IN THE EAST AFRICAN COURT OF JUSTICE

AT BUJUMBURA, BURUNDI

APPELATE DIVISION

(Coram: Nestor Kayobera, P.; Geoffrey Kiryabwire, VP; Sauda Mjasiri; Anita Mugeni; and Kathurima M'Inoti, JJA.)

APPEAL NO 3. OF 2020

BETWEEN

CENTRAL BANK OF KENYA..... APPELLANT

AND

PONTRILAS INVESTMENTS LIMITED.....1ST RESPONDENT

THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA.....2ND RESPONDENT

[Appeal from the Ruling of the First Instance Division at Arusha (Monica Mugenyi, PJ; Faustin Ntezilyayo, DPJ; Fakihi A. Jundu; Audace Ngiye; and Charles Nyachae, JJ.) in Reference No. 8 of 2017 dated 15th June 2020],

JUDGMENT OF THE COURT

INTRODUCTION

1. This appeal by the Central Bank of Kenya (the Appellant) emanates from the ruling of the First Instance Division of this Court (the Trial Court) dated 15th June 2020 in Application No. 14 of 2019 arising from Reference No. 8 of 2017.

2. The Appellant is a body corporate established by Article 231 of the Constitution of Kenya and the Central Bank of Kenya Act, Cap 491 Laws of Kenya, and is responsible for, among others, formulating monetary policy, promoting price stability and issuing currency in Kenya. In this appeal the Appellant is represented, as it was in the Trial Court, by Messrs. TrippleOKLaw Advocates, LLP.

3. The 1st Respondent, Pontrilas Investments Limited, was the Applicant before the Trial Court and is a limited liability company incorporated in the Republic of Kenya under the Companies Act, No. 17 of 2015. The 1st Respondent is represented in this appeal, as in the Trial Court, by Messrs. Katende, Ssempebwa & Company Advocates.

4. The 2nd Respondent is the Attorney General of Kenya, the legal representative of the Republic of Kenya, a State Party to the Treaty for the Establishment of the East African Community (the Treaty). In this appeal the 2nd Respondent is represented by Mr. Charles Mutinda, Deputy Chief State Counsel.

REFERENCE TO THE TRIAL COURT

5. In the Reference before the Trial Court, which was amended on 15th December 2017 and further amended on 12th December 2018, the 1st Respondent averred that it was the legal assignee of deposits made in Kenya at Imperial Bank Ltd which was under regulation by the Appellant. The 1st Respondent further contended that following serious misrepresentation, false accounting and fraudulent activities at Imperial Bank, the Appellant placed Imperial Bank under supervision, management and control of the Kenya Deposit Insurance Corporation (KDIC) on 13th October 2019, with KDIC serving as the receiver. It was averred that the Appellant is functionary an institution of the East African Community.

6. It was the 1st Respondent's further contention that in breach of Articles 6, 7, 8(1), 82 (1) of the Treaty and Article 3 and 14 of the Protocol Establishing the East African Community Monetary Union, the Appellant and the 2nd Respondent failed to properly supervise Imperial Bank so as to secure and safeguard the 1st Respondent's deposits. As a result of the Appellant's alleged and particularised breach of duty, negligence, failure to adhere to good governance, misfeasance, conspiracy and deceit, the 1st Respondent pleaded that its right to property guaranteed by Article 40 of the Constitution of Kenya, its right to consumer protection under Article 46 of the Constitution of Kenya, and its right to fair administrative action under Article 47 of the Constitution of Kenya were violated by the Appellant and the 2nd Respondent.

7. Accordingly, the 1st Respondent prayed for remedies as follows:

(a) a declaration that both the Appellant and the 2nd Respondent are in breach of their obligations under the Treaty for the Establishment of the East African Community (as amended on 14th December 2006 and 20th August 2007) and the objectives of the Protocol for the Establishment of the East African Community Monetary Union in allowing the claimant's deposit to be lost;

(b) a declaration that the 1st Respondent is entitled to compensation jointly and severally by the Appellant and the 2nd Respondent for the loss suffered by the 1st Respondent as a consequence of the said breaches;

(c) an award of special damages in the form of loss of deposits as follows: -

1. Ksh. 606,508,497
2. US$ 2,363,143.86
3. EUR. 46,544.00
4. GBP. 5,308.00

(d) an award of general damages

(e) interest upon such sums as the 1st Respondent shall be found to be due;

(f) costs of this reference, and

(g) further or other reliefs as the court may deem fit to grant.

8. In its Response to the Reference, dated 11th October 2017, and amended and further amended on 23rd January 2018 and 9th November 2018, the Appellant denied liability and that it was an institution of the Community. It maintained that its constitutional and statutory duties did not extend to managing Imperial Bank and further that its supervisory role was not a substitute for the responsibility of Imperial Bank's Board of Directors and Senior Management, who bore the obligation of running the bank in accordance with professional and sound banking practices.

9. The Appellant further contended that it intervened in the affairs of Imperial Bank to protect depositors and to save the economic system after it discovered extensive fraudulent transactions at the bank. To that end it placed Imperial Bank under receivership and appointed the KDIC as the receiver, over whom it had no control or authority in law.

10. Lastly the Appellant raised a raft of objections to the reference, among them that by dint of Article 30 of the Treaty, the Court lacked jurisdiction, that the reference was time-barred, that the 1st Respondent had no *locus standi* to institute the Reference and that the Reference was based on an illegality under the laws of Kenya.

11. On its part, the 2nd Respondent also opposed the Reference vide its response dated 18th January 2018 and amended on 15th November 2018. This Respondent denied liability and averred that the Reference did not disclose a cause of action under Article 30(1) of the Treaty. The 2nd Respondent further contended that the Court lacked jurisdiction to entertain the reference and that the same was in any event time-barred. It was further contended that the Republic of Kenya had taken various measures to ensure good governance in banks and financial institutions

as required by the Treaty and the Protocol for the Establishment of the East African Community Monetary Union.

