IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Isaac Lenaola, DPJ; Faustin Ntezilyayo J, Fakihi A. Jundu J &Audace Ngiye J)

REFERENCE NO.5 OF 2015

1. RWENGA ETIENNE
2. MOSES R. MARUMBO..... APPLICANTS

VERSUS

SECRETARY GENERAL,
EAST AFRICAN COMMUNITY ..... RESPONDENT

23RD MARCH, 2016

JUDGMENT OF THE COURT

A. INTRODUCTION

1. The Applicants herein are allegedly natural persons, adult citizens of the Republic of Rwanda and United Republic of Tanzania respectfully (hereinafter referred to as 'Rwanda' and 'Tanzania' respectively), and purportedly resident in their respective countries. They did not appear in Court at all throughout the hearing of the Reference.

2. The Respondent is the Secretary General of the East African Community (EAC), who is sued in a representative capacity for an on behalf of the EAC Secretariat.

3. At the hearing of the Reference, the Applicants were represented by Mr. Paul Ng'arua, while Dr. Anthony Kafumbe, Counsel to The Community, appeared on behalf of the Respondent.

B. BACKGROUND

4. On 3rd August 2015 the Respondent published an advertisement for the recruitment of the Registrar of the East African Court of Justice (EACJ), Ref. EAC/HR/2014-2015/033, on the website of the EAC.
5. The advertisement expressly restricted eligibility for application to citizens of the Republics of Burundi, Kenya and Uganda owing to a quota points system applied in the EAC recruitment process.
6. The advertisement did also enumerate requirements for academic qualifications and professional experiencethat were purportedly over and above the requirements stipulated in Article 45(1) of the Treaty for the Establishment of the East African Community (hereinafter referred to as 'the Treaty').

7. Aggrieved with alleged irregularities in the recruitment process, the Applicants filed the present Reference.

C. APPLICANTS' CASE

8. It is the Applicants' case herein that Article 45(1) of the Treaty for the Establishment of the East African Community (hereinafter referred to as 'the Treaty') makes explicit provision for the appointment of the Registrar of the Court and, indeed, the Council of Ministers (hereinafter referred to as 'the Council') directed the Respondent to comply with the said legal provision in the recruitment of a Registrar.

9. The Applicants contend thatthe Respondent contravened the Treaty by setting work experience terms in the advert under scrutiny herein that did not take into account the requirements in each Partner State for one to hold the office of Registrar. The Applicants further contend that the Respondent applied the quota system wrongly to pre-disqualify potential candidates from Rwanda and Tanzania, yet none of the Partner States possessed the 12 quota points required for eligibility to compete for the position of Registrar. They thus conclude that the recruitment process was neither transparent nor fair in so far as it favoured some Partner States against others, and the selective application of the quota system undermined the spirit of integration and violated the rights of potential candidates from the eliminated countries.

10. The Applicants sought the following Prayers:

a. A Declaration that the act of the Respondent to recruit the Registrar in contravention of Article 45(1) of the Treaty was an infringement and violation of the said Treaty.

b. A Declaration that the ongoing process of recruitment of the Registrar was null and void.

c. The Respondent be stopped from continuing with the recruitment process until all irregularities were dealt with.

d. The Respondent be directed to recruit a Registrar in accordance with Article 45(1) of the Treaty.

e. A Declaration that the elimination of Rwanda and Tanzania yet none of the Partner States had the requisite quota points was a violation of the spirit of integration under the Treaty, as well as the quota system that guides recruitment in the Community.

f. The Respondent be directed to implement the guidelines of the Quota Manual in accordance with Article 6(d) of the Treaty.

g. The Respondent be directed to invite potential candidates from all 5 Partner States and the Quota points be considered only at the time of appointment of the successful candidate.

h. Costs and all incidentals be allowed.

11. The Reference was supported by an Affidavit deponed by the First Applicant and filed on 4th December 2015, the gist of which was as follows:

a. Whereas the position of Registrar carries 12 points in the Quota system, the quota points held by each Partner State as at 4th December 2015 was as follows:- Kenya (4.8); Uganda (4.8); Burundi (11.8); Rwanda (-1.20), and Tanzania

(2.8); but the Respondent did not advise the Councilmeeting of 14th August 2015 that none of the Partner States possessed the requisite 12 quota points.

b. The First Applicant had wanted to apply for the position of Registrar but the impugned advert imposed extraneous conditions in contravention of Article 45(1) of the Treaty, and ousted him from the application process.

c. As a person qualified to hold such high judicial office in Rwanda as provided by Article 45(1) of the Treaty, the First Applicant stood to suffer irreparable injuries and his rights as a potential applicant for the position of Registrar would be permanently violated if the orders sought from this Court were not granted. Similarly, the legitimacy of the office of the Registrar and the Court would be greatly hampered by the irregularities in the recruitment process if the orders sought from the Court were not granted.

d. The recruitment of EAC staff was premised on the principle of citizens from all the Partner States enjoying equal right to employment opportunities accruing from the integration process, and the spirit of integration would be frustrated unless the Respondent was restrained from continuing with the recruitment process for the position of Registrar.

