



IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA



FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Faustin Ntezilyayo, DPJ; Audace Ngiye, Charles O.

Nyawello & Charles Nyachae, JJ)

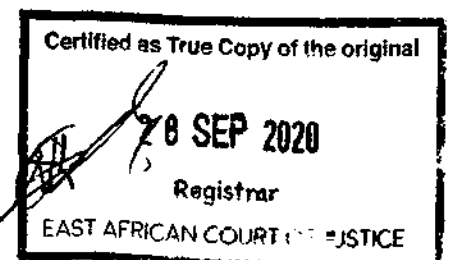
REFERENCE NO. 13 OF 2017

PROF. ELIAS BIZURU APPLICANT

VERSUS

**THE INTER-UNIVERSITY COUNCIL
FOR EAST AFRICA RESPONDENT**

28TH SEPTEMBER 2020



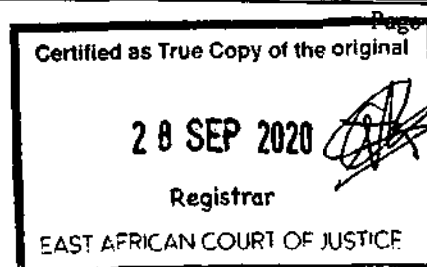
JUDGEMENT OF THE COURT

A. INTRODUCTION

1. This Reference was brought under Articles 6(d) and 30(1) of the Treaty for the Establishment of the East African Community (hereinafter 'the Treaty'), challenging the decision of the Respondent rescinding his offer of appointment by the Inter-University Council for East Africa (IUCEA), an institution of the East African Community. The Reference is premised on the allegation of lack of transparency in the recruitment process.
2. The Applicant is a resident of Bujumbura, Burundi and thus resident within the East African Region for the purposes of Article 30(1) of the Treaty. The Respondent is the Inter-University Council for East Africa sued in its own name as an institution of the Community, for the purposes of the same Article 30(1).
3. At the trial the Applicant was represented by Mr. Janvier Bayingana, while Dr. Anthony Kafumbe appeared for the Respondent.

B. BACKGROUND

4. In October 2016, the IUCEA advertised the position of Chief Research and Innovation Officer through their website. In response to that advertisement, the Applicant emailed his application with all supporting documents on 10th October 2016.
5. The first written response from the IUCEA was on 21st February 2017, when the Applicant received an email message informing him that he had been shortlisted for an interview that had been scheduled for 27th February 2017. The said institution sent him an electronic air ticket for that purpose. He did subsequently participate in the interview as scheduled.
6. On 26th April 2017, the IUCEA required him to submitted supplementary documents, which were duly supplied. In addition, there was the academic verification document submitted by the university where he completed his PhD degree. That submission was done with the Applicant's approval.



7. On 21st September 2017, the Applicant received a letter of regret from the IUCEA Executive Committee informing him of that he had not been selected for the post. As a result, the Applicant filed this Reference in the Court.

C. APPLICANT'S CASE

8. The Applicant's case is set out in the Statement of Reference; the Affidavit in support of the Reference; in his written submissions, and in the oral highlights thereof made during the hearing.

9. It is the Applicant's case that there was no transparency in the recruitment process in respect of the position of Chief Research and Innovation Officer in the IUCEA. The thrust of his case is that, having emerged the best candidate in the interviews as indicated in the Minutes thereof, he should have been appointed to the advertised position. However, he subsequently received a letter of regret from the IUCEA Executive Committee informing him that he had not been selected for the job.

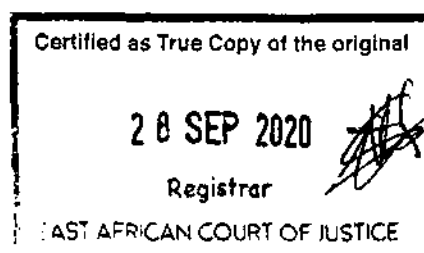
10. The Applicant questions the transparency of the IUCEA Executive Committee decision of 27th August, 2017 that ignored his performance in the interviews to deny him an offer of employment.