THE APPELLANT'S PRELIMINARY OBJECTION IN THE TRIAL COURT

12. On 30th January 2018 the Appellant took out a preliminary objection to the Reference founded on some eight grounds, namely:

(a) The Court lacks jurisdiction over the 1st Respondent;

(b) The Court lacks jurisdiction to determine and grant the reliefs sought;

(c) The Reference is time-barred;

(d) The Reference is bad in law and has been filed contrary to the provisions of the Treaty;

(e) The 1st Respondent lacks *locus standi* to file the Reference;

(f) The Reference is based on an illegality;

(g) The Reference is an abuse of Court process; and

(h) The Reference is incompetent, fatally defective, does not lie and ought to be struck out or dismissed with costs.

13. The trial court directed that it would hear and determine the preliminary objection first, limited to only one issue, namely:

"Whether the (Appellant) had been properly sued, was properly before the Court, and the Court thus has jurisdiction over it."

THE TRIAL COURT'S DETERMINATION ON THE PRELIMINARY OBJECTION

14. After hearing the preliminary objection, by a ruling dated 4th July 2019, the Trial Court overruled the objection. The Court found and held that:

    a. The preliminary objection raised both a question of law and fact and therefore was not a proper preliminary objection;

    b. Reference No. 8 of 2017 should proceed to hearing on its merits;

    c. The Appellant was at liberty, if it so wished, to address the question of its *locus standi* as a matter of law and fact at the hearing of the Reference; and

    d. Each party should bear its own costs.

15. The Appellant did not prefer an appeal against the ruling of 4th July 2019.

1ST RESPONDENT'S APPLICATION FOR SUMMONS TO THE GOVERNOR OF THE APPELLANT

16. On 17th December 2019 the 1st Respondent filed a Notice of Motion in the Trial Court for:

    a. Summons to issue to compel the attendance of Dr. Patrick Njoroge, the Governor of the Appellant, as a witness and to produce some documents described in the supporting affidavit to the motion as

B1, B2, B3, B4, B5, B6, B7, B8, B9, B10, B11, B12 and B13 (a) to (i); and

b. Leave to amend the Reference by substituting the date 27th June 2017 with 28th June 2017

17. The application was based, *inter alia*, on the grounds that Dr. Njoroge was the Governor and Chief Executive Officer of the Appellant and therefore his evidence was necessary to enable the Court determine effectually the issues before it. It was also contended that Dr. Njoroge had in his possession and control the required documents, which were relevant and necessary for the determination of the matter before the court. As for the amendment, it was justified on the ground that it was typographical and non-prejudicial.

18. The Appellant and the 2nd Respondent opposed the application on the grounds that the Imperial Bank records were in the custody and possession of KDIC, the receiver, and that Dr. Njoroge was not in a position to provide the documents; that KDIC was an independent legal entity and not subject to the direction or control of the Appellant and the 2nd Respondent; that the request for documents offended Rule 55(2) of the then applicable Court Rules for lack of accurate description; that the request was a fishing expedition for evidence; and that the proposed amendment was time-barred.

THE TRIAL COURT'S DETERMINATION OF THE APPLICATION FOR SUMMONS

19. After hearing the parties' submissions, the Trial Court made the following orders on 15th June 2020:

a. By consent of the parties, the application for amendment is allowed. The Amended Reference stands duly amended by correcting the date of the meeting mentioned in paragraph 65N of the Amended Reference to read 28th June 2017;

b. The application for the production of the documents delineated in items B13(c), (e) and (i) of Schedule A to the application is hereby allowed;

c. The application for the production of the documents outlined in clauses B1, B2, B3, B4, B6, B7, B8, B9, B11, B12 and B13 (a), (d), (f), (g) and (h) of the same Schedule is hereby disallowed;

d. The application for witness summons to issue in respect of Dr. Patrick Njoroge is hereby disallowed;

e. Witness summons are hereby issued in respect of the Head of (the Appellant's) Bank Supervisory Department to appear in person for purposes of adducing evidence and production of the documents stipulated in B13 (c), (e) and (i) of Schedule A to the application; and

f. Each party to bear its own costs.

APPEAL TO THE APPELLATE DIVISION

20. The Appellant was aggrieved and preferred the present appeal founded on 19 grounds of appeal, which we do not deem it necessary to set out here because at the scheduling conference, all the 19 grounds metamorphosed into only five issues.

21. The Appellant therefore asked the Court to:

a. Allow the appeal;

b. Set aside the ruling and order of the Trial Court rendered on 15th June 2020 in Application No. 14 of 2019, Pontrilas Investment Ltd v Central Bank of Kenya & Another, arising from Reference No. 8 of 2017; and

c. Award costs of the appeal to the Appellant.

22. The 1st Respondent was also aggrieved by the ruling of the Trial Court and gave notice of cross-appeal under Rule 94(4) against parts of the ruling. The 1st Respondent contended that the Trial Court erred by holding that:

a. The appearance as witness by Dr. Njoroge, the Governor of the Central Bank of Kenya, the Appellant, was not necessary to enable the Trial Court to determine the issues before it effectively; and

b. The documents listed in the 1st Respondent's application referred to in clause B13 (a) (b) and (f) of Schedule A of the affidavit of Mr. Hugh Smith were not documents requested in compliance with "the

trifold test of specificity, relevance and opposite party's possession or control."

23. The 1st Respondent therefore prayed for the Court to:

a. Allow the cross-appeal;

b. Order Dr. Njoroge as Governor of the Central Bank of Kenya to appear as a witness at the hearing of the Reference before the Trial Court; and

c. Order the documents named and listed in the 1st Respondent's application as documents referred to in clause B13 (a) (b) and (f) of Schedule A of the affidavit of Mr. Hugh Smith, be produced at the hearing of the Reference.

24. At the scheduling conference of the Appeal, the above grounds of appeal and of cross-appeal were consolidated into the following five issues:

a. Whether the Trial Court committed a procedural irregularity by ordering the production of the documents in B13(c) (e) and (i);

b. Whether the Trial Court committed a procedural irregularity by excluding the documents in B13 (a), (b) and (f) of Schedule A from the documents to be produced;

c. Whether the Trial Court committed a procedural irregularity by issuing witness summons to the Appellant's Head of Supervision;

d. Whether the Trial Court committed a procedural irregularity in not considering or properly weighing the Appellant's points of law and submissions; and

e. Whether the parties are entitled to the remedies sought.

