JUMUIYA YA AFRIKA MASHARIKI

IN THE EAST AFRICAN COURT OF JUSTICE

AT KAMPALA

APPELLATE DIVISION

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

APPLICATION NO. 10 OF 2022
(ARISING FROM REFERENCE NO. 1 OF 2015)

BETWEEN

JOHNSON AKOL OMNYOKOL.....APPLICANT

AND

ATTORNEY GENERAL OF THE REPUBLIC OF UGANDA.....RESPONDENT

[Application for Review and Setting Aside of the Ruling and Order of the Appellate Division (Nestor Kayobera, P., Geoffrey Kiryabwire, VP., Sauda Mjasiri, Anita Mugeni & Kathurima M'Inoti, JJA dated 10th May 2022 arising from Reference No. 1 of 2015]

Certified as a True Copy of the Original
Deputy Registrar
East African Court of Justice
Dated 22/2/2022

RULING OF THE COURT

INTRODUCTION

1. The Applicant's Reference No. 1 of 2015 has been pending for hearing before the First Instance Division ***(The Trial Court)*** for almost eight years because the **Applicant, Johnson Akol Omnyokol**, insists that the Court must include some particular issues for determination. That stand has seen the Applicant before this Division on a purported appeal, an application to review a decision of the Court striking out his appeal, an application to interpret the decision of the Court, and now a further application for review.

2. By his Notice of Motion dated 8th July 2022, the Applicant has moved the Court to review and set aside its ruling dated 10th May 2022 and to include an extra issue for determination by the Trial Court during the hearing and determination of **Reference No. 1 of 2015**, now pending before that Court. The application is purportedly taken out under under **rules 4, 52** and **83(2)** of the **East African Court of Justice Rules of Procedure, 2019 (the Rules).**

3. The Applicant is a citizen of the **Republic of Uganda** resident in Kampala in the said Republic. He is self represented in this application.

4. **The Respondent** is the **Attorney General** of the **Republic of Uganda,** a Partner State to the **Treaty for the Establishment of the East African Community (the Treaty)**. The Respondent is represented in this application by **Ms. Goretti Arinaitwe,** Senior State Attorney and Ms. **Imelda Adong,** Senior State Attorney.

BACKGROUND

5. On 14th June 2017, the Trial Court held a scheduling conference where it settled the issues for determination in **Reference No. 1 of 2015** and set down the Reference for hearing on 5th September 2017.

6. On 5th September 2017, the Applicant orally applied before the Trial Court for inclusion of what he termed "two pertinent issues" among the issues for determination by the Court in the Reference. Those issues were:-

> *"i. Whether it was lawful for the Government of Uganda (Supreme Court) to award the Appellant (Applicant) salary arrears using an obsolete salary scale of the year 1998 when he was dismissed from the service at a salary scale of UGX 247,524/= per month instead of the current salary scale of UGX 1,177,688/= per month thereby violating Articles 158 (1) and 254(2) of the Uganda Constitution hence breaching Uganda's internal laws and the Treaty creating the East African Community in Article 6(d) and Article 7(2) and;*
>
> *ii. Whether it was lawful for the Uganda Government (Supreme Court) to award the Appellant salary or emoluments prospectively up to the year 2024 the year when the Appellant would officially retire thereby illegally and constructively retiring the Appellant from civil service without following the Public Service Commission 45, Article 275(5) of the Uganda Constitution hence breaching Uganda's internal*

laws and the Treaty creating the East African Community in Article 6(d) and Article 7(2) respectively."

7. The Trial Court considered the oral application and finding no merit in the same, dismissed it. The applicant was aggrieved and lodged **Appeal No. 4 of 2017** in this Court against the refusal of the Trial Court to re-open the issues for trial.