11. The Applicant seeks the following Reliefs, reproduced verbatim:

- (i) To declare the IUCEA Executive Committee decision of 27th August, 2017 an infringement of the Treaty of EAC.
- (ii) To nullify the IUCEA Executive Committee decision of 27th August, 2017.
- (iii) To reimburse the applicant the costs associated with this Reference (to be determined at the closure of the proceedings by the Applicant).

D. THE RESPONDENT'S CASE

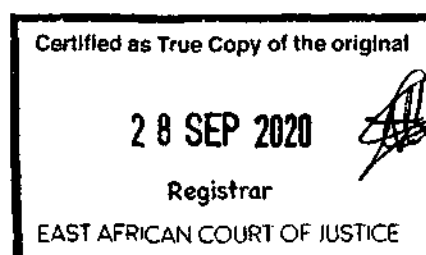
12. Similarly, the Respondent's case is set out in the Response to the Statement of Reference; the Affidavit in support thereof; its written submissions, and in the



oral highlights thereof made during the hearing. It is the Respondent's case that the impugned recruitment process was conducted in accordance with the Treaty, the IUCEA Staff Rules and Regulations and the EAC Council of Ministers' directives with regard to due diligence checks in EAC recruitment processes. It is the Respondent's contention that although the Applicant was the best interviewed candidate, he was not given an offer of employment because he failed the due diligence test. He was thus sent a regret letter.

13. Affidavit evidence was adduced by Ms. Jolly Atuhaire Kamwesigye, the Principal Human Resource Officer of the IUCEA, to the effect that under section 9(a) of the Inter-University Council for East Africa Act of 2009 the IUCEA Executive Committee has the final decision on the recruitment of staff. At its 24th meeting held on 28th June 2017, the Executive Committee acted on a due diligence check undertaken on the Applicant to decline to make him an offer of appointment.
14. In his submissions, learned Counsel for the Respondent disputed the Applicant's allegation of non-transparency in the impugned recruitment process on the premise that there had been consistent communication with the Applicant at each stage of the process right up to the letter of regret. From the Respondent's point of view, this consistency serves as evidence of transparency, as what is required is the taking of reasonable steps in the circumstances to keep the Applicant informed of the developments in the process.
15. It was the Respondent's contention that the Applicant lacked the moral credibility for appointment to the position sought. Indeed, paragraph 4 of the Respondent's written submissions sums up its intervention in the recruitment process as follows:

During the approval process for the Applicant's appointment, which is a preserve for the Executive Committee under the IUCEA Act, 2009, the Republic of Burundi protested the Applicant's appointment on account of moral credibility. The Republic of Burundi asserted that it had fully sponsored the Applicant for PhD studies on condition to return and teach at the University of Burundi, a condition the Applicant breached



and instead sought another teaching job in the Republic of Rwanda. The averment is that the Applicant was given a PhD scholarship in understanding that he was to return and resume teaching in the University of Bujumbura .

16. On that ground, the Counsel for the Respondent maintains that Articles 6(d) has never been breached, and thus there is no case against his client.

E. ISSUES FOR DETERMINATION

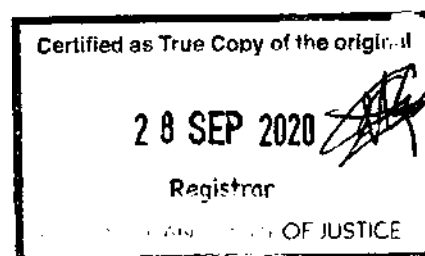
17. At the Scheduling Conference held on 21st September 2019, the Parties framed the following issues for determination:

- (i) Whether the decision of the Respondent not to appoint the Applicant to the position of the Chief Research and Innovation Officer was an infringement of Article 6(d) of the Treaty for the Establishment of the East African Community; and
- (ii) Whether the parties are entitled to the reliefs sought.

F. COURT'S DETERMINATION

Issue No. 1: Whether the decision of the Respondent not to appoint the Applicant to the position of the Chief Research and Innovation Officer was an infringement of Article 6(d) of the Treaty for the Establishment of the East African Community.

