IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

APPELLATE DIVISION

APPEAL NO. 3 OF 2013

(JUDGMENT)

Alcon International Limited.....Applicant

Versus

Standard Chartered Bank of Uganda and 2 Others .....Respondents

DATE: 27.07.15

CORAM

PRESIDING

Hon. Justice Dr. Emmanuel Ugirashebuja	-	The President
Hon. Justice Liboire Nkurunzinza	-	The Vice-President
Hon. Justice James Ogoola	-	Justice of the Court
Hon. Justice Edward Rutakangwa	-	Justice of the Court
Hon. Justice Aaron Ringera	-	Justice of the Court

ASSISTING

Mr. Michael Maghanga	-	Court Clerk
Mr. Juma Fikirini	-	Court Clerk

APPELLANT

Mr. Fred Athuok	-	Counsel

COUNSEL FOR 1st RESPONDENT

Mr. Barnabas Tumusingize	-	Counsel.

(Court commenced at 10.03 a.m.)

Mr. Michael Maghanga: Court in Session. Appeal No. 3 of 2013 between Alcon International Limited and the Standard Chartered Bank of Uganda and 2 Others coming up for delivery of Judgement.

The President (Hon. Justice (Dr.) Ugirashebuja): Good morning Counsel.

Counsels: Morning.

The President (Hon. Justice (Dr.) Ugirashebuja): I can assume that you are the one to introduce the Coram. Go ahead.

Mr. Barnabas Tumusingize: May it please you, my Lords. My Names are Barnabas Tumusingize, I appear for Standard Chartered Bank, my Learned Friend Mr. Fred Athuok appears for the Appellant, Falcon International. My Lords, for the Attorney General of the Republic of Uganda, unfortunately, the Representatives who are here had their luggage stuck in Nairobi because of the issues relating to the flights with the U.S. President so though they are here, they are not robed and that is basically the reason why. But otherwise they are here. For Standard Chartered Bank, the head of Legal and Company Secretary Emily Gakiza and a Representative of Alcon International is also present in Court. My Lords, we are ready to receive the Judgment.

The President (Hon. Justice (Dr.) Ugirashebuja): I will now call upon Justice Ringera to deliver the Judgment on behalf of this Court.

Hon. Justice Aaron Ringera: This is the Judgment of the Court.

JUDGMENT

A. INTRODUCTION

1. The facts of the matter before us are discernible from the record of Appeal and are as below.
2. ALCON INTERNATIONAL LTD (hereinafter "the appellant") was registered and incorporated in Kenya as Company No: C 9646 by the Registrar of Companies at Nairobi in January, 1971.
3. On 21st July, 1994, the appellant entered into an agreement with the National Social Security Fund (NSSF) of Uganda for completion of a partially constructed structure in reinforced concrete within the City of Kampala.
4. According to the Contact, the appellant was to be paid $16,160,000 after the completion of the structure later to be known as "Workers House". A Company known as ALCON INTERNATIONAL LTD (UGANDA) (herein "Alcon Uganda") is the one that carried out the execution of the Contract.
5. On various dates between 11th December, 1997 and 30th April, 1998, NSSF wrote to the appellant giving notice of termination of the Contract due to defaults allegedly committed by Alcon Uganda. After lengthy correspondence between the parties, the Contract was formally terminated on 15th May, 1998.
6. On 30th November, 1998 the appellant sued NSSF in HCCC No. 1255 of 1998, seeking relief for wrongful termination of the Contract. The Court advised the parties to proceed to arbitration of their dispute and they did so.
7. The Arbitrator awarded the appellant a sum of $ 8,858,469.97.
8. NSSF challenged the arbitral award before the High Court but its appeal was dismissed and the arbitral award was affirmed. NSSF then filed Civil Appeal No. 2 of 2004 before the Court of Appeal of Uganda challenging the judgment of the High Court.
9. As a Condition for the stay of execution of the High Court decree pending the hearing and final determination of the appeal by the Court of Appeal, the High Court ordered NSSF to provide a bank guarantee for the decretal amount and interest thereon and costs.
10. The Standard Chartered Bank (herein after "the Bank"), the first Respondent herein, at the request of NSSF provided the requisite guarantee dated 29th October, 2003

undertaking and guaranteeing to pay to the Registrar of the High Court of Uganda (hereinafter "the Registrar"),the third Respondent herein, on account of the appellant, the sum of USD 8,858,469.97 or such other lesser or higher sum as shall have been allowed or determined by the Court of Appeal plus accrued interest at the rate set out in the award or such rate as shall be determined by the Court of Appeal and Costs as ordered or as shall have been ordered by the Court of Appeal on presentation of a Court of Appeal Order or Decree duly sealed and signed and indicating that the Appeal has been finally decided and determined in favour of the appellant, without further assurance or demand within 14 days. The said guarantee was to remain in force for a period of one year subject to renewal for subsequent periods not exceeding one year upon receipt of a written request from the Registrar 15 days before the expiry date until final determination of the appeal by the Court of Appeal. The liability of the Bank would be extinguished by payment to the Registrar of the respective sums of money or upon expiry of the guarantee.

11. The aforesaid appeal was finally decided and determined in favour of the appellant in a Judgment of the Court of Appeal delivered and dated the 25th August, 2009.
12. On 26th August, 2009, the appellant wrote to the Bank enclosing the Judgment of the Court of Appeal and demanding payment of the guaranteed sums to the Registrar and directing the Registrar to forward the said sums to the appellant.
13. On 31st August, 2009, the Bank declined to honour the guarantee and alleged that the said demand ought to be made by the Registrar as opposed to the appellant. It also requested that the decree be attached to the demand.
14. On 2nd September, 2009, and by two letters of the same date, the appellant wrote to the Bank and the Registrar enclosing the decree and requesting both of them to move expeditiously and take immediate action for payment of the due sums within the time limited by the guarantee.
15. While the appellant was awaiting payment of the guarantee, NSSF moved to the Supreme Court of Uganda which in Civil Application No. 20 of 2009, made Orders on 9th September, 2009 staying the execution of the Arbitral Award pending the disposal of an appeal for which notice had already been filed by NSSF and a firm of Advocates known as W. H. Ssentoogo t/a Ssentoogo & Partners. The Supreme Court further ordered the

Applicants before it to deposit a bank guarantee in the name of the Registrar of the Supreme Court in the full amount awarded together with the accrued interest and that the guarantee should also guarantee the payment of taxed costs. The said guarantee was to be issued by the same bank and be in similar form to the guarantee which had been used to obtain a stay in the High Court.

