IN THE EAST AFRICAN COURT OF JUSTICE
APPELLATE DIVISION
AT ARUSHA

(Coram: Nestor Kayobera, P.; Anita Mugeni and Kathurima M'Inoti, JJA.)

APPEAL NO. 2 OF 2021

BETWEEN

EAST AFRICA LAW SOCIETY..... APPELLANT

AND

THE ATTORNEY GENERAL OF
THE UNITED REPUBLIC OF TANZANIA.....FIRST RESPONDENT

AND

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

[Appeal from the Judgment of the First Instance Division of the East African Court of Justice at Arusha by Hon. Lady Justice Monica K. Mugenyi (Principal Judge), Hon. Justice Audace Ngiye and Hon. Justice Charles A. Nyachae, JJ.) dated 25th November, 2020 in Reference Number 1 of 2019.

JUDGMENT

INTRODUCTION

1. This is an Appeal by East Africa Law Society ("the Appellant") against the Judgment of the First Instance Division of this Court (hereinafter referred to as " the Trial Court") dated 25th November 2020 arising from Reference No. 1 of 2019, by which the Trial Court dismissed the Reference in the following terms:

   "In the final result, the Reference is hereby dismissed with costs to the Respondents."

2. The Appellant is an umbrella civil society organization of the national bar associations in East Africa and enjoys observer status in the East African Community (EAC). For purposes of this appeal the Appellant is resident in East Africa and is represented by Mr. Hannington Amol, Advocate and Mr. Archilleus Rweramira, Advocate.

3. The First Respondent is the Attorney General and legal advisor to the United Republic of Tanzania, a Partner State to the Treaty for the Establishment of the East African Community (hereinafter referred to as "the Treaty"). The 1st Respondent is represented by Mr. Abubakar Mrisha, Principal State Attorney, Mr. Peter Museti, Senior State Attorney, MS. Canon Salama, State Attorney, and Mr. Zakameradi Yohanesi, State Attorney.

4. The Second Respondent is, by dint of Article 67 of the Treaty, the Principal Executive Officer of the EAC. In this appeal the 2nd

Respondent is represented by Dr. Anthony Kafumbe, Counsel to the Community.

5. It is the case of the Appellant that the process of nominating Hon. Justice Mjasiri to the Appellate Division of the East African Court of Justice (hereinafter "the Court") contravened Article 6(d) of the Treaty for having been clouded in secrecy, without transparency and without participation by stakeholders.

6. It is also the case of the Appellant that by failing to design a public process that affords the citizens and the general public to know and vet the prospective nominees to the Court, the Respondent contravened its obligations under Article 6(d) of the Treaty that requires it to conduct its businesses with transparency, accountability and with regard to good governance principles.

7. It is further the case of the Appellant that a process conducted in secrecy as the impugned one also denied other qualified citizens of the United Republic of Tanzania equal opportunity to compete for the job.

8. It is the case of the Appellant that, the Hon. Judge, having attained the mandatory retirement age (65 years) and actually having retired from the highest court in Tanzania, lost her legal capacity to again serve as a judge in Tanzania under Article 120 of the Constitution of the United Republic of Tanzania.

9. It is also the case of the Appellant that despite being a highly reputable and decorated Judge and corporate Counsel, the Hon. Judge's qualifications fall short of the requirement of Article 24(1) of the Treaty as

she was, at the time of appointment on 1st February 2019, not qualified to hold a judicial office in Tanzania by virtue of her age.

10. It is the case of the Appellant that by failing to involve the citizens, stakeholders and the general public at any stage of the nomination process, the Respondent failed to uphold Article 7(1) of the Treaty thus degrading what should be a public process to an opaque and executive-led process layered in onion rubber and devoid of public participation.

11. It is also the case of the Appellant that the Second Respondent failed to initiate the process of investigation or verification of the nomination process leading to the appointment of Her Ladyship to the Court, contrary to his express mandate by virtue of Article 71 of the Treaty.

12. It is finally the case of the Appellant that the Second Respondent has failed to institute the process of putting in place transparent, accountable, fair and public-centered guidelines that should inform the process of nomination of Judges to the Court; and that without such a step, the Partner States have fallen back to opaque and undesirable systems of appointment that violate the Treaty.

BACKGROUND

The facts from which this Appeal arises are as follows:

13. On 1st February, 2019, the 20th Ordinary Summit of Heads of State of the EAC appointed, pursuant to Article 24(1) of the Treaty, Hon. Lady Justice Mjasiri, from the United Republic of Tanzania, Judge to the Appellate Division of the Court to replace Hon. Justice Edward M. K. Rutakangwa who was due to retire on 12th February, 2019.

14. Prior to her appointment as Judge of the Appellate Division of the Court, Hon. Lady Justice Mjasiri had served as Judge of the Court of Appeal of Tanzania, the highest judicial institution in the United Republic of Tanzania, until her retirement in 2018 upon attaining the mandatory retirement age of 65 years in accordance to Article 120 of the Constitution of the United Republic of Tanzania.

15. On 28th March 2019, the Appellant filed Reference No.1 of 2019 in the First Instance Division of the Court against the process of nominating Hon. Lady Justice Mjasiri which, in the Appellant's view, was clouded in secrecy and in contravention to its obligations under Article 6(d) of the Treaty that required the 1st Respondent to conduct its businesses with transparency, accountability and with regard to good governance principles. The Appellant therefore prayed for the following remedies:-

i. ***A DECLARATION*** *that the decision of the 1st Respondent nominating Hon. Lady Justice Sauda Mjasiri to the East African Court of Justice contravened Article 24 of the Treaty;*

ii. ***A DECLARATION*** *that the impugned decision contravened Article 6(d) of the Treaty for want of transparency, fairness, equal opportunity and accountability;*

iii. ***A DECLARATION*** *that the impugned decision contravened Article 7(1) of the Treaty for lack of public participation;*

iv. ***A DECLARATION*** *that based on the foregoing, Hon. Sauda Mjasiri is not properly nominated and/or appointed to the office of Judge of the East African Court of Justice;*

v. ***A DECLARATION*** *that the 2nd Respondent acted in breach of the Treaty by failing to properly advise the Summit or the Community, and by failing to investigate and verify the qualifications of Her Ladyship as well as the process leading to her nomination;*

vi. ***AN ORDER*** *that the 1st Respondent should design transparent, fair, accountable and people-centered nomination process and then carry out the nomination process de novo having regard to the principles enunciated in Articles 6(d) and 7(1) and the qualifications set out in Article 24, within a timeframe to be set by the Court;*

vii. ***AN ORDER*** *directed at the 2nd Respondent to institute the process of putting in place guidelines towards a transparent, accountable, fair and people-centered process of nominating Judges to the Court;*

viii. ***COSTS*** *be borne by the Respondents; and*

ix. ***ANY OTHER ORDER*** *that the Court considers expedient in the circumstances.*

