IN THE EAST AFRICAN COURT OF JUSTICE

FIRST INSTANCE DIVISION AT ARUSHA

(Coram: Johnston Busingye, PJ,M.S. Arach-Amoko, DPJ, John J.Mkwawa,J,

Jean B.Butasi, J,Isaac Lenaola,J.)

REFERENCE NO. 01 OF 2012

IN THE MATTER OF A REFERENCE UNDER ARTICLE 30 (1) OF THE TREATY FOR

THE ESTABLISHMENT OF THE EAST AFRICAN COMMUNITY

AND

IN THE MATTER OF THE 13TH EAST AFRICAN COMMUNITY SUMMIT DIRECTIVES

BETWEEN

TIMOTHY ALVIN KAHOHO.....APPLICANT

AND

THE SECRETARY GENERAL OF THE

EAST AFRICAN COMMUNITY.....RESPONDENT

DATE: 17TH MAY 2013

JUDGMENT

Introduction

1. Timothy Alvin Kahoho, (hereinafter **"the Applicant")** is a citizen of the United Republic of Tanzania and a journalist by profession. In the Reference premised on Articles 23(1)and (3),27(1) and 30 (2) of the Treaty for the Establishment of the East African Community (hereinafter, **"the Treaty"),** as well as Rules 24 of the East African Court of Justice Rules of Procedure, 2010, he has sought the following Orders:

(a) A declaration that the Summit had grossly breached the Treaty in particular Articles 6, 7 and 123 (6) of the Treaty , by mandating the Secretariat to inter alia;

(i) Produce a road map for establishing and strengthening the institutions identified by the Team of Experts as critical for the functioning of the Customs Union, Common Market and Monetary Union.

(ii) Formulate an action plan for the purposes of operationalising the other recommendations in the report of the Team of Experts, and

(iii) Propose an action plan on, and a draft model of, the structure of the East African Political Federation for consideration by the Summit at its 14th Ordinary Meeting.

(b) The Summit approved the protocol on Immunities and Privileges for the East African Community, its organs and institutions for conclusion in breach of Articles 73 and 138 of the Treaty.

(c) Further, a declaration that the Summit has no mandate under the Treaty to exclude Partner States and the Council from performing functions vested to them by the Treaty and which have an impact in the integration process.

(d) That if ever the Secretariat has already done the mandated functions under items (a) (i) to (iii) and (b) hereto, this Honorable Court be pleased to declare them null and void.

(e) Costs of this Application

(f) Any other relief(s) that this Court deems fit to grant.

Factual Background

2.The uncontested facts in this Reference are that on 30th November 2011, the Summit of the East African Community (hereinafter **"the Summit")** issued a Communiqué after its meeting in Bujumbura, Burundi, and of interest to this matter are paragraphs 6 and 10 where it stated as follows:

"6.The Summit approved the …Protocol on Immunities and Privileges for the East African Community, its organs and Institutions for conclusion" AND

"10. The Summit considered and adopted the Report of the Team of Experts on fears, concerns and challenges on the Political Federation. The Summit noted that the Team of Experts had studied and made recommendations for addressing the fears, concerns and challenges. The Summit mandated the Secretariat to:-

I. Produce a Road Map for establishing and strengthening the Institutions identified by the Team of Experts as critical to the functioning of a Customs Union, Common Market and Monetary Union;

II. Formulate an action plan for purposes of operationalising the other recommendations in the Report of the Team of Experts; And

III. Propose an Action Plan on, and a Draft Model of the structure of the East African Political Federation for consideration by the Summit at its 14th Ordinary Meeting."

3. It is the language, tenor, and import of the above parts of the Communiqué that triggered the Reference under consideration.

Case for the Applicant

4. The Applicant appeared in person and ably argued his case as follows:

That the Summit contravened Articles 73 and 138 of the Treaty when it directed the conclusion of the Protocol on Immunities and Privileges because principally, in his view, those are not areas of co-operation to which a Protocol can be concluded within the meaning of Article 151 of the Treaty.

