IN THE EAST AFRICAN COURT OF JUSTICE

APPELLATE DIVISION AT ARUSHA

(Coram: Emmanuel Ugirashebuja, P; Liboire Nkurunziza, VP; Edward Rutakangwa, Aaron Ringera and Geoffrey Kiryabwire, JJ.A.)

APPEAL NO. 4 OF 2015

BETWEEN

SIMON PETER OCHIENG

JOHN TUSIIME.....APPELLANTS

AND

ATTORNEY GENERAL OF THE

REPUBLIC OF UGANDA.....RESPONDENT

(Appeal from the Judgment of the First Instance Division at Arusha, Tanzania (Monica K. Mugenyi, PJ; Isaac Lenaola,DPJ and Fakihi A.Jundu, J) dated 7th August 2015 ***in Reference No.11 of 2013****)*

JUDGMENT

A. INTRODUCTION

1. This is an Appeal against the Judgment of the First Instance Division of this Court (hereinafter referred to as "the Trial Court") dated 7th August 2015 arising out of Reference No. 11 of 2013, by which the Trial Court

dismissed the Reference and held that each Party shall bear his own costs.

2. The Appellants sued the Attorney General of Uganda in his capacity as legal representative of the Republic of Uganda ("Uganda") before the Trial Court seeking for declarations that the Respondent contravened the Treaty for the Establishment of the East African Community ("the Treaty"), especially Articles 6(d) and 7 (2) of the Treaty that enjoins the Partner States to abide by the rule of law.

3. In bringing the suit before the Trial Court, the Appellant relied on the requirement dictated by the principle of separation of powers. In a democratic society, it is the function of the Judiciary, as separated from the other branches of the government, to interpret the legal rights and duties in accordance with the law. They [Appellants] contended that the executive arm of Uganda exceeded its powers in effecting appointment of judges of the High Court, Court of Appeal and the Supreme Court.

4. To put our input on the importance of the doctrine of separation of powers which is in play in this Appeal, let us quote Professor Hammond who said: "***The most insidious enemy of [the] doctrine [of separation of powers] is excess. The doctrine depends upon the three branches of government understanding their respective spheres, and not exceeding them, or at least not exceeding them in a gross or continuous way***": See "The Judiciary and the Executive" (1991) 1 Journal of Judicial Administration, p.88 at p.90.

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5. The legal system in Uganda recognizes the content of the above quotation. In that regard, the Constitution of Uganda in Articles 130 (b) and 134 (1) makes it clear in providing that the number of justices shall be as by law established, on the strength of which, the Appellants believed that the President of Uganda had to expedite appointments in order to avoid undermining the day to day judicial and administrative functions of the Uganda Judiciary.

6. The Appellants were both in this Division and in the Trial Court represented by Mr. Ladislaus Rwakafuuzi, (Learned Counsel) and the Respondent by Ms. Christine Kaahwa, (Learned Principal State Attorney) assisted by Ms. Claire Kukunda, (State Attorney) and Mr. Jimmy Oburu (Principal State Attorney) from the Attorney General's Chambers of Uganda.

B. BACKGROUND

7. Before the filing of the Reference in the Trial Court on 23rd of December 2013, the Appellants were concerned with long standing vacancies in the Judiciary of Uganda especially in the High Court, the Court of Appeal and the Supreme Court of Uganda.

8. As a result, the Applicants [now the Appellants] instituted before the Trial Court a case against the Attorney General of Uganda in Reference No. 11 of 2013 complaining *inter alia* that the President of Uganda had refused to appoint Judges as required by the laws of Uganda.

9. At the Trial Court, 4 Issues for determination were raised namely:

Issue No. 1.Whether the Reference raised a matter for interpretation by this Court pursuant to Article 30 of the Treaty?

Issue No. 2. Whether the Parliament of Uganda has ever resolved to increase the number of High Court Judges to 82 and if so, whether the President of the Republic of Uganda, ("the President") had refused to appoint Judges of the High Court as prescribed by the Parliament and recommended by the Judicial Service Commission?

Issue No.3. Whether the President has declined to appoint Judges of the Court of Appeal and Supreme Court as prescribed by the laws of Uganda?

Issue No. 4. Whether the alleged refusal of the President to appoint Judges is a breach of Articles 6(d) and 7(2) of the Treaty?

10. The Trial Court determined all the four Issues as raised. On the first Issue, the Trial Court found that it had jurisdiction over the subject matter before it. The Trial Court was satisfied that the Reference did raise complaints of illegality and infringement of Treaty provisions by the Respondent, as well as matters for interpretation by this Court and finally, resolved Issue No.1. in the affirmative.

