



**IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA  
FIRST INSTANCE DIVISION**



*(Coram: Jean Bosco Butasi, PJ; Isaac Lenaola, DPJ; Faustin Ntezilyayo, J: Monica Mugenyi, J & Fakihi A. Jundu J)*

**REFERENCE NO.8 OF 2013**

**BETWEEN**

1. PATRICK NTEGE WALUSUMBI .....
2. DAN SSENGA .....
3. MOHAMMED WAIGA.....
- } **APPLICANTS**

**VERSUS**

1. THE ATTORNEY GENERAL OF THE  
REPUBLIC UGANDA..... 1<sup>ST</sup> RESPONDENT
2. THE ATTORNEY GENERAL OF THE  
REPUBLIC OF KENYA ..... 2<sup>ND</sup> RESPONDENT
3. THE ATTORNEY GENERAL OF THE  
UNITED REPUBLIC OF TANZANIA ..... 3<sup>RD</sup> RESPONDENT
4. THE ATTORNEY GENERAL OF THE  
REPUBLIC OF RWANDA .....4<sup>TH</sup> RESPONDENT
5. THE ATTORNEY GENERAL OF THE  
REPUBLIC OF BURUNDI..... 5<sup>TH</sup> RESPONDENT
6. THE SECRETARY GENERAL OF  
THE EAST AFRICAN COMMUNITY..... 6<sup>TH</sup> RESPONDENT

**27<sup>TH</sup> FEBRUARY, 2015**

## JUDGMENT OF THE COURT

### **A. INTRODUCTION**

1. This Reference, filed on 10<sup>th</sup> October, 2013 by the above named Applicants has been brought under Articles 3(2), 3(a), (b), (c), (f), 6(d), 7(2), 8(1)(c), 23, 27 (1) and 30 of the Treaty for the Establishment of the East African Community (“the Treaty”) and Rule 24 of the East African Court of Justice Rules of Procedure 2013 (“the Rules”) seeking for a declaration and an order as herein below stated.
2. The Applicants are Ugandan traders trading in the Republic of South Sudan vide their company known as the **Uganda Traders Association of South Sudan Ltd** which initially was also one of the Applicants in this Reference until 5<sup>th</sup> September, 2014 when it was struck out for non-compliance of Rule 24(4) of the Rules. The Applicants’ address for the purpose of this Reference is indicated as C/O Mr. Rwakafuuzi & Co. Advocates, Plot 7 Luvuma Street, Jafaali Kibirige House, and P.O. Box 26003, Kampala, Uganda.
3. The 1<sup>st</sup> to the 5<sup>th</sup> Respondents are the Attorney Generals of the Republic of Uganda, the Republic of Kenya, the United Republic of Tanzania, the Republic of Rwanda and the Republic of Burundi, respectively, who are Partner States’ Principal Legal Advisers, and are being sued on behalf of their respective Governments. The 6<sup>th</sup> Respondent has been sued pursuant to Article 4(3) of the Treaty as the Principal Executive Officer of the East African Community.

### **B. REPRESENTATION**

4. The Applicants were represented by Mr. Laduslaus Rwakafuuzi, Mr. Michael Maviki and Mr. Deo Mukwaya. The 1<sup>st</sup> Respondent was represented by Mr. Denis Bireije, Mr. Geoffrey Madete and Mr. Jeffrey Atwine; Mr. Lawrence Muiruri Ngugi, Ms. Barbara Wachira Claire and Mr. Timothy Kihara appeared for the 2<sup>nd</sup> Respondent; Ms. Sara Mwaipopo Mbuya, Mr. Mark Mulwambo,

Mr. Harun Matagane, Ms. Adelaide Kasala, Ms. Aliseaa Mbuya, Mr. Abubakar Mrisha and Mr. Godfrey Matagane appeared for the 3<sup>rd</sup> Respondent; Mr. Aimable Malaala appeared for the 4<sup>th</sup> Respondent and Mr. Wilbert Kaahwa represented the 6<sup>th</sup> Respondent.

### **C. BACKGROUND**

5. The Reference filed by the Applicants has been prompted by the action of the Republic of South Sudan of applying to join as a member of the East African Community on 11<sup>th</sup> November, 2011. They allege that the Partner States are in their final stages of admitting the said country as a member of the East African Community and that the decision was slated on 4<sup>th</sup> April, 2014 as per the Statement by Hon. Shem Bageine, Chairperson of the East African Council of Ministers and the Minister of State for East African Affairs, Uganda, when he gave updates on the East African Community Affairs on 9<sup>th</sup> September, 2013 in Kampala.

6. The Applicants are opposing the application of the Republic of South Sudan to join the membership of the East African Community on the grounds stated herein below in the Applicants 'case.

7. The Applicants are therefore seeking the following reliefs:

***“ a) A declaration that the Republic of South Sudan is not a fit and proper country to be granted membership in the East African Community; and***

***b) An order that the Respondents should not grant membership to the Republic of South Sudan in the East African Community.”***

### **D. THE APPLICANTS' CASE**

8. The Applicants' case is contained in the Reference and is supported by an Affidavit deposed by one of the Applicants, Mr. Patrick Ntege Walisumbi. In addition to what has been stated in paragraphs 5 and 6 above, which should

be read as part of the Applicants' case, the Applicants further contended that:-

- a) The Affidavit deponed by the 1<sup>st</sup> Applicant in Annexure "A" shows that the Government of the Republic of South Sudan has admitted to human rights violation/abuses and that the same has been corroborated by the Report of the Verification Committee on the application of the Republic of South Sudan to join the East African Community (Annexure 11 to the 6<sup>th</sup> Respondent's Response);*
- b) The conduct of the Republic of South Sudan as alleged seriously or gravely offends Articles 3(3) (a), (b), (c), (d), (e), (f), 7(1), (2), and 8(1)(c) of the Treaty as far as it violates human rights and social justice, reflects a flagrant rejection of the rule of law and good governance; and*
- c) Based on what is above stated, it follows that the directive of the Summit of EAC Heads of State made on 30<sup>th</sup> November, 2012 during the 14<sup>th</sup> Ordinary Summit authorising the Council of Ministers to commence negotiations with the Republic of South Sudan as regards its application to join the East African Community and the entire on-going process of negotiations with the said country, gravely offend the core principles of the Treaty as outlined in Articles 3(2), 3(3)(b), (c), (e) (f), 6(d), 7(1) and (2), and 8(1)(c) of the Treaty.*

#### **E. THE RESPONDENTS' CASE**

9. The Respondents, in their replies to the Reference have vigorously opposed or resisted the Reference.

#### **THE 1<sup>ST</sup> RESPONDENT CASE**

10. The 1<sup>st</sup> Respondent's case was supported by the Affidavit deponed by Hon. Shem Bagaine, the Ugandan Minister of State for East African Affairs. He contended that:-