THE FIRST RESPONDENT'S RESPONSE TO THE REFERENCE

16. In its response, the First Respondent opposed the Reference and asked the Trial Court to dismiss the same with costs on the following grounds: " –

i. *Hon. Lady Justice Sauda Mjasiri was nominated by the First Respondent because she is a jurist with recognized competence and proven integrity, impartiality and independence as provided under Article 24 of the EAC Treaty;*

ii. *The process of nominating Hon. Justice Sauda Mjasiri was conducted transparently and all requisite procedures were followed by the First Respondent;*

iii. *Article 25(1) of the Treaty provides for maximum period of seven years for a judge to hold office whereas Article 25(2) provides that a judge shall hold office for the full term of his or her appointment unless he or she resigns or attains seventy (70) years of age or dies or is removed from office in accordance with the EAC Treaty; that therefore the rest of the Appellant's averments are opinions with no legal basis;*

iv. *The First Respondent did not contravene any of its obligations under Articles 6(d), 7(1) and 24 of the Treaty."*

17. *The First Respondent prays that the Reference be dismissed in its entirely with costs and specifically for the following reliefs:*

i. ***A DECLARATION*** *that the decision of the First Respondent nominating Hon. Sauda Mjasiri to the East African Court of Justice does not contravene Articles 6(d),7(1) and 24 of the EAC Treaty;*

ii. ***A DECLARATION*** *that Hon. Sauda Mjasiri was properly nominated and/or appointed Judge to the East African Court of Justice;*

iii. ***AN ORDER*** *that the Reference has not merit, and therefore be dismissed with costs; and*

iv. ***ANY OTHER RELIEF*** *(s) that the Court may deem fair, right and just to grant.*

THE SECOND RESPONDENT'S RESPONSE TO THE REFERENCE

18. The response by the Second Respondent opposed the Reference and asked the Trial Court to dismiss the Reference with costs on the following grounds: " -

i. *Appointment to the East African Court of Justice is based on two parts of eligibility: the first part deals with eligibility of judges for appointment to judicial office in their respective countries and the second part provides that they may be jurists of recognized competence. On the other hand, a reading of Article 24(1) of the Treaty reveals that a person must be of proven integrity, impartiality and independence and fulfill the conditions required for holding of such high judicial office, or who are jurists of recognized competence in their respective partner states;*

ii. *Upon perusing the curriculum vitae of Hon. Justice Sauda Mjasiri, the Second Respondent observed that it is consistent with Article 24(1) of the EAC Treaty, because the nominee was a jurist of recognized competence and vast expertise. In that context, the 2nd Respondent observed that the nominee has been a justice of the Court of Appeal of Tanzania with a wealth of experience in criminal law and procedures, criminal trials, appeals, commercial law, civil procedure and human rights.*

iii. *Article 24(1) of the Treaty is clear that one need not meet both requirements concurrently to be eligible for appointment as a judge at the East African Court of Justice.*

iv. *Given the profile of Hon. Justice Sauda Mjasiri as described in her curriculum vitae, the second Respondent did not have any doubts that the nominee was a jurist of recognized competence in the United Republic of Tanzania and beyond and in that context was a proper person for nomination by her country for appointment to the East African Court of Justice.*

v. *Although Justice Sauda Mjasiri may have attained the age of 65 and may have retired from the Judiciary of the United Republic of Tanzania, Article 24(1) of the Treaty makes her appointment tenable because it provides an alternative opening that enables those who may not be serving in the judiciary but are jurists of recognized competency in their respective Partner State to be appointed; and the term jurists of recognized competence is not confined to career academics but also extends to judges with a distinguished career such as that of Justice Sauda Mjasiri.*

vi. *The current provisions of Article 24(1) of the Treaty have not made it mandatory for the general public to vet the prospective nominees to the East African Court of Justice, and that the Second Respondent has had no evidence or any public outcry that other qualified citizens of the United Republic of Tanzania were not allowed to compete for this job. Further, the Second Respondent pleads that following her nomination and appointment, Justice Sauda Mjasiri acquired a vested right to be a judge of the East African Court of Justice and the Court ought to lean in favour of the preservation of this right rather than its extinction as suggested by the Appellant.*

vii. *Considering that Article 24(1) of the Treaty, at least in respect of nominating a jurist of recognized competence for appointment as a*

judge to the East African Court of Justice had been complied with by the United Republic of Tanzania, the Second Respondent had no reasonable basis to assume that such an appointment contravened any provision of the Treaty, and that there was no basis for investigating any breaches of the Treaty.

viii. *The Second Respondent argues that all declarations and or reliefs and prayers sought by the Applicant against him including costs are not warranted.*

19. *The Second Respondent pleads in summing up that: "*

i. *The Statement of Reference discloses no cause of action against him;*

ii. *Hon. Justice Sauda Mjasiri was properly nominated in terms of Article 24(1) of the Treaty as a jurist of recognized competence and thus in accordance with the relevant laws of the United Republic of Tanzania and there are no breaches of the Treaty that were occasioned;*

iii. *The granting of the orders and other reliefs sought by the Applicant against the Second Respondent does not arise and the entire Reference is misconceived and should be dismissed with costs.*

DECISION OF THE TRIAL COURT

20. During the Scheduling Conference held on 29th January 2020, the following four issues were framed for determination;

i. Whether the process and the decision of nominating Hon. Justice Sauda Mjasiri contravened Articles 6(d), 7(1) and 24(1) of the Treaty;

ii. Whether pursuant to Article 71 of the Treaty, the Second Respondent was obliged to investigate and verify the qualifications and suitability of Hon. Justice Sauda Mjasiri's appointment to the Court, and advise accordingly;

iii. Whether the Respondents are under obligation to institute the process of putting in place guidelines towards transparent, accountable, fair and people-centered process of nominating judges to the Court; and

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

21. In its judgment, the Trial Court considered the alternative arguments of the Parties on how Articles 6 and 7 should be interpreted and was persuaded that it is not by accident that neither Article 24 nor any other provision of the Treaty prescribes for the Partner States a uniform process of nomination of Judges to the Court.

22. It was further persuaded that the Partner States deliberately left such nomination process to their respective discretion and allowed themselves leeway in the Treaty to adopt different nomination processes for purposes of Article 24, which would not necessarily amount to an illegality or violation of the Treaty.

