IN THE EAST AFRICAN COURT OF JUSTICE
APPELLATE DIVISION AT ARUSHA

(Coram: Emmanuel Ugirashebuja, P.; Liboire Nkurunziza, V.P; Edward Rutakangwa, Aaron Ringera, and Geoffrey Kiryabwire, JJ.A)

APPEAL NO. 7 OF 2015

BETWEEN

THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY .....APPELLANT

AND

RT. HON. MARGARET ZZIWA .....RESPONDENT

Appeal from the Ruling and Order of the First Instance Division at Arusha (Monica K. Mugenyi, P.J, Isaac Lenaola, DPJ, Faustin Ntezilyayo, Fakihi A. Jundu and Audace Ngiye, JJ) dated 6th November, 2015 in Reference No. 17 of 2015.

JUDGMENT

A. INTRODUCTION.

1. This is an Appeal by the Secretary General of the East African Community ("the Appellant") against the Ruling of the First Instance Division of this Court ("the Trial Court") whereby the Trial Court overruled with costs the Preliminary Objection taken on behalf of the Appellant to the effect that the Appellant's witnesses in the Reference, who were all members of the East African Legislative Assembly ("EALA"), could not adduce evidence in the Reference without first complying with the Provisions of the EALA (Powers and Privileges) Act, 2003 ("the Privileges Act").

2. Dr. Margaret Zziwa is the Respondent. She was the Applicant in the Trial Court. She is represented in the Appeal by Mr. Justin Semuyaba and Mr. Jet John Tumwebaze.

3. The Appellant is, in this Court, as in the Trial Court, represented by Mr. Stephen Agaba.

B. BACKGROUND.

4. The Respondent is an elected member of EALA from the Republic of Uganda. At all material times during the Reference from which the Appeal arises, she was also the elected Speaker of the EALA.

5. In the Reference, she complained against certain actions and decisions of EALA and its Committee on Legal Rules and Privileges which pertained to investigations against her and a consequential impeachment motion.

6. The Reference was scheduled for hearing before the Trial Court on 8th and 9th September, 2015.

7. On the first hearing day, i.e. 8th September, 2015, the Appellant raised what its Counsel called a 'point of law' to the effect that the Respondent's witnesses, all being members of EALA, could not testify on her behalf without first obtaining approval of the EALA as per Section 20 of the Privileges Act.
8. The Trial Court took the view that the point of law raised by the Respondent was a preliminary objection and that the same had been improperly raised before the Trial Court as notice thereof had not been given in accordance with Rule 41 of the East African Court of Justice Rules, 2013 ("the Rules of the Court").
9. Counsel for the Appellant was aggrieved by the ruling and intimated that he would appeal against it but after listening to some observations from the Trial Court, he apparently relented and agreed that the Court could proceed with the hearing.
10. When the Respondent took the oath to testify, the Appellant's Counsel stood up on what he called an issue for clarification. He requested the Court as a procedural concern before the production of the Respondent's testimony, to ask the witness to confirm whether she had obtained a clearance and leave of the Assembly to appear in Court as a witness as was required under Section 20(1) of the Privileges Act.
11. After some to-ing and fro-ing, the Trial Court asked Counsel for the Appellant to file a formal preliminary objection to which the Respondent would also formally reply.
12. And thus, it came to pass that a Notice of Preliminary Objection dated 8th September 2015, and purportedly made under Rule 1 (2) and Rule 41 (1) of the Rules of the Court and the Orders of the Trial Court issued

on 8th September, 2015, was lodged in the Registry on the self same 8th September 2015.

13. After hearing arguments thereon on the 9th September, 2015, the Trial Court, on the 6th November 2015, held that it would be premature to forestall the Appellant's evidence on the ground that it did not comply with Section 20 of the Privileges Act, without first hearing that evidence, and overruled the objection raised by the Appellant with costs to the Respondent.

C. THE APPEAL TO THE APPELLATE DIVISION.

14. Dissatisfied with the above ruling, the Appellant appealed to this Division. He preferred the following six grounds of Appeal, namely:

    (1) The Honourable Justices of the First Instance Division erred in law and even committed procedural irregularities when they held that since the Respondent had opted to give oral evidence as opposed to evidence by affidavit, the Honourable Justices of the First Instance Division were not able to determine whether the Respondent's evidence falls in the ambit of Section 20 of the East African Legislative Assembly (Powers and Privileges) Act 2003; yet on the record, there are Pleadings, the Affidavit of the Respondent, Documents obtained from the Clerk of the Assembly, upon which the Applicant's (Respondent's) case is grounded.