**“a) The Reference is premature, speculative, frivolous, unjusticiable, academic, abuse of Court process and bad in law because no decision or action has already been taken by the Partner States to admit the Republic of South Sudan in the East African Community;**

**b) The Court is devoid of jurisdiction to entertain and determine issues relating to a state that is not a member of the East African Community;**

**c) The Application by the Republic of South Sudan to join the East African Community as per requirements of Articles 3 of the Treaty has been appropriately considered by various Summits held by Heads of State of Partner States. Investigations and verifications have been carried out as per criteria and considerations set out in Article 3(3) of the Treaty.”**

**11.** However, the 1<sup>st</sup> Respondent further contended that a decision to whether the Republic of South Sudan is a fit and proper country to be granted membership of the East African Community can only be taken after the verification process has been completed and the recommendations thereof have been accepted by the Summit of the Heads of State. It is thus his contention that since no decision has been made to date, there is no basis for the Applicants’ allegation of violation of the provisions of the Treaty.

## **THE 2<sup>ND</sup> RESPONDENT’S CASE**

**12.** The 2<sup>nd</sup> Respondent’s grounds for opposing the Reference were similar to those presented herein above by the 1<sup>st</sup> Respondent. It was, however, his further contention that the Applicants have failed to establish a case of violation of the Treaty in the assumption of the mandate to receive and consider an application for admission of a foreign State into the East African Community or in the procedure entailed in consideration. He maintained that the Respondents have demonstrated adherence and fidelity to the letter and spirit of the Treaty in the course of the process being undertaken by the relevant Organs of the East African Community.

### **THE 3<sup>RD</sup> RESPONDENT'S CASE**

**13.** The 3<sup>rd</sup> Respondent's case was supported by the Affidavit deponed by Mr. Mark Eldad Mulwambo, Senior State Attorney at the Attorney General's Chambers, The United Republic of Tanzania. In addition to the abovementioned grounds for opposing the Reference presented by the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents, the 3<sup>rd</sup> Respondent contended that the Applicants did not have a cause of action against the Partner States of the East African Community.

**14.** He further contended that the on-going process on whether or not to grant membership of the East African Community to the Republic of South Sudan is the prerogative of the Partner States based on the Treaty's requirements, terms and conditions and that, however, such decision has not yet been made to date. The 3<sup>rd</sup> Respondent was therefore of the view that any statement made at any briefing meeting or press conference by any responsible Minister or member or employee of the East African Community cannot be treated as an ultimate decision of the East African Community.

### **THE 4<sup>TH</sup> RESPONDENT'S CASE**

**15.** The 4<sup>th</sup> Respondent's Reply opposing the Reference was supported by the Affidavit deponed by Hon. Johnson Busingye, the Attorney General of the Republic of Rwanda. He opposed the Reference on the same grounds as those presented above, and contended that a decision on the Republic of South Sudan's application to join the East African Community can only be taken after the verification process is completed and the recommendations thereof accepted by the Summit of the Heads of State of the East African Community.

## **THE 5<sup>TH</sup> RESPONDENT'S CASE**

16. The 5<sup>th</sup> Respondent's case was supported by the Affidavit of Mr. Sylvester Nyandwi, the Permanent Secretary in the Ministry of Justice of the Republic of Burundi. His Reply opposing the Reference was based on the same arguments as those advanced above by the 1<sup>st</sup> to the 4<sup>th</sup> Respondents.

## **THE 6<sup>TH</sup> RESPONDENT'S CASE**

17. The 6<sup>th</sup> Respondent's Reply to oppose the Reference was supported by the Affidavit deposed by Ambassador Dr. Richard Sezibera, the Secretary General of the East African Community. Apart from similar grounds for opposing the Reference as those presented above by the other Respondents, the 6<sup>th</sup> Respondent further contended that ***“currently, the process of negotiations between the Republic of South Sudan and the East African Community on the matter has not started, therefore, a decision on admission or non-admission of the said country has not been made;***

***Based on the aforesaid, it follows that the Applicants' case is based on speculation and conjecture and is to that extent frivolous, vexatious and an abuse of Court process.”***

18. It was the 6<sup>th</sup> Respondent's contention therefore, that taking into account the roles, functions and responsibilities entrusted by the Treaty to different Organs of the East African Community, granting of orders sought by the Applicants does not arise.

## **F. SCHEDULING CONFERENCE**

19. A Scheduling Conference was held on 5<sup>th</sup> September, 2014 whereby all the Parties were present save for the 5<sup>th</sup> Respondent. As it will be seen later on,

the said Respondent did not file any submission nor did he attend the hearing date (12<sup>th</sup> November, 2014).

**20.** At the said Scheduling Conference, the following were the main points of agreement by the Parties:-

- a) The Republic of South Sudan has applied to join the East African Community;***
- b) The consideration of the application of the Republic of South Sudan to join the East African Community is still on-going and no final decision has been taken by the Summit;***
- c) There are triable issues based on the provisions of Article 3, 6, 27, 29 and 30 of the Treaty;***

**21.** The following were disagreed matters or issues for determination by this Court:-

- a) Whether or not this Honourable Court is vested with jurisdiction to entertain the Reference;***
- b) Whether the Reference discloses a cause of action taking into account the provisions of Article 30(1) of the Treaty;***
- c) Whether the on-going process of considering the application of the Republic of South Sudan to join the East African Community violates the provisions of Articles 3(a), (b), (c), (f), 6(d), 7(2) and 8(1)(c) of the Treaty; and***
- d) Whether the Applicants are entitled to the orders sought.***

**22.** As to prayers, the Applicants prayed for orders sought in the Reference while all the Respondents prayed for dismissal of the Reference with costs.

## **G. DETERMINATION OF ISSUES**

### **ISSUE NO.1: WHETHER OR NOT THIS HONOURABLE COURT IS VESTED WITH JURISDICTION TO ENTERTAIN THE REFERENCE**

**23.** Each Party has canvassed the above issue by way of written submissions. In the following paragraphs, we reflect on the various arguments made by the Parties in their submissions on **Issue No.1** as well as our determination thereon.