For avoidance of doubt, Article 73 of the Treaty provides as follows:

"1. Persons employed in the service of the Community:

(a) Shall be immune from civil process with respect to omissions or acts performed by them in their official capacity; and

(b) Shall be accorded immunities from immigration restrictions and alien registration.

2. Experts or consultants rendering services to the Community and delegates of the Partner States while performing services to the Community or while in transit in the Partner States to perform the services of the Community shall be accorded such immunities and privileges in the Partner States as the Council may determine."

Article 138 provides as follows;

"1. The Community shall enjoy international legal personality.

2. The Secretary General shall conclude with the Governments of the Partner States in whose territory the headquarters or offices of the Community shall be situated, agreements relating to the privileges and immunities to be recognized and granted in connection with the Community.

3. Each of the Partner States undertakes to accord to the Community and its officers the privileges and immunities accorded to similar international organizations in its territory."

Article 151 provides that;

"1.The Partner States shall conclude such Protocols as may be necessary in each area of co-operation which shall spell out the objectives and scope of, and institutional mechanisms for co-operation and integration.

2. Each Protocol shall be affirmed by the Summit on the recommendation of the Council.

3. Each Protocol shall be subject to signature and ratifications of the parties hereto.

4. The annexes and Protocols to this Treaty shall form an integral part of this Treaty."

5. It is the Applicant's case that reading all the above provisions together, the issue of immunities and privileges cannot be an area of co-operation as at no point has the Council of Ministers recommended or effected such a decision. That previously, all Protocols signed by the Parties to the Treaty confined themselves to the areas of co-operation as spelt out in Articles 74 – 131 of the Treaty and anything outside those Articles cannot properly be an area of co-operation.

6. The Applicant then made the point that having read the Draft Protocol on Immunities and Privileges, he is more than convinced that the issues of **"the staff and workers of the Community"** cannot be raised to a level akin to an area of co-operation.

7. On the issue whether the Summit could properly mandate the Secretariat to undertake any of the functions set out in paragraph 10 of the Communiqué, the Applicant argued that such an act was a clear violation of Articles 6, 7 and 123 (6) of the Treaty because the issue of the establishment of a Political Federation of the Partner States can only be **initiated** by the Summit which then d**irects** the Council to undertake the process as is the language of Article 123 (6). That an attempt at circumventing that process by mandating the Secretariat to propose an Action Plan and Draft Model for the Political Federation would be a violation of the Treaty.

8. In addition to the above, the Applicant, at the hearing of the Reference, stated that at its 14th Summit, the Summit indeed realized its "error" in the 13th Summit and directed the issue of the process leading to a Political Federation to the Council but even then, it had failed to initiate the same and so a violation of Article 123 (6) continued.

9.In furtherance of the above argument, the Applicant went on to state that the process towards a Political Federation cannot be a preserve of the Council or Summit but must of necessity involve all citizens of the Partner States. In support of this position, he quoted an excerpt from the book, ***''East African Federation: Blessing or Blight",by Harid Mkali, Ivydale Press, London 2012*** ,where the author quoted the late Mwalimu Julius Nyerere, Founding Father of The United Republic of Tanzania as stating in a pamphlet published on 16th October 1968 and titled "***Freedom and Development***":

"No person has the right to say, 'I am the people'. No Tanzanian has the right to say 'I know what is good for Tanzania and the others must do it.' …so to take Tanzania into Federation without a Referendum is to say that the President and the Cabinet know 'what is good for Tanzania and the others must do it'. This federation is potentially highly toxic for Tanzania, a fact that needs to be squarely faced by all concerned and that is why the consent of all Tanzanians is crucial – lest we blame one another tomorrow."

10. The point made by the Applicant is that to fast-track the Political Federation without finalizing the Customs Union, Common Market and Monetary Union and without consulting citizens of the Partner States would be an act of unprecedented violation of the Treaty by the Summit.

11.The Applicant raised two other issues in submissions which are pertinent; the first is the argument that the issue of Immunities and Privileges can only be settled by conclusion of Agreements by the Secretary General of the Community in that respect with Partner States and not by creation of a Protocol.