25. After the scheduling conference, the parties, in compliance with the Court's directions filed written submissions which they highlighted on 3rd June 2021.

THE APPELLANT'S CASE

26. On whether the Trial Court committed a procedural irregularity by ordering production of the documents listed in B13 (c), (e) and (i), Mr. Oduor, learned counsel for the Appellant submitted that the Court misinterpreted and misconstrued its powers under Rule 66(1) of the Court's Rules of Procedure, 2019. Counsel contended that the summons issued under that provision presuppose unwillingness or reluctance to testify or produce documents by the person to whom the summons are issued and that is why there is a penalty for non-compliance with the summons. In the present case, counsel submitted, the 1st Respondent did not demonstrate unwillingness or reluctance by Dr. Njoroge and the Court did not address its mind to the issue, which was a procedural irregularity. In the absence of evidence of unwillingness or reluctance to testify or produce documents, counsel added, there was no basis for the Court to compel production of the documents listed in B13(c), (e) and (i).

27. It was counsel's further submission that the words *"Any party"* as used in Rule 66 (1) must be interpreted to mean a party who has satisfied the Court that he has a legitimate or proper claim under the Treaty. In the

instant case, it was contended, the Appellant had objected to *jurisdiction rationae personae, jurisdiction rationae temporis* and *jurisdiction rationae materia*, which the Court had not determined before it issued the summons against the Appellant to testify and produce documents. Counsel added that the Court must be satisfied that it has jurisdiction before it can exercise its procedural powers, and that in this case the Court had literally put the cart before the horse when it made orders against a party who was contesting jurisdiction and before the Court had finally determined the issue of jurisdiction. It was also contended that the powers conferred by Rule 66(1) must be understood in the context of an adversarial system and that it was not the remit of the Court to force a party to avail witnesses to the opposite party or to conduct investigations.

28. Next the Appellant faulted the Trial Court for holding that specificity of document identification was the primary consideration under rule 66(2). It was submitted, on the authority of **Prosecutor v. William Samoei Ruto & another (ICC-01/09-01/11)** that under international law, in an application for witness summons for production of documents the applicant must demonstrate that the documents sought are relevant to the issue, necessary to the cause of action, and are described with sufficient detail to allow the particular documents to be identified. The appellant took the view that those three conditions are separate and distinct hurdles to be met sequentially, so that if relevance is not demonstrated, the other conditions need not be considered. Counsel added that the 1st Respondent did not show, and that the Trial Court agreed as much, how the information in the documents sought would assist its case. Having so found, it was urged, the Trial Court ought to have dismissed the application instead of taking it upon itself to demonstrate the relevance, even when there was no disputed or agreed issues for trial. That, it was contended, was a procedural irregularity.

29. Lastly on the first ground, the Appellant contended that even the documents in B 13 (c) (e) and (i) which the Trial Court ordered to be produced were in fact generic and not described in specific terms, thus making it impossible for the Appellant to comply and the Court itself to ascertain compliance.

30. On whether the Trial Court committed a procedural irregularity by issuing witness summons to the Appellant's Head of Supervision, the appellant submitted that having concluded that the Governor was not the most competent witness to produce the documents sought by the 1st Respondent, and therefore there was no need to compel his attendance, the Court ought to have dismissed the application. It was contended that it was a procedural irregularity for the Court to issue witness summons to the Appellant's Head of Supervision whilst the 1st Respondent had sought no such prayer.

31. Turning to whether the Trial Court committed a procedural irregularity in not considering or properly weighing the Appellant's points of law and submissions, the Appellant submitted that it raised several preliminary objections to the Reference under Rule 41 of the Rules of the Court, and that those objections, which would determine whether the Appellant should participate in the reference, are still alive and outstanding. It was contended that it was irrational for the Court to issue summons to witnesses to testify and produce documents without first determining the live and outstanding issues of the Court's *jurisdiction rationae personae, jurisdiction rationae temporis* and *jurisdiction rationae materia.* The Appellant also urged that the Trial Court had consistently assisted the 1st respondent to build its case through a myriad of

amendments and by issuing summons to witnesses to testify and produce documents which they could not in law access or produce.

32. It was the Appellant's further submission that the organs and institutions of the Community are set out in Article (9) (1) and 9(3) of the Treaty and that the Appellant is not listed among those organs and institutions and that there is no Protocol in existence making the Appellant such an organ or institution. The Appellant relied on a number of decisions of the Court in support of the submission, among them, **Modern Holdings (EA) Ltd v Kenya Ports Authority, EACJ Ref. No. 1 of 2008, Hillary Ndayizamba v Attorney General of Burundi, EACJ Ref. No. 3 of 2012** and **Alcon International Ltd v The Standard Chartered Bank of Uganda & 2 others, EACJ Ref. No. 2 of 2011**.

33. The Appellant concluded by submitting that the procedural irregularities committed by the Trial Court amounted to a miscarriage of justice and urged the Court to allow the appeal with costs.

34. The Appellant did not address the 1st Respondent's Cross-Appeal

THE 2ND RESPONDENT'S CASE

35. We heard the 2nd Respondent first because he was supporting the Appeal. Mr. Mutinda, learned counsel for the 2nd Respondent submitted that it was a procedural irregularity for the Trial Court to order production of the documents in B13 (c), (e) and (i) because the 1st Respondent had not demonstrated that the documents were relevant or necessary and had also failed to describe them in sufficient detail and to prove their existence and possessions and control by the Appellant. Counsel submitted, on the authority of **Oluoch v. Charagu [2003] EA 649**, that to

justify the order that the Trial Court made, the 1st Respondent was obliged to prove, which it failed to do, that the documents existed, were relevant and important in determining an issue, and were in the possession, custody or power and control of the person against whom the order is sought. Counsel also cited **Motor Mart & Exchange Ltd v. The Standard Insurance Co. Ltd [1960] EA 616** and submitted that the 1st Respondent was obliged, but failed, to adequately and accurately outline the specific documents to be produced, thus making the application a fishing expedition.

