IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

(FIRST INSTANCE DIVISION)

(Coram: Jean Bosco Butasi PJ; M.S.Arach-Amoko DPJ; J.J.Mkwawa J; I.Lenaola J; F. Ntezilyayo J)

REFERENCE No. 8 of 2012

(Arising out of Reference Number 1 of 2010 And Taxation Reference No. 1 of 2011)

BETWEEN

HON. SITENDA SEBALU……..APPLICANT

AND

THE SECRETARY GENERAL

OF THE EAST AFRICAN COMMUNITY …… … RESPONDENT

Date:22nd November, 2013

JUDGMENT OF THE COURT

Introduction

1. This Reference was lodged in this Court on the 28th June, 2012 under Article 30 of the Treaty for the Establishment of the East African Community and Rules 1(2), 21, 74, 84 and 85 of the East African

Community Rules of Procedure (hereinafter referred to as the **"Treaty"** and the **"Rules",** respectively). It is premised on Articles 6, 7(2), 8(1) (c),13,14,15,16,20,21,22,23,24, 27(1) 29, 38,44 and 71 of the Treaty.

2. The Applicant, Hon. Sebalu, is a resident of Kasangati, Kyadondo East Constituency, Wakiso District, in Uganda. His address for the purpose of this Reference is indicated as c/o M/S Bakiiza & Co. Advocates, Plot 65, 3 William Street Road, Kampala, Uganda.

3. The Respondent is the Secretary General of the East African Community (hereinafter referred to as the **"Community"** or the **"EAC").** He is sued in the capacity of the Principal Executive Officer of the Community pursuant to his mandate under Articles 4(3), 29 and 71 of the Treaty.

BACKGROUND

4. The protracted history of the Reference is as follows: In 2006, the Applicant participated in the Parliamentary elections for the seat of Member of Parliament for Kyadondo East Constituency in Wakiso District, in Uganda. He lost to one Hon. Sam Njuba. He was dissatisfied with the outcome of the election and consequently, he challenged the results in the High Court, the Court of Appeal and eventually he ended up in the

Supreme Court, which is the highest Court in Uganda, but he was unsuccessful in all those Courts.

5. Having exhausted the local courts, he wanted to appeal to the East African Court of Justice (EACJ), but realized that the EACJ lacked the jurisdiction to entertain appeals from the national courts of the EAC Partner States. He then filed **Reference No. 1 of 2010—Sitenda Sebalu v The Secretary General of the East African Community, The Attorney General of the Republic of Uganda, Hon. Sam Njuba and the Electoral Commission of Uganda.** In that Reference, **t**he Applicant's main complaint was that, although Article 27(2) of the Treaty provides for conferment on the EACJ, such other original, **appellate,** human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date, none of those additional limbs of jurisdiction had been conferred on the EACJ by the Council yet.

6. The Applicant's specific grievance against the Secretary General was that , being the Chief Executive Officer(CEO) of the Community, he is mandated by the Treaty, to convene the Council of Ministers so that they may conclude a protocol to operationalise the extended jurisdiction of the EACJ in order to handle *inter alia* appeals from the final appellate courts of the Partner States and that the said protocol had been pending action

since 4th May, 2005 as a Draft Protocol to operationalise The Extended Jurisdiction of the EACJ. Despite that mandate, he had failed to do so.

7.For that reason, the Applicant invited the Court in that Reference, to *inter alia*, interpret Articles **5, 6(d),7(2) and 8(1)(c)** of the Treaty so as to determine whether the delay to vest the EACJ with **appellate** jurisdiction was a contravention of the doctrines and principles of good governance, including adherence to the principles of democracy, **the rule of law,** social justice and **the maintenance of universally acceptable standards of human rights** which are enshrined in the Treaty and which the Partner States undertook to abide by.

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

9. Among the Applicant's prayers was that quick action should be taken by the Community in order to conclude a protocol to operationalise the extended appellate jurisdiction of the EACJ under Article 27 of the Treaty to

enable the Applicant and other interested litigants preserve their right of appeal to the EACJ.

10. On 30th June, 2011, the Court struck out the case against two of the Respondents but ruled in the Applicant's favour against the Secretary General and the Attorney General of Uganda. The Court made several orders but the order that gave rise to the instant Reference was that:

"3… ***quick action should be taken by the East African Community in order to conclude the protocol to operationalise the extended jurisdiction of the East African Court of Justice."***

11. The Court also awarded the Applicant the costs of the said Reference against the Secretary General and the Attorney General of the Republic of Uganda.

12. Subsequently, the Applicant filed a bill of costs vide **Taxation Cause No. 1 of 2011---Hon. Sitenda Sebalu v- The Secretary General of the East African Community and the Republic of Uganda**. On the 20th January, 2012 the Registrar taxed the bill and awarded a total of **USD 105,068.20**, as costs to the Applicant to be shared equally between the two Respondents in the sum of **USD 52,534.10** each.