    (2) The Honourable Justices of the First Instance Division erred in law in misconstruing the provisions of Section 20 (1) of the East African Legislative Assembly (Powers and Privileges) Act, 2003,

by importing new terms in the provision hence leading to a different interpretation and application of the provision.

(3) The Honourable Justices of the First Instance Division erred in law and committed procedural irregularities by over-ruling the Objection when in fact they had established and found that the provisions of Section 20(1) of the East African Legislative Assembly (Powers and Privileges) Act, 2003 are valid and binding on all members and officers of the Assembly.

(4) The Honourable Justices of the First Instance Division erred in law by distinguishing the Clerk from members and other officers of the Assembly and ordered him not only to produce the documents of the Assembly to Court but also appear as a witness without need for special leave of the Assembly contrary to Section 20(1) of the East African Legislative Assembly (Powers and Privileges) Act, 2003; which they had found to be binding on all members and officers of the Assembly.

(5) The Honourable Justices of the First Instance Division erred in condemning the Appellant to pay costs yet they had made a finding that the Appellant's Objection in respect of Section 20 (1) of the East African Legislative Assembly (Powers and Privileges) Act, 2003 is a valid and applicable law which was the Appellant's point of objection.

(6) The Honourable Justices of the First Instance Division erred in law and even committed irregularities by issuing orders on matters that were not raised in the Objection or had been abandoned by the Parties in the course of hearing.

15. The Appellant asked the Court:

(a) To allow the Appeal.

(b) To vary the Ruling and Order of the Trial Court on the issues stated above.

(c) To award the costs of the Appeal and of the Trial Court to the Appellant, or, in the alternative, to order that the costs abide the result of the Reference.

16. At the Scheduling Conference of this Appeal on 24th February, 2016, the Appellant abandoned grounds (4) and (6) of Appeal. And the remaining four grounds of Appeal were, with the concurrence of both Counsel, consolidated into the following three issues for determination:

(1) Whether or not the objection raised in the Trial Court was a true Preliminary Objection.

(2) Whether or not the Trial Court erred in law and/or committed procedural irregularities in overruling the objection raised.

(3) Whether or not the Trial Court erred in condemning the Appellant to pay costs to the Respondent.

17. After the Scheduling Conference, the Parties, in compliance with this Court's Directives, filed their Written Submissions.

18. On the 9th of May 2016, both parties appeared before the Court and highlighted those Written Submissions.

D. THE COURT'S ANALYSIS AND FINDINDS.

19. Having read the record of Appeal with care and considered the Written Submissions on behalf of the Parties and the highlights thereof at the

hearing, we think it just and meet to consider this Appeal on an issue by issue basis. We do so below.

Issue No. 1: Whether or not the Objection raised in the Trial Court was a true Preliminary Objection.

20. The point of departure here must be an elucidation and understanding of what a true preliminary objection is in law.
21. Both Counsel cited the same judicial authorities for the meaning of a Preliminary Objection. The *locus classicus* in the Municipal Systems of Kenya, Uganda and Tanzania is, without doubt, **Mukisa Biscuit Manufacturing Company Ltd v. West End Distributors Ltd** [1969] E.A. 696.

In that case, Law, J. A. defined a Preliminary Objection thus:

> "*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 pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to 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 at p.170, Sir Charles Newbold, P. with his characteristic force and clarity deplored "*the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection*". He continued:

"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 by the other side 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 improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice must stop."

The Judgment of the Tanzania Court of Appeal in **Hezron M. Nyachij v Tanzania Union of Industrial and Commercial Workers & Another** [Civil Appeal No. 71 of 2001] was also invoked. After invoking the authority of **Mukisa Biscuit Manufacturing Co. Ltd** (supra) the Tanzania Court of Appeal expressed its view on the object of a preliminary objection thus:

"The aim of a preliminary objection is to save the time of the Court and of the parties by not going into the merits of an application because there is a point of law that will dispose of the matter summarily."

In similar vein, the same Court in **Selcom Gaming Limited v Gaming Management (T) Ltd & Another,** [Civil Application No. 173 of 2005], said:

"A preliminary objection must...raise a point of law based on ascertained facts and not evidence. Secondly, if the objection is sustained, that should dispose of the matter... A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but on stated legal, procedural or technical grounds. Any

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alleged irregularity, defect or default must be apparent on the face of the application."