18. It was the Applicant's submission that there was no transparency in the impugned recruitment process, particularly at the point in time when he was served with the regret letter conveying the decision not to appoint him to the said position. From his perspective, the decision declining his appointment to the position vied for rendered the process non-transparent and, accordingly, constitutes a violation of Article 6(d) of the Treaty. To support his position, learned Counsel for the Applicant relies on Article 6(d) of the Treaty, but invokes no case law in support of his allegations..



19. Conversely, it was the contention of the learned Counsel for the Respondent that, under section 9(a) of the Inter-University Council for East Africa Act, the IUCEA Executive Committee was under no obligation to abide by the results of the interview given that the feedback from the Respondent State in response to due diligence checks on the Applicant had yielded a credibility question. Further, in so far as the Applicant had been kept abreast with each stage of the recruitment process right to the point of the emailing of the regret letter, it could not be argued that the said process had been non-transparent. Likewise, the Respondent relies on Article 6(d) but invokes nothing from the jurisprudence of the Court or from elsewhere.

20. We have carefully considered the rival arguments of the Parties. The facts as stated by them point to the abortion of the recruitment process prior to an offer of employment to the Applicant. It is thus a pre-contractual dispute. From those facts, we deduce the dispute to have arisen only at the last stage of the recruitment process, when the Applicant received the email that communicated the decision of the IUCEA Executive Committee declining to make him an offer of appointment. It is this decision that the Applicant thinks is tainted with non-transparency and, thus, alleged to violate Article 6(d) of the Treaty. On the other hand, the Respondent disputes the alleged non-transparency in the entire process.

21. We deem it necessary to reproduce Article 6(d) of the Treaty, as well as restate our understanding of the notion of transparency. Article 6(d) reads:

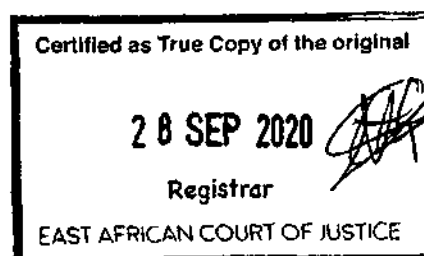
The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

(a)

(b)

(c)

(d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social



justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

22. The Treaty does not specify the parameters entailed in the concept of transparency. In the absence of an authoritative definition or exposition, we resort to the usual import of the term. In simple terms 'transparency' means not hiding anything that matters in the situation. Put in another way, it means being open and clear so that the other party to a transaction sees everything that matters. This shade of meaning is reflected by Black's Law Dictionary¹ in the following quotation:

Transparency. Openness; clarity; lack of guile and attempt to hide damaging information. The word is used of financial disclosures, organizational policies and practices, lawmaking, and other activities where organizations interact with the public.

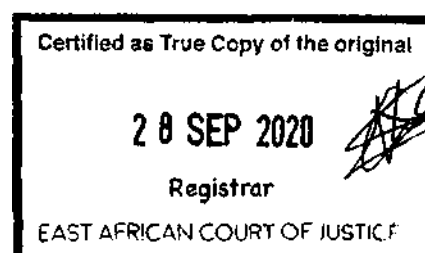
23. According to this definition, transparency comprises four parameters:

- a) openness,
- b) clarity,
- c) lack of guile, and
- d) attempt to hide damaging information.

24. As Black's Law Dictionary is an authoritative legal work of reference, its definition can be adopted in the absence of a definition from a relevant legislation or relevant case-law. It provides default definitions where both the legislation and case-law are silent on the matter. We do therefore adopt this definition along with the parameters it sets out.

