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

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

APPLICATION NO. 6 OF 2018
(Arising from **Reference No. 2 of 2018**)

HON. FRED MUKASA MBIDDE ..... APPLICANT

VERSUS

1. **THE ATTORNEY GENERAL OF THE REPUBLIC OF BURUNDI**
2. **THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY ..... RESPONDENTS**

24TH APRIL, 2018

RULING OF THE COURT

INTRODUCTION

1. On 19th December 2017, the Speaker of the 4th Assembly of the East African Legislative Assembly (EALA) was elected without the participation of EALA Members from the Republic of Burundi and the United Republic of Tanzania.

2. The Attorney General of the Republic of Burundi ('the First Respondent') subsequently filed **Reference No. 2 of 2018, The Attorney General of the Republic of Burundi vs. The Secretary General of the East African Community** in this Court, challenging the legality of that election on account of its purported violation of the rule(s) governing quorum in the Assembly. The office of the Secretary General of the East African Community (EAC) ('the Second Respondent') is sued therein in its representative capacity, being held responsible for the impugned actions of the Assembly.

3. Hon. Fred Mukasa Mbidde, a Member of EALA ('the Applicant'), has since filed the present Application for leave to be joined as an intervener in the Reference in opposition to the case advanced by the First Respondent. We deduced the Application to be premised on the following grounds:

    a. As a duly elected Member of EALA, the Applicant is entitled to participate in **Reference No. 2 of 2018** in so far as it contests the election of the Speaker of EALA and could have the effect of paralysing the activities of the Assembly.

b. The Applicant's interest in the Reference hinges on the preposition that should the Reference be upheld by the Court, the House would be incapacitated, there being no Speaker to preside over it; which in turn would deny the Applicant the opportunity to participate in the activities thereof, and negate the East African Community's representation therein.
c. The Reference has far-reaching implications on the function of the Applicant and the other elected Members of the House but they are not party to it.
d. The Orders sought in the Reference would have the effect of condemning the Applicant unheard, and cause him irreparable loss and damage.

4. The Application was supported by an Affidavit deposed by Hon. Mbidde, the thrust of which is as follows:

a. The Applicant had been authorised to swear the affidavit on behalf of himself and the entire membership of EALA.
b. He is conversant with the events surrounding the impugned election of the Speaker.
c. In the event that the Reference succeeded, EALA's activities would be paralysed and the Orders sought (if granted) would cause irreparable loss and damage to the Applicant and EALA.
d. whereas the Applicant's intervention would assist the Court in its interpretation of the Treaty, specifically Article 57(1) of the Treaty; if, on the other hand, the question of the Assembly's quorum was misconstrued it would affect the activities of the Assembly and bring the operations of the entire Community to a halt.

5. In an Affidavit in Reply deposed by Mr. Nestor Kayobera and objecting to the Application, it was averred as follows in a nutshell:

    a. On 19th December 2017, an election of the Speaker of the 4th Assembly was conducted without the participation of Members of the House from the Republic of Burundi and the United Republic of Tanzania, thus only Members from the Republics of Kenya, Rwanda, South Sudan and Uganda elected the Speaker of the 4th Assembly.
    b. The Applicant was one of the Members who elected the Speaker, and subsequently moved the Assembly to grant him leave to appear before this Court as an interested party represented by private lawyers.
    c. The lawyers retained for that purpose are not representing the Applicant as an individual but, rather, the entire Assembly contrary to Article 69(1) of the Treaty that designates the Counsel to the Community (CTC) as the principal legal advisor to the Community.
    d. Following the rejection of the Applicant's original Application for intervention, **Application No. 4 of 2018**, he successfully 're-moved' the House to grant him leave to intervene in **Reference No. 2 of 2018**, but seven (7) of the Assembly's Members from the Republic of Burundi did not participate in the said motion.
    e. The suspension of Rule 12(1) of the Assembly's Rules of Procedure to grant the Applicant the leave sought without the requisite quorum of the House was an injustice to the First Respondent.

f. Whereas the Applicant's Affidavit in support of the Application indicated that he deposed the same on behalf of the Members of the Assembly, it does not indicate that 7 Members from the Republic of Burundi were not party to that decision as they were not present in the House when it was made.

g. Rule 36(2)(e) mandatorily requires an Application for joinder as an intervener to contain a statement of the applicant's interest in the result of the substantive suit, but in this case the Applicant's interest was captured in paragraphs 5, 6, 10 and 11 of the Application, as well as paragraphs 15 and 20 of his supporting Affidavit.

h. It is not clear what expertise the Applicant seeks to draw from to purportedly assist the Court in the interpretation of the rule on the Assembly's quorum.

i. Allowing this Application would cause irreparable prejudice to the First Respondent, the people of the EAC and the Members of the House from the Republic of Burundi given that the leave granted by the House violates its own Rules of Procedure.