13. However, the Council of Ministers did not implement the judgment in **Reference No. 1 of 2010** and the Respondent did not pay his share of the taxed costs to the Applicant. Uganda has done so and this Reference was then instituted for the reasons detailed below.

THE APPLICANT'S CASE

14.From what can be deduced from the convoluted pleadings, the grounds of the Reference are that the Council of Ministers/ Sectoral Committee on Legal and Judicial Affairs has failed to implement the said judgment and the taxation Ruling . He states that instead of complying with the Court order, the Council of Ministers/ Sectoral Committee on Legal and Judicial Affairs, in its meetings held from the 2nd to 3rd November, 2011 and subsequently from the 12th to 13th March, 2012, revised the Draft Protocol to operationalise the extended jurisdiction of the EACJ that was adopted from the Zero Draft Protocol in the meetings held on the 24th November 2004 and on the 8th July, 2005; and later considered in subsequent meetings (hereinafter referred to for brevity as the **"Draft Protocol");** and excluded the appellate and human rights jurisdiction therefrom. He contends that this act was in defiance of and a contempt of the judgment and the order of this Court in Reference No.1 of 2010.

15.The Applicant further contends that the failure by the Council of Ministers/Sectoral Committee on Legal and Judicial Affairs to implement the judgment of the Court in **Reference No. 1 of 2010** and to pay the costs awarded in **Taxation Cause No. 1 of 2011**, is an infringement of Articles 7(2),(8)(1)(c), 13,14,15,16,20,21,22,23,27(1),30,38 and 44 of the Treaty.

16. He also avers that the above action by the Council of Ministers/ Sectoral Committee on Legal and Judicial Affairs is in itself an infringement of the Fundamental Principles and a contravention of the doctrines and principles of good governance including adherence to the principles of democracy, **the rule of law, social justice and the maintenance of universally accepted standards of human rights** which are enshrined in the aforementioned Articles of the Treaty in particular with regard to the peaceful settlement of disputes.

17.The Applicant also asserts that, being the Principal Executive Officer of the Community, the Respondent is mandated to ensure that meetings of the Council of Ministers / Sectoral Council on Legal and Judicial Affairs and the Partner States to conclude the protocol for the extended jurisdiction of the EACJ are held and the judgment of the Court implemented. He has failed to do so, yet the rule of law requires that public affairs should be

conducted in accordance with the law and decisions of the courts. Hence, the Respondent has also disobeyed the orders of the Court .

18. For the reasons above, the Applicant prays for the following declarations and orders from the Court:

a) The failure of the Council of Ministers/Sectoral Committee on Legal and Judicial Affairs to implement the judgment of the Court in Reference No. 1 of 2010 and Taxation Cause No. 1 of 2011, is an infringement of Articles 7 (2), 8(1) (c), 13, 14, 15, 16, 20, 22, 23, 27(1), 30, 38 and 44 of the Treaty.

b) The action by the said Council of Ministers/ Sectoral Committee on Legal and Judicial Affairs of changing the Draft Protocol to Operationalise the Extended Jurisdiction of the EACJ from the one that had been earlier on adopted from the Zero Draft Protocol at its meetings of 24th November 2004 and later on 8th July 2005, is in itself an infringement and a contravention of the fundamental principles and doctrine of good governance including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights

which are enshrined in the aforementioned Articles of the Treaty in particular regard to the peaceful settlement of disputes.

c) The Secretary General should, for and on behalf of the Partner States, be cited for contempt of Court for the abovementioned actions.

d) The Secretary General should be ordered to take action to expeditiously implement the judgment in Reference No. 1 of 2010 and to pay the US$ 52,534.10 adjudged taxed costs.

e) Costs of the Reference be provided for.

THE RESPONDENT'S CASE

19.In a brief response filed on the 14th November, 2012 and in the accompanying affidavit sworn on behalf of the Respondent by the then Deputy Secretary General in charge of Political Federation, Dr. Julius Tangus Rotich, the Respondent admits that the Court delivered judgment against him in **Reference No. 1 of 2010** and in the ensuing **Taxation Cause No.1 of** 2011, costs were taxed and he was to pay US$ 52,534.10, but states that:

a) being aggrieved and dissatisfied with the said judgment, he filed **EACJ Application No. 9. of 2012—The Secretary General of The East African Community vs- Hon. Sitenda Sebalu** under Rules 4, 84 and 85 of the EACJ Rules of Procedure, for leave to appeal out of time; and

b) that the said application was yet to be heard and determined by the Court.

20. The Respondent avers that, pending the determination of the appeal process he had commenced, he cannot be condemned for:

a) Contempt of court or infringement of Articles 38 and 44 or any of the stated Articles of the Treaty; or

b) for having abused his role by conducting public affairs outside the law as alleged by the Applicant in paragraphs 1, 4 and 6 of the Reference.

