IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA
APPELLATE DIVISION

(*Coram: E. Ugirashebuja, P; L. Nkurunziza, VP; J. M. Ogoola, E. Rutakangwa, A. Ringera, JJA)*

APPEAL NO. 4 OF 2014

BETWEEN

ANGELLA AMUDO .....APPELLANT

AND

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

[Appeal from part of the Judgment and Order of the First Instance Division at Arusha, Jean Bosco Butasi, PJ; J. Mkwawa, J; and Faustin Ntezilyayo, J; Dated 26th September, 2014 in Claim No. 1 of 2012]

30TH JULY, 2015

JUDGMENT OF THE COURT

1. This Appeal seeks to assail the Judgment and decree of this Court's First Instance Division ("the Trial Court") dated 26th September, 2014 in Claim No. 1 of 2012 ("the Claim"). Apparently, both parties to this Appeal (the "Appeal") were not satisfied with that Judgment. It appears the Judgment did not meet each Party's desires and/or expectations.

2. The Claim was instituted on 27th September, 2012 by a Statement of Claim, against the Respondent. The basis of the claim was particularized in paragraphs 12 to 23, the most prominent of which run as follows:-

> *"12. The Claimant's claim against the Respondent is for a declaration that the tenure of appointment of the Claimant as Project Accountant initially for a period of 20 months and the subsequent purported periodical extensions of the appointment were* ***ultra vires*** *the powers of the Secretary General and inconsistent with the Staff Rules and Regulations of the Respondent, a declaration that the Claimant was entitled to a contract of employment for a period of 5 years from the date of assumption of duty subject to renewal once for another five years, general and special damages for loss of earning and the facts constituting the cause of action whose presentation to the Court arose on or about the 16th September, 2012 are outlined in the paragraphs below:-*
>
> *13. Following an advertisement for the post of Project Accountant of the East African Community, the Claimant*

*applied for the post and went through various stages of interview for the successful candidate. A copy of the advertisement is attached hereto and marked "**ANNEX A 1".***

*14. Under Minute 2.1.3 of the minutes of the meeting of the Finance and Administration Committee of the Respondent Secretariat, the claimant was recommended for appointment as Project Accountant of the Community. An extract of minutes is attached hereto and marked "**ANNEX A 2".***

*15. During its 16th meeting, the Council of Ministers of the Community accepted the recommendations presented to it and appointed the Claimant to the position of Project Accountant of the Community. A copy of Minute 6.1.3 by which the Claimant was appointed is attached hereto and marked "**ANNEX A 3."***

*16. The Secretary General of the Community, acting **ultra vires** his powers and mandate contrary to Regulation 22(1) (c) of the East African Community Staff Rules and Regulations, in implementing the decision of the Council, gave the Claimant a contract with a tenure of 22 months instead of fixed 5 years renewable once for another 5 years, knowing very well that the position to which the Claimant was appointed to was categorized as that of professional staff. A copy of the contract is attached hereto and marked "**ANNEX A 4".***

18. The Claimant upon appointment, took up employment with the Community, served very diligently and professionally in accordance with the scope of her duties, established

financial controls including checking abuse of claims and executed all such legal assignments as were given to her by superiors from time to time.

19. Contrary to the Staff Rules and Regulations and in violation of established the (sic) Council of Ministers existing policies and actuated by malice, the Secretary General of the Community and/or his authorized deputies purported to employ the Claimant and to give her purported renewals of contract as they wished…….

*20. The Claimant was dissatisfied with the actions of the Executive Officers of the Respondent in the irregular manner they implemented the Council decision to employ her and asked that the complaint be referred to the Council of Ministers for a decision. A copy of the petition and reminders to have the matter presented to the Council are attached hereto and collectively marked "**ANNEX A 11".***

21. On or about the 5th September, 2012, the Claimant wrote to the Secretary General of the Respondent requesting to be given communication of the decision of the Council within 15 days of the last date of the meeting of the Council but no such communication was given within the said time or at all and hence the presentation of this claim in the Court. Copy of the communications is attached hereto and marked "ANNEX A 12."

22. The Claimant shall aver that the Respondent is vicariously liable for the wanton action of its Executive Officers herein outlined.

23. As a result of such actions the Claimant has sustained loss and damages:-

(i) Loss of earnings for a period of 78 months at a minimum rate of US$6,128 totalling US$447,984.

(ii) General damages for pain and suffering and mental anguish.

WHEREFORE the claimant prays to the Court for Judgment against the Respondent for:

*A. A declaration that the tenure of appointment given to Claimant (sic) initially for a period of 20 months and the subsequent periodical extensions of the appointment up to 30th April 2012 were **ultra vires** the powers of the Secretary General and his deputies and inconsistent with the Staff Rules and Regulations of the Respondent.*

B. A declaration that the Respondent (sic) was entitled to a contract of employment for a period of 5 years from the date of assumption of duty renewable once for another 5 years.

C. Special damages for loss of earnings in the sum of US$477,984.

D. General damages as per paragraph 23 (ii) hereof.

E. Aggravated damages for the wanton conduct of the Respondent's Executive Officers.

F. Costs of the claim on a full indemnity basis with interest thereon."

3. The Respondent resisted the claim. He asserted that the claim was time barred, and in the alternative, that the Claimant/Appellant was not an employee of the East African Community ("the Community") governed by the latter's Staff Rules and Regulations, 2006 as claimed.

4. In response, through her Reply to the Statement of Defence, the Appellant, belatedly claimed that as the claim was based on Article 31 of the Treaty for the Establishment of East African Community ("the Treaty") and not under Article 30, her claim was not barred by limitation under Article 30(2).

