules do comply with Article 50. Under the Treaty each Partner State has the discretion to choose any democratic electoral system for the election of the members of the Assembly. The election rules made by the Kenya National Assembly establish such a democratic electoral system of proportional representation. They do not infringe Article 50 in any way and the Court should respect them.

[91] The 1st interveners support the submission that the election rules were lawfully made by the Kenya National Assembly within its discretion under, and in compliance with, Article 50(1). They submit that in interpreting that Article and applying it to the election rules, the Court should take the rules as they are, and not consider whether the rejected drafts were better. The Court cannot question the validity of the rules on basis of whether they are democratic enough. They were made by the competent authority, and were adopted in a

democratic manner after a detailed and focused debate. The Court may only determine if in making the rules the National Assembly complied with its mandate to determine a procedure that caters for the stipulations under Article 50.

[92] In addition it is contended that the claimants are estopped from challenging the validity of the election rules, which they recognized and relied on up to the conclusion of the election.

FINDINGS ON ISSUE NO.3

[93] We should at the outset reiterate that the point we have to decide on under this issue is whether the election rules constitute an infringement of Article 50 of the Treaty. It is therefore, immaterial that the claimants or any of them may have previously regarded the election rules as valid or may have done anything or taken any step in pursuance of their provisions. We say this because it is our firm view that once a question of infringement of the Treaty is properly referred to this Court under Article 30, the question ceases to be of purely personal interest. This court would be failing in its duty under Article 23 if it refuses to determine the question on the ground of the claimant's previous conduct or belief.

[94] Furthermore, it is well settled that the doctrine of estoppel cannot be raised against the operation of statute. (See *Maritime Electric Co. Ltd vs. General Dairies Ltd.*, (1937) 1 All ER 748; *Southend-on-Sea Corporation vs. Hodgson (Wickford) Ltd.*, (1961) 2 All ER 46 and *T. Tarmal Industries vs. Commissioner of Customs and Excise* (1968) EA 471. Similarly in our view, estoppel cannot be invoked to prevent an inquiry into an alleged infringement of the Treaty. If the rules made in exercise of power conferred by Article 50 are ultra vires, they cannot be saved on the ground that the claimants previously regarded them as intra vires.

[95] The point of inquiry under this issue is what the rules provide in regard to "election of the members of the Assembly." Consequently, the 1st respondent misses the point when he submits that through the rules the National Assembly adopted a democratic system of proportional representation. Proportional representation can be effected through nomination and/or appointment as is the case, under Article 33 of the Kenya Constitution, for the "nominated members" of the National Assembly. In any case, it is the Treaty that provides for proportional representation in the Assembly, and which directs that the representation shall be achieved by election. The critical point is not whether the rules provide for proportional representation but whether they provide for election of members of the Assembly on basis of proportional representation as provided by Article 50.

[96] The election rules provide in rule 4, that the National Assembly shall elect the nine members of the Assembly "according to the proportion of every party in the National Assembly". To that extent, there is partial compliance with Article 50. However, the apparent absence of any provision to cater for gender and other special interest groups is a significant degree of non-compliance, notwithstanding the discretion of the National Assembly in determining the extent and feasibility of the representation.

[97] The major deviation from Article 50 is that the election rules do not provide for the National Assembly to elect the members of the Assembly. Rule 5 provides for the nomination of candidates by the political parties and sets out the procedure for submitting nomination papers to the House Business Committee. Rules 6 and 7 then provide –

“6. The House Business Committee shall consider the nominees of the parties delivered to it under sub-rule (4) of rule 5 and shall ensure that the requirements of Article 50 of the Treaty are fulfilled.