23. Finally, the Trial Court dismissed the Reference with costs to the Respondents.

THE APPEAL

24. Aggrieved by the said decision of the Trial Court, the Appellant on 15th January 2021, lodged this Appeal based on eight grounds of appeal which were listed in the Memorandum of Appeal as follows: "

i. *The Hon. Learned Judges of the First Instance Division erred in law by interpreting the two limbs of Article 24 as exclusive of each other;*

ii. *The Hon. Learned Judges of the First Instance Division erred in law by holding that people centered doctrine is restricted to common market and customs union under Article 2(2) and 5(2) of the Treaty;*

iii. *The Hon. Learned Judges of the First Instance Division erred in law by limiting its jurisdiction to the plain meaning of Article 24 without regard to other provisions of the Treaty;*

iv. *The Hon. Learned Judges of the First Instance Division erred in law by finding that the discretion provided to the Partner States on appointment of judges under Article 24 cannot be subjected to a public process and therefore cannot be questioned by the Court;*

v. *The Hon. Learned Judges of the First Instance Division erred in law by holding that where the Treaty is silent on any matter, the Partner States have absolute discretion and the Court cannot denote offence;*

vi. *The Hon. Learned Judges of the First Instance Division erred in law by holding that the 2nd Respondent was under no obligation to investigate and verify the qualification of Hon. Justice Mjasiri as per Article 71 only*

that he had to satisfy himself that the proposed nominee met the requirements in Article 24;

vii. *The Hon. Learned Judges of the First Instance Division failed in their duty to act fairly and impartially by proceeding with open bias against the Appellant's case and by taking into account extraneous matters that denoted their bias while prejudicing the Appellant's case;*

viii. *The Hon. Learned Judges of the First Instance Division erred in law by awarding costs against the Appellant while the Appellant, a civil society, had no personal benefit in the outcome of the matter, rather than providing necessary checks and balances to the East African Community's institutions and Partner States by virtue of its Observer Status on East African Community matters.*

25. The Appellant further prayed for Orders:

i. That the Appellate Division overturn the whole decision made by the Learned Judges of the First Instance Division on the 25th November 2020;

ii. That the Appellate Division substitutes the orders and findings made by the First Instance Division with appropriate orders as prayed for in the Reference;

iii. An Order that the costs of and incidental to this Appeal be met by the Respondents;

iv. That the Appellate Division makes such further or other orders as it deems just in the circumstances.

26. The Appellate Division of the Court is mandated to hear and dispose of this Appeal under Article 23 and 35A of the Treaty.

SCHEDULING CONFERENCE

27. At the scheduling conference of the Appeal, the eight grounds of appeal were consolidated into four substantive issues namely:

i. Whether the Learned Judges of the First Instance Division erred in law by interpreting the two limbs of Article 24 as exclusive of each other without regard to other provisions of the Treaty;

ii. Whether the Learned Judges of the First Instance Division erred in law by holding that the 2nd Respondent was under no obligation to investigate and verify the qualification of Hon. Justice Mjasiri as per Article 71 of the Treaty;

iii. Whether the Learned Judges of the First Instance Division erred in law and failed in their duty to act fairly and impartially by proceeding with open bias against the Appellant's case and by taking into account extraneous matters not relevant to the case;

iv. What remedies are the parties entitled to.

MANDATE OF THE COURT

28. As rightly submitted by the Parties to this Appeal, the jurisdiction of the Appellate Division to hear appeals proffered from the Trial Court is provided for under Article 35A of the Treaty. Such an appeal shall be on "*...points of law, grounds of lack of jurisdiction, or procedural irregularity.*"

29. In the case of **Simon Peter Ochieng & Another Vs The Attorney General of the Republic of Uganda,** Appeal No. 4 of 2015, this Court made it clear that the right of appeal to this Division is restricted to the scope provided for under the said Article 35A of the Treaty. Furthermore, the burden of proof falls on the party alleging the error who must advance arguments in support of the contention and explain how the error invalidates the decision. The Parties must bear in mind that this Court does not undertake a hearing *de novo* of the questions of fact and law examined by the Trial Court.

THE PARTIES' SUBMISSIONS

ISSUE NUMBER ONE

WHETHER THE FIRST INSTANCE DIVISION ERRED IN LAW BY INTERPRETING THE TWO LIMBS OF ARTICLE 24 AS EXCLUSIVE OF EACH OTHER WITHOUT REGARD TO OTHER PROVISIONS OF THE TREATY;

APPELLANT'S SUBMISSIONS

30. The Appellant, started by underlining that the "Appeal is not about the character, distinction or ability of Hon. Lady Justice Mjasiri who in any event stands tall as a tower of jurisprudence with her credentials spread through an extraordinary judicial career". On the contrary, the appeal and Reference it originated from are challenging the opaque practice by the respondents in attempts to enervate the regional Court by failing to follow clearly spelt out procedures and best practices in nominating a judge.

31. Submitting on the 1st issue, the Appellant reiterated that its case at the Trial Court was that the United Republic of Tanzania failed to uphold the provisions of Article 24 of the Treaty in nominating the Hon. Lady Justice Mjasiri for appointment. That at the time of her appointment as Judge of the Appellate Division of the Court, the Hon. Judge had retired having attained the mandatory retirement age under Article 120 of the Constitution of the United Republic of Tanzania.

32. Learned Counsel further submitted that until the point of taking oath of office, the process was under the control of the Respondents and was not known to stakeholders or the public. He submitted that the Trial Court ought to have found that Article 24 forms part of the entire Treaty and must be interpreted in harmony with its own sub-articles as well as with the rest of the Treaty and that the Trial Court misinterpreted Article 24 and improperly interpreted the Treaty, thereby reaching a wrong conclusion.

33. Counsel for the Appellant further submitted that in interpreting Article 24, the Trial Court ought to have applied Articles 31 and 27 of the Vienna Convention on the Law of Treaties.

34. Counsel further submitted that in relation to Article 24(1), the Trial Court ought to have found that the intention of the Partner States was never to establish two distinct criteria for qualification of judges but rather to enable persons who are not ordinarily serving the Judiciary to get a chance to serve as judges of the regional court. He also submitted that the Trial Court ought to have found that it would be an absurdity should Article 24 be interpreted to mean that a nominee not qualified to be a Judge in concerned Partner State can be appointed a Judge of the Court.

35. In support of his submissions, Counsel referred to the case of ***Timothy Alvin Kahoho vs The Secretary General of the East African Community,*** EACJ Appeal No. 2 of 2013 where this Court held that:

"A Treaty should be interpreted holistically and purposively. In this connection, Article 123(6) must not be read selectively or in isolation. It must be read together with other Articles of the Treaty."