12. Secondly, that as a citizen of a Partner State, he was deeply troubled by the actions of the Summit aforesaid and was entitled to general and special Damages for the pain that he suffered ,including developing high blood pressure.

Case for the Respondent

13.The Respondent's answer to all the issues raised above was that the Reference was completely misguided and that the Applicant had failed to understand the intentions of the framers of the Treaty upon a clear reading of Articles 73, 138 and 151 relating to the Draft Protocol on Immunities for the following reasons;

i) That although a number of Headquarters' Agreements have been concluded by the Respondent pursuant to Article 138 (2) of the Treaty, inconsistencies were noted from one Partner State to another and after a series of meetings, the Sectoral Council on Foreign Policy Coordination proposed to the Council of Ministers that a Protocol was necessary to provide standard guidelines that would uniformly cater for the employees of the Community, its Organs and Institutions , particularly on matters of immunities and privileges to be granted to them in Partner States.

ii) That the negotiation and conclusion of the proposed Protocol on Immunities and Privileges for the Community, its Organs and Institutions was meant to create a common platform to enable Partner States coherently implement Articles 73 and 138 as read with Article 151 of the Treaty.

iii) That the argument that no areas of co-operation can be raised under Article 73 and 138 aforesaid is unsustainable because the issue was raised within the meeting of the Attorneys-General of the Partner States held on 2nd November 2011 and it was agreed that the need to establish a common platform to guide the issues of status, immunities and privileges signed by the Secretary General with the Governments of Partner States was important and sufficient to warrant a Protocol being concluded. Further, that the proposed Protocol would fall within Articles 5(3), (h), 131 and 151 of the Treaty as enabling provisions for Partner States to advance their integration and that Article 131 was a general co-operation clause which could be invoked from time to time when new areas of co-operation emerged.

14.On the question of Political Federation and the processes leading to it, the case for the Respondent is that the mandate given to the Secretariat to propose an action plan for consideration by Summit was not a contravention of Articles 6, 7 and 123 (6) of the Treaty but were in fact consistent with the same.

15. That the **initiation** of the said process was a matter undertaken by the Summit which then directed the Council to operationalise it in line with the Treaty. Council in compliance thereof, appointed a Team of Experts towards that end at its 20th Meeting held on 19th – 26th March 2010 and the directive at the 13th Summit was only a follow up to a process that had long been in place and the 13th Summit was not the meeting at which the same was **initiated**.

16. Further, that the functions of the Secretariat are set out in Article 71 of the Treaty and that the wording of that Article is wide enough to cover the implementation of any directive given to it by the Summit, including the one issued in the Communiqué under attack.

17. It is also the Respondent's contention that Article 123(6) of the Treaty is complimentary to, and not in conflict with, Article 71, and that the latter does not oust the former. That taken in that context, it ***"would be strange to expect the Council to execute its demanding assignments relating to integration other than through the Secretariat which is seized with both the technical and other relevant capabilities that facilitate the Council."*** It is also contended in that regard that ***"in exercising its mandate under the Treaty, [Council] relies entirely on the Secretariat to do so and as such the fears and prayers of the Applicant are alarmist, misconceived and generally designed to abuse Court process."***

18. Lastly on this issue, the Respondent has urged the point that all Partner States were aware that at an appropriate time after the Secretariat had completed its assignment, the Partner States would negotiate the proposed institutions relevant for Political Federation or any other matters ,and neither the Summit nor the Secretariat made any suggestion that such negotiations are not necessary. That in furtherance of that position, the Summit at its 14th Summit, contrary to the Applicant's assertion, **directed** the Council to report progress to the 15th Summit on all matters forming the subject of the Reference herein.