D. RESPONDENT'S CASE

12. The Respondent contends that the recruitment process in issue presently was conducted in accordance with the Treaty and Staff Rules and Regulations of 2006; at the time the impugned advert in respect thereof was run, the staffing of the Court showed

that Rwanda and Tanzania had exhausted their quota points, and the status of the quota points was duly circulated to all Partner States before the said advert was published and they all accepted it as valid.The Respondent questioned the authenticity of the quota points presented by the Applicant, contending that it was a misrepresentation of the quota points that had formed the basis of the recruitment process in issue presently.

13. It is also the Respondent's case that Article 45(1) of the Treaty should not be cited in isolation of Article 45(3) thereof; rather, the terms and conditions as determined by the Council under the latter provision had been set at 15 years' experience given the demanding nature of the position of Registrar at regional level, as well as the seniority of that office.The Respondent denied extending preferential treatment to any of the Partner States.

14. The Respondent relied on an Affidavit of the Director of Human Resources and Administration at the EAC Secretariat, Mr. Joseph E. Ochwada, that was filed on 29th September 2015, and stated that:

    a. The quota points that had been annexed to the Reference as at 3rd August 2015 were inaccurate and a misrepresentation of the correct points.

    b. The terms and conditions for the position of Registrar as determined by the Council acting within its mandate under the Treaty were set at 15 years experience given the demanding nature of the job at regional level.

    c. At the time of running the advertisement in respect of the position of Registrar, the staffing of the Court revealed that

Rwanda and Tanzania had exhausted their quota points and this fact was duly communicated to all Partner States.

d. The recruitment process in issue presently was done in compliance with Treaty provisions and all other enabling instruments issued by the Council.

15. An additional affidavit in support of the Respondent's case and deponed by the same deponent was lodged out of time and no attempt was made by learned Counsel for the Respondent to have it properly placed on record.We shall revert to this matter of procedure later in this judgment. However, for present purposes, the deponent therein *inter alia* stated that:

a. The advert was in compliance with Article 45(1) of the Treaty as read together with Article 45(3) thereof, and was therefore consistent with Article 31 of the Vienna Convention on The Law of Treaties.

b. The Council was mandated to appoint a Registrar by Regulation 23(8) of the EAC Staff Rules and Regulations, 2006; and it did, under Article 14 of the Treaty, prescribe the experience required for that position.

c. Article 3.5 of the *Operational Manual for the Implementation of the Quota System in Recruitment of Staff in the East African Community* (hereinafter referred to as 'the Operational Manual') did provide for rounding off of quota points and, after such computation, only candidates from Burundi, Kenya and Uganda were eligible to compete for the advertised position.There was, therefore, no discrimination against any Partner State, neither had any of them opposed

the recruitment process despite their being informed of the available quota points prior to the publication of the advert.

d. Rwanda had -1.20 quota points therefore, being over-represented in the Court, it could not bring more staff thereto. The introduction of the quota points enabled citizens from all the Partner States to enjoy equal opportunities to employment in the Community.

e. The First Applicant's qualifications notwithstanding, his averment that his employment opportunities had been ruined was speculative as there was no guarantee that he would have emerged the best candidate had he been interviewed.

E. SCHEDULING CONFERENCE

16. Pursuant to a Scheduling Conference held under Rule 53 of the Court's Rules, the Parties framed the following issues for determination:-

i) Whether the Respondent's advertisement for the position of the Registrar of the EACJ published on 3rd August 2015 referenced EAC/HR/2014-2015/033 was contrary to Articles 14, 45(1) and 45(3) of the Treaty.

ii) Whether the decision of the Council taken under Articles 14(3) and 45(3) are subject to Article 2 of the Protocol on Decision Making by the Council of the East African Community.

iii) Whether the recruitment process for the Registrar of EACJ wrongly eliminated potential candidates from Tanzania and Rwanda contrary to Article 6(d) of the Treaty.

iv) **Whether in the absence of anyone Member qualifying to attain the requisite quota, it was discriminatory to exclude Tanzania and Rwanda to contest contrary to Article 6(d) of the Treaty.**

v) **Whether the Applicants are entitled to the prayers sought.**

F. ISSUES:

17. Rather than address each issue as framed above, learned Counsel for the Applicants opted to collectively address all the issues under what he termed 'heads of argument'.

Applicants' Submissions:

18. Under the first two heads of argument, it was Counsel's contention that the Reference was premised on the breach of Article 45(1) of the Treaty, which the Respondent had undermined and/ or amended by its purported application of Article 45(3) thereof, thus adding extraneous requirements to Article 45(1) of the Treaty without due process.In the same vein, under his third head of argument, Mr. Ng'arua argued that the Treaty had been breached by the Council, whichsought to enhance the qualifications for the position of Registrar but omitted to publish its decision in that regard in the Gazette as prescribed by Article 14(5) of the Treaty.

