



**IN THE EAST AFRICAN COURT OF JUSTICE  
APPELLATE DIVISION  
AT ARUSHA**

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

**APPEAL NO.1 OF 2022**

**IN THE MATTER OF AN APPLICATION BY AVOCATS SANS  
FRONTIERE TO APPEAR AS *AMICUS CURIAE***

[Appeal from the decision of the Principal Judge (Justice Yohane B. Masara), dated 15<sup>th</sup> December 2022, in Miscellaneous Application No.42 of 2021].

Certified as a True Copy of the Original  
*[Signature]*  
Deputy Registrar  
East African Court of Justice

*[Signature]*

## JUDGMENT OF THE COURT.

### A. INTRODUCTION

1. This Appeal arises from a letter Ref: EACJ/C-4/Vol.I/21 of 15<sup>th</sup> December 2021 from the Principal Judge in response to Application No. 4 of 2021 filed by Avocats Sans Frontière under Rule 110 of the East African Court of Justice Rules of Procedure, 2019.
2. The Appellant, Avocats Sans Frontière (also referred to as ASF), is appealing from the decision rendered by the Principal Judge, Yohane B. Masara, through the said letter in which he disallowed the Appellant's request to be admitted as *amicus curiae* in Reference No.39 of 2020.
1. There is no Respondent in this Appeal. The Appellant was represented by Mr. Frank Tumusiime and Mr. Kevin Bakulumpagi, Advocates.

### B. BACKGROUND

4. The Appellant's case is that on 6<sup>th</sup> May 2021 it applied by notice of motion to appear as *amicus curiae* in Reference No. 39 of 2020 namely, Center for Food and Adequate Living Rights and Three Others Versus the Attorney General of the Republic of Uganda, the Attorney General of the Republic of Tanzania and the Secretary General of the East African Community.
2. That the Appellant be admitted on the grounds that it is an independent, neutral, non-partisan party to the matter with the intention to contribute to jurisprudence and that it possesses legal expertise in the area of natural resource governance, environmental law and transboundary investments, as well as human rights.

3. The Applicant stated that it possesses proven expertise through the people working with it as well as its wide research and involvement in many other proceedings before international tribunals, like the East African Court of Justice and the European Court.
4. In the response to the request by Avocats Sans Frontière to be admitted as *amicus curiae*, the Principal Judge began by questioning the Rule under which the application was brought.
5. The application was filed under the repealed Rule 36(1) of East African Court of Justice Rules of Procedure, 2013 which required a person applying to be admitted as an intervener or *amicus curiae* to do so by filing a notice of motion.
6. However, that requirement was done away with upon the adoption of the new East African Court of Justice Rules of the Court, 2019 which came into force in February 2020.
7. The Principal Judge further cited Rule 60 of the East African Court of Justice Rules of the Court, 2019 which provides that: -
  - (1) *At any stage of the proceedings, the Court may, if it considers it desirable for the proper determination of the case, invite or grant leave to a Partner State, organization or person to submit in writing any observation on any issue that the Court deems appropriate.*
  - (2) *For the purposes of sub-rule (1), leave to appear as amicus curiae may be granted by the President or Principal Judge, as the case may be upon request in writing detailing therein that person's interest in the matter".*
8. That since February 2020, the Application for leave to appear as *amicus curiae* is made by a letter detailing the Applicant's interest in the matter

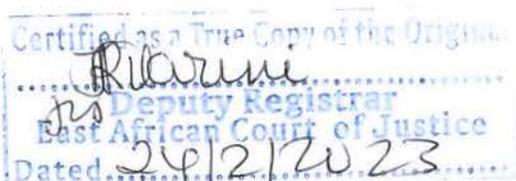


that he wishes to appear in. That therefore, Application No. 4 of 2021 which was filed on 5<sup>th</sup> May 2021, long after the 2019 Rules had come into force was done contrary to the prescribed procedure in the Rules of the Court, 2019.

9. Even though the Applicant made reference to the wrong rules of procedure in his request to appear as *amicus curiae*, the Principal Judge considered it on its merit and rendered a decision.
10. In his response by letter Ref: EACJ/C-4/Vol.I/21 of 15<sup>th</sup> December 2021, the Principal Judge disallowed the request by Avocats Sans Frontière to be admitted as *amicus curiae* in Reference No. 39 of 2020 on the grounds that the Applicant lacked neutrality in the matter presented in the Reference.
11. The Appellant, being dissatisfied with the decision of the Principal Judge, filed a notice of appeal on 15<sup>th</sup> March 2022 and a Memorandum of Appeal on 1<sup>st</sup> April 2022, respectively challenging part of the decision of the Principal Judge.