22. We desire to say at this stage that decisions of the Courts of the Partner States are not binding on this Court. They are nonetheless entitled to great respect, and they may be persuasive where they determine procedural issues akin to those submitted for the determination of this Court. And, of course, that is particularly so where those decisions are of the Partner States highest Courts. Be that as it may, we hasten to add that where a matter in contention has in the past received the attention of the East African Court of Justice (EACJ) it is in the interest of developing this Court's jurisprudence that parties cite the authority of the EACJ and other regional and international courts on such points. In that regard, the EACJ has, as apparent below, pronounced itself with clarity on what constitutes a preliminary objection.

23. In **Attorney-General of Kenya v. Independent Medical Legal Unit** [EACJ, Appeal No. 1 of 2011], this Court cited with approval the exposition of the law by Law, J. A. and Newbold, P. in **Mukisa Biscuit** case (supra) and said the Court must avoid "treating, as preliminary objections, those points that are only disguised as such; and will instead treat as preliminary objections, only those points that are pure law; which are unsustained by facts or evidence, especially disputed points of fact or evidence or such like". And in **The Attorney-General of Tanzania v. African Network for Animal Welfare (ANAW)** [EACJ Appeal No. 3 of 2011], the Court opined that matters which:

"*involved the clash of facts, the production of evidence and the assessment of testimony... cannot and should not be treated as a preliminary point.*"

24. In our opinion, the above authorities lead us to the conclusion that a preliminary objection can only be properly taken where what is involved is a pure point of law, which if argued successfully, would summarily dispose of the suit or Application before the Court (that is to say, without a hearing on the merits). And in point of procedure, Rule 41 of the Court Rules is clear. It provides:

"(1) A Party may by pleading raise any preliminary objection.

(2) Where a Respondent intends to make a Preliminary Objection he shall, before the Scheduling Conference under Rule 53 of the Rules, give not less than seven (7) days written notice of the preliminary objection to the Court and to the other parties of the ground of that objection."

25. In the instant Reference, the Appellant, in the first instance, took its Preliminary Objection orally at the commencement of the trial without the requisite or any notice at all to the Respondent. The Trial Court correctly held that the point of objection was raised improperly before the Court. In our view, that ought to have been the end of the matter. Fortunately, for the Appellant, lady luck was his companion that day. The Trial Court in its grace, which is codified in Rule 1 (2) of the Court's Rules, allowed him to file a formal objection to the self-same effect to be argued on the morrow. That was done without demur by Counsel for the Respondent.

26. What was the objection filed? It was this:

> *"The Applicant's witnesses (being members or officers of the East African Legislative Assembly) cannot adduce evidence without complying with the provisions of Section 20 of the East African Legislative Assembly (Powers and Privileges) Act, 2003."*

27. And, pray, what is the import of Section 20 of the Privileges Act? The said Community Law provides as follows:

> *"20 (1). Notwithstanding the provisions of any other law, no member or officer of the Assembly and no person employed to take minutes or record evidence before the Assembly shall, except as provided in this Act, give evidence elsewhere in respect of the contents of such minutes or evidence or of the contents of any document laid before the Assembly or such Committee, as the case may be, or in respect of any proceedings or examination held before the Assembly or such Committee, as the case may be, without special leave of the Assembly first had and obtained in writing."*

28. The import of the above provision is clear. No member or officer of the Assembly or minutes taker or evidence recorder can give evidence outside EALA of the contents of any minutes or record of evidence of EALA or of any documents laid before the Assembly or a Committee thereof, or in respect of any proceedings or examination held before that Assembly or such a Committee without the Assembly's special written leave. From the perspective of adjective law (Procedural Law), such minutes, records, documents, proceedings or examinations are privileged evidence. As such, they are inadmissible in any forum other

than the Assembly itself unless the privilege is waived by such Assembly. And the proof of the waiver of the privilege is a written permission from the Assembly. We hasten to add that the witnesses themselves are not incompetent to testify. They are competent. It is the specified material from EALA they may seek to adduce in evidence which is privileged.

