IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

APPELLATE DIVISION

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

APPEAL NO. 11 OF 2022

(Arising from Reference No. 21 of 2019)

BETWEEN

YU SUNG CONSTRUCTION LIMITED ..... APPELLANT

AND

THE ATTORNEY GENERAL OF THE

REPUBLIC OF SOUTH SUDAN ..... RESPONDENT

(Appeal from the Ruling of the First Instance Division of the East African Court of Justice at Arusha by Yohane B. Masara (Principal Judge), Audace Ngiye (Deputy Principal Judge), Charles Nyachae, Richard Muhumuza & Richard Wabwire Wejuli, (JJ.) dated 26th, September, 2022 in Application No. 1 of 2021 arising from Reference No. 21 of 2019).

JUDGMENT OF THE COURT

A. INTRODUCTION

1. Yu Sung Construction Ltd, "the Appellant" in this appeal filed Reference No. 21 of 2019 in the First Instance Division of this Court ("the Trial Court") on 4th November, 2019 against the Hon. Attorney General of the Republic of South Sudan ("the Respondent"). The Respondent had 45 days within which to respond to the Reference under Rule 32 of the East African Court of Justice Rules, 2019 (the Court Rules). The Respondent was represented by Mr. Biong Pieng Juol Arup (Mr. Biong), a State Attorney from the Attorney General's office. The time elapsed without the Respondent filing a response to the Reference. The Appellant applied for a default judgment through an application dated 24th December 2019. The Respondent, through its said advocate Biong made an oral application to the Trial Court for extension of time within which to file a response to the Reference. The Trial Court granted the Respondent 30 days within which to file their response. The Respondent failed to do so again and instead wrote a letter to the Court indicating that they wanted to settle the matter.

2. The matter came before the Trial Court on 31st August 2020 and a Consent Judgment was allegedly entered by the Trial Court and endorsed by the Principal Judge. The Respondent filed an application for Review before the Trial Court on 5th February 2021 seeking to set aside the said consent judgment.

3. The Trial Court granted the Application for Review. It held that the doctrine of *Res Judicata* and *Functus Officio* were not applicable in the case. The Trial Court also held that the Appellant and the Respondent

were not bound by the doctrine of *Approbation* and *Reprobation.* The Trial Court also gave leave to Counsel Elijah Mwangi from the law firm of Macharia - Mwangi & Njeru Advocates to represent the Respondent, the Applicant in Application No. 1 of 2021 despite the fact that Mr. Biong failed to file a Notice of Withdrawal under Rule 21(1), (2), (3) and (5) of the Rules. According to the Appellant the Trial Court validated new instructions and representation by a new lawyer contrary to the Rules.

4. It is the Appellant's case that the Trial Court wrongly held that the Compromise and the Consent Judgment/Order entered and registered on 26th November 2020 did not conform to the requirements of Rule 62 of the Rules and that the Ruling of the Trial Court was not in harmony with public law and policy.

5. The Appellant also complained that the Trial Court wrongly extended the time within which the Respondent was to file a response in the main Reference No. 21 of 2019 for another 30 days despite the earlier extension of 30 days granted to the Respondent.

B. REPRESENTATION

6. The Appellant was represented by learned Counsel Professor Patrick Lumumba of Lumumba & Lumumba Advocates and learned Counsel Justine Semuyaba of Iga & Company Advocates, while learned Counsel Elijah Mwangi from Macharia - Mwangi & Njeru Advocates represented the Respondent. Mr. Semuyaba was the Counsel who addressed the Court on behalf of the Appellant.

B. BACKGROUND

7. According to the Respondent, on or about June 2006, before South Sudan became independent, the then Sudan People's Liberation Army (SPLA) entered into an agreement with a Kenyan Company known as **Bethlehem Engineering and Construction Company Limited** (hereinafter referred as "the Company") for construction of a Military Academy and Warehouse in Natinga, South Sudan. The Academy was to be constructed in honour of South Sudan's liberation hero and was to be known as **Dr. John Garang Military Academy.** The Company received advanced payments of US, 6,510,000 (United States Dollars Six Million Five Hundred and Ten Thousand) but became insolvent in 2007.

8. It was also the Respondent's case that despite the advanced payments which were made to the Company, no work was done and as a result no progress was made in the construction. On the site where the Company claimed to have undertaken the said works only overgrown grass could be found and there was no construction whatsoever. A Committee formed by the Government of South Sudan recommended that the contract be terminated. The Contract was then awarded to the Appellant.

Despite South Sudan gaining independence on 9th July, 2011 no claim was made against the Company and no suit was filed in either Juba or Khartoum.

D. THE REFERENCE

9. After a period of Eight (8) years, in 2019, the Appellant filed a Reference before the Trial Court on 4th November 2019 seeking to

recover US $ 46,403,228.26 (United States Dollars Forty Six Million Four Hundred and Three Thousand Two Hundred Twenty Eight and Cents Twenty Six) from the Respondent for failure to pay the Appellant for the construction done for them. The said Reference was filed under Articles 4(1), (2), (3), 5, 6(b), (d), (e), (f), (g), (h) of the Treaty for the Establishment of the East African Community (the Treaty) and Articles 2, 3, 4, 5, 6, 7(2) (b), 7(6), 16(1) and (2), 7 (7), 23, 29, 39, 45 (1) (b), 45 (2) (b), 43(3) (n) of the Protocol for the Establishment of the East African Community Common Market (the Protocol). The Reference was also grounded on Rules 1(2) and 24 of the Court Rules with all enabling provisions of the law as well as Article 4 of the UN Resolution on Responsibilities of States for International Wrongful Debts (2001) and The Vienna Convention on the Laws of Treaties. The Reference was amended on 20th November 2019.

10. The Respondent, did not file a Response to the Reference. A Counsel from the Respondent's office, Mr. Biong appeared before the Trial Court and sought time to respond to the Reference.

11. On 26th November, 2020 a consent order awarding the Appellant the sum of USD 49,398,473.91(United States Dollars Forty Nine Million Three Hundred and Ninety Eight Thousand Four Hundred Seventy Three and Cents Ninety One) was allegedly entered by the Trial Court. The said Consent Order was a result of a Compromise Agreement prepared and filed by the Appellant's Advocates. It was signed by Professor Lumumba, Mr. Semuyaba and Mr. Biong.

12. The Appellant went to the High Court of Kenya and attempted to enforce the decree, which prompted the Respondent to file an application for review in the Trial Court.