5. In its Ruling dated 2nd May, 2013, on the issue of limitation, the Trial Court found in favour of the Appellant. In so doing, it found itself seized with the necessary jurisdiction to entertain and determine the Claim on merit.

6. The agreed issues during the trial were accordingly:-

> "(*a) Whether the Claimant's claim is time barred under Article 30(2) of the Treaty;*
>
> *(b) Whether the Claimant was a staff member governed by EAC Staff Rules and Regulations, 2006;*
>
> *(c) Whether the position of Project Accountant that the Claimant held would entitle her to a five year contract with a possibility of renewal;*
>
> *(d) What remedies are available to the parties?"*

7. It is our considered opinion that as the issue of limitation had, rightly or wrongly, been disposed of in the Ruling of 2nd May, 2013,

it was absolutely unnecessary to retain it as one of the live issues in the case.

8. In the Trial Court, the Parties gave affidavital, direct and documentary evidence in support of their respective positions.

9. In its Judgment the Trial Court ruled that:-

(a) The Claimant's appointment for an initial period of twenty (20) months and subsequent periodical extension of the appointment up to the 30th April, 2012, were ultra vires the powers of the Secretary General and his deputies and inconsistent with the EAC Staff Rules and Regulations (2006);

(b) The Claimant was entitled to a contract of employment for a period of five (5) years in accordance with the EAC Staff Rules and Regulations;

(c) The Claimant was only entitled to special damages for loss of earnings to the tune of only USD 9,024.00 and not USD 477,984; and

(d) *The Claimant was entitled* to half of the taxed costs.

The claims for general and aggravated damages were dismissed.

10. This Judgment pleased neither party. The Appellant was the first to knock at the doors of this Appellate Division and the Respondent followed her footsteps with a cross-appeal.

11. The Appellant's dissatisfaction with the Judgment rested on four grounds, namely that:-

(a) *The Trial Court erred in varying her monthly consolidated package when the said pay was not an issue in the case;*

(b) *The Trial Court erred in not awarding her "loss of earnings for the final terms of the contract duration;"*

(c) *The Trial Court "erred in law in refusing to" award her "either general or aggravated damages"; and*

(d) *The Trial Court erred in not awarding her full costs when she "had substantially succeeded in all the issues framed for determination."*

12. On his part, the Respondent had a litany of complaints, citing 21 errors of law and procedure which he believed vitiated the impugned Judgment. As some of these grounds of complaint are interrelated, we have found the following to be the most pertinent:-

> *"1. The Honourable Judges of the First Instance Division erred in law and even committed procedural irregularities when they confirmed the Respondent as a staff member governed by the EAC Staff Rules and Regulations, (2006) despite the evidence adduced to the contrary.*
>
> *2. The Honourable Judges of the First Instance Division erred in law and even committed procedural irregularities when they confirmed the position of Project Accountant that the Appellant held would entitle her to a five years Contract yet the project she worked under was to come to an end in less than five years.*

6. The Honourable Judges of the First Instance Division erred in law and even committed procedural irregularities when they failed to scrutinize and apply correctly Regulation (20) (2) of the EAC Staff Rules and Regulations, 2006 which restricts recruitment in positions not on Approved Structure for Positions in the Establishment of the Community of all Organs (Secretariat, EACJ and EALA) vis a vis Regulation 22 (1) (c) which provides for a five years contract for all professional staff.

12. The Honourable Judges of the First Instance Division erred in law in refusing to uphold the Estoppel Principle and find that the Respondent was bound by the signature she appended on the contract.

16. The Honourable Judges of the First Instance Division erred in law and even committed procedural irregularities by awarding special damages for loss of earnings when in fact the Appellant was employed legally as per Council decision and her contract was fully performed.

18. The Honourable Judges of the First Instance Division erred in law when it (sic) refused to award costs to the Respondent".

13. Prior to the hearing of the Appeal, a Scheduling Conference was held at which the Appellant was represented by Mr. James Nangwala, Learned Advocate and the Respondent was advocated for by Mr. Steven Agaba, learned advocate. The agreed issues for determination were:

"*Whether the learned Judges of the First Instance Division committed procedural irregularities in considering the law, Council decisions and evidence adduced at trial in:-*

(i) determining that the Appellant was a staff member governed by the EAC Staff Rules and Regulations, 2006;

(ii) holding that the position of Project Accountant which the Appellant held, would entitle her to a five year contract with a possibility of renewal, and

(iii) If so, whether their judgment should be varied or reversed to the extent of the irregularity."

14. Counsel for the Parties lodged their elaborate submissions in support of their respective stances in the Appeal.

15. Ahead of our consideration and determination of the issues raised by this Appeal, for a better appreciation of the dispute between the parties and our subsequent decision, we found it opportune to explore albeit briefly, the Claim's factual and legal background.

16. It is common ground that the Appellant is a professional Accountant and resides at Arusha, Tanzania. Under the Treaty, the Community, in order to attain its political, economic, social, cultural, and other objectives, is empowered, *inter alia,* to employ staff, both professional and non-professional and to engage in a number of development programmes and projects using its own internally generated funds and/or funds from the donor community or Development Partners, pursuant to Article 133 (a) of the Treaty.

Such projects/programmes included the Regional Integration Support Programme ("the RISP") funded by the European Union.

17. To further facilitate the smooth functioning of the Community and promote harmonious working relationships, the Community's Council of Ministers ("the Council") has, under Article 14(3) (a) of the Treaty, powers to make staff rules and regulations. Such Rules and Regulations are already in place. These are the East African Community Staff Rules and Regulations, 2006 ("the Staff Rules"). The Staff Rules govern all members of staff of the Community including its organs and institutions. The Council in 2006 also approved the Community's establishment structure.