#### **I. APPLICANTS' SUBMISSIONS**

**24.** The Applicants contended that the Court is vested with jurisdiction to entertain the Reference and have argued that:-

***“The Reference seeks from this Court the interpretation and application of the provisions of the Treaty against the directive or decision of the Summit authorizing negotiations to commence with the Republic of South Sudan whose human rights violation, as explained, allegedly offends or infringes core principles of the Treaty in Articles 3(3), (b), (c), (e), (f) 6(d), 7(2) and 8(1) (c);***

***It is the said infringement of the core principles of the Treaty that consequently forms the legal foundation on the jurisdiction of this Court under Articles 23(1), 27(1) and 30(1) of the Treaty to entertain and determine the Reference.***

***The Court has held in past various decisions that the provisions of the Treaty require strict compliance and their breach or infringement vests the Court with jurisdiction under Articles 23(1) and 27(1) for application and interpretation of the same.”*** The decision in **Samuel Mukira Mohochi vs.**

**Attorney General of the Republic of Uganda, EACJ Reference No.8 of 2021**

was cited in support of that proposition.

25. The Applicants further argued that ***“The Reference is not meant to determine whether or not the Republic of South Sudan committed human rights violations but calls upon this Court not to countenance the behavior or action of the EAC Summit to direct commencement of negotiations with the Republic of South Sudan in disregard of the report of the Verification Committee which concluded that the Republic of South Sudan does not adhere to the core principles enshrined in the Treaty; and***

***“The Court has the responsibility to ensure that such core principles are upheld by the EAC Partner States.”*** In that regard, the decision in **James Katabazi and 22 Others vs. Secretary General of the East African Community and Attorney General of Uganda, EACJ Reference No.10 of 2007** was cited.

26. In response to submissions by the Respondents, the Applicants further submitted that ***“in considering grant of membership to a foreign country, Article 3(3) of the Treaty provides for conditions to be met by the foreign country. Those conditions include inter alia geographical proximity and inter dependence between it and the Partner States and adherence to universally accepted standards of human rights and social justice. That in applying those conditions, the Summit in its 13<sup>th</sup> Communiqué rejected the application of the Republic of South Sudan because of lack of geographical proximity and therefore, the Republic of South Sudan upon that rejection, should not have been allowed to proceed to the “negotiations level” as authorized by the Summit on 30<sup>th</sup> November, 2012 as it had already failed to meet one requisite condition under Article 3(3)(d) of the Treaty; and***

***The directive of the Summit issued on 30th November, 2012 for commencement of negotiations with the Republic of South Sudan constitutes an infringement within the meaning of Article 30(1) of the Treaty and the said decision was legally wrong as it disregarded or infringed the conditions set out in Article 3(3)(b) of the Treaty.***

27. Further, that the Republic of South Sudan on its own admission and as corroborated by the Verification Report, was in violation of the principle of adherence to acceptable standards of human rights and is therefore guilty of non-adherence with the core principles enshrined under Article 3(3)(b) of the Treaty. The Summit ought therefore to have rejected the application of the Republic of South Sudan as it did when the said country failed to meet the conditions set out in Article 3(3) (d) with regard to geographical proximity. It is the said breach or infringement of the said Article that provides this Court with the jurisdiction to entertain the Reference, so submitted the Applicants.

## **II. THE RESPONDENTS' SUBMISSIONS**

28. Each Respondent filed separate submissions with regard to **Issue No.1.** and on its part, the **1<sup>st</sup> Respondent** submitted that the declarations and orders sought by the Applicants are a prerogative of the Summit under the Treaty as far as granting of membership to a foreign country is concerned and is not delegable to another Organ. That to do so would violate the principle of separation of powers and the Nigerian decision of **Hon. Abdallah Macciado Ahmed vs Sokoto State House of Assembly and Anor (2004 ) 44 WRN 52** was cited in that regard.

29. He further submitted that “ ***to grant the declarations and orders sought by the Applicants, will be to condemn the Republic of South Sudan unheard about all the allegations of human rights violation by the Applicants and to***

*do so would amount to the Court acting against the maxim of audi alteram partem (no party should be condemned unheard).*

*The granting of the reliefs sought by the Applicants implies that a finding and decision has been made by the Summit on the issue and yet to-date, no final decision has been made on the matter and so the Reference is speculative and moot.”*

30. On its part, the 2<sup>nd</sup> Respondent submitted that;

*“The question of admission or non-admission of a foreign country to the membership of the Community is a prerogative of the Summit under Article 11(9)(c) of the Treaty and involves a set criteria, terms and conditions laid down in Article 3 of the Treaty as well as policy issues, balance of best interests, political considerations, and relations with foreign countries, all of which the Court is ill suited to adjudicate upon.”*

31. He further submitted that under the principle of separation of powers and justiciability, the nature and the subject matter involving negotiations between the Partner States and the Republic of South Sudan are not amenable to the judicial process and in that regard, **R vs. the Secretary for the Home Department ex Parte Bentley (1994) 12, 13, 349** as well as **Samuel Muigai Nga’ng’a vs. the Minister for Justice, National Cohesion & Constitutional Affairs and Another [2013] eKLR** were cited.

32. The 2<sup>nd</sup> Respondent further argued that the jurisdiction of the Court is conferred under Articles 23(1) and 27(1) of the Treaty on the interpretation and application of the Treaty. It has no jurisdiction to deal with allegations of violation of human rights alleged by the Applicants and it has no jurisdiction to adjudicate in a matter involving a foreign country which is not a member of the East African Community such as the Republic of South Sudan.

- 33.** He finally submitted that the mandate of entering into negotiations for membership of a foreign country in the Community is entrusted on the Summit under Articles (3)(2) of the Treaty as well as the powers of admission thereof under Article 11(9)(c ) and those powers are not delegatable. Such powers are in any event of a political nature and involve political value judgment not suitable for judicial adjudication. The case of **Oetjen vs Central Leather Company 246 U.S 297** was cited to support that submission.
- 34.** On its part, the 3<sup>rd</sup> Respondent agreed with the above submissions and added that the allegation that the Republic of South Sudan is involved in human rights violations is a matter for the domestic courts of that country and not this Court.
- 35.** The 4<sup>th</sup> Respondent on its part, while adopting the submissions of the Respondents, added that allegations of rape, murder, torture etc. allegedly committed by citizens of the Republic of South Sudan against members of the Applicants' company cannot be entertained by this Court as South Sudan is not a member of the Community.
- 36.** The 6<sup>th</sup> Respondent submitted *inter alia* that although the Court has held in various past decisions that it is vested with jurisdiction under Articles 23(1), 27(1) and 30(1) to apply and interpret Treaty provisions, the Applicants in their Reference, supporting Affidavit and submissions have not shown or demonstrated that the Respondents, in handling the application of the Republic of South Sudan, have infringed or ran afoul of Article 3 of the Treaty so as to invoke the jurisdiction and authority of the Court.