19. That therefore, the Reference, being devoid of merit, should be dismissed with costs.

The Scheduling Conference

20. On 15th January 2013, a Scheduling Conference was held and the Parties agreed that the following issues would be the ones to be determined by the Court:

i) Whether the 13th Summit decisions as set out in paragraph 6 of its Communiqué issued on 30th November 2011 in the Republic of Burundi approving the Protocol on Immunities and Privileges contravened Articles 73, 138 and 151 of the Treaty;

ii) Whether the 13th Summit of the Heads of States' decision to mandate the Secretariat to undertake the functions stated in paragraph 10 of its Communiqué issued on the 30th November 2011 at Bujumbura in the Republic of Burundi was in contravention of Articles 6, 7 and 123 (6) of the Treaty.

iii) Whether the process towards the establishment of a Political Federation of the Partner States is an exclusive preserve of the Council to which the Secretariat cannot contribute.

iv) Whether the conclusion of Protocols is only permissible where the Treaty specifically provides for areas of co-operation.

v) Whether the Applicant is entitled to the prayers sought"

Determination

21. We have read the following documents on record:

i) The Reference titled **"Application dated 12th January 2012"**

ii) The Response to Reference together with the Affidavit in support both dated 28th February 2012.

iii) The Reply to the Response dated 20th March 2012

iv) The Response to the Reply to the Response dated 8th May 2012.

v) Applicant's written submission filed on 13th February 2013.

vi) Respondent's written submissions filed on 14th March 2013.

vii) Applicant's rejoinder to the Respondent's written submissions filed on 15th April 2013 .

22.We have also taken into account the annextures to the documents placed before us including the Communiqué under attack, the Communiqué issued after the 14th Summit, the Report of the 11th Meeting of the Sectoral Council on Legal and Judicial Affairs, the Report of the 20th Meeting of the Council of Ministers, the draft Protocol on Immunities and Privileges of the East African Community, its Organs and Institutions, the Headquarters Agreement between the Government of Kenya and the Community for the Lake Victoria Basin Commission and the Headquarters Agreement between the Government of the United Republic of Tanzania and the Secretariat for the Tripartite Commission for co-operation between the United Republic of Tanzania, the Republic of Kenya and the Republic of Uganda.

Principles of Interpretation of the Treaty

23. In **Modern Holdings (E.A) Limited vs Kenya Ports Authority, EACJ Reference No. 1 of 2008,** this Court stated inter-alia that ***"The Treaty being an international Treaty among five sovereign States, namely; Kenya, Uganda, Tanzania, Rwanda and Burundi, is subject to the international law on interpretation of treaties, the main one being*** **'The Vienna Convention on the Law of Treaties' (VCLT)"**

The Court then proceeded to invoke Article 31(1) of the Vienna Convention on the Law of Treaties which sets out the general rule of interpretation as including the following factors;

"A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

24. The above principle is what we shall use as a guide in determining the four principal issues placed before us for resolution.

25. All the above documents together with the Treaty will also form the basis for our opinion which we now render as follows:-

Issue No. 1 – whether the 13th Summit decision as set in paragraph 6 of its Communiqué issued on 13th November 2011, in the Republic of Burundi, approving the Protocol on Immunities and Privileges contravened Articles 73, 138 and 151.

26. We have elsewhere above reproduced Articles 73, 138 and 151. To answer the Applicant's complaint with regard to paragraph 6 of the Communiqué, one must necessarily begin by defining a "**Protocol**". Article 1 of the Treaty defines it in the same language as **Black's Law Dictionary, Ninth Edition,** where it is defined as "***a treaty amending and supplementing another treaty". Wikipedia*** goes further to explain that it is a ***"rule on how an activity should be performed especially in the area of diplomacy."***

27. In the context of the issue at hand, the Respondent has explained that for Articles 73 and 138 to be ***"coherently implemented***", a Protocol was required under Article 151. Article 151 (1) specifically provides that Protocols shall be concluded as may be necessary in each area of co-operation and the Protocol shall spell out the objectives of, and institutional mechanisms for co-operation and integration.

28. Looking at the definition of a Protocol as above together with Article 151 of the Treaty, it is obvious that the conclusion of any Protocol is at the instance and discretion of the Summit where it deems such an action necessary to achieve the objectives of the Community. That is why Article 151(4) specifically provides that once concluded, a Protocol becomes an integral part of the Treaty. Integral means that it becomes a necessary part of the Treaty and supplements it in the operationalisation of the area of co-operation that it is meant to address.