36. Regarding issuance of summons to the Appellant's Head of Supervision, the 2nd Respondent submitted that the Trial Court acted in excess of jurisdiction and committed a procedural irregularity, because the 1st Respondent had not sought such a prayer either in the pleadings or the application, and only sought summons specifically against the Governor, Dr. Njoroge. He contended that parties are bound by their pleadings and to issue orders that a party has not applied for in an adversarial system is in excess of jurisdiction and likely to be perceived as assistance to a party. In support of the proposition the 2nd Respondent cited **Pushpa d/o Raojabhai M. Patel v. Fleet Transport Company Ltd [1961] 1 EA 1025**.

37. As regards the alleged failure by the Trial Court to consider and or properly weigh the Appellant's submissions and points of law, it was submitted that the Appellant had raised valid objections on the Court's jurisdiction to hear and determine the Reference, limitation of time, and the capacity of the 1st Respondent, which the Court ought, but failed to determine first. The 2nd respondent relied on the decisions in **Mukisa Biscuit Manufacturers Ltd v. West End Distributors Ltd [1969] EA 696** and **Democratic Party v. The Secretary General, EAC & another,**

Ref. No. 2 of 2012 and submitted that it was a procedural irregularity for the Trial Court to progress the Reference without first resolving the jurisdictional issues.

38. Turning to the cross-appeal, the 2nd Respondent submitted that the 1st Respondent did not prove or demonstrate that the documents in question were in the possession or control of the Appellant or its Governor and as such no order for production could issue against them. The 2nd Respondent added that the Trial Court did not err by disallowing the prayer for production of the documents listed as B1, B2, B3, B4, B6, B7, B8, B9, B11, B12 and B13 (a), (b), (d), (g) and (h) because they were not accurately and specifically described and their relevance was not demonstrated.

39. The 2nd Respondent therefore urged the Court to allow the appeal and dismiss the cross-appeal with costs.

THE 1ST RESPONDENT'S CASE

40. Prof. Ssempebwa, learned counsel for the 1st Respondent, opposed the appeal, submitting that there was no basis for the Appellant's complaints because some amendments were made before closure of pleadings, another by the consent of the Appellant, and others pursuant to an order of the Court after hearing all the parties. He added that if the Appellant was aggrieved by the amendments, its remedy lay in an appeal, which it did not prefer.

41. Turning to the issues for determination, counsel submitted, as regards the first issue, that the Trial Court did not misconstrue Rule 66(1) of the Courts Rules and the Rule did not contain the conditions that the

Appellant was reading into it. It was submitted that the Court could summon any person if his or her attendance is required to give evidence or produce documents and that the Appellant did not lead any evidence that the Governor was a willing witness. On the contrary, it was submitted, the evidence on record showed that the Governor was not a willing witness.

42. Regarding the preliminary objections on jurisdiction the 1st Respondent submitted that the same was fully canvassed and disposed of by the Trial Court when it held that the preliminary objection raised mixed issues of law and fact to be determined at the hearing of the Reference. Counsel urged the Court to reject the Appellant's argument as a disguised attempt to raise the issue of jurisdiction afresh whilst the appellant had not appealed against the ruling of the Trial Court on jurisdiction.

43. On whether the Trial Court misapprehended the adversarial system, it was submitted that the contention that the Court's system was adversarial was debatable, taking into account the obligation under Article 126 to harmonise the laws of the Partner States, some of which are not purely adversarial. Counsel added that the rules of procedure provide wide discretion and allow transparency through discovery and that rule 66(1) is intended to compel attendance of a relevant witness, even when a party does not wish to call that witness. Counsel urged that exercise of discretion conferred by the law cannot amount to descending into the arena of the conflict as submitted by the Appellant. Counsel further denied that the Trial Court had failed to apply the correct test and principles under Rule 66(1), adding that there was no doubt that the 1st Respondent's Reference was a challenge to the Appellant's supervisory

role and that the documents in question were relevant and necessary for the purpose.

44. As regards issuance of summons to the Appellant's Head of Supervision, the 1st Respondent submitted that by dint of Rule 66 (3) the Trial Court had power to summon any witness, even on its own motion, to give evidence or to produce documents essential for the just determination of a matter before the Court. Counsel added that it was the Appellant itself which indicated, while opposing the application to summon the Governor, that there were other officers, in the Supervision Department who were better suited to give evidence and produce documents.

45. Turning to whether the Trial Court failed to consider or properly weigh the Appellant's points of law and submissions, the 1st Respondent reiterated that in the absence of an appeal against the Ruling dated 4th July 2019, the issue of jurisdiction was not before the Appellate Division.

46. For all the above reasons, the 1st Respondent prayed that the appeal be dismissed with costs.

47. Turning to the cross-appeal, the 1st Respondent submitted that the Appellant's replying affidavit in opposition to the application to summon Dr Njoroge did not deny that Dr Njoroge was a relevant witness, but merely asserted that there were other relevant or competent witnesses. It was further contended that the Governor, as the Chief Executive commands the services of the other officers of the Appellant, can tap from their knowledge, and has control over and can access the Appellant's documents. The 1st respondent added that it had referred to the direct intervention of Dr Njoroge and that at the stage of determining

the relevance of a witness, the weight to be attached to his evidence was not the decisive test. In the circumstances the 1st Respondent submitted that the Trial Court erred by holding that the attendance of Dr. Njoroge was not necessary.

48. Lastly on whether the Trial Court committed a procedural irregularity by excluding the documents in B13 (a), (b) and (f) of Schedule A from the documents to be produced, the 1st Respondent submitted that all those documents met the test of specificity. On the document in B13(a), it was contended that it was described in specific terms and referred to one identified document, namely the Report of KDIC to the Central Bank of Kenya allowing expression of interest in the purchase of Imperial Bank, whilst that listed in B13 (b) was identified as a situational analysis backing the decision to close Imperial Bank. As to the document in B13 (f), it was submitted that it was described as minutes of the meeting held on 28th October 2015, which was as specific as it can ever get.

49. For all the above reasons, the 1st Respondent urged the Court to allow the Cross-Appeal, direct Dr. Njoroge as the Governor of the Central Bank of Kenya, to appear as a witness at the hearing of the Reference in the Trial court; and direct the Appellant to produce at the hearing of the Reference the documents lists in the 1st Respondent's application as B13 (a), (b) and (f).