#### **DETERMINATION ON ISSUE NO.1**

- 37.** It is not in dispute that at least four steps or stages are necessary in the consideration of an application to join the East African Community. They are the following :-

- i) Application by the foreign country;*
- ii) Verification of the application for conformity with the conditions under Article 3(3) of the Treaty;*
- iii) Negotiations as to the nature, extent or type of membership to be granted; and*
- iv) Granting of the membership.*

**38.** It is also agreed that as far as the application of the Republic of South Sudan to join the East African Community is concerned, no final decision has been made by the Summit. At each of the above stages, the Summit is expected to make a decision one way or the other and Annexes 1 to VIII annexed to the 6th Respondent's Response to the Reference are *Minutes* or *Communiqué* records of the various meetings of the Summit in which the issue of the application of the Republic of South Sudan has been dealt with. In each meeting, the Summit has given various decisions or directives to the Council of Ministers in respect of the said application.

**39.** In our considered view, the question whether the directives or decisions of the Summit on 30<sup>th</sup> November, 2012, as contained in the 14<sup>th</sup> Communiqué amount to an infringement of Articles 3(2), (3)(b), (c), (e), (f), 6(d), 7(2) and 8(1)(c) as read with Articles 23 and 27(1) of the Treaty, is a matter within the jurisdiction of this Court. In Samuel M. Muhochi [supra] this Court stated as follows:-

*“What matters in our considered opinion, is that the application seeks that this Court determines whether the actions and decisions of the Respondents were an infringement of specific Treaty provisions. It is the interpretation and application of these provisions in order to determine whether the impugned action and decisions are infringement that provides the jurisdiction of the Court under Article 27(1).”*

40. We hold the same view in this Reference and accordingly, we must agree with the Applicants on the issue of jurisdiction.

41. As regards the contention of the Respondents that the Republic of South Sudan is not a member of the East African Community and is therefore not bound by the Treaty and as such the Court has no jurisdiction to adjudicate on the allegations of human rights violations against the Ugandan traders including the Applicants trading in the said Republic, we have carefully considered the rival arguments of the Parties on the aforesaid point. First, we agree with the Respondents that the Republic of South Sudan is not a member of the East African Community and is therefore not bound by the Treaty. However, once a foreign country applies for membership to join the Community, it will necessarily have to come under the purview of Article 3(2) of the Treaty for purposes of *“negotiations”* with the Partner States. For avoidance of doubt, the said provision states as follows:-

***“The Partner States may, upon such terms and in such manner as they may determine, together negotiate with any foreign country the granting of membership to, or association of that country with, the Community or its participation in any of the activities of the Community.”***

42. In that context, and looking at the Reference before us, the challenge by the Applicants is on the aforesaid directive by the Summit of the Heads of State issued on 30<sup>th</sup> November, 2012 rather than the fact that the Republic of South Sudan is or is not a member of the East African Community. The said directive was made by the Summit which is an Organ of the East African Community and is a decision amenable to the jurisdiction of this Court under Article 30(1) of the Treaty.

43. Further, we quite agree with the Applicants that in this Reference, the Republic of South Sudan is not on trial for alleged human rights violations

committed against the Ugandan traders in the said country. Article 27(2) of the Treaty cannot therefore be invoked to deny this Court jurisdiction as alleged by the Respondents. In any event, as a general policy of the Court, which is in any event inapplicable to the present Reference, mere mention of human rights in a reference cannot be the basis of ouster of jurisdiction under Article 27(2) of the Treaty. That policy was what led the Court in **Samuel M. Muhochi** [supra] to state as follows;

***“In particular, this Court has consistently held and the Appellate Division has consistently upheld, that mere inclusion of human rights violations in a Reference will not deter the Court from exercising its interpretation jurisdiction under Article 27(1) of the Treaty”***

44. We reiterate that holding and without any hesitation, we shall hold and find that this Court is vested with jurisdiction to entertain this Reference and would therefore answer this issue in the affirmative.

**ISSUE NO.2: WHETHER THE REFERENCE DISCLOSES A CAUSE OF ACTION TAKING INTO ACCOUNT THE PROVISIONS OF ARTICLE 30(1) OF THE TREATY**

**I. THE APPLICANTS’ SUBMISSION**

45. The Applicants, citing Article 30(1) of the Treaty, strongly contended that the Reference discloses a clear and concise cause of action. They argued that this Court has already pronounced itself that for a cause of action to be established under Article 30(1), it is not necessary to show a right or interest that has been infringed and/or damage that has been suffered as a consequence of the matters complained of in the Reference. That it is enough to state that the matter complained of infringes a provision of the Treaty in a relevant manner and reference was made to **Hon. Sitenda Sebalu**

vs. Secretary General of the EAC & 3 Others and EACJ Ref. No.1 of 2010, Prof Peter Anyang Nyong'o and Others vs. Attorney General of Kenya and Others, EACJ Ref. No.1 of 2008 in that regard.

46. The Applicants further contended that in the present Reference, their complaint is against the directive of the EAC Summit in their 14<sup>th</sup> Communiqué which authorized negotiations between the Council of Ministers and the Republic of South Sudan aiming at admitting the Republic of South Sudan into the East African Community. In their opinion, the said directive was illegal, null and void *ab initio* since the said country in a report compiled by the Ugandan Traders Association of South Sudan and in another report compiled by the Verification Committee set up by the Community was found not to accede, adhere or strictly observe the universally accepted principles of good governance, democracy, rule of law, observance of human rights and social justice.
47. Based on the aforesaid reports, the Applicants have argued that directive of the Summit above mentioned as well as the ongoing negotiations, generally and fundamentally infringe Articles 3(a), (b), (c), (e) and (f), 6(d), 7(1), (2) and 8(1), (c) of the Treaty, hence, in terms of Article 30(1) of the Treaty, it is clear that a cause of action has been established and calling for interpretation of the alleged infringed Articles. Further, the Applicants contended that they are natural persons residing in the Republic of Uganda who in terms of Article 30(1) of the Treaty have a *locus standi* to bring an action before this Court.
48. In their rejoinder to the Respondents' submissions as regards the Respondents' arguments that the Reference is speculative as no final decision has been made by the Summit, the Applicants contended that the process of admitting a foreign country into the Community under Article 3(2) and (3) of the Treaty involves at least four steps namely: (1) ***Application by the foreign***

*country, (2) Verification of the application for conformity with the conditions under Article 3(3) of the Treaty, (3) Negotiations as to the nature, extent or type of membership to be granted and (4) Granting of the membership.*

49. They submitted further that at each stage or step, the Summit makes a decision whether to advance or not to the next stage or step in the process. They further contended that in the present case, the Summit decided to advance from the verification step to the negotiation level and that decision or directive of the Summit constituted an abdication of, and amounted to a fundamental breach of the core principles of the Community under Article 3(3)(b) and therefore constitutes a cause of action under Article 30(1) of the Treaty.

