



**IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA  
FIRST INSTANCE DIVISION**



*(Coram: Yohane B. Masara, PJ; Charles O. Nyawello, DPJ; Charles Nyachae,  
Richard Muhumuza & Richard Wabwire Wejuli,, JJ)*

**APPLICATION NO.6 OF 2022  
(Arising from Reference No. 8 of 2017)**

**THE CENTRAL BANK OF KENYA ..... APPLICANT**

**VERSUS**

**PONTRILLAS INVESTMENTS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL OF THE  
REPUBLIC OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

**2<sup>ND</sup> DECEMBER 2022**

## REASONED RULING OF THE COURT

### A. INTRODUCTION

1. The instant Application was filed by the Applicant on 16<sup>th</sup> March 2022. The Application was made under Rules 4 and 52 of The East African Court of Justice Rules 2019. The Application arises from Reference No.8 of 2017 where the 1<sup>st</sup> Respondent herein, Pontrillas Investments Limited, filed a Reference against the Applicant herein, The Central Bank of Kenya, and the 2<sup>nd</sup> Respondent herein, The Attorney General of the Republic of Kenya.
2. The instant Application sought an order that the hearing in Reference No.8 of 2017, Pontrillas Investments Limited vs the Central Bank of Kenya and the Attorney General of The Republic of Kenya be bifurcated and for the Court to first consider the jurisdictional and admissability objections raised by the Applicant herein, the 1<sup>st</sup> Respondent in the Reference, in its Further Amended Statement of Reference dated 8<sup>th</sup> November 2018.
3. On 17<sup>th</sup> November 2022, this Court, after hearing the Parties, gave the following ruling:

**“Having listened to the parties in this Application and considering the evidence on record, further taking into consideration the provisions of Articles 9 and 30 of the Treaty regarding institutions of the Community, it is our decision that the Applicant, the 1<sup>st</sup> Respondent, in Reference No.8 of 2017 should not have been sued as it is not an institution of the Community. We therefore**

**discharge the 1<sup>st</sup> Respondent in the main Reference from further participation as a party. We direct that the Reference proceeds against the Attorney General of the Republic of Kenya as the sole Respondent.”**

4. This Ruling is, therefore, the Reasoned Ruling to expound the basis of our said decision rendered on 17<sup>th</sup> November 2022 as stated in the last paragraph.

## **B. REPRESENTATION**

5. At the hearing of the Application, the Applicant was represented by Learned Counsel James Ochieng Oduol and Noreen Kidunduhu. The 1<sup>st</sup> Respondent was represented by Learned Senior Counsel, Prof. Edward Fredrick Ssempebwa and Mr. Ladislaus Rwakafuuzi. The 2<sup>nd</sup> Respondent was represented by Learned Chief State Counsel, Mr. Charles Mutinda and Learned Senior State Counsel, Ernest Kioko.

## **C. BACKGROUND**

6. Following an earlier Preliminary Objection wherein the Applicant herein (the 1<sup>st</sup> Respondent in the Reference) challenged its inclusion as a party in the Reference on account of it being an institution of the Community, this Court on 4<sup>th</sup> July 2019 made the following ruling:

**“We do therefore overrule the present Preliminary Objection; we order that Reference No.8 of 2017 be heard on its merits, and urge the Parties (should they be so inclined) to address the issue of the First**

**Respondent's *locus standi* therein as a question of law and fact''.**

7. The Applicant herein, ostensibly pursuant to the said Order, filed the instant Application, seeking that the Court bifurcate the hearing of the Reference, and first consider the jurisdictional and admissibility objections raised by the Applicant herein, as the 1<sup>st</sup> Respondent in the Reference.
8. The Instant Application was supported by the Affidavit of Kennedy Kaunda Abuga, filed together with the Application on 16<sup>th</sup> March 2022.
9. Belatedly but with the leave of the Court, the 1<sup>st</sup> Respondent, on 15<sup>th</sup> November 2022, filed an Affidavit in Reply deponed by Wambui Kibicho.

**D. COURT'S DETERMINATION**

10. At the hearing of the Application, Prof. Ssempebwa sought to raise what he described as a preliminary point. In his submissions, the instant Application was substantially the same as the Preliminary Objection by the Applicant herein (The 1<sup>st</sup> Respondent in the Reference) that was argued on 21<sup>st</sup> March 2019. That, the Court made a ruling that the Reference proceed to be heard on its merits and that the issue of jurisdiction or *locus standi* would be raised at the said hearing. That therefore, the hearing should not be separated and heard in pieces.
11. On his part, Counsel Ochieng Oduol submitted that the issue that the Court has to decide is whether or not the Applicant, ought to be a Respondent in the Reference. That, the Court, in its ruling of 4<sup>th</sup>



July 2019, did not restrict itself on how the issues would be dealt with at the hearing. That the Application is made with judicial economy in mind, the Court could decide in what manner to declare the decision of the issue on jurisdiction and admissibility, and that in any event, there would be no prejudice caused to the 1<sup>st</sup> Respondent herein.