THE COURT'S ANALYSIS AND DETERMINATION

50. The Court has carefully considered the record of appeal, the issues for determination and the written and oral submissions by learned

counsel for the parties. We shall consider the issues sequentially, but we shall start with issue No. 4 under which jurisdictional points were raised and argued.

Issue No 4: Whether the Trial Court committed a procedural irregularity in not considering or properly weighing the appellant's points of law and submissions.

51. Under this issue, the complaint is on the manner in which the Trial Court handled the Appellant's preliminary objection resulting in the ruling dated 4th July 2019. It is the Appellant's contention that the issue of jurisdiction is still alive and that the Appellant is being compelled to participate in the Reference before the Trial Court has determined whether the Appellant is a proper party in the reference, whether the Reference is founded on an illegality and whether it is time-barred. It is the Appellant's submission that it is not an organ or institution of the Community and further that there is no Protocol between the State Parties that has made the Appellant an Institution of the Community. The Appellant also complains about amendments to the Reference that the Trial Court allowed at the behest of the 1st Respondent which the Appellant considers were unjustified and were calculated to aid the 1st Respondent to surmount the defences raised by the Appellant to the reference.

52. The 2nd Respondent in substance supports the Appellant's submissions.

53. On its part, the 1st Respondent counters that the issue of jurisdiction was raised and addressed by the Trial Court in its ruling dated 4th July 2019 where the Court found that the preliminary objection raised

mixed issues of law and fact and further directed that the preliminary objection be determined at the hearing of the Reference. The 1st Respondent submitted that the Appellant did not appeal against the ruling of 4th July 2019 and that the present appeal is against the ruling dated 15th June 2020, which did not address the issue of jurisdiction and therefore that issue is not properly before the Court. Regarding the other jurisdictional issues raised by the Appellant, the 1st Respondent submitted that they too are yet to be determined because the Trial Court directed that they would be resolved at the hearing of the Reference. On the amendments, the 1st Respondent's position is that two of the amendments were properly allowed by the Trial Court and the last one was with the consent of the Appellant.

54. As we noted earlier, when the Appellant raised its preliminary objection founded on eight grounds, the Trial Court directed that it would hear the preliminary objection limited to whether the Appellant had been properly sued, was properly before the Court and the Court thus has jurisdiction over the Appellant. The other issues were to be determined in the Reference. After hearing the parties on the agreed preliminary objection, the Trial Court concluded that the objection raised mixed issues of fact and law best determined after hearing evidence in the Reference. As at this stage, the Trial Court has not determined the question of jurisdiction, all that it has done is to defer determination of the issue to a latter occasion, namely during the hearing of the Reference.

55. We are alive to the fact that an issue of jurisdiction may be raised at any time, even by the Court itself *suo motu*. (See **Manariyo Desire v The Attorney General of Burundi, Appeal No 1 of 2017)**. There is therefore nothing to stop the Appellant from raising the issue of

jurisdiction in this appeal; it is an issue that the Court can raise on its own motion.

56. This Court has stated time and again that a question of jurisdiction is a threshold issue which must be determined first. In **Alcon International Ltd v. The Standard Chartered Bank of Uganda & 2 Others, Appeal No. 1 of 2011**, the Court expressed itself as follows:

> *"The requirement that jurisdiction be established as a threshold matter is very basic. Without jurisdiction, the court cannot proceed at all. The determination of doubts about jurisdiction must precede the determination of the merits of the Reference."*

57. And in **The Attorney General of the United Republic of Tanzania v. African Network for Animal Welfare, Appeal No. 3 of 2011**, the Court emphasised:

> *"Jurisdiction is a most, if not the most, fundamental issue that a court faces in any trial. It is the very foundation upon which the judicial edifice is constructed; the fountain from which springs the flow of the judicial process. Without jurisdiction, a court cannot take even the proverbial first Chinese step in its judicial journey to hear and dispose of the case."*

58. In this appeal the question of jurisdiction was raised as a preliminary objection, which by law must be confined to matters of law only. The words of Sir **Charles Newbold**, P. in **Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd. (1969) EA 696**

on the nature of a preliminary objection have been severally cited with approval by this Court. The learned President held:

> *"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion." (Emphasis added)*

59. The moment the court is called upon to determine issues of fact or issues of mixed facts and law in a preliminary objection, the matter before it is not a proper preliminary objection. In the same **Alcon International Ltd v. The Standard Chartered Bank of Uganda & 2 Others, Appeal No. 1 of 2011** the Court reiterated that a contested issue cannot form the basis of a preliminary objection.

60. Earlier in **The Attorney General of the United Republic of Tanzania v. African Network for Animal Welfare, Appeal No. 3 of 2011** the Court had rendered itself:

> *"All the other so-called Preliminary Points were not at all Preliminary Points of law. Each and everyone of them involved the clash of facts, the production of evidence, and the assessment of testimony. Any such issue (depicting those features) cannot and should not be treated as a Preliminary Point. Rather, it becomes a matter of substantive adjudication of the litigation on its merits – with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross-examined; and a finding of fact then made by the Court."*

61. After considering the preliminary point which it had framed on whether the Appellant had been properly sued, was properly before the Court, and the Court thus has jurisdiction over it, the Court found that what was before it was not a pure point of law capable of determination as a preliminary point. The Court delivered itself thus;

"We take the view that, as a matter of law, institutions of the Community would firstly be such institutions as are designated as such in Article 9(3) of the Treaty. Article 9(2), on the other hand, envisages that the Summit will from time to time as it deems fit or necessary establish various bodies, departments and services as institutions of the Community. This clearly is an ongoing process. At any given time, therefore, including at the time of filing or hearing the instant application, it cannot be discerned, by reading the said Article whether or not a particular entity is an institution of the Community having been so established by the Summit in terms of Article 9(2). Whether or not an entity has been so established, can only be demonstrated by adducing appropriate evidence either in support or negation of that contention.