19. Advancing the principle of *generalia specialibus non-derogant* under his fifth head of argument, learned Counsel argued that the general provisions of Article 45(3) could not override the specific provisions of Article 45(1) of the Treaty. It was his contention that the requirement for a Registrar to hold an LLM Degree and have 15 years experience amounted to an

amendment to Article 45(1) that, if left to stand, would be manifestly arbitrary, illegal and a violation of the Treaty.

20. We did also understand Mr. Ng'arua to argue, under the fourth head of his submissions, that in augmenting the qualifications for the position of Registrar, the Council contravened Article 2(1)(h)(i) of the Protocol on Decision Making by the Council of the East African Community (hereinafter referred to as 'the Protocol on Decision Making') in so far as it omitted to refer the alleged Treaty amendment to the Summit.

21. Under his sixth head of argument, he reiterated his earlier argument on the absence of due process in the Council's decision given that the matter was never referred to the Summit as prescribed by Article 2(2) of the Protocol on Decision Making. In that regard, Mr. Ng'arua argued that to the extent that Article 2(2) of the said Protocol required a decision taken under Article 45 to be in writing, by simple majority and recommended to the Summit, such a decision should have been demonstrated by the Respondent to have had the following features: a meeting of the Council; record of quorum; an agenda under Article 45(1) and (3); a physical tally and record of votes to reflect the simple majority; a declaration or resolution, and record of the proceedings; publication in the Gazette, andit should have been recommended to the Summit.

22. Finally, it was Mr. Ng'arua's submission that none of the Partner States had the requisite 12 quota points but that fact was not brought to the Council's attention by the Respondent; this raises questions as to whether the Council's decision under Article

45(3) was properly taken, and consequently the decision to exclude citizens of Rwanda and Tanzania from competing for the advertised position under such circumstances, was not backed by a decision of Council.

23. Aside from the foregoing heads of argument, Mr. Ng'aruadid take issue with the documentary evidence filed in support of the Respondent's case. He opined that the *Report of the Council Meeting of 8th – 13th January 2001*, as well as the *Report of the 30th Council of Ministers Meetingof 20th – 28th November 2014* were irrelevant to the present case; the *East African Community Output Based Job Descriptions* of August 2006appeared to be an incomplete proposal document, and Annexure B to Mr. Ochuada's Affidavit – *Distribution of Points for EAC Organs as at 1st June 2015*had been applied out of context.

24. Mr. Ng'arua also questioned the Respondent's application of the Vienna Convention on the Law of Treaties, arguing that a single act would not constitute a practice, nor would what in his view amounted to a multiplicity of errors constitute a practice. It was his contention that the documents presented by the Respondent did not amount to an instrument that would assist in deducing the intention of the framers of the Treaty given that they arose in the course of the implementation of the Treaty and not before its formulation.

25. Finally, it was strongly submitted for the Applicants that, given the dynamic nature of the quota points system, the quota points applicable to a recruitment process should be as at the time

of selection rather than advertisement, as had been done by the Respondent.

Respondent's Submissions:

26. By way of rebuttal of the first and second heads of arguments above, Dr. Kafumbe contended that Article 45(1) of the Treaty was never amended in the recruitment process under scrutiny; rather, it was rightly applied together with Article 45(3) that provides for salary and other conditions of service of staff to be determined by the Council. We understood it to be the submission for the Respondent that the term 'conditions of service' under Article 45(3) of the Treaty was broad enough to include qualifications for a job, as well as provisions, requirements, rules, specifications and standards that form an integral part of a contract.

27. Indeed, in response to the third head of argument, Dr. Kafumbe argued that it was under the provisions of Article 45(3) that the qualifications for the position of Registrar, as well as the terms and conditions of service of all court staff had been set by the Council. He submitted that the said terms of service were stipulated in the *Final Report of the Structural Review of the East African Community Report of Eminent Persons*(hereinafter referred to as 'the Report of the Structural Review'), which had been duly published in the Gazette on 30th April 2005 as prescribed by Article 14(5) of the Treaty.

28. In response to the fifth head of argument, Dr. Kafumbe contended that the decision to standardize the qualifications for the position of Registrar through a study had been informed by the

Council's realization that there were disparities in the respective Partner States with regard to the qualifications and experience required of persons holding such high judicial office.

29. On the other hand, contrary to the position advanced in the fourth and sixth heads of arguments on the absence of due process in the foregoing decision by Council, Dr. Kafumbeargued that the applicable legal provision in that regard was Article 2(1)(g) of the Protocol on Decision Making, which provides for consensus on policy decisions made pursuant to Article 14(3)(a) of the Treaty. He questioned the applicability of Article 2(1)(h)(i) of the said Protocol, contending that the decision was not tantamount to an amendment of the Treaty. It was his submission that decisions taken by consensus did not require a voting process.