18. At its 14th Ordinary Meeting held between 24th – 28th September 2007, the Council was informed of the resignation of one Mr. Ponziano Nyeko, from his post of Project Accountant and one Senior Engineer, Mr. Enock Yunazi (See Exh. P6). As shown in Exh P6:-

> "The Council:
>
> (a) Took note of the report that:-
>
> (i) the two above – mentioned officers have tendered their notice of resignation from EAC employment;
>
> (ii) both Officers handled specialized one-man sections, which would suffer as a consequence of their resignations, hence the need for their urgent replacements;

(b) Approved the advertisement of the two positions for recruitment of qualified persons on a competitive basis."

19. Mr. Nyeko had been employed for a period of five years in the RISP Project which period was, indeed, its life span. Following this approval, the vacant post of Project Accountant was advertised **vide** Exh. P1.

20. The recruitment process followed and ultimately the Council at its 16th meeting of 13/09/2008 (Exh. P5) appointed the Appellant as Project Accountant to replace Mr. Ponziano Nyeko.

21. The most pertinent parts of the Letter of Appointment of the Appellant partly stated the following:-

"Dear Ms. Angella Amudo.

RE: LETTER OF APPOINTMENT AS PROJECT ACCOUNTANT

Following the approval of the 16th Ordinary Council of Ministers Meeting held on 13th September, 2008, I have the pleasure to inform you that you have been appointed as Project Accountant, under RISP Funding, with effect from 1st October, 2008 in accordance with the terms and conditions specified below:

1. ***Post***

You will be employed as Project Accountant attached to the EAC Secretariat, funded under RISP Project. You shall not be considered as a regular staff member under the EAC Staff Rules and Regulations except where it is specified in this contract.

2. ***Official Duty Station and Place***

Your official duty station and place of recruitment shall be Arusha, Tanzania.

4. Effective date of Appointment

The effective date of appointment is 1st October, 2008 or the date of assumption of duty.

6. Tenure

This contract will run from the date of assumption of duty up to June, 2010.

7. Remuneration

Your monthly remuneration will be a consolidated package of USD 6,128 (US Dollars Six Thousand One Hundred Twenty Eighty Only). No other benefits will be payable.

11. Rights and Obligations

Your rights and obligations shall be limited to the terms and conditions of this contract. In instances where rights and obligations are not specifically covered by this contract, the Secretary General will make a specific ruling, which will not set a precedent, and which will be based on the EAC Conditions of Services (sic) of staff at comparable levels.

12. Dispute Settlement

Any dispute arising from or in connection with this contract shall be settled amicably between you and EAC. Where an amicable settlement of a dispute or a conciliation procedure within fixed deadlines cannot be reached, the dispute will be referred to an

Arbitration Panel of arbitrators. One arbitrator will be appointed by you, one by the employer and a third by both parties. The Arbitration Panel shall use the Arbitration Rules of the EAC Court of Justice.

13. Separation

You shall be separated from service if your contract is not renewed at its expiration. In the event that your contract is terminated, you shall be given one month written notice of such termination or one month remuneration in lieu of notice. Similarly, if you wish to resign, you shall give one month notice or one month remuneration in lieu of notice.

15. Acceptance

If the terms and conditions spelt out in this contract are acceptable, please sign the attached slip and return it to the Secretary General for further processing.

Yours Sincerely,
Amb. Juma V. Mwapachu
SECRETARY GENERAL

CC: Accounts
I, ANGELLA AMUDO
.....

(EMPLOYEE'S FULL NAME IN CAPITAL LETTERS)

Do hereby accept the appointment/contract dated 29th September, 2008 Offered to me as Project Accountant, in accordance with the terms and conditions mentioned hereinabove.

Signature ..... Date: .17th October, 2008"

22. The Appellant assumed duty on 1st November, 2008. She served the full term of her contract, without a word of complaint enjoying all the benefits of the contract.

23. Upon expiry of her formal Contract of Employment, the Appellant was given periodic "Short-Term Employment Contracts", in the same position which she, apparently, gladly accepted. On 27th April, 2012, the Respondent informed her by letter (Exh. P20), that her *"Short-term contract as Project Accountant which expires on 30th April, 2012 will not be renewed."* She was formally thanked for the services she had rendered to the Community and wished success in her future endeavours.

24. She reacted instantly. By her letter dated **30th April, 2012** (Exh. P21), she expressed her dissatisfaction with the decision to terminate her employment as it was contrary to the Council decision of **13/09/2008.** She maintained that, the contract ought to have *"been running for five years renewable once"*. She sent another letter to the Respondent dated 8th May, 2010 (Exh. P22), for the first time registering her grievances on her *"irregular appointment terms..."* When the Respondent failed to act favourably, she forsook the arbitration route and accessed the Trial Court.

25. The Trial Court found merit in her claims. It held, as already shown, that the Appellant was a staff member of the Community. She was, therefore, found to have been entitled to a five year contract, but denied her damages and half her costs.

26. We have carefully and dispassionately studied all the material before us including counsel's able submissions in Appeal. We are

increasingly of the view that an effective disposal of this appeal hinges on whether the Trial Court properly interpreted the pleadings, the relevant Treaty provisions, the Staff Rules as well as the evidence, before concluding that the Appellant was a staff member governed by the Staff Rules, and, further to that, by holding that the Claim was properly laid under Article 31 of the Treaty. We approach this crucial issue well alive to the fact that there is a whale of a difference between the requirements of Article 30 and those of Article 31. The two are mutually exclusive.