36. He also referred to the case of ***Attorney General of the United Republic of Tanzania vs African Network for Animal Welfare (ANAW),*** EACJ Appeal No.3 of 2011, where this Court held that:

"The purpose of these Treaty provisions cannot and must not be allowed to be undermined by a narrow or restrictive reading of those provisions. Rather the provisions must be given a purposive interpretation, construction, application and implementation. Such is the essence of the Vienna Convention on the Interpretation of Treaties."

37. Counsel for the Appellant further referred to the case **of *The East Africa Law Society & Another vs the Attorney General of the Republic of Kenya & Another,*** EACJ Reference No.3 where it was stated that:

" ...Taking into account the said general principle of interpretation enunciated in Article 31 of the Vienna Convention on the Law of Treaties we think that we have to interpret the terms of the Treaty not only in accordance with their ordinary meaning but also in their context and in light of their objective and purpose. Primarily we have to take the objective of the Treaty as a whole, but without losing sight of the objective or purpose of a particular provision."

38. Counsel submitted that even if the element of a reputable jurist is considered, the nominee's appointment breached the Treaty as she could not on the strength of her credentials as a reputable jurist qualify to be appointed as a judge under the national laws of Tanzania. He further submitted that the process of appointment of the Hon. Judge contravened Articles 6(d) and 7(1) of the Treaty for having been carried out secretively, without transparency, and without participation by stakeholders. That the Trial Court ought to have found that Article 24 of the Treaty must be read together with Article 6(d) on the principles of the Community, and that would have required the Respondents in making the appointment to act transparently and in accountable manner.

39. Counsel for the Appellant further submitted that the 1st Respondent did not allege or even prove that the vacancy was advertised in a public media or in a stakeholder forum, say among the judges of the United Republic of Tanzania by the Judicial Service Commission; and that the 1st Respondent failed to show that the nomination and appointment followed a competitive process that grants equal opportunity to every eligible candidate as required by Article 6(d) of the Treaty. He further underlined that the Article 6(d) principles have connection with international jus cogens and principles established in globally accepted codes and conventions, alluding to the Bangalore Principles on Judicial Conduct, which provide for instance that:

"Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects."

40. Counsel finally submitted on the 1st issue that had the Trial Court applied the Commonwealth Latimer House Principles on Independence of

the Judiciary and the Vienna Convention on the Law of Treaties, it ought to have arrived at a conclusion that the Reference was merited; and that an application of the above principles to the Reference ought to have found that:

i. Article 24 of the Treaty must be read purposively in order to find that even a jurist of recognized competence must be capable of qualifying as a Judge of a high judicial office in the sponsoring Partner State prior to being appointed to the Court;

ii. The 1st Respondent was required to put in place transparent, accountable, fair, equal and people-centered selection processes for purposes of nominating a Judge under Article 24(1) of the Treaty;

iii. The 2nd Respondent was required to enquire into the process leading to selection of a Judge under Article 24(1) and to determine if the process adopted complied with or violated the Treaty; and

iv. The 2nd Respondent was under obligation to research on and develop appropriate guidelines on best practices for selection of Judges to the Court, under Article 71.

1st RESPONDENT'S SUBMISSIONS

41. In his submissions, Mr. Abubakar Mrisha, Principal State Attorney submitted in a nutshell that the Trial Court did not make any error in interpreting Article 24(1) of the Treaty which provides two exclusive criteria in the nomination of the Judges to the Court. He indicated that while it is true that the Hon. Lady Justice Mjasiri has retired as a Judge under Article 120 of the Constitution of the United Republic of Tanzania, such retirement

does not disqualify her from being appointed as a Judge of the Court, as the appointment does not contravene the provisions of Article 24(1) of the Treaty.

42. Counsel further submitted that for purpose of Article 24 of the Treaty, the recommendation for nominating a Judge to the Court is exclusively the domain of Partner States, and correspondingly, the appointment is the domain of the Summit. He also submitted that beyond the qualifications stated in Article 24 of the Treaty, the same does not provide the procedure to be adopted in nomination of judges of the Court, which is left to each individual Partner States. That the mere fact that a person has retired is not a justification that he/she does not have qualification or competency to be appointed as judge of the Court taking into account that the retirement age in the United Republic of Tanzania (65 years) is different from that of the Court (70 years).

43. Counsel also submitted that the process of nominating Hon. Lady Justice Mjasiri did not compromise the ideals of judicial independency of the Court as stated in the Treaty and the spirit of the Bangalore Principles which are best practices. He further submitted that regarding Articles 6(d) and 7(2) of the Treaty, there is no requirement of public participation in the Treaty for the Appellant to argue that the 1st Respondent was obliged to ensure that there was involvement of stakeholders.

44. Counsel for the 1st Respondent finally submitted that Hon. Lady Justice Mjasiri was appointed in accordance with Article 24 of the Treaty and the process of her appointment was not through an opaque nor uncountable process. He further underlined that the process of nominating Hon. Lady Justice Mjasiri was done in full compliance with the fundamental and operational principles outlined under Articles 6(d) and 7(2) of the Treaty.

2nd RESPONDENT'S SUBMISSIONS

45. Before submitting on the framed issues, Counsel to the Community, Dr. Anthony Kafumbe, representing the Secretary General of the EAC underlined that the Second Respondent firmly believes that the Trial Court rendered a judgment consistent with the Treaty and the intentions of the Partner States on the nominations of Judges as set out in Article 24(1) of the Treaty. He added that the Treaty and in particular Article 24(1) was followed to the letter and as such there was no breach of the Treaty and that therefore the Appeal should be dismissed in its entirety and the Judgment of the Trial Court upheld.

46. Accordingly, Counsel contended that Partner States have agreed on the manner in which Judges are selected to join the Court and the procedure has been in use since the Treaty came into force more than twenty years ago; and if and only when the Partner States decide to revisit the selection process, will this Article be amended accordingly.

47. Counsel further argued that as it is at the moment, the 2nd Respondent was in order to seek a nomination from the 1st Respondent of a Judge that met the requirements of Article 24(1) of the Treaty and that upon receiving the nomination he had no basis to decline or advise against the nomination because it met all the requirements, in particular the nominated person was a jurist of vast expertise as was indicated in her Curriculum Vitae and work experience. He added that abiding with the provision of Article 24(1) of the Treaty did not and no evidence was tendered to show that this action compromised judicial independence of the Court, and that the Bangalore Principles on Judicial Conduct are principles that Judiciaries are encouraged to apply but are not mandatory.

48. Counsel emphasized that though the Bangalore Principles are perceived as standards which all judiciaries and legal systems may adopt, they are not mandatory to constitute a basis of suing the Community.