21. Lastly, the Respondent avers that the pleadings contained in paragraphs 2,3,5 and 7 of the Reference are irrelevant to the matter before the Court and to that extent, render the Reference frivolous and vexatious and an abuse of the Court process.

22. Wherefore, the Respondent contends that the need for granting of the orders sought in the Reference does not arise and prays that the Reference should be dismissed with costs.

23. It should be noted however that the Court heard the application on 22nd January, 2013 and dismissed it in the ruling delivered on the 14th February 2013 and so no further proceedings on appeal are pending at all.

POINTS OF AGREEMENT

24.At the close of the pleadings, the parties held a Scheduling Conference on the 5th of February 3013, pursuant to Rule 53 of the Rules of Procedure and the points of agreement were that:

(a) There is a judgment delivered by the EACJ in Reference No.1 of 2010, Sitenda Sebalu v The Secretary General of the East African Community and 3 others.

(b) *There is a taxation ruling in Taxation Cause No. 1 of 2011 arising out of Reference No.1 of 2010 ordering the Respondent to pay the Applicant US $ 52,534.10.*

(c) ***There is <u>the Draft Protocol to Operationalise the Extended Jurisdiction of the</u> <u>East African Court of Justice</u> that was adopted from the Zero Draft Protocol in the Council of Ministers' Meetings held on the 24th November 2004 and later 8th July 2005 and later considered in subsequent meetings.***

(d) ***The Council of Ministers/ Sectoral Committee on Legal and Judicial Affairs in its meetings held on the 2nd-3rd November 2011 and subsequently on the 12th-14th March 2012, revised the said Draft Protocol and excluded the Appellate jurisdiction and Human Rights jurisdiction.***

(e) ***There is a Resolution of the EALA made on April 26th 2012 and a Communiqué of the 10th Extraordinary Summit of the EAC Heads of State dated 28th April 2012 urging the Council of Ministers to expedite the amendments of Article 27 of the Treaty and extend the jurisdiction of the EACJ to include among others Crimes Against Humanity.***

(f) ***That the Court has jurisdiction to determine the Reference.***

ISSUES

25. Distilled from the above pleadings, the parties framed the following issues for determination by the Court:

1)Whether the Council of Ministers/ Sectoral Committee on Legal and Judicial Affairs, in its meetings held on the 2nd to 3rd November, 2011 and subsequently on the 12th to 13th March 2012, by revising the Draft Protocol to Operationalise the Extended Jurisdiction of the EACJ that was adopted from the Zero Draft Protocol in the Council of Ministers meetings held on the 24th November 2004 and later on the 8th July 2005; and later considered in subsequent meetings; and excluding the Appellate Jurisdiction and Human Rights Jurisdiction of the Court that was confirmed in Reference No. 1 of 2010- Sitenda Sebalu vs The Secretary General of the East African Community and 3 Others is an act of contempt of court.

2) Whether the action of the Council of Ministers/ Sectoral Committee on Legal and Judicial Affairs of changing the Draft Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice that was adopted from the Zero Draft Protocol in the Council

of Ministers' meetings held on the 24th November 2004 and later on the 8th July 2005; and later considered in subsequent meetings; is in itself an infringement of the Fundamental Principles and a contravention of the doctrines and principles of good governance including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights which are enshrined in the aforementioned Articles of the Treaty in particular with regard to the peaceful settlement of disputes.

3) Whether the Resolution of the East African Legislative Assembly made on the 26th April 2012 and the Communiqué of the 10th Extraordinary Summit of the Heads of State dated 28th April 2012 urging the Council of Ministers to expedite the amendment of Article 27 of the Treaty to include jurisdiction to cover among others, Crimes Against Humanity is binding on the Council of Ministers.

4) Whether the Respondent in delaying and or failing or neglecting to pay the US$ 52,534.10 taxed costs to the Applicant is an act of contempt of court and is in itself an infringement of the Fundamental Principles and a contravention of the doctrines and principles of good governance including adherence to the principles of democracy, the

rule of law, social justice and the maintenance of universally accepted standards of human rights which are enshrined in the aforementioned Articles of the Treaty in particular with regard to the peaceful settlement of disputes.

5) Whether the parties are entitled to the remedies sought.

REPRESENTATION

26. The Applicant was represented by Mr. Bakiiza Chris and Mr. Justin Semuyaba while Mr.Wilbert Kaahwa, the learned Counsel to the Community represented the Respondent. They highlighted written submissions that they had earlier filed.

