IN THE EAST AFRICAN COURT OF JUSTICE
APPELLATE DIVISION AT ARUSHA
APPEAL NO. 2 OF 2011

BETWEEN

ALCON INTERNATIONAL LIMITED ..... APPELLANT

AND

THE STANDARD CHARTERED BANK OF UGANDA..... 1ST RESPONDENT

THE ATTORNEY GENERAL OF UGANDA
ON BEHALF OF THE REPUBLIC OF UGANDA ..... 2ND RESPONDENT

REGISTRAR OF THE HIGH COURT OF UGANDA ..... 3RD RESPONDENT

(Appeal from the Ruling of the First Instance Division at Arusha by J. Busingye PJ, JJ Mkwawa, B. P. Kubo, JJ dated 24th August, 2011 in Reference No. 6 of 2010).

JUDGMENT OF THE COURT

The present case is an appeal by Alcon International Limited, a limited liability company incorporated in the Republic of Kenya,

against the decision of the First Instance Division of the Court in Reference No. 6 of 2010. The Standard Chartered Bank of Uganda; the Attorney-General of the Republic of Uganda; and the Registrar of the High Court of Uganda are the 1st, 2nd and 3rd Respondents, respectively.

The substance of the dispute between the Parties as placed before the court below is as follows: The Appellant company was contracted by the National Social Security Fund, Uganda (NSSF) to construct 'Workers House', in Kampala. NSSF terminated the agreement and this set in motion arbitration proceedings under the contract. The Appellant was the successful party in the arbitration proceedings and was awarded US $8,858,469.97. This arbitral award is being contested in the courts in Uganda and the matter is now before the Supreme Court as Civil Appeal No. 15 of 2009, in which NSSF wants to set aside the arbitral award.

While the matter is being litigated in the courts in Uganda, the Appellant herein instituted Reference No. 6 of 2010 in the First Instance Division against the above-mentioned Respondents seeking the following reliefs –

1. That this Honourable Court be pleased to interpret and apply Articles 27 (2) and 151 of the Treaty for the Establishent of the East African Community together with Articles 29 (2) and 54 (2) (b) of the Protocol on the Establishment of the East African Community Common Market on the enhanced Jurisdiction

of this Honourable Court as a Competent Judicial Authority with regard to the enforcement of trade and resolution and settlement of disputes for the protection of cross-border investments.

2. That this Honourable Court be pleased to declare that the signing of the Protocol on the Establishment of the East African Community Common Market and the coming into force of the said Protocol on 1st July 2010 enhanced the jurisdiction of this Honourable Court as envisaged under Article 27 (2) of the Treaty as a competent judicial authority for the determination of cross-border trade disputes between persons emanating from Partner States.

3. That this Honourable Court be pleased to declare that where a public official of a Partner State fails to honour his obligation/duty, statutory or legal, to a person from a different Partner State, then under the spirit and letter of the Treaty and the Protocol, this Court has jurisdiction to enforce that obligation or duty expeditiously.

4. That this Honourable Court be pleased to direct the Respondents jointly and/or severally to pay to the Claimant the decretal sum of US$8,858,469.97 together with interest and costs in full under the Bank and costs in full under the Bank Guarantee dated 29th October, 2003.

5. That this Honourable Court direct the Respondents jointly and or severally to pay to the Claimant general damages assessed by this Court.

6. That this Honourable Court direct the Respondents jointly and or severally to pay interest on the sums of money due on such rates and from such dates as this Hourable Court should direct.

7. That this Honourable Court be pleased to make such further or other orders as may be necessary in the circumstances.

8. That the costs of this Reference be borne by the Respondents in any event.

The 1st Respondent during the Scheduling Conference conducted by the First Instance Division under Rule 53 of the Court's Rules of Procedure raised a number of preliminary objections on points of law. At the end of the scheduling conference, the agreed preliminary objections were as follows –

1. Whether the Reference is properly before the Court as against the 1st and 3rd Respondents;

2. Whether the Reference is time barred;

3. Whether the Claimant has rights under the Protocol on the Establishment of the East African Community Common Market in respect of acts which arose prior to the coming in force of the Protocol.

Before hearing the merits of the substantive Reference, the court below had to deal first with the above mentioned preliminary objections. Learned Counsel for the Parties filed their respective written submissions on the issues agreed upon and made oral submissions as well. In the final analysis, the court below struck out the Reference with costs. It is against this background that the Appellant has now appealed to the Appellate Division of the Court.