49. Summing up his introductory views on the appeal before submitting on the framed issues for determination by this Court, Counsel for the 2nd Respondent submitted that this appeal has no merit, is premature and should be dismissed and the Judgment of the Trial Court upheld. He contended that there was no basis for the 2nd Respondent to undertake any research, verification and investigation on any matter affecting the Community in this regard and that it is not a responsibility for him, as alleged by the Appellant to institute a nomination process for Judges that is transparent, accountable, fair and people-centered as this is already provided for under Article 24 of the Treaty.

50. Submitting on the first issue, Counsel for the 2nd Respondent argued that the Trial Court did not err in holding that Article 24(1) of the Treaty provides two exclusive criteria in the nomination of Judges to the Court, which are that a nominee either meets the requirements of being appointed a Judge at national level or is a jurist of recognized competency. He also underlined that the United Republic of Tanzania did not breach the provisions of Article 24 of the Treaty by nominating the Hon. Lady Justice Mjasiri for appointment and that although she may have attained the mandatory retirement age of 65 years under Article 120 of the Constitution of Tanzania, she met the requirements of the Treaty for purposes of appointment to the Court.

51. Counsel submitted further that the Treaty requires either a jurist of recognized competency or a person who met the criteria required in the

Partner States for holding a high judicial office, which are separate qualifications as rightly interpreted by the Trial Court. He also submitted that Hon. Lady Justice Mjasiri meets the requirements of a jurist of recognized competency and this qualification has been brought out by her Curriculum Vitae which was made available to the Court without the Appellant contesting any aspect of that Curriculum Vitae.

52. Counsel for the 2nd Respondent argued that in the circumstances, he is not aware of any requirement in the Treaty that before any Partner State nominates a Judge, the stakeholders or the public must be in the know and have a say. He also submitted that the Treaty in Article 24(1) is explicit on what is required and the Trial Court rightly found that there are two limbs to Article 24(1) of the Treaty and there was no breach of the Treaty. Counsel therefore submitted that the provisions of Articles 6(d) and 7(2) are canvassed in Chapter two of the Treaty and are of general application which should not be a basis for questioning a process addressed specifically under Article 24(1) of the Treaty.

53. In respect of interpretation of the Treaty, Counsel submitted that the Trial Court was right to find that there were no contradictions at all as Article 31 of the Vienna Convention on the Law of Treaties requires that Treaties be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of the treaty's object and purpose. He also submitted that this was done properly because Partner States did not agree on uniform guidelines on nomination of judges save the criteria set out in Article 24(1) of the Treaty; and that the Partner States provided two limbs to Article 24(1) of the Treaty that enable career judges, distinguished practitioners and academics who may be jurists of recognized competence to be appointed to the Court.

54. Counsel urged this Court to decline any invitation to find that a nominee not qualified to be a judge in the sponsoring country on account of age cannot be appointed a Judge of the Court because the parameters are different and the second limb of Article 24(1) of the Treaty is meant to address this situation. He therefore submitted that the Treaty has set a retirement age of 70 years in Article 25(2) and all this was taken into account by the Trial Court. As long as Hon. Lady Justice Mjasiri was under the retirement age of 70 years and she met the requirements of Article 24(1) of the Treaty as a jurist, her appointment was in order and the findings of the Trial Court should be upheld.

55. Counsel submitted that the process of nominating the Judge did not compromise the independence of the Court and the spirit of the Bangalore Principles which as already indicated are best practices but not mandatory on the Court. He submitted that in any case, the Treaty did not set out a procedure to be followed in the nomination of judges as this was left to individual Partner States. Counsel referred to the case of **Simon Peter Ochieng & Another vs the Attorney General of the Republic of Uganda,** EACJ Reference No.11 of 2013, where it was clarified that the Partner States are at liberty to come up with rules on matters of internal functioning.

56. Counsel for the 2nd Respondent contended further that the Trial Court was in order in all its findings and the same should be upheld because:

i. Although at the time of appointment, Hon. Lady Justice Mjasiri may not have met all the requirements of being a judge in the United Republic of Tanzania, she had the requirement of being a jurist of recognized competence. Reference was made to the case of **Malawi Mobile Limited vs Common Market of East and Southern Africa**,

COMESA Court of Justice, Reference No.1 of 2017, where the Court found that a jurist of recognized competence can be appointed to court whether or not they also qualify to be appointed to high judicial office in country of domicile.

ii. There is no requirement under the Treaty that a judge for appointment at the Court, even if he or she meets the provisions of Article 24(1) of the Treaty must also meet the requirement of being appointed a judge at national level, including the age limit.

iii. What was for interpretation before the Court was Article 24(1) of the Treaty and not the national laws of the United Republic of Tanzania on the retirement of judges.

iv. There is no requirement in the Treaty that in appointing judges, there must be a public process with the participation of all stakeholders because this was a matter reserved for national sovereignty and therefore reference to breaches of Articles 6(d) and 7(2) of the Treaty are not tenable.

v. There may be need for public participation in the process of nomination and appointment of judges in future but for now it is not a requirement to advertise this vacancy and that the 2nd Respondent did not have any basis to insist that the position be advertised.

57. Regarding best practices in appointment of Judges, Counsel submitted that no evidence was adduced during the trial that the appointment of Judges under Article 24(1) of the Treaty was opaque, not accountable and neither was there any indication of any outcry from the public. He added that matters of judicial independence are not applicable because

appointing a judge who is a jurist does not in any way mean that the appointee is influenced by the Executive and that any perceptions that judges are influenced by their appointing authority, who in any case is the collective of the Presidents of all the EAC Partner States constituting the Summit as provided for in Article 10 of the Treaty, is merely speculative.

58. Finally, Counsel submitted that there was nothing to demonstrate that the process of selecting judges in accordance with Article 24(1) of the EAC Treaty impacts on the independency of the Court as alleged by the Appellant. He further submitted that the Appellant's pleadings importing the Commonwealth Latimer House Principles on the Independence of the Judiciary are merely persuasive and not binding in any way. He also argued that having requested and received a name from the 1st Respondent in accordance with the provisions of Article 24(1) of the Treaty, the 2nd Respondent did not fail any obligations under the Treaty and should not be blamed in any way.

COURT'S DETERMINATION

ISSUE NUMBER ONE

59. We have carefully read and considered the pleadings and submissions together with the supporting legal authorities cited by the opposing parties for which we are grateful. We now tackle issue number one as hereunder.

60. In this issue, it is the Appellant's case that the Trial Court erred in law in holding that the process of nominating and appointing the Hon. Lady Justice Mjasiri to the Appellate Division of this Court respectively by the 1st Respondent and the Summit of EAC Heads of State did not contravene the provisions of Articles 6(d), 7(1) and 24(1) of the Treaty.