16. On 14th September, 2009, NSSF wrote to the Bank informing it of the Supreme Court's Order of Stay of execution of the Court of Appeal Judgement and the requirement for a fresh guarantee. The Bank was further informed by NSSF that the existing guarantee had been overtaken by events and was requested to cancel the same in favour of a fresh guarantee in favour of the Registrar of the Supreme Court.
17. On 21st December, 2009 the Bank in compliance with the instructions of NSSF issued a fresh guarantee in favour of the Registrar of the Supreme Court in the total amount of $ 13,360,874.97 as per Supreme Court Orders.
18. While the matter was pending for determination in the Supreme Court, the appellant moved to the First Instance Division of this Court by way of reference No. 6 of 2010 dated 20th August, 2010.
19. While the reference was pending determination in the First Instance Division, the Supreme Court of Uganda on 8th February, 2013 delivered its judgment and ordered that (i) the arbitral award and the decision of the High Court be set aside, (ii) that the Judgment of the Court of Appeal be similarly set aside, and (iii) HCCC No. 1255 of 1998 be returned to the High Court for trial afresh. The Supreme Court reasoned that the award was made in the absence of a cause of action against the appellants therein and that it was obtained illegally and contrary to public policy and that HCCs No. 1255 of 1998 was wrongly referred to Arbitration.

B. <u>THE REFERENCE TO THE FIRST INSTANCE DIVISION.</u>

20. In the reference, the appellant sued the Bank as the 1st Respondent, The Attorney-General of Uganda for and on behalf of the Government of Uganda (hereinafter referred to as "The Attorney-General") as the 2nd Respondent and the Registrar as the 3rd Respondent.

21. As against the Bank, the appellant averred that it was in breach of its duties as a reputable bank in failing to honour the guarantee dated 29th October, 2003.
22. As against the Registrar, the appellant averred that he was in breach of his duties as a public officer by failing to make any or any timely demand for payment of the due sums under the subject bank guarantee.
23. The appellant further averred that it wrote on several occasions to the Chief Justice of Uganda on the stalemate but there was not a single response from the Chief Justice thereby signaling a failure of prompt justice to trading persons from the Republic of Uganda and, accordingly, the Attorney-General of Uganda, as the Principal Legal Advisor to the Government of Uganda was fully responsible for such failure.
24. The appellant further averred that by virtue of the aforesaid breaches, the Respondents were in breach of the spirit and letter of the Protocol on the establishment of the East African Common Market (hereinafter "the Common Market Protocol") and in particular Article 29 thereof on the protection of cross-border investments and returns of investors of other Partner States.
25. The appellant further averred that as the leader of Government Business, the Attorney-General failed to ensure that Government officials of the Republic of Uganda including the Registrar, carry out their duties to ensure protection and security of investments and to foster trade within the East African Community as envisaged under the East African Treaty and the Common Market Protocol, within the East African Community.
26. The appellant further averred that failure of the Respondents to honour their legal and contractual obligations was against the spirit and letter of the East African Community Treaty and the Common Market Protocol to the extent that the bank having given a valid guarantee in the High Court to secure payment of a decretal amount failed to honour the said guarantee.
27. The appellant further averred that upon signature on 20th November, 2009 and the coming into force of the Common Market Protocol on 1st July, 2010, and by virtue of Article 54 (2) thereof, the jurisdiction of this Court as envisaged by Article 27 of the Treaty and as a competent Judicial Authority in the Community, was enhanced for the enforcement of the rights and obligations accruing to trading persons from different Partner States.

28. Lastly, the appellant averred that by virtue of Articles 27 (2) and 151 of the Treaty and Article 54 (2) (b) of the Common Market Protocol, International Banking law and practice and the Rules of natural justice, this Court as a competent Judicial Authority had jurisdiction to determine, dispose of and grant the prayers sought in the Reference.

29. The Prayers sought in the reference were:-

    (i) That this honourable court be pleased to interpret and apply Articles 27(2) and 151 of the Treaty for the Establishment 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 and enhancement of trade and resolution and settlement of disputes for the protection of cross-border investments;

    (ii) 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) as a competent judicial authority for the determination of cross-border trade disputes between persons emanating from partner states;

    (iii) 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 Protocol, this court has the jurisdiction to enforce that obligation or duty expeditiously;

    (iv) That this honourable court be pleased to direct the Respondents jointly or severally to pay to the claimant the decretal sum of $ 8,858,469.97 together with interest and costs in full under the Bank guarantee dated the 29th October,2003;

    (v) That this honourable court direct the Respondents jointly and or severally to pay to the claimant general damages assessed by this court;

    (vi) That this honourable Court directs the Respondents jointly and or severally to pay interest on the sums of money on such rates and from such dates as this honourable Court should direct;

(vii) That this honourable Court be pleased to make such further or other orders as may be necessary in the circumstances; and

(viii) That the costs of this Reference be borne by the Respondents in any event.

30. After the pleadings in the reference were filed by all the parties, a scheduling conference was held by the First Instant Division of the Court on 25th February 2011. At the conference, the Bank raised a number of preliminary points of law and prayed that the Court disposes of them before proceeding to hear the reference. The points raised were:
    (a) Whether the reference was properly before the Court as against the Bank and the Registrar;
    (b) Whether the reference was time barred; and
    (c) Whether the Claimant had rights under the Common Market Protocol in respect of acts which arose prior to the coming into force of the said Protocol.

31. After hearing the Parties arguments, The First Instance Division took the view that there were judicial proceedings going on in the Courts of Uganda concerning the matters raised in the reference and it would, in the circumstances, be absurd to have parallel proceedings in two different courts with a probability of a clash of decisions and an execution stalemate. That court found it was improper for the appellant to have abandoned the litigation before the courts in Uganda and seek sanctuary in this Court. For that reason, the Court found and held that the Reference was improperly before the Court as against all the respondents. So issue No. 1 was answered in the negative.
32. The Court did not think it necessary to consider the other points of objection raised and ordered that the reference be struck out with costs to the Respondents.