E. APPLICATION FOR REVIEW

13. The Applicant/Respondent filed an application for Review on 5th February, 2021 under Articles 35(3), 39 and 27 of the Treaty and Rules 4, 5, 21(3), 52, 83 and 84 of the Court Rules on the grounds that the Consent Judgment was entered fraudulently and without any legal authority.

14. The Applicant sought the following orders:-

(a) That the Application be certified urgent and heard *ex parte*;

(b) That the Applicant be granted leave to change Advocates from Mr. Biong to the law firm of Macharia-Mwangi & Njeru Advocates;

(c) That pending hearing and determination of the Application *inter parties,* there be a stay of execution of the Consent Judgment and decree issued on 26th November 2020 and all further subsequent enforcement proceedings other than the hearing of the said application;

(d) That the Court be pleased to review and or set aside the Consent Judgment and Decree issued on 26th November, 2020 and all subsequent enforcement proceedings pursuant to the Judgment and Decree; and

(e) That the time for filing the Response to the Respondent's Reference No. 21 of 2019 be extended and the Applicant be granted unconditional leave to file its Response to the Reference.

15. The Respondent complied with the order of the Trial Court and filed a Response and a Counter Claim, witness statements and other documents.

F. FINDINGS BY THE TRIAL COURT ON THE APPLICATION FOR REVIEW

16. The application for review and/or setting aside of the Consent Judgment was heard by the Trial Court which granted the Respondent leave to file its Response to the Reference within a period of thirty (30) days. After hearing the Application, the Trial Court held that:-

a. "The matter is not *Res Judicata.*

b. The Court is not *Functus Officio.*

c. The Applicant had *Locus Standi* in this matter.

d. The Representation of the Applicant by the law firm of Macharia-Mwangi & Njeru Advocates is hereby validated.

e. The law firm of Macharia-Mwangi & Njeru Advocates be entered on record as the duly instructed Advocates for the Applicant.

f. The Court's omission to satisfy itself that the Consent Agreement was lawful is a manifest mistake and error on the face of the record.

g. The Consent Order and Decree issued by this Court on 26th November, 2020 be and is hereby set aside in its entirety.

h. The time for filing a Response in Reference No. 21 of 2019 be and is hereby extended.

i. The Respondent therein is granted unconditional leave to file its response within thirty (30) days from the date hereof; and

j. Costs of the Application shall abide the outcome of the Reference."

17. The decision of the Trial Court in the above Application for review resulted in Appeal No. 11 of 2022.

G. THE APPEAL

18. The Appellant appealed to the Appellate Division against the said decision and orders and raised the following grounds of appeal in its Memorandum of Appeal, namely:-

"i The Learned Judges of the First Instance Division erred in Law when they held that the Doctrine of *Res Judicata and Functus Officio* were not applicable to this case.

ii. The Learned Judges of the First Instance Division erred in Law when they held that the Appellant was not bound by *The Doctrine of Approbation and Reprobation* when the Compromise and Consent Judgment were entered at The Respondent's own Instance and admission.

iii. The Learned Judges of the First Instance erred in Law when they held that Counsel Elijah Mwangi from **The Law Firm Macharia – Mwangi and Njeru Advocates** who represented the Respondent in **ARISING FROM APPLICATION NO. 1 OF 2021 REFERENCE NO. 21 OF 2019 IN THE MATTER OF BETWEEN YU SUNG CONSTRUCTION LTD APPELLANT VERSUS THE ATTORNEY GENERAL OF THE REPUBLIC OF SOUTH SUDAN RESPONDENT** could be granted Leave to Change Advocates from **Biong Pieng Juol Arup a State Attorney from the Republic of South Sudan under Rule 21(1), (2), (3) and (5) of the Rules of Procedure of The East African Court of Justice Rules 2019** and validated his instructions and representation of the Respondent.

iv. The Learned Judges of the First Instance Division committed a Procedural Irregularity and erred in Law when they ignored that **Mr. Elijah Mwangi from the Law Firm – Macharia-Mwangi and Njeru Advocates** only had instructions from the Central Bank of South Sudan restricting him to handle this case in the Republic of Kenya and not in the East African Court of Justice and therefore, could not legally represent the Attorney General of the Republic of South Sudan.

v. The Learned Judges of the First Instance Division committed a Procedural Irregularity when they held that the requirement for communication of change or instruction of Advocates as stipulated in the Rules was not intended to be used as a sword against the Litigant but rather as a shield to protect them.

vi. The Learned Judges of the First Instance Division erred in Law whey they held that the Compromise and Consent Judgment entered on the **26th November 2020 did not conform to the requirements of Rule 62 of the Rules of Procedure of the East African Court of Justice Rules 2019.**

vii. The Learned Judges of the First Instance Division erred in Law when they held that there was a mistake and error on the face of the Court record at the time **The Compromise and Consent Order and Decree** in this case was entered by the Parties and Recorded and Endorsed by Court on the **26th November 2020**.

viii. The Learned Judges of the First Instance Division erred in Law when they held that all The Orders and subsequent Execution actions arising from the impugned Compromise and Consent Order and Decree have no legal basis and are *void abinitio.*

ix. The Learned Judges of the East African Court of Justice committed a Procedural Irregularity when they further extended the time within which the Respondent was to file a Response in The Main Reference No. 21 of 2019 for another **thirty (30) days** yet it had been given the extension of **thirty (30) days** within which to file its Response.

x. The Learned Judges of the First Instance Division committed a Procedural Irregularity when they misconstrued the fact the Respondent was already paid **(US $24,000,000) Twenty Four Million Dollars)** against the contract sum whereas not.

xi. The Learned Judges of the First Instance Division committed a Procedural Irregularity when they held that **Mr. Biong Pieng Juol Arup a Public Attorney within the meaning of The Constitution of the Republic of South Sudan and Sections 15, 18, 24 and 25 of the Ministry of Legal Affairs and Constitutional Development Act** did not have the legal mandate to compromise and consent on behalf of **The Government of the Republic of South Sudan** whereas there were various Legal Opinions of the Attorney General of the Republic of South Sudan and a commitment of the Minister of Finance to pay the Appellant

prior to the signing of The Compromise and Consent Judgment/Decree.

xii. The Learned Judges of the First Instance Division committed a Procedural irregularity when they held that they failed to properly peruse the Court Record and all communications as proof that the Court was satisfied that the dispute in this case was **adjusted wholly or by a lawful Agreement or Satisfaction or compromise which was properly recorded under Rule 62 of the Rules of Procedure of the East African Court of Justice 2019 on the 26th November 2020.**

xiii. The Learned Judges of the First Instance Division committed a Procedural Irregularity when they failed to apply the known principles of Review as enunciated in **The Case of the Attorney General of Kenya v Independent Medical Unit EACJ Appeal No. 1 of 2011.**

xiv. The Judges of the First Instance Division erred in law when they overlooked the provisions of Article 24(8) of the Treaty authorizing the Principal Judge who had powers to direct work of the First Instance Division, represent it, and regulate the disposition of the matters brought before the Court and preside over its sessions.

xv. The Learned Judges of the First Instance Division erred in law when they denied the Respondent Costs of the Application.