8. This Court heard the purported appeal and by a judgment dated 24th August 2018, found that the Applicant had no right of appeal in the circumstances of the case. The Court expressed itself as follows:

> *"The Treaty is so clear that there cannot be any confusion whatsoever between a judgment and a Scheduling Conference nor an order and a Scheduling Conference for the purposes of an appeal."*

9. The Court concluded as follows: -

> *"We have established that in the East African Community jurisprudence an appeal lies to the Appellate Division only to challenge a judgment or an order of the First Instance Division of this Court and not scheduling conference notes or trial transcripts as it is the case in this appeal. For that reason, the Appeal is totally misconceived, and wanting on account of lack of jurisdiction of this division. The Appeal, misconceived as it is, ought to be struck out and there is no need to entertain it on merits. The pending Reference in the Trial Court should continue to its logical conclusion."*

10. Accordingly, the Court struck out the Applicant's Appeal, but directed each party to bear its own costs.

11. Undeterred, the Applicant filed in this Court **Application No. 5 of 2018**, seeking among others, review of the judgment,

reinstatement of the appeal that was struck out and extension of time to extract what he termed a "decree" and adduce new evidence. The Respondent opposed the application vide an affidavit sworn on 16th November 2018.

12. Before the hearing of that Application, by a letter dated 25th September 2019 in which the Registrar of the Court was responding to the Applicant's letter dated 6th September 2018 apparently seeking recusal of the Principal Judge from hearing **Reference No. 1 of 2015**, the Registrar advised the Applicant that the Principal Judge had recused herself from the Reference. The letter concluded as follows:-

> *"The subject reference shall therefore be placed before a different Bench of three judges who will consider whether to take a fresh scheduling, re-hearing of evidence and determination as the case may be."*

13. The Applicant took that letter to be an unequivocal invitation to a scheduling conference for **Reference No. 1 of 2015**. When **Application No. 5 of 2018** came up for hearing in this Court on 12th November 2019, the Court stayed further proceedings in the same to await the outcome of the appearance before the Trial Court pursuant to the Registrar's letter.

14. Next, the parties appeared before the Trial Court when the Applicant took the position that **Reference No. 1 of 2015** should undergo another Scheduling Conference. However, after hearing the parties and considering the Judgment of this Court striking out the Applicant's Appeal and directing the Reference to proceed to

its logical conclusion, as well as the order of this Court staying further proceedings in **Application No. 5 of 2018**, the Trial Court held that there was no order from this Court requiring it to conduct another Scheduling Conference for the Reference. In its succinct ruling, the Court stated:-

> *"There is no directive for this Court to reschedule. Unless there is such directive, the only directive that this Court can implement is to proceed with the hearing where it stopped when you (the Applicant) proffered the appeal, and that will be our order."*

15. The Applicant responded by filing an application before this Court under ***Rule 122*** of the ***Rules*** asking the Court to interpret its Judgment dated 24th August 2018. Of course there was nothing to interpret because the Court struck out the appeal and directed the hearing of the Reference to proceed to its logical conclusion. In effect, having struck out the appeal, the Court did not grant the Applicant's request for inclusion of additional issues for determination.

16. Be that at it may, the Application came up for hearing before this Court on 10th May 2022 when the Applicant was represented by **Mr. Christopher Buyi Wofuba**, Advocate, and the Respondent by **Ms. Christine Khaawa, Ms Imelda Adong** and **Ms. Goretti Arinaitwe**, State Attorneys. Counsel agreed by consent to the inclusion of an additional issue, which they framed as follows:-

> *"Whether the retirement and the award of salary/emoluments prospectively up to 2024 to the Applicant by the Supreme Court of Uganda contravened the Constitution of the Republic of Uganda, the Public Service Commission Regulations and Articles 6(d) and 7(2) of the Treaty."*

17. On that basis, the Court marked the Application dated 30th November 2021 as compromised by consent and further directed as follows:-

> *"The Court hereby adopts the issue as framed and agreed by the parties and further directs that the hearing and determination of the Reference at the First Instance Division shall proceed on the basis of the issues framed earlier together with the additional issue."*

THE APPLICATION FOR REVIEW

18. Instead of pursuing the hearing of the Reference as directed, on 22nd July 2022, the Applicant came back to this Court, now seeking review and setting aside of the ruling and order dated 10th May 2022. As indicated earlier, the application is purportedly taken out under **rules 4, 52** and **83(2)** of the Rules and is supported by the Applicant's supporting affidavit sworn on 7th July 2022, his additional or second affidavit sworn on 4th November 2022, and affidavit in rejoinder sworn on 4th November 2022. The Respondent opposed the Application vide a Replying Affidavit sworn on 24th October 2022 by **Ms. Maureen Ijang,** Senior State Attorney in the Attorney General's Chambers.