29. We heard the Applicant to be arguing that privileges and immunities are not areas of co-operation and that under Article 138,

only Agreements with Partner States can address those issues. With respect, we disagree with him. We say so because he has taken a very narrow view of what the Treaty sets out as ***"areas of co-operation."*** He has also completely failed to note that Chapter Twenty Seven of the Treaty is headed, ***"Co-operation in other fields***" and Article 131, the only Article in that Chapter, is titled, ***"Other Fields***". Pausing there for a moment, it is obvious to us that the framers of the Treaty were aware that it would be wrong, nay naïve, to presume that on 30th November 1999, when the Treaty was ratified, all areas of co-operation would be visible and clearly demarcated. Article 131 was then enacted in answer to that difficulty and it is in the following words;

"1. Subject to the provisions of this Treaty, the Partner States undertake to consult with one another through appropriate institutions of the Community for the purpose of harmonizing their respective policies in such other fields as they may from time to time, consider necessary or desirable for the efficient and harmonious functioning and development of the Community and the implementation of the provisions of the Treaty.

2. For purposes of paragraph 1 of this Article, the Partner States may take in common such other steps calculated to further the objective of the Community and implementation of the provisions of the Treaty." (Emphasis added).

30. To our minds, Article 131 must be read together with Articles 73 and 138 for a holistic appreciation of the reason why a Protocol on Immunities and Privileges is necessary. The reasons given by the Respondent include the need to harmonise and create a common platform to guide the ***"issue of status immunities and privileges in Host Agreements signed by the Secretary General with Governments of the Partner States relating to EAC Organs and Institutions."*** These reasons are not alien to the need for a harmonious, functioning and developing Community under Article 131 aforesaid.

31. We have had a look at the Proposed Protocol on Immunities and Privileges of the East African Community, Organs and Institutions as well as the Headquarters Agreements elsewhere mentioned above. The Proposed Protocol has the following structure:

a) Definitions

b) Objectives

c) Scope of Arrangement

In the preamble, it is partly stated as follows;

"that it is desirable to conclude a Protocol by which the Partner States undertake to accord the Community, its organs, institutions and persons employed in different capacities in its service with such immunities and privileges as are accorded to similar international organizations in the territories of the Partner States."

32.The language, structure and import of the Proposed Protocol, in our view, is in line with the harmonization, functioning, development and furtherance of the objectives of the Community and the implementation of the provisions of the Treaty which is what one can discern from reading Articles 73, 131 and 138 in good faith and we find no inconsistencies therein.

33.Before we conclude the determination of Issue No. 1, we must point out that the execution of any Agreement under Article 138 (2) is not an ouster of the provision for conclusion of a Protocol under Article 151 where the situation so demands. The Treaty provisions must be read as complimentary to each other and none (as is the Applicant's line of argument) should be seen as independent and in conflict with another. To argue otherwise, would lead to a legal absurdity and a negation of the principle that the Treaty must be interpreted as a whole and not selectively to suit a set purpose.

34. One other issue we must clarify is the intent and meaning of co-operation in the context of the Treaty. We heard the Applicant to argue that the issue of immunities and privileges cannot be one amounting to co-operation because it is personal to the employees of the Community. **"Co-operation"** is defined in **Black's Law Dictionary** (supra) as ***"the voluntary coordination action of two or more countries occurring under a legal regime and serving a specific objective."***

35. Taken in the above context , the legal regime is the Treaty and the specific objective of the Treaty is the eventual full integration of the Partner States in both political and economic terms. In furtherance of that objective, The Proposed Protocol in Article 2 states as follows;

"The objectives of this Protocol are to provide a basis upon which –

a) property and assets of the Community shall be protected from every form of legal process;

b) funds of the Community shall be protected from the Partner States' financial controls, regulations or moratorium of any kind.;

c) immunities and privileges shall be accorded to persons in the service of the Community".