25. In this Reference, the following facts have been established. First, there was communication at and about each stage of the process. At the tail end of this

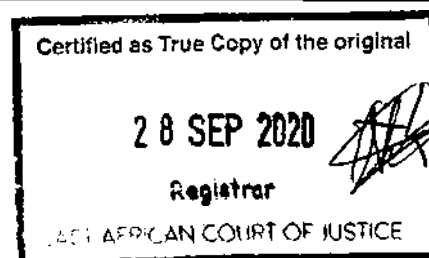
¹ 8th edition



communication, the Applicant was informed of the decision to decline him appointment with the IUCEA. Secondly, at the end of the process and before the formal offer of employment, the Republic of Burundi entered a protest on grounds of moral credibility. As a result, the IUCEA Executive Committee communicated to the Applicant that his application for the advertised position had not been successful. Thus, it is an issue of freedom of contract in that the offeror is free to rescind a potential offer in light of the information availed at the pre-contract offer stage.

26. By comparing the parameters of the concept of transparency set out in paragraphs 22 and 23 above against the facts of this case, we are led to the finding that the parameters from (a) to (c) are reflected by the first stage of the communication between the parties. The second stage, relating to the intervention of the Republic of Burundi, in our considered opinion does not negate the transparency of the recruitment process. Rather, it represents regional public policy of the East African Community whereby all candidates for vacancies within the Community (including its organs and institutions) would be subjected to a due diligence check prior to appointment. This includes securing the endorsement of a candidate's home country. That due diligence having yielded an objection from the Respondent State, a contrary decision by the IUCEA was not sustainable.

27. Consequently, in relation to this issue, we find that Article 6(d) has been misconceived, and does not apply since the matter relates to freedom of contract whereby a party is free to execute contractual relations with a party of choice. The notion of freedom of contract is similarly applicable to employment contracts such that an employer is at liberty to execute a contract with a party (employee) of choice, subject to the terms of the engagement process. In the instant case, the Council of Ministers having designated due diligence checks as an integral part of the recruitment process, the Respondent State was at liberty to express its reservations and the IUCEA was obliged to abide by the said objection. We therefore find no lack of transparency in the impugned recruitment process. Accordingly, we answer this issue in the negative.



Issue No.2: Whether the parties are entitled to the reliefs sought.

28. The Applicant has sought the reliefs highlighted in paragraph 11 above. Since the sole substantive issue has been resolved in favour of the Respondent, the reliefs sought in clauses (i) and (ii) thereof are clearly untenable.

29. On the question of costs, Rule 127 of this Court's Rules posits that costs should follow the event unless the Court, for good reason, decides otherwise. In **Schuller vs. Roback (2012) BCSC (British Columbia Supreme Court) 8**, citing with approval **Gold vs. Gold (1993) BCCA (British Columbia Court of Appeal) 82**, the following factors informed judicial discretion in departing from the general rule:

When the court should order otherwise is a matter of discretion, to be exercised judicially by the trial judge, as directed by the Rules of the Court. ... Factors such as hardship, earning capacity, the purpose of the particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award itself are all matters which a trial judge, quite properly, may be asked to take into account. Assessing the importance of such factors within the context of a particular case, however, is a matter best left for determination by the trial judge.

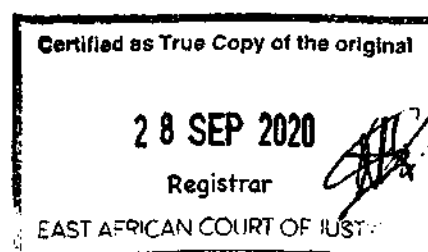
30. In the instant Reference, the Applicant has failed to prove his case on the balance of probabilities. Therefore, we see no good reason to depart from the principle that costs follow event, and we make our order accordingly.

G. CONCLUSION

31. In the final result, we hereby dismiss this Reference with costs to the Respondent.

It is so ordered.

Dated, signed and delivered by Video Conference this 28th day of September, 2020.



Monica K. Mugenyi

Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE

[Signature]

***Hon. Justice Dr. Faustin Ntezilyayo**
DEPUTY PRINCIPAL JUDGE

[Signature]

Hon. Justice Audace Ngiye
JUDGE

[Signature]

Hon. Justice Dr. Charles Nyawello
JUDGE

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Hon. Justice Charles Nyachae
JUDGE

****[Hon. Justice Dr. Ntezilyayo resigned from the Court in February 2020 but signed this Ruling in terms of Article 25(3) of the Treaty.]***