50. As to the contention that the 6<sup>th</sup> Respondent is wrongly sued in the Reference, the Applicants submitted that the 6<sup>th</sup> Respondent is the Principal and the Accounting Officer of the Community under Article 67(3) of the Treaty and liable, in his representative capacity, for any actions of the Community. As for the Partner States, that they have been sued independently within the meaning of Article 3 of the Treaty as they had individually approved the improper directive through their respective Heads of State. That therefore, the Reference has been brought jointly and severally against them for the above reasons and the arguments of the 6<sup>th</sup> Respondent on the said point are erroneous and misleading.

## **II. THE RESPONDENTS' SUBMISSION**

51. The 1st Respondent in his submissions cited Article 30(1) of the Treaty in full as well as the decisions of this Court in **Prof. Peter Anyang' Nyong'o and Others vs. Attorney General of Kenya & Others, EACJ Ref. No.1 of 2006** and **Legal Brains Trust (LBT) vs. Attorney General of Uganda, EACJ Appeal No.4 of 2012** to show how a cause of action is established under the Treaty. In relying

on **Prof. Peter Anyang' Nyong'o**, [supra], the 1<sup>st</sup> Respondent was making the point that under Article 30(1), the Court is compelled to exercise its jurisdiction only where it is being called upon to determine the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community referred to it on the ground that it is unlawful or it infringes specific provisions of the Treaty. Further, he relied on the decision in **Legal Brains Trust (LBT) Limited** [supra], to argue that under Article 30(1) of the Treaty, a cause of action must be founded on the failure of a Partner State or an institution of the Community to apply the Treaty. He explained that the said Article opens the doors of the Court to any legal or natural person who is a resident of the Community and who wishes to challenge the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the basis that there is thereby a violation of a particular provision of the Treaty.

**52.** He however argued that on the contrary, what the Applicants claim to be a cause of action is the unfounded complaint that the Summit is bound to admit the Republic of South Sudan into the Community and that by so doing the Summit would be contravening the Treaty, but in truth, no decision to admit the Republic of South Sudan has been made by the Summit to date and to warrant the present Reference. Further, that it has not been shown that the Summit has failed to apply Article 3(3) of the Treaty or the procedures prescribed by the Council of Ministers under Article 3(3)(b) of the Treaty and therefore, the Reference is premature and does not disclose a cause of action under Article 30(1) of the Treaty.

**53.** On his part, and while agreeing with the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent argued that the Reference targets the Summit which is an organ of the Community as per the definition in Article 1 of the Treaty while Article 30 as

framed shows that proceedings under it can only be directed against a Partner State or an institution of the Community and not an organ of the Community such as the Summit. Secondly, that the power of admission of a foreign country is vested in the Summit under Article 11(9)(c) of the Treaty and not any Partner State and so there is no plausible cause of action against the Partner States. Thirdly, the Reference does not disclose any cause of action contemplated under Article 30(1) but merely consists of mere allegations against a legitimate process of an organ of the Community.

**54.** Fourthly, the 2<sup>nd</sup> Respondent contended that the Court's jurisdiction under Article 30 read together with Article 27 is delimited within the East African Community and the Court has no other extra territorial jurisdiction stretching to Non-member States. The Reference therefore, so far as it seeks the examination of the actions and institutions of the Republic of South Sudan, which is neither a member of East African Community nor a Party to this Reference, discloses no cause of action.

**55.** Fifthly, the 2<sup>nd</sup> Respondent contended that the allegations of human rights violations against Ugandan traders, including the Applicants, trading in the Republic of South Sudan have no justifiable cause before this Court. That such allegations should in any event be dealt with by institutions within the Republic of South Sudan or under settlement arrangements between the Ugandan Government, the Republic of South Sudan and the Applicants, through their company, the Ugandan Traders Association of South Sudan.

**56.** The 2<sup>nd</sup> Respondent lastly submitted that, negotiations between the Republic of South Sudan and the Partner States for admission of the said country into the East African Community does not fall under any of the categories of "Act, regulation, decision or action that is unlawful or an infringement of the provision of the Treaty under Article 3(1)" and therefore, the Reference

discloses no cause of action against any member of the Community and should be struck out.

57. The 3<sup>rd</sup> Respondent, while admitting that the Applicants have established a cause of action, generally, denied that they have a cause of action against him, specifically. That under Article 30(1) of the Treaty, any cause of action must be predicated upon alleged violations of the Treaty by an institution of a partner state and so such violations have been cited as against his office or any institution of his country.

58. It was also his argument that negotiations with The Republic of South Sudan for admission to the EAC cannot create a cause of action under Article 30 aforesaid.

59. The 4<sup>th</sup> Respondent as well as the 5<sup>th</sup> Respondents did not make any submissions on this issue but the 6<sup>th</sup> Respondent argued that, Article 30(1) of the Treaty and as was decided in Prof. Peter Anyang' Nyong'o, [supra], envisages a statutory cause of action and not a cause of action as ordinarily found in tort or contract. Further, that in the Sitenda Sebalu case [supra], this Court held that, ***"it is enough if it is alleged that the matter complained of infringes a provision of the Treaty in a relevant manner. This argument supports the existence of a cause of action,"***

60. The 6<sup>th</sup> Respondent also cited the case of Legal Brains Trust (LBT) Limited [supra], where the Appellate Division held that:-

***".....under Article 30(1), the cause of action must be founded on the failure of a Partner State or an Institution of the Community to apply the Treaty. In the instant case, the Applicants did not complaint of any failure in the application of the Treaty, neither by a Partner State nor by an institution of the Community. Article 30 of the Treaty opens the doors of this Court to any legal or natural person who is resident in the Community and who***

*wishes to challenge the legality of any Act, regulation, directive, decision or action that was alleged to have been made or taken in violation of the Treaty Particular Articles of the Treaty were mentioned as having been infringed”.*

- 61.** That based on the aforesaid cited authorities, he admitted that the mere fact of occasioning a breach of the Treaty is in itself a cause of action and he does not deny the legal capacity under which the Applicants have come to this Court. However, he contended that, the matters that the Applicants have complained about (the directives to commence negotiations for the admission of the Republic of South Sudan into the Community), do not fall under the category of *“Act, regulation, directive, decision or action that is unlawful or an infringement of the provisions of the Treaty”* for purposes of constituting a cause of action under Article 30(1) of the Treaty.
- 62.** That therefore, the decisions of the Court in the case of Hon. Sitenda Sebalu, [supra] and Hon. Peter Anyang’ Nyong’o [supra] are distinguishable from the instant case in that in the said cases, the complaints were in respect of actions and decisions that had already taken place while in the present case, no decision has been made by the Summit to warrant any intervention by this Court.
- 63.** The 6th Respondent further contended that the Applicants have made blanket allegations against all the Respondents as if they all have the same duties and obligations which is not true and in any event, Article 3 of the Treaty mandates Partner States to negotiate with any foreign country as to the grant of membership to the Community taking into consideration the matters under Article 3(3) of the Treaty and the said Article outlines the rights and duties of the Partner States. That in that context, the Applicants have failed to show how the Respondents have infringed the Treaty or what they

had done or failed to do in terms of Article 3(2) of the Treaty for purposes of finding a cause of action against them.

