



THE REPUBLIC OF UGANDA

**THE COURT OF APPEAL OF UGANDA
AT KAMPALA**

(Coram: Buteera; DCJ, Bamugemereire & Mugenyi JJ~~CO~~)

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A

ELECTION PETITION APPEAL NO. 5 OF 2023

1. AGABA GILBERT
2. LOLEM JOSEPHINE
3. NAKITENDE SALAAMA ADELAIDE
4. BWENGYE LAUBEN MUHANGI APPELLANTS

VERSUS

1. ATTORNEY GENERAL
2. HON. AMONG ANNET ANITA
3. ADOLF MWESIGE KASAIJA
4. AKOL ROSE OKULLU
5. NAMARA DENNIS
6. KAKOOZA JAMES
7. ODONGO GEORGE STEPHEN
8. MUSAMALI PAUL MWASA
9. KADOGO VERONICA BABIRYE
10. MUGYENYI MARY MUTAMWEBWA
11. AMONGIN JACQUELINE
12. SIRANDA GERALD BLACKS RESPONDENTS

(Appeal from Ruling of the High Court of Uganda at Kampala (Singiza, Ag. J) in
Election Petition No. 2 of 2022)

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JUDGMENT OF MONICA K. MUGENYI

A. Introduction

1. Mr. Gilbert Agaba, Ms. Josephine Lolem, Ms. Adelaide Salaama Nakitende and Mr. Lauben Muhangi Bwengye ('the Appellants') were candidates in the election of Uganda's representatives to the East African Legislative Assembly (EALA) that took place on 29th September 2022. The Appellants competed against Ms. Rose Akol Okullu, Mr. Dennis Namara, Mr. James Kakooza, Mr. George Stephen Odongo, Mr. Paul Mwasa Musamali, Ms. Veronica Babirye Kadogo, Ms. Mary Mutamwebwa Mugenyi, Ms. Jacqueline Amongin and Mr. Gerald Blacks Siranda ('the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth Respondents' respectively).
2. Upon conclusion of the election, the Speaker of the Ugandan Parliament, Hon. Anita Annet Among ('the Second Respondent') declared the Fourth to Twelfth Respondents as Uganda's duly elected representatives to the EALA, which result was subsequently published by the Clerk to Parliament, Hon. Adolf Mwesige Kasajja ('the Third Respondent') in the Uganda Gazette of 30th September 2022.
3. Dissatisfied with the election result, the Appellants filed Election Petition No. 2 of 2022 at the High Court of Uganda sitting at Kampala ('the Trial Court') contesting the manner in which the election was conducted for purportedly violating the Treaty for the Establishment of the East African Community ('the Treaty'), the East African Legislative Assembly Elections Act, 2011 ('the EALA Elections Act') and the Ugandan Constitution. At the hearing of the petition, the Respondents jointly raised three preliminary objections to the effect that:
 - (a) The trial court did not have jurisdiction to entertain matters that touched on the interpretation of the EAC Treaty.
 - (b) The Second and Third Respondents had been wrongfully sued as parties to an election petition.
 - (c) The Appellants' additional affidavits, which had been filed after the closure of pleadings, were improperly before the court.

4. On 15th March 2023, the trial judge upheld the first preliminary point of law and, adjudging it to dispose of the matter before the court, dismissed the petition with costs; hence the lodging of this Appeal in this Court.
5. On Appeal, the Appellants were represented by Messrs. Jude Byamukama and Phillip Mwesige; Mr. George Kallemera, Commissioner Civil Litigation and Mr. Moses Akena, Senior Legal Officer in the Parliament of Uganda, jointly appeared for the First, Second and Third Respondents; Mr. Alex Kamukama represented the Fourth, Fifth, Seventh, Eighth and Eleventh Respondents; while the Sixth, Ninth and Tenth Respondents were represented by Messrs. Apollo Katumba, Justin Semuyaba (for whom Mr. Kamukama held brief) and Ronald Oine respectively.

B. The Appeal

6. The Appellants challenge the trial court's Ruling on the following grounds:
 - I. *The learned trial Judge erred in law when he held that he had no jurisdiction to determine the Petition before him in its entire form.*
 - II. *The learned trial Judge erred in law and fact when he disregarded binding precedents from the East African Court of Justice and instead held that the petition sought to interpret the treaty.*
 - III. *The learned trial Judge erred in law and fact when he wrongly exercised his discretion to award costs to the Respondents.*
7. They seek the following remedies:
 - (a) *The Appeal be allowed and the ruling and orders of the lower court be set aside.*
 - (b) *A retrial be ordered before a different judge so that Election Petition No. 2 of 2022 is heard on its merits.*
 - (c) *The Respondents meet the costs of this appeal and of the lower court jointly or severally.*
8. The parties' respective conferencing notes were upon their request adopted as their written submissions. The submissions address *Grounds 1 and 2* together,

followed by the separate consideration of *Ground 3* of the Appeal. For parity, I propose to adopt the same approach.