On Issue No 2, The Trial Court found that the Applicants, contrary to Rule 40 (1) of the East African Court Justice Rules of Procedure, 2013 ("the Rules") which expressly prohibits the Parties' departure from the pleadings, attempted to depart from the content of the Reference by introducing omissions by the Judicial Service

Commission instead of Inactions of the President that were pleaded. The Counsel for Applicants [now the Appellants] conceded that there had been a departure from the pleadings and as a result, the Trial Court answered Issue No.2 in the Negative.

On Issues No.3 and No.4, the Trial Court found that there was no evidence adduced to prove that the President had refused to effect the alleged judicial appointments. "*The Trial Court did not deem it necessary to delve into the question as to whether or not the unproven refusal did in fact manifest the specific violations complained of therein*" (*sic*).

Consequently, the Trial Court declined to grant all the Declarations sought by the Applicants.

11. As to costs, the Trial Court noted that although costs were prayed for by the Applicants, they were never in issue in the Joint Scheduling Memorandum agreed upon by both Parties. In addition, the Trial Court took the view that the Reference did clarify issues of public interest and resolved to be guided by the jurisprudence of this Court which is that each Party bears his own costs in a suit grounded on issues of broad public interest. In the end, the Trial Court dismissed the Reference and ordered each Party to bear his own costs.

12. Dissatisfied by the Judgment of the Trial Court, the Applicants [now the Appellants] appealed to this Appellate Division in this Appeal No.4 of 2015 (" the Appeal").

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C. THE APPEAL

13. The Appellants raised seven grounds of Appeal namely:

1. *That the learned Justices of the First Instance Division erred in law and fact when they found that there was no resolution of the Parliament of Uganda increasing the number of the High Court Judges from 50 to 82.*

2. *That the learned Justices of the First Instance Division erred in law when they found that the Appellants had departed from their pleadings when (Appellant) submitted that Refusal or failure by the Judicial Service Commission to recommend to the President Judges for appointment to the High Court Bench amounted to refusal by the Government to appoint Judges and therefore a violation of the Treaty for the East African Community.*
3. *That the learned Justices of the First Instance Division erred in law and fact when they found that the increase of the number of High Court Judges from 50 to 52 and proposed 68 was outside the law because no resolution of Parliament indeed existed.*

4. *That the learned Justices of the First Instance Division erred in law when they failed to find that requirements of certificates of financial implications are legally provided and not mere administrative tools in the hands of government to regulate the internal functioning of the central administrative unit.*

5. *That the learned Justices of the First Instance Division erred in law when they held that the omission to appoint the Judges provided for by law was due to financial constraints.*

6. *That the learned Justices of the First Instance Division erred in law when they held that the President's failure to appoint Judges by the date of the Judgment of the Court, was due to pre-appointment due diligence checks which was not limited in time by law.*
7. *That the learned Justices of the First Instance Division erred in law when they held that there was no evidence that the President had refused to appoint Judges of the Court of Appeal and Supreme Court as pleaded by the Applicants, and that violation of the Treaty had not been proved.*

14. The Appellants further prayed that the Court grants the following orders:

1. *To allow the Appeal,*
2. *To set aside the Judgment of the First Instance Division,*
3. *To give Judgment to the effect that the government of Uganda Refused to appoint judges as per the laws of Uganda and thereby violated the EAC Treaty in Art 6(d) and 7(2), and*
4. *To award costs of both Courts to the Appellants.*

15. At the Scheduling Conference of the Appeal held on 11th May 2016, the seven grounds of Appeal were consolidated into three substantive Issues namely:

Issue No 1. Whether the Trial Court erred in law in finding that the President had not arbitrarily refused to appoint judges of the High Court, Court of Appeal and Supreme Court of Uganda as required by law and consequently the actions of the President were not arbitrary or in breach of Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community?

Issue No.2. Whether the First Instance Division erred in law in finding that the matter for refusal by the Judicial Service Commission of Uganda to recommend Judges for Appointment by the President was a departure from the Appellants' pleadings.

Issue No. 3. What remedies are the Parties entitled to?

16. After the Scheduling Conference, the Parties filed their Written Submissions. On 17th August 2016, both Parties appeared before this Court and highlighted their Written Submissions. Mr. Rwakafuuzi, Counsel for the Appellants, informed the Court that after having consultation with the Respondent, he conceded on Issue No. 2, namely, "**Whether the First Instance Division erred in law in finding that the matter for refusal by the Judicial Service Commission of Uganda to recommend Judges for Appointment by the President was a departure from the Appellants' pleadings**" and accordingly abandoned this particular ground of complaint.