7. Upon being satisfied that the requirements of rule 6 have been complied with, the House Business Committee shall cause the names of nine nominees of the parties to be tabled before the National Assembly and such nominees shall be deemed to have been elected as members of the East African Legislative Assembly in accordance with Article 50 of the Treaty.»(Emphasis is added)

[98] It is not clear if “the requirements of Article 50» mentioned in rule 6 and “the requirements of rule 6» mentioned in rule 7 are the same or different, thus making the role of the House Business Committee in the process rather uncertain. What we can deduce from the rules is that its role is to vet the nominees to ensure that they qualify to be elected and presumably that they are representative of the groupings specified in Article 50. Be that as it may, it is plain from the two rules that the nine nominees are not elected by the House Business Committee, contrary to a spirited effort by counsel for the 3rd interveners to argue that the House Business Committee is “an electoral college». If that were so, it would be unnecessary to stipulate that the nominees are deemed to be elected by the National Assembly. Indeed the use of the expression “nominees are deemed to be elected» signifies that the nominees are not elected.

[99] The same learned counsel persuasively argued that the word “deem» is a good legal word in common usage. He asserted: “We deem that which in law ought to have taken place, to have taken place» We agree that the word “deemed» is commonly used both in principal and subsidiary legislation to create what is referred to as legal or statutory fiction. The legislature uses the word for the purpose of assuming the existence of a fact that in reality does not exist. In *St. Aubyn (LM) vs. A.G.* (1951) 2 All ER 473, Lord Radcliffe describes the various purposes for which the word is used where, at p.498 he says –

[100] “The word “deemed» is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.»

[101] It is common ground that the election rules were made “in exercise of the powers conferred by Article 50(1) of the Treaty», and obviously for the purpose of implementing the provisions of the said Article. In rule 7, the legislature used the word “deemed» in order to create the fiction that upon the names of party nominees being laid on the table they would in law be elected by the National Assembly as members of the Assembly although in reality they are not so elected. The reason for creating that fiction is that Article 50 of the Treaty expressly provides that the nine members of the Assembly from each Partner State shall be elected by the National Assembly. In other words the fiction was created to circumvent an express provision of the Treaty.

[102] In *Indira Sawhney vs. Union of India*, JT (1999) (9) SC 557: (2000) 1 SCC 168, a statutory declaration of non-existent facts as existing, which was unrelated to existing facts was held to be in violation of Articles 14 and 16 of the Indian Constitution. Similarly we

hold that rules made for the purpose of implementing provisions of the Treaty cannot be permitted to violate any provision of the Treaty through use of legal fiction. To uphold the legal fiction in rule 7 of the election rules would be tantamount to upholding an amendment of Article 50, by one Partner State unilaterally. We can find no justification for doing so.

[103] The dichotomy that this situation poses is as follows: The National Assembly of any democratic sovereign state has the powers of regulating its conduct through rules of procedure by whatever name called. Once made and adopted, they are binding until revoked, amended or otherwise modified by the National Assembly itself. Ordinarily what the National Assembly does in accordance with such rules is lawful and valid. However, a state, which in exercise of its sovereign power binds itself to an international treaty, may end up facing conflicting demands, namely the demand to abide by its treaty obligations and the demand to abide by its own rules that conflict with the former.

[104] In the reference, the claimants plead, and in the written submissions by counsel it is reiterated, that the election rules were not gazetted or published. However it was not seriously canvassed, let alone proved, that failure to gazette or publish them rendered the rules invalid or of no legal effect. In the written submission the rules are described as “window dressing» with no bearing on Article 50, with the additional passing remark: “They have not even been gazetted or published independently». We make this observation because proof that the rules are of no legal effect would have erased or avoided the dichotomy. As it is, however, we start from the position that the rules are binding on the National Assembly and then consider if their inconsistency with or infringement of Article 50 renders them unlawful and not binding on the National Assembly.

[105] As we pointed out earlier in this judgment, the Treaty provides in Article 33(2) that decisions of this Court on the interpretation of provisions of the Treaty shall have precedence over decisions of national courts on a similar matter. That provides a clear-cut solution in the event of conflicting court decisions. But the Treaty does not provide a similarly explicit solution to the dichotomy where a Treaty provision (say Community rule) is in conflict with a national rule.

[106] We think the solution lies in the basic principle at international law, to the effect that a state party to a treaty cannot justify failure to perform its treaty obligation by reason of its internal inhibitions. It cannot be lawful for a state that with others voluntarily enters into a treaty by which rights and obligations are vested, not only on the state parties but also on their people, to plead that it is unable to perform its obligation because its laws do not permit it to do so. The principle is embodied in Article 27 of the Vienna Convention on the Law of Treaties, which reads –

“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.»