IT IS PROPOSED TO ASK THIS COURT TO ALLOW THE APPEAL ON THE FOLLOWING ORDERS:-

(a) The Appeal be allowed.

(b) The Judgment of the East African Court of Justice (First Instance Division) be varied/quashed.

(c) Counsel Elijah Mwangi from the **Law Firm Macharia – Mwangi and Njeru Advocates** who represented the Respondent in **ARISING FROM APPLICATION NO. 1 OF 2021 REFERENCE NO. 21 OF 2019 IN THE MATTER OF BETWEEN YU SUNG CONSTRUCTION LTD APPELLANT VERSUS THE ATTORNEY GENERAL OF THE REPUBLIC OF SOUTH SUDAN RESPONDENT** be struck off the Court Record.

(d) The Compromise/Consent Judgment Decree entered in **REFERENCE NO. 21 OF 2019 IN THE MATTER OF BETWEEN YU SUNG CONSTRUCTION LTD APPELLANT VERSUS THE ATTORNEY GENERAL OF THE REPUBLIC OF SOUTH SUDAN RESPONDENT** be reinstated.

(e) The Appellant be granted costs of **APPLICATION NO. 1 OF 2021 AND THE MAIN REFERENCE NO. 21 OF 2019 IN THE MATTER OF BETWEEN YU SUNG CONSTRUCTION LTD APPELLANT VERSUS THE ATTORNEY GENERAL OF THE REPUBLIC OF SOUTH SUDAN RESPONDENT** as well as costs in this Appeal.

(f) This Honourable Court makes such consequential or further Order(s) as it may deem just and equitable."

F. ISSUES FOR DETERMINATION

19. At the Scheduling Conference which was held on 11th November, 2022, the following issues were agreed upon by the parties and approved by the Court:-

1. Whether the First Instance Division erred in law by holding that it had jurisdiction to entertain the application dated 25th January, 2021 to set aside the consent judgment dated 26th November 2020.

2. Whether the First Instance Division erred in law by holding that the applicant had locus standi in the application.

3. Whether the First instance Division erred in law and committed a procedural irregularity by allowing the law firm of M/S Macharia-Mwangi & Njeru Advocates to come on record for the Respondent.

4. Whether the First Instance Division erred in law by setting aside the Consent judgment dated 26th November, 2020.

5. Whether the First Instance Division erred in law and committed a procedural irregularity by extending the time for the Respondent to file its Response in Reference No. 21 of 2019.

6. What remedies, if any, are the parties entitled to.

ISSUE NO. 1 - WHETHER THE FIRST INSTANCE DIVISION ERRED IN LAW BY HOLDING THAT IT HAD JURISDICTION TO ENTERTAIN THE APPLICATION DATED 25TH JANUARY, 2021 TO SET ASIDE THE CONSENT JUDGMENT DATED 26TH NOVEMBER 2020.

APPELLANT'S CASE

20. In relation to issue No.1, Counsel submitted that there was a compromise between the parties under Rule 62 of the Court Rules. The Court's duty was to respect the compromise. According to Counsel, a compromise is a form of judgment and the Trial Court had no jurisdiction to upset the compromise. The Court has to respect the parties' agreement. What is needed is judicial recognition under Article 35 of the Treaty and Rule 83 of the Court Rules. Counsel submitted further that Mr. Biong was properly mandated to represent the Republic of South Sudan under Rule 62 of the Court Rules. He also submitted that if there were procedural irregularities in recording proceedings, the Court should have invoked Rule 4 and 81 of the Court Rules. The Court is therefore obliged to respect the parties' compromise as an agreement was reached outside the Court by Senior Government officials of the Republic of South Sudan. Counsel made reference to the agreement reached by the Ministries of Defence, Justice and Finance on making the payments under Rule 62 of the Court Rules. However he conceded that the second limb of Rule 62 was not complied with as no hearing took place and the Consent Judgment was entered contrary to the requirements of the rule.

21. Counsel for the Appellant relied on the Supreme Court of Uganda case of **Saroj Gandesha v Transroad,** S.C.C.A 13 of 2009 where Justice Katureebe (as he then was), held that *a judgment entered on the agreement of the parties, constitutes a contract between the parties and when sanctioned by the Court becomes a judgment of the Court.* Counsel submitted that such an agreement cannot be set aside by the Court because it is a contract between the parties. All the Court has to

do is respect the parties' contract or compromise and then proceed to record it.

22. Counsel also relied on the case of the **Attorney General of the Republic of Rwanda v. Eric Kabalisa Makala**, Application No. 2 of 2022. According to Counsel the Court discussed some irregularities which were done by the Registrar contrary to the Court Rules. The Appellate Division of this Court observed that if there are any omissions by the Court officials or the Court itself, the said omissions should not be visited on the litigants.

He also made reference to **Chitaley and Rao** in their **Commentary on the Code of Civil Procedure** (1908) 7th Edition Vol.3 (1963) where a **Compromise** is defined *as an adjustment of actions outside Court before* a *Decree*. Where such adjustments of actions are made out of court, they can be notified to Court in the presence of all parties concerned and the Court would then pass a Decree in accordance therewith so far as it relates to the action and such a Decree would become final in so far as it relates to the subject matter of the action as dealt with by such agreement or compromise. He submitted that a Consent Decree can only be set aside on grounds of fraud, mistake or misrepresentation. He cited **Chitaley & Rao** (supra) in support of the proposition.

23. Counsel also made reference to the slip rule and relied on the case of **Oil Seeds (U) Limited v Uganda Development Bank,** Civil Appeal No. 9 of 2009. According to Counsel, the errors could have been corrected by the Trial Court under the slip rule, therefore there was no need to entertain the application for review. On the doctrine of *Res Judicata,* Counsel submitted that the Court cannot set aside a compromise reached between the parties.