### **C. APPELLANT'S GROUNDS OF APPEAL**

15. The Appellant, lodged this appeal on the following grounds: –
  - i. That the learned Justice of the First Instance Division erred in law in holding that the participation of the Appellant in analyzing the human rights due diligence system and the activities utilized by Oil and Gas Company Perenco Group in Southern Tunisia affirms the lack of neutrality to matters before the Court in Reference No. 39 of 2020.



- ii. That the learned Justice of the First Instance Division erred in law in holding that the appellant demonstrated sufficient expertise on the matters currently before the court but that it would not be beneficial to the Court and the parties to admit Avocats Sans Frontière as *amicus curiae*.
- iii. That the learned Justice of the First Instance Division erred in law in holding that Reference No. 39 of 2020 touches on matters of public interest and natural resources governance, which align with the objectives of the appellant's work, but held that it is not in the interest of justice to admit Avocats Sans Frontière as *amicus curiae*.
- iv. That the procedure of admitting an *amicus curiae* through an application by a letter to a single judge without an opportunity to be heard is against the principle of good governance, rule of law, accountability, transparency, social justice and equal opportunities and in so holding, the Principal Judge reached a wrong conclusion in law and occasioned a miscarriage of justice.

#### **D. THE SCHEDULING CONFERENCE.**

16. At the Scheduling Conference for the Appeal held on 18<sup>th</sup> August 2022 the Court raised *suo motu* the issue of the jurisdiction of the Appellate Division to entertain the matter. With the assistance of the Court and with the Appellant's consent, the following issues were framed for determination: -

- i. Whether the Appellate Division has jurisdiction to hear this Appeal.
- ii. Whether the Principal Judge erred by declining to grant the Appellant leave to appear as *amicus curiae*.
- iii. Whether the procedure prescribed by rule 60 of the East African Court of Justice Rules of the Court, 2019 for application for leave to appear as *amicus curiae* contravenes Article 6(d) and 7(2) of the Treaty for the Establishment of the East African Community.
- iv. What remedies should the court grant.

#### **E. SUBMISSIONS BY THE APPELLANT.**

##### **ISSUE 1. Whether the Appellate division has jurisdiction to hear this Appeal?**

##### **Appellant's case.**

17. The Appellant's counsel argued that Article 35A of the Treaty for the Establishment of the East African Community provides that a judgment or any order of the First Instance Division may be appealed to the Appellate Division based on points of law; grounds of lack of jurisdiction or procedural irregularity.
12. He referred this Court to the case of **Attorney General of Kenya v. Prof. Anyang' Nyong'o & 10 others, Appeal No. 1 of 2009**, Aug.17, 2010 highlighting that a litigant is afforded an unfettered right of appeal against the judgment of the First Instance Division even where the

decision was made by a single judge. Thus, the Appellant contended that the decision made by the learned Principal Judge amounts to a judgment which is appealable as of right. The Appellant submitted that under Rule 2 of the EACJ Rules of the Court, 2019, a judgment is defined to include any decision, ruling or order made by the Court.

13. He further submitted that Rule 60 of the EACJ Rules of Court, 2019 allows the Principal Judge to determine whether or not to grant leave to an organization to join as *amicus curiae* and that the decision of the First Instance Division dated 15<sup>th</sup> December 2021, attached to the record of appeal, embodies all elements provided under Rule 17(5) of the EACJ Rules of the Court, 2019 and as such is appealable. It was contended that the decision is dated, has the name of the judge who determined it, the advocates for the parties, statement of facts, points for determination, decision and reasons for the decision.
14. The Appellant further based its submission on Rule 86 of the Court Rules 2019, to say that appeals are allowed to clarify points of law, establish whether the court has jurisdiction to entertain the case; and establish whether the First Instance Division committed any procedural irregularity.
15. That its appeal is premised on the matters of law and the Principal Judge misdirected himself on matters of law relating to neutrality of a party in an application to be admitted as *amicus curiae*. That he also misdirected himself on matters regarding the principles of good governance, rule of law, accountability, transparency, social justice, human rights and equal opportunities as envisaged under Articles 6(d)

and 7(2) of the EAC Treaty, 1999, when he dismissed the Appellant's application to be joined in Reference No. 39 of 2020 as *amicus curiae*.