DETERMINATION OF THE ISSUES BY THE COURT

Issues No. 1 and 4: Contempt of Court

27. It is common ground that the Rereference sets out two separate allegations of contempt under issues 1 and 4, respectively. Under issue No. 1, the alleged contempt arises out of the act of the Council of Ministers of revising the Draft Protocol to exclude the appellate and human rights jurisdiction of the EACJ.The issue is basically, whether it is an act of contempt of the order of the Court in Reference **No.1 of 2010** that quick

action was not taken by the EAC to conclude the Protocol to operationalise the extended jurisdiction of the EACJ under Article 27(2) of the Treaty.

28. The second alleged act of contempt is in respect of delay/failure or neglect to pay the taxed costs to the Applicant. Since they were addressed together by both counsel, we shall also adopt the same order.

Applicant's submissions

29. The thrust of the Applicant's argument on this issue is that in **Ref. No. 1 of 2010,** the Court, under Order number 3 commanded specifically, that quick action should be taken by the EAC in order to conclude the Protocol to operationalise the extended jurisdiction of the EACJ under Article 27 of the Treaty. That the Court should take judicial notice of the fact that the judgment was delivered on 30th June, 2011 and the instant Reference was filed on the 28th of June, 2012.It is that quick action that finally became the source of this Reference because it was close to one year, and in loud silence by the Respondent, that judgment had not been implemented by the Respondent. That instead of implementing the judgement based on the Draft Protocol as per the Court's order, the Council of Ministers have instead revised the said Draft Protocol to exclude the appellate and human rights jurisdiction to the EACJ. That the Court should therefore find that the

act of revising the Draft Protocol that had been confirmed by the Court in its judgment in **Ref. No. 1 of 2010** is an act of contempt of the Court.

30. Regarding the second alleged act of contempt, Counsel for the Applicant submitted that the Ruling was delivered on the 20th January, 2012, but up to the date of filing the Reference, the taxed costs had not been paid by the Respondent. Counsel argued that there was moreover an attempt to deny the Applicant the opportunity to enjoy the fruits of his judgment by filing a belated application for extension of time within which to appeal that was fortunately dismissed by this Court. To drive his point home, Counsel also referred to the letter by the Respondent dated 3rd April, 2013 on the subject stating that the Council had even observed that the settlement of the said costs would set a bad precedent and submitted that there is enough evidence to condemn the Respondent for contempt of the Court in respect of the taxation order as well.

Respondent's submissions

31. In his reply, Mr. Wilbert Kaahwa, referred to several texts and authorities on the meaning of and the law on "contempt" including ***Halsbury's Laws of England, 4th Edition page 284 paragraph 458; Eady and Smith, Sweet and Maxwell , 2005 pages 919-926; Kasturial Laroya***

vs Mityana Staple Cotton Co. Ltd and Another [1958]EA 394, Patel vs Republic, 1969 EA 545;Mutikika vs Baharini Farm Ltd,[1985] KLR 227.

He thereafter invited the Court, in determining the issue, to examine and take into account:

(a) The nature of contempt of court as perceived and propounded in the law ;

(b) The mandate of the Council of Ministers under the Treaty as well as the Respondent's conduct in handling the matter.

32. He argued very strongly, that the Court would, after carrying out the above examination and applying the law and the relevant provisions of the Treaty to the facts of the case, find that the Reference is not only frivolous and vexatious but the alleged contempt was not backed by law or any evidence at all and it should be dismissed with costs to the Respondent.

Decision of the Court on issues 1 and 4.

33. The first issue for determination is whether the failure by the Council of Ministers to implement the order by the Court in **Reference No. I of 2010** amounted to contempt of Court.

The law

34. It should be noted from the outset that, unlike the case of the national courts of Kenya, Uganda and Tanzania for instance, where there are specific provisions under their laws covering instances of contempt, there is no specific provision under the Treaty or in the Rules of this Court that empowers the Court to deal with cases of contempt. However, we are of the considered view that the Court has inherent power to deal with such cases under Rule 1(2) of its Rules of Procedure, which provides that:

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

35.According to **Halsbury's Laws of England,(supra):**

"it is a civil contempt <u>to refuse or neglect</u> to do an act required by a judgment or order of the court <u>within the time specified</u> in that judgment, or to disobey a judgment or order requiring a person to abstain from doing a specific act." (Underlining is added for emphasis).

36. Further, according to case law, it is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until it is discharged. The

uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.(See***: Hadkinson v Hadkinson [1952] All ER 567).***

37. In ***LC Chuck and Cremier [1896] ER 885,*** it was held that a party who knows of an order whether null or void, regular or irregular cannot be permitted to disobey it. That it would be dangerous to hold that the suitors or their solicitors, could themselves judge whether an order was null or valid- whether it was regular or irregular. That the course of a party knowing of an order which is null or irregular and who might be affected by it is plain. He should apply to the Court that it might be discharged. As long as it exists, it must be obeyed.