30. It was argued for the Respondent that the application of clauses 3.5 and 7 of the Operational Manual was such that some of the Partner States did have the requisite quota points for the position of Registrar, and the Secretary General's office was vested with the mandate to interpret and implement the said Manual, therefore the Applicants' interpretation thereof was untenable.It was further submitted that the history of recruitment within the EAC was pertinent for purposes of illustrating the Community's practices and procedures; clause 4.6 of the Operational Manual provides for the Respondent to inform each Partner State of its outstanding quota points at the beginning of each recruitment, which was duly done in recruitment process in issue presently, and the implementation of the said Manual was transparent, predictable and efficient.

31. Finally, Dr. Kafumbe addressed this Court on the issues as framed, arguing that the Respondent duly conducted the present recruitment process in accordance with Article 45(1) and (3) of the Treaty; the Council rightly took the decision under Article 45(3) by consensus as prescribed by Article 2 of the Protocol on Decision Making; the Respondent rightly eliminated candidates from Rwanda and Tanzania, and that the correct application of the Operational Manual yielded some qualifying Partner States with the requisite quota points to participate in the recruitment process under scrutiny herein.

Submissions in Reply:

32. In reply, we understood Mr. Ng'aruato maintain his position that the qualifications of the position of Registrar were not published in the Gazette, and any purported amendment to the Protocol on Decision Making should have been referred to the Summit. He drew a distinction between the formula for the assignment of quota points for each position and that which is applicable for purposes of the redemption of a post by a Partner State, and reiterated his earlier position that no one Partner State had the requisite quota points for the position of Registrar.

G. COURT'S DETERMINATION:

33. We have carefully considered the pleadings of both Parties, as well as their respective arguments in submissions. We note that the Respondent's additional Affidavit was lodged out of time, having been filed on 16th December 2015 rather than 9th December 2015 as had been scheduled. Similarly, the Respondent's written submissions were lodged 2 days after the designated date and, in

turn, the Applicants' submissions in reply were lodged 10 days after the scheduled date.Mr. Ng'arua did not take any issue with the late filing of either the Respondent's additional Affidavit or written submissions, but simply filed his own submissions in reply late as well.

34. The time lines that were violated by the Parties were fixed by the Court in accordance with the provisions of Rule 53(4) of the Court's Rules of Procedure. We do recognize that it is a civil contempt of court for any party to neglect to comply with a court order within the time specified therefor. *See* ***Halsbury's Laws of England, 2001 Reissue, Vol 9(1), para. 458, p.55***. However, we are also cognizant of the maxim of equity, *vigilantibus non dormientibus aequitas subvenit* – equity aids the vigilant, not those who slumber on their rights. The import of that maxim is that a party who has been wronged must act relatively swiftly to preserve their rights, failure of which such party would run afoul of the defence of *laches*– an equitable principle barring a stale claim owing to passage of time or lack of diligence that unreasonably prejudices the opposite party, its own mischief notwithstanding.*See* ***Ibrahim, Ashraf Ray, The Doctrine of Laches in International Law, Virginia Law Review, Vol 83, No. 3, 1997, pp. 647 – 692***.

35. Furthermore, Rule 4 of the Court's Rules of Procedure provides:

> **"A Division of the Court may, for sufficient reason, extend the time limited .... by any decision of itself for the doing of any act authorized or required by these**

Rules, whether before or after the expiration of such time and whether before or after the doing of the act ..."

36. We take the view that the silence or inaction of learned Counsel for the Applicants with regard to the late filing of the pleadings cited hereinabove, while not absolving Counsel for the Respondent of his duty to comply with court orders, isnonetheless sufficient reason not to reject the said documentation. The circumstances of this case are such that the acquiescence of learned Counsel for the Applicants would lend credence to his having accepted their late filing. The justice of the matter therefore dictates that the pleadings filed out of time be deemed to have been filed within the time lines prescribed in the Scheduling Conference Notes of 24th November 2015. We do, therefore, invoke our judicial discretion and inherent powers under Rules 1(2) and 4 of the Court's Rules to extend the time prescribed for the filing of the Respondent's additional affidavit and written submissions, as well as the Applicant's submission in reply, and do hereby admit them on the Court Record.

37. We now revert to the merits of the Reference. It seems to us that it essentially gravitates around two (2) broad issues: first, whether or not the specification of additional qualifications for the position of Registrar, beyond the requirements stipulated in Article 45(1) of the Treaty constituted a contravention of the Treaty, and secondly, whether or not the quota system was correctly applied by the Respondent in the impugnedrecruitment process. These 2 broad issues are reflected in the first and second issues framed at the Scheduling Conference, as well as the third and fourth issues respectively. Therefore, the strange approach to submissions

adopted herein notwithstanding, we propose to address Issues 1 and 2 together, Issues 3 and 4 together and conclude with a determination of the fifth issue.