29. It is thus manifestly clear to us that before the sword of Section 20(1) of Privileges Act can be drawn to strike a witness, it is necessary to establish that the witness to whom the sword is pointed, and thus whose evidence is sought to be shut out is (i) a member or officer or staff of EALA; (ii) he or she intends to give evidence of the contents of minutes taken in, evidence given in, documents laid before, or any proceedings, or an examination held before the EALA or any of its Committees; and (iii) he or she does not have written special leave of the Assembly to do so.

30. That being so, was the Preliminary Objection taken by Counsel for the Appellant and overruled by the Trial Court a true Preliminary Objection? Counsel for the Appellant submitted at length that it was because it was a point of law (the interpretation of Section 20 of the Privileges Act), which if determined in the Appellant's favour, may dispose of the Reference as the Respondent's case was built on the foundation of EALA documents as evident from the references thereto in the Statement of Reference and the supporting Affidavit, and without using such minutes, documents and proceeding of the Assembly, the Respondent's case would collapse, and the Court would have no jurisdiction to assess the evidence brought before it without the special leave of the Assembly. He added that the point of law raised was

easily ascertainable from the facts in the Statement of Reference (Pleadings).

31. Counsel for the Respondent, on his part, submitted that the Objection taken was just a "a purported preliminary objection" which could not dispose of the case since no evidence had been adduced at the trial. In his view, the Reference could, in any event, stand as not all the documents relied upon by the Respondent form part of the Assembly or any of its Committee's documentation, and, further, that the Clerk had been ordered by the Court to produce documents which the Court could rely on in determining the case even if the Respondent's witnesses were barred from testifying.

32. Having considered the rival Submissions, we have come to the conclusion that the Objection taken by Counsel for the Appellant was not a true preliminary objection. It was just but a purported or pretended preliminary objection because it was not founded on a pure point of law which, if upheld, would have summarily disposed of the Reference before the Court. We say so for the following reasons. First, the point taken was not a pure point of law. It appertained to the production and the admissibility of evidence. The Objection taken could not have been determined either way without first examining the evidence. The reason for that conclusion is this: although it was not in dispute that the Respondent's witnesses were members of EALA, the Trial Court could not have determined whether their evidence offended section 20 (1) of the Privileges Act without first hearing them and determining: (i) whether they or any of them was adducing the sort of evidence which was forbidden to be tendered without special leave of the Assembly; and, (ii) that they or any of them did not have such

leave. Secondly, the point, if upheld, would not have led to a summary disposal of the Reference. This is because the Clerk of the Assembly had, in compliance with the Trial Court's witness summons produced certain documents which the Trial Court would have had to consider during the merits of the case even if the Respondent's witnesses had been debarred by the Trial Court on the basis of the Appellant's Objection. We have deliberately used the expression "led to a summary disposal of the Reference" to disabuse Counsel for the Appellant of the notion that it suffices for a point of law raised to qualify as a Preliminary Objection if such point, if successfully argued, has the possibility (as opposed to the certainty) of disposing of the Reference. That is necessary because Counsel made heavy weather of the word "may" in the exposition of the law by Newbold, J.A. (supra) referred to in paragraph 21 herein above. In our view, the word "may" as used by Newbold, J.A. meant "should" or "must". We are fortified in that view by **MERRIAN-WEBSTER DICTIONARY** (online), which indicates that the word "may" could in law mean "shall" or "must" where the sense, purpose, or policy requires this interpretation." And in **BLACK'S LAW DICTIONARY, 9th Edition,** it is postulated that "in dozens of cases, courts have held may to be synonymous with shall or must." As observed in paragraph 21 above, the purpose of a preliminary objection is to terminate the proceedings without a consideration of the merits thereof and thereby save both the Court's and the parties' time and money. Accordingly, the word "may" cannot but mean "must" in the usage of the same by Newbold, J.A.

33. In the result, we answer issue No. 1 in the negative. The Objection taken by the Appellant was not a true preliminary objection as understood in the jurisprudence of this Court.

Issue No. 2: Whether or not the First Instance Division erred in law or committed procedural irregularities in overruling the Objection raised.