64. For the above reasons, the Respondents pleaded that the Reference does not disclose a cause of action against them taking into account the provisions of Article 30(1) of the Treaty.

### III. DETERMINATION ON ISSUE NO.2

65. The issue for consideration and determination is whether the Reference discloses a cause of action under Article 30(1) of the Treaty.

66. In our view, the Applicants' contention that the directive of the Summit on 30<sup>th</sup> November, 2012 infringes the various provisions of the Treaty, constitutes a cause of action under the provisions of Article 30(1) of the Treaty in not far-fetched subject to the merits of their contention being established later in this judgment. This view finds support in various past decisions of this Court and more so, Hon. Sitende Sebalu case [supra], where this Court held that:-

*"It is enough if it is alleged that the matter complained of infringes a provision of the Treaty in a relevant manner. This argument supports the existence of a cause of action."*

67. Further, in Attorney General of the Republic of Kenya and Independent Medical Legal Unit, EACJ Appeal No. 1 of 2011, the Appellate Division held that:-

*"It is that alleged infringement which, through interpretation of the Treaty under Article 27(1), which constitutes the cause of action as a Reference."*

68. In stating as above, the Applicants' case, brought in respect of the directive of the Summit made on 30<sup>th</sup> November, 2012 and contained in the 14<sup>th</sup>

Communiqué, falls within the assertions of the said various decisions of this Court, that it is sufficient to allege an infringement of a specific provision of the Treaty, as the Applicants have done, so as to constitute a cause of action under Article 30(1) of the Treaty. In **Prof. Peter Anyang Nyong'o** [supra], this Court explained that Article 30(1) of the Treaty, on which the Applicants have base this Reference, envisages a statutory cause of action and not a cause of action as ordinarily known in tort or contract and we maintain that principle as applicable to the present case.

**69.** As regards the contention that Article 30(1) of the Treaty does not envisage a reference against an organ of the Community, in our considered view, though there are various entities in the Community, all are united under the corporate status of the said body. That is why in **Samuel Mukira Muhochi**[supra], this Court observed as follows:-

***“Legally, the organs are not corporate entities but are components of the Community which is the corporate body. Ordinarily, an act of an organ in discharging its functions is an act of the corporate Community.”***

**70.** It follows therefore, that the attempt by the Respondents to show that in some Articles, the powers or functions are vested in distinct entities or not vested in some Respondents, is a narrow and restrictive outlook which may not be beneficial to the interpretation of Article 30(1) of the Treaty. In the **East African Law Society and 4 Others vs. The Attorney General of the Republic of Kenya and 3 Others, EACJ Ref. No.3 of 2007**, this Court stated as follows:-

***“We note the disparity in the three Articles depending on who is responsible for the alleged failure or infringement, but having regard to the purpose of the provisions, namely to ensure compliance with provisions of the Treaty and to provide for empowerment of inter alia any resident to***

***seek judicial and adjudication where there is allegations of non-compliance, we are inclined to the view that a restrictive interpretation would defeat that purpose.”***

**71.** In the same decision, this Court stated further as follows:-

***“Lastly, we are not persuaded by the Respondents urging us that we give to Article 30, a narrow interpretation that excludes from the application of that Article infringement by an organ of the Community. With due respect to the Learned Counsel, it seems to us that such a restrictive interpretation is not based on sound ground. It is only based on the fact that no mention of the infringement of the Treaty by an organ of the Community is made in Article 30“***

**72.** We reiterate the above holdings and would only add that a restrictive interpretation of the Treaty is not prudent and we further hold that all the Respondents, including the 6<sup>th</sup> Respondent, cannot be excluded under Article 30(1) of the Treaty once an allegation of breach or infringement of the provisions of the Treaty have been made. It is a wholly different matter however as to whether in fact those allegations as made, are true or not.

**73.** There is another assertion by the Respondents that the Court’s jurisdiction under Article 30 read together with Article 27 is de-limited within the East African Community and that there is no extra-territorial jurisdiction stretching to a non-member State. To our minds and as we have earlier stated, it is agreed that the Republic of South Sudan is not a member of the East African Community nor is it a Party to this Reference. We have also already stated that the Court in as far as this Reference is concerned, is called upon to deal with the alleged infringement of the mentioned Articles resulting from the mentioned directive of the Summit. Such an assertion is still within the territorial jurisdiction of the Court under Article 23(1), 27(1) and 30(1) of the

Treaty. As we have already discussed earlier, the Republic of South Sudan is brought in the picture or to the scene merely because it submitted its application for joining the Community under Article 3(2) of the Treaty. It is received as a foreign country “to negotiate” with the Partner States in accordance with the conditions and criteria set forth under Article 3(3) of the Treaty. The issue of extra-judicial jurisdiction does not therefore arise if the substratum of the Reference is looked at and we hold and find that the alleged infringement of the cited Articles of the Treaty is a matter to be dealt within the jurisdiction of this Court.

**74.** For avoidance of doubt, for a cause of action to be established under Article 30(1) of the Treaty, one only need to show that he is a resident of a Partner State; he is complaining about the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community and lastly, that the actions allegedly constitute a violation of the Treaty. In the present case, we have no doubt that the Applicants have discharged that burden.

**75.** Finally, for completion of our analysis of Article 30(1), we are constrained to address ourselves to the issue of prematurity of the Reference as raised by all the Respondents and specifically, the 1st, 2nd and 3rd Respondents. In that regard, we have already found that the consideration of the Republic of South Sudan’s application to join the Community is ongoing and no final decision has been taken by the Summit. In fact, it would appear that the negotiations that were authorized by the Summit are yet to commence.

**76.** We understood the Respondents to argue that an ongoing process *per se* was not actionable under Article 30(1) of the Treaty until a final decision had been taken. With respect, we would disallow this position. For ease of reference Article 30(1) provides 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 the Treaty.”***

**77.** Article 30(1) explicitly distinguishes between a decision and an action, delineating each of them as a basis for a cause of action thereunder. It does not draw any distinction between a final decision and a decision taken in the course of a process, but provides for both categories of decisions as constituting a basis for a cause of action. Therefore, it is our considered view that a decision taken in the course of an ongoing process, subject to proof of intrinsic circumstances, is just as actionable as a final decision taken upon conclusion thereof.