36. Article 138 (1) provides that **"the Community shall enjoy international legal personality"** and therefore Article 2 (a) and (b) of the Proposed Protocol address that provision while Article 2 (c) above is in furtherance of Article 138 (2) and (3) which the Applicant latched onto in his submissions.

37. It is obvious without saying more, that the Proposed Protocol is not wholly about staff immunities and privileges and that Article 138 can clearly create an area of co-operation to which a Protocol can properly be concluded under Article 151 of the Treaty. Even if it were, we do not find that such a factor, alone, would constitute an inconsistency with the Treaty.

38. In conclusion on this issue, we must state that Article 131 was enacted to reduce frequent amendments of the Treaty whenever a new area of co-operation arises and which cannot otherwise be managed outside existing provisions of the Treaty. The issues arising from Article 138 aforesaid fit that reasoning perfectly.

39. For the above reasons, our answer to Issue No. 1 is in the negative.

Issue No. 2 – whether the 13th Summit of Heads of State Decision to mandate the Secretariat to undertake the functions stated in paragraph 10 of its Communiqué, that was issued on 13th November 2011 in Bujumbura was in contravention of Articles 6, 7, and 123 (6) of the Treaty.

40. Elsewhere above we have set out the contents of paragraph 10 of the Communiqué and one of the issues that the Secretariat was mandated to do was to propose an action plan on, and a draft model of the structure of the East African Federation for consideration by the Summit at its 14th Ordinary Meeting. That matter is also partly to be covered in the determination of Issue No. 3 later in this judgment.

41. For purposes of Issue No. 2, we shall limit ourselves to the issue of the interpretation to be given to Article 123 (6) and the role of the Secretariat in the Community. In that regard, it is important to note that Article 123 (6) provides as follows;

"The Summit shall initiate the process towards the establishment of a Political Federation of the Partner States by directing the Council to undertake the process''.

42. The Applicant's argument in this regard is that by mandating the Secretariat to ***"propose an action plan"*** and a "***draft model of the structure of the East African Political Federation",*** the Summit acted in breach of the operational principles of the Community (Article 7) and the ***"General undertaking as to implementation"*** of the Treaty (Article 8) as well as specifically Article 123 (6) aforesaid.

43. We agree with the Respondent that the Applicant's argument on this issue is misguided. We say so, with respect, because as shall be seen later, initiation of the process of Political Integration and eventual Political Federation was not made at the 13th Summit, but much earlier. That, therefore, the mandate given to the Secretariat was in furtherance of a process that had been in place long before the Bujumbura Communiqué which then leads to the question: what is the relationship of the Summit vis-à-vis the Secretariat" Article 71 of the Treaty sets out the functions of the Secretariat and of relevance to the issue at hand and as properly argued by the Respondent, are the following:

i) Article 71 (1) (b) –the initiation of studies and research related to and the implementation of programmes for the most appropriate and expeditious and efficient ways of achieving the objectives ***include "widening and deepening co-operation among Partner States"*** and the establishment in accordance with the provisions of the Treaty, a Customs Union, a Common Market, and

subsequently a Monetary Union and a Political Federation.

44. All the above objectives are also set out at paragraph 10 of the Communiqué and the Secretariat was neither ***initiating*** them nor was it ***undertaking*** the actual processes as alleged by the Applicant. It was merely mandated to do technical work which under the Treaty provisions quoted above, is entirely in its province.

ii) Article 71 (1) (d) – the undertaking either on its own initiative or otherwise investigations, collection of information or verification of matters relating to any matter affecting the Community that appears to it merit examination.

45. A clear reading of paragraphs 10 (a) and (b) of the Communiqué would show that the Secretariat was actually examining and working from drafts prepared by a Team of Experts and verifying and harmonizing them towards the functioning of the Customs Union, Common Market and Monetary Union. In our humble view, that mandate does not fall outside Article 71 of the Treaty.

iii) Article 71 (1) (l) – the responsibility for the implementation of the decisions of the Summit and the Council.