D. COURT'S DETERMINATION.

17. Having carefully read the Submissions of the Parties and after having taken cognizance of the concession by Counsel for the Appellants on Issue No. 2, the remaining substantive issues for our consideration are only two, namely:

Issue No 1. Whether the Trial Court erred in law in finding that the President had not arbitrarily refused to appoint judges of the High Court, Court of Appeal and Supreme Court of Uganda as required by law and consequently the actions of the President were not arbitrary or in breach of Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community? And Issue No. 2. What remedies the Parties are entitled to?

18. It is not the practice of this Court to cite verbatim the entirety of Written Submissions. However, the nature of the Appellants' Written Submissions necessitates the citation of them since the Court will review whether the Appeal fulfils the criteria established in Article 35A of the Treaty for instituting an appeal.

19. The Appellants' Submissions as presented by their Counsel in the instant Appeal are as follows:

"*These Submissions shall be limited to traversing findings of law that the Appellant contend are misdirections. Otherwise, the Appellants reiterate their Submissions in the lower court.*

Their Lordships in the Court below held that the requirement for financial implications is a tool by the Executive to regulate the internal functioning of the central administrative hierarchy. That where the Executive imposes a requirement for the certificate of financial implications, it is acting within the Ugandan legislative framework and therefore acting in accordance with the Law. It is posited there for the Appellant in relation to the appointment of Justices of the Court of Appeal and Supreme Court, Articles 134 (1) and 130(b) of the Constitution of the Republic of Uganda respectively provide that the number of the justices shall be as by law prescribed. The Judicature Act was amended to provide for the increase of the number of judges as pleaded. However, even before the Judicature Act could be amended, it was the requirement of the Budget Act, 2001 S.10 that:-

*"**Every Bill introduced in Parliament shall be accompanied by its indicative financial implications if any, on revenue and expenditure over the period of not less than two years after its coming into force**."*

Therefore by the time the bill seeking to amend the Judicature Act to increase the number of Justices of the Court of Appeal and Supreme Court had been published the finances that would support the increased number of Judges had been provided. Therefore it should not be said that the Judges could not be appointed because of lack of finances.

Secondly, by the time the Reference was filed, as it was pleaded, the Supreme Court had only 6 Judges instead of 11. And the Chief Justice's place was vacant. Since the Chief Justice position had

always existed, it was erroneous for the lower Court to hold that appointing a Chief Justice required extra resources.

The position of Chief Justice continued to be vacant even at the time of hearing of the Reference in April 2015, and yet the Judicial Service Commission had confirmed as early as November 2013 that the President had been forwarded names to appoint a Chief Justice inter alia. What does the presidential silence be token? Only refusal. The Court below erred to have found that the President did not refuse to appoint Judges of the Court of Appeal and Supreme Court.

Their Lordships in the lower Court also held that the President was entitled to make consultations before appointment. This holding is a misdirection. As it was pleaded, by the time the Reference was filed in December 2013, the Supreme Court and the Court of Appeal had 6 and 11 Judges respectively. This situation continued to obtain even on the date of hearing, more than a year later. How can consultation take so long, especially in light of the fact that the President is obliged to appoint only the names that are recommended to him. There was no evidence from the Judicial Service Commission that the President had referred the names back to them. It only means that he refused and therefore exercised a discretion he does not have thus acting arbitrarily in utter abuse of power, contrary to the dictates of Art. 6 (d) & 7 (2) of the Treaty.

Their Lordships cited the principle of legality enunciated in Halsbury's Laws of England 4th Edn VOL 1 page 5 thus:

"the Executive does not enjoy a general or inherent rule-making or regulatory power except in relation to internal functioning of

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the central administration hierarchy... nor in general, can state necessity be relied on to support the existence of power or duty or justify deviations from lawful authority".

Therefore the certificate of financial implication if made a requirement for appointment of a judge or judges of the Supreme Court would amount to imposing a duty so as to justify deviation from lawful Authority. Parliament can only pass any law after obtaining a certificate of financial implication from the Executive. Once the law, in this case the Judicature Act is in place requiring increased of the number of judges, of Supreme Court and Court of Appeal, further certificates of financial implications for appointment of individual Judges, amounts to imposing a duty to justify deviation from a statutory requirement.

Therefore their Lordships erred to have held that the executive was entitled to impose the requirement of certificate of financial implication before appointment of judges of the Supreme Court and Court of Appeal.

The Appellants adopt their arguments in the Court below."