Issues 1 & 2: *Whether the Respondent's advertisement for the position of the Registrar of the EACJ published on 3rd August 2015 referenced EAC/HR/2014-2015/033 was contrary to Articles 14, 45(1) and 45(3) of the Treaty, AND Whether the decision of the Council of Ministers taken under Articles 14(3) and 45(3) are subject to Article 2 of the Protocol on Decision Making by the Council of the East African Community.*

38. The Applicants' case with regard to the present issues is essentially three-pronged. First, they contend that by purporting to augment the qualifications for the position of Registrar under Articles 14(3) and 45(3) of the Treaty, the Council (and by extension, the Respondent) contravened the provisions of Article 45(1) thereof. Secondly, the Applicants argue that the purported augmentation of the qualifications stipulated in Article 45(1) of the Treaty amounted to an amendment thereof. Finally, it is their case that the said augmentation/ amendment did not follow due process as outlined in Article 14(5) of the Treaty, and Articles 2(1)(h)(i)and 2(2) of the Protocol on Decision Making.

39. We are constrained to observethat the Applicants did,at the Scheduling Conference,concede that the policy decision taken by the Council under Article 14(3) of the Treatydid not amend the provisions of Article 45(1) thereof. This position is reflected in Clause 3(iii) of the Scheduling Conference Notes as a point of

agreement. An agreed fact cannot be deemed to be in issue. Consequently, any legal arguments made on the question of the purported amendment of Article 45(1) of the Treaty shall not be considered in this judgment.

40. On the other hand, it was the Respondent's contention that the recruitment process in issue presently was duly conducted in accordance with Article 45(1) and (3) of the Treaty; the Council was mandated to specify the qualifications for the position of Registrar under Articles 14 and 45(3) of the Treaty, and, finally, the Council rightly took the decision with regard to the said qualifications by consensus as prescribed by Article 2(1)(g) of the Protocol on Decision Making.

41. For ease of reference, we reproduce the pertinent Treaty provisions below.

Article 14(1)

"The Council shall be the policy organ of the Community."

Article 14(3)

"For purposes of paragraph 1 of this Article, the Council shall:

(a) Make policy decisions for the efficient and harmonious functioning and development of the Community."

Article 45(1)

"The Council shall appoint a Registrar of the Court from among citizens of the Partner States qualified to hold such high judicial office in their respective Partner States."

Article 45(3)

"The salary and other conditions of service of the Registrar and other staff of the Court shall be determined by the Council."

42. We must categorically state that we find Article 45(3) of the Treaty inapplicable to the recruitment process that is under scrutiny presently. That legal provision pertains specifically to 'salary and other conditions of service'. In the Interpretation section of the Treaty the terms 'salary' and 'terms and conditions of service' are defined to include '**wages, overtime pay, salary and wage structures, leave, passages, transport for leave purposes, pensions and other retirement benefits, redundancy and severance payments, hours of duty, grading of posts, medical arrangements, housing, arrangements for transport and travelling on duty, and allowances**.'

43. Whereas we do appreciate that the foregoing employment parameters are typically pre-determined prior to the commencement of a recruitment process, as would the qualifications for any vacant position; it seems to us that the items listed in that interpretation clause entail emoluments, benefits and rules of engagement that would accrue to a holder of a staff position post-recruitment; one that has met the minimum requirements for a staff position and is either duly employed as such or has been given an offer of employment. The term 'terms and conditions of service' cannot be stretched to include criteria against which a candidate would be evaluated in the course of the recruitment process. With respect, we are unable to appreciate

how criteria or requirements that would pre-qualify a candidate for admission to the recruitment process can be equated to terms and conditions of service that pertain to the post-recruitment, post-appointment phase. The former are pertinent to the recruitment process, while the latter would accrue to the employment phase.We do, therefore, find that any purported prescription of the qualifications for the post of Registrar under Article 45(3) of the Treaty was erroneous and misconceived.

44. Be that as it may,whereas Article 45(3) limits the mandate of the Council to the formulation ofstaff terms and conditions of service as defined above, Article 14(3) does mandate it to take policy decisions that would engender 'the efficient and harmonious functioning and development of the Community.' The question would be whether or not the setting of qualifications for the position of Registrar, the requirements set out in Article 45(1) notwithstanding, legally fell within the ambit of Article 14(3)(a) of the Treaty, and if so, whether the criteria the Council set thereunder contravened Article 45(1) of the Treaty.

45. It is a well recognized rule of procedure that s/he who asserts must prove their case. Courts require the party that raises a claim or advances a particular contention to establish the elements of fact and of law on which the decision in its favour might be given. Ultimately, it is the litigant that seeks to establish a fact who bears the burden of proving it. See ***Henry Kyarimpa vs. Attorney General of Uganda EACJ Appeal No. 6 of 2014*** *and* ***Shabtai Rosenne: The Law and Practice of the International Court, 1920-2005, Vol. III, Procedure, p.1040***. We hasten to add that this evidential burden upon a party that seeks to rely on a

specific fact does not negate the overall burden of proof upon a claimant to prove his/ her case against the respondent.