C. Determination

9. Under *Grounds 1* and *2* of the Appeal, the Appellants fault the trial court for declining jurisdiction over *Election Petition No. 2 of 2022* on the mistaken premise that paragraphs 4 and 6 of the Petition raise issues of Treaty interpretation. The trial judge is faulted for reverting to the principle of subsidiarity without regard for the substance of the Petition and the reliefs sought thereunder. It is argued that the Petition questions the veracity of the impugned EALA election and seeks reliefs that could only be enforced by a national court exercising its mandate under Article 52 of the Treaty and section 6(1) of the EALA Elections Act.

10. To demonstrate the relevance of the reliefs to the question of jurisdiction, Counsel for the Appellants cite the case of **Christopher Mtikila v Attorney General of Tanzania & Other (2005 – 2011) EACJLR 62** where, faced with a challenge to the election of two EALA representatives from the United Republic of Tanzania, the East African Court of Justice (EACJ) declined jurisdiction to entertain a matter that sought to annul elections held by the Tanzanian National Assembly. Counsel further draw an analogy between the EACJ's position in that case vis-à-vis the stance adopted in **Jude Mbabali v Edward Sekandi (2014) UGCC 15**, where Uganda's Constitutional Court faulted the petitioner in that case for filing a petition that required it to make factual findings that were best interrogated under the Parliamentary Elections Act. It was observed (per Mwangusya, JCC as he then was):

After making findings on the facts and the law the court is required to make findings on remedies including the nullification of the elections and damages. none of the above raises any matter for constitutional interpretation because making a finding of fact, ... it would follow from the finding on the facts that whoever has infringed on the law and the Constitution would suffer the consequences including but not limited to the nullification of the elections. The consequences are well covered in the Parliamentary Elections Act and the Constitution. So, the question is what would be there for this Court to interpret? None in my view.

11. In the same case, distinguishing between the Constitutional Court's interpretative mandate and the enforcement of constitutional provisions by any other court, it was further observed (per Kasule, JCC):

A competent court determining a cause is at liberty to find and pronounce itself as to whether or not, in its finding, a particular set of facts of the case are contrary to or are in compliance with the Constitution. The said court is just applying the Constitution to the facts of the case. likewise, one seeking enforcement of a right or freedom guaranteed under the Constitution by claiming redress for its infringement may apply to any other competent court for such redress under Article 50 of the Constitution. such a one does not necessarily apply to the constitutional court because to get such redress there is no need for the Constitutional Court to first interpret the Constitution. all that is needed is the court adjudicating the matter to apply the Constitution to the proved set of facts and/ or law and proceed to grant or not grant the redress sought.

12. It is thus opined that insofar as the matters that were before the trial court in this case similarly necessitated a factual finding as to whether the impugned EALA elections had been conducted in accordance with the law and established electoral principles, they ought to have been entertained by the court.

13. The trial court is further faulted for declining to determine those issues in the petition that did fall within its jurisdiction and disregarding those issues that did not fall within its mandate, as was purportedly done by the EACJ in **Prof. Peter Anyang' Nyong'o & Others v Attorney General of Kenya & Others (2005 – 2011) EACJLR 16; Abdu Katuntu v Attorney General of Uganda (2012 – 2015) EACJLR 58** and **Among A Anita v Attorney General of Uganda & Others (2012 – 2015) EACJLR 79**. Given the trial judge's disinclination to adopt the same approach, he is alleged to have flouted the doctrine of precedent that obliges a lower court to abide a legal principle established by a superior court. This, in Counsel's view, was a material error in law and fact.

14. Counsel for the Appellants maintain that, contrary to the trial judge's findings, paragraphs 4 and 6 of the Petition do not raise any questions for Treaty interpretation, but simply call for the application of Articles 6(d) and 7(2) of the Treaty to the allegations raised in the Petition in accordance with the trial court's mandate under Article 52 of the Treaty and section 6 of the EALA Elections Act.

In their estimation, the matters before the trial court were capable of determination without need for any interpretation by the EACJ.

15. Additionally, the trial court drew criticism for disregarding the duty upon national courts to observe and apply the international norms and standards stipulated in the cited Treaty provisions, as well as the recognition by Uganda of the rights and remedies available thereunder on account of its domestication of the Treaty under section 3 of the East African Community Act, 2002 ('the EAC Act'). In Counsel's view, section 3(2) of the EAC Act mandates Ugandan courts to deal with matters pertaining to the obligations, remedies and procedures available under the Treaty.
16. With specific regard to paragraph 4, it is argued that the Treaty was only one of the laws that the impugned election was averred to have contravened therefore the trial court ought to have considered the Appellants' claims within the context of the other laws cited. Reference in that regard is made to the decision in **Ariko Johnny De West v Omara Yuventine & Another (2022) UGCA 195** where this Court faulted the trial court for dismissing a petition for having been brought under a wrong law without regard either for the substance of the petition or the other legal provisions cited therein.
17. In any event, it is the Appellants' contention that even if perchance paragraphs 4 and 6 of the Petition did raise matters for Treaty interpretation; rather than dismiss the Petition, the trial judge should have sought such an interpretation from the EACJ under Article 34 of the Treaty.
18. In relation to *Ground 3* of the Appeal, Counsel are of the view that the Petition warranted a departure from the general rule that costs follow the event given the approach supposedly adopted by Ugandan courts towards the award of costs in electoral disputes. They cite Halsbury's Laws of England, Civil Procedure, Vol. 11 (2009), 5th Edition, paras. 870 - 871 in support of proposition that the losing party in a litigation that a court deemed 'necessary' should not be condemned in costs. This Court purportedly adopted a similar stance in **Owebeyi James v Electoral Commission & Another, Election Petition Appeal No. 72 of 2021**, where the award of costs against the losing party was reversed on appeal; and in **Akuguzibwe Lawrence v Muhumuza David & Others (2017) UGCA 86**, where