Appeal against the Ruling on the Preliminary Objections

33. The appellant appealed against the above Ruling in **Appeal No. 2 of 2011: ALCON INTERNATIONAL LTD VS THE STANDARD CHARTERED BANK OF UGANDA & 2 OTHERS.** Upon hearing arguments from the parties, the Appellate Division held that the First Instance Division did not discuss nor did it make a finding of whether it had jurisdiction to entertain the Reference. It stated that that was a fundamental issue on which the Court below had to decide as a threshold issue. In the

course of so holding, the Court cited with approval the decision of the Kenyan Court of Appeal in the case of the **OWNERS OF THE MOTOR VESSELS "LILLIAN S" VS CALTEX OIL (KENYA) LTD [1989] KLR I, at Page 14**, where **Nyarangi, J.A.** postulated the law thus:

> ***"Jurisdiction is everything. Without it, a Court has no power to make one 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"***

34. In the result, the Appellate Division allowed the appeal, set aside the order of the First Instance Division, re-instated Reference No. 6 of 2010, and directed the First Instance Division to specifically determine the merits of the Reference before it.

35. At the scheduling conference held on 3rd May, 2012, the parties agreed that the following were the issues to be determined by the Court :-

    (i) Whether the Reference was properly before the Court as against the 1st and 3rd Respondents within the meaning of Article 30(1) of the Treaty, they being neither Partner States nor Institutions of the Community;

    (ii) Whether the Claimant had a cause of action against the Attorney-General of Uganda;

    (iii) Whether the Court had jurisdiction over acts that took place before the coming into force of the Common Market Protocol;

    (iv) Whether the Reference was time barred in accordance with Article 30 (2) of the Treaty;

    (v) Whether the provisions of Article 54(2) of the Common Market Protocol extended the jurisdiction of the court for settlement of cross-border investment disputes;

    (vi) Whether the Respondents were in breach of Articles 27 and 151 of the Treaty for the Establishment of the East African Community as read together with the provisions of Article 54 of the Protocol on the Establishment of the East African Common Market by failing to honour or act in accordance with the bank guarantee dated 29th October, 2003 as amended on 23rd October, 2008;

(vii) Whether the Claimant was entitled to the prayers in the Reference dated 20th August, 2010.

The Determination by the First Instance Division

36. Having read and taken note of the Reference, the pleadings and affidavits filed by the parties, the written submissions, all annexure including the Contract between the Parties for erection of "Workers House" in Kampala, the Rulings and Judgments of the National Courts in Uganda, the arbitral award and the guarantee, the Court determined the agreed issues as below.

Issue No. 1: whether the Reference was properly before the Court as against the 1st and 3rd Respondents within the meaning of Article 30 (1) of the Treaty, they being neither Partner States no Institutions of the Community?

37. After considering the provision of Article 30 (1) of the Treaty and the definitions of the words "Partner State" and "Institution" in the Treaty, the Court found and held that neither the Bank nor the Registrar of the Court were a Partner State or an Institution of the Community and they could not, therefore, be properly sued in that capacity before the Court as they were not bound by the Treaty or any of its Protocols. The Court was fortified in its view by its previous decision in the cases of **Anyang' Nyong'o & Others Vs the Attorney-General of the Republic of Kenya and Others,[Ref. No. 1 of 2006]** where the Court held that:-

> **"A reference under Article 30 of the Treaty should not be construed as an action in tort brought by a person injured by or through misfeasance of another. It is an action to challenge the legality under the Treaty of an activity of a Partner State or of an Institution of the Community. The alleged collusion and cognizance, if any, is not actionable under Article 30 of the Treaty."**

38. The Court also took note that in **Modern Holdings (E.A.) Ltd. vs. Kenya Ports Authority, [Ref. No. 1 of 2008],** the Court had stated that the Kenya Ports Authority though rendering services to the Partner States and their Citizens did not *Ipso facto* become an institution of the Community within the meaning of Article 30 of the Treaty as it not created by the summit of the Community but by the Republic of Kenya.

39. In the result, all the Complaints against the Bank and the Registrar were dismissed.

Issue No. 2: Whether the Claimant had a cause of action against the Attorney-General?

40. The Court took note of the Claimant's submissions that the gravamen of its case was that the Republic of Uganda had failed to protect its cross border investment contrary to Articles 5, 127, and 151 of the Treaty as read with Articles 29 and 54 (2) of the Common Market Protocol as embodied in (i) the wrongful termination of the building Contract by the NSSF, (ii) the refusal by NSSF to pay for work done; (iii) the continued confiscation of the Claimant's plant, machinery and tools of trade, (d) and failure and/or refusal by the Bank and the Registrar of the Court to honour the Guarantee in spite of Rulings and Judgments of the High Court and Court of Appeal of Uganda in its favour; (iv) failure and/or denial of Justice as particularized by the Claimant. Having taken note of the foregoing, the Court looked at the matter in the context of the whole Reference and concluded that the substratum of the Reference was the bank guarantee dated 29th October 2003 as amended on 23rd October, 2008.
41. The Court found that by virtue of the decision of the Supreme Court of Uganda which set aside the arbitral award and the decisions of both the High Court and the Court of Appeal for Uganda which were all in favour of the Claimant, the bank guarantee issued as a Condition for Stay of execution of the arbitral award and Court costs ceased to exist and, accordingly, the whole reference had to collapse. The Court found that the substratum of the reference had gone and there was, in the circumstances, no cause of action against the Attorney-General of Uganda.

Issue No. 3: Whether the Court had Jurisdiction over acts that took place before the coming into force of the Protocol ?

42. The Court noted that it was common ground that the alleged breach of contract by the Bank and the Registrar to honour the guarantee, the arbitral proceedings and award, the Orders of the High Court and Court of Appeal of Uganda and the issuance of a bank guarantee all occurred before 1st July, 2010 when the Common Market Protocol entered into force.
43. The Court further noted that the Claimant's contention was that the issue of whether the Court had jurisdiction over acts that took place before the Protocol entered into force had

been overtaken by events since the Appellate Divisions had directed in its ruling dated 16th March, 2012, that the First Instance Division should proceed and "determine the merits of the Reference before the Court." In addition, according to the Claimant, (i) the Respondents were guilty of a continuing breach of their obligations under the guarantee and, therefore, the issue of retroactivity did not arise because it was expressed in the guarantee that the liability of the Bank should be extinguished by payment to the Registrar of the decretal amount; (ii) the rule as to non-retroactivity of Treaties did not apply where "a different intention appears from the Treaty or is otherwise established", and (iii) although the Common Market Protocol came into force on 1st July, 2010, Article 151 (4) of the Treaty indicated that once a Protocol is signed and ratified it became an "Integral Part" of the Treaty and it followed that the Common Market Protocol should be read as "an Integral Part" of the Treaty.