38. It follows from the above authorities that the position of the law is clear; as long as court orders are not discharged, they are valid and since they are valid, they should be obeyed. That being the case, the only way in which a litigant can obtain reprieve from obeying a court order before its discharge is by applying for and obtaining a stay. As long as the order is not stayed, and is not yet discharged, then a litigant who elects to disobey it does so at the risk and pain of committing contempt of court.

39. To prove contempt, the complainant must prove the four elements of contempt, namely:

1)The existence of a lawful order;

2) The potential contemnor's knowledge of the order;

3) The potential contemnor's ability to comply; and

4) The potential contemnor's failure to comply.

(see: **Wikipedia, the free encyclopedia).**

40. The standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, and almost, but not exactly, beyond reasonable doubt. The jurisdiction to commit for contempt should be carefully exercised with the greatest reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor.(See:**Mutitika v Baharani Farm Ltd (supra)).**

41. The judgment in Reference **No. 1 of 2010** was delivered on the 30th June, 2010. The Respondent admits that he was fully aware of it since he was a party to the proceedings. This Reference was filed on the 28th of June, 2012. That was nearly one year after the date of judgment and the order was to the effect that "3… ***quick action should be taken by the***

East African Community in order to conclude the protocol to operationalise the extended jurisdiction of the East African Court of Justice."

42. It is not disputed that to date, the judgment has not been implemented by the Council of Ministers. It is also an agreed fact that the judgment was confirming the Draft Protocol that had been adopted from the Zero Draft Protocol by the Council of Ministers in their meetings held on 24th November, 2004 and later on the 8th July, 2005 and considered in subsequent meetings as well.

43. The Court notes further that both parties agreed that the Council of Ministers/ Sectoral Committee on Legal and Judicial Affairs in its meetings held from 2nd to 3rd November, 2011 and subsequently from the 12th to the 14th of March, 2012, revised the said draft and excluded the appellate and human rights jurisdiction therefrom.

44. Apart from that, evidence was adduced by the Applicant and it is also in the public domain that the East African Legislative Assembly (EALA) passed a Resolution on the 26th April, 2012 that was welcomed by the Council of Ministers as well as the Summit of the Heads of States, at its 10th Extraordinary Summit , in the Communiqué dated 28th April, 2012,

urging the Council of Ministers to expedite the amendment of Article 27 of the Treaty to extend the jurisdiction of the EACJ to include among others, Crimes against humanity.

45. Evidence has also been availed to this Court, and it is not denied by the Respondent that the latest version of the Draft Protocol on the extended jurisdiction of the EACJ that the Council of Ministers came up with actually excludes the appellate jurisdiction that was the subject of **Reference No 1 of 2010.**

46. With respect to the taxed costs, there is also no dispute that the Registrar granted the order on the 20th January, 2012 and that it is still outstanding.

47. However, the record shows that there was indeed, an attempt by the Respondent to vide **EACJ Application No.9 of 2012** filed on the 10th July 2012, to seek for extension of time to file an appeal against the judgment in Reference No. 1 of 2010.The record further shows that the Court heard the said Application on 22nd January, 2013 and dismissed it on the 14th February, 2013 with costs to the Applicant for lack of merit. The record also shows that the Applicant filed the instant Reference on the 28th June,

2012. Therefore, at the time of filing the instant Reference, **Application No. 9** of **2012** was pending determination by the Court.

48. The question then arises as to whether it is sufficient answer to an allegation of contempt if there is a pending appeal process in respect of the judgment from which the alleged contempt arises. Our view is that it does not, in the absence of a stay of execution; a court order must be obeyed. (See: ***Hadkinson v Hadkinson*** supra). In the premises, the Respondent cannot rely on that Application as a sufficient justification for delaying the implementation of the Judgment as he sought to do in his response to the Reference

49. As earlier stated, in the instant case, there is no order of stay of execution to prevent the Applicant from enforcing the orders nor have the orders been discharged. This means that the judgment of the Court in Reference **No. 1 of 2010** remain undischarged and it must be obeyed. The same thing applies to the taxation order in Reference No.1 of 2011, arising therefrom. In the absence of any plausible explanation, the Court holds that disobedience of those orders, which are still in force, constitutes contempt of court.

50. From the above, we find that the Reference is not frivolous and vexatious as Counsel for the Respondent alleged, because the Applicant has proved to the required standard the existence of two lawful orders of the court, the knowledge by the Respondent and the Council and their failure to comply with the said orders.

51. Moreover, under Article 38 (1) of the Treaty:

"(3) ***A Partner State or the Council shall take, without delay, the measures required to implement a judgment of the Court."*** ***(***Underlining is provided for emphasis.)

52. The language of the Article is plain and unambiguous. The object and purpose of Article 38(3) of the Treaty is clear. It is to ensure that the orders of the Court are not issued in vain.

53. Although the Applicant in the Reference and the submissions did not seek any specific penalty for the alleged contempt, we shall at the end of this judgment make an appropriate order to that effect.