34. It is necessary for a proper appraisal of this issue to set out the rationale for the Trial Court's Decision to overrule the Objection.
35. At paragraph 41 of the Ruling attacked, the Trial Court delivered themselves as follows:

> *"We find that it has not been satisfactorily established before us that the evidence the Applicant intends to adduce before this Court does, in fact, fall within the ambit of section 20 of the EALA (Powers and Privileges) Act. We take the view that it would be premature at this stage to forestall her evidence on the pretext that it does not comply with the provisions of section 20 of the said Act. We do, nonetheless reiterate our position herein that the said Act is valid Community Law and must be complied with by all witnesses that seek to adduce evidence that fits within the parameters thereof. The only exception in this regard would be the Clerk to the Assembly who, as we have held above, was summoned as a witness in this matter pursuant to a Court order."*

36. Then at paragraph 42, the Court stated:

> *"in the final result, we do hereby overrule the objections raised by the Respondent with costs to the Applicant."*

37. Counsel for the Appellant pointed out that in the Statement of Reference, the Respondent in part (e) thereof disclosed the nature of the evidence she would adduce as being, *inter alia:*

(i) Notice of intention to move the Motion for removal of the Speaker of EALA;

(ii) Motion of a resolution to remove the Speaker of the EALA and a list of the Members of the House who signed;

(iii) A list of the Members on the Committee of Legal Rules and Privileges;

(iv) Three letters withdrawing the signatures from two EALA members of the United Republic of Tanzania dated 29th May 2014;

(v) Ruling of the Speaker dated 4th June 2014;

(vi) Letter by some members of EALA summoning and directing the Clerk of EALA to preside over the Assembly dated 26th November, 2014;

(vii) Letter by Clerk of EALA requesting for advice from CTC dated 26th November, 2014;

(viii) Letter by Clerk to the Speaker suspending her from office dated 26th November, 2014;

(ix) Response by the Speaker dated 27th November, 2014;

(x) Response by the CTC dated 30th November, 2014;

(xi) Letter by the Committee on Legal Rules and Privileges requiring the Speaker to appear before the Committee dated 1st December 2014;

(xii) Letter by the Temporary Speaker, Hon. Chris Opoka, directing the Clerk to convene the Assembly on 17th December, 2014 to consider the Committee Report dated 2nd December, 2014;

(xiii) A list of 17 complaints against Hon. Margaret Zziwa provided by the Committee.

38. He further pointed out that on 12th August, 2015, the Clerk of the Assembly was summoned by the Trial Court and in obedience to such summons availed the following documents:

(i) Hansard Extract (The Proceedings of EALA), 3rd meeting, Wednesday, 26th November, 2014; (See pages 994-998 – Record of Appeal Vol III).

(ii) Report of the EALA Committee on Legal Rules and Privileges on investigation of the complaints raised in the motion for the removal of the Speaker from office (See pages 999-1019 – Record of Appeal Vol III).

(iii) Hansard (The Proceedings of EALA), 55th Sitting, Tuesday, 1st April, 2014; (See pages 1027-1033 – Record of Appeal Vol III).

(iv) Hansard (The Proceedings of EALA), 58th Sitting, Tuesday, 29th May, 2014; (See pages 1034-1052 – Record of Appeal Vol III).

39. Counsel also pointed out that the Reference was supported by the Respondent's Affidavit which also made reference to EALA documents.

40. Counsel for the Appellant submitted that all the above documents are on record as part of the Respondent's evidence, that they were all EALA documents, and, accordingly, there was evidence on record that would have enabled the Trial Court to make a determination that such evidence ran afoul of the provisions of Section 20 of the Privileges Act. He submitted that on this score, the Trial Court committed a procedural irregularity by ignoring the Parties' Pleadings, the Affidavit in support of the Reference and the documents that were supplied by the Clerk of the Assembly and pretended that there was completely no evidence before them to enable them determine whether the Respondent's evidence would fall within the ambit of Section 20 of the said Act because it was glaringly clear that documentary evidence on record squarely fitted the requirement of the said provision of law.

41. Counsel for the Appellant further submitted that the Trial Court overruled the Objection on the basis of an error of law on its part. He submitted that the Trial Court erred in law by misinterpreting the law on admission of evidence relating to Parliamentary Proceedings by holding that the Respondent could use the proceedings as evidence as long as she did not rely on the contents thereof. In his view, the Trial Court did so by adding the word "contents" before the words "in respect of proceedings" in their interpretation, whereas that term is only applicable to minutes or evidence or documents; but not to proceedings.

42. Counsel for the Respondent, on his part, submitted that there was no procedural irregularity on the part of the Trial Court for the reason that since the Respondent had opted to give oral evidence, and she had not done so, the Trial Court was right to find that it could not determine whether her evidence would offend Section 20 of the Privileges Act, by

merely looking at the Statement of Reference and the supporting Affidavit before hearing her. In his view, the Trial Court could not determine whether the documents on record offended the Act before the Appellant and her witness had testified on them.