6. At the hearing of the Application, the Applicant was represented by Mssrs. Donald Deya, Justin Semuyaba and Nelson Ndeki, while Mssrs. Nestor Kayobera and Stephen Agaba appeared for the First and Second Respondents respectively.

APPLICANT'S SUBMISSIONS

7. It was argued for the Applicant that his interest in **Reference No. 2 of 2018** was motivated by his being a Member of the Assembly who was present on the day the events in issue in that Reference unfolded; he

did participate in the said events, and had evidence, information and insights in respect thereof that he wished to bring to the attention of the Court, not least being a proper interpretation of the Assembly's Rules of Procedure. It was further argued for the Applicant that the Orders sought in the Reference (if granted) had the effect of reversing a decision of the Assembly and incapacitating the Assembly in the absence of a Speaker to preside over it, thus further inhibiting the work of an Assembly that had already commenced its operations six (6) months late. The maxim *audi alteram partem* was cited by learned Counsel for the Applicant in a bid to underscore the need for the Applicant to be heard in a challenge to an action that he had participated in.

8. Mr. Deya did also address questions arising from the First Respondent's Affidavit in Reply, to wit, the ambit of the authority granted to the Applicant by the Assembly and its legal representation by the CTC. He clarified that the leave sought from the House had only been for purposes of accessing the Assembly's records and not to secure its permission *per se*. Learned Counsel argued that whereas the office of the CTC was by law required to provide legal representation to the East African Legislative Assembly, the Applicant was not bound to be represented by the said office given that he was accessing the Court as an individual Member of the Assembly.

FIRST RESPONDENT'S SUBMISSIONS

9. Conversely, it was the contention of learned Counsel for the First Respondent that in the absence of the requisite quorum of the House, the leave granted to the Applicant was irregular and the present

Application was improperly before this Court. It was his submission that whereas Rule 12(1) of the Assembly's Rules of Procedure provided for the quorum to constitute a minimum of one-third of the elected Members from each Partner State, which would translate to three (3) Members from each of them there being nine (9) elected Members from each Partner State, only two (2) Members from the Republic of Burundi were present in the House when it granted the said leave to the Applicant. He thus implored the Court to exercise its discretion under Rule 36 judiciously.

10. Mr. Kayobera did also take issue with the absence of a statement of interest in the Application before us, contending that it was explicitly prescribed by Rule 36(2)(e) of this Court's Rules of Procedure and could not be inferred from the grounds of an application, which (in his view) were separately provided for under Rule 21(1) of the Rules. He cited this Court's decision in **Union Trade Centre (UTC) vs. The Attorney General of the Republic of Rwanda & Others, EACJ Application No. 9 of 2014** in support of his contention that the inclusion of a statement of interest in an application for intervention was a mandatory requirement.

11. Mr. Kayobera faulted the Applicant for seeking to intervene in the Reference in order to assist the Court in the interpretation of the Assembly's Rule on quorum, the Bench's competency in that regard notwithstanding, and questioned the Applicant's legal representation by private lawyers in light of the express provisions of Article 69(1) of the Treaty, which designate the CTC as the East African Community's principal legal advisor.

SECOND RESPONDENT'S SUBMISSIONS

12. On his part, Mr. Agaba submitted that the Second Respondent saw no reason to oppose the Application given that it had been duly filed under Article 40 of the Treaty for the Establishment of the East African Community ('the Treaty') and Rule 36 of the Court's Rules of Procedure; neither could his client deduce any prejudice arising therefrom.

SUBMISSIONS IN REPLY

13. In specific reply to the question of quorum, Mr. Deya asserted that whereas learned Respondent Counsel had deposed an affidavit contending that there was no quorum in the House when the leave sought by the Applicant was granted, Mr. Kayobera was not present in the House during the proceedings in question but had not disclosed the source of that information in his Affidavit either by attaching an extract of the said proceedings or otherwise. Mr. Deya clarified that the Applicant did not require the permission of the Assembly in order to file the present Application, but rather had sought its leave to rely on the Assembly's records in the event that this Application was granted and he did participate in the Reference as an intervener.