46. In the instant case, the Respondent pleaded its compliance with the Treaty in the process for the recruitment of a Registrar for the Court. The evidential burden on the issue of compliance thus rests with that Party. In that regard, the Respondent did adduce evidence that the qualifications for the position of Registrar were determined by the Council acting within its mandate under Article 14 of the Treaty, and were set at 15 years' experience in view of the demanding nature of the position at regional level. *See paragraphs 5(iii) and 10 of the additional affidavit and affidavit in support of the Respondent's case respectively.*Quite clearly, the rationale behind the 15-year experience requirement was to underpin the efficiency of the office of the Registrar. The veracity of this evidence was not rebutted by the Applicants; rather their affidavit evidence simply questioned adherence of those requirements with the provisions of Article 45(1) of the Treaty.

47. It did also emerge in submissions that there were disparities in the qualifications for the holder of such high judicial office in the respective Partner States. Against that background, it seemsquite logical to us that there would be need to standardize the qualifications for the position of Registrar within the EAC in order to underscore the efficacy of the Court, an organ with a pivotal function in the development of the Community. Therefore, we take the view that policy decisions taken to entrench efficiency and efficacy in the office of the Registrar of the EACJ, as illustrated above, would squarely fall within the mandate of the Council under Article 14(3)(a) of the Treaty.

48. We are unable to agree with the Applicants that such standardization amounted to a breach of Article 45(1) or indeed of the Treaty. Article 45(1) does place an obligation upon the Council to consider for appointment to the position of Registrar a citizen of any of the Partner States that qualifies to hold such high judicial office therein.The requirements of Article 45(1) set the minimum pre-qualification criteria for a candidate to be admitted to the recruitment process, while the standardized qualifications adopted by the Council prescribe such standards as would engender the development of the Court and, by extension, the Community. As we have held hereinabove, this was the prerogative of the Council under Article 14(1) and (3) of the Treaty.

49. In the instant case, given that the standardized qualifications have not been proven to have fallen below the qualifications applicable to such high judicial office in any of the Partner States, it cannot be suggested that the provisions of Article 45(1) have been breached. Rather, the requirements prescribed by Article 45(1) have been duly embedded within the standardized criteria set by the Council pursuant to Article 14(1) and (3)(a) of the Treaty. Indeed, we find no evidence in the Reference that a candidate that would have met the criteria set by the Council and is duly recommended for appointment under Article 45(1) of the Treaty, would not meet the minimum qualifications stipulated in that Article.

50. In the result, with utmost respect, we do not find any contradictions in either the interpretation or application of the Treaty by the Council's decision to prescribe specific qualifications for the position of Registrar. We are satisfied that the

advertisement for the position of Registrar that was published on 3rd August 2015 did not contravene either Article 14 or Article 45(1) of the Treaty. As we have held hereinabove, we do not find Article 45(3) applicable to the said recruitment exercise. We would, therefore, answer Issue No. 1 in the negative.

51. The next question then would be whether due process was observed in taking the said policy decision. It was the Applicants' case that the Council's augmentation of the qualifications for the position of Registrar violated Article 2(1)(h)(i) of the Protocol on Decision Making for not being taken by simple majority, as well as Article 2(2) of the same Protocol for not being referred to the Summit. Conversely, we understood learned Respondent Counsel to argue that the applicable legal provision in that regard was Article 2(1)(g) of the Protocol on Decision Making, which provides for consensus on policy decisions made pursuant to Article 14(3)(a) of the Treaty.

52. We have carefully considered Article 2(1) of the Protocol on Decision Making. Clauses (g) and (h)(i) thereof read as follows:

> **"The decisions of the Council on the following matters shall be by consensus:**
>
> **(g) Policy decisions made pursuant to Article 14(3)(a) of the Treaty.**
>
> **(h) Decisions on what should be recommended to the Summit on:**
>
> **i. Amendment of the Treaty."**

53. First and foremost, we do agree with Dr. Kafumbe that the Council's decision, having been a policy decision taken pursuant to Article 14(3)(a), did fall within the ambit of Article 2(1)(g) of the Protocol on Decision Making. Secondly, as held earlier in this judgment, the question of the policy decision amounting to an amendment of Article 45(1) was conceded by the Applicants during the Scheduling Conference. We have not been addressed on any other Treaty provision that might have been amended by the said decision. In any event, it is abundantly clear from a reading of Article 2(1) that even a decision under Article 2(1)(h)(i) would have been taken by consensus and not simple majority as argued by Mr. Ng'arua.In the result, we would answer Issue No. 2 in the affirmative, and do find that the Council's decision under Article 14(3) of the Treaty was subject to Article 2(1)(g) of the Protocol on Decision Making.

54. Before we take leave of this issue, we are constrained to address the question of the publication of the foregoing policy decision in the Gazette, as posited by Mr. Ng'arua. He argued that the Council's decision was not published in the Gazette as purportedly required by Article 14(5). On the other hand, the Respondent contended that the said decision was published in the Gazette of 30th April 2005.