43. As regards the alleged error of law, Counsel for the Respondent submitted that there was no error of law since the Trial Court had overruled the Preliminary Objection as being premature. He did not specifically answer the Appellant's complaint that the Trial Court misinterpreted Section 20 (1) of the Privileges Act, by erroneously placing the word "content" before the word "proceedings" thereby altering the meaning of the provision.

44. We have now weighed the rival submissions on this issue. Having done so, we have come to the following view of the matter.

45. In **The Attorney-General of Tanzania v. African Network for Animal Welfare (ANAW)** (supra), this Court defined a procedural irregularity as follows:

> "*procedural irregularities are in character, irregularities that attach to the conduct of a proceeding or trial. It comprises such irregularities as the inadmissibility of documents or witnesses, denying a party the opportunity to be present or to be heard at all, hearing a matter in camera (where it should be heard in public and vice versa), failure to notify or serve in time or at all, etc...*
>
> *In short, procedural irregularities attach to a denial or failure of due process (i.e. fairness) of a proceeding or hearing.*"

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46. And in **Angella Amudo v The Secretary General of the East African Community** [EACJ APPEAL NO. 4 of 2014], we held that a Court commits a procedural irregularity when, *inter alia*, it acts irregularly in the conduct of a proceeding, for example by ignoring the party's pleadings.

47. Counsel for the Appellant sought to persuade us that the Trial Court committed a procedural irregularity by ignoring the Respondent's Pleadings (Statement of Reference) and the evidence on record in the form of EALA documents listed in paragraph 37 herein above and thus holding that there was no evidence before the Trial Court to enable it determine whether the provision of Section 20 of the Privileges Act was infringed.

48. We are not so persuaded for the following reasons. The submission is based on a fundamental misconception of what constitutes evidence in a trial. In that regard, we reiterate what we said in **Union Trade Centre Ltd (UTC) v The Attorney-General of Rwanda** [EACJ Appeal No. 1 of 2015]. We held:

> *"It is trite law that pleadings in Court (Whether in the form of Reference, Motion on Notice, Statement of claim or by whatever other name called) are not evidence. They are averments the proof of which is submitted to the trier of fact."*

49. From that exposition of the law, we think that first, it is self-evident that the Respondent's Statement of Reference and the documents enumerated therein as constituting the nature of evidence in support of her case were not evidence. The Trial Court could not, fairly, be accused of committing a procedural irregularity by ignoring such

'evidence' in examining the applicability of Section 20 of the Privileges Act. If we may say so, the Trial Court in so holding had scanned the statute with legal lenses, and what it discerned is unimpeachable. Secondly, as regards her Affidavit in support of the Reference, the Respondent having elected at the Scheduling Conference to offer oral evidence, the said Affidavit could not be regarded as evidence in the case unless and until the Respondent adopted the contents thereof and the same was tendered as an exhibit in the case. Thirdly, as regards the documents produced by the Clerk to the Assembly, the same (though relevant to the Respondent's case) were not and could not obviously be evidence to be taken into account in the determination of whether or not the Respondent's witness should be barred from testifying by virtue of the provisions of Section 20 of the Privileges Act as the Clerk was not one of her witnesses. In the result, the Trial Court did not commit the alleged procedural error, and such charge is devoid of merit.

50. With regard to the alleged error of law in the interpretation of Section 20 of the Privileges Act, suffice it to state that the *ratio decidendi* of the impugned ruling by the Trial Court was that it was not open to the Court to find that the evidence the Respondent and her witnesses would adduce would be an affront to Section 20 of the Privileges Act, without first hearing them. That is a conclusion which this Court itself has reached in paragraph 32 herein above. That being the case, we cannot but find that the Trial Court did not commit any error of law in arriving at its conclusion. The overruling of the objection, we hasten to add, was not based on the prefixing of the word "contents" before the word "proceedings" as alleged. We therefore do not consider it

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necessary to determine whether the alleged interpolation of the word "content" before the word "proceedings" led to an erroneous interpretation of the statute by the Trial Court.

51. In the result, we answer Issue No. (2) in the negative as well.

Issue No. (3): Whether or not the First Instance Division erred in condemning the Appellant to pay costs to the Respondent.