**78.** In conclusion, having analyzed the various arguments by the Parties under **Issue No.2** and having given our considered view and position on the matter, we hold that the Applicants have persuaded and convinced us that a cause of action has been disclosed under the provisions of Article 30(1) of the Treaty. In short, their allegation that the directive of the Summit made on 30<sup>th</sup> November, 2012 as found in the 14<sup>th</sup> Communiqué infringes Articles 3(2), 3(3)(b), (c ), (e), (f), 6(d), 7(2) and 8(1)(c ) of the Treaty suffices to support the existence of cause of a action in this Reference. We would therefore answer this issue in the affirmative.

**ISSUE NO.3: WHETHER THE ONGOING PROCESS OF CONSIDERING THE APPLICATION OF THE REPUBLIC OF SOUTH SUDAN TO JOIN THE EAST AFRICAN COMMUNITY VIOLATES THE PROVISIONS OF ARTICLES 3(A), (B), (C), (E), (F), 6(D), 7(2) AND 8(1)(C) OF THE TREATY**

**I. THE APPLICANTS' CASE**

79. The Applicants contended that the ongoing process of negotiations with the Republic of South Sudan as authorized by the Summit on 30<sup>th</sup> November, 2012, is null and void *ab initio* in as far as it infringes Articles 3(a), (b), (c), (f), 6(d), 7(1) & (2) and 8(1)(c). They further contended that the Report of the Uganda Traders Association of South Sudan (Annex. "A" to the Affidavit of the First Applicant) details human rights violations including rape, assault, torture, extra-judicial killings, false imprisonment as well as confiscation of merchandise committed against Ugandan traders by police and military officials of the Republic of South Sudan; that the said Report was corroborated by the Verification Committee's Report which *inter alia* observed that the Republic of South Sudan does not adhere to universally accepted principles of good governance, democracy, the rule of law, observance of human rights and social justice, and therefore the directive of the Summit on 30<sup>th</sup> November, 2012 authorizing negotiations aimed at admitting a State which does not adhere to the said principles was a threat to the rule of law and good governance within the EAC.
80. It was also the Applicants' contention that the foregoing principles were benchmarks for a better integration among Partner States, as well as a safeguard against arbitrariness, dictatorship and anarchy. They cited the cases of **James Katabazi & 21 Others vs. The Secretary General of the EAC & The Attorney General of the Republic of Uganda EACJ Ref. No. 1 of 2007; Plaxeda Rugumba vs. The Secretary General of the EAC & Another EACJ Ref. No. 8 of**

**2010, and Samuel Mukira Muhochi vs. Attorney General of the Republic of Uganda EACJ Ref. No. 5 of 2011** in support of their argument.

**81.** The Applicants also contended that the Summit's directive of 30<sup>th</sup> November 2012 amounted to a decision that was taken without regard to the provisions of Article 3(2) of the Treaty in so far as it sanctioned the commencement of negotiations with a country that was not in compliance with the conditions outlined in Article 3(3)(b). Learned Counsel argued that the 'negotiations' envisaged under Article 3(2) were only for purposes of determining the type of membership that could be offered to an Applicant that sought to join the EAC.

## **II. THE RESPONDENTS' CASE**

**82.** It was argued for the 1<sup>st</sup> Respondent that the process for the consideration of the Republic of South Sudan's Application to join the EAC did not violate the provisions of the Treaty; rather, under Article 3(2) of the Treaty, matters relating to admission to the membership of the Community were the express mandate of the Partner States and this Court had no mandate to usurp that role or determine the propriety of countries that sought to join the Community.

**83.** The 1<sup>st</sup> Respondent further contended that, in exercise of their mandate, the Partner States were guided by the criteria, conditions and other considerations outlined in Articles 3(3) and 3(4) of the Treaty. That the burden of proof that the Respondents had acted outside the scope of Article 3(4) lay with the Applicants but had not been discharged.

**84.** The 1<sup>st</sup> Respondent did also contend that the present Reference was premature, having been filed prior to a decision on the admission of the Republic of South Sudan and in the absence of proof that such a decision had been taken without due regard to the considerations and criteria set out in Article 3 of the Treaty. It was learned Counsel's contention that a decision as to

whether the Republic of South Sudan qualified to join the EAC could only be taken after the verification process was complete and recommendations thereof had been accepted by the Summit, before which there was no basis for an allegation of violations of Treaty provisions.

**85.** The 2<sup>nd</sup> Respondent re-echoed the submissions of the 1<sup>st</sup> Respondent above, contending that whereas the requisite provisions of the Treaty had been duly complied with by the Partner States, the Applicants had not impugned the legality of the Protocols or the procedures of the Community under which an Application for membership in the EAC could be considered or suggested that they violated the Treaty. Similarly, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents re-echoed the 1<sup>st</sup> Respondent's submission on the prematurity of the Reference and the decision to admit a Country into the Community being the prerogative of the Partner States, contending that the laid down procedure had been duly complied with.

**86.** In the same vein, the 6<sup>th</sup> Respondent maintained that the procedure adopted by the Partner States had not been concluded so as to warrant the present Reference and did not violate the provisions of the Treaty. With particular reference to Article 3 of the Treaty, the 6<sup>th</sup> Respondent contended that a violation thereunder could only arise where negotiations with a foreign country were undertaken in the absence of a formal application or a decision was taken without regard to the conditions stipulated in Article 3(3) of the Treaty. It was learned Counsel's contention that the Applicants had not discharged the burden of proof upon them in that regard.

### **III. DETERMINATION ON ISSUE NO.3**

**87.** Articles 6(d), 7(2) and 8(1)(c) provide as follows:-

#### **Article 6(d)**

***“The fundamentals principles that shall govern the achievements of the objectives of the Community by the Partner States shall include:***

***Good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.”***

#### **Article 7(2)**

***“The Partner States shall undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.”***

#### **Article 8(1)(c)**

***“The Partner States shall:***

***Abstain from any measures likely to jeopardize the achievement of the objectives or implementation of the provisions of this Treaty.”***

**88.** The admission of new members into the East African Community is regulated by Article 3(2) of the Treaty. The Article provides:-

***“The Partner States may, upon such terms and in manner as they may determine, together negotiate with any foreign country the granting of***

***membership to, or association of that country with, the Community or its participation in any of the activities of the Community.”***

89. The parameters against which the foregoing function is performed are detailed in Articles 3(3), 3(4) and 3(6) of the Treaty. Article 3(3) of the Treaty provides as follows:-

***“Subject to paragraph 4 of this Article, the matters to be taken into account by the Partner States in considering the application by a foreign country to become a member of, be associated with, or participate in any of the activities of the Community, shall include that foreign country’s:***

- a) Acceptance of the Community as set out in the Treaty;***
- b) Adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice;***
- c) Potential contribution to the strengthening of integration with the East African region;***
- d) Geographical proximity to and inter-dependence between it and the Partnership State;***
- e) Establishment and maintenance of a market driven economy; and***
- f) Social and economic policies being compatible with those of the Community.***

90. Article 3(4) of the Treaty provides as follows:-

***“The conditions and other considerations that shall govern the membership or association of a foreign country with the Community or its participation in any activities of the Community shall be as those prescribed in this Article.”***

91. Article 3(6) reads:

***“The procedure to be followed with respect to the foregoing provisions of this Article shall be prescribed by the Council.”***

92. The procedure in reference in Article 3(6) of the Treaty is then codified in the Protocol for Admission to the East African Community (hereinafter referred to as ‘the Protocol’). It seems to us that the net effect of Articles 3(2) of the Treaty and 3(3) of the Protocol is to designate the admission of a foreign country into the Community as a function of the Summit.