RESPONDENT'S CASE

24. Mr. Elijah Mwangi, learned counsel for the Respondent commenced his submissions by stating that he is properly in Court under Rule 19 of the Court Rules as he is permitted to practice in Kenya. On the first issue regarding whether the First Instance Division erred in law by holding that it had jurisdiction to entertain the application dated 25th January 2021 to set aside the Consent Judgment dated 26th November 2020, Counsel submitted that taking into account the manner in which the compromise was recorded, pursuant to Rule 62 of the Court Rules the parties needed to satisfy the Court that they entered into a lawful agreement. The parties had presented a written Compromise that was converted into a decree by the Presiding Judge and the Registrar without having a proper quorum. In order to have a proper quorum it is necessary to have the presence of the Presiding Judge and two other Judges in order to sign off any order. A single Judge has no powers to enter a judgment. Under the Court Rules a single Judge can only make an order for extension of time, etc. The Consent Judgment was therefore not properly approved.

25. Counsel submitted that the slip rule relied on by Counsel for the Appellant is in respect of very minimal omissions which are obvious. He contended that the Rules are very clear and that no appearance was made before the Trial Court before the consent judgment was entered.

26. According to Counsel, the Principal Judge did not have any jurisdiction to enter any judgment as Rule 69(2) is very clear what a single Judge can do and it is mainly extension of time, substituted service, examining process, leave to amend, and supplementary affidavits. In the present case it was a proceeding that was leading to a judgment. He submitted that the last appearance by the parties before

the Trial Court was on 31st August 2020 when Mr. Biong was allowed 30 days to file a response to the Reference. He stated that was the last properly constituted court proceedings. Hence there was no competent judgment by the Trial Court. The judgment relied upon by the Appellant is null and void, the same was entered into without jurisdiction and in violation of the required procedures under the Court Rules. Counsel relied on The Canadian Supreme Court case of **Media QMI Inc v Kamel** (2021) SCC 23 where it was stated that *if you do not have jurisdiction, it does not matter what you do. It is not enough for the parties to agree, proper procedures must be followed.*

27. Counsel made reference to Articles 6 and 7 of the Treaty where it is clearly stated that the Court is supposed to uphold the rule of law and transparency. Therefore the Court cannot act without jurisdiction and say it is following the law. The parties were denied an opportunity to be heard and this is what the Respondent wanted. The Trial Court gave the Respondent the opportunity to file its defence and to be heard as a substantial amount of money was involved. The Respondent has already done so and has already filed witness statements. The Military Academy did not look like one, no work was done and the area in question was just surrounded by grass. According to the Counsel for the Respondent, this is a proper matter for review.

COURT'S ANALYSIS AND DETERMINATION

28. The issue before us for determination is whether the Trial Court erred in law by holding that it had jurisdiction to entertain the application dated 25th January 2021 to set aside the consent judgment dated 26th November 2020. In order to determine whether the Trial Court had

jurisdiction to hear the application and to set aside the Consent Judgment, we need to determine whether there is in existence a proper consent judgment entered by the Trial Court. In doing so we have to define what a Judgment is.

29. According to **Black's Law Dictionary, 8th Edition** a *judgment* is defined as follows:-

> *"A court's final determination of the rights and obligations of the parties in a case".*

An *agreed judgment* is defined as follows:-

> *"A settlement that* ***becomes a court judgment when the judge sanctions it****. In effect an agreed judgment is merely a contract acknowledged in an open court and ordered to be recorded, but it binds the parties as fully as other judgments also termed consent judgment; stipulated judgment; and judgment by consent."*

30. In order for the consent judgment to be effective it needs to be sanctioned by the Court. Looking at the sequence of events, the consent judgment in question was not sanctioned by the Trial Court as defined in the Rules. Even though there is a decree on record which is signed by the Registrar of the Court, however there was no appearance by the parties before the Trial Court in order to render the judgment effective. The decree has to originate from an order of the Court.

31. Rule 69 of the Court Rules is crystal clear, it provide as follows:-

> *(1) "The quorum of the Court shall be three(3) or five(5) Judges, one of whom shall be the Principal Judge or Deputy Principal Judge:-*

Provided that having regard to public importance of the matter or to any conflict or other complexity in the law applicable, the Principal Judge or on application by any party, the Court may direct such matter to be heard and determined by a Full Bench".

(2) "The following interlocutory matters may be dealt with and determined by a single Judge:-

(a) applications for extension of time prescribed by these Rules or by the Court;

(b) applications for an order for substituted service;

(c) applications for examining a serving officer;

(d) applications for leave to amend pleadings; and

(e) Applications for leave to lodge one or more supplementary affidavits under Rules 52(6) and 54(2)".

32. Counsel for the Appellant strongly relied on the decision of this Court in **Eric Kabalisa Makala** (supra) that a mistake by an officer of the Court or by the Court should not be visited on a litigant. The Court is of the considered view that the circumstances of the present case are very different. In the **Kabalisa** case (supra) a party who was unrepresented was exempted from payment of security for costs by the Registrar. The Court held that the Registrar had no such powers under the Rules, but because the innocent litigant had been misled by the Registrar, the mistake should not be visited on him. The Court found that the failure to pay the security for costs was a procedural infraction. That in itself did not render the appeal null and void.

33. In this appeal, the Appellant who is represented by counsel is relying on an improper consent Judgment not sanctioned by the Trial Court which did not sit to enter a valid judgment. What is clearly undisputed is the decree signed by the Registrar but did not originate from an order of the Trial Court as required under the Court Rules. Such a decree is null and void and cannot be cured by the Trial Court. As Lord Denning held in ***Mcfoy v. United Africa Limited*** [1961] 3 All ER 1169 at page 1172:

> *"If an act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."*

In view of what we have stated, it follows as night follows day that there is no valid consent judgment of the Trial Court.

34. It therefore follows that the slip rule under Rule 81 of the Court Rules does not apply in this case because that rule is intended only for correction of minor clerical or arithmetic mistakes in Judgments. That Rule cannot be invoked to validate a Judgment which is a nullity. In ***Raniga v. Jivraj*** [1965] EA 700, the former East African Court of Justice held as follows, regarding the slip rule:-

> *"A court will, of course, only apply the slip rule where it is satisfied that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order*

which it would have made had the matter been brought to its attention."

35. We should also point out that the decision in **Oil Seeds (U) Ltd v Uganda Development Bank** (supra) does not assist the Appellant because, unlike in this case, the Supreme Court of Uganda found that the Registrar had powers to endorse a Deed of Settlement concluded by the parties.