52. As seen in paragraph 36, the Trial Court overruled the Appellant's Preliminary Objection with costs.

53. The Appellant submitted before us that the Trial Court erred in law in condemning the Appellant to pay costs yet the said Court had made a finding that Section 20(1) of the Privileges Act was a valid and applicable law, which was precisely the Appellant's Point of Objection. Counsel for the Appellant cited Rule 111(1) of the Rules of this Court as the basis of this submission. The said Rule provides:

> *"111(1). Costs in any proceedings shall follow the event unless the Court for good reasons otherwise orders."*

54. As we understood Counsel for the Appellant, his complaint was that the Trial Court departed from the Principle stated in Rule 111(1) that costs should follow the event unless for good reason the Court ordered otherwise. In his view, the event was the outcome of the substantive Reference (which had not been determined). Furthermore, according to him, there was no reason to order otherwise because the Appellant had not acted unreasonably to raise a point of law – which the Trial Court found to be a valid one – and there was no substantial success by the Respondent to warrant the award of costs to her.

55. Counsel for the Respondent, on his part, submitted that the Trial Court applied the general principle that costs follow the event and exercised its discretion properly in awarding the Respondent the said costs. In his view, there was nothing on the Trial Court's record to show that the said discretion was not exercised judiciously, or that it was exercised capriciously. In the circumstances, Counsel submitted, this Court should not interfere with the Trial Court's exercise of discretion.

56. We have considered the rival submissions. Having done so, we have concluded that the Appellant's complaint regarding the award of costs was manifestly ill founded. The "event" that Rule 111 (1) refers to is the outcome of the matter before the Court for consideration when the order for costs is made. The matter before the Trial Court at the time the order for costs was made here was not the substantive Reference but the Preliminary Objection taken by the Appellant. The said preliminary objection was overruled, meaning that the Respondent succeeded on the matter. A clearer case of costs following the event could not be found. The Trial Court did not order otherwise.

57. In the result, we answer Issue No. (3) in the negative.

58. Having answered all the issues framed for determination in the negative, we should now proceed to the final disposition of the matter. But before we do so, we feel impelled by the questions asked by the Court at the hearing of this Appeal and the answers thereto by Counsel to pronounce ourselves on procedural propriety.

E. PROCEDURAL PROPRIETY.

59. We begin by acknowledging the force of the judicial aphorism that rules of procedure are a handmaid of justice, and not its mistress. We

also take note of the wise prescription in some of the Constitutions of the Partner States such as those of Kenya, Uganda, and Tanzania which provide that in exercising the judicial function, the Courts of Justice should do substantial justice without undue regard to technicalities of procedure. The aphorism referred to teaches all concerned that rules of procedure are useful tools in the dispensation of justice but they should not be elevated to a fetish above lady justice herself. And the National Constitutions referred to, do not jettison the rules of procedure. What they do is forbid **undue** regard to them in the sacred duty of dispensing justice. We discern nothing in that wisdom which justifies a haphazard approach to lady justice. She ought to be approached properly.

60. In the matter of preliminary objections, Rule 41 of our rules is crystal clear. A party may by pleading raise any point of preliminary objection (sub rule 1). And where a Respondent intends to raise a preliminary objection he shall, before the Scheduling Conference, give not less than seven (7) days written notice of the preliminary objection to the Court and to the other parties of the grounds of that objection. The objective of the rule is equally clear. The Court and the other parties to the suit should not be ambushed by a point of law. Trial by ambush is a judicial taboo. In this case, no notice of the Preliminary Objection was given. The Objection was taken on the day of the hearing. The Trial Court very properly overruled it. That ought to have been the end of the matter. We say so without questioning the exercise of grace by the Trial Court in allowing the Appellant to re-agitate the same preliminary objection (albeit, now dressed as a formal application) the following day.

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61. At the hearing of this Appeal, the Court asked Counsel for the Appellant to point out where in the Record of Appeal the extracted order appealed against was housed. Counsel pointed at pp. 317-335 of Vol 1 of the Record of Appeal. When informed by the Court that what he was referring to was the ruling of the Court, he appeared taken aback. He said that in his long experience in this Court, Appeals have been preferred and canvassed without there being a formal extracted order or decree on record. Now, we do not question Counsel's experience or the truth of his averment from the bar. Suffice it to say this: Rule 88(1) of the Rules of the Court provides that the Record of Appeal shall contain, *inter alia*, the following documents:

"*e) the Judgment or reasoned order;*

f) the decree or order;"

62. Rule 2 defines a decree as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit. And Rule 69 reads as follows:

"*(1) Every decision of the Court shall be embodied in an order.*

(2) An order ...shall be dated as of the date the decision was delivered and shall contain particulars of the case and specify clearly the relief granted or other determination of the case including costs."