It is clear to us that Article 9(2) and 9(3) are separate and distinct legal, bases under the Treaty for determining whether or not a particular entity is an institution of the Community in terms of Article 1 thereof, which provides "'institution of the Community' means the institutions of the Community established by Article 9 of this Treaty". An entity will thus be determined to be an institution of the community by one or the other of these bases. In the case of Article 9(2), such determination by the Court is a question of fact that would require proof of the

Summit having established the entity as an institution of the Community."

62. We have re-examined the pleadings in the Reference and are satisfied that it is a contested issue whether the Appellant is an institution of the Community, with the 1st Respondent asserting that it is, while the Appellant denies that it is such an institution. In the circumstances, we are satisfied that the Trial Court did not commit a procedural irregularity in holding whether it had jurisdiction over the Appellant was an issue of mixed law and facts which could not be determined as a preliminary point, but had to be determined in the Reference after hearing evidence.

63. On the issue of amendments to the 1st Respondent's Reference, the Reference was filed on 28th August 2017 and the Response on 17th November 2017. The 1st Respondent Amended its Reference on 15th December 2017 before Reply which the Appellant concedes was before close of pleading under Rule 43 of the Rules of the Court, and therefore did not require leave of the Court. Indeed, the Appellant filed its Response to the Amended Reference on 23rd January 2018.

64. The second amendment of the Reference was with the leave of the Court after close of pleadings as required by Rule 48(c). The last amendment on 15th June 2020 was merely to correct a typographical error, which the Trial Court found was not prejudicial to any of the parties and the Appellant, in any case, consented to the Amendment.

65. Rule 51 vests in the Court broad powers to allow amendments to pleadings at any stage of the proceedings on such terms as may be just. The primary consideration of the Court is to avoid an injustice and to ensure that the real question in controversy between the parties is before

the Court. In **Johnson Akol Omunyokol v. Attorney General of Uganda, Application No 3 of 2016**, the First Instance Division, relying on **Eastern Bakery v. Castelino [1958] EA 461, Shivji v Pellegrini [1972] HCD N. 76** and **Rogers Mogaka Mogusu v. George Onyango Oloo & 2 Others [2004] eKLR,** explained that Rules 48 and 51 of the Rules of the Court expressly vest in the Court discretionary power to allow amendment of pleadings for purposes of deciding the real question or issue in controversy between the parties and that as a rule, amendments to pleadings should be freely allowed if they can be made without injustice to the other side.

66. Other than casting aspersions on the Court and general allegations that the Trial Court assisted the 1st Respondent to build its case, the Appellant has not specified how the Trial Court, in the circumstances of this appeal, committed a procedural irregularity by allowing the 1st Respondent to amend its Reference.

67. Accordingly, Issue No. 4 is answered in the negative.

Issue No 1: Whether the Trial Court committed a procedural irregularity by ordering the production of the documents in B13 (c) (e) and (i).

68. On this issue, the Appellant, whose position is supported by the 2nd Respondent, submits that the Trial Court misapprehended its powers under Rule 66(1) which requires proof that a witness is unwilling to testify or produce documents before the Court can summon him or her. The Appellant also maintained that the powers of the Court under that provision must be understood in the context of the adversarial system under which the Court operates. The second limb of the Appellant's

submissions on this issue is that the phrase "any party" in Rule 66(1) means any party with legitimate claim and over whom the Court has found it has jurisdiction. The Appellant also faulted the Trial Court for failure to consider sequentially the conditions precedent for issuance of summons to produce documents, contending that the Trial Court ought not to have issued the summons once the 1st Respondent failed to show how the documents would assist its case. Lastly the Appellant contended that the documents in B13 (c) (e) and (i) which the Trial Court ordered produced were generic rather than specific.

69. On its part the 1st Respondent submits that there is no basis for reading into Rule 66(1) the limitations urged by the Appellant, that the adversarial systems is not inconsistent with summons to witnesses to testify and produce documents, that there was no evidence that the Governor was a willing witness and that the Court had the power to summon any person whose attendance is required to give evidence and to produce documents. It was the 1st Respondent's submission that the documents in B13(c) (e) and (i) were specific and met the test for production.

70. The relevant provisions of Rule 66 of the Rules of the Court are in the following terms:

> *"66(1) Any party in a claim or reference may apply to the Court for summons to any person whose attendance is required to give evidence or to produce documents...*
>
> *(3) The Court may on its own motion summon any person to give evidence or to produce any document if in its opinion*

such evidence or document is essential for the just determination of any matter before it."

71. Even a plain reading of the provision leaves no doubt that the power vested in the Court to summon witnesses is broad and discretionary. The Court may be moved by a party to a claim or reference or it can act on its own motion, and may summon a person, so long as it is satisfied that the person's attendance is required to give evidence or to produce documents. In view of what we have stated about the Trial Court's decision on the jurisdictional issue, which it held will be determined after taking evidence in the Reference, we do not see any merit in the Appellant's argument that "any party" in Rule 66(1) means only a party with legitimate claim and over whom the Court has found it has jurisdiction.

72. When the Rules vest a discretion in the Court, it is not a procedural irregularity merely because the Court exercised or refused to exercise the discretion. Indeed, in **The Attorney General of Burundi v. The Secretary General, East Africa Community & Another, Appeal No. 2 of 2019,** where it was alleged that the Trial Court's failure to exercise its discretionary power constituted a procedural irregularity, this Court held:

"It was within the discretion of the Trial Court to exercise its inherent powers in the interest of justice. The call to invoke the power was that of the Trial Court. It was only that Court that could determine what the interest of justice required in the case before it. Can this Appellate Division on that premises find it to be a procedural irregularity on the part of the Trial Court not to have invoked its inherent powers? Our

answer is a categorical negative. It cannot be a procedural irregularity not to exercise a discretionary power."

We shall only add in the same breath that it is not a procedural irregularity for the Trial Court to exercise a discretionary power, unless it is demonstrated that the exercise was injudicious, which the Appellant has not done.

71. We also do not read any requirement in the relevant provisions of Rule 66 that the Court's power to summon a witness is contingent upon demonstration *of unwillingness* of the witness to testify, although that may look like a logical postulate. There could be a myriad of situations where a witness is ready and willing to testify, but nevertheless the summons are necessary, for example to justify absence from place of work. Be that as it may, we agree with the 1st respondent that the Appellant did not in fact demonstrate that the Governor was willing to appear and testify, which defeats the Appellant's own argument.