27. Article 30 provides in relevant parts, thus:-

> "*1. Subject to the provisions of Article 27 of this Treaty, any person who is a resident of a Partner State may refer for determination by the Court, the l**egality 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.*
>
> *2. 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;" [Emphasis is ours].*

28. On the other hand, Article 31 is in the following terms:-

> "*The Court shall have jurisdiction to hear and determine disputes between the Community and its employees that arise out of the terms and conditions of employment of the*

employees of the Community or the application and interpretation of the staff rules and regulations and the terms and conditions of service of the Community." [Emphasis is ours].

29. Two clear and distinct differences are immediately discernible from the two provisions. One, while the Court may be accessed by anybody under Article 30, including the Community employees, the remedy under Article 31 is only available to employees of the Community **qua** employees. Two, while the right granted by Article 30 is circumscribed in the sense that the proceedings must be instituted within two months, Article 31 imposes no such limitation. All the same, on this latter aspect, this rider is imperative. It is not every dispute between the Community and its employee (s) that is justiciable under Article 31. The dispute or cause of action must have arisen out of the *"terms and conditions of employment*" or *"the application and interpretation of the staff rules and regulations and conditions of service of the Community."* Outside that, the action will be unmaintainable.

30. The above conclusion of necessity takes us back to the pertinent issue we posed in paragraph 26 above. This is whether the Claim was properly laid, entertained and determined by the Trial Court under Article 31 of the Treaty.

31. Indeed, on this counsel for both parties deserve tributes. They had by consensus submitted this as the first issue at the Trial Court's Scheduling Conference. Unfortunately, however, at the urging of the Trial Court, it was abandoned altogether. Instead, what was their second issue, which reads:-

"(a) Whether the claimant's claim is time barred under Article 30(2) of the Treaty," –

became the first issue.

32. In our respectful opinion, once the first issue which read:-

"(*a) Whether or not the Claimant's claim is governed by Article 30 or 31 of the Treaty*,"

was discarded, this issue became completely irrelevant. All the same, the Trial Court dealt with it before the trial started. Ultimately, as we have already indicated, it was decided on the basis of Article 31 which the Trial Court found, and very correctly, to be open-ended, a situation we find to be very unsatisfactory. It found the Claim, therefore, not time barred as it involved a dispute between the Community and its employee (the Appellant). In our respectful opinion, this is where the Trial Court first went wrong. It failed to appreciate the nature and substance of the Appellant's claim. We are saying so advisedly and for the following reasons.

33. It is common knowledge that any claim or suit be it in tort, contract, etc; must always be based on a cause of action. A cause of action is the reason or basis for which a suit or claim is brought. If we may borrow the words of the Privy Council in **Muhammad Hafiz v. Muhammad Zakariya** (1922) 49 I.A. 9, and use them here, we would explain it in understandable language to be:-

"...the cause of action is that which gives occasion for and forms the foundation of the suit..."

34. We take it to be settled law that there can be no suit, without a cause of action having accrued to the claimant or plaintiff. It is equally settled that a cause of action should always be gleaned from the plaint or statement of claim and not from the claimant's assertions from the bar or submissions. In this particular case, the Appellant's cause of action could only be traced in her Statement of Claim, particularly paragraphs 12, 15, 16, 19, 20, 22 and 23.

35. We have had the advantage of reading the Appellant's Statement of Claim and its annexures. It was obvious, even to the naked eye that the Appellant's sole basis (cause of action) of her claim against the Respondent was the alleged illegal decision of the Respondent of appointing her as a Project Accountant under the RISP funding for a period running from 1st October, 2008 to 30th June, 2010. To her, the Respondent acted in excess of his mandate and in bad faith (that is, **ultra vires** his powers), as the appointment was contrary to the directives of the Council. This decision led her to suffer general and specific damages as indicated therein. She was accordingly challenging the legality of the Respondent's decision and seeking the Court's declaration to that effect. This pleading, therefore, took the Appellant's claim out of the ambit of Article 31.

36. As we have already sufficiently demonstrated, a claim under Article 31 is strictly confined to disputes between the Community and its employees under the situations stipulated therein. It is glaringly clear to us that this was not the case here, for two self-evident reasons. **One,** by the time the Appellant instituted the Claim, in December, 2012, she had long ceased to be an employee of the Community, even under the RISP funding Project.

As per paragraph 13 of her contract of employment (Exh. P5), she was effectively "separated from the service" of the Community on 30th April, 2012. It is totally inconceivable, under the circumstances, that she would have maintained an action under Article 31. It is unfortunate that the Trial Court took it for granted that she was still an employee of the Community. We are saying so deliberately because in its Ruling concerning the competence of the Claim, the learned trial Justices never addressed themselves to the Parties' pleadings having in mind this specific issue.

37. Two, what was being challenged was the legality of the Respondent's decision, which fell squarely within the four corners of Article 30. The Appellant, being a resident of one of the Partner States, and in view of our decision, in **The East African Law Society & Four Others v. The Attorney General of Kenya & Three Others,** (EACJ) Appeal No. 3 of 2011, she had locus *standi* to institute such a claim against the Respondent.

38. From the above discourse, it is our conclusive finding that the Claim was based in and governed by Article 30 of the Treaty and not Article 31 as the Trial Court irregularly held. Since the Claim was instituted about 27 months after the expiry of the initial tenure and nearly five (5) months after the expiry of the last short-term contract, it was unarguably time barred. It ought to have been dismissed with costs. The Trial Court did not do so, but proceeded to determine it on merit with no voice of dissent from the Respondent. Was that proper? We have no flicker of doubt in our minds that it was not. We shall endeavor to elaborate why.

39. There is no gainsaying that the defence of limitation had challenged the Trial Court's jurisdiction to entertain the Claim and determine it on merit. What the Respondent was saying, briefly, was that the Trial Court lacked jurisdiction **ratione temporis**.