The Appellant lodged a total of fifteen (15) grounds of appeal in its memorandum of appeal. In terms of Rule 99 of the Rules of Procedure, a Scheduling Conference was held and the parties agreed upon the following five (5) grounds of appeal, namely that –

1. The learned Honourable Judges erred in law and fact in holding in the first place that the Reference was improperly before the Court as against the 1st, 2nd and 3rd Respondents and striking out the Reference before making a finding as to whether the Court itself had jurisdiction to entertain the Reference.

2. The learned Honourable Judges erred in law and fact by failing to address and/or make a finding on each of the only preliminary issues raised by the Respondents and which were the subject of the Ruling.

3. The learned Honourable Judges misdirected themselves and erred in law and fact by failing to appreciate the pleadings of all the Parties before the Court and failing to hold that the Appellant and the Respondents were not parties to the pending proceedings in the Supreme Court of Uganda.

4. The learned Honourable Judges erred in law and fact with regard to the intepretation and application of the provisions of the Treaty and the Protocol by failing to pinpoint which provisions of the Treaty and the Protocol ousts the jurisdiction of the Honourable Court on the basis of pendency of proceedings in the National Courts.

5. In view of the provisions of Article 33 (2) of the Treaty, the learned Honourable Judges erred in law by holding, inter alia, that:

(a) it would be absurd to have parallel proceedings in two different Courts;
(b) that a clash of decisions would cause confusion between the Court and the Courts in Uganda;
(c) it would result in an execution stalemate.

Mr. Athuok learned Counsel for the Appellant adopted the written submissions that were filed in the Court of First Instance. The Appellant categorically denied that it was a party to Supreme Court Civil Appeal No. 15 of 2009, National Social Security Fund and N.H. Sentongo t/a Sentongo and Parties vs Alcon International Limited. This was a contested issue and could not form the basis of a preliminary objection. Learned Counsel added that the First Instance Division failed to address the issues based on the interpretation of the Treaty for the Establishment of the East African Community ("the Treaty") and the Protocol on the Establishment of the East African Community Common Market (Common Market Protocol) and so this Division should interpret the Treaty where the court below failed to do so.

Mr. Athuok was of the view that this Division had jurisdiction to dispose of the preliminary objections on appeal. He contended that the court below erred in law in finding that the Reference was improperly before it and in striking it out even before making a finding as to whether the Court had jurisdiction. He added that they had submitted that the Court had jurisdiction under the Treaty and the Common Market Protocol. The court below had a duty to intepret Articles 27 and 30 of the Treaty as well as Articles 29 and 54 of the Common Market Protocol in order to show that the Court had jurisdiction to entertain the Reference.

Mr. Tumusingize, learned Counsel for the 1st Respondent submitted that Article 54 of the Common Market Protocol did not extend the jurisdiction of the Court to handle disputes under the Common Market Protocol. Article 27 of the Treaty was not amended to cater for the purported extended jurisdiction. In addition, he submitted that there was no rule or law requiring that the court below should have addressed all the preliminary points of law raised and on the available material before the court below, the court below was entitled to hold that there were pending proceedings in the Supreme Court of Uganda.

Ms. Patricia Mutesi, learned Counsel for the 2nd and 3rd Respondents, adopted the submissions made before the court below. She contended that the court below had discretion in any matter before it to determine whether it should hear everything that had been placed before it. She added that the court below was prudent and wise to consider the on-going proceedings in the courts of Uganda.

With all due respect to the learned Counsel for the 1st Respondent, we are beginning to witness in this Court a growing tendency to commence the trial of References not on their merits but with preliminary objections on points of law. Perhaps it is an expedient way of disposing of References, but this may not end up that way. More often than not, it is an unnecessary costly detour of the proceedings. We wish to associate ourselves with these pertinent observations made by Lord Templeman **in Ashmore V**

Corp of Lloyds [1992] 2 A11ER 486 at page 493 where he stated thus –

> "*The Parties and particulary their legal advisers in any litigation are under a duty to cooperate with the courts by chronological, brief and consistent pleadings which define the issues and leave the judge to draw his own conclusions about the merits when he hears the case. It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner*."

Before we move on to discuss and determine the substantive grounds of appeal, it is instructive to briefly mention the nature of the jurisdiction of the Appellate Division of the Court. It is not every decision of the First Instance Division which is appealable. Article 23 (3) of the Treaty provides as follows –

> *"23(3) The First Instance Division shall have jurisdiction to hear and determine at first instance subject to a right of appeal to the Appellate Division under Article 35A any matter before the Court in accordance with this Treaty*."

Appeals to this Division are governed by Article 35A of the Treaty as amended. It provides as follows –

"*35 A. An appeal from the judgment or any order of the First Instance Division of the Court shall lie to the Appellate Division on –*

(a)points of law;
(b)grounds of lack of jurisdiction;
(c)*procedural irregularity*."