14. In the same vein, Mr. Semuyaba took issue with Mr. Kayobera for doubling as an advocate and witness in the same matter, as well as omitting to disclose the source of information of matters attested to in his Affidavit. Reiterating the Applicant's interest in the Reference as an elected Member of the Assembly, who did in fact participate in the impugned election of the Assembly's Speaker; Mr. Semuyaba referred

the Court to the case of **Julie Folcik vs. Orange County Registrar of Voters & Another Superior Court of the State of California Case No. 30-2012-00553905** for an exposition on the grounds for the grant or refusal of an application for intervention.

15. Learned Counsel referred us to the case of **Advocats San Frontier vs. Mbugua Mureithi Nyambura & 2 Others, EACJ Application No. 2 of 2103**, where it was held that there was no need for the filing of a *statement of interest* as a separate document from an application for intervention, provided that '**the interest is clearly or succinctly set out in the Affidavit or the body of the Application itself**.' In his view, therefore, the objection by the First Respondent amounted to reliance on technicalities. He did also cite the cases of **Anita A. Amongi vs. The Attorney General of the Republic of Uganda & Another** and **Christopher Mtikila vs. The Attorney General of the United Republic of Tanzania & Another** in support of his preposition that Hon. Members of the EALA had in the past successfully sought to be joined in proceedings before this Court as interveners, the legal representation of the office of the CTC notwithstanding; and in **Anita A. Amongi vs. The Attorney General of the Republic of Uganda** (supra) a supporting affidavit had been admitted by the Court as a statement of interest.

16. We revert to a more detailed consideration of the foregoing cases later in this Ruling.

COURT'S DETERMINATION

17. Applications for intervention in any matter before this Court are substantively governed by Article 40 of the Treaty, while Rules 21 and 36 of the Court's Rules of Procedure outline the procedure entailed therein. We reproduce these provisions for ease of reference.

Article 40:

(a) A Partner State, the Secretary General or a resident of a Partner State who is not a party to a case before the Court may, with leave of the Court, intervene in that case, but the submissions of the intervening party shall be limited to evidence supporting or opposing the arguments of a party to the case.

Rule 21(1):

Subject to sub-rule (4) of this Rule (which prescribes the format of applications), **all applications to the First Instance Division shall be by motion, which shall state the grounds of the application.**

Rule 36:

(1) An application for leave to intervene under Article 40 of the Treaty and an application for leave to appear as *amicus curiae* shall be by notice of motion.

(2) An application under sub-rule (1) shall contain: -

(a) A description of the parties;

(b) The name and address of the intervener;

(c) A description of the claim or reference;

(d) **The order in respect of which the intervener or *amicus curae* is applying for leave to intervene;**

(e) **A statement of the intervener's or *amicus curae's* interest in the result of the case.**

(3) The applicant shall serve on each party who shall, within thirty (30) days, file and serve a response.

(4) If the Court is satisfied that the application is justified, it shall allow the intervention and fix a time within which the intervener or amicus curae may submit a statement of intervention and the Registrar shall supply to the intervener or amicus curae copies of the pleadings.

18. In a nutshell, Rule 21(1) provides for all applications before this Court to be instituted by way of a Notice of Motion that outlines the grounds on which such applications are premised. This principle is re-echoed in Rule 36, the Rule that specifically governs applications for intervention before the Court. *See Rule 36(1).* Rule 36(2)(e), on the other hand, prescribes parameters that should be included in an application for intervention, including a statement of the applicant's interest in the result of the case. In the present Application, a lot of ground was canvassed by both Parties with regard to the import of Rule 36(2)(e): whether or not it is a mandatory provision and the extent to which it may be deemed to have been complied with by a party. We were referred to numerous authorities that have canvassed that issue. We find it necessary to address the cited cases forthwith.

19. In **Union Trade Centre Ltd (UTC) vs. The Attorney General of the Republic of Rwanda & 3 Others** (supra), it was held:

The word used in these provisions [Rule 36(2)(d) and (e)] **is '*shall*' meaning the aforesaid conditions are mandatory to an application seeking intervention in a pending Reference before this Court. ... Providing 'Statement of Interest' is a mandatory condition or requirement under Rule 36(2)(e). Since an application for intervention is made under Rule 21(1), it means that the Applicants had to comply with both conditions, that is, stating grounds of the Application as is required under Rule 21(1) and furnishing a Statement of Intervener's Interest as required under Rule 36(2)(e).**

20. On the other hand, a similar question had been addressed in **Advocats Sans Frontier vs. Mbugua Mureithi Wa Nyambura & 2 Others** (supra) as follows:

Secondly in the Application as above the Applicant is required under Rule 36(2)(e) of the Court Rules of Procedure to file an application which are contained inter-alia a statement of the interveners or amicus curiae's interest in the result of the case. While the Respondents argued forcefully that the statement of interest must be a separate document from the Motion itself, we find no justification for such a position and in our view it is sufficient that the interest is clearly or succinctly set out in the Affidavit or body of the Application itself. In any event, Rule 36(4) is the operative rule in terms of the substance of the amicus curae's intervention and we see no obligation to the filing of such a statement at the time of seeking leave.