40. It is trite law that any court's jurisdiction can be challenged at any stage of the proceedings even at the appellate stage. Furthermore, a challenge on jurisdiction must be decided and not assumed, and once the challenge is positively proved, the proceedings must be dismissed.

41. It is also common knowledge that a judgment rendered by a court or tribunal without jurisdiction is a nullity forever. The cases in which these principles have been propounded are legends: See, for instance, **The Hon. Attorney General of the United Republic of Tanzania v. Africa Network for Animal Welfare (ANAW)** (EACJ), Appeal No. 3 of 2011, **Motor Vessel ("Lillian S") v. Caltex Oil (Kenya)** Ltd. [1989] K.L.R. 1, **Fanuel M. N'gunda v. Herman N'gunda** (CAT) Civil Appeal No. 8 of 1995 (unreported), **Melo V. U.S.**, 505 F 2 d 1026, **Basso v. Utah Power & Light Co.,** 495 F 2 d 906, **Richard Rukambura v. Isack Ntwa Mwakapila & Another,** (CAT) Civil Appeal No. 3 of 2004 (unreported).

42. May be it would be more refreshing to return to the case of **Norwood v. Renfield,** 34 C 329 in which it was tellingly held that:-

"*A universal principle as old as the law is that proceedings of a court without jurisdiction are a nullity and its judgment therein without effect either on person or property."*

43. In **P. Dasa Muni Reddy v. P. Apparao** (1974) 2 SCC725, the Supreme Court of India held that estoppels or waivers cannot confer jurisdiction to an authority which it does not possess. In **Richard Rukambura's** case (supra), the Court succinctly held that:-

> *"On a fundamental issue like that of jurisdiction a court can **suo motu**, raise it and decide the case on the ground of jurisdiction without even hearing the parties."*

44. Basing on the above principles, Abdoolcadel, J., in the Malaysian case of **Federal Hotel Sdn. Bhd v. National Union of Hotel Bar & Restaurant Workers** (1983) 1 MLJ 175 at page 178, stated with sufficient lucidity thus:-

> *"...jurisdiction does not originate in the consent of the parties and cannot be established, where it is absent, by such consent or acquiescence.* ***It is a fundamental principle that no consent or acquiescence can confer on a court or tribunal with limited jurisdiction to act beyond that jurisdiction, or can estop the consenting Party from subsequently maintaining that such court or tribunal has acted without jurisdiction*** *[Essex County Council v. Essex Incorporated Congregational Church Union (at pages 820-821 per Lord Reid)]. This* ***principle that jurisdiction cannot be conferred by agreement or estoppel*** *was firmly reiterated recently by the English Court of Appeal in Secretary of State for Employment v. Globe Elastic Thread Co. Ltd in a decision which was reversed by the House of Lords but affirmed on this point."* [Emphasis supplied.]

45. We fully subscribe to this salutary holding.

46. Furthermore, we hasten to add that we found it necessary to refer to authorities from diverse jurisdictions in order to demonstrate the universal character and applicability of those principles. We shall, accordingly, be guided by them in our determination of this Appeal.

47. We are also mindful of the fact that in determining its jurisdiction at the threshold, a court must be guided by the relevant law(s), treaties inclusive, and the parties' pleadings and not by the parties' allegations or assertions of facts from the bar.

48. Alive to the legal requirement to determine its jurisdiction first, the Trial Court, as alluded to earlier on, embarked on this process before going to the merits of the claim. In its ruling it fell hook, line, and sinker for the Appellant's claim. May be unaware of the clear Ruling of this Court (for there is not even a fleeting reference to it) in the **East African Law Society and Four Others v. The Attorney General of Kenya and Three Others,** (supra) to the contrary, the Trial Court held:

> "*Further, the office of Secretary General, the Respondent in the claim, is neither a Partner State nor an institution of the Community under Article 9 of the Treaty as read together with Article 30 above. The import of both provisions is that no proper claim can be made by an employee qua employee against the Secretary General by the invocation of Article 30.*
>
> *Conversely, Article 31 is titled,* ***"Disputes between the Community and its Employees"****. For the avoidance of doubt, the Article provides as follows..."*

49. In the **East African Law Society and Four Others** case (supra), the Court decisively preferred a purposive construction of Article 30 to the narrow and restrictive one adopted by the Trial Court in this case. It held that the Organs of the Community were not excluded from the application of Article 30.

50. Consequently, and with due respect, without in any way addressing itself to the pleaded facts in the Statement of Claim alleged to constitute the cause of action, the Trial Court held that the Claim was laid under Article 31 which has no limitation encumbrances.

51. We have also found from the Ruling that what weighed heavily on the minds of the learned trial Justices before so concluding was the wording of the Appellant's pleadings, which was entitled "**STATEMENT OF CLAIM**". To them, this was conclusive proof that the Claim was based on Article 31 and not Article 30 of the Treaty. However, in so concluding they appear to have pigeon-holed two salutary maxims of respectable antiquity, one Latin and one French. These are: **"Cucullus non facit monachum**" (L) and/or "**L'habit ne fait pas le moine**" (Fr.). Freely translated they both mean that "*The cowl (a monk's hooded garment) does not make the monk*". That is what Shakespeare had in mind when he wrote that a Rose by any other name would smell just as sweet. We also find with profound respect to the Learned Trial Justices, that they appear to have unwittingly failed to take cognizance of the settled principle of adjective law that parties are always bound by their pleadings.

52. From all the above, it is our finding that the Claim had its basis in Article 30 of the Treaty, and ought to have been instituted within two months of the Respondent's decision.