[107] We were referred to several judicial decisions arising from national law that contravened or was inconsistent with European Community law, as persuasive authorities on this subject. (See *Algemene Transporten Expeditie Onderneming van Gend en Loos vs. Nederlandse Administratie der Belastingen* [1963] ECR 1; *Flaminio Costa vs. ENEL* [1964] ECR 585; and *Amministrazione delle Finanze dello Stato vs. Simmenthal* [1978] ECR 629). In some cases the national law in issue was in existence when the

Community law came into force, while in others it was enacted after the Community law. In neither case where there is conflict between the Community law and the national⁴² law the former is given primacy in order that it may be applied uniformly and that it may be effective.

[108] For purpose of illustration, it suffices to briefly describe what are commonly called the Factortame cases. Spanish fishermen who owned British registered fishing boats challenged in the British courts new English legislation for being discriminatory in breach of European Community law. They applied for an interim injunction to postpone the operation of the new legislation pending a preliminary ruling on a reference made to the European Court of Justice (ECJ) to determine if the law was contrary to Community law. The House of Lords dismissed the application on the ground that under the English law the courts cannot issue an injunction against the Crown. That decision was also referred to the ECJ which held that the full effectiveness of Community law would be impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting an interim relief. On basis of the preliminary ruling by the ECJ, the House of Lords in *R vs. Secretary of State for Transport, ex p. Factortame Ltd. (No.2)* [1991] 1 A.C. 603, reconsidered and reversed its previous decision.

[109] In the instant reference, the position of the 1st respondent and the supporting interveners appears to be on weaker ground. First, while we appreciate that the election rules were subject of a full debate touching on the provisions of Article 50, and that the rules were adopted through a democratic decision, the decision was made irrespective of the awareness of the possibility that the rules were an infringement on Article 50. Secondly it is noteworthy, that the National Assembly made the rules not in exercise of sovereignty inherent in a state, but in exercise of a discretionary power conferred on it by the Treaty. It was bound to make rules that conform to the primary purpose of the Article that conferred⁴³ the power, which primary purpose is to provide for the election of nine members of the Assembly by the National Assembly of each Partner State. That purpose is defeated by the provision of rule 7 of the election rules, which provides for a fictitious election in lieu of a real election.

[110] We therefore find that the election rules infringe Article 50 to the extent of their inconsistency with it, which we have identified.

[111] In the result we declare that the National Assembly of Kenya did not undertake an election within the meaning of Article 50 of the Treaty, and that the election rules in issue infringe the same Article.

[112] We order that the claimants shall have costs of the reference to be borne by the 1st respondent and to be taxed by the Registrar taking into account that a single applicant could have presented the reference. All other parties shall bear their own costs.

[113] Before taking leave of this reference we are constrained to observe that the lack of uniformity in the application of any Article of the Treaty is a matter for concern as it is bound to weaken the effectiveness of the Community law and in turn undermine the achievement of the objectives of the Community. Under Article 126 of the Treaty the Partner States commit themselves to take necessary steps to inter alia "harmonise all their national laws appertaining to the Community». In our considered opinion this reference has demonstrated amply the urgent need for such harmonization.

[114] Secondly, we also are constrained to say that when the Partner States entered into the Treaty, they embarked on the proverbial journey of a thousand miles which of necessity starts with one step. To reach the desired destination they have to ensure that every subsequent step is directed forward towards that destination and not backwards or away from the destination. There are bound to be hurdles on the way. One such hurdle is balancing individual state sovereignty with integration. While the Treaty upholds the principle of sovereign equality, it must be acknowledged that by the very nature of the objectives they set out to achieve, each Partner State is expected to cede some amount of sovereignty to the Community and its organs albeit in limited areas to enable them play their role.

Dated at Arusha this day of 2007

MOIJO. M. OLE KEIWUA
PRESIDENT

JOSEPH. N. MULENGA
VICE PRESIDENT

AUGUSTINO.S .L . RAMADHANI
JUDGE

KASANGA MULWA
JUDGE

HAROLD R. NSEKELA
JUDGE