21. On that basis, Mr. Semuyaba argued that a full statement (presumably of Intervention) would be filed by his client after the leave sought in the present Application had been granted, and thus implored the Court to follow the stance adopted in the foregoing case where the reflection of an applicant's interest in an affidavit or the body of the application itself was deemed to be sufficient for purposes of applications under Rule 36(2)(e). Indeed, learned Counsel sought to buttress this position with introductory observations made by this Court in **Anita A. Amongi vs. The Attorney General of Uganda & Another**, (supra) as follows:

> **It is also worth noting that on 17th August 2012 nine interveners, namely the Ugandan Representatives to the EALA, filed a Notice of Motion under Article 40 of the Treaty and Rule 36 of the Rules. This Court granted their Application on 5th February 2013. The Court also allowed the Interveners' supporting affidavit deponed by one Hon. Margaret Nantongo Zziwa (the 1st Intervener) to serve as the statement of intervention as provided under Rule 36(4) of the Rules. Further to the foregoing, the Interveners were allowed to make submissions.**

22. We must state from the onset that we do firmly recognize the doctrine of judicial precedent as a cardinal rule in the determination of cases. This doctrine is premised on the principle of *stare decesis (*which in a nutshell means 'to stand by decided matters') and enjoins courts, in arriving at their own decisions, to give due regard to binding and persuasive precedents as reflected in the decisions of superior

courts and courts of concurrent jurisdiction respectively. The rationale behind this is fairly obvious: judicial precedent engenders legal certainty in the administration of justice, ensuring as far as possible that similar facts attract a similar result from courts. Needless to say, legal certainty is a critical tenet of the rule of law. Therefore, whereas the decisions of the Appellate Division of this Court would be binding upon us, previous decisions of this Division of the Court would have persuasive authority and may be departed from where the circumstances so warrant albeit for demonstrably sufficient reason. It would suffice to note at this stage that the authorities to which we were referred by learned Counsel in this Application pertain to decisions of the First Instance Division of this Court and, to that extent, are persuasive authority. We do, therefore, interrogate the submissions before us on that premise.

23. We have carefully considered the cases cited before us as reproduced hereinabove, as well as the law applicable to the contents of an application for intervention. The interpretation of the procedural rules governing applications for intervention is at the heart of this Application. It is not disputed by either the Applicant or First Respondent that applications for intervention, such as the present one, are brought by way of Notice of Motion. Indeed, not only does Rule 21(1) prescribe a Notice of Motion as the manner in which all applications before this Court may be brought; Rule 36(1), which explicitly addresses applications for intervention, does prescribe the same procedure. The only issue in contention between the Parties as far as the procedure to be followed is concerned appears to gravitate

around the substance of the Application or the contents of the Notice of Motion in an application for intervention.

24. Rule 21(1) provides the procedure governing ALL applications before this Court, stating that they shall be by notice of motion, which Motion shall state the grounds therefor. Rule 36(1) and (2) then specifically address the procedure entailed in applications for leave to intervene in a Reference as provided by Article 40 of the Treaty. Rule 36(2)(e) requires a notice of motion in an application for leave to intervene to *'contain'* specified details, including a statement of the intervener's interest in the result of the case. Whereas the requirement in Rule 21(1) is for all applications before the Court to *'state'* the grounds of the application, Rule 36(2)(e) requires an application for leave to intervene to specifically 'contain' the details encapsulated therein. In our considered view, there is no room for conjecture in the foregoing Rules: the requirement for a notice of motion in an application for leave to intervene to contain a statement of interest is just as instructive as the requirement for the grounds of an application before the Court to be stated in notices of motion. The two (2) Rules have equal force of law and must be construed *in pari materia*. In that regard, a plain interpretation of Rule 21(1) and 36(2)(e) is that the notice of motion in an application for leave to intervene before this Court should *state* the grounds of the application and *contain* a statement of interest as envisaged in Rule 36(2)(e).

25. Having so held, we now revert to the case law that was cited to us by both Parties. We must categorically state that introductory remarks in a court's judgment or ruling, as was the case in **Anita A. Amongi**

vs. The Attorney General of Uganda & Another (supra), do not constitute the decision of the court or the *ratio decidendi* on which the decision is premised so as to establish a judicial precedent for courts. As stated quite succinctly in Oxford's Dictionary of Law,[1] '**it is that part of a judgment that represents the legal reasoning (or ratio decidendi) of a case that is binding**.' We would, therefore, disregard Mr. Semuyaba's reference to the introductory remarks in the **Anita A. Amongi** case.