53. Since the Claim was patently time barred, the Trial Court lacked jurisdiction ***ratione temporis***. Inaction, through either ineptitude or otherwise, of Counsel for the Respondent, could not confer jurisdiction on the Trial Court to entertain the Claim which was patently time barred in terms of Article 30(2).

54. When we pointed out this fact to Ms. Piwang', Learned Counsel who advocated for the Appellant at the hearing of the Appeal, she was apparently not taken aback. She gallantly argued that the Claim could not have been time barred as the Appellant was pursuing the matter through administrative channels, that is, by complaining to the Secretariat. To buttress her argument, she confidently referred us to the Appellant's letters dated 30th April, 2012 (exh. P 21) and 8th May, 2012 (exh. P 22).

55. We have found no merit in that argument. It is totally untenable in law. This is because, as was correctly held in the case of **Patrick Ami v. Dominick Safari and Three Others** (CAT) Civil Appeal No. 5 of 1998: -

> "*Protests and complaints other than judicial proceedings, do not count in the reckoning of periods of limitation, but may be relevant in seeking extension of time."*

56. The above holding notwithstanding, we have found it imperative to point out that in any event these protests were made after the Appellant's contract of employment had come to an end.

57. All said and done, we hold without any demur that the entire proceedings in the Trial Court were a nullity on account of want of jurisdiction. We, accordingly, quash and set them aside. If authority for this is needed, we shall quickly refer to our decision given in Appeal No. 4 of 2012 Between **Legal Brains Trust (LBT) and The Attorney General of the Republic of Uganda,** wherein we nullified the proceedings in the First Instance Division which had been determined on merit when the Trial Court had no jurisdiction to entertain the matter.

58. Under normal circumstances we would have rested the matter here. But for the purpose of completing the record and providing guidance for future actions, we shall go further and venture our opinion on the issue agreed on in this appeal.

59. In deciding that the Appellant was a staff member governed by the Staff Rules, the Trial Court Justices placed much reliance on the uncontested facts that:-

(a) The job advertisement (Exh. P1) did not indicate that the position of Project Accountant was governed by the RISP agreement;

(b) The Finance and Administration Committee in its 8th – 9th September, 2008 meeting, recommended to the Council the appointment of the Appellant in the Professional Staff position as Project Accountant to replace Mr. P. Nyeko, and

(c) the Council acting on that recommendation at its 16th meeting appointed the Appellant "to the position of a Project Accountant as a professional staff."

60. But to the chagrin of the Trial Court's Justices:-

> *"...when on 29th September, 2008 the Respondent came to implement the above Council's decision, he informed Ms. Angella Amudo that she had been appointed as Project Accountant in the category of Professional Staff but as a Project Accountant attached to the EAC Secretariat funded under RISP Project. It is indicated in the said letter that the appointment was not to be considered as a regular staff member under the EAC Staff Rules and Regulations (2006), except where it was specified so in the contract."*

61. Thereafter, having made a fleeting reference to Articles 70(2) and 14(3) (a) of the Treaty, the Learned Trial Justices held that the Respondent was not vested, under Articles 9 and 16 "with powers to amend or review a Council's decision". They then decisively held that:-

> *"...the letter of appointment of Ms. Angella Amudo as Project Accountant under RISP was not in conformity with the Council's decision."*

62. That is how Issue No. 2 before the Trial Court was answered in the affirmative.

63. The crucial issue at this juncture would have been whether the Respondent amended or reviewed the Council's decision regarding the employment of the Appellant, as vigorously argued

by her, and held by the Trial Court but strongly denied by the Respondent. Indeed, to us, that was the mainstay of the Appellant's complaint.

64. The holding of the Trial Court that the Respondent acted **ultra vires** his powers in amending the Council decision, generates this germane question: was the finding based on solid facts as argued by the Appellant, or on a misapprehension of the evidence, improper inferences from the proven facts and a misinterpretation of the provisions of the Treaty and the Staff Rules, as pressed by the Respondent?

65. We are fully aware that a court commits an error of law or a procedural error when it:-

(a) misapprehends the nature, quality, and substance of the evidence: See, for instance, ***Peters v. Sunday Post*** *(1958) EA 424;* ***Ludovick Sebastian v. R****, (CAT) Criminal Appeal No. 318 of 2007 (unreported);*

(b) draws wrong inferences from the proven facts: see, ***Trevor Price & Another vs. Raymond Kelsal*** *[1957] EA 752,* ***Wynn Jones Mbwambo v. Waadoa Petro Aaron*** *(1966) E.A 241; or*

(c) *acts irregularly in the conduct of a proceeding or hearing leading to a denial or failure of due process (i.e. fairness) e.g irregularly admits or denies admission of evidence, denies a party a hearing, ignores a party's pleadings, etc: see,* ***The Hon. Attorney General v. ANAW*** (supra).

66. We are also alive to the fact that in the administration of justice, procedure is essential. It facilitates justice and furthers its ends. But it must never thwart it, hence the mundane truth that rules of procedure are but handmaidens of justice and not mistresses of the judicial process **(Pasupuleti Venkateswarlu v. Motor & General Traders AIR 1975 S. C. 1409)**. Rules of procedure must, accordingly, be construed liberally and in such a manner as to render the determination and enforcement of substantive rights and duties effective. It is persistently postulated, that a hypertechnical view should not be adopted by the courts in interpreting and applying them. As aptly observed by the Supreme Court of India, in the case of **Ram Manohar Lal v. N.B. Supply,** AIR 1969 S.C. 1967, a party cannot be refused just relief because of some mistake, negligence, inadvertence or even infraction of the rules of procedure, not going to the root of the matter of course. These rules are in all cases intended to be aids to a fair trial and for reaching a fair decision and not a bar to the search for the truth in a case in order to achieve substantive justice.