Accordingly, we answer issues No. 1 and 4 in the affirmative.

Issue No. 2: ***Whether the act of changing the Draft Protocol is an infringement of the Articles of the Treaty cited therein.***

Applicant's submissions

54. Counsel for the Applicant submitted that the act of changing the Draft Protocol that had earlier been adopted from the Zero Draft Protocol was an infringement of the Fundamental Principles and a contravention of the doctrines and principles of good governance including adherence to the principles of democracy, ***the rule of law,*** social justice ***and the maintenance of universally accepted standards of human rights*** *which are enshrined in the aforementioned Articles of the Treaty in particular with regard to the peaceful settlement of disputes.*

55.His main argument is that the rule of law requires that public affairs are conducted in accordance with the law and decisions of court. According to Counsel for the Applicant, the bone of contention is that the Draft Protocol that was laid before Court in the **Sitenda Sebalu** case is different from the ones the Council of Ministers developed in their meetings of 2nd to 3rd November, 2011 and subsequently 12th to 14th March, 2012, as they went ahead, under the guidance of the Respondent, to craft amendments to the original Protocol and excluded the appellate and human rights jurisdiction of the EACJ. Counsel argued that this is contrary to the undertaking by the Partner States under Article 27(2) that:

"2. The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction".

56. According to Counsel, the Court was alive to this fact in the ***Sitenda Sebalu*** case where it noted that the extended jurisdiction did not come as an afterthought and it held inter alia, that, the delay in extending the jurisdiction of the EACJ not only holds back and frustrates the conclusion of the Protocol but also jeopardizes the achievement of the objectives and implementation of the Treaty and amounts to an infringement of Article 8 (1) (c) and contravenes the principles of good governance as stipulated by Article 6 of the Treaty. That this is the very reason the Applicant has come back to the Court to ensure implementation of that decision.

57. Counsel asserted that judgments of the Court ought to be accepted by the Partner States and the Council of Ministers immediately. This is the clear intention of Article 38 of the Treaty and failure to accept the judgment of the Court is a violation of Article 38 of the Treaty.

Respondent's submissions

58. Learned Counsel for the Respondent contended that the act of changing the Draft Protocol was not an infringement of the fundamental principles and doctrines laid down in the Treaty at all.

59. According to Counsel, it is important to put both the law and the Council of Ministers' implementation of that law in proper perspective. The relevant provision is Article 27(2). His contention is that it is important first of all, to note that the Treaty accords the Council of Ministers as the Community policy organ, latitude "***to determine"*** the suitable jurisdiction.

60.He invited the Court to interprete, in terms of **Article 31 of the Vienna Convention on the Law of Treaties, 1969,** Article 27(2) in good faith and in accordance with the ordinary meaning to be given to the terms of the Treaty in their context. He then went on to argue that if the Contracting Parties to the Treaty intended to donate unrestricted, though desired jurisdiction instantly, they would have provided so clearly and without any ambiguity. That contrary to the Applicant's often repeated assertions, it is not legally tenable to allege, as he does, that the Council of Ministers/ Sectoral Council on Legal and Judicial Affairs are acting contrary to their obligations as far as:

(a) the implementation of Article 27(2) of the Treaty is concerned; or

(b) in developing the relevant protocol from a zero stage onto other suitable stages.

61. Counsel drew the Court's attention to the fact that the Court in **Reference No.1 of 2010,** took cognizance of the role and the activities undertaken by the Council of Ministers in implementing Article 27(2). He pointed out that the Court did not fault the Council of Ministers for developing the protocol in a manner inconsistent with the Treaty as alleged by the Applicant. The Court only faulted the delay in finalizing the protocol.

62.Counsel contended further, that the Applicant cannot be heard to merely plead that the systematic development of the protocol by the relevant organs of the Community is in itself an "infringement of the fundamental principles and a contravention of the doctrines and principles of good governance including adherence to the principles of democracy, ***the rule of law,*** social justice ***and the maintenance of universally accepted standards of human rights"***. That this allegation must be proven based on evidence and legal tenets.

63. Lastly, Counsel submitted that there is a dearth of relevant authorities in the administrative and adjudicatory handling of allegations of the type the Applicant has pleaded. However, for purposes of persuasive authority, he

drew the Court's attention to the assertion in **Shelton D: Remedies in International Human Rights Law, Oxford University press, 1999, PAGES 38-90, 183-195;** to the effect that in pressing claims of abuse of fundamental rights, pleas must be specific and certain, for purposes of facilitating proceedings. That therefore to the extent that the Applicant's pleadings and submissions on this issue are wide, generalized and mainly arise out of mere conjecture, the allegation is not proven.