election litigation was opined to be a matter of great national importance that warranted the award of costs in such a manner as would not deter aggrieved parties from seeking court redress. It is thus proposed that, as the first petition in Uganda to challenge the election of the country's EALA representatives, the matter before the trial court was a deserving case for non-condemnation of the losing party in costs. This Court is therefore urged to set aside the trial court's award of costs against the Appellants.

19. Conversely, in response to *Grounds 1 and 2* of the Appeal, the Respondents contend that the averments in paragraphs 4 and 6 of the Petition, as well as paragraph 5 of the three supporting affidavits, depict a challenge to the impugned election that is clearly grounded in Articles 6(d) and 7(2) of the Treaty, and section 6(1) of the EALA Elections Act. It is accordingly proposed that the Appellants bore the onus of proof that the remedies sought in respect of the alleged electoral irregularities could be granted without need for the interpretation of the Treaty or the EALA Elections Act. In their view, such interpretation is necessary to ascertain the legally prescribed conduct of EALA elections and is a preserve of the EACJ.
20. Counsel for the Respondents support the trial judge's decision not to address such of the allegations in the petition as fell within the trial court's mandate as, in their estimation, jurisdiction cannot be exercised in piecemeal. Seeking to distinguish the decision in **Christopher Mtikila v Attorney General of Tanzania & Other** (supra) from the facts of the present case, it is argued that whereas the trial court is clothed with jurisdiction to determine election petitions, it does not have the jurisdiction to determine a petition that is rooted in alleged Treaty and Community Law violations. It is opined that the determination of such a petition would necessitate the interpretation of the invoked Treaty provisions, the laws that regulate the conduct of EALA elections and applicable Parliamentary Rules of Procedure; all of which goes beyond the jurisdiction of the High Court of Uganda. Reference in that regard is made to **Jude Mbabali v Edward Sekandi** (supra), **Testimony Motors Ltd v Commissioner Customs, Uganda Revenue Authority (2011) UGCommC 47** and Articles 23, 27 and 30 of the Treaty as applied in **James Alfred Koroso v Attorney General of Kenya & Another, EACJ Ref. No. 12 of 2014**.

21. Citing the decision of the EACJ in **East African Law Society & Others v Attorney General of Kenya & Others (2005 – 2011) EACJLR 68**, it is argued that the trial judge did not violate the doctrine of precedent as alleged by the Appellants given that under Article 33 of the Treaty the EACJ's decisions only form binding precedent on matters to do with Treaty interpretation. The decisions in **African Network for Animal Welfare v Attorney General of the United Republic of Tanzania (2005 – 2011) EACJLR 242** and **Hassan Basajjabalaba & Another v Attorney General of Uganda, EACJ Ref. No. 8 of 2018** are cited in support of the view that the trial judge correctly declined jurisdiction in deference to the principle of harmony and certainty espoused in **East African Law Society & Others v Attorney General of Kenya & Others** (supra).
22. In a bid to distinguish the circumstances that obtained in **Ariko Johnny De West v Omara Yuventine & Another** (supra) from the facts of the present Appeal, it is argued that the question of jurisdiction did not arise in that case, the only bone of contention therein having been the citing of a wrong procedural law, which arguably was a mere technicality. In this case, it is opined, the Appellants' pleadings did raise questions of jurisdiction.
23. It is further proposed that national courts have the discretionary power under Article 34 of the Treaty to make preliminary rulings on Treaty interpretation or application, but such power is only exercisable where a court has jurisdiction over the matter before it. Curiously, it is then opined that a national court would have the discretion to determine whether or not it requires the EACJ's interpretation of a Treaty provision in its determination of a matter before it.
24. In response to *Ground 3* of the Appeal, on the other hand, Counsel cite section 27(1) of the Civil Procedure Act, Cap. 71 (CPA) and **Kiska Ltd v Augelias (1969) EA 6** for the proposition that costs are awarded at the discretion of a trial court, which discretion will not normally be interfered with by an appellate court unless the Appellant demonstrates that the trial court wrongly exercised its discretion. In their view, the circumstances of the present Appeal present no valid reasons for a departure from the general rule in section 27(2) of the CPA that costs should follow the event, its being an election dispute *pers se* being no reason for the denial of

costs. This Court is therefore urged not to interfere with the trial judge's decision to award costs to the Respondents.