THE APPLICANT'S CASE

19. When the application came up for hearing on 10th November 2022, the Applicant took the view that the Application should be scheduled first because the hearing notice indicated that the application was coming up for scheduling and second because

unless it was scheduled, all the issues in it would not be addressed. However, the Court directed that the only issue in the application was whether the Court should review and set aside the ruling of 10th May 2022. Accordingly, the Court ordered the parties to address that one issue.

20. In arguing the application, the Applicant relied on his three affidavits. In all, those affidavits and the annextures thereto, run to close to 260 pages. The affidavits constitute a case study in violation of the rules of drawing affidavits in so far as the purported affidavits do not contain and contain only averments of fact; they are argumentative and contain theories and opinions; they do not disclose what is within the applicant's own knowledge and what he has been informed; they do not disclose the source of the information deposed to which is not within his own knowledge; and, above all, the bulk of the Affidavits and the annextures thereto are utterly irrelevant to an application for review under **Rule 83**. Indeed, if the Court had been properly moved, it would not have hesitated to strike out those irrelevancies.

21. In ***Attorney General of the Republic of Burundi v. Secretary General, East African Community & Another,*** Appeal No. 2 of 2019, this Court held as follows, regarding expunging affidavits:-

> *"The striking out or expurgation of irrelevant or inadmissible evidence is founded on the Court's duty as the master of its own processes to ensure the ends of justice and prevent abuse. Fairness is the hallmark of justice. If irrelevant or inadmissible evidence were to be presented to the Court and*

allowed to remain on record, a grievous wrong would be committed in that evidence without probative value would but sodden with prejudice to the party adversely affected thereby, would be part of the Court's record with the result that the stream of justice would be polluted. The Court prevents such a prospect by exercising an inherent power to reject, strike out, or expunge such evidence from its record either upon objection by a party, or proprio motu."

22. The applicant dwelt at length on the history of the litigation leading to **Reference No 1 of 2015** that he has carried out through all the levels of the Judiciary in Uganda, right up to the Supreme Court , including the demerits of the outcomes. As far as is remotely relevant to the application for review, the Applicant argued that the Court was wrong to include only one instead of the two issues that he wanted included and that he and his counsel consented to the issue and indicated that they were happy with them because their "mind slipped off." He contended that the Court had indicated that it would incorporate both issues, but ended up incorporating only one. He added that the omitted issue on the salary scale was the most important of all the issues and unless it was included he would suffer an injustice because the parties cannot address the issue and the Court cannot determine it.

23. The Applicant kept going back to his appeal which was struck out, contending that the issues were very well framed there and that the Court should just pick the issues from there. Not satisfied with adding only one more issue as he had sought in the application, the Applicant orally asked the Court to add yet a third issue, which he framed thus:-

"Whether it was lawful to (sic) the Supreme Court of Uganda to increase salary and emoluments of the applicant by 25% thereby breaching the principle of separation of powers in the rule of law by usurping the role of the Executive (Permanent Secretary of the Ministry of Public Service working in liaison with the Secretary to the Treasury) as per Articles 154, 155, 156 of the Uganda Constitution, Section (A-a) No.14, 15, (D/a) 8 (B-c) 1, 2, 3, 4, 6, 7, 8 of the Standing Orders as violating the domestic laws of Uganda and the Treaty."

24. Turning specifically to **rule 83** on the grounds for review, namely discovery of new and important matter or evidence, mistake or error apparent on the face of the record, or because an injustice has been occasioned, the applicant submitted that his application was based on all those grounds and unless the ruling was reviewed, he would suffer an injustice because he would be awarded his salary using the old and outdated scale. He concluded by submitting that review of the ruling and addition of the issues he wanted would not occasion the respondent any prejudice.

THE RESPONDENT'S CASE

25. The gist of the Respondent's response in the Replying affidavit of **Ms. Maureen Ijang** is that the application is bad in law, totally lacking merit and an abuse of the process of the Court. Counsel for the Respondent submitted that on 10th May 2022, the parties reached a compromise and agreed to an additional issue to be included among the issues for determination in **Reference No. 1 of 2015** and that the Court adopted that consent and directed the hearing of the Reference before the Trial Court to proceed accordingly.