36. Counsel for the Appellant has conceded that the second limb of Rule 62 of the Court Rules was not complied with. Rule 62 is reproduced as under for ease of reference:-

> "*Where it is proved to the **satisfaction** of the Court that a dispute or reference has been adjusted wholly or in part by any lawful agreement or compromise, **the Court shall, on the application of any party, direct that such agreement, compromise or satisfaction be recorded and shall enter judgment accordingly".***

[Emphasis supplied]

37. It is evident from the record that no hearing took place before any of the quorum of Judges of the Trial Court as required under the Court Rules and no judgment was entered. There were no proceedings whatsoever to satisfy the Court that the dispute was settled by lawful agreement or compromise. This is more significant where one of the parties is challenging the validity of the impugned Consent Judgment. On the first page of the decree after the title "Decree" it is indicated in parenthesis ("*Before the Principal Judge*"). There are no proceedings and orders to support this.

38. A consent decree is an order by the Court under Rule 62 of the Court Rules upon an agreement almost always put in writing, between the parties to a law suit instead of continuing the case through trial or hearing. In this case the Decree was signed by the Registrar and on page 553 of the Record of Appeal it is indicated that matter is marked settled and the terms of settlement are set out given the circumstances.

39. We note that According to the record of appeal, before Reference No. 21 of 2019 was filed in the Trial Court, the Registrar of the Court attended a high level ministerial meeting which was also attended by the representative of the Appellant. The said meeting, whose purpose was to discuss this dispute, took place in Juba, South Sudan on 31st August, 2019.

40. We note with concern on the manner in which the impugned Consent Judgment was reached and approved by the Trial Court. The Compromise Agreement was effected and signed by the parties on 26th November, 2020. The said agreement was filed in the Court Registry on the same day, and the decree of the Court was also extracted and signed on the same day. No hearing having taken place and there being no existence of any Court Order somehow leaves a question mark on how the whole process was handled.

41. The rule of law and transparency are of vital importance in the Treaty and judicial proceedings and this Court will not countenance or condone even a whiff of suspicion.

42. For the foregoing reason the Trial Court had no alternative but to hear and grant the application for review to set aside the improper consent judgment.

43. Given the conclusion reached on the impugned Consent Judgment, we entirely agree with the findings of the Trial Court that the doctrines of *functus, officio, res judicata, approbation and reprobation* do not apply at all given that there is no valid Judgment / and or order by the Trial Court.

44. For the foregoing reasons, we answer Issue No. 1, in the negative.

ISSUE NO. 2 WHETHER THE TRIAL COURT ERRED IN LAW BY HOLDING THAT THE APPLICANT HAD LOCUS STANDI IN THE APPLICATION

APPELLANT'S CASE

45. On issue No. 2, Counsel for the Appellant submitted that the Trial Court erred in law by holding that the Compromise and Consent Judgment did not conform to the requirements of Rule 62 of the Court Rules. The sequence of the letters from the South Sudan Ministry of Justice and Constitutional Affairs, Minister of Defence and Veteran's Affairs of the Transitional Government of National Unity of the Republic of South Sudan, the Under Secretary Ministry of East African Community and a final Commitment of the Ministry of Finance and Planning demonstrated clearly support of the Compromise Agreement. He argued that the role of the Court was only to endorse the Consent Judgement and extract a Decree / Order with that Compromise and all supporting correspondence as the satisfaction. According to Counsel, the compromise was concluded and a consent judgment was entered into. The matter was *res judicata* and the

Applicant had no *locus standi*. The Respondent did not file any cross appeal.

46. According to Counsel, the Legal Opinions of the Attorney General of the Republic of South Sudan and a commitment by the Ministry of Finance to pay the Appellant prior to the signing of the Compromise and Consent Judgment constituted admissions that the disputes were lawfully settled. The Compromise Agreement was lawful and was properly done and the parties agreed to compromise the dispute.

47. Counsel submitted that the Doctrine of *Res Judicata and Functus Officio* and the Doctrine of *Approbation and Rebrobation* when the Compromise and Consent Judgment / Order were entered into at the Respondent's own instance and admission are binding and applicable.

48. In Counsel's view, the Trial Court was not required to interrogate whether the merit of the Compromise Agreement passed the legality test. Mr. Biong had the legal mandate to present the compromise agreement on behalf of the Republic of South Sudan. The Trial Court committed a procedural irregularity by holding that Mr. Biong, a Public Attorney within the meaning of the Constitution of the Republic of South Sudan and sections 15, 18, 23 and 24 and 25 of the Ministry of Legal Affairs and Constitutional Development Act did not have the legal mandate to compromise and consent on behalf of the Government of South Sudan, despite being backed up by all the legal opinions emanating from the relevant government offices. Mr. Mwangi, a Kenyan private lawyer had no mandate to challenge what had been agreed upon by the Government of South Sudan when there were binding legal opinions from the Attorney General.

RESPONDENT'S CASE

49. On this issue, Counsel for the Respondent submitted that there was no error in law and the Trial Court was correct in holding that Applicant/Respondent had locus standi. There was a serious procedural irregularity which needed to be corrected. The consent judgment was not properly made by the Court. There was a lack of quorum and the judgment was endorsed only by a single Judge instead of a panel of at least three judges. In order to set aside the consent order, the Court had to hear the parties on merit. The Court therefore properly exercised its discretion to set aside the invalid Judgment. There was a counterclaim filed by the Applicant/Respondent for money paid in advance and for work not done. The Appellant was required to present a defence.

COURT'S ANALYSIS AND DETERMINATION

50. According to **Blacks Law Dictionary (supra)** *locus standi* **is defined as follows:-**

> *"a place of standi", that is the right to bring an action or to be heard in a given forum.*

A Partner State under Article 28 of the Treaty has a right to bring an action before the Court and in any case the Respondent was already a party to the Reference. Article 28(2) provides as follows:-

> *" A Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action on the ground that it is ultra vires or unlawful or infringement of the provision of this Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power."*

51. Given our findings on issue No. 1 on the existence of an invalid and improper judgment, the Trial Court cannot be faulted for allowing the application by the Respondent because there was a need to set the record right. The Respondent, who was claiming that the Consent Judgment was not valid had locus standi in the Application.

Accordingly, we answer Issue No. 2 in the negative.

ISSUE NO. 3: WHETHER THE TRIAL COURT ERRED AND COMMITTED A PROCEDURAL IRREGULARITY BY ALLOWING THE FIRM OF M/S MACHARIA-MWANGI & NJERU ADVOCATES TO COME ON RECORD FOR THE RESPONDENT.