72. In the same vein, we are not able to agree with the Appellant's contention that summons to witnesses to testify and produce documents is inconsistent with an adversarial system. All the Partners States of the Community that have an adversarial system have provisions similar to Rule 66 which empower the municipal courts to summon witnesses to testify and to produce documents. Section 22 (b) of the Uganda Civil Procedure Act, Cap 71, Section 25(b) of the Tanzania Civil Procedure Code, Cap 33, and Section 22(b) of the Kenya Civil Procedure Act, Cap 21, all provide as follows:

"Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—

a. *make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;*

b. *issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;*

c. *order any fact to be proved by affidavit."*

73. To our mind, that would not have been the case if summons to witnesses to testify or produce documents were alien to an adversarial system.

74. On the Appellant's contention that the Trial Court erred by failing to consider sequentially the conditions precedent for issuance of summons to produce documents, it is necessary to consider how the Trial Court approached the issue. The Trial Court, in interpreting Rule 66, relied on **Guyana v. Suriname, International Courts of General Jurisdiction (ICGJ) 370 (PCA 2007)** and concluded that to make an order for production of documents, the documents must be relevant, described with specificity, and in the possession or under the control of the opposite party. The Trial Court then proceeded to evaluate the 1st Respondent's application on the basis of that criteria.

75. It is important to point out that the Trial Court was alive to and aware that in applying the criteria, it was not necessarily required to follow any particular sequence. That is why the Court put a rider that it would apply the criteria, "in no particular order of prominence." Nevertheless the Trial Court added that specificity of document identification was a primary consideration, granted the requirements of Rule 66(2). The Court then rendered itself thus:

> *"It seems to us that the question as to whether documents are either relevant or within the possession or control of a proposed witness can scarcely be interrogated in the absence of reasonably explicit description of them. Having thereby ascertained the documents, they would then be subjected to the tests of relevance and possession or control of the party from which they are sought."*

76. In light of the foregoing, we do not think there is any justification in the Appellant's assertion that the Trial Court failed to consider the criteria sequentially.

77. Turning to the documents in B13 (c) (e) and (i) the Appellant and the 2nd Respondent submit that they were generic rather than specific. Having carefully considered those documents, we have no basis for faulting the Trial Court's conclusion that they were specific. The Trial Court found, after careful analysis, that unlike the documents sought in B1, B2, B3, B4, B6, B7, B8, B9, B11, and B12, those in B13 (c), (e) and (i) were fairly accurately described as:

"(c) The Central Bank Supervision Department Inspection Reports on Imperial Bank Limited as at 30th June 2015, 2014, 2013, 2012, 2006 and 1996 complete with confidential transmission letters and signed certificates of awareness";

"(e) The report received by CBK, which confirmed fraudulent activities of substantial magnitude and the misrepresentation of IBL's financial statements, the subject of the Press Release of October 27, 2015, and subsequent Periodical Reports from the Kenya Deposit Insurance Corporation (KDIC)", and

"(i) The reports of results, steps taken to facilitate the recovery of the funds that were obtained irregularly from IBL, a forensic audit and other investigations on the culpability of the fraudulent activities as stated in paragraph 6 of the Press Release of October 27, 2015."

78. We perceive no procedural irregularity in the manner in which the Trial Court dealt with the matters raised in Issue No. 1 and we therefore answer the issue in the negative.

Issue No 2: Whether the Trial Court Committed a procedural irregularity by excluding the documents in B13 (a), (b) and (f) of Schedule A from the documents to be produced.

79. This issue was raised by the 1st Respondent in its Cross-Appeal, who submitted that the Trial Court committed a procedural irregularity by excluding the documents in B13 (a), (b) and (f), which met the test of specificity. On their part, the Appellant and the 2nd Respondent

maintained that the Trial Court properly excluded those documents for being general and lacking specificity.

80. The documents in question were described as follows:

> *"(a) The Report from KDIC to the Central Bank which allowed them to request expressions of Interest in the purchase of IBL;*
>
> *(b) The situation analysis of the Central Bank in which the decision was taken to close IBL; and*
>
> *(f) Minutes of the meeting of the CBK and KDIC held with IBL's shareholders, directors and parallel meeting they held with a cross-section of depositors on October 28, 2015"*

81. There is no merit in 1st Respondent's submission that the Trial Court excluded the documents in B13 (a), (b) and (f) on the grounds of lack of specificity. On the contrary, the Trial Court found that the said documents were succinctly defined. Twice in the ruling of 15th, the Trial Court stated as follows:

> *"A plain reading of clause B13 would suggest that items B 13 (c), (e) and (i) are described with sufficient specificity as would make them readily ascertainable. Similarly, items B13 (a), (b) and (f) are fairly accurately described."* (See page 15).
>
> *"Against that background, and having earlier in this ruling held the documents outlined in items B13 (a), (b), (c), (e) (f) and (i) of Schedule A to have been duly identified for production, we do now assess them to deduce their*

relevance to the matters in issue in the Amended Reference." (See Page 16).

82. The reason why the Trial Court excluded the documents in B13 (a), (b) and (f) was not for lack of specificity as submitted by the 1st Respondent, but because the 1st Respondent failed to satisfy the Trial Court that those documents were in the possession or control of the Appellant. After carefully addressing the issue of possession and control, the Trial Court concluded as follows:

> *"We are satisfied therefore that the documents in items B13 (c) (e) and (i) are indeed within the possession and control of the (Appellant). However, we can scarcely say the same of the documents listed under items B13 (a), (b) and (f). Having carefully considered the material that was availed to us in the present Application and the Amended Reference, we find nothing on record that supports their existence, let alone satisfactorily demonstrates that they are within the possession or control of the (Appellant). It cannot be presumed that either the report alluded to under item B 13 (a) exists or minutes were actually taken at the meeting referred to in item B13 (f). The requests therein would appear to be far-fetched and speculative."*

83. Again, we do not perceive any procedural irregularity on the part of the Trial Court. It did not exclude the documents on the basis of lack of specificity, but rather on the basis of the 1st Respondent's failure to establish existence and possession and control by the Appellant.