26. Nonetheless, Mr. Semuyaba did also refer us to the decision in **Advocats Sans Frontier vs. Mbugua Mureithi Wa Nyambura & 2 Others** (supra), which similarly addresses the question of the nature of statement of interest envisaged under Rule 36(2)(e). Having construed that Rule to require an application for intervention to contain or include a statement of interest, we do respectfully agree with the decision in that case that there is no justification in the Rules for the statement of interest prescribed in Rule 36(2)(e) to be a separate document from the application for intervention but, rather, it should be included in the body of the application (Notice of Motion) itself. With utmost respect, however, we do clarify that Rule 36(2)(e) is not couched in terms as would endorse the propriety of the inclusion of a statement of interest in an affidavit in support of the application. The import of Rules 36(1) and (2)(e) read together is that the application, which is by notice of motion, shall include a statement of interest. No reference whatsoever is made to a supportive affidavit in that regard. It will suffice to note that it is a cardinal rule of judicial practice that written laws are the

[1] 2009, 7th Edition, Oxford University Press, p.

primary source of law to clarify any issue before a court, and recourse may only be made to case law or judicial precedent where the written laws on a matter before the court are not sufficiently clear or conclusive. In the present scenario, where Rule 36(2)(e) is sufficiently prescriptive, we are bound by and unable to depart from the substance and letter of the written Rule. Therefore, a statement of reference stated or expressed in a supporting affidavit would not suffice for purposes of the express provisions of Rule 36(2)(e). We so hold.

27. The foregoing notwithstanding, it would appear that the issue before us presently is whether or not non-inclusion of a statement of interest from an application for intervention would be fatal to the application, or otherwise render it incurably and irredeemably defective. An ancillary question to the one above would be whether the 'statement of interest' should take on any particular format. None of the authorities cited before us addressed these questions. The case of **Union Trade Centre Ltd (UTC)** (supra) that was cited by learned Counsel for the First Respondent interpreted the use of the word 'shall' in Rule 36(2)(e) such as to render it mandatory for an applicant for leave to intervene to furnish his/ her statement of interest in the application. It did not, however, address the question of the specific format of the statement of interest envisaged under the said Rule.

28. We do respectfully agree with the decision in the **Union Trade Centre (UTC)** case in so far as it renders the inclusion of a statement of interest in the application mandatory. We hasten to distinguish the facts of that case from those on the matter before us presently. In the **UTC** case, it would appear that learned counsel for the applicants

therein was under the mistaken view that the grounds of an application for leave to intervene were tantamount to and could suffice as the statement of interest. As we have held earlier in this Ruling, that is not the case. Rather, the import of Rule 36(2)(e) is that the notice of motion in an application for leave to intervene before this Court should *state* the grounds of the application and *contain* a statement of interest.

29. The question then would be what format would an application for leave to intervene that contains grounds of the application, as well as a statement of interest take? A literal interpretation of Rule 36(2)(e) would suggest that such an application should depict a 'section' that states the grounds of the application and another 'section' that contains the statement of interest. Such an approach would overtly and conclusively satisfy the requirements of the Rule. A more purposive interpretation of the same Rule, however, would lend credence to a statement of interest *contained* in the *stated* grounds of the application being equally satisfactory compliance with the express requirements of Rule 36(2)(e). In the matter before us, the Applicant adopted the latter approach. As was quite aptly averred in the First Respondent's Affidavit in Reply, the Applicant's interest in the Reference was captured in paragraphs 5, 6, 10 and 11 of the Application. We take the considered view that these statements in the Application, whereas not clearly demarcated as such, do nonetheless sufficiently depict the Applicant's interest in the Reference. Indeed, all that is required under Rule 36(2)(e) is 'a statement' of the intervener's interest in the result of the case, not necessarily a stand-alone 'statement of interest' that is separate and distinct from the grounds of the application. We therefore

find that the present Application for leave to intervene in **Reference No. 2 of 2018** is properly before us. We so hold.

30. We now revert to the merits of the Application. We have carefully considered the written submissions of all the Parties in this Application, and did just as carefully listen to them in oral highlights thereof. It did transpire in submissions that the Applicant contested the validity of the First Respondent's Affidavit in reply for offending the rules on affidavits with regard to disclosure of sources of information that is not within the deponent's knowledge. In that regard, we did understand it to have been the Applicant's submission that Mr. Kayobera was not a member of the Assembly but purported to attest to matters that had occurred within the precincts of the House without disclosing the source of his information. This alleged anomaly would appear to pertain to the First Respondent's assertion that 7 of the Assembly's Members from the Republic of Burundi neither participated in nor were they party to the said Motion, and the suspension of the Assembly's Rules on quorum to allow the Motion on the floor of the House was prejudicial to his client.