26. Counsel further summited that the Applicant had not presented any grounds to justify the review of the Ruling of the Court dated 10th May 2022. As regards what constitutes mistake or error apparent on the face of the record for purposes of **rule 83** of the Treaty, counsel relied on ***Nyamogo & Nyamogo Advocates v. Kago*** [2001] 2 EA 173 and submitted that the rule contemplated that the error must be self-evident and is not one that must be found through a long and drawn out process of reasoning. Counsel added that a view of law held by the Court which is a possible view does not constitute an error apparent on the face of the record merely because a different view is possible and that even a wrong view is only a ground of appeal, not a ground for review.

27. Counsel urged that the Applicant's wish to add additional issues for determination did not constitute mistake or error apparent on the face of the record under **rule 83** so as to justify review of the ruling. It was also counsel's further argument that there was no injustice occasioned to the Applicant because the parties had by consent agreed on the issues and that in any case, the issues the Applicant wanted to add were sufficiently covered and could be addressed within the framed issues.

28. In his rejoinder the Applicant submitted that his application was within **rule 83** and in particular because an injustice would be occasioned to him if the issues he wanted were not included. He

contended that in addition to **rule 83,** he had also invoked the Court's inherent powers so as to meet the ends of justice.

THE COURT'S ANALYSIS AND DETERMINATION

29. We have considered the Applicant's Application for review and setting aside the Ruling of the Court dated 10th May 2022. As we have already indicated, the application purports to be brought under **rule 4**, **rule 52** and **rule 83(2)** of the Rules. We propose to first consider each one of those rules to find out whether they permit the kind of application that is now before us.

30. **Rule 4** speaks to the inherent powers of the Court. It provides as follows:-

> *"Inherent Powers of the Court.*
> *Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers to make such orders or give such directions as may be necessary to the ends of justice or to prevent abuse of the process of the Court."*

That rule recognises the reserve powers of the Court, powers that exist by virtual of the Court's character as a Court, for the purpose of doing justice where it is deserved, or to prevent abuse of its process. The question then arises whether **rule 4,** of and by itself, can donate jurisdiction to the Court to entertain an appeal or an application?

31. This Court has held that it is not bound by decisions of municipal courts and tribunals. However, where the municipal courts, particularly the highest levels have pronounced themselves

on a provision of law that is *in pari materia* with a provision of the Treaty or the Rules, the Court will consider such pronouncements as persuasive. In ***Geoffrey Magezi v. National Medical Stores***, Appeal No. 2 of 2016, the Court held as follows:-

> *"The Court once again states that decisions of municipal courts do not have precedential authority here. However, as the Court has stated often before, such decisions may provide inspiration to this Court, particularly where they have been rendered by the highest tribunals in those countries and they are relevant to the matter under consideration by the Court."*

32. In ***Board of Governors, Moi High School, Kabarak v. Malcolm Bell*** [2013] eKLR the Supreme Court of Kenya considered the nature of the inherent powers of a Court, whilst interpreting **rule 5(3)** of the **Supreme Court Rules, 2013,** which is *in pari materia* with **rule 4** of the Rules. The Court observed as follows:-

> *"Such powers (inherent), it is our apprehension, are not substantive powers such as will open up foundations to new lines of litigation – as in the case of jurisdiction, or some source of a cause of action. Rather, inherent powers are endowments to the Court such as will enable it to remain standing, as a constitutional authority, and to ensure its internal mechanisms are functional; it includes such powers as enable the Court to regulate its internal conduct, to safeguard itself against contemptuous or disruptive intrusions from elsewhere, and to ensure that its mode of discharge of duty is conscionable, fair and just.*
>
> *[28] Are such powers capable of donating jurisdiction? It is not possible. For jurisdiction is a critical threshold in the tenability of a cause of action, and must emerge from the Constitution or the statute law, or from a rule created on the basis of statute law.*
>
> *[29] This perception is consistent with the comparative jurisprudence coming to our attention. The South African*