25. By way of Rejoinder, Counsel for the Appellants deny referring the present dispute to the EACJ, arguing that the case of **Phiona Rwandarugali v Attorney General & Another, EACJ Ref. No. 58 of 2022** that was cited by the Respondents in that regard has no bearing whatsoever on this Appeal. Be that as it may, they reiterate the view that the trial court does have jurisdiction to determine the matters raised in paragraphs 4 and 6 of the Petition insofar as they call for the application (as opposed to the interpretation) of Articles 6(d) and 7(2) of the Treaty. In their view, the democratic principles referred to in those Treaty provisions are enforceable under section 3 of the EAC Act.

26. It is argued that insofar as the case of **Attorney General of Uganda v Tom Kyahurwenda, EACJ Case Stated No. 1 of 2014** adjudged Articles 6 and 7 of the Treaty to be justiciable before national courts, it settled the question of the trial court's jurisdiction to entertain the matters raised in the Petition in issue presently. Counsel contest the Respondent's contention that the reference of a matter to the EACJ under Article 34 of the Treaty is discretionary, arguing that **Attorney General of Uganda v Tom Kyahurwenda** (supra) adjudged it to be mandatory. Finally, they maintain that the trial judge's award of costs against the Appellants was made on an erroneous premise, and invite this Court to set aside that order.

27. I have carefully considered the parties' rival submissions in this Appeal, as well as the pleadings on record. It becomes apparent that this Appeal touches on purely procedural issues, without delving into the merits of the election petition that was before the trial court. These procedural issues can be summed up in the broad question as to the remit of EAC partner states' domestic courts on Treaty interpretation and application in the face of the EACJ's jurisdiction as succinctly encapsulated in the Treaty.

28. The trial judge quite correctly acknowledges in his Ruling that Article 52 of the Treaty expressly confers jurisdiction upon national courts to adjudicate election disputes in respect of the EALA. He however adjudges the interpretation of the

Treaty by domestic courts to be risky and unwise, before discharging himself as follows on the trial court's jurisdiction in this matter:

It is the decision of this court that it was the intention of the partner states that only the EACJ should be clothed with the mandate to interpret the treaty because 'institutionally speaking' it is the organ most suited to do so. As such, any petition built on the idea that this court may in fact exercise some 'plenary' powers to interpret the treaty must fail. Given the diversity of legal systems under the treaty, it is also wise that national courts should be restrained from encroaching on a mandate that they cannot efficiently exercise. Since the petition in its current form seeks to interpret the treaty, it is dismissed with costs to the respondents for want of jurisdiction due to the reasons stated in this ruling.

29. I am constrained to state from the onset that it is now well settled law that the interpretation of the EAC Treaty is the exclusive preserve of the EACJ. This position is spelt out in the Treaty itself, as well as applicable case law. Articles 27(1) and 30(1) of the Treaty are instructive on the jurisdiction of the EACJ. For ease of reference, they are reproduced below.

Article 27(1)

The Court shall initially have jurisdiction over the interpretation and application of this Treaty:

Article 30(1)

Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.

30. Article 27(1) categorically delineates the interpretation and application of the Treaty as the EACJ's exclusive mandate, while Article 30(1) provides the context within which such jurisdiction would be exercised. I return to the question of Treaty application later in this judgment but it will suffice to state here that the EACJ has addressed the question of its jurisdiction in numerous decided cases, and has severally found its jurisdiction to have been sufficiently established where it is averred on the face of the pleadings that the matter complained of constitutes an

infringement of the Treaty. See Hon. Sitenda Sebalu v The Secretary General, East African Community & Others (2005 – 2011) EACJLR 160 and Prof. Peter Anyang' Nyong'o & 10 Others v The Attorney General of the Republic of Kenya & 2 Others (supra). Additionally, in the latter case of Attorney General of Uganda v Tom Kyahurwenda (supra), the court categorically reserved to itself the exclusive mandate of Treaty interpretation, observing that **'it was the intent and purpose of the framers of the Treaty to grant this Court (the EACJ) the exclusive jurisdiction to entertain matters concerning the interpretation of the Treaty.'**¹

31. That notwithstanding, however, the proviso to Article 27(1) and the provisions of Article 30(3) of the Treaty explicitly exclude from the regional court's jurisdiction such matters as have been expressly conferred or reserved by the Treaty to the domain of organs or institutions of the EAC partner states. Those Treaty provisions are reproduced below.

Article 27(1)

.....

Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.

Article 30(3)

The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State.

32. In this case it has been argued, quite validly in my view, that the Treaty spells out such a reservation under Article 52(1), where all questions pertaining to the election of a partner state's EALA representatives are reserved to the applicable national institution. Article 52(1) of the Treaty is in *pari materia* with the section 6(1) of the EALA Elections Act, and reads as follows:

¹ See Preliminary Ruling in Attorney General of Uganda v Tom Kyahurwenda, Case Stated No. 1 of 2014, para. 50.

Any question that may arise whether any person is an elected member of the Assembly or whether any seat on the Assembly is vacant shall be determined by the institution of the Partner State that determines questions of the election of members of the National Assembly responsible for the election in question. (*my emphasis*)

33. In its construction of that Treaty provision, the EACJ has unequivocally pronounced itself on the delimits of its jurisdiction in election petitions arising from the election of EALA country representatives, restricting itself to only claims that require Treaty interpretation. Thus, in **Prof. Peter Anyang' Nyong'o & 10 Others v The Attorney General of the Republic of Kenya & 2 Others** (supra) and **Christopher Mtikila v Attorney General of Tanzania & Other** (supra) the regional court declined jurisdiction over disputes that solely contest a declared EALA membership and raise no questions for Treaty interpretation.