44. The Court noted the respondents' submissions on those issues which were:-

(i) A Treaty could not apply to acts that took place before it came into force unless it was expressly stated so or such an intention could be inferred from its provisions;

(ii) No provision could bind a Party in relation to any act or fact which occurred or any situation which ceased to exist before the entry into force of the Treaty according to Article 28 of the Vienna Convention on the Law of Treaties;

(iii) The principle of non-retroactivity of a Treaty had been discussed by the Court in **Emmanuel Mwakisha Majiwasi & 748 others Vs Attorney-General of Kenya [Appeal No. 4 of 2011]** where it was held that the Treaty cannot apply retroactively unless such intention derives explicitly from the provisions of the Treaty itself or may be implicitly deduced from the interpretation thereof;

(iv) A plain reading of Article 55 of the Common Market Protocol showed that the Treaty could not apply to events prior to its ratification;

(v) Nothing in the Protocol pointed to an intention by the parties thereto for its retrospective application and, accordingly, it could not apply to a situation regarding the enforcement of the Bank guarantee which was issued on 29th October, 2003 and amended on 23rd October, 2008 while the Protocol came into effect on 1st July, 2010.

45. On consideration of the rival arguments, the Court accepted that the Protocol is an integral part of the Treaty, that it entered into force on 1st July, 2010, that on a consideration of

Articles 28 and 31 of the Vienna Convention on the Interpretation of Treaties, nothing showed that the framers of the Protocol had any intention of its retroactive application and, accordingly, the Common Market Protocol cannot apply to acts that took place before 1st July, 2010 and the Court lacked jurisdiction to determine those matters.

46. The Court noted there was a nexus between non-retroactivity of a Treaty and its jurisdiction. It was guided by the Appellate Division's decision in **Emmanuel Mwakisha Mjawasi & 748 Others Vs The Attorney-General of Kenya** (supra) where the Court delivered itself as follows:

> **". . . Where then, one may ask, did the Court derive its jurisdiction since the Treaty which normally confers the jurisdiction on the Court did not apply? Non retroactivity is a strong objection: when it is upheld, it disposes of the case there and then. As non-retroactivity renders the Treaty inapplicable forthwith, what else can confer jurisdiction on the Court?"**

47. The Court also took guidance from the Appellate Division's ruling in **Attorney-General of the United Republic of Tanzania Vs African Network for Animal welfare [Appeal No.3 of 2011]** on the question of jurisdiction where the Court observed-

> **"Jurisdiction is a most, if not the most, fundamental issue that a Court faces in any trial (sic). It is the very foundation upon which the judicial edifice is constructed; the fountain from which springs the flow of the judicial process. Without jurisdiction, a Court cannot take even the proverbial first step in its judicial journey to hear and dispose of the case."**

48. Having determined issues Nos. 1, 2 and 3 in favour of the respondents, the Court concluded that the reference must collapse and any determination of issues Nos. 4, 5, 6 and 7 was wholly academic and it declined to take such a path. It, in the result, dismissed the reference.

49. As regards costs, the Court observed that the Claimant had been seeking justice for long and was yet to finalize HCCS No. 1255 of 1998 in Uganda which was the original case in the dispute. In the circumstances, it deemed it inappropriate to penalize it with costs and ordered that each party should bear its own costs.

C. THE APPEAL TO THE APPELLATE DIVISION

50. The Appellant was dissatisfied with the whole of the said judgment. It accordingly appealed therefrom by instituting this appeal.

51. The memorandum of appeal enumerated a suffocating thirty one (31) grounds of appeal.

52. The Bank on its part lodged a Notice of a cross-appeal in the Kampala Sub-registry on18th November, 2013 pursuant to the provisions of Rule 91 of the Court's Rules. The Attorney-General of Uganda and the Registrar of the High Court of Uganda did likewise on 4th December, 2013. In their respective notices of cross-appeal, the Bank contended that the First instance Division erred in law by declining to award costs to the respondent and the Attorney-General and the Registrar contended that the First Instance Division erred in law when it decided that each party should bear its own costs.

53. At the scheduling conference of the appeal pursuant to Rule 99 of the Court's Rules held on 21st August 2014 the parties agreed that those grounds of appeal and of the cross-appeals by the respondents may be distilled and compressed into the following issues:-

(i) Whether or not the Court erred in law in holding that the reference as against the 1st and 3rd respondents was improperly before it within the meaning of Article 30 (1) of the EAC Treaty;

(ii) Whether or not the Court erred in law in finding that there was no cause of action against the Attorney-General of Uganda;

(iii) Whether or not the Court erred in law in finding that it had no jurisdiction over acts that took place before the coming into force of the Common Market Protocol;

(iv) Whether or not the Court erred in law in holding that issues 4, 5, 6, and (7) (as framed in the scheduling conference) would be wholly academic; and

(v) Whether or not the Court erred in law in failing to award costs to the successful parties.

54. We propose to deal with the above issues in the order in which they are formulated above.

Issue No. (1): Whether or not the Court erred in law in holding that the Reference as against the 1st and 3rd Respondents was improperly before it within the meaning of article 30 of the Treaty ?

Appellant's Case

55. The Substance of the appellant's case as we understood it was that Article 54 (2) (a) of the Common Market Protocol extended the jurisdiction of this Court to determine disputes

brought by individuals and legal persons against other individuals and legal persons with respect to infringement of rights and privileges recognized by the Common Market Protocol. Accordingly, as the Claimant's grievance was the failure by the Registrar to recall the Bank guarantee and failure by the Bank to honour the said guarantee, both the Bank and the Registrar were properly before the Court.

1st and 3rd Respondents' Case.

56. The substance of their case was, first, that they were neither Partner States nor Institutions of the Community within the meaning of Article 30 of the Treaty, and secondly, that Article 54 of the Common Market Protocol did not and could not have extended the jurisdiction of the Court as contended for the reason that any extension of the Court's jurisdiction could only be done pursuant to the provisions of Article 27 (2) of the Treaty. It was their case that Article 27 (2) was clear that extension of the Court's jurisdiction required the Conclusion of a Protocol to operationalize such extended jurisdiction and the Common Market Protocol which was concluded pursuant to the Article 76 (4) of the Treaty was not the kind of Protocol contemplated by Article 27 (2). The point was also taken by the Attorney-General that Article 54 (2) of the Common Market cannot in any case impose liability on private persons and only the Attorney-General could be sued.