61. In a nutshell, this Court has been established under Article 9 of the Treaty as the Judicial Organ of the Community with a clear mandate enunciated in Article 23(1) to ensure adherence to the law in the interpretation and application of and compliance with the Treaty.

62. In their submissions, both parties clearly underlined that nomination and appointment of Judges to the Court shall be in accordance with Article 24 of the Treaty which spells out the qualifications of the Judge to be nominated and appointed, which provision we reproduce below for avoidance of doubt:

"Judges of the Court shall be appointed by the Summit from among persons recommended by the Partner States who are of ***proven integrity, impartiality and independence*** *and who fulfill the conditions required in their own countries for the holding of such high judicial office,* ***or who are jurists of recognized competence in their respective Partner States****..."* (Our Emphasis)

63. From the provisions of Article 24(1) of the Treaty, it cannot be doubted that, a person is eligible for nomination and appointment as Judge to the Court, if he or she is of proven integrity, impartiality and independence.

64. The Appellant from his introductory submissions clearly underlined that:

"We must make it clear that the appeal is not about the character, distinction or ability of Hon. Lady Justice Mjasiri who in any event stands tall as a tower of jurisprudence with her credentials spread through an extraordinary judicial career."

65. In other words, the Appellant has never questioned the integrity, impartiality or independence of Hon. Lady Justice Mjasiri. On the contrary the Appellant affirmed her character and even added that Hon. Lady Justice Mjasiri is a jurist of highly and extraordinary judicial career.

66. According to the Appellant, this Appeal and the Reference it originated from are not challenging the character and qualifications of Hon. Lady Justice Mjasiri, but only the opaque practice by the 1st Respondent and the Secretary General of the East African Community (EAC) in attempts to enervate the regional Court by failing to follow clearly spelt out procedures and best practices in nominating a judge.

67. Once the nominee has satisfied the Treaty requirement of "proven integrity, impartiality and independence", the nominee is further required to fulfil the conditions required in the nominating Partner State for holding high judicial office, ***or in the alternative***, to be a jurist of recognized competence, in their respective Partner States. It is common ground that the Appellant does not challenge Hon. Lady Justice Mjasiri's integrity, impartiality and independence.[Emphasis ours]

68. We agree with the Trial Court that the additional qualifications set out in the Treaty are disjunctive rather than conjunctive. A nominee who satisfies either of the other two requirements satisfies the requirement of the Treaty. That nominee must be either qualified to hold high judicial office in the nominating Partner State or be a jurist of recognized competence in the nominating Partner State. A candidate does not have to be both.

69. Whereas the Hon. Lady Justice Mjasiri had ceased to qualify to hold high judicial office in the United Republic of Tanzania upon attaining the age of 65 years, the Treaty did not bar the United Republic of Tanzania

from nominating her as a Judge of the Court as a jurist of recognized competence in the United Republic of Tanzania. We are therefore, satisfied that to interpret Article 24 of the Treaty as the Appellant invites us to do would amount to undermining the clear terms of the Treaty.

70. The Appellant's allegations against the 1st and 2nd Respondent that the process of nomination and appointment of Hon. Lady Justice Mjasiri was opaque and did not follow clearly spelt out procedures are strong allegations and the Appellant was duty bound to prove which processes stipulated by the Treaty were not followed. This Court has already observed in a number of its decisions that he who alleges must prove.

71. In the case of ***Henry Kyalimpa vs Attorney General of Uganda,*** EACJ Appeal No.6 of 2014, this Court observed that:

> *"The Court will formally require a party putting forward a claim or contention to establish the elements of fact and law on which a decision in its favour is given."*

72. The Appellant has not proved how the process of nominating and appointing Hon. Lady Justice Mjasiri Judge to the Appellate Division of this Court was opaque and has not proved which are the procedures spelt out in the Treaty as regards nomination and appointment of Judges to the Court and how those procedures were violated by the 1st and 2nd Respondents respectively.

73. The Appellant's allegations that the process of appointment of the Hon. Lady Justice Mjasiri to this Court contravened Articles 6(d) and 7(2) of the Treaty for having been carried out secretively, without transparency and without participation by the stakeholders are not supported by any

evidence or legal provision. The Appellant does not indicate any provision of the Treaty which obliges nomination of Judges to this Court to be subjected to stakeholder participation and does not indicate who, under the Treaty, are the stakeholders who must be consulted before Judges are appointed to the Court. In these circumstances, allegations which are not supported by any evidence or are not founded on provisions of the Treaty cannot sustain a Reference or an Appeal.

74. The other contention by the Appellant that the nomination and appointment of Hon. Lady Justice Mjasiri violated the provisions of Articles 6(d), 7(2) and 24 of the EAC Treaty is that the Judge was appointed after she had already retired pursuant to Article 120 of the Constitution of the United Republic of Tanzania which sets the retirement age for Judges of the Court of Appeal of Tanzania at 65 years. However, reference should also be made to the provisions of the Treaty which sets the retirement age of judges at 70 years. Article 25(2) of the Treaty provides that:

> *"A Judge shall hold office for the full term of his or her appointment unless he or she resigns or attains seventy (70) years of age or dies or is removed from office in accordance with this Treaty."*

75. It is therefore the duty of this Court under Article 23(1) of the Treaty to ensure adherence to law in the interpretation and application of and compliance with this Treaty. On 1st February 2019, when the Summit of EAC Heads of State appointed Hon. Lady Justice Mjasiri, she had not attained the retirement age of 70 years provided for under Article 25(2) of the Treaty because the retirement age of Judges of this Court is provided for in the Treaty rather than in the Partner States' Constitutions and laws.

76. In view of our findings above, we accordingly answer issue Number One in the negative.

ISSUE NUMBER TWO

WHETHER THE LEARNED JUDGES OF THE FIRST INSTANCE DIVISION ERRED IN LAW BY HOLDING THAT THE 2ND RESPONDENT WAS UNDER NO OBLIGATION TO INVESTIGATE AND VERIFY THE QUALIFICATIONS OF THE HON. JUSTICE SAUDA MJASIRI AS PER ARTICLE 71 OF THE EAC TREATY

THE APPELLANT'S SUBMISSIONS

77. Counsel for the Appellant submitted that the 2nd Respondent in the letter to the 1st Respondent inviting nomination to fill the vacancy in the Court, highlighted the Treaty requirements and advised the 1st Respondent to consult before submitting the name of the nominee. He also submitted that the Trial Court ought to have found that the consultations can only mean the open process envisaged under Article 6(d) of the Treaty.

78. Counsel further submitted that the process could take many forms, including stakeholder participation through judicial forums such as the Judicial Service Commission or selection panel, direct public participation and representative participation through a process sanctioned by Parliament. He also argued that by receiving a name but failing to appraise himself as to whether the name submitted was a product of consultation, the 2nd Respondent obviously failed his duty under the Treaty and the Trial Court ought to have found him in breach.