16. The Appellant relying on **Angella Amudo v. Sectary General of EAC, Appeal No.4 of 2014**, at page 28 (July 30, 2015), submitted that a court commits an error of law when it misapprehends the nature, quality, and substance of the evidence, ignores or misapprehends or misapplies a pertinent law or principle of law or draws wrong inferences from the proven facts or decides a case without evidence.
17. That the learned judge of the Trial Court drew wrong inferences from the previous works of the Appellant on oil and gas related activities to determine that it is not neutral but also ignored the principles of law enshrined under Article 6(d) and Article 7(2) of the EAC Treaty thereby coming to an unfair and unjust decision.
18. In the premises, the Appellant submitted that the Appellate Division has jurisdiction to hear and determine the appeal. That the law allows for public participation of members of the East African Community in the matters before Court. That the duty of the Court is to ensure adherence to the law in compliance with the EAC Treaty Article 23(1) and that as such, a decision by a single trial judge should be subjected to re-evaluation by the Appellate Division to determine if the decision is in consonance with the body of the law of the East African Community.
19. The Appellant's Counsel stated that he is aware that Rule 98(10) of the EACJ Rules requires the Appellant to include a copy of the decree/order of the court in the record of appeal, that however his failure to include it is an honest mistake on his part, and prays that this Court does not penalise a *bonafide* litigant. The Court needs to ensure that

access to Court in *amicus curiae* proceedings is well interpreted and allows for public participation in the processes of regional economic community.

20. That the Appellant has applied to the Registrar of the EACJ for a copy of the order and shall make an application to amend the record of appeal to include the order of the Court in the record of appeal.
21. However, during the hearing of the Appeal on 14<sup>th</sup> November 2022, when highlighting his submissions, Counsel for the Appellant abandoned the idea of requesting for the decree or order of the First instance Division; as well as the idea of applying to this Court for leave to amend the record of appeal.

#### **F. COURT'S DETERMINATION.**

##### **ISSUE 1. Whether the Appellate Division has jurisdiction to hear this Appeal?**

29. The issue of jurisdiction of the Appellate Division to hear this Appeal was raised *suo motu* by the Court. For this Court it is judicious to first consider its own jurisdiction before considering the other issues raised by the Appellant.
22. Submitting on this issue, the Appellant contends that the jurisdiction of this Court is provided for under **Article 35A** of the Treaty for the Establishment of the East Africa Community and from the jurisprudence of this Court in **Attorney General of Kenya v. Prof. Anyang' Nyong'o & 10 others, Appeal No. 1 of 2009**, Aug.17, 2010 highlighting that a litigant is afforded an unfettered right of Appeal against the judgement of

Rules) and not by notice of motion as it used to be under the repealed Rules of 2013.

26. From the above analysis, we find that the letter Ref: EACJ/C-4/Vol.I/21 of 15<sup>th</sup> December 2021 of the Principal Judge is not a decision of the First Instance Division as defined in rule 69(1) and therefore is not appealable to this Court as provided for in the Treaty and the Rules of Court.
27. Secondly, is whether a decision of the Principal Judge sitting as single judge under Rule 60 (2) in a matter of *amicus curiae* can amount to a judgment or an order of the First Instance Division and thus be appealable before this Court.
28. In support to his submissions that the decision of the Principal Judge sitting as a single judge is a judgment or an order of First Instance Division thus appealable to the Appellate Division, the Appellant relied particularly on **Prof. Anyang' Nyong'o** (*supra*), where the Court held in general terms that the decision of any single judge filed by a Notice of Motion is appealable.
29. In **Prof. Anyang' Nyong'o** (*supra*), the Court relied on Article 35 of the Treaty and on rule 77 of Rules of the Court regarding the appeal in general. Instead, it should have analyzed the crux of the problem which was the issue of the quorum of the First Instance Division whose decisions are appealable before the Appellate Division and would have found that the remedy on a decision of a single judge was provided for under Rule 59 (3) the equivalent of the current Rule 69(3) of the Rules of the Court, 2019.

30. Therefore, we are of the view that **Prof. Anyang' Nyong'o** (*supra*) is not applicable in the instant appeal whose issue for determination relates to nothing other than the quorum of the First Instance Division.