The Court's Determination

57. The determination of this issue as well as issue nos.(2),(3),and to some extent issue no.(4) calls upon this court to pronounce itself on the concept of jurisdiction and its application in the context of the Treaty for the Establishment of the East African Community.

58. In the practice of the International Court of Justice, the word jurisdiction is used as a unitary concept to denote three essential elements which enable the Court to operate. These are *jurisdiction ratione materiae*, *jurisdiction ratione personae* and *jurisdiction rationae temporis* (see **Shabtai Rosenne: The Law and Practice of the International Court [1920-2005], Vol. II, Chapter 9**. *Jurisdiction rationae material* is concerned with the power of the Court to entertain and decide on the subject matter of the Complaint before it. *Jurisdiction rationae personae* on the other hand pertain to the ability of the parties to appear before the Court as applicants or as respondents or in any other capacity. And *jurisdiction rationae temporis* focuses on the temporal parametres of the dispute before the Court, such as time bar or limitation. We, as an international court on our own right, take

inspiration from the International Court of Justice's conceptualization of jurisdiction and shall adopt it for our analysis hereinafter.

The Court's *Jurisdiction Ratione Personae*

59. The issue of the propriety of the Bank and the Registrar being impleaded in the reference is one of *jurisdiction ratione personae.*

60. Articles 28, 29, 30, 31, 32, 36 and 40 of the Treaty all address the concept of the Court's Jurisdiction *ratione personae*. Broadly speaking, the Court is approached by the form of a reference by either (i) the Partner States (article 28), or (ii) the Secretary General (article 29), or (iii) Legal and Natural Persons (Article 30); an employment dispute between the Community and its employees (Article 31); an arbitral reference by the Community or any of its institutions, a Partner State or a Person (Article 32); an advisory opinion at the instance of the Summit, the Council or a Partner State (Article 36), or an intervention by a Partner State, the Secretary General or a resident of a Partner State (Article 40). In all those situations, the Treaty is quite clear as to who has the ability to be the Applicant, or the Respondent or the Intervenor, as the case may be.

61. The reference subject matter of the appeal herein was filed by a legal person (Alcon International Ltd) against the Standard Chartered Bank of Uganda, the Attorney-General of the Republic of Uganda, and the Registrar of the High Court of Uganda under Article 30 of the Treaty. The propriety of impleading the Bank and the Registrar was the subject matter of issue no. (1) in this appeal. Article 30 (1) of the Treaty reads as follows:

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

62. The case for the Bank and the Registrar was simply that as they were neither a Partner State, nor an Institution of the Community, they could not be proper respondents to the reference. Apart from relying on the plain text of the Treaty itself, they also relied on this Court's decision in the Cases of **ANYANG NYONGO & OTHERS VS. THE ATTORNEY-**

GENERAL OF KENYA & OTHERS [Reference No. 1 of 2006] and MODERN HOLDINGS VS KENYA PORTS AUTHORITY [Reference No. 1 of 2008].

The Appellant, on its part, argued that Article 30 of the Treaty is subject to Article 27 thereof and in the circumstances of this case, the Common Market Protocol extended this Court's jurisdiction under Article 27 (2) and Article 54 (2) thereof and, accordingly, brought the Bank and the Registrar within the jurisdiction of the Court thus making them proper Respondents to the action.

63. The Attorney-General and the Registrar responded to the above contention by submitting that the Common Market Protocol only created legal liability on Partner States as parties to the Protocol and by force of Article 29 of the Protocol, the legal duty or obligation to protect cross border investments was placed solely upon the Partner States. They further submitted that the words **"even where"** in sub-article (2) (a) of Article 54 of the Protocol cannot be construed to guarantee a right of redress against persons acting in their official capacities in Partner States. They further submitted that under Article 31 (1) of the Vienna Convention on the Law of Treaties, a Treaty must be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in light of its objects and purpose ,and that if such an approach is adopted, it would lead to the conclusion that liability under Article 29 as read with Article 54 (2) of the Common Market Protocol attaches to States and not individuals or National Institutions.

64. The Bank on its part submitted that the Common Market Protocol is not the kind of Protocol envisaged under Article 27 (2) of the Treaty for extension of the Court's jurisdiction: a Protocol to extend the Court's jurisdiction would have been enacted under Article 27; the Common Market Protocol was concluded under the provisions of Articles 76 and 104 of the Treaty for the establishment of the East African Community. In its view, Article 54 (2) (a) of the Protocol did not in any way add to the nature and type of the respondents envisaged under Article 30(1) so as to bring the Bank and the Registrar within the purview of the Court's jurisdiction they being neither Partner States nor Institutions of the Community.

65. Last, but not least, all the respondents submitted in one accord that the passing of the Common Market Protocol, and in particular Article 54 thereof, did not render the Court's

previous interpretation of Article 30 of the Treaty in the case of **ANYANG NYONGO and MODERN HOLDINGS LTD.** (supra) no longer applicable.

66. Having considered the rival submissions, we take the following view of the matter.

67. The decision of the First Instance Division as set out in Paragraphs 37 and 38 above, to wit, that by the plain reading of Article 30 (1) of the Treaty as well as its interpretation in the cases of **ANYANG NYONGO** and **MODERN HOLDING LTD** (supra) the only proper respondent to references by legal and natural persons under Article 30 of the Treaty are Partner States or Institutions of the Community the legality of whose Acts, regulations, directions or actions are brought into question and, accordingly, the Bank and the High Court Registrar were improperly brought before the Court cannot be faulted.