93. Further, while Article 3(1) of the Protocol replicates verbatim the conditions for admission to the Community stipulated in Article 3(4) of the Treaty, Article 4(3), (4), (5), (6) and (7) of the same Protocol outlines the procedure to be adopted by the Council of Ministers and Summit in such admission. Article 4(3), (4),(5), (6) and (7) read as follows:-

***“3. An application for granting of membership shall be included in the agenda of the Council;***

***4. The Council may, after due consideration of the application make an appropriate recommendation thereon, for the action of the Summit of Head of States;***

***5. In all cases, consideration of the admission of a member or associate member shall be included in the agenda of the Summit;***

***6. The Summit of the Head of States may, after due consideration of the recommendation by the Council, make a decision on the application; and***

***7. The decision of the Summit on the application shall be communicated to the applicant country by the Secretary General.”***

94. In the same vein, Article 4(1) of the Protocol provides for a foreign country that wishes to join the Community to submit an application in writing and Article

4(2) of the same Protocol provides for the communication of such application to the Partner States. Article 4(2) reads:-

***“The Secretary General shall, on receipt of an application for membership, association or rights of participation in the activities of the Community communicate a copy thereof to all Partner States.”***

95. In the instant Reference, it is not in dispute that the Republic of South Sudan did submit such an application on 11<sup>th</sup> November 2011. We therefore find that Article 4(1) of the Protocol has been duly complied with. The 6<sup>th</sup> Respondent contended that the provisions of Article 4(2) of the Protocol were similarly adhered to. We find no counter evidence or arguments on this issue by the Applicants. We therefore find no reason to disallow the Respondents contention, and are satisfied that the said provision was duly complied with in the process under scrutiny.

96. Indeed, the 6<sup>th</sup> Respondent’s affidavit evidence sought to demonstrate that the provisions of the said Protocol were duly complied with throughout the process with regard to the Application by the Republic of South Sudan. The Applicants contested this on the premise that the ‘negotiations’ envisaged under Article 3(2) of the Treaty should only be held with a foreign country which has been verified and found *prima facie* to conform to the conditions set out under Article 3(3)(b) of the Treaty, but the Summit’s directive for the commencement of negotiations with the Republic of South Sudan fell short of this in light of glaring evidence that the Republic of South Sudan did not meet the conditions set out thereunder. The Applicants further contended that the negotiations referred to in Article 3(2) of the Treaty only concern the nature, extent or type of membership to be granted to an applicant and not a determination of a foreign country’s conformity with the conditions set out under Article 3(3) of the Treaty.

**97.** We have carefully considered the arguments of the Parties above against the law in reference. We find nothing in Article 3(2) of the Treaty that would warrant the restrictive interpretation posited by the Applicants. On the contrary, Article 3(2) explicitly provides for negotiations thereunder to be undertaken ‘upon such terms and in such manner’ as the Partner States may determine. We have established that the Protocol was promulgated under Article 3(6) of the Treaty to determine the manner in which admission of a foreign country into the Community would ensue. Article 3(3) thereof designated the Summit to make the decision as to such admission. The designated Organ (the Summit), on 30<sup>th</sup> November 2012, acting within its discretionary mandate, issued a directive for negotiations to commence with the Republic of South Sudan. It thus executed its mandate thereunder. If, for argument’s sake, the Summit was willing to have the alleged human rights violations considered as negotiation points, that would clearly be its prerogative.

**98.** In any event, we are not persuaded by the contrary arguments advanced by the Applicants. In our considered view, reference to the different types of ‘membership’ in Article 3(2) denotes the possible levels of association with the EAC that are available to foreign countries. Indeed, the requirement in Article 4(1) of the Protocol for clarity as to the type of membership sought by such foreign country would serve to buttress this interpretation of Article 3(2) of the Treaty.

**99.** In the result, we are satisfied that the process under scrutiny duly complied with the Treaty and Protocol; the directive for the commencement of negotiations was grounded in the Summit’s discretionary mandate as enshrined in Article 3(2) of the Protocol, and it did not contravene Articles 6(d), 7(2) and

8(1)(c) of the Treaty as alleged. We would, therefore, answer this issue in the negative.

**ISSUE NO.4: WHETHER THE APPLICANTS ARE ENTITLED TO ORDERS SOUGHT**

**100.** The Applicants seek the following Orders:

- a) A Declaration that the Republic of South Sudan is not a fit and proper country to be granted membership in the East African Community;*  
*and*
- b) Orders that the Respondents should not grant membership to the Republic of South Sudan in the East African Community.*

**101.** On the other hand, the Respondents oppose the reliefs sought by the Applicants on the grounds that a Declaration that the Republic of South Sudan is unfit for membership of the Community would be tantamount to the Court usurping the role of the Summit.

**DETERMINATION ON ISSUE NO.4**

**102.** We have carefully considered the submissions of all the Parties on this issue. We find Article 3(2) of the Treaty and Articles 3(3) and 4(6) of the Protocol very pertinent thereto in so far as they address the mandate of the Partner States and Summit with regard to admission of a foreign country to the Community. The prayers sought by the Applicants would appear to require this Court to pronounce itself on a matter explicitly reserved for the above Organs of the Community. In any event, having decided the preceding issue in the negative, the prayers sought by the Applicants are not tenable.

**CONCLUSION**

**103.** In conclusion, the Reference is hereby dismissed with costs to the Respondents. It is so ordered.

Delivered, Dated and Signed this 27<sup>th</sup> Day February, 2015 at Arusha.

.....  
**JEAN BOSCO BUTASI**  
**PRINCIPAL JUDGE**

.....  
**ISAAC LENAOLA**  
**DEPUTY PRINCIPAL JUDGE**

.....  
**FAUSTIN NTEZILYAYO**  
**JUDGE**

.....  
**MONICA MUGENYI**  
**JUDGE**

.....  
**FAKIHI A. JUNDU**  
**JUDGE**