31. First and foremost, the question as to whether an advocate that has personal conduct of a case can swear an affidavit in such a matter, as happened in the present Application, is as debatable as it is controversial. This practice has been held to violate the tenets of advocates' professional conduct and would render an affidavit fatally defective. In **R. vs. Secretary of State for India (1941) 2 All ER 546**, a junior counsel of one party was called as a witness to prove certain aspects of Indian Law and thereafter purported to continue acting as

counsel in the case. Whereas no objection was raised by opposite counsel, it was held that '**this was irregular and contrary to practice. A barrister may be briefed as counsel in a case, or he may be a witness in a case. He should not act as both counsel and witness in the same case**.' This position was cited with approval in **Yunus Ismail t/a Bombo City Stores vs. Alex Kamukama & Others t/a Bazari, Supreme Court Civil Appeal No. 7 of 1987, (UG)** and **Francis Babumba & Others vs. Bunju High Court Civil Suit No. 679 of 1990, (UG)**. We are respectfully persuaded by the foregoing position, particularly so in a case such as the present one where the sole advocate for the First Second Respondent purported to concurrently double as the sole witness for the same Party.

32. To compound matters, the affidavit deposed by the same advocate cum witness did not disclose the source of information in respect of matters that were apparently not in the deponent's knowledge. The contents of paragraphs 4, 5, 7, 16 and 23 are matters that would not have been readily known to a deponent that was not present in the House when the events in reference therein took place. Paragraph 16 expressly attests to the deponent of the impugned affidavit having been told certain information, but the source of the said information or the verification thereof is not disclosed.

33. It is now well settled law that such an affidavit would be incurably defective. Thus in the case of **Phakey vs. World Wide Agencies Ltd (1948) 15 EACA 1**, where a paragraph in an affidavit was expressed to be based on the deponent's knowledge and belief but neither the source of information nor the basis for the belief were disclosed, the

affidavit was held to be worthless and the Motion on which it was premised was dismissed. In the same vein, in the case of **Bombay Flour Mill vs. Chunibhai M. Patel (1962) EA 803**, in which a deponent had not clarified whether he was attesting to facts within his own knowledge or on information given to him by someone else, the court adopted the binding decision in the East African Court of Appeal case of **Noormohammed Janmohamed vs. Kassamali Virji Madhani (1952) 20 EACA 8**, where an application in respect of which a similar affidavit had been deponed was dismissed on the premise that '**an affidavit of that kind ought never to be accepted by a court as justifying an order based on these so-called 'facts'.**'

34. Quite clearly, paragraph 16 of the First Respondent's Affidavit in reply, like the impugned affidavit in **Phakey vs. World Wide Agencies Ltd** (supra), acknowledges receipt of information but neither the source of the information or verification referred to in that paragraph is disclosed in the Affidavit. It reads:

> ***That however, I am informed and which information I verified to be true, that most of the elected Members from the Republic of Burundi (7 of them) did not participate in the passing of the motion which allowed Honourable Fred Mukasa Mbidde to appear as an intervener.***

35. Similarly, the scenario in **Noormohammed Janmohamed vs. Kassamali Virji Madhani** (supra) above does arise in the case before us presently in so far as paragraphs 4, 5, 7 and 23 of the impugned Affidavit in reply attest to matters that would not be readily known by a deponent that was not present in the House when the events in

reference therein took place, but the deponent thereof does not disclose the source of his information at all. We reproduce them below for ease of reference.

Paragraph 4:

That I know very well that on 19th December 2017, election of the 4th Speaker of the 4th Assembly (EALA) was conducted but elected EALA Members from the Republic of Burundi and from the United Republic of Tanzania did not participate in that election.

Paragraph 5:

That only EALA elected members from the Republics of Kenya, Rwanda, South Sudan and Uganda elected the contested 4th Speaker of the 4th Assembly.

Paragraph 7:

That the Applicant (Intervener) was one of the EALA Members who elected the 4th contested EALA Speaker.

Paragraph 23:

That however, as I indicated before, the motion was passed without attaining the quorum required under Rule 12(1) of EALA Rules of Procedure since Burundi elected Members did not participate in the passing of the motion.