34. By way of contextual background, the Applicant in the **Mtikila** case had sought the nullification of the EALA election in respect of representatives from the United Republic of Tanzania for having yielded eleven rather than the requisite nine representatives. Citing with approval its earlier decision in **Prof. Peter Anyang' Nyong'o & 10 Others v The Attorney General of the Republic of Kenya & 2 Others** (supra), the EACJ held:

The Court (in the *Anyang' Nyong'o* case) said that if it was only called upon to substitute names, that is, act as if there was an election petition, the Court would have no jurisdiction. That would be the domain of the Kenyan courts. That is also the case with regard to this reference: the declaration that two persons were improperly elected and that they are not Members of the Legislative Assembly is the domain of the High Court of Tanzania and not this Court. We, therefore, hold that this Court has no jurisdiction to entertain this application which seeks to annul the elections held by the National assembly.

35. In the **Prof. Peter Anyang' Nyong'o** case, specifically addressing the question of jurisdiction under Article 52(1) of the Treaty, the EACJ had rendered itself as follows:

We note that the claimants make no secret of the fact that they were prompted to bring this reference by what they claim to be unlawful substitution of the 3rd interveners for

the 3rd, 9th, 10th and 11th complainants as the NARC nominees and the resultant deeming of the former as elected members of the Assembly. Those circumstances *per se* raise the question whether the 3rd interveners are elected members of the Assembly and the question is squarely within the parameters of Article 52(1), which provides –

Any question that may arise whether any person is an elected member of the Assembly or whether any seat on the Assembly is vacant shall be determined by the institution of the Partner State that determines questions of the election of members of the National Assembly responsible for the election in question.

Needless to say, this provision also creates a cause of action under the Treaty. However, it is the one cause of action under the Treaty over which this Court has no jurisdiction. ... It is, at most, a dispute that should have been referred to the High Court of Kenya under Article 52. (my emphasis)

36. The import of the foregoing decisions is that the regional court's jurisdiction as outlined in Articles 27(1) and 30(1) of the Treaty would not extend to electoral disputes in respect of partner states' EALA representatives that, without raising any question for Treaty interpretation, not only contest the conduct of the election but also seek reliefs touching on the respective partner states' EALA representation. Such electoral disputes are exclusively reserved to the domain of partner states' domestic courts within the precincts of the proviso to Article 27(1), Article 30(3) and Article 52(1) of the Treaty.

37. With regard to the circumstances of the Appeal before us, therefore, it becomes abundantly clear that the High Court of Uganda would be the national organ that is envisaged under Article 52(1) of the Treaty to determine electoral contestations arising from an election of Uganda's representatives to EALA. The High Court's jurisdiction in that regard is derived from section 60(1) of the Parliamentary Elections Act, 2005 as construed against the backdrop of Article 52(1) of the Treaty. To the extent that Article 52(1) of the Treaty defrays the determination of questions arising from the election of partner states' EALA representatives to the domestic organ that determines similar questions in respect of the election of Members of the Ugandan Parliament, the High Court of Uganda that is under section 60 of the Parliamentary Elections Act designated as the court before which

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election petitions arising from parliamentary elections in Uganda may be lodged, would assume that mantle of jurisdiction.

38. In the instant case, however, the trial court declined to exercise this jurisdiction on the premise that the Petition had invoked Treaty provisions the interpretation of which lay with the EACJ. The trial judge opted to address the issue in accordance with what he termed as the principle of subsidiarity. With respect, I am unable to abide that position for the reasons I shall endeavor to clarify forthwith.

39. It has been held earlier in this judgment that if the dispute that was before the trial court was solely a matter for Treaty interpretation the trial court would have correctly declined jurisdiction as this is the exclusive preserve of the EACJ. On the other hand, if it was purely an electoral dispute the trial court was clothed with apposite jurisdiction under Article 52(1) of the Treaty and section 60(1) of Uganda's Parliamentary Elections Act and would therefore have wrongly declined to determine the petition. As can be deduced from the Petition itself, the allegations raised therein encompass aspects of an electoral dispute *per se*, as well as questions for Treaty interpretation. This is demonstrated in paragraphs 4 and 6 of the Petition which, for ease of reference, are reproduced below:

(1)

(2)

(3)

(4) *Your Petitioners aver that the said election was not conducted in accordance with the Treaty for the Establishment of the East African Community, the East African Legislative Assembly Elections Act and the Ugandan Constitution inter alia. The said election grossly offended and made a farce of the democratic principles. The 1st Respondent failed in his duty to advise the institution of Parliament to follow the Treaty.*

(5)

(6) *Your Petitioners further aver that the election, as conducted, offended all democratic principles laid down in the Treaty for the Establishment of the East African Community, especially **Articles 6(d) and 7(2)** as well as **Section 6(1)** of the East African Legislative Assembly Elections Act. In particular, the following acts and omissions, inter alia, offend the Treaty and the Act;*