12. After hearing both parties, the Court was of the view that, it would benefit more if it heard the parties on the substantive Application, wherein the 1<sup>st</sup> Respondent was at liberty to include its objections as part of its response, whereupon the Court could make a joint ruling.

13. In proceeding to argue the Application, Mr. Ochieng Oduol submitted that the 1<sup>st</sup> Respondent in the Reference, has consistently disputed the jurisdiction of the Court over it, and that it is wrongly joined in the proceedings by dint of the express provisions of the Treaty in particular, Article 30(1) that gives the Court jurisdiction where the impugned act, regulation, directive, decision or action is that of a Partner State or an Institution of the Community. That the Court has previously stated in its decisions, that in terms of the Treaty, only Partner States or Institutions of the Community can be legitimate Respondents before the Court.

14. Mr. Ochieng further referred the Court to the Affidavit of Florence Ochago, Principal Legal Officer in the Office of the Counsel to the Community, which Affidavit depones to the fact that the Central Bank of Kenya is not an Institution of the Community.

15. In Mr. Ochieng's submission, the Applicant herein had discharged the burden of demonstrating that it is not an Institution of the

Community and should therefore not have been joined in the proceedings.

16. Mr. Ochieng further reiterated his submission that the instant Application is premised on the need for efficient litigation and procedural efficiency.
17. Prof. Ssempebwa submitted in opposition to the Application. He prayed that the Court does rely on the submissions made in the Preliminary Objection in Reference No.8 of 2017. To this, he added the submission that the 1<sup>st</sup> Respondent herein disputes the contents of the Affidavit of Florence Ochago and in particular paragraph 6 thereof which lists the Institutions of the Community. That those Institutions listed comprise only Institutions established by various Protocols and do not include bodies, departments and services, as contemplated by Article 9 of the Treaty.
18. Upon careful consideration of the respective arguments of the parties herein, the Court gave the Ruling as stated in paragraph 3 herein above.
19. As stated above, the substantive issue of whether the Applicant herein was properly a Respondent in the Reference, was canvassed earlier, by way of a Preliminary Objection. At that time, the Court disallowed the Objection on the basis that the question before it was one of both law and fact, and not a pure question of law, for it to be considered as a Preliminary Objection.
20. We are persuaded by the submission of Counsel for the Applicant that in its Ruling of 4<sup>th</sup> July 2019, the Court left room for the parties to prove the issue in contention (the legitimacy under the Treaty, of the 1<sup>st</sup> Respondent in the Reference being a party over whom the

Court has jurisdiction) at the hearing of the Reference, paying heed to both law and fact.

21. By the Affidavit of Florence Ochago, the Applicant herein introduced evidence in support of its contention that it was not an Institution of the Community in terms of the Treaty.

22. The Institutions of the East African Community, are defined in Article 9(2) and (3) of the Treaty which provide as follows:

**Article 9:**

**2. The institutions of the Community shall be such bodies, departments and services as may be established by the Summit.**

**3. Upon the entry into force of this Treaty, the East African Development Bank established by the Treaty Amending and Re-enacting the Charter of the East African Development Bank, 1980 and the Lake Victoria Fisheries Organisation established by the Convention (Final Act) for the Establishment of the Lake Victoria Fisheries Organisation, 1994 and surviving institutions of the former East African Community shall be deemed to be institutions of the Community and shall be designated and function as such.”**

23. In her Affidavit, referred to above, at paragraph 5, Florence Ochago authoritatively states and lists the current Institutions of the Community, pursuant to the said Article 9 (2) and (3) of the Treaty.



24. At Paragraph 6 of the said Affidavit, Florence Ochago avers that:

**“The Central Bank of Kenya is not an Institution of the East African Community as it was not established in accordance with the procedures for the Establishment of Institutions of the Community under Article 9(2) and (3) of the Treaty.”**

25. In reply to Ms Ochago’s comments, Ms Wambui Kibicho in her Affidavit in Reply, stated at paragraph 7 thereof:

**“I am advised by the same Counsel that under the Treaty the Institutions of the Community are such bodies, departments and services as may be established by the Summit. I am further advised that the Institutions listed in the Affidavit of Florence Ochago are all bodies set up by specific Protocols as services that have been established. I accept and believe such advice.”**

26. With respect, the averment of Ms Kibicho, purporting as it does, to rebut the evidence of Ms Ochago, fails on that score.