79. Counsel submitted that the Trial Court ought to have found further that the 2nd Respondent was under obligation pursuant to Article 71(1)(a) of the Treaty to initiate, receive and submit recommendations to the Council for

purposes of advancing and promoting the Community and to seek to promote independence of the Judiciary through transparent and inclusive selection processes.

80. Counsel finally submitted that the Trial Court ought to have found that the 2nd Respondent failed to discharge his obligation and violated the Treaty in the process.

THE 1ST RESPONDENT'S SUBMISSIONS

81. Counsel for the 1st Respondent submitted that Article 71 of the Treaty does not task the Secretary General to report any findings to a specific organ of the Community but rather defines the scope of his function under Article 71(d) which gives discretionary power to investigate any matter that appears to affect the Community.

82. Counsel finally argued that the 2nd Respondent was not exercising his discretion because nomination of Hon. Justice Mjasiri was done in accordance with Article 24(1) of the EAC Treaty, and that this 2nd issue has no merit and should be answered in the negative.

THE 2ND RESPONDENT'S SUBMISSIONS

83. Counsel for the 2nd Respondent submitted that the Trial Court was correct in holding that the 2nd Respondent was under no obligation to investigate and verify the qualifications of Hon. Lady Justice Mjasiri as per Article 71 of the Treaty. He pleaded that vide his letter dated 13th September 2018 he communicated with the 1st Respondent to abide with Article 24(1) of the Treaty and nominate a Judge for appointment and this was done accompanied by the Curriculum Vitae of the nominee.

84. Counsel further averred that Article 71(1)(d) of the Treaty provides a margin of appreciation to the Secretariat to make a determination if a matter requires any investigation and given that the 1st Respondent had respected Article 24(1) of the Treaty by appointing a jurist, there was no basis to carry out any investigations in respect of the appointment of Hon. Lady Justice Mjasiri by the United Republic of Tanzania. He further submitted that investigation of matters affecting the Community has a discretionary aspect and as such where the matters do not merit investigation such as in the Mjasiri case, there was nothing blameworthy on the part of the 2nd Respondent.

85. Counsel finally submitted that there is no basis for developing guidelines on selection of Judges because that is a matter that the Treaty left to Partner States to deal with. In the circumstances, there was no obligation on the 2nd Respondent to carry out any investigation on a matter that was dealt with in a manner consistent with the provisions of the Treaty.

COURT'S DETERMINATION

86. We have carefully read, analyzed and considered the pleadings and submissions together with the supporting legal authorities by the opposing parties for which we are grateful to learned counsel. We now resolve Issue No. 2 as hereunder.

87. The crux of the Appellant's case is very simple: namely that the 2nd Respondent was under obligation to investigate and verify the qualifications of the Hon. Lady Justice Mjasiri before her nomination by the United Republic of Tanzania as per Article 71 of the Treaty.

88. Before faulting the 2nd Respondent for not having undertaken investigation relating to the nomination and appointment of Hon. Lady Justice Mjasiri to this Court, we would wish to reproduce Article 71(1)(d) of the Treaty which provides as follows:

"The Secretariat shall be responsible for the undertaking either on its own initiatives or otherwise, of such investigations, collection of information, or verification of matters relating to any matter affecting the Community that appears to it to merit examination."

89. We have found in the 1st issue that the nomination and appointment of Judges to this Court as envisaged under Article 24 of the Treaty is left to the practice in each Partner State. We are also in agreement with counsel for the 2nd Respondent that there is no basis for him to develop guidelines on selection of Judges on matters that the Treaty has left to each Partner State to deal with.

90. We also agree with Counsel for the 2nd Respondent needed only to satisfy himself that the proposed nominee met the requirements under Article 24 without forgetting the provisions under Article 25(2) of the Treaty relating to retirement of Judges of this Court.

91. In addition to the submissions by both the 1st and 2nd Respondents, we are fortified by the provisions Articles 24(1), 25(2) and 71(1)(d) of the Treaty that the 2nd Respondent was under no obligation to investigate and verify the qualifications of the Hon. Lady Justice Mjasiri given the finding that the United Republic of Tanzania did not violate the provisions of Articles 24(1) and 25(2) of the Treaty.

92. In view of our findings above, we accordingly answer issue Number Two in the negative.

ISSUE NUMBER THREE

WHETHER THE FIRST INSTANCE DIVISION FAILED IN THEIR DUTY TO ACT FAIRLY AND IMPARTIALLY BY PROCEEDING WITH OPEN BIAS AGAINST THE APPELLANT'S CASE AND BY TAKING INTO ACCOUNT EXTRANEOUS MATTERS THAT DENOTED THEIR BIAS WHILE PREJUDICING THE APPELLANT'S CASE

THE APPELLANT'SUBMISSIONS

93. Counsel for the Appellant submitted that the Trial Court exhibited unconscious bias and acted unfairly in determining the Reference before them. He argued that the Respondents refused to disclose relevant materials in their exclusive custody and that the learned Judges did not make adverse reference out of such conduct thereby leading to miscarriage of justice. Counsel further submitted that the learned Judges failed to apply relevant principles of law on adverse inference where a party suppresses evidence material to a case.

94. Counsel contended that the Trial Court misinterpreted the Treaty and took into account irrelevant considerations in findings that the principles of public participation, equal opportunities and accountability do not apply to nomination and appointment of a Judge under Article 24.

95. Counsel further argued that the Trial Court misapprehended the foundation of the case before them and arrived at a wrong conclusion on costs because the Appellant had no personal interest in the outcome of the case. He further submitted that it was erroneous and unfair for the Trial

Court to ignore the pivotal role played by the Appellant in promoting regional integration and slap it with costs when it had demonstrated that it had brought the case in good faith and with sole intention of advancing regional integration. He urged that the Court had applied this rule with regards to costs in matters relating to interpretation of treaty provisions. In support, he referred to the case of **Attorney General of the United Republic of Tanzania Vs Anthony Calist Komu,** EACJ Appeal No.2 of 2015 where this Court held that:

"The Court has on numerous occasions followed the general rule that costs follow the event. However, where a case has been instituted by a public-spirited person, is arguable and raised significant issues as to interpretation and future application of the Treaty provisions, this Court has exercised its discretion not to award costs against this litigant when he/she loses the reference."

THE 1ST RESPONDENT'S SUBMISSIONS

96. Counsel for the 1st Respondent submitted that the Trial Court did not see need of exercising discretionary power to draw adverse inference where nomination of Hon. Lady Justice Mjasiri was done in accordance with the provisions of Article 24 of the EAC Treaty.