Court of Appeal decision in Oosthuiven v. Road Accident Fund (258/10) [2011] ZASCA 118 has the following passage:

> *'[A] Court's inherent power to regulate its own process is not unlimited. It does not extend to the assumption of jurisdiction which it does not otherwise have.'"(Emphasis added).*

Indeed, in **Attorney General of the Republic of Uganda v. Johnson Akol Omunyokol,** Application No. 10 of 2015, a matter involving the same parties in this Application, this Court held as follows on the inherent powers of the Court:-

> *"It is trite law that the inherent powers of a court may only be invoked where there is no express provision that addresses a matter for adjudication. Inherent powers certainly cannot be exercised in contravention of, conflict with or ignoring express legal provisions."*

(See also **Angella Amudo v. Secretary General, East African Community**, Appeal No, 4 of 2014). We are persuaded by that reasoning.

33. It is therefore trite law that a party is not allowed to invoke the inherent jurisdiction of the Court when there is a substantive provision of the Rules providing for the right of access to the Court. The party must use the substantive provision, not the reserve jurisdiction under **rule 4.** Therefore, **rule 4** is simply not applicable and on its own, cannot confer jurisdiction to bring an application to review the ruling of the Court.

34. **Rule 52** is equally not relevant to applications before this Court. The Rule is found in **Part B** of the Rules, which is titled **"Proceedings in the First Instance Division"**. The applicable

rules in this Court are provided in **Part C** of the Rules, titled **"Proceedings in the Appellate Division"**.

35. Lastly is **rule 83** of the Rules. That rule provides the procedure for the exercise of the review jurisdiction of the Court. However, it must be borne in mind that it is the Treaty itself which confers on the Court the substantive jurisdiction to review its Judgments. Rule 83 is merely a procedural provision. To properly appreciate the review jurisdiction of the Court, the starting point is therefore the Treaty itself, which provides as follows in **Article 35(3)**:-

> *"35(3). An application for review of a judgment may be made to the Court only if it is based upon the discovery of some fact which by its nature might have had a decisive influence on the judgment if it had been known to the Court at the time the judgment was given, but which fact, at that time, was unknown to both the Court and the party making the application, and which could not, with reasonable diligence, have been discovered by that party before the judgment was made, or on account of some mistake, fraud or error on the face of the record or because injustice has been done." (Emphasis added)*

36. On the other hand, **rule 83** is in the following terms:-

> *"83(1) An application for review of a judgment under Article 35 of the Treaty shall be made in accordance with this rule.*
>
> *(2) A party who from discovery of a new and important matter or evidence, which after the exercise of due diligence, was not within its knowledge or could not be produced by it at the time when the judgment was passed or the order made, or on account of some mistake, fraud or error apparent on the face of the record, or because an injustice has been done, desires to obtain review of the judgment **or order,** may apply to the Court for review of the judgment without unreasonable delay.*

(3) The Court shall grant an application for review only where the party making the application under sub-rule (2) proves the allegations relied upon to the satisfaction of the Court.

(4) When an application for review is granted, the Court may re-hear the case or make such other order as it thinks fit.

(5) Subject to the parties' right of appeal, a decision made by the Court on an application for review shall be final."

37. It is worth of note that **Article 35(3)** of the Treaty provides for review of a Judgment rather than review of a Ruling. **Rule 83(2)** equally provided for review of Judgment but goes further to provide that a party who "desires to obtain review of the judgment or **ORDER"**, may apply to the Court. A plain reading of Article 35(1) of the Treaty gives the impression that review is restricted to Judgments only. However, when the Article is read together with **Article 1** of the Treaty, it is clear that the Court may even review a ruling so long as the conditions set in the Treaty and the Rules are satisfied. The relevant part of **Article 1** provides thus:-

" 'Judgment' shall where appropriate include a ruling, an opinion, an order, a directive, or a decree of the Court."

Similarly, **rule 2** of the Rules defines a Judgment to mean:-

" 'Judgment' includes any decision, ruling or order made by the Court."