APPELLANT'S CASE

52. On issue No. 3, Counsel for the Appellant submitted that the Trial Court should not have allowed Advocate Elijah Mwangi to represent the Respondent. According to him, this lawyer from Kenya with no authority was merely trying to upset the compromise. He stated that Rule 19 provides that representation has to be in person, by agent or advocate.

53. The procedure under Rule 21(1), (2), (3) (4) & (5) of the Court Rules had to be followed. He contended that the letter instructing the Respondent's counsel did not come from the Government of South Sudan but from the Central Bank. Under Rule 19, appearance by counsel on behalf of the Government of South Sudan required approval by the Ministry of Justice. This requirement was not met as no approval was given. The Attorney General and his office were the ones with the mandate to represent the Republic of South Sudan in Court. Counsel argued that it was inconceivable that a private lawyer from Kenya could

be instructed to appear on behalf of the Government of South Sudan after a compromise had been lawfully made and a Consent Judgment had been endorsed by the Court under Rule 62 of the Court Rules. According to counsel, the role of the Court was only to endorse the Consent Judgment and to extract a Decree / or Order as the compromise was initiated by the Respondent.

54. Counsel argued that the letters of instruction came from the Central Bank of South Sudan, which is a different legal entity from the Attorney General of South Sudan. He submitted that no notice of withdrawal was filed by the Republic of South Sudan. Mr. Semuyaba however, admitted that since the Ruling of the Trial Court on the application, there has been no complaint raised by the Government of South Sudan regarding Mr. Mwangi's appearance on its behalf.

55. Counsel submitted that the Trial Court erred and committed a procedural irregularity by allowing the law firm of M/s Macharia-Mwangi & Njeru Advocates to come on record for the Respondent. The illegality of instructing a private firm rendered all the resultant acts done by the said advocates in relation to the Attorney General irregular, null and void. According to Counsel, under Rule 21 of the Court Rules, a change of the Advocate on record for a party cannot be effected once a Judgment has been entered, without a Court order made on an application with notice to the Advocate previously on record and who is sought to be replaced. A Kenyan lawyer has no mandate to challenge what had been agreed upon by the parties, Counsel contended.

56. In the instant case an application for review filed by a firm of Advocates not previously on record and without a Court order allowing them to come on record was thus incompetent and should have been dismissed. The orders sought by the Application should not have been granted as the Trial Court was already *functus officio.* The proceedings in Reference were no longer alive and pending and the Trial Court could not reopen the case. Counsel contended that the argument by the Trial Court that Rule 21 of the Court Rules was not intended to be used as a sword against a Litigant but rather as a shield to protect them is absolutely wrong. And that the Trial Court was in breach of the provisions of Article 37 of the Treaty.

57. Counsel lastly submitted that Elijah Mwangi did not fulfil the legal requirements for communication of change of advocates as required by the Court Rules and sections 11(2) (b), 15, 18, 24 and 25 of the Ministry of Legal Affairs and Constitutional Development Act of South Sudan and therefore the Trial Court erred in law and committed a procedural irregularity in granting the law firm of M/s Macharia-Mwangi & Njeru Advocates leave to represent the Respondent.

RESPONDENT'S CASE

58. In relation to Issue No. 3, Mr. Mwangi submitted that Mr Biong was not an external lawyer who was independent of his client. He was a State Counsel from the Attorney General's Chambers. He argued that the client took a step and appointed his law firm to represent them and to replace Mr. Biong. According to Counsel, Rule 19 of the Court Rules is not the most clear Rule in terms of a State appointing an external lawyer. Rule 21 is not very clear either, however his law firm applied for

leave as a matter of caution. According to him their law firm was coming in afresh from outside the State representation. He submitted that consideration should be taken that the Treaty prioritises the right of representation. The notice of change of advocate is aimed at protecting parties and not otherwise. This does not affect the validity of proceedings, and cannot go to jurisdiction as long as the lawyer is a competent lawyer and legally allowed to practice in a Partner State.

59. He submitted further that he was aware that Mr. Biong was an employee of the Attorney General and went to Court and presented documents. He stated that there was a malfunction in the Attorney General's office and Mr. Biong was not authorized by his office to do what he did. He did not have the authority from the relevant Ministry which was responsible for making the payments. He was not looking at the interests of the State. The interest of public funds in the Community has to be protected, Counsel contended. Therefore the Respondent was entitled to a hearing to resolve all these issues.

COURT'S ANALYSIS AND DETERMINATION

60. We entirely agree with the arguments raised by Counsel for the Respondent and the findings made by the The Trial Court. Indeed it is Mr. Biong who should have filed the requisite notice of withdrawal. However the Respondent had to change him, as he was allegedly working against the interest of the Respondent, hence the non-compliance with the relevant Court Rule.

61. We agree with the findings of the Trial Court that the requirement for change of instructions of Advocate as stipulated under the Rules was not intended to be used as a sword against the litigant but as a shield to protect him. It is inconceivable that the intention of the Court Rules is to

deny a litigant legal representation for the reason that his lawyer did not comply in a timely manner to notify the other party of its intention to withdraw instructions. The Trial Court was of the view that given the peculiar conduct of the State Counsel from his failure to file a response to the Reference within the stipulated time and the subsequent hurried compromise settlement leading to a Consent Judgment, there was need to validate the representation of the Respondent by the law firm of Macharia-Mwangi & Njeru Advocates.

In view of the prevailing circumstances, no procedural irregularity was committed by allowing the firm of Macharia-Mwangi & Njeru Advocates to come on record for the Respondent. Given that position, we find issue No. 3 in the negative.

ISSUE NO. 4 – WHETHER THE TRIAL COURT ERRED IN LAW BY SETTING ASIDE THE CONSENT JUDGMENT DATED 26th NOVEMBER 26, 2020

APPELLANT'S CASE

62. Counsel for the Appellant submitted that the Trial Court erred in law in finding that there was a mistake and / or error apparent on the face of the record when the Consent Judgment was entered by the Court on 26th November, 2020. He contended that the Trial Court failed to apply the known principles of Review of Judgments under the Treaty as enunciated in **Attorney General of the Republic of Kenya v Independent Medical Legal Unit** (supra). He argued that the Compromise Agreement was properly recorded under Rule 62 of the Court Rules which negated the Respondent's

claim that the Compromise and Consent / Decree Order was not in harmony with public policy and law.