Decision of the Court on issue No. 2

64. We have perused the pleadings drawn and filed by learned Counsel for the Applicant and we find that they are indeed longwinded and general. The Applicant cites about eighteen Articles of the Treaty as the basis of his Reference. However, the Applicant does not demonstrate how each one of them was infringed in the pleadings. It is only in the submissions that Counsel for the Applicant makes an effort to show that the alleged acts may have infringed Articles 6(d), 7(2), 8(1) (c) ,38 and 44 of the Treaty. The submissions of Counsel for the Respondent has merit to that extent.

65.We are further in agreement with Mr. Kaahwa as far as the interpretation of Article 27(2) *vis -a- avis* the functions of the Council of

Ministers under Article 14 of the Treaty. The operative words in Article 27(2) is:

"(2).. jurisdiction as will be <u>determined</u> by the Council at a suitable date."

66. It is clear from the language of Article 27(2) that the Contracting Parties did not confer an unrestricted jurisdiction on the Court. They left the role of determining the jurisdiction of the Court to the Council of Ministers as the policy organ of the Community under Article 14 of the Treaty. Indeed it is not for the Court to dictate to the Council of Ministers how to carry out its functions under the doctrine of separation of powers. That is why, for instance, the Court in Reference **No.1 of 2010**, did not criticize the Council for changing the Zero Draft, but only faulted the Council for delaying the conclusion of the protocol for the extended jurisdiction of the Court. Under Article 23, the role of the Court as the judicial body of the Community,is to ensure adherence to law in the interpretation and application and compliance with the Treaty.

67. Further, it is the view of this Court that the Zero Draft was still work in progress, and therefore, the Council reserved the right to make any alterations it deemed appropriate during the negotiation process. The

Council cannot for that reason be faulted for violation of any provision of the Treaty in the process of carrying out its functions under the Treaty.

68. In any event, until the Protocol is concluded under Article 151 of the Treaty, its contents cannot be known. Therefore, whether the Protocol will be in conflict or not with the said Article 27(2) is speculative and a decision by the Court in that regard will be premature. A zero Protocol and a Draft Protocol cannot in the circumstances be placed before this Court for interpretation, as the Applicant's Counsel would like this Court to do.

For the above reasons we answer issue No. 2 in the negative.

ISSUE NO.3: ***Whether the Resolutions of EALA and the Summit Decisions are binding on the Council of Ministers.***

69.This issue, with due respect to the parties, was smuggled into the Reference. It was not part of the grounds of the Reference. Nevertheless we shall deal with it since both parties have addressed us on it. It has to do with the Resolution of the EALA made on the 26th April, 2012 and the Communiqué dated 28th April, 2012, issued by the Heads of States at their 10th Extraordinary Summit urging the Council of Ministers to expedite the amendment of Article 27 of the Treaty and extend the jurisdiction of the Court to cover Crimes Against Humanity.

Submissions by Applicant

70.Counsel for the Applicant submitted that both the EALA Resolution and the Communiqué are binding on the Council of Ministers. He relied on the case of ***Calist Andrew Mwatela and 2 Others v EAC ; EACJ Application No. 1 of 2005*** to support his position***.***

Submissions by Respondent

71.Counsel for the Respondent had the same view. The thrust of his submission is that, on the basis of the provisions of the Treaty (in respect of the responsibilities of the Summit and its modus operandi) and comparative assessment and practice in the European Union and the African Regional Economic Communities, was that the EAC Summit can direct the Council and the decisions of the Summit are binding on the Council. Accordingly, the decision made by the Summit at the 10th Extraordinary Summit regarding the Resolution of the EALA on the extension of the EACJ is binding on the Council of Ministers. He relied on the case of ***Kahoho v The Secretary General of the East African Community: EACJ Ref. No. 1 of 2012*** to buttress his argument on the point***.***

Decision of the Court

72. As stated earlier, this was a non- issue. The Summit is the highest organ in the institutional framework of the Community as established under Article 9 of the Treaty. Under Article 11(1), it is charged with the overall supervisory function of giving:

" ***general directions and impetus as to the development and achievement of the objectives of the Community.***"

73.As Mr Kaahwa rightly pointed out, the Summit is therefore charged with giving general directions and impetus on such key milestones in the systematic establishment of the integral parts of the Community and ultimately, the political federation. The Court also notes that supremacy in institutional arrangements are a common feature of international organization law. It is a practice that makes the European Commission, for instance, the principal executive arm of the European Union (EU) responsible for:

(a) generating new laws and policies, overseeing their implementation, managing the EU Budget, representing the EU in the international negotiations and promoting the interests of the EU as a whole; and

(b) guiding the EU Council of Ministers in making decisions on EU law and policy; and

(c) proposing draft laws to the EU Council and Parliament.

74. The Court further notes for comparative purposes that the Summit of the Heads of States in the other Regional Economic Communities such as the Common Market For Eastern and Southern Africa (COMESA), the South African Development Community(SADC) , play a similar role.

75. The binding nature of the Summit decisions, directives and Resolutions on the Council is thus not debatable.

We accordingly answer this issue in the affirmative as well.