55. With due respect to learned Counsel for the Respondent, we find that the Gazette copy in question offends established rules of procedure and evidence for the following reasons. First, the Gazette was annexed to the Respondent's submissions, thus defeating the rule of procedure that enjoins parties to avail all evidence in support of their case to opposite party in time to

enable the other party prepare its case in rebuttal. Secondly, it did not reflect the specific decisions purportedly taken by the Council. Item 1(a)(ii) at page 31of the Gazette referred to a Report on the Organizational Structure and Terms and Conditions of Service in respect of the EACJ, but the details adopted or a summary thereof were not availed to the Court. On the other hand, item 1(b) simply reflected the Council as having taken note of the Community's Staff Requirements. That would hardly be tantamount to a decision. It would have been useful for the Respondent to avail the Court with the report referred to in the Gazette, but this was not done. We therefore find no evidence of the Council's policy decision having been published in the Gazette as had been argued by Counsel for the Respondent.

56. Perhaps more importantly, nonetheless, is the question as to whether there is, in fact, a legal requirement for decisions of the Council to be published in the Gazette at all. As can be gleaned from the wording of Article 14(5), what the Treaty requires to be published in the Gazette are 'regulations and directives' of the Council. The provision reads:

> Article 14(5) of the Treaty
>
> **"The Council shall cause all regulations and directives made or given by it under this Treaty to be published in the Gazette; and such regulations and directives shall come into force on the date of publication unless otherwise provided."**

57. We do not find any provision in the Treaty that imposes upon the Council the duty to publish its decisions in the Gazette, or

translate any or all of them into regulations for purposes of publication therein. Therefore, strictly speaking, there was no Treaty obligation upon the Council to publish its decision with regard to the Registrar's qualifications in the Gazette. We so hold.

Issues 3 & 4: *Whether the recruitment process for the Registrar of the EACJ wrongly eliminated potential candidates from Tanzania and Rwanda contrary to Article 6(d) of the Treaty,AND Whether in the absence of any one Member qualifying to attain the requisite quota, it was discriminatory to exclude the said Partner States from contesting contrary to Article 6(d) of the Treaty.*

58. There is contention between the Parties as to whether the quota system should have been applied as at the date of the advert, as was done, or as at the date of selection of the successful candidate. It is, however, not disputed that the position of Registrar attracts 12 quota points. What is in contention herein is which of the quota computations should have formed the basis of the recruitment process under scrutiny. The Applicants propose the correct computation as being that reflected in Annexure V to the Reference as follows: Rwanda (-1.2), Burundi (11.8), Uganda (4.8), Kenya (4.8) and Tanzania (2.8). On the other hand, the Respondent maintains that the applicable quota points are reflected in Annexure I to the Response to the Reference as follows: Rwanda (-1.2), Burundi (11.8), Uganda (11.8), Kenya (11.8) and Tanzania (2.8).

59. Furthermore, whereas the Respondent made a case for rounding off the quota points held by each country as at the date of the advert to the nearest whole number on the basis of Clause 3.5 of the Operational Manual; the Applicant maintained that, given the dynamic nature of the quota points system, the quota points applicable to a recruitment process should be as at the time of selection rather than advertisement. In the event, the Applicants attributed what they termed 'the selective application of the quota system' to favouritism that undermined the spirit of integration, and discriminated against the rights of potential candidates from the eliminated countries.

60. We have carefully considered the submissions of both Parties on the question of quota points. The Operational Manual that regulates the operation of the quota system in the Community appears to have been formulated to give effect to the provisions of Article 6(e) of the Treaty, which enumerates the 'equal distribution of benefits' as a fundamental principle of the Community. Indeed, Clause 2.0 of the Operational Manual explicitly expounds its legal basis as being grounded in Article 6(e) of the Treaty.

61. Article 31(3)(a) of the Vienna Convention on the Law of Treaties does take due cognizance of '**any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions**.' The Operational Manual was enacted on the recommendation of the Council to operationalize the quota system now applicable in the EAC. *See clause 2.0 thereof.* It does, therefore, represent an agreement of the Partner States with regard to recruitment in the Community. It

is, therefore, absolutely pertinent to the application of the Treaty as provided in Article 23 thereof.

62. We deem it necessary to reproduce the pertinent provisions of the Treaty and Manual for ease of reference:

Article 6(d) of the Treaty

"The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

(d) good governance including adherence to the principles of .... transparency, ... equal opportunities..."

Clause(s) 4.6 of the Manual

"A Partner State must have points in order for its citizens to be considered as eligible candidates.

At the beginning of each recruitment exercise, the Secretariat shall inform each Partner State about her balance of weighted points."

Clause 7.1of the Manual

"**Interpretation and implementation of these guidelines is vested in the Secretary General**."