The Appellate jurisdiction of this Division is derived from the Treaty. It is evident from Article 35A above that matters of fact are in principle the exclusive province of the First Instance Division. Consequently prospective appellants to this Division of the Court should bear in mind Article 35A and Rule 77 of the Rules of Procedure when lodging their respective appeals.

With this background, we now proceed to consider the first ground of appeal. This was to the effect that the court below struck out the Reference before making a finding on the jurisdiction of the Court to entertain the Reference in the first place. The first preliminary objection was divided into four sub-issues as follows –

(i) That the 1st Respondent is neither a Partner State nor an Institution of the Community in terms of Article 30 of the Treaty;

(ii) That the Court had no jurisdiction to entertain and determine the Reference under Article 54 (2) of the Protocol;

(iii) That the Court had no jurisdiction under Article 27 (2) of the Treaty;

(iv) That it would be a duplication of proceedings to entertain the Reference, since there are pending proceedings in the courts in Uganda.

Learned Counsel for all the parties, both in their written submissions and orally before us covered all these issues. However, the court below discussed the fourth sub-issue alone. The court below stated as follows –

> "*First and foremost, we find it neccessary to associate ourselves with the submission of the learned Counsel for the 1st Respondent that there is overwhelming evidence from the material now before us that there have been and still are several cases in the courts of Uganda in which the instant Claimant is directly involved."*

With this finding, the court below was of the view that it was inappropriate for the appellant to pursue its claims in two different fora. On this ground alone, the court below struck out the Reference. The sub-issue discussed above by the court below,

was not, with respect, a preliminary objection. In the oft-cited case of **Mukisa Biscuit Manufacturing Co. Ltd** v **West End Distributors Ltd** [1969] EA 696, Law, J.A. stated at page 700 –

> *"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration,"*

And Sir Charles Newbold, P. had this to say at page 701 –

> "*A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."*

The matters discussed by the court below are disputed facts. This is evident from the 1st Respondents' response to the Reference in paragraphs 3, 4, 7, 8, 9 and 10. The 2nd and 3rd Respondents' joint response also do not agree with the facts pleaded by the Appellant. From the parties' pleadings themselves, these issues

are contested. The court below descended into considering facts and not law. We are in respectful agreement with the Respondent that this sub-issue was not a valid preliminary objection. The court below was expected to be dealing with "pure points of law" which would dispose of the Reference. The purpose of raising preliminary objections is not to shut out or stifle legitimate adjudication. Preliminary objections are particularly unhelpful and are without basis in the context where facts are in dispute. In the event, we overrule the fourth sub-issue as a preliminary objection.

The remaining three sub-issues of the first issue; the second; the fourth and fifth grounds of appeal are essentially grounds of complaint against the Court's assumption of jurisdiction in the Reference. The issue of jurisdiction of the Court to entertain the Reference was squarely put before the court below. It was one of the three isssues agreed upon to be resolved as preliminary objections. The requirement that jurisdiction be established as a threshold matter is very basic. Without jurisdiction, the court cannot proceed at all. The determination of doubts about jurisdiction must precede the determination of the merits of the Reference. In the case of the **Owners of the Motor Vessel "Lillian S"** v **Caltex Oil (Kenya) Limited,** [1989] KLRI at page 14 Nyarangi, J. A. stated thus –

> "*Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction,*

there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

And in the case of **Fanuel Mantiri N'gunda v Herman Mantiri Ng'unda and 20 Others** (CAT) Civil Appeal No. 8 of 1995 (unreported) the Court stated as follows –

"*The basic question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature ... (T)he question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial ... It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case."*

Learned Counsels for both parties with one voice, as it were, correctly submitted that the court below did not attempt to answer the fundamental issue before it: whether the Court had jurisdiction to entertain the Reference. The issue of jurisdiction had to be answered first before proceeding any other issue. Inexplicably, an issue that was not in law a preliminary objection was taken up to strike out the Reference.

The second ground of appeal was to the effect that the court below did not make a finding on the preliminary objections agreed upon during the scheduling conference. There is considerable merit in this complaint. The record clearly shows that the court below dealt only with one sub-issue. Two issues were not touched upon. Even the fundamental issue of jurisdiction was not discussed at all. Rule 68 (5) of the Rules of Procedure provide in part as follows –

> "*68 (5) The judgment of the Court shall contain:*
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> *(f) the points for determination;*
>
> *(g) the decision arrived at;*
>
> *(h) the reasons for such decision".*

The court below, in view of the decision it had reached, did not deem it necessary to consider and determine the remaining issues. This was in contravention of Rule 68 (5) above. All the issues raised in the Scheduling Conference had to be decided upon by the court below.