63. Counsel argued that the Court's endorsement and Recording of a Compromise Agreement was properly done. The Compromise Agreement was lawful and was not set aside. According to him the Court failed to construe and apply the known principles governing Review and the Slip Rule under Article 35(2) of the Treaty as read in tandem with Rules 81(1), (2), (3), 83 and 123 of the Court Rules. He submitted that the Trial Court committed a procedural irregularity by failing to properly peruse the court record and all communications and various legal opinions of the Attorney General of South Sudan and the commitment of the Minister of Finance to pay the Appellant by signing the Compromise Agreement which was subsequently properly recorded under Rule 62 of the Court Rules.

64. Counsel submitted that the Court's mandate was not to interrogate the merits of the Agreement and question the entitlement exactitude. The Court's duty was only to determine whether an agreement was reached by the parties. Therefore the Trial Court erred in law when it held that the Compromise and Consent Judgment/Decree Order in this case was not in harmony with public policy and law. The Trial Court was wrong to find that there was an omission on its part to satisfy itself that the Consent Agreement was lawful. The Court found that the omission in itself was a manifest mistake and error on the face of the record which necessitated the setting aside of the Consent Judgment. Counsel stated that a Consent Judgment endorsed and recorded by the Court becomes a judgment of the Court. It follows therefore that

the Court cannot vary or set it aside except in accordance with the Treaty and the Court Rules. He argued that a Consent Judgment can be set aside only in certain circumstances, for example on account of some mistake, fraud and / or error apparent on the face of the record, or because an injustice has been done.

65. Counsel then asked the Court to examine the powers and scope of the Court to set aside a Consent Judgment. He made reference to Article 35(3) of the Treaty and Rule 123 of the Court Rules and submitted that given the Trial Court's holding on paragraph 30 of the judgment, the Court can only set aside a consent judgment where it was found to have been fraudulently obtained or there was misrepresentation or on account of some other mistake. Counsel relied on the decision in **Hirani v Kassam** [1952] 19 EACA 1. Counsel submitted that in the present case the impugned Consent Judgment was not found by the Court to be unlawful, only that the Court itself failed to satisfy itself as to whether it was lawful. He made reference to paragraph 57 of the Judgment. According to him a mistake on the part of the Court when noticed ought to be corrected and cannot be a ground to set aside a lawfully or duly executed Compromise Agreement. The Court therefore had no powers to set aside the Consent Judgment; it ought to have corrected the error instead. An error or mistake on the face of the record does not vitiate a duly executed Consent Judgment, particularly where such error or omission was committed by the Court itself at the point of endorsing and recording the Compromise Agreement. Such an error or mistake ought to have been corrected by the Court itself.

RESPONDENT'S CASE

66. On this issue, Counsel for the Respondent contended that as submitted on issue No. 1, the doctrine of *Res judicata* does not arise. As there was no valid Judgment entered by the Trial Court, therefore the Trial Court had all the rights to set aside the purported Consent Judgment which was invalid and improperly entered into, due to lack of the requisite quorum. Relying on the Canadian Supreme Court case of **Media QMI Inc v Kamel** (supra) Counsel submitted that merely because parties to a civil case were engaged in a settlement did not take away the Courts's public law jurisdiction to ensure that the proceedings complied with the legal processes. According to Counsel, in view of the clear breaches of Rules 62 and 69 of the Court Rules, the Consent Judgment was entered irregularly and that was an apparent error on the face of the record. The Trial Court therefore had jurisdiction under Rule 83 of the Court Rules to set it aside. The Respondent also relied on the South African Case of **Oppressed ACS, A Minority 1 Pty and Another v the Government of the Republic of South Africa and Others,** Case No, ZASCA 50 (11 April,2022) where the Constitutional Court of South Africa held that a consent / compromise entered into by a Government Department without proper authority was capable of being set aside on grounds of illegality and lack of consent.

COURT'S ANALYSIS AND DETERMINATION

67. In view of this Court's findings hereinabove on issue No.1, we answer issue No. 4 in the negative. The Trial Court did not err in law by setting aside the consent judgment dated 26th November, 2020. In effect there was no valid judgment as the judgment lacked a proper

quorum as required by the Court Rules. The doctrine of *res judicata, approbation and reprobation does not apply given that the judgment was not a judgment of the Trial Court and was invalid.*

The case of **Media QMI Inc v Kamel** (supra) was cited by the Respondent out of context because it is a minority decision.

68. In the instant case the illegality was occasioned by the Trial Court for failure to comply with Rule 62. When the omission was brought to its notice, the Trial Court did the correct thing and set aside the impugned Consent Judgment. Given the circumstances, we are of the considered view that the Consent Judgment and Decree was properly set aside because the same was illegal and invalid. The Trial Court was not properly constituted when the purported Consent Judgment was recorded.

69. Counsel for the Respondent made reference to Rule 62 of the Court Rules and argued that the Rule provides for two principal obligations. Firstly, for the Court to satisfy itself about the legality of the agreement or compromise and secondly, to record and enter Judgment as would have been agreed or compromised by the parties.

70. According to the Trial Court, after carefully reviewing the proceedings, it made a finding that the proceedings did not disclose any evidence that the Court satisfied itself about the lawfulness of the agreement, let alone the impugned consent agreement. In fact, as pointed out on issue No. 1, no proceedings took place before the Trial Court and no order was made by the Trial Court. Accordingly, the Consent Judgment was properly set aside by the Trial Court.

71. The Trial Court relied on the cases of **Christopher Mtikila v Attorney General of the United Republic of Tanzania and Another**, Application No. 8 of 2007 and **FX Mubuuke v Uganda Electricity**

Board, HCMA No. 98 of 2005 on grounds for review. In considering the requirements of the provisions of Article 35 of the Treaty and Rules 62 and 83 of the Court Rules the Court made reference to the cases of **Edison Kanyabwera v Pastori Tumwebaze,** Supreme Court of Uganda Civil Appeal No. 6 of 2004 where it was held as follows:-

> *"In order for an error to be ground for review, it must be an evident error which does not require any extraneous matter to show its correctness. It must be an error so manifest and clear that no Court would permit such an error to remain on record. The error may be one of fact but it is not limited to matters of fact and also includes an error of law."*

72. We agree with the findings of the Trial Court that the impugned Consent Judgment, having resulted from a clear error should not be permitted to remain on court record and is eligible for review. The Trial Court rightly held that all orders and subsequent execution actions deriving from the impugned Consent Judgment and Decree have no legal basis and are *void ab initio.*

Therefore issue No. 4 is answered in the negative.

ISSUE NO. 5. WHETHER THE TRIAL COURT ERRED AND COMMITTED A PROCEDURAL IRREGULARITY BY EXTENDING THE TIME FOR THE RESPONDENT TO FILE ITS RESPONSE IN REFERENCE NO. 21 OF 2019.