67. We wish to emphasize that a distinction has to be drawn between provisions which confer jurisdiction and those which regulate procedure. Although jurisdiction can neither be waived nor created by consent, as we have already demonstrated, a procedural provision may be waived (**Superintendent of Taxes v. Orkrarman Nathman Trust**, (1976) 1 SCC 766: AIR 1975 S. C.C. 2065 para 27, 28). This accounts for the inclusion of Rule 1(2) in the East African Court of Justice Rules of Procedure, 2013 ("the Court Rules") which reads:-

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

68. It is obvious that given the plain language in this provision, we are enjoined to give the Court Rules a liberal construction so as to effectuate the remedial purposes of Rule 1(2), i.e. to aid the Court in attaining substantive justice.

69. It was the Respondent/Cross Appellant's strong contention that the Learned Trial Justices misapprehended the nature, substance and quality of the entire evidence before them. Mr. Agaba forcefully argued that the Learned Trial Justices either without justification failed to admit relevant evidence, or completely ignored admitted credible evidence from Mr. Joseph Ochwada, Mr. Juvenal Ndimurirwo, and Dr. Julius Tangus Rotich which would have proved or tended to prove beyond any doubt that the Appellant had never been a staff member of the Community covered by the Staff Rules.

70. The Respondent strenuously maintained that contrary to the protestations of the Appellant through her learned advocate, Mr. Nangwala (who represented her at the trial), he never amended the Council's decision. To him, the letter of appointment issued to the Appellant was in accord with the Council Decisions (EAC/CMII/Decision 125 and EAC/CM 16/Decision 41) as well as the Staff Rules.

71. On her part, the Appellant strenuously urged us to uphold the Trial Court's Decision as the Respondent acted contrary to the

clear Directives of the Council contained in EAC/CM 16/Decision 41. She also confidently asserted that as she was employed in the professional cadre, the position of Project Accountant was an established position within the Community.

72. In resolving these diametrically opposed positions, we found it convenient to start with the Treaty and the Staff Rules. It is provided in Article 16 that the regulations, directives and decisions of the Council taken or given under the Treaty provisions **"shall be binding** on the Partner States, on all organs of the Community...", except the Summit, the Court and the Legislative Assembly (EALA), "within their jurisdiction". In terms of Article 9 (g) of the Treaty the Secretariat and the Council are both Organs of the Community, hence the Respondent is bound by the mandatory provisions of Article 16 and of Regulation 20.

73. We have already shown that the Council has already promulgated the Staff Rules as mandated by Article 14(3) (a) of the Treaty. It is explicitly provided in Regulation 20(2) that:-

> "*No recruitment shall be undertaken unless an approved vacancy exists in the establishment of the Community and for which financial provision has been made."*

74. We believe that the language used here is very plain and needs no interpolation.

75. There is no dispute on the fact that the Staff Rules on which the Appellant's Claim is pegged were promulgated long before she joined the Community. The Respondent tendered evidence before the Trial Court, whose authenticity has never been doubted or

challenged to date, in the form of the Establishment Structure (Exh. R.E.1) passed by the Council in August, 2006, to bear him out on his stance. This irrefragable evidence, shows vividly in page 7 (page 233 of the Record of Appeal) that the position of Project Accountant is not an established position in the Community. This, in our respectful opinion, ought to have told it all to the Learned Trial Justices, if they had taken the trouble to glance at it. Mr. Ochwada, (the Community's Director of Human Resources and Administration), Mr. Ndimurirwo, (the then Community's Acting Director of Finance) and Dr. Rotich, (the then Deputy Secretary General), persistently stated that the Appellant was not a member of staff covered by the Staff Rules. They maintained that, like her predecessor, Mr. Nyeko, she was at all material times while at the Community working under the RISP Project.

76. On this, they are wholly supported by the Appellant's own evidence, Exh. P2 (the Letter of Appointment), without which she would never have seen the inside of the Community. It is specifically provided therein that she was being employed as "Project Accountant under the RISP funding," and she "shall not be considered as a regular staff member under the Staff Rules and Regulations." She freely and voluntarily accepted the position and worked under those clear conditions until her tenure expired, and thereafter readily accepted short-term contracts until 30th April, 2012. She cannot now be heard to complain. We would be failing in our duty to render justice without fear or favour, if we let her both eat her cake and have it at the same time.

77. In addition, in their respective Affidavits filed on 13th March, 2013 prior to the formal hearing, on 11th November, 2013, both Mr. Ochwada and Mr. Ndimurirwo, individually deponed that:-

"...the employees of the Community are employed in two different categories, namely the established positions governed by the East African Community Staff Rules and Regulations, 2006 and in Project Positions funded by various EAC Development Partners governed by respective co-operation Agreements concluded between EAC and such Development Partners."

78. Dr. Rotich deponed in similar vein and added:-

> "*10, THAT the claimant, during her tenure, was one of the professional staff working as a Project Accountant funded under RISP Project, hence not an officer recognized under Regulation 22(1) (c) of the East African Staff Rules and Regulations."*

79. We have found nothing strange in this. This is because not all professionals, let alone Professional Accountants, are members of staff of the Community. This evidence was never challenged by way of a replying Affidavit or at all.