46. This responsibility is extremely wide and covers all directives and mandate issued by and conferred by the Summit on the Secretariat and this is the critical link between the Summit and the Secretariat. The latter, functionally, is subservient to the former and this is the context in which the mandate contained in the Communiqué must be looked at. In addition to this, Article 11 which relates to the functions of the Summit provides at Article 11(1) that:

"The Summit shall give general directions and impetus as to the development and achievement of the objectives of the Community."

The directions given to the Secretariat contained in paragraph 10 aforesaid are well within the mandate of the Summit and conversely this is also within the Secretariat's mandate to receive and act on those directions and we see no breach of the Treaty by either of the two Organs of the Community.

47. We also agree with the Respondent that the directions given were not an end in themselves; the Secretariat was also directed to present all the draft proposals for consideration by the Summit at its 14th Ordinary Meeting .At that Meeting, the drafts proposals would only become useful if the Summit adopted them in which event they would become its documents and not of any other Organ.

48. While addressing this issue, it behoves us to address in a few words the critical role that the Secretariat plays in the affairs of the Community, generally. In the book**, "The Drive Towards Political Integration in East Africa,**" Ed. Isabelle Wafubwa and Joseph Clifford Birungi at page 173, one Prof. Sam Turyamuhika writes as follows:

"The current EAC Secretariat has been typified as powerless, meetings and workshop organizer, minute taker etc."

49. We take a different view of that harsh and unfair judgment. The EAC Secretariat is the fulcrum on which the wheels of integration rotate. The Summit, the Council of Ministers, the Co-ordination Committee and Sectoral Committees are all part-time and meet only as often as their functions require. Yet, the Secretariat slogs, day in, day out, to ensure that the ship of integration remains afloat. The Community, in our view ,is like a giant ship owned by shareholders(the people of East Africa);the Summit is like a Board of Directors and the Council, is like the Management. The Captain is the Secretary-General and the crew are the staff in the Community. To call the Captain and crew, useless, and denigrate their role in keeping any ship on the high seas on course, is to say that the shareholders or the Board of Directors can single-handedly and without any input from those that physically man the ship, sail that ship from a distance. The Summit represents the owners of the ship, and its duty is to decide where the ship goes and should always act in the best interests of the shareholders. The Summit thus meets periodically to assess progress and regularly inform the shareholders of the profits (benefits) from the operations of the ship. The Council, Co-ordination and Sectoral Committees are the Summit's agents in overseeing progress aforesaid. Without the Captain and crew, the ship can barely survive the storms and other perils that are prevalent in high seas including attacks by pirates. We digressed to make the point that, our reading and understanding of Articles 11,14,18,21 and 71 of the Treaty, which create the functions of the Organs of the Community, is that the Secretariat is the only Organ created by Article 9 of the Treaty to steer the ship of integration by implementing decisions of all the other Organs and its crucial role thereby ought to be recognized and supported.

50. In any event on Issue No. 2, our answer is in the negative.

Issue No. 3 – whether the process towards the establishment of a Political Federation of the Partner States is an exclusive preserve of the Council to which the Secretariat cannot contribute.

51. We have touched on this issue while addressing Issue No. 2 and we think that the present issue is a corollary of the other. However, it is obvious that whereas Issue No. 2 also dealt with directions to the Secretariat regarding the Customs Union, Common Market and Monetary Union, this one is specific to paragraph 10 (c) of the Communiqué which is about Political Integration.

52. Elsewhere above, we stated that the initiation of a process towards a Political Federation did not begin with the Communiqué issued at Bujumbura. In a book titled ***"The State of East Africa Report, 2006"*** published by Society for International Development, at page 7, it is written as follows:

"At the August 28th , 2004 EAC Summit held in Nairobi, Kenya, the Presidents of Kenya, Uganda and Tanzania resolved to work towards 'the political federation of East Africa'. To this end, a high level Committee on Fast-Tracking East Africa Federation was established. The Committee reported back to the Heads of State at a Summit held on November 26th, 2004 in Arusha, Tanzania, where it was resolved to set up a political federation by '2010'. In their Joint Communiqué following the Third Extra-Ordinary Summit of the East African Community held on May 30th, 2005, in Dar es Salaam, Tanzania, the Heads of State 'reaffirmed their commitment to East African Federation which is enshrined in the Treaty Establishing the East African Community'. They 'further observed that a strong Federation is only possible if it is owned by the people of East Africa themselves through the effective and informed participation from the very beginning of the process through to the end'."