- (i) *The simultaneous conduct of polling and campaigning thereby denying candidates a fair opportunity to canvass for support from the electorate which consists entirely of Members of Parliament.*
- (ii) *The usage of a ballot paper whose order of names of candidates was entirely arbitrary, did not follow alphabetical order or any other clear order. Instead, the names of the 4th to 12th Respondents followed each other on the ballot paper in confirmation of the fact that they were a predetermined choice and the entire voting exercise was meaningless.*
- (iii) *The failure to conduct voting in plenary and resort to a secretive polling station that was never disclosed to candidates and that denied them opportunity to inspect the beginning and the end of the polling exercise.*
- (iv) *The failure to clearly indicate to candidates the commencement time for voting and closure of the period.*
- (v) *The blocking of some Members of Parliament who were lined up from voting on spurious grounds that polls had closed.*
- (vi) *The participation in voting by some ex-officio Members of Parliament who are barred by law from participating in the exercise.*
- (vii) *The 2nd Respondent, who was returning officer for the exercise and required to be impartial, directly campaigned for some candidates while demonstrating bias and prejudice against the 1st Petitioner.*

40. Whereas paragraph 4 and 6 of the Petition allude to the violation of Articles 6(d) and 7(2) of the Treaty, the latter paragraph substantiating the broad allegations in the former; paragraph 6 and indeed the rest of the Petition depict an electoral dispute that is grounded in supposed electoral irregularities and illegalities, and in respect of which the Appellant seeks the following reliefs:

- (a) *An order be issued annulling the result of the election conducted on 29th September 2022 for Uganda's representatives to the East African Legislative Assembly.*
- (b) *A declaration that the 4th to 12th Respondents were not validly elected as Uganda's representatives to the East African Legislative Assembly.*
- (c) *An order be issued annulling the election of the 4th to 12th Respondents as Ugandan Representatives to the East African Legislative Assembly.*
- (d) *An order for the conduct of fresh elections for Ugandan representatives to the East African Legislative Assembly be issued.*
- (e) *An order that the 2nd and 3rd Respondents jointly and/ or severally pay the costs of this petition.*

41. On the face of the pleadings, therefore, the Petition presents both a question for Treaty interpretation, as well as a substantive challenge to the election of Uganda's EALA representatives. How then would such a dispute be addressed?
42. First and foremost, as has been elaborated earlier in this judgment, given the succinct provisions of Article 52(1) of the Treaty as aptly construed in **Prof. Peter Anyang' Nyong'o & 10 Others v The Attorney General of the Republic of Kenya & 2 Others** (supra) and **Christopher Mtikila v Attorney General of Tanzania & Other** (supra), the adjudication of the electoral dispute falls squarely within the jurisdiction of the High Court of Uganda. With respect, that is a mantle that the High Court cannot and should not shy away from.
43. We were referred to the case of **Prof. Peter Anyang' Nyong'o & 10 Others v The Attorney General of the Republic of Kenya & 2 Others** (supra) in support of the proposition that the trial court should have addressed the electoral dispute for which it had jurisdiction and ignored the Treaty interpretation aspect of the Petition in respect of which it was devoid of jurisdiction. In that case, although the regional court was faced with a challenge to Kenya's EALA representatives, it only entertained the aspect of the case that sought the determination of the impugned election's compliance with Article 50(1) of the Treaty, as that was well within its remit.
44. With tremendous respect, however, I am disinclined to follow that approach in this case given the succinct provisions of Article 34 of the Treaty. It reads as follows:
- Where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions of this Treaty ... that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question.**
45. That Treaty provision has been conclusively construed by the EACJ to address situations where a domestic court is faced with a case the determination of which partially depends on the interpretation of some provisions of the Treaty. Indeed, the application of the preliminary reference mechanism that ensues under Article 34 of the Treaty is most aptly demonstrated in the preliminary ruling that was

delivered by the EACJ in Attorney General of Uganda v Tom Kyahurwenda (supra). The regional court enjoined domestic courts to refer to it any question for Treaty interpretation where **'the national court or tribunal considers that a ruling on the question is necessary to enable it to make a judgment.'**² It was emphatic on the resultant preliminary ruling from the EACJ being **'binding on the national court or tribunal which has sought a preliminary ruling, (as well as) binding erga omnes (towards all) in the sense that it is binding on all national courts and tribunals in all Partner States of the Community.'**³

46. The foregoing dictum resonates with the over-arching principle that the EACJ enjoys exclusive Treaty interpretation jurisdiction, and is in tandem with the rationale underlying the preliminary reference mechanism which was appositely restated in the same Tom Kyahurwenda decision as follows:

It is of utmost importance to understand the significance of the preliminary ruling procedure. **The procedure is the keystone of the arch that ensures that the Treaty retains its Community character and is interpreted and applied uniformly with the objective of its provisions having the same effect in similar matters in all the Partner States of the East African Community.** In the absence of this procedure, it is possible that legions of interpretation of the same Treaty would emerge drifting hither and thither, aiming at nothing. This would at best create a state of confusion and uncertainty in the interpretation and application of the Treaty; and at worst, ignite an uncontrolled crisis which would destabilise the integration process. The situation could even be more disastrous were national courts and tribunals permitted to declare Community Acts, regulations, directives and actions invalid **in the absence of a ruling to that effect by the East African Court of Justice.**⁴ (*my emphasis*)

47. I am constrained to observe here that the EACJ's undoubtedly pivotal observation above would not necessarily oblige domestic courts to refer to the regional court each and every question raised before them that touches on Treaty interpretation and/ or application. The preliminary ruling in the Tom Kyahurwenda case requires

² See Preliminary Ruling in Attorney General of Uganda v Tom Kyahurwenda, Case Stated No. 1 of 2014, para. 56.