20. As if taking a cue from Counsel for the Appellants, Counsel for the Respondent reiterated her earlier Submissions in the Trial Court as well on the substantive Issue No.1. On dropped Issue No. 2., Counsel for the Respondent had little to say and referred this Court to paragraphs 32- 37 of the Trial Court Judgment where the Trial Court found the Issue of refusal by the Judicial Service Commission to

forward names to the President as recommendation was never raised in the Applicants' [now Appellants] pleadings and that it amounted to a departure from Pleadings contrary to Rules 37(1) and 40(1) of the Rules of the Court. This was conceded by the Counsel for the Appellants.

21. The way Counsel for the Appellants has presented the submissions does not bring the Appellants' Appeal within the scope of Article 35A of the Treaty read together with Rule 77 of the Rules of the Court which constitute the legal basis for an Appeal to be instituted before this Court. For sake of clarity, Article 35A reads as follows:

"***An Appeal from the judgment or any order of the First Instance Division of the Court shall lie to the Appellate Division on-***

(a) points of law;

(b) grounds of lack of jurisdiction;

(c) ***procedural irregularity.***"

Rule 77 of the Rules of the Court echoes the same by providing that:

"***An Appeal from the judgment or any order of the First Instance Division shall lie to the Appellate Division on:***

(a) points of law;

(b) grounds of lack of jurisdiction;

(c) procedural irregularity."

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22. The above two provisions set conditions precedent for an Appeal to be properly brought before this Court. The condition ***sine qua non*** under the above provisions is that, a party bringing an Appeal has to establish either ***"points of law"***, ***"grounds of lack of jurisdiction" or "procedural irregularity"***.

23. An Appeal brought before this Court outside the scope created by the above relevant provisions is certainly without merit and is untenable.

24. In the instant Appeal, the Appellant has produced three pages of Written Submissions (see Para. 19 of this Judgment) supporting the Issues raised during the Scheduling Conference. In one way or another, the Counsel for the Appellants reiterated the Submissions and arguments he made in the lower Court (page 2 and 3 of his Written Submissions dated 5th June 2016, as reflected in paragraph 19 of this Judgment).

25. Under Article 35A of the Treaty above quoted, a Party alleging an **error of law, a ground of lack of jurisdiction or a procedural irregularity,** must advance argument in support of his allegations. This was also reiterated in the case of **Prosecutor v MITAR Vasiljvic, ICTY, App Ch. Case No. IT-98-32-A/ 25 Feb. 2004.** "ICTY case": in which the Appeal Chamber of ICTY held that a party alleging that there is an error of law must advance argument in support of the contention and explain how the error invalidates the decision...

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26. Litigants should bear in mind that this Court is not tasked to undertake a rehearing *de novo* of questions of fact and law examined by the First Instance Division. The right to appeal to the Appellate Division is restricted to the extent that the appeal falls within the scope of Article 35A. As per the Article, the Judgment of the Trial Court can be challenged on the following grounds: the Trial Court's findings on question of law, grounds of lack of jurisdiction or procedural irregularity.

27. In **Bittamann V ASIC (No.2) [2006] FCA**, it was held that "*the Court has power to strike out a notice of Appeal... where the notice does not state a question of law*".

28. Taking into account the above, the Submissions of Counsel for the Appellants premised on the arguments produced in the Trial Court, it is obvious, even on the basis of the introduction "*these Submissions shall be limited to the findings of the law that the Appellants contend are misdirections. Otherwise, the Appellants reiterate their Submissions in the lower Court...*", that nothing in them meets the requirements of Article 35A of the Treaty or the standard of the jurisprudence of this Court in Appeal matters.

29. It is trite that "he who alleges must prove". In that regard, a Party alleging whatever error must explain what the alleged error is and how it leads to a miscarriage of justice. Equally, in the instant Appeal, it is up to the Appellants who are alleging an error of law occasioned by the Trial Court to identify, establish and explain what

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the alleged error of law is and how it invalidates the impugned decision.

30. In light of the above, the Submissions of Mr. Rwakafuuzi, Counsel for the Appellants, allegedly produced to support the error occasioned by the Trial Court as per Issue No 1.have nothing to do with point of law involved nor did he legally show what can undermine the Judgment of the Trial Court.

Instead of establishing the legal requirement enunciated above and which gives effect to the application of the provision of 35A of the Treaty, the Counsel for the Appellants gives a reproduction *in verbatim* of the facts as submitted in the Trial Court. That, as matter of principle, cannot be deemed to meet the legal requirement dictated by Article 35A of the Treaty. The rationale is simple. Counsel could not have known and made any Submissions on errors committed by the Trial Court before it rendered its Judgment.