97. Counsel further submitted that since the Treaty does not bind the Respondents to produce evidence of the nomination process of judges under the Treaty, the argument of the Appellant is misplaced. Accordingly, he prayed the Court to dismiss it and uphold the decision of the Trial Court.

THE 2ND RESPONDENT'S SUBMISSIONS

98. Counsel for the 2nd Respondent submitted in a nutshell that there was no bias against the Appellant and that the Trial Court did not in any way take into account any extraneous matters that denoted bias while prejudicing the Appellant's case. Accordingly, Counsel argued that there was no suppression of any evidence because the evidence in question was already in the public domain and not in the exclusive custody of the 2nd Respondent. He also argued that there was no basis for the Trial Court to make any adverse inference on suppression of evidence but that to the contrary, what was in issue was the discharge of burden of proof by the Appellant before the Court. Counsel referred to the decision of the former House of Lords **(Re B** [2008] **UKHL 35,** where Lord Hoffman clarified as follows:

"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."

99. Counsel further submitted that there was no basis for the Court to invoke adverse inference given the circumstances of the nomination of Hon. Lady Justice Mjasiri as Judge to this Court and as such all the authorities cited by the Appellant are not application.

100. On the allegations of awarding punitive costs against public interest litigation, Counsel for the 2nd Respondent submitted that costs are awarded in accordance with the provisions of the Rules of Procedure of the Court, 2019, and that they follow the event unless the Court for good reason decides otherwise.

101. Counsel also argued that costs as such are not awarded because of personal interest or lack thereof in any litigation. He further argued that the 2nd Respondent asserted much effort in filing papers and preparing and to defend the Reference and as such it is only proper and just that costs be awarded accordingly.

COURT'S DETERMINATION

102. We have carefully considered the rival written and oral submissions made by the parties on this matter and we now resolve Issue No. 3 as hereunder.

103. The crux of this issue is that Counsel for the Appellant contends that the Trial Court exhibited unconscious bias and acted unfairly in determining the Reference before it. The assertion by the Appellant that the 2nd Respondent did not produce material evidence to determine whether the 1st Respondent followed the guidelines given in nominating a Judge to this Court, is already resolved by our findings and determination on the 1st and 2nd issues above. The process of nominating Judges to this Court as provided for under Article 24(1) of the EAC Treaty is clear enough and does not require guidelines as contended by the Appellant.

104. The Appellant contention that the Trial Court exhibited unconscious bias and acted unfairly in determining the Reference before it was based on a number of incidents of alleged unfairness, including "*failing to act on*

suppression of evidence by the respondents and failing to consider relevant practices on nomination of Judges in comparative international tribunals.

105. With due respect to Counsel for the Appellant, the alleged incidents advanced against the Trial Court to demonstrate unfairness and bias in determining the Reference were not proved. In the case of **Simon Peter Ocheng & Others vs the Attorney General of the Republic of Uganda**, (supra) this Court reiterated that:

"It is trite that he who alleges must prove. In that regard, a party alleging whatever error must explain what the alleged error is and how it leads to a miscarriage of justice. Equally, in the instant Appeal, it is up to the Appellants who are alleging an error of law that was occasioned by the Trial Court to identify, establish and explain what the alleged error of law is and how it invalidates the impugned decision".

106. The Appellant's arguments that it was erroneous and unfair for the Trial Court to ignore the pivotal role played by the Appellant in promoting regional integration and slap it with costs when it had demonstrated that it had brought the case in good faith and with sole intention of advancing regional integration is not evidence of bias. Similarly the averment that the Reference was brought in Court in good faith and with sole intention of advancing regional integration is also not evidence of bias on the part of the Trial Court.

107. The question of costs is dealt with under Rule 127(1) of this Court's Rules of Procedure, which states that costs shall follow the event unless the Court for good reasons decides otherwise. This Rule was also emphatically reinforced in the recent case of the **Attorney General of the Republic of Burundi vs the Secretary General of the East African**

Community & Another, EACJ Appeal No. 2 of 2019, where the Respondents were awarded costs against the Republic of Burundi. The Trial Court did not award punitive costs against the Appellant but applied the provisions of Rule 127(1) of this Court's Rules which of and by itself is not evidence of bias.

108. On our part and as stated in the **Anthony Calist Komu case (supra),** this case was arguable and raised significant issues on the proper interpretation and future application of the Treaty provisions, relating to the process of nomination and appointment of Judges to this Court. This case will also help EAC Partner States and the EAC Secretariat in abiding with the provisions of the Treaty, especially Article 24(1), 25(2) and 71 of the EAC Treaty. It will further emphasises that the EAC Treaty is an internationally negotiated document and therefore its interpretation abides with Article 31 of the Vienna Convention (1969) on the law of treaties as well as to the purpose and objectives of the framers of the Treaty.

109. From our findings above, we find it more judicious that the order by the Trial Court awarding costs to the Respondents as against the Appellant be hereby set aside and substituted with an order that each Party bears its own costs in this Court and in the Trial Court.

110. Finally, having found that the process of nomination and appointment of the Hon. Lady Justice Mjasiri to this Court was in accordance with the provisions of Article 24(1), 25(2) and 71 of the Treaty, the allegations of bias and unfairness in determining the Reference in the Trial Court were not proved.

111. Accordingly, we answer issue No. 3 in the negative.

ISSUE NUMBER FOUR

REMEDIES

112. We have answered issue number one, issue number two and issue number three in the negative, meaning that the Appellant has not been able to prove the merit of any of them.

113. On the question of costs, we have found that this case was arguable and raised pertinent issues on the proper interpretation and future application of the Treaty provisions, relating to the nomination and appointment of Judges to this Court. We have also found and determined that in application of Rule 127(1) of this Court's Rules, there is good reason in this case to depart from the rule that costs follow the event and order that each Party bears its own costs in this Court and in the Trial Court.

CONCLUSION

114. In light of the above findings, considerations and determination, the Appellant has not succeeded on three of the framed issues. Accordingly, we hold as follows:

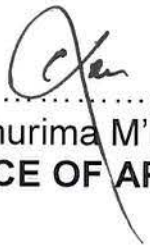
a. The Appeal is dismissed.
b. The Judgment of the Trial Court is upheld except only that the order as to costs is reversed.
c. Each Party shall bear its own costs in this Court and in the Trial Court.

IT IS SO ORDERED

Dated, Delivered, and signed at ARUSHA this 31st day of August 2022

Nestor Kayobera
PRESIDENT

Anita Mugeni
JUSTICE OF APPEAL



Kathurima M'Inoti
JUSTICE OF APPEAL