³ See Preliminary Ruling in Attorney General of Uganda v Tom Kyahurwenda, Case Stated No. 1 of 2014, para. 58.

⁴ Ibid, at para. 48.

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them to make a determination as to whether ‘**a ruling on the question is necessary to enable it to make a judgment,**’ in which case a question on the issue for interpretation would be referred to the EACJ. The Tom Kyahurwenda ruling nonetheless negates the need for such a reference where the EACJ ‘**has already clarified the point of law in previous judgments (Acte éclair).**’⁵

48. Consequently, where the EACJ has clearly, unequivocally and unambiguously pronounced itself on an issue there would be no need to seek a preliminary ruling on the same; rather, domestic courts would be bound to abide the regional court’s interpretation on that issue. This, for instance, is manifestly demonstrated in this judgment where the EACJ’s interpretation of Article 52(1) of the Treaty has been adopted as the binding position on the question of jurisdiction over election disputes in respect of partner states’ EALA representatives.

49. However, where there are conflicting decisions or no pronouncement whatsoever from the regional court on an issue, it is arguable that there would be no clear interpretation on such an issue and domestic courts would be obliged to seek interpretation on it by recourse to the preliminary reference mechanism articulated in Article 34 of the Treaty. This could very well give the regional court the opportunity to harmonize any discordant interpretations that may have ensued before it, particularly given that preliminary rulings are the exclusive preserve of its Appellate Division.

50. Returning to the specific dispute that is before us presently, the trial judge having formed the view that the petition before him involved questions of Treaty interpretation, it would have been incumbent upon him to ascertain whether or not the EACJ has previously pronounced itself on the ‘*principles of democracy*’ that were invoked in the Petition before it under Articles 6(d) and 7(2) of the Treaty. If no such interpretation had previously been rendered by the regional court, the trial judge would have had to make a determination as to whether a ruling thereon by the EACJ is necessary to enable him render judgment in the matter. If in his judgment the answer to that question was in the affirmative, he was obliged to stay

⁵ Ibid, at para. 57.

the hearing of the Petition; formulate and refer to the EACJ for interpretation a question arising from the averments in the pleadings.

51. Needless to say, the EACJ's interpretation of the question so referred would be binding upon the trial court, as well as all other courts and tribunals in the partner states faced with similar questions, and any issues arising from the interpretation of the Treaty would be premised on the interpretation provided by the EACJ. By so doing, the trial judge would have secured the EACJ's interpretation of the Treaty for application to the facts of the electoral dispute before him.

52. Indeed, the preliminary ruling in **Attorney General of Uganda v Tom Kyahurwenda** (supra) does conclusively address the question of Treaty application. It draws a distinction between the interpretation and application of the Treaty, reserving the Treaty interpretation function to its exclusive jurisdiction, while extending the Treaty's application or enforcement to the partner states' domestic courts. It was held:

The Court deems it important to distinguish the application of the Treaty from interpretation of the same as found in Article 34. Whereas, as we held above, interpretation is the preserve of this Court, the same is not necessarily the case for the application of the Treaty by the national courts to cases before them. It would defeat the purpose of preliminary reference mechanism if the Court's interpretation of Article 34 of the Treaty extended to "application of treaty provisions". The purpose for the mechanism is for the national courts to seek interpretation of the Treaty provisions in order that they may then apply them to a case at hand. Hence, to interpret Article 34 as requiring "application of the Treaty provision" to be excluded from the purview of national courts would "lead to a result which is manifestly absurd or unreasonable".
The national courts seek interpretation from this Court in order to be empowered to apply the Treaty provisions to the facts of the case(s) before them.⁶ (*my emphasis*)

⁶ See Preliminary Ruling in **Attorney General of Uganda v Tom Kyahurwenda, Case Stated No. 1 of 2014**, para. 51.

53. It is within that contextual background that the EACJ does in the same **Tom Kyahurwenda** case underscore the justiciability of Articles 6, 7 and 8 of the Treaty before domestic courts in the following terms:

These Fundamental Objectives and Fundamental Operational Principles of the Treaty are just that: truly fundamental - solemn, sacred and sacrosanct. They are the rock foundation, upon which the solid pillars of the Treaty, the Community and the Integration agenda are constructed. They stand deeper, larger and loftier than “mere aspirations” that certain counsel for Partner States would make them out to be. **The Court, therefore, holds that Articles 6, 7 and 8 are justiciable both before this Court and before the national courts and tribunals.**⁷ (*my emphasis*)

54. In the result, I find that the trial judge erred in dismissing the petition for lack of jurisdiction, without recourse to the EACJ preliminary reference mechanism for a preliminary ruling on such issues raised in the petition as called for Treaty interpretation. The trial court is bound by the EACJ's preliminary ruling in **Attorney General of Uganda v Tom Kyahurwenda** (supra) – as indeed are all other domestic courts within the EAC partner states, which adjudged Articles 6 and 7 of the Treaty to be justiciable before domestic courts. It thus had jurisdiction within the ambit of the preliminary rulings mechanism to interrogate the claims in Election Petition No. 2 of 2022 for purposes of the application or enforcement of Articles 6(d) and 7(2) of the Treaty, without necessarily encroaching upon the EACJ's Treaty interpretation mandate. I would accordingly uphold *Grounds 1* and *2* of this Appeal.