63. From the foregoing definitions and provisions, it ought to be clear that there is an ocean of a difference between Judgment and Decree, on the one hand, and Ruling (or reasoned Order) and Order, on the other

hand. The Record of Appeal here did not contain the Order appealed from and was thus incomplete and the Appeal was incompetent.

64. Counsel litigating before the East African Court of Justice are charged not to treat the Court's Rules as decorations on the Treaty (pursuant to which such Rules are made), or on the Rule Book itself.

65. In the instant matter, the Appellant is twice lucky. Lucky that he was given a second bite at the cherry in agitating the so-called Preliminary Objection, and lucky that the Respondent did not apply for the striking out of the Appeal on the ground that it was incompetent.

F. APPEALS ON INTERLOCUTORY DECISIONS AND THE COST OF LITIGATION.

66. As the curtain was falling on the hearing of this Appeal, Counsel for the Respondent referred us to two decisions of the Court of Appeal of Uganda which were not on his list of authorities. The Appellant's Counsel graciously did not object to their production. They are **Hon. Gagawala Nelson G. Wambuzi v Kenneth Lubogo** [Election Petition Application No. 10 of 2010] and the **Returning Officer Kampala & 2 Others v Catherine Naava Nabagesera** [Civil Appeal No. 39 of 1997]. Both decisions dealt with the right of Appeal against interlocutory decisions in election petitions. The Court of Appeal of Uganda held that Section 66 (1) of the Parliamentary Elections Act did not confer a right of appeal from interlocutory orders and, accordingly, none lay in those cases. However, the same Court made it clear in The **Returning Officer Kampala & 2 Others v Catherine Nabagesera** (supra) that a party was at liberty to argue any grounds of appeal related to

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interlocutory orders made in the course of the hearing in an appeal against the final decision on an election petition.

67. The above jurisprudence is not strictly relevant in the East African Court of Justice (EACJ) because Article 35A of the Treaty confers on Parties a right of appeal even from interlocutory decisions. The said provision reads:

> *" 35A. An appeal from the judgment or any order of the First Instance Division of the Court shall be to the Appellate Division on –*
>
> *(a) Points of law;*
> *(b) Grounds of lack of jurisdiction;*
> (c) *Procedural irregularity.*"

68. This provision throws open the door of the Appellate Division to any complaint against any decision of the First Instance Division (whether the decision be final or interlocutory) provided the complaint touches on a point of law, jurisdiction, or procedural irregularity.

69. Be that as it may, we think there is wisdom in the Ugandan Court of Appeal's *obiter dictum* that grounds of appeal related to interlocutory orders may be taken in the appeal against the final decision of the Court. We say so because our experience in this Court shows that a lot of to-ing and fro-ing between the two Divisions of the Court could be avoided, with considerable benefit in the saving of costs and precious judicial time, if parties in the First Instance Division who are aggrieved with its interlocutory decisions could, unless justice would otherwise be

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irreparably damaged, reserve their right of appeal therefrom to the substantive appeal from the final decision of the First Instance Division. This Court commends such a practice. We think its adoption would result in more expedition in the dispensation of justice. Alas, we digress.

G. CONCLUSION.

70. We have said enough in Part D of this Judgment to show that the Appellant has stumbled and fallen in all the three issues presented to the Court for determination.

71. The upshot of our consideration of the Appeal is that –

(a) The Appeal be, and is hereby, dismissed with costs here and below.

(b) The taxation of those costs do abide the conclusion of the Reference on the merits.

It is so ordered.

Dated, Delivered and Signed at Arusha the 27th day of May, 2016.

.....
Emmanuel Ugirashebuja
PRESIDENT

.....
Liboire Nkurunziza
VICE-PRESIDENT

.....
Edward Rutakangwa
JUSTICE OF APPEAL

.....
Aaron Ringera
JUSTICE OF APPEAL

.....
Geoffrey Kiryabwire
JUSTICE OF APPEAL

Certified as True Copy of the Original
.....
The Registrar
East African Court of Justice
DATE: ..... 20 .....