84. Accordingly, Issue No. 2 is also answered in the negative.

Issue No 3: Whether the Trial Court committed a procedural irregularity by issuing witness summons to the Appellant's Head of Supervision

85. Both the Appellant and the 1st Respondent are aggrieved that the Trial Court issued witness summons to the Appellant's Head of Supervision and have made the issue the subject of Appeal and the Cross Appeal. The Appellant and the 2nd Respondent submit that the Trial Court acted in excess of jurisdiction and committed a procedural irregularity by granting the 1st Respondent a prayer which it had not sought either in the application or the Reference. It is contended that the 1st Respondent's prayer was for summons to Dr. Njoroge and not to the Appellant's Head of Supervision and having found that the summons could not issue against Dr. Njoroge, the only option available to the Trial Court was to dismiss the Application.

86. On its part the 2nd Respondent submits that the Trial Court committed a procedural irregularity by failing to summon Dr. Njoroge who was a relevant witness and the Chief Executive officer of the Central Bank of Kenya, with easy access to all the Appellant's documents.

87. The Trial Court declined to summon Dr. Njoroge because it found that all the answers that the 1st Respondent sought from Dr. Njoroge could be found in the documents listed under B13(c), (e) and (f), which fell within the Appellant's supervisory functions and which it ordered produced. The Trial Court also took into account the Appellant's replying affidavit to the application for summons in which Mr. Kennedy K. Abuga, a Director in the Governor's Office, deposed that the Appellant had many Departments including Bank Supervisory Department, with competent

officers who could give evidence based on their own knowledge. Relying on **Democratic Republic of Congo v. Uganda (2005) ICJ 201**, the Trial Court stated that it would prefer contemporaneous evidence from persons directly involved and with direct knowledge. Once again, we do not perceive how the Trial Court committed a procedural irregularity by concluding that the Appellant's Head of Supervision, rather than the Governor, was the best suited witness in a Reference where the primary issue is the discharge by the Appellant of its supervisory functions.

88. As correctly urged by the 1st Respondent, it was the Appellant itself which took the position that it had other officers, in the Supervision Department who were better suited to give evidence and produce documents than the Governor. We have already adverted to the terms of Rule 66(3) which empowers the Court, even on its own motion to summon any person to give evidence or to produce any documents where it is of the opinion that such evidence or documents are essential for the just determination of the matter before it. Even without the application by the 1st Respondent, the Trial Court had discretion under Rule 66(3) to summon the Appellant's Head of Supervision. Exercise of such discretion cannot amount to acting in excess of jurisdiction or a procedural irregularity.

89. There is therefore no merit in the different positions advanced by the Appellant and the 1st Respondent in this ground of Appeal and we answer issue No. 3 in the negative.

Issue No 5: Whether the parties are entitled to the remedies sought.

90. The Appellant prayed in the Appeal for the Court to allow the appeal, set aside the ruling of the Trial Court dated 15th June 2020 and award it

the costs. On its part, the 1st Respondent prayed in the Cross-Appeal for the Court to allow the Cross-Appeal, order Dr. Njoroge to appear as a witness at the hearing of the Reference, and order the documents in B13 (a) (b) and (f) produced at the hearing of the Reference. Having come to the conclusion that both the Appeal and the Cross-Appeal have no merit, we answer Issue No. 5 in the negative.

DISPOSITION

91 . The upshot of our consideration of the Appeal and Cross-Appeal is that:

a. The Appeal is dismissed;

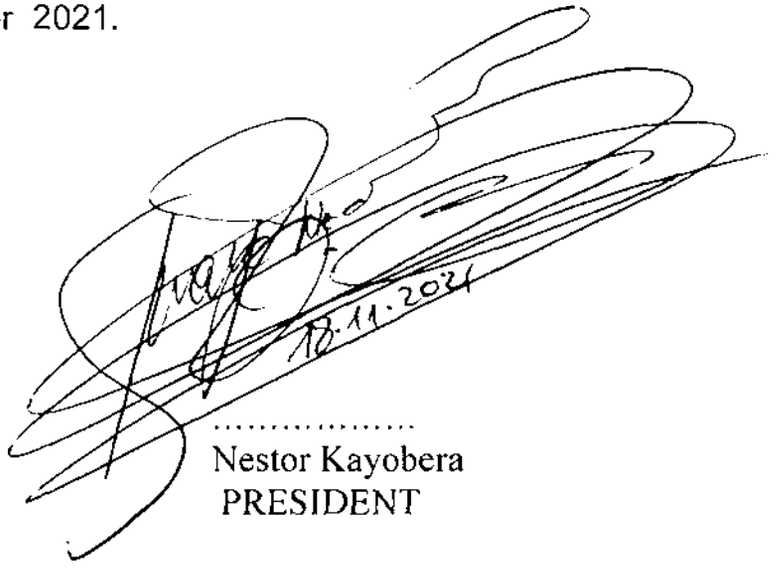
b. The Cross-Appeal is dismissed; and

c. Each party to bear its own costs.

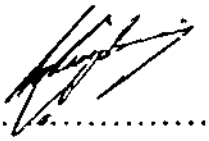
92 . The Trial Court to proceed to hear and determine Reference No. 18 of 2017.

IT IS SO ORDERED

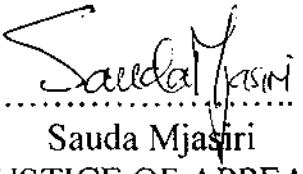
DATED, DELIVERED, AND SIGNED in Bujumbura on this 18th day of November 2021.



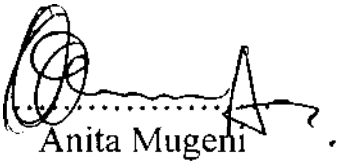
.....
Nestor Kayobera
PRESIDENT



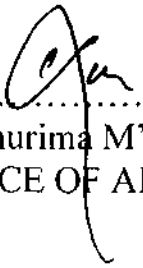
Geoffrey Kiryabwire
VICE PRESIDENT



Sauda Mjasiri
JUSTICE OF APPEAL



Anita Mugeni
JUSTICE OF APPEAL



Kathurima M'Inoti
JUSTICE OF APPEAL