63. The first component of Clause 4.6 is couched in terms that make it abundantly clear that a citizen of a Partner State can only be considered eligible to submit to the recruitment process if such Partner State possesses the requisite quota points for that position. It would appear, therefore, that the possession of the requisite quota points by a Partner State is a pre-qualification

requirement that must be met before EAC citizens can be eligible to apply for a staff position. In the same vein, the second component of the same provision enjoins the Secretariat to inform each Partner State of the points available to them at the onset of any recruitment. It seems to us that this practice was intended to foster the transparency and integrity of the points system, and give an opportunity to Partner States to put the record straight right from the onset, if the circumstances so warranted.

64. Our interpretation of these two provisions read together is that the issue of quota points did accrue at the commencement of the recruitment exercise and not at the point of selection of the winning candidate, as suggested by the Applicants. It does follow, then, that the Respondent rightly computed the quota points available to each Partner State at the beginning of the recruitment process so as to determine which, if any, of them was eligible to present candidates for the position of Registrar.

65. The question would be whether any of the Countries possessed the requisite quota points. As depicted hereinabove, Burundi, Kenya and Uganda each held 11.8 quota points as at the date of the advertisement, which points were rounded off to the nearest whole number to give the three (3) countries 12 quota points each. The Applicants fault the Respondent for 'rounding off' the said quota points. We do appreciate Mr. Ng'arua's argument that Clause 3.5 pertains to the computation of quota points applicable to each staff position, rather than the computation of points held by each Partner State. It simply included a note that '**when one uses an excel worksheet, the computer corrects to the nearest point**', which is what appears to have informed the

Respondent's decision to round off the Partner States' quota points to the nearest whole number.

66. Be that as it may, we have carefully considered the provisions of Clause 7.1 of the Operational Manual. We agree with Dr. Kafumbe that it vests the implementation and interpretation of the Manual with the Respondent. That mandate must, nonetheless, be exercised with demonstrable transparency, objectivity and professionalism. With that yardstick in mind, we are unable to fault the Respondent's implementation of the quota system in the matter before us. It seems quite logical, rational and objective to us that if the quota points applicable to staff positions can be rounded off to the nearest whole number, similarly, the points available to Partner States would be computed on like basis.

67. We do not deduce any discriminatory practice in the Respondent's computation of the quota points available to the Partner States, neither can lack of transparency be attributed to a Party that duly circulated the quota points available to each Partner State as required by Clause 4.6. Most certainly the said computation cannot be equated to unequal distribution of opportunities within the EAC. Indeed, the Respondent's additional Affidavit evidence did explicitly expound the rationale behind the quota system as a measure to enable citizens from all the Partner States to enjoy equal opportunities to employment in the Community. *See paragraph 5(xi) of the additional affidavit.* We do, therefore, disallow the Applicants' claims in that regard.

68. In the result, we are satisfied that the Republics of Burundi, Kenya and Uganda did possess the requisite quota points to have their citizens compete for the position of Registrar in the EACJ, and the elimination of potential candidates from the Republic of Rwanda and United Republic of Tanzania was neither discriminatory nor a violation of Article 6(d) of the Treaty. We do, therefore, answer Issues 3 and 4 in the negative.

Issue 5: *Whether the Applicants are entitled to the prayers sought*

69. In a nutshell, the Applicants sought Declarations that the present recruitment process was a violation of the Treaty; the said recruitment process was null and void, and the elimination of Rwanda and Tanzania was a violation of the spirit of integration under the Treaty, as well as the quota system that guides recruitment in the Community. They did also seek the following Orders against the Respondent: the halting of the recruitment process until all the alleged irregularities ensuing therefrom had been addressed; compliance with Article 45(1) of the Treaty in the recruitment of a Registrar; implementation of the Operational Manual in accordance with Article 6(d) of the Treaty, and inclusion of candidates of all Partner States in the recruitment exercise, with application of quota points at the time of appointment of the successful candidate. Quite clearly, given our findings on the substantive issues, neither the Declarations nor Orders sought against the Respondent are tenable. They are accordingly disallowed.

70. With regard to the Applicants' prayer for costs, on the other hand, Rule 111(1) of the Court's Rules of Procedure provides that

costs shall follow the event '**unless the court, for good reason, decides otherwise**.'

71. In the instant case, whereas the First Applicant represented himself as a person that was personally aggrieved by the recruitment process, the Second Applicant appeared to have been a person that was purely interested in the proper implementation of the Treaty.

72. The Reference has, indeed, procured the clarification of significant aspects of the Community's recruitment process. To that extent, it seems to have been litigation that was instituted in the public interest. We deem that to be sufficient reason to depart from the general rule on costs.

73. In the final result, therefore, we hereby dismiss this Reference and order each Party to bear its own costs. We so order.

74. Dated, delivered and signed at Arusha this 23rd day of March 2016.

Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE

Hon. Justice Isaac Lenaola
DEPUTY PRINCIPAL JUDGE

Hon. Justice Faustin Ntezilyayo
JUDGE

Hon. Justice Fakihi A. Jundu
JUDGE

Hon. Justice Audace Ngiye
JUDGE