68. We are unpersuaded that the Common Market Protocol extended this Court's *jurisdiction ratione personae* to legal and natural persons within the Partner States. The reasons are these. First, the provisions of Article 27 (2) of the Treaty that the Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date, and to that end the Partner States shall conclude a Protocol to operationalize the extended jurisdiction, leaves no doubt in our minds that the jurisdiction of the Court can only be extended by a Protocol concluded pursuant to that sub-Article for the specific purpose of extending the Court's jurisdiction. The Common Market Protocol (which was concluded under Articles 76 and 104 of the Treaty) is not such a Protocol and in no wise extends the Court's *jurisdiction ratione personae* or *ratione materiae.* Secondly, by dint of Article 31 (1) of the Vienna Convention on the Law of Treaties, a Treaty should be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Adopting that approach, we note that Article 29 of the Common Market Protocol provides that Partner States undertake to protect cross border investments and returns of investors of other Partner States within their territories. We also note that Article 54 (2) of the same Protocol provides that Partner States guarantee that any person, whose rights and liberties which are recognized by the Protocol have been infringed upon, shall have the right to redress, even where the infringement has been committed by persons acting in their official capacity. In short, the obligation or duty to protect cross border investments is on Partner States and the guarantee to provide redress is by the self-same States. It is to our mind

axiomatic that the bearer of the duty or obligation and the guarantor of redress – who is a Partner State – is the only proper Respondent to an action (by whatever name called) by a legal or natural person under the provisions of the Common Market Protocol. A challenge against the actions or omissions of Public Officials acting in their official capacity must be lodged against the Partner State and not the Official (s) concerned. Thirdly, the interpretation of Article 30 of the Treaty in the case of **ANYANG NYONGO and MODERN HOLDINGS LTD** (supra) to the effect that only Partner States or Institutions of the Community are proper Respondents to a reference thereunder has not been implicitly overturned or rendered otiose by the entry into force of the Common Market Protocol.

69. In the result, we would answer issue No.1 before this Court in the negative.

Issue No. (2): whether or not the court erred in law in finding that there was no cause of action against the Attorney-General of Uganda?

Appellant's Case

70. The Appellant adopted its submissions in the First Instance Division. It emphasized that its Case was not just about the Bank guarantee: It was a case of failure of justice in the Republic of Uganda perpetrated by the Registrar failing to recall the guarantee, the Bank failing to honour the same guarantee, and the Attorney-General failing to ensure that it's cross border investment was protected as per Articles 29 and 54 of the Common Market Protocol. The appellant faulted the various adverse judgments against it by the Courts of Uganda and contended that they exhibited failure of justice. There was therefore a cause of action against the Attorney-General.

2nd Respondent's Case

71. The Attorney-General of Uganda submitted that it was evident from the record that the Bank guarantee formed the substratum of the reference. The Claimant's grievance was that the Bank failed to honour the guarantee and the Registrar failed to enforce it. The ultimate relief sought was payment of the guaranteed sum. That being so, and it being the case that by the time the First Instance Division decided the appellant's reference the guarantee had ceased to exist (as the Supreme Court of Uganda had set aside the arbitral award as well as the Judgments of the High Court and Court of Appeal of Uganda on which the said guarantee was predicated), there was no cause of action against the Attorney-General.

The Court's Determination

72. Looking at the issue before us holistically, it is clear beyond peradventure that the appellant's case was an invitation to this Court to address and redress its grievance concerning non protection of its cross border investment in Uganda pursuant to the provisions of the Common Market Protocol. In short, the subject matter of the dispute was alleged infringement of its rights under the Common Market Protocol. And so the most critical issue was whether the Court had power to deal with the Common Market complaint presented to it. In other words, whether the court had *jurisdiction rationae materiae*.

The Court's J*urisdiction Rationae Materiae*

73. As the rival contentions centred on an interpretation of Article 54 of the Common Market Protocol we shall read it in *extenso*. It provides:-

> **Article 54 - Settlement of Disputes**
>
> 1. Any dispute between the Partner States arising from the interpretation or application of this Protocol shall be settled in accordance with the provisions of the Treaty.
> 2. In accordance with their Constitutions, national laws and administrative procedures and with the provisions of this Protocol, Partner States guarantee that:
>
> (a) any person whose rights and liberties as recognized by the Protocol have been infringed upon, shall have the right to redress, even where this infringement has been committed by persons acting in their official capacities; and
>
> (b) the competent judicial, administrative or legislative authority or any other competent authority, shall rule on the rights of the person who is seeking redress.

74. The meaning of sub-article 1 is common ground: any Common Market disputes between States shall be settled by reference thereof to the East African Court of Justice.

75. The meaning of sub-article 2 is hotly debated. According to the appellant, disputes other than inter-state ones may be redressed by the competent judicial, administrative or legislative authorities of Partner State or any other competent authority. The appellant contends that the expression **"any other competent authority"** includes this Court and even the East African Legislative Assembly. To hold otherwise, the appellant contends,

would be absurd as the Court of Justice of the East African Community would be excluded from performing an essential role in the integration of the community, i.e. the settlement of Common Market disputes. In the appellant's view, a litigant is free to elect the forum in which to lodge its complaint for redress: i.e either in any of the national bodies or in this Court. The Jurisdiction of this Court in Common Market matters, the appellant contends, is complementary to that of national institutions. The respondents, on their part, submit that the expression **"any other competent authority"** in paragraph (b) of sub-article 2 means a national authority within the state for the reason that the guarantee of the partner state is in the context of its "constitution, national laws and administrative procedures" as per the opening words of sub-article 2.

76. We agree with the respondents' submissions that the marrow and pith of sub- article 2 of Article 54 is that Partner States guarantee that any person whose rights and liberties (as recognized by the Common Market Protocol) are infringed upon by State Officials shall have a right to redress by that State's competent judicial, administrative or legislative authority or any other competent authority. We also agree that the phrase "any other competent authority" refers to a national authority howsoever established other than a judicial, administrative or legislative body .Indeed it stands to reason that it is only within national institutions that any partner state can guarantee the adjudication of disputes by aggrieved persons. The appellant's contention that any other competent body includes the East African Court of Justice, though attractive, is accordingly rejected. Such rejection will not, in our view, do violence to the letter and spirit of the Protocol or the objective of harmonious and consistent interpretation of the Treaty and the Protocol for two reasons. First, as this Court held in the Case **of <u>THE EAST AFRICAN LAW SOCIETY VS. THE SECRETARY-GENERAL OF THE EAST AFRICAN COMMUNITY</u>** (supra), the provision of Article 54 of the Protocol does not oust the Court's interpretative jurisdiction under the Provision of Article 27 of the Treaty. Accordingly, any interpretation of the Protocol by a National Court which would be inconsistent with this Court's interpretation of the same would be superseded by this Court's interpretation by dint of Article 38 (2) of the Treaty which provides that:-

> **"Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of National Courts on a similar matter."**

77. Secondly, Article 34 of the Treaty provides for the device of Preliminary Rulings by the Court on reference by National Courts. We would hope that in redressing non inter-state Common Market grievances, National Courts and Tribunals will make use of the Provisions of this Article to refer issues of interpretation of the Protocol to this Court in order that there can be uniform and consistent application of the law in Member States of the East African Community.