38. We are accordingly satisfied that the Court (both Divisions) have jurisdiction to review their decisions, including rulings. Indeed in **Independent Medical Legal Unit v. Attorney General of the Republic of Kenya**, Application No. 2 of 2012, the Court held as

follows, when the jurisdiction of the Appellate Court to review its judgments was challenged:

> *"Accordingly there is absolutely no bar for the Appellate Division of this Court, to review* ***its own decisions and judgments****, whether such have been rendered on appeal or pursuant to its own special original jurisdiction (such as in advisory opinions, case stated, arbitration, etc.)" (Emphasis added).*

At page 32 of the Judgment, the Court concluded thus:

> *"The Appellate Division of this Court has express jurisdiction under Art 35(3) and rule 76 (of the East African Court of Justice Rules, 2013) to review* ***its own decisions*** *in appropriate cases." (Emphasis added).*

39. Indeed, there is a precedent in **Christopher Mtikila v Attorney General of the United Republic of Tanzania & Others**, Application No 8 of 2007, where the Court entertained an application for review of its ruling, considered the application on merits but dismissed the same as unmeritorious.

40. It must however be appreciated that the review jurisdiction of the Court is totally different from its appellate jurisdiction. The extent and limit of the Court's review jurisdiction was succinctly explained in the same **Independent Medical Legal Unit v. Attorney General of the Republic of Kenya**, (supra) where the Court held:-

> *"The review jurisdiction of the Court cannot be exercised on the ground that the decision of the court was erroneous on merit. That would be in the province of a Court of Appeal. A review cannot be brought merely for fresh hearing or argument or correction of an erroneous view taken earlier. A review proceeding cannot be equated with the original*

hearing of the case. The purpose of the review jurisdiction is not to provide a back door by which unsuccessful litigants can seek to re-argue their cases."

41. Turning to the merits of the Application, **rule 83(2)** has clear parameters, the satisfaction of which entitles an aggrieved applicant to an order of review. The first is discovery of new and important matter of evidence which was not within the knowledge of the applicant after exercise of due diligence and or could not be produced at the time of the judgment or ruling. The second is mistake, fraud or error on the face of the record. The third and last, is because an injustice has been done. Under **Article 35(3),** those are the **ONLY** grounds of review. **Rule 83(3)** further requires the Court to grant an application for review **ONLY** where the applicant proves the allegations (the grounds) to the satisfaction of the Court.

42. In **Independent Medical Legal Unit v. Attorney General of the Republic of Kenya** (supra), this Court held as follows:-

"To qualify for review...an application needs to fulfil any, a combination of all the conditions specified immediately above. A prospective Applicant for review must adduce discovery of some new set of facts/evidence which was not within the knowledge of the party and the Court at the time of the delivery of judgment, and which the Party or the Court could not have discovered even if they deployed due diligence; or the impugned judgment must evince some mistake, fraud or error that is manifest in the face of the record; or, alternatively, the judgement, as is, must have given rise to a miscarriage of justice."

(See also **Paul John Mhozya v Attorney General of the United Republic of Tanzania**, Application No. 14 of 2018)

43. In regards to the first ground on discovery of new and important evidence not within the knowledge of the applicant even upon exercise of due diligence or incapable of production before ruling, that ground has no application on the facts before us. The ruling in question adopted a consent order by the parties. The applicant, who on the material day was represented by counsel, was aware of the issues he wanted canvassed and he had been aware of them all the way from 15th September 2017 when he first applied orally before the Trial Court for inclusion of two additional issues. He cannot claim not to have been aware of the issues or to have been incapable of producing them at the time of the ruling. Indeed, he rather unwittingly admitted that he was aware of the issues and able to produce them, when he stated that those issues were in the Appeal that was struck out and the Court should just pick them from there.

44. The learned authors of ***Mulla's Commentary on the Indian Civil Procedure Code,*** 15th ed. state as follows at page 2726 regarding the interpretation of a rule of the **Indian Civil Procedure Code** that is in *pari materia* with **rule 83(3)**:-

> *"Applications on this ground must be treated with great caution and as required by r. 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence*

of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made." (Emphasis added).

We are accordingly persuaded that the Applicant has not satisfied this limb of the rule.