55. Turning to *Ground 3* of the Appeal, Rule 27 of the Parliamentary Elections (Interim Provisions) Rules grants the High Court discretion in the determination of costs in election petitions. It reads as follows:

All costs of and incidental to the presentation of the petition and the proceedings consequent on the petition shall be defrayed by the parties to the petition in such manner and in such proportions as the court may determine.

56. That Rule is instructive on how costs in election petition appeals may similarly be addressed. Nonetheless, I am also cognizant of the general rule in section 27(2)

⁷ Ibid, at paras. 68, 69.

of the CPA that costs should follow the event unless the court for good reason decides otherwise. So that, a court's discretion on the award of costs would be judiciously exercised within the parameters of that general rule.

57. However, section 27(2) of the CPA does also provide for an exception to the general rule whereby costs need not follow the event where the court or judge for good reasons decides otherwise. As quite correctly argued by learned Counsel for the Appellants, public interest litigation has since emerged as one of the considerations that constitute good reason to depart from the general rule espoused in section 27(2) of the CPA. See **Kiiza Besiqye v Museveni Yoweri Kaguta & Electoral Commission (2001) UGSC 4.**

58. It is against that backdrop that I find the present case (both before the lower court and on appeal) to entail a matter of considerable public interest with regard to the principles governing the election of the country's EALA representatives. I would therefore allow *Ground 3* of this Appeal.

D. **Conclusion**

59. The upshot of this judgment is that the Appellants having succeeded in all the grounds of appeal, I would allow this Appeal with the following orders:

- I. The ruling and orders of the trial court in *Election Petition No. 2 of 2022* are hereby set aside.
- II. *Election Petition No. 2 of 2022* is hereby remitted back to the High Court for determination on its merits before another judge.
- III. Each party is ordered to bear its own costs in this Court and the court below.

I would so order.

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Dated and delivered at Kampala this 29th Day of November,
2023.

Monica K. Mugenyi

Monica K. Mugenyi

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

**(Coram: R. Buteera DCJ, C. Bamugemereire & M. Mugenyi,
JJA)**

ELECTION PETITION APPEAL NO. 5 OF 2023

(Arising from Ruling of the High Court of Uganda at Kampala (Dr. Douglas Singiza, Ag. J) in Election Petition No. 2 of 2022)

- 1. AGABA GILBERT**
- 2. LOLEM JOSEPHINE**
- 3. NAKITENDE SALAAMA ADELAIDE**
- 4. BWENGYE LAUBEN MUHANGI ::::::::::: APPELLANTS**

VERSUS

- 1. ATTORNEY GENERAL**
- 2. HON. AMONG ANNET ANITA**
- 3. ADOLF MWESIGE KASAIJA**
- 4. AKOL ROSE OKULLU**
- 5. NAMARA DENNIS**
- 6. KAKOOZA JAMES**
- 7. ODONGO GEORGE STEPHEN**
- 8. MUSAMALI PAUL MWASA**
- 9. KADOGO VERONICA BABIRYE**
- 10. MUGYENYI MARY MUTAMWEBWA**
- 11. AMONGIN JACQUELINE**
- 12. SIRANDA GERALD BLACKS ::::::::::: RESPONDENTS**

JUDGMENT OF RICHARD BUTEERA, DCJ

I have had the benefit of reading in draft the Judgment of my learned sister M. Mugenyi, JA, I concur with the reasoning, decision and orders she proposed therein.

Since C. Bamugemereire, JA, also agrees, this Appeal succeeds in the terms and orders as proposed by M. Mugenyi, JA in her lead Judgment.

Dated at Kampala this ^{29th}..... day of November..... 2023.



Richard Buteera

DEPUTY CHIEF JUSTICE

THE REPUBLIC OF UGANDA
THE COURT OF APPEAL OF UGANDA
AT KAMPALA
ELECTION PETITION APPEAL NO. 5 OF 2023
(Coram: Buteera; DCJ, Bamugemereire, Mugenyi JJCC)

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(Appeal from Ruling of the High Court of Uganda at Kampala (Dr. Douglas Singiza, Ag. J) in Election Petition No. 2 of 2022)

JUDGMENT OF CATHERINE BAMUGEMEREIRE JA

I had the privilege to read, in draft, the Judgment of our learned sister Monica Mugenyi JA and I agree with her reasoning, decision and orders.



29th November 2023

Catherine Bamugemereire
Justice if Appeal