31. The quorum of the First Instance Division as provided for under Rule 69 (1) and (2) of the Rules of the Court, 2019 is as follows: -

*"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 the 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. Given the above, the application to be admitted as *an amicus curiae* does not fall under matters to be heard by the First Instance Division whose quorum is 3 or 5 judges and does not appear either among interlocutory applications to be determined by a single judge.



33. Although the application for leave to appear as *amicus curiae* is not included in the interlocutory matters that are dealt with and determined by a single judge as provided under Rule 69(2) (supra); it may however, under Rule 60 (2) of the Rules of the Court, 2019, be granted or denied by the President or Principal judge who sits and decides the matter as a single judge.

34. With regard to the right to be heard, it should be further noted that the Rules of the Court of 2019 provide for a remedy in case a party is not satisfied with the decision of a single Judge under rule 69(3) of the Rule of the Court, 2019 which provides that: -

*“A party dissatisfied with a decision of a single Judge may, apply informally to the Judge at the time when the decision is given or by writing to the Registrar within seven (7) days after the decision of the Judge to have it varied, discharged or reversed by a Full Court”.*

35. Counsel for the Appellant conceded to this fact during the hearing of the Appeal on 14<sup>th</sup> November 2022 at page 15 of the proceedings where he stated that: -

*“...this is a case that should have gone before a full Bench in the First Instance Division. I have corrected the wrong impression where we interchangeably by mistake and my apology for that. So ordinarily, this matter should have gone before a full Bench...”.*

36. For the above reasons therefore, the Appellant should have sought remedy to the response from the Principal Judge by having it varied,

discharged or reversed by the full court of the First Instance Division within the prescribed time. Therefore, this Court finds that the Appellate Division has no jurisdiction to hear this appeal and we answer issue No.1 in the negative.

**ISSUES 2 TO 4.**

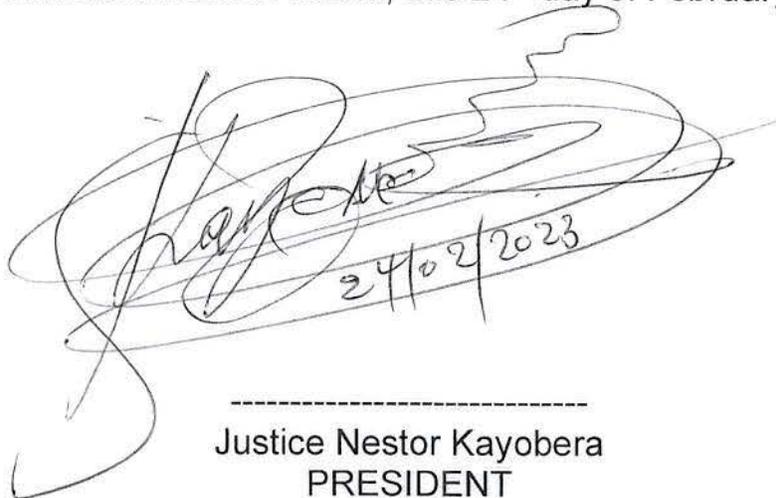
For the reasons set out in this judgment, we find that this Court does not have jurisdiction to hear the appeal brought by Avocats Sans Frontière. The matter should have gone first to the full Court in the First Instance Division. In this case, we do not deem it necessary to delve on other issues raised by the Appellant for the purposes of this decision, since the Court has no jurisdiction to consider the appeal.

**DISPOSITION.**

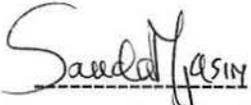
In the final result this Appeal is hereby dismissed for lack of jurisdiction of the Appellate Division with no order to costs.

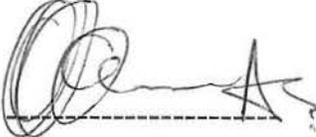
**It is so ordered.**

Dated, Signed and Delivered at Arusha, this 24<sup>th</sup> day of February, 2023.



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Justice Nestor Kayobera  
PRESIDENT

  
Sauda Mjasiri  
VICE PRESIDENT

  
Anita Mugeni  
JUSTICE OF APPEAL

  
Kathurima M'Inoti  
JUSTICE OF APPEAL

  
Cheborion Barishaki  
JUSTICE OF APPEAL

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Deputy Registrar  
East African Court of Justice  
Dated 24/2/2023