27. Firstly, the averment is as to what Ms Kibicho has been advised by Counsel, which can only be a matter of law, not a matter of fact such as would rebut the facts that Ms Ochago avers to in her Affidavit, on behalf of the East African Community.

28. Secondly and in any event, whereas Ms Ochago in her Affidavit on behalf of the East African Community, categorically states at paragraph 6 that the Central Bank of Kenya is not an Institution of the Community, nothing in Ms Kibicho’s Affidavit specifically rebuts



that evidence in any way demonstrating that indeed the Central Bank is such an Institution.

29. Ms Ochago's averments in paragraphs 5 and 6 of her Affidavit therefore, in our considered opinion, stand as uncontroverted evidence.

30. Learned Counsel, Prof. Ssempebwa purported to state from the bar as follows:

**“we are disputing the Statement of Florence Ochago that these are the only Institutions of the Community because they don't include bodies, departments and services and our argument would be that the 1<sup>st</sup> Respondent is part of the services under the Monetary Union processes that are ongoing just like all the Central Banks and therefore qualifies as an Institution of the Community.**

31. With respect, we find this latter argument far-fetched and unconvincing. Article 9(2) of the Treaty is clear. We agree with Counsel Ochieng Oduol that Prof. Ssempebwa would have been obliged to counter Ms Ochago's Affidavit with evidence that shows a decision by the Summit, pursuant to Article 9(2) of the Treaty, establishing the Central Bank of Kenya as an Institution of the Community.

32. In the circumstances, in our reading of Article 9 of the Treaty and considering Ms Ochago's uncontroverted evidence, we are left in no doubt whatsoever, that the Central Bank of Kenya, the Applicant herein, is not an Institution of the Community.

33. In our view, on the question of what is an Institution of the Community in terms of Article 9 of the Treaty and for purposes of Article 30 of the Treaty, the instant matter is on all fours with the case of **Modern Holdings (E.A.) Limited Vs. Kenya Ports Authority, EACJ Reference No.1 of 2008.**

34. To paraphrase the words of the Court in **Modern Holdings** (supra), the Central Bank of Kenya is not among the Institutions of the Community created under Article 9 (2), or a surviving institution of the East African Community appearing on the above list. As such, the Central Bank of Kenya is not one of the Respondents envisaged under Article 30 of the Treaty.

35. This interpretation of the Treaty provisions was reiterated by the Court in **Alcon International Limited vs Standard Chartered Bank of Uganda & 2 Others.**

36. The Court stated:

**“We further note that in Modern Holding (E.A) vs Kenya Ports Authority, the Court stated that the Kenya Ports Authority was created by the Republic of Kenya and not by the Summit and the mere fact that it rendered services to East African Partner States and its citizens did not ipso facto make it an Institution of the Community. We adopt those findings, and therefore, it is our holding that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents were improperly sued in the Reference and all the complaints against them are dismissed.”**

37. Similarly, herein, for the reasons set out above, we find and hold that the 1<sup>st</sup> Respondent in the Reference, the Applicant herein, was improperly sued.

38. The Applicant herein, not being an Institution of the Community in terms of Article 9 of the Treaty, this Court lack jurisdiction *ratione personae* over it.

39. We accordingly dismiss all complaints against the 1<sup>st</sup> Respondent in the Reference, and discharge the said 1<sup>st</sup> Respondent, the Applicant herein from the Reference.

#### **E. CONCLUSION**

40. The 1<sup>st</sup> Respondent in Reference No.8 of 2017, is not a proper party over which this Court can exercise jurisdiction. Accordingly, we discharge the 1<sup>st</sup> Respondent from the Reference and dismiss all claims against it.

41. On costs, Rule 127(1) of this Court's Rules provides that "**Costs in any proceedings shall follow the event unless the Court shall for good reasons otherwise order.**" We see no reason to depart from the Rule, and we thus award costs in the Reference as well as this Application, to the 1<sup>st</sup> Respondent/Applicant.

42. It is so ordered.

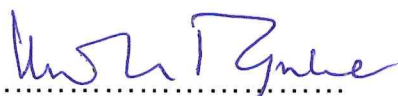
Dated, signed and delivered at Kampala this 2<sup>nd</sup> Day of  
December, 2022.




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Hon. Yohane B. Masara  
**PRINCIPAL JUDGE**



.....  
Hon. Dr Charles O. Nyawello  
**DEPUTY PRINCIPAL JUDGE**



.....  
Hon. Charles A. Nyachae  
**JUDGE**



.....  
Hon. Richard Muhumuza  
**JUDGE**



.....  
Hon. Justice Dr Leonard Gacuko  
**JUDGE**