ISSUE NO. 5: *Whether the Applicant is entitled to the Remedies sought.*

Applicant's Submissions

76. Counsel for the Applicant contends that the Applicant is entitled to the remedies sought.

Respondent's submissions

77. On the Contrary, Counsel for the Respondent submits that the Applicant's entitlement to the remedies sought depends on proof of his allegations. He submits that the requisite standard of proof has not been

attained by the Applicant as far as the pleadings and submissions are concerned.

78. Counsel further submits that, without derogation from the above submissions, the Court ought to appreciate that the EAC is an international organization, established by an international Agreement of more than two State Parties, of which he is the Principal Executive Officer. As such, the EAC has immunity from suits and legal process. (See: Halsburys ***Laws of England, 4th Edition at page 608 paragraph 915.)***

79.He also submits that Article 73(1) specifically gives immunity to the Respondent as an employee of the EAC from legal process in respect to omissions or acts performed by him in his official capacity. In addition, Article 138 (1) provides that the Community shall enjoy international legal personality, while Article 138 (3) states that each of the Partner States shall accord to the Community and its officers the privilege and immunity accorded to other similar international organizations in its territory.

80. He further asserted that, the EAC Headquarters Agreement grants the EAC Immunity from judicial, executive, legislative and administrative processes. As stated in ***Beer Und Regan v Germany, Appl. 28934/94, European Court of Human Rights,*** this emanates from recognition by

sovereign states of the fact that ***"the attribution of those privileges and immunities is an essential means of ensuring the proper functioning of such organizations free from the unilateral interference by individual governments."***

81. The main privileges and immunities typically enjoyed by international organizations and in the case of the EAC are: immunity from jurisdiction and execution, the inviolability of premises and archives, currency and fiscal privileges and freedom from communication.

82. That in light of this international law position of which the Applicant's Counsel is aware, no execution process can be levied upon the EAC by virtue of the Diplomatic Privileges it enjoys.

83. It is the Respondent's submission that based on the arguments set forth hereinabove, the Applicant is not entitled to the remedies he seeks.

The Decision of the Court

84. From the pleadings and the submissions, the Applicant seeks declarations and orders that:

(a) That the failure of the Council of Ministers/ Committee on Legal and Judicial Affairs to implement the judgment of the Court in

Reference No. 1 of 2010 and Taxation Cause No. 1 of 2011, is an infringement of Articles 7(2),8(1)(c),13,14,15,16,20,21,22,23,27(1),30,38 and 44 of the Treaty.

b) The action by the said Counsel of Ministers/ Sectoral Committee on Legal and Judicial Affairs of changing the Draft Protocol to Operationalise the Extended Jurisdiction of the EACJ from the one that had been earlier on adopted from the Zero Protocol at its meetings of 24th November 2004 and later on 8th July 2005, is in itself an infringement and a contravention of the fundamental principles and doctrines of good governance including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights which are enshrined in the aforementioned Articles of the Treaty in particular regard to the peaceful settlement of disputes.

c) The Secretary General should, for and on behalf of the Partner States, be cited for contempt of Court for the abovementioned actions.

d) The Secretary General should be ordered to take action to expeditiously implement the judgment in Reference No. 1 of 2010 and to pay the US$ 52.534.10 adjudged taxed costs.

e) Costs of the Reference be provided for.

84. We have considered the submissions of both learned counsel and taken into consideration the pleadings and evidence on record. In light of our findings and conclusions on the issues herein, we make the following declarations and orders:

(a) The failure by the Council of Ministers/ Sectoral Committee on Legal and Judicial Affairs to implement the Judgment of the Court in Reference No 1 of 2010 and Taxation Cause No. 1 of 2011 is an infringement of Article 38(3) of the Treaty and a contempt of Court.

(b) Prayer (b) is disallowed.

(c) Prayer (c) is granted. However , because the Respondent has not flagrantly disrespected the order since he has made an effort to convince the Council to pay the taxed costs to the Applicant as per his letter referred to earlier on in this judgment, and considering the unique circumstances of this case, therefore, the Court hereby grants the Respondent the opportunity to purge the contempt with respect to

the taxed costs and to pay the same within three (3) months from the date of this order.

(d)Prayer (d) is granted but only in respect of the judgment in Reference No.1of 2010.

(e) Prayer (e) is also granted, since this Reference was a result of the failure by the Partner States to implement the Court's orders. The Respondent shall pay the costs of the Reference to the Applicant.

It is so ordered.

Dated at Arusha this…..day of November, 2013

…….
Jean Bosco Butasi
Principal Judge

……..
Mary Stella Arach–Amoko
Deputy Principal Judge

……

John Joseph Mkwawa
Judge

……..

Isaac Lenaola

Judge

……
Faustin Ntezilyayo
Judge