31. Counsel for the Appellant did not direct his mind to the legal conditions created by Article 35A of the Treaty in order to avoid Submissions which are not compatible with the substantive requirements and the standards of our established jurisprudence on appeals.

32. It is not at the Appellate Division where the appellant establishes facts as if this Division is exercising original jurisdiction in this matter. Reproduction of facts as presented in Trial Court does not help the Appellants to make tenable an Appeal before this Division.

33. In light of the above, we recall that the Trial Court in its Judgment, made it clear that *"...the Applicants [now the Appellants] did not adduce cogent and credible evidence to establish* ***a refusal by the President in effecting judicial appointments****..."*

34. The basis of dismissal in the Trial Court was solely on matters of fact; therefore, this renders the Appeal incompetent and untenable pursuant to the provision of Article 35A of the Treaty read together with Rule 77 of the Rules of the Court and the established jurisprudence of this Court.

35. The fact that a losing party does not like the verdict of the Trial Court is not in itself enough to sustain an appeal since the Appeal to the Appellate Division of this Court is restricted as we discussed above. To meet the standard required by Article 35A of the Treaty, the Counsel for the Appellant had for example to demonstrate in his Submissions that the Trial Court committed errors of law or procedural irregularities or lacked jurisdiction. For that, we recall our decision in **Angella Amudo v. the Secretary General of the East African Community** [EACJ] Appeal No. 4 of 2014 that *"a court commits an error of law or procedural error when it:-*

(a) misapprehends the nature, quality and substance of evidence: See, for instance Peters v. Sunday Post (1959) EA 424; Ludovick Sebastian v. R, (CAT) Criminal Appeal No. 318 of 2007(unreported);

(b) draws wrong inferences from the proven facts: see, Trevor Price & Another v. Raymond Kelsal [1957] EA 752, Wynn Jones Mbwambo v. Waadoa Petro Aaron [1966] EA 241; or

(c) acts irregularly in the conduct of the proceeding or hearing leading to a denial or failure of due process (i.e. fairness) e.g. irregularly admits or denies admission of evidence, denies a party a hearing, ignores a party's pleadings, etc: see, Attorney General of the United Republic of Tanzania v. ANAW" [EACJ] Appeal No. 3 of 2011.

36. This Court is not persuaded that the Counsel for the Appellants pointed out an error of law or procedural error as elaborated in the above case law.

37. It was strange that even during the highlighting of the Written Submissions at the hearing, Counsel for the Appellants did not address the Court on Issues as agreed during the Scheduling Conference. He was many times asked to tell the Court what specific Issue he was submitting on, because there was no correlation between his arguments and the Issues, as illustrated in the Record of hearing.

38. In the analysis of the Appellants' Counsel's Submissions in the Appeal under scrutiny, we agree with the observation of The ICTY case (supra) that "***the Appeal Chamber cannot be expected to consider a party's submissions in detail if they are obscure,***

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contradictory, vague or suffer from other formal and obvious insufficiencies..." The Court went further and held *inter alia* that... " *the arguments are dismissed because the Appellant fails to make submissions as to how the alleged error led to the miscarriage of justice ..... and that the appellant has not demonstrated that no reasonable trier of fact could have made this finding...*"

39. We are persuaded by the above reasoning and we would borrow from it and find that the Appellants did not succeed in discharging their duty as per law and practice established. Their Counsel failed to meet the rigorous standards in presentation of his Submissions due to many manifest insufficiencies. Therefore, this Court is duty bound to reject the Submissions and dismiss the Appeal.

E. CONCLUSION

40. It is obvious to us that in the instant case, the Counsel for the Appellants failed to establish what the alleged errors of law were committed by the Trial Court in its determination of the Reference before it when it held that the President did not arbitrarily refuse to appoint the Judges and Justices in Uganda Judiciary. We therefore, find the Appeal, manifestly wanting in merit and it is hereby dismissed.

41. On the Issue of costs, we recall that it is our established jurisprudence that this Court has consistently exercised its discretion

not to award costs in litigation involving public interest. The same reasoning will be applied in the instant Appeal.

42. Each Party shall bear his own costs both in this Division and the First Instance Division.

It is so ordered.

Delivered, dated and signed at Arusha this....24th.....day of November 2016.

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Emmanuel Ugirashebuja
PRESIDENT

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Liboire Nkurunziza
VICE PRESIDENT

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Edward Rutakangwa
JUSTICE OF APPEAL

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Aaron Ringera
JUSTICE OF APPEAL

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Geoffrey Kiryabwire
JUSTICE OF APPEAL