36. In the **Noormohammed Janmohamed** case an affidavit which similarly did not disclose the source of the deponent's information was held to be unacceptable and unable to justify or support the orders

sought in the application.[2] With respect, therefore, we do find the First Respondent's Affidavit in reply herein incurably defective and do hereby expunge it from the record in its entirety.

37. Be that as it may, the expunging of the First Respondent's Affidavit in reply does not negate the duty upon the Applicant to prove his case to the required standard. For purposes of a civil matter, such as the present one, the required standard of proof would be proof on a balance of probabilities. The case for the Applicant hinges on his interest in the subject matter of the Reference as an affected person, being a Member of the Assembly whose Rules of Procedure are in issue. We understood him to seek to draw on his long service as such to provide insights to the factors that informed the Assembly's impugned course of action, and does so in support of the Second Respondent in the Reference, the Secretary General of the East African Community.

38. The role of an intervener in court proceedings can be surmised from Article 40 of the Treaty and Rule 36(4) of this Court's Rules. Having reproduced them earlier in this Ruling, we do not deem it necessary to do so again. Suffice to note that Article 40 restricts the intervention of an intervener to submissions in respect of evidence in support of one or another of the parties, meaning an intervener may provide his/ her/ its perspective on *questions of fact* adduced by one party viz the other(s). It is, therefore, to that scope of intervention that the statement of intervention in reference in Rule 36(4) would be restricted. Indeed, in **UHAI EASHRI & Another vs. Human Rights Awareness &**

[2] See paragraph 33 above

Promotion Forum (HRAPF) & Another Consolidated Applications No. 20 & 21 of 2014, the role of an intervener was distinguished from that of a party to a case or an *amicus curae* in the following terms:

> **In the EAC jurisdiction, distinction has been drawn between an *amicus curae* and an intervener: the latter may advocate a point of view in support of one party over another, whereas the former may n0t. *See Rule 36 of the Court's Rules of Procedure and Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 Others Petition No. 12 of 2013 (SCK).* We think that this is a useful distinction to distinguish between a party to a suit that has *locus standi* in a matter; an intervener that, while not having *locus standi* in a matter, does have a partisan interest therein, and an *amicus curae* that has an interest in providing objective, cogent assistance to the courts to engender the advancement of legal jurisprudence on a given subject.**

39. We do respectfully abide by that position but hasten to add two (2) clarifications thereto. First, whereas a party to a Reference before this Court would have *locus standi* therein as spelt out in Article 30 of the Treaty, an intervener and *amicus curae* may not necessarily have *locus standi* in the Reference but might otherwise have an interest therein; the former to support a partisan position and the latter to advance a neutral, objective position. For instance, a non-resident of the Partner States who would not have *locus standi* under Article 30 of the Treaty to participate in a matter before the Court as a party, would very well be entitled to apply for leave to intervene in a matter or be joined as

amicus curae under Article 40. Secondly, whereas Article 40 appears to restrict the role of an intervener to questions of fact, an *amicus curae* would appear to be mandated to address the Court on questions of law and fact. In our considered view, this is not to say that an intervener may not address the Court on the law applicable to the facts that s/he seeks to substantiate, but s/he would not be at liberty to address the Court on issues of law as between the Parties to the Reference.

40. We have carefully considered the case of **Julie Folcik vs. Orange County Registrar of Voters & Another** (supra), to which we were referred by learned Counsel for the Applicant. In that case, intervention was held to be appropriate where:

> **(1) The nonparty has a direct and immediate interest in the litigation;**
> **(2) Intervention will not enlarge the issues in the case; and**
> (3) **The reasons for intervention outweigh any opposition by the existing parties.**

We are most respectfully persuaded by the position expounded therein.

41. On that premise, we are satisfied that the Applicant in the matter before us, to the extent that he is Member of the EALA who participated in the election that is challenged in **Reference No. 2 of 2018**, does have a direct and immediate interest in the said litigation. Without descending into the merits of the said Reference, it seems to us that the Applicant's intervention would assist in clarification of the issues in that case, without necessarily enlarging them given that it would be restricted to evidence that is already on record therein. Indeed,

whereas learned Counsel for the First Respondent did challenge the procedure of the House that delivered leave to the Applicant to appear before this Court, we take the view that those complaints are akin to the substratum of the Reference, similarly raise the question of the rules governing the quorum of the House and thus go to the merits of the Reference. In our judgment, those are matters that would be best determined in the Reference with as much insight and clarification as would be available to the Court at that stage.