78. Having formed the opinion that the redress of non-inter-state State Common Market complaints was not entrusted to this Court by the Protocol, we are impelled to conclude that the Court lacked *jurisdiction ratione material* to entertain the reference and should have downed its tools without entering into the issues of the propriety of the parties or the non-retroactivity of the Common Market Protocol.

79. From the finding that the court lacked *jurisdiction rationae Materiae,*it follows that there could not be a cause of action against the Attorney-General of Uganda predicated on his alleged acts of omission to see to it that the claimant's rights under the Common Market Protocol were protected.

80. Be that as it may, it is evident that the First Instant Division decided issue no.2 on the rather narrow ground canvassed by the Attorney-General that the bank guarantee formed the substratum of the reference and as the said guarantee had ceased to exist by reason of the Supreme Court of Uganda having set aside the arbitral award as well as the judgments of the High Court and the Court of Appeal on which the guarantee was grounded, there was no cause of action against him.

81. Having considered the arguments on this aspect of the matter, we have arrived to the conclusion that the above decision of the First Instance Division to the unimpeachable and should be upheld.

82. In the result, we answer issue no.2 in the negative.

Issue No. (3): Whether or not the Court erred in law in finding that it had no jurisdiction over acts that took place before the coming into force of the Common Market Protocol?

Appellant's case

83. The appellant's case was two pronged. First, it contended that by dint of Article 151 (4) of the Treaty which provides that a Protocol become an integral part of the Treaty, the

Common Market Protocol is an integral part of the Treaty for East African Community and, accordingly, its provisions are to be deemed to be applicable from 7th July, 2000 when the Treaty entered into force. Secondly, and in the alternative, as the guarantee had not been honoured at the time the reference was filed, the appellant had a subsisting cause of action against the respondents and the issue of retroactive application of the Protocol did not arise.

Respondents' Case

84. The respondents' case was essentiality that there could not be a cause of action on acts occurring before the Common Market Protocol itself came into force in July 2010. The failure to honour the guarantee was before that date. The Protocol could not be applied retroactively. As regards the contention that the Common Market Protocol gave new life to the appellant's continuing cause of action, the respondents' relied on the Appellate Division's decision in **ATTORNEY-GENERAL OF THE REPUBLIC OF KENYA VS INDEPENDENT MEDICAL LEGAL UNIT, [Appeal No. 1 of 2011]** where the Court held that the Treaty did not recognize any continuing breach or violation of the Treaty outside the two months after a relevant action came to the knowledge of the Claimant.

The Court's Determination

85. Issue No. 3 before this Court, revolves around the Court's *jurisdiction ratione temporis.*

The Court's J*urisdiction Rationae Temporis*

86. Article 30 (2) of the Treaty provides:-

> **"The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be."**

87. The substance of the provision is that a reference should be filed within two months of the crystallization of the cause of action or knowledge of its existence by the complainant.

88. It is not in contention that by the 12th of October, 2009 the appellant knew that the Bank had refused to pay under the guarantee and, accordingly, the cause of action had arisen. And it is a fact that the Common Market Protocol entered into force on 1st July, 2010. And so the

issue that cried out for resolution was whether the Common Market Protocol could apply to acts or actions that occurred before its entry into force.

89. The substance of the Parties arguments before this Court is set out in Paragraphs 83 and 84 herein.

90. Having considered the rival submissions, we agree with the respondents' submissions that the Common Market Protocol could not be applied retroactively. We reiterate what we said in **EMMANUEL MWAKISHA MJAWASI & OTHERS VS THE ATTORNEY – GENERAL OF KENYA** (supra) that a Treaty cannot apply retrospectively unless a different intention appears from the Treaty itself or such an intention is otherwise established (see Articles 28 and 29 of the Vienna Convention on the Law of Treaties). We also find the following passage in the arbitral award delivered in the Island of Palmas arbitration quite instructive:-

> **"A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."**

[See OLIVIER CORTEN & PIERRE KLEIN (Eds): THE VIENNA CONVENTIONS OF THE LAW OF TREATIES: A Commentary, Vol.1, and P. 723]

91. In the instant case, the Protocol did not expressly express a different intention. On the contrary, Article 55 is clear that the Protocol shall enter into force upon ratification and deposit of instruments of ratification with the Secretary General by all the Partner States. No clauses are exempted from that general provision. And the appellant did not establish otherwise an intention by the Partner States that the Protocol would apply retrospectively.

92. As regard the issue of whether failure to honour the guarantee was a continuing cause of action, we reiterate what we held in **ATTORNEY-GENERAL OF KENYA VS INDEPENDENT MEDICAL LEGAL UNIT** (supra) that Article 30(2) of the Treaty does not recognize any continuing breach or violation of a treaty outside the two months after a relevant cause of action comes to the knowledge of the Claimant. The appellant's submission that failure to pay a bank guarantee is a continuous act and the principle of retroactivity would not apply until all the sums have been paid there under is rejected for the further reason that such a postulation would be tantamount to applying the right of

redress in respect of protection of cross border investments (which are conferred by the Common Market Protocol) to juridical facts (nonpayment of a bank guarantee) which would not have been a violation of any treaty or protocol in force at the time of their occurrence.

93. The upshot of our consideration of this aspect of the matter is that we find the Court lacked *jurisdiction ratione temporis*. In that connection, we also reiterate what we said in **EMMANUEL MWAKISHA MJAWASI** (Supra):

> **"Non-retroactivity is a strong objection. When it is upheld, it disposes of the case there and then."**

94. In the result, we answer issue no.3 in the negative.

Issue No. (4): Whether or not the Court erred in law in holding that issues Nos. 4, 5, 6 and 7 (as framed in the scheduling conference) were wholly academic?

95. The issues agreed upon at the First Division's scheduling conference are set out in Paragraph 35 above and need not be repeated. Suffice it to state that issue (4) was whether the reference was time barred under Article 30 of the Treaty; issue No. (5) was whether Article 54 (2) of the Common Market Protocol extended the jurisdiction of the Court to deal with settlement of cross border investment disputes; Issue No. (6) was whether the respondents were in breach of Articles 27 and 151 of the Treaty as read with Article 54 of the Common Market Protocol in failing to honour and pay the bank guarantee; and issue no. (7) was whether the appellant was entitled to the reliefs sought?