The third ground of appeal relates to the joinder of parties in the municipal courts in Uganda and in this Court. With respect, we have a problem with this ground of appeal. Does it fall under "**ground of law"** in Article 35 A of the Treaty? The parties have disagreed as to who are the parties in the Supreme Court of Uganda. This is a question of mixed law and fact which cannot be resolved by the Appellate Division of this Court. The complaint

seems to be that the parties in the Supreme Court are not the same parties in the Reference before the Court. This is a disputed matter of fact and the court below did not make a finding. With respect, we the Appellate Division cannot make findings of fact on appeal.

The complaint in the fourth ground of appeal is to the effect that the court below did not refer to any of the provisions of the Treaty or the Common Market Protocol which oust the jurisdiction of the Court on the ground that there are similar undecided cases in the municipal courts. We agree with this complaint. The issue was raised and argued but, the court below did not consider and determine it.

The last ground of appeal challenged three findings of the court below to the effect that: (1) it will be absurd to have parallel proceedings in two different courts (2) that a clash of decisions would cause confusion between this Court and the courts in Uganda and (3) it would result in an execution stalemate. Essentially, this is a complaint against the only finding of the court below made allegedly, as a preliminary objection. The court below made a determination on the facts on this point, considered irrelevant issues, and struck out the Reference. By any stretch of imagination, this was not a preliminary objection. The issue could not be resolved without adducing evidence to establish the facts. The cause of action before this Court is an alleged breach or infringement of the Treaty and not an arbitral

award for breach of contract as in the Uganda courts. There is, therefore, no likelihood of a conflict or a clash between this Court and the courts of Uganda.

Counsel for the 1st Respondent, Mr. Tumusingize, lodged in terms of Rule 92 of the Rules of Procedure, a Notice of Grounds for Affirming the Decision upon other grounds than those relied upon in the First Instance Division. These grounds were –

(i) That the Reference was improperly before the Court as against the First Respondent as it is not a Partner State or Organ of the Community within the meaning of Article 30 of the Treaty for the Establishment of the East African Community;

(ii) That the Reference was time barred;

(iii) That the Claimant has no rights under the Protocol on the Establishment of the East African Community for acts that arose prior to the coming into force of the Protocol.

These issues are essentially the same ones that were raised by the 1st Respondent as preliminary points of law. Learned Counsels for the parties made very erudite arguments when presenting their arguments in this appeal. As we stated earlier on in this judgment, the First Instance Division did not discuss these issues nor did it make a decision thereon. The Treaty and this Court's Rules of

Procedure do not give the Appellate Division concurrent jurisdiction with the First Instance Division below to assume jurisdiction so that this Division takes up the issues and resolve them on appeal. Hence, we decline the invitation to do so, however attractive. It is contrary to the spirit of Articles 23 (3) read together with Article 35A of the Treaty.

The Appellant sought the following Orders, namely –

1. That the Ruling and Order of the 1st Instance Division of the Court dated the 24.9.2011 be set aside;
2. That this Honourable Court be pleased to dispose of the preliminary points of law raised by the Respondents in the First Instance Division of the Court;
3. That the First Instance Division had jurisdiction to entertain Reference No. 6 of 2010;
4. That Reference No. 6 of 2010 in the First Instance Division of the Court be reinstated.

With respect, our answer to the first prayer is, yes. For the reasons explained in this judgment, the Ruling of the First Instance Division dated the 24.9.2011 cannot be allowed to stand. However, we decline the invitation to assume original jurisdiction and thereby to dispose of the preliminary objections raised by the Respondents. This is an Appellate Division of the Court operating under the mandate of Article 23 (2) and (3) and Article 35A of the Treaty. That mandate of the Appellate Division is to hear and determine

appeals from judgments and any Orders from the First Instance Division of the Court. We are not aware of any provision in the Treaty that confers concurrent jurisdiction with the First Instance Division. The First Instance Division did not discuss nor did it make a finding of whether it had jurisdiction to entertain the Reference. This was a fundamental issue on which the court below had to decide as a threshold issue.

In the result, we allow the appeal with costs. The Ruling and Order of the First Instance Division dated 24.9.2011 is accordingly set aside, and we do hereby re-instate Reference No. 6 of 2010. Furthermore we direct the First Instance Division to specifically determine the merits of the Reference before the Court.

DATED AT ARUSHA this 16th day of March, 2012

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Harold R. Nsekela
PRESIDENT

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Emily R. Kayitesi
JUSTICE OF APPEAL

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James Ogoola
JUSTICE OF APPEAL