42. Mr. Kayobera did also question the need for the Applicant as an intervener viz the function of the CTC as the legal advisor to the Community. In the same vein, he challenged the role of private lawyers representing the Applicant and Members of the Assembly yet legal representation of the Assembly was under Article 69(1) of the Treaty reserved for the CTC, the principal legal advisor to the Community. We understood his contestation in that regard to have been premised on the averment in the Applicant's affidavit that he had been authorized to swear the affidavit in his own interest and on behalf of the entire membership of the Assembly, and his retention of private lawyers to represent him before this Court. It was subsequently clarified in response to questions from the Bench that the Applicant had indeed brought the present Application in his own right and on behalf of the Members of the House.

43. With respect, we do not find the Applicant's position on this being a purported representative action to be borne out by the material on record. The authorization of the House that is in issue is first introduced

in paragraph 4 of the Applicant's affidavit in support of the Application. It reads:

> *That as a duly elected member of EALA, I am entitled to intervene in the abovementioned Reference since it is challenging the election of the Speaker of EALA and it has the effect of putting the activities of EALA to a standstill if it succeeds.* (A copy of the authority to commence these proceedings are *(sic)* hereto attached and marked as **Annexure "A"**)

44. The express wording of the Resolution of the House that was availed to the Court, in turn, reads as follows:

> *Now therefore this House do resolve to:-*
>
> (1) *Grant leave to Hon. Fred Mukasa Mbidde and any other Member of the Assembly who may want to intervene, and/or to appoint lawyers to represent it in the case Reference No. 02 of 2018 in the East African Court of Justice.*
>
> (2) *Grant leave to Hon. Fred Mukasa Mbidde to use the records of the House in case* ***Reference No. 02 of 2018.***

45. Our construction of clause 1 of the Assembly's Resolution is that Hon. Mbidde and any other Member of the House that may wish to intervene in the Reference were authorized to do so. In the absence of an express resolution to that effect, the foregoing Resolution is not tantamount to authorizing Hon. Mbidde to act on behalf of such other Member of the House as would be interested in intervening in the said Reference. The same clause of the Resolution is very ambivalent and circumspect on whom the lawyers in reference would represent.

Whereas the word used is 'it' – suggesting that the lawyers would be representing the entire Assembly, given our construction of the singular authority granted to each Member of the House to seek to intervene in the Reference if they so wish, this eventuality is not tenable. As quite rightly pointed out by learned Counsel for the First Respondent, it would run afoul of the letter and spirit of Articles 4(3), 9(1)(f) and 69(1) of the Treaty, the import of which is to allot legal personality to the office of the Secretary General (on behalf of Organs of the Community) and that office would be represented as such by the office of the CTC. In our judgment, therefore, the present Applicant was authorized to and did file the Application before us in his personal capacity, and we consider the lawyers that represented him in this Application to have done so in that capacity.

46. Be that as it may, the fact of the office of the Secretary General having been sued in its representative capacity for the alleged acts or omissions of the Assembly does not exempt any Member of the Assembly from seeking the leave of this Court to intervene in the case. Under Article 40 of the Treaty, a Member of the Assembly (like any other resident of a Partner State) does clearly have *locus standi* to intervene in any case before the Court, provided that his/ her residency is not in dispute. The question of the Applicant's residency did not arise in the present Application. Article 40 does not expressly or implicitly prohibit any Member of the Assembly from participating in a case as an intervener simply on account of the case being premised on the alleged activities or omissions of the House, as is the case presently. On the contrary, it does recognize the partisan nature of an intervener to support or oppose either party in a case before the Court.

CONCLUSION

47. Rule 36(4) of the Court's Rules leaves the question of who may or may not be granted leave to join a matter as an intervener entirely to the discretion of the Court. It reads:

> **If the Court is satisfied that the application** (for leave to intervene) **is justified, it shall allow the intervention and fix a time within which the intervener .... may submit a statement of intervention and the Registrar shall supply to the intervener ... copies of the pleadings.**

48. We have carefully considered the merits of this Application and deduce no injustice or prejudice whatsoever to be suffered by the First Respondent in the event that it is allowed. On the contrary, we deem it to be in the interests of justice as well as the best interests of the Community that a Member of the House who was present when the decisions underlying the impugned election were made be granted leave to intervene in a Reference as pivotal as **Reference No. 2 of 2018** is to the business of the Assembly.

49. In the result, we would allow the Application for leave to intervene in **Reference No. 2 of 2018**. We order each Party to bear its costs.

Dated, signed and delivered at Arusha this 24th day of April, 2018.

HON. LADY JUSTICE MONICA K. MUGENYI

PRINCIPAL JUDGE

HON. ISAAC LENAOLA

DEPUTY PRINCIPAL JUDGE

HON. JUSTICE FAKIHI A. JUNDU

JUDGE