Appellant's case

96. The gist of the appellant's case was that the matters raised in issues (4), (5), (6) and 7 were not academic and deserved resolution. In its view, the Court by declaring them academic avoided an interpretation of Articles 29 and 54 of the Common Market Protocol which were the core of its case.

Respondents' case

97. The respondents, on their part, took the position that the First Instance Division having found that the Bank and the Registrar were wrongfully brought before the Court and that there was no cause of action against the Attorney-General, it followed that there was nobody against whom any relief sought by the appellant could be awarded, and, accordingly, the remaining issues were all academic. The doctrine of mootness as propounded in the

Canadian Supreme Court Case of **BOROWSKI Vs ATTORNEY-GENERAL OF CANADA [1989] S.C.R. 342** was prayed in aid.

The Court's Determination

The doctrine of Academic issues or mootness:

98. We recall that as recounted in Paragraph 53 above, the fourth issue for determination by this court was whether or not the First Instance Division erred in law in holding that issues nos.4, 5, 6, and 7 (as framed in the scheduling conference by the 1st Instance Division) would be wholly academic.

99. In the context of this case, the issue is this: in light of the Court having found that (i) the Common Market Protocol could not be applied retrospectively to facts or a situation that occurred before its entry into force (issue No. 3); (ii) the Standard Chartered Bank and the Registrar of the Court were improperly joined in the reference (Issue No. 1); and (iii) there was no cause of action against the Attorney-General of Uganda (issue No. 2), was there a dispute between the parties left for decision by the self-same Court? The answer must be an emphatic "no". In the absence of any respondents from whom the appellant could be awarded the reliefs claimed, there was no inter- party dispute for resolution by the Court. The appellant's case was as dead as the dodo. Any further examination of the matter would have been an academic exercise as the First Instance Division stated.

100. For the sake of completeness, it must be said by this Court that the doctrine of mootness or academic adventure by Courts of Justice is well known. The *raison d'être* of Courts of Justice is to give binding decisions on live disputes submitted to them by the parties or, render advisory opinions in limited cases where their Constitutive Constitutions, Statutes or Treaties so provide. If there is no live dispute for resolution (and there can be none in the absence of contending parties) or the Court is not exercising any advisory opinion jurisdiction it may have, a Court of Justice would be wasting the public resources of money and time by engaging in a futile and vain exposition of the law. The abstract exposition of the law is the province of academics and not Courts of Justice and hence the use of the adjective "academic" to describe such endeavours.

101. In **BOROWSKI V THE ATTORNEY-GENERAL OF CANADA** (supra), the Supreme Court of Canada expressed itself in similar vein as follows:

> **"The doctrine of mootness is an aspect of a general policy practice that a Court may decline to decide a Case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the Court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the Court will have no practical effect on such rights, the Court declines to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the Court is called upon to reach a decision. Accordingly, if, subsequent to the initiation of the action or proceeding, events occur which affect the rights of the parties, the case is said to be moot. The general policy or practice is enforced in most cases unless the Court exercises its discretion to depart from its Policy or Practice."**

102. We entirely agree with this postulation of the law.

103. The upshot of our consideration of this matter is that we answer issue no.4 in the negative.

Issue No (5): Whether or not the Court erred in law in failing to award costs to the successful parties?

Appellant's Case

104. The appellant submitted that the First Instance Division was correct in denying costs to the respondents and its reasoning that the appellant had seriously suffered in the pursuit of justice in the Courts of Uganda was a good reason for so ordering.

Respondents' Case

105. The respondents, on their part, submitted that there was no good reason given by the First Instance Division to deny them costs. They pointed out that they were not parties to the cases in Uganda involving the appellant. They added that it was unjust to deny them costs and yet when the appellant had won in the appeal against the Court's ruling on the Preliminary objections, it was awarded costs.

The Court's Determination

106. We have carefully considered the rival submissions on the issues submitted for determination. Having done so, we have taken the following view of the matter.

107. Rule 111 (1) of the Court's Rules of procedure provides as follows:

"Costs in any proceedings shall follow the event unless the Court shall for good reason otherwise order."

108. The question to ask in this appeal is therefore whether the court exercised its discretion judiciously in declining to give costs to the successful parties who cross-appealed.

109. The reason the Court gave for declining to give the respondents costs is that the appellant had been seeking justice for long and was yet to finalize HCCC No. 1255 of 1998 in Uganda which was the original case in the dispute.

110. We agree with the respondents' submissions that there was no good reason to deny them their costs and the Court exercised its discretion improperly in denying them costs for the following reasons. First, contrary to the Court's holdings, the appellant was not a party to HCCC 1255 of 1998 in Uganda; the correct party was Alcon International (Uganda). Secondly, even if the Appellant was a party to HCCCs 1255/98 the record shows that it was NSSF Uganda which had been seeking justice against Alcon International Ltd by appealing against the arbitral award made against it to the High Court, Court of Appeal, and eventually the Supreme Court of Uganda where it succeeded and that Court set aside the arbitral sward. Thus the finding that "the Claimant has been seeking justice for long" was based on a misapprehension of the facts on record before the court. Thirdly, there was no finding that the delay in obtaining justice in Ugandan Courts was caused by the conduct of the respondents thus warranting them to be deprived of costs to the Reference. Fourthly, the long delay in the Ugandan Courts was a consequence of a Party exercising its right of appeal and the exercise of such a right could not on a proper exercise of discretion be used as a reason to deny a successful litigant its costs as to do otherwise would be in effect to fetter the party's undoubted legal right of appeal. Last but not least, to deny costs on the basis of happenings outside the Reference was tantamount to the Court taking into account irrelevant matters and was thus an improper exercise of judicial discretion.

CONCLUSION

111. The upshot of our consideration of this appeal and the cross Appeal is that:

(a) The appeal is dismissed with costs to the Respondents here and below;

(b) the cross appeal is allowed with costs to the Respondents.

Orders accordingly. That is the Judgment of this Court.

Counsels: Most obliged.

The President (Hon. Justice (Dr.) Ugirashebuja): That is the Judgment. We will retire. There is a second Ruling which is going to be made but we will retire for a few minutes, 15 minutes and then make the Ruling on the costs.

Mr. Michael Maghanga: Please rise.

(The court adjourned at 11: 26 a.m.)