45. The other limb is mistake, fraud or error on the face of the record. We agree with the Respondent that a mistake or error on the face of the record does not mean just any error. The alleged error or omission must be self-evident so as not to require an elaborate argument or magnifying glass to see it. Again, in **Independent Medical Legal Unit v. Attorney General of the Republic of Kenya** (supra), the Court explained as follows:-

> *"The error apparent" must be self-evident; not one that has to be detected by a process of reasoning. No error can be said to be an error apparent where one has to "travel beyond the record" to see the correctness of the judgement. It must be an error which strikes on merely looking at the record, and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions."*

46. Just as in the first ground, we do not perceive any error of such character. What is obvious is that after the adoption of the consent order, the applicant had an epiphany of sorts and a change of mind. Such do not constitute an apparent error and are not grounds for review under **rule 83(3)**.

47. The last limb is what the Applicant laid great emphasis on, contending that failure to include the issues he wanted included would occasion him injustice. However, we must reiterate that the parties agreed by consent to add one more issue, which the Court found to sufficiently address the additional matters that the Applicant wanted to raise. Parties cannot just keep adding purported issues for determination, because even after first requesting to add an additional issue, at the hearing of this application the Applicant orally sprung up yet a further issue.

48. Under **rule 4** of the Rules of the Court has a bounden duty to take charge of the conduct of all proceedings and ensure that there is focus on the real issues in dispute. Merely because a party so wishes, he or she cannot just add issues for determination, if those issues are already sufficiently covered. The residual or reserve power under **rule 4** is available to the Court whenever it is necessary to stop vexation, oppression or impediment of timely resolution of disputes.

49. Indeed, under **rule 63(4)** of the Rules, it is the responsibility of the Trial Court to frame the issues for determination for purposes of a scheduling conference where the parties cannot agree. The rule provides as follows:-

"63(4) At the Scheduling Conference, the Court shall review the pleadings and after such examination of the parties as may appear necessary, ascertain upon which material propositions of fact or law the parties are at variance, and

shall thereupon proceed to frame and record the issue on which the decision of the case appears to depend." *(Emphasis added).*

50. We note that in this case, the Trial Court duly framed the issues as required by **rule 63(4)** and having reviewed the issues as framed by the Trial Court together with the additional issue agreed upon by the Parties, this Court was satisfied that they adequately address all the matters in controversy in the Reference. Accordingly, we are not satisfied that beyond the Applicant's say so, he has demonstrated injustice that has been done to him.

51. Ultimately we find that the Applicant has not satisfied the parameters set out in **Article 35(3)** of the Treaty and **rule 83(3)** of the Rules to justify review of the ruling dated 10th May 2022. The Application therefore fails and is dismissed in its entirety.

COSTS

52. By dint of **rule 127**, costs in any proceedings shall follow the event, unless, for ***good reasons*** the Court orders otherwise. The general rule is therefore that a successful party is entitled to costs and the losing party pays those costs, unless the Court is satisfied that there are good grounds to depart from the general rule. The Applicant has presented an Application totally devoid of merit. He has persisted in presentation of such Appeals and Applications which the Court has not hesitated to strike out or dismiss, but has so far spared him having to pay costs. The Court must bear in

mind the conduct of a party in determining whether there are good reasons to depart from the general rule on costs. Taking the history of this litigation into account, the numerous unmeritorious applications and appeals whose combined effect has been to delay the hearing and determination of the Reference before the Trial Court, we do not see any good reason to depart from the rule that costs follow the event. Accordingly, we award costs of this application to the respondent.

DISPOSITION

53. The upshot of our consideration of the Applicant's application is that:-

a. The Application is dismissed in its entirety; and

b. The Applicant shall bear the costs of the Application.

IT IS SO ORDERED

DATED, DELIVERED, AND SIGNED in Arusha on this 22nd day of February 2023.

Certified as a True Copy of the Original
Deputy Registrar
East African Court of Justice
Dated 22/2/2023

22/02/2023

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Nestor Kayobera
PRESIDENT

.....

Sauda Mjasiri
VICE PRESIDENT

.....

Anita Mugeni
JUSTICE OF APPEAL

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Kathurima M'Inoti
JUSTICE OF APPEAL

.....

Barishaki Cheborion
JUSTICE OF APPEAL

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Dated. 22/2/2023