80. The Appellant's persistent assertions that she was a regular member of staff under the Staff Rules, therefore, flies in the face of this massive evidence to the contrary, although, admittedly, in its decision of 13/9/2008 the Council did not specifically state that the term of the Appellant "should be limited or pegged to the remaining project life span" as correctly contended by Mr. Nangwala. All the same, in our considered opinion, the Council had no duty to do so

for the following two clear reasons. **One,** the Appellant's position was not an established one within the Community. **Two**, the Council had so clearly pronounced itself in its earlier decision (EAC/CM/11/Decision 125) when it established the position of Project Accountant which was first held by Mr. Nyeko. This is clear from the evidence of Mr. Ochwada (pages 360-1). In his comprehensive evidence, he unambiguously elaborated on how RISP came about in 2006.

81. Mr. Ochwada, partly, said:-

> *"RISP was a programme which was developed by the European Union to support regional integration matters for three legs namely EAC, COMESA and SADC... The EAC was a beneficiary, but because the EAC had not signed the contribution agreement directly with EU, it had to get funds through COMESA which had a direct contribution agreement with EU. So, what happened is that when this programme was developed and the EAC became a beneficiary in 2006, the accountants on the ground were fairly thin.* ***This is when the Secretariat requested the Council to approve a position which would be funded under the RISP funding to take care of these funds. That is how the position of RISP Project Accountant was approved by the Council*** *during its 11th Meeting which was held on 20th March, to 4th April, 2006.* ***It was specifically for the period of funding because the funds were coming in for a period of five years."*** [Emphasis is ours].

82. We must confess that after scanning the entire evidence on record, we have not gleaned therefrom an iota of evidence contradicting this piece of vital evidence. On the contrary, we have found on record evidence from the Appellant tending to bear out Mr. Ochwada on this. This is contained in Exh.P6, wherein it is shown that the Council, after taking cognizance of the resignation of Mr. Nyeko, and noting that he had been handling a " **specialized one-man section, which would suffer as a consequence" of his resignation,** recognized the urgent need for his replacement. It accordingly approved an advertisement of the position "for recruitment of qualified persons." This evidence discredits the Appellant in her assertion that the position of Project Accountant was an approved position within the Community Establishment. If that was the case, the Council would not have undisguisedly categorized it as "a specialized one-man section", which would have been paralyzed by Mr. Nyeko's departure unless an immediate replacement was found.

83. It is on record, and even in the Judgment of the Trial Court, that the Parties had agreed that whatever evidence given in support or against the Claim should be backed either by the Staff Rules and the Council's directives, decisions, recommendations and/or opinions. Our study of the evidence did not lead us to any point where the Appellant doubted the existence of Council Decision 125. However, it is surprising, if indeed the Appellant was seeking justice, that when Mr. Ochwada wanted to read the contents of this Decision, Mr. Nangwala strongly objected, claiming that that was new evidence barred by Rule 39 (2) of the Court as that extract was not annexed to the Respondent's pleading. Although he did

not dispute the existence of the decision, he was supported by the Trial Court. Yet, we find the trial Court lamenting in its judgment that:-

> *"The group of words 'lifespan of the project' at this preliminary stage is neither meaningful nor helpful unless we pursue the analysis of the whole process of the recruitment."*

84. But who is to blame for this quagmire? The Trial Court had sacrificed that piece of crucial evidence at the altar of hypertechnicality. This is where it could have invoked Rule 1(2) of the Court Rules to attain "the ends of justice". Rule 39 is not a jurisdictional rule. Depending on the facts of each case, it can be interpreted in such a way as not to lead to a failure of justice. Fortunately, the evidence of Mr. Ochwada on this point was readily at hand to aid the Trial Court attain substantive justice in the case. But it was jettisoned to the winds. It was not considered at all.

85. With these observations and findings in mind, we can now confidently say that after objectively scrutinizing the impugned Trial Court's Judgment we regrettably learnt that in canvassing issue No. 2, the Learned Trial Justices never touched the evidence of Mr. Ndimurirwo and Dr. Rotich at all. Not only that; they did not refer, even fleetingly, to both Exh. P2 and Exh. RE1. Furthermore, the above quoted evidence of Mr. Ochwada, which was favourable to the Respondent, was not discussed at all, even for the purpose of rejecting it, but with good reason. More disturbing, while correctly directing their attention to the peremptory provisions of Article 16 of the Treaty in order to find the Respondent liable, they, with due respect, failed to address themselves to the equally mandatory provisions of Regulation 20 (2) of the Staff Rules, which

bind both the Council and the Respondent. Since the position of Project Accountant was not an established position, none of them could have validly engaged the Appellant as a member of staff under the Staff Rules.

86. The above cited omissions and irregularities, in our considered opinion, lead to only one irresistible conclusion. This is that the Learned Trial Justices committed errors of law and procedure, commissions and omissions which led to a wrong decision and, therefore, a failure of justice, as well articulated by Mr. Agaba in his submissions. It would, therefore, have been our specific finding that the Respondent in issuing Exh. P2 did not act **ultra vires** his powers. Had he done what the Appellant has been all along pressing for, he would not have escaped being condemned for violating the Treaty and the Staff Rules.

87. For the foregoing reasons, we hold that all things being equal, we would have answered both limbs of the issue framed for determination in this Appeal in the affirmative and allowed the Cross-Appeal with costs, had we been convinced that the Claim was competent.

88. All said and done, we dismiss the Appellant's Appeal in its entirety and allow the Cross-Appeal with full costs in this Court and in the First Instance Division.

89. It is so ordered.

Dated, Signed and Delivered at Arusha this 30th day of July, 2015.

.....
Emmanuel Ugirashebuja
PRESIDENT

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Liboire Nkurunziza
VICE PRESIDENT

.....
James Ogoola
JUSTICE OF APPEAL

.....
Edward Rutakangwa
JUSTICE OF APPEAL

.....
Aaron Ringera
JUSTICE OF APPEAL