APPELLANT'S CASE

73. Counsel submitted that the Trial Court committed a procedural irregularity by extending time for the Respondent to file its Response. The Respondent had 45 days to file its response which elapsed without

the Respondent filing its response. The Respondent made an oral application to the Court for an extension of time to file a response to the Reference which was granted by the Court. The 30 days period lapsed without filing a Response to the Reference.

74. Counsel further submitted that a number of high level meetings were held and prior to the date of the Consent Judgment Mr. Biong appeared in Court on 31st August 2020 and sought time to consult with the Government to negotiate a settlement. Parties came to an agreement and presented in Court a Compromise Agreement dated 26th November, 2020 which was later contested as obtained through fraud. It was contended that Mr. Biong was fully authorized and signed the Consent Agreement on behalf of the Republic of South Sudan committing to pay the Appellant a sum of USD 49, 398, 473.91 (United States Dollars Forty Nine Million Three Hundred and Ninety Eight Thousand Four Hundred Seventy Three and Cents Ninety One). Further, that he acted as the Public Attorney and Legal Advisor under the National Ministry of Justice of South Sudan, which properly represented the government. In counsel's view, the Respondent did not offer any sufficient reason for failure to file a response within 45 days and neither did they offer sufficient reason for failure to file a Response even when the time was extended.

75. Counsel argued that the Trial Court committed a procedural irregularity when it ordered that the time for filing a Response in Reference No. 21 of 2019 be extended. The Respondent was given unconditional leave to file its response within 30 days from the date of Judgment. Given the fact that there was a compromise agreement, the Trial Court ought not to have extended the time within which to allow the

Respondent to file its response. According to Counsel, the Trial Court had no powers to exercise its discretion under Rules 4 and 5 of the Court Rules. Extension of time could not be granted in view of the existence of the Compromise Agreement.

RESPONDENT'S CASE

76. Counsel argued that the compromise agreement was not properly obtained. The officials of the Ministry of Finance and Planning as well as the officials of the Ministry of Defence and Veteran's Affairs swore affidavits that they were not consulted before the Government allegedly entered into the Consent Judgment. Consequently the entire consent judgment was impeachable and was rightly reviewed and set aside. He urged the Court to dismiss the appeal with costs.

COURT'S ANALYSIS AND DETERMINATION

77. The Court finds this issue in the negative given the conclusion made earlier that the Consent Judgment was invalid. A judgment is valid and of legal effect only if the Court that issues it had competence to decide the matter or other legal authority that is legally binding and enforceable. It is a Judgment which is made in accordance with the law and is not subject to challenge on appeal. However, a Judgment that is made without jurisdiction or due process is not a valid Judgment. Given the nature of the consent Judgment entered into, which was subsequently set aside by the Trial Court for the procedural irregularities preceding it, it was in the interest of justice that the respondent be given a chance to file its response in Reference No. 21 of 2019.

78. Whether or not to extend time is a matter of discretion for the concerned Court, which discretion has to be exercised judiciously, not arbitrarily or capriciously. An Appellate Court is not entitled to interfere with exercise of discretion by the Trial Court merely because it would have exercised the discretion differently if the matter was before it. The Appellate Court is only entitled to interfere with exercise of discretion where the Trial Court has misdirected itself on the law, misapprehended the facts, taken account irrelevant considerations or failed to take into account relevant considerations or if the decision is plainly wrong. The Appellant has not established any of the grounds upon which the exercise of discretion by the Trial Court may be faulted.

79. We also bear in mind that the parties to this appeal will now have the opportunity to have the dispute heard on merit and the Appellant would not be prejudiced in any way. We entirely agree with the findings of the Trial Court given the circumstances surrounding the conclusion and recording of the Consent Judgment.

ISSUE NO.6 - WHAT REMEDIES IF ANY ARE THE PARTIES ENTITLED TO.

APPELLANT'S CASE

80. Counsel for the Appellant revisited the prayers made and stated that the Appeal has merit and urged the Court to allow the Appeal with costs.

RESPONDENT'S CASE

81. On his part, the Counsel for the Respondent submitted that the appeal has no merit and should be dismissed with costs.

COURT'S ANALYSIS AND DETERMINATION

82. The Court having found all the issues against the Appellant finds that the Respondent is entitled to the reliefs claimed. The basis for the Court's decision is that the Consent Judgement has no leg to stand on, in view of the absence of any valid Court Order / and or Judgment, on which the decree is based.

83. In **Margaret Zziwa v. Secretary General of the East African Community,** EACJ Appeal No. 2 of 2017, it was held that the Court is the guardian of the Treaty and is charged with ensuring its application and compliance with it. It was also emphasised that the Court has a duty to afford litigants effective reliefs.

84. Given our findings on Issues Nos. 1, 2, 3, 4, 5 & 6 the Appellant has not succeeded in this Appeal and is therefore not entitled to any of the reliefs sought.

COSTS

85. In relation to costs, we take the following view on the matter. According to Rule 127 (1) of the Rules of the Court, 2019:-

> *"costs in any proceedings follow the event unless the Court shall for good reason otherwise order."*

86. In **Margaret Zziwa v The Secretary-General of EAC** (supra), the Court held that:-

> *"Costs are in the discretion of the Court (and that) in exercising such discretion, the Court bears in mind that costs follow the event and that a successful party may only exceptionally be deprived of costs depending on the particular circumstances of the case such as the conduct of the parties themselves or their legal*

representatives, the nature of the litigants, the nature of the proceedings or the nature of the success."

The question to ask ourselves in this matter is whether in exercising our discretion, we should depart from the general rule in Rule 127 of the Rules. We have seen no reason to do so.

DISPOSITION

87. In view of our findings hereinabove, this Appeal is hereby dismissed in its entirety with costs to the Respondent. Order accordingly.

DATED, DELIVERED and SIGNED at **ARUSHA** on this 27th day of November, 2023.

27-11-2023

.....
Nestor Kayobera
PRESIDENT

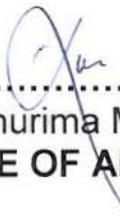
.....
Sauda Mjasiri[1]
VICE PRESIDENT

[1] Justice Sauda Mjasiri retired from the East African Court of Justice, Appellate Division on 19th June 2023. This judgment is signed under Article 25(3) of the Treaty.

.....

Anita Mugeni

JUSTICE OF APPEAL



.....

Kathurima M'Inoti

JUSTICE OF APPEAL

.....

Cheborion Barishaki

JUSTICE OF APPEAL