53. This *background* is important in answering the question whether the Summit, pursuant to Article 123 (6) of the Treaty actually initiated the process towards a Political Federation at the Bujumbura Summit. In fact in its Report dated 26th November 2004 presented to the Summit, the Committee on Fast Tracking East African Federation, in its transmittal letter to the Heads of State, acknowledged that the Summit in fact initiated the process by its Communiqué of the 28th August 2004 and not later. These facts cannot be contested because they have been well documented for posterity.

54. Turning back to the specific question raised above, while determining Issue No. 2, we were categorical that the Secretariat is not a stranger to the implementation of the process towards a Political Federation and we have said why. We have already analysed its relationship with the Summit and now it behoves us to determine its relationship with the Council.

Article 14 of the Treaty defines the functions of the Council to include;

i) to make policy decisions – Article 14 (1);

ii) to promote, monitor, and keep under constant review the implementation of programmes of the Community and ensure the proper functioning and development of the Community – Article 14 (2);

iii) Subject to the Treaty, give directions to the Partner States and to all other organs and institutions of the Community other than the Summit, Court and the Assembly- (Article 14(3).

55. One of the organs of the Community under Article 9 (g) of the Treaty is the Secretariat and therefore it would be expected that when executing its mandate under Article 123 (6) of the Treaty, to undertake the process leading to a Political Federation, the Council is well within its powers to give direction to the Secretariat in any matter it deems fit including that process. Elsewhere above, we made the point and now we reiterate it, that of all the Organs of the EAC, it is only the Secretariat which is clothed with the mandate and technical expertise to implement the integration agenda as may be directed by Council or Summit.

56. The Applicant also made the point that the Summit, by implication, admitted its **'error'** in mandating the Secretariat, as opposed to the Council, in implementing the process leading to a Political Federation. To his mind, the fact that the 14th Summit used the following words ,was telling in that regard;

"The Summit Noted the Progress made on the Road Map for establishing the Political Federation and model Structure for the Federation and directed Partner States to consult further….And directed the Council of Ministers to Report progress to

the 15th Summit of the EAC Council of Ministers."

57. We have elsewhere above stated that the Summit can direct the Secretariat as well as the Council in matters relating to the implementation of the Treaty. Whether in one instance it directs one and later the other, is not in any way a breach of the Treaty. These Organs must all work in tandem towards the attainment of the objectives of the Community and there is no **"error**" that was rectified when the Summit acted as it did in the 14th Summit.

58. Another issue which we must address is that of the participation of the citizens of the Partner States in the integration process. Although the issue was vaguely pleaded it was more firmly articulated in submissions by the Applicant and his point was that like Mwalimu Nyerere warned in 1968, the process of integration must be people-centred or it will lead to regrettable consequences. The issue is not difficult and all we can do in answer to the Applicant ,is to refer to Article 7(1) (a) which provides that one of the Operational Principles of the Community is that of a '**People-centered and market driven co-operation'.** If the People of East Africa are at the centre of the entire process, then it follows that their input is not just necessary but imperative.

59. This Court takes judicial notice of the fact that meetings with citizens were held in all Partner States prior to the initiation of the process towards a Political Federation and there is no evidence placed before us to show that such consultations will not continue in the future .

60. Without belabouring the point, the process leading to a Political Federation is not exclusive to the Council and all Organs must work together to attain it and the place of the people is assured in that process.

61. Issue No. 3 must be answered in the negative for the above reasons.

Issue No. 4 – Whether the completion of Protocols is always only permissible where the Treaty specifically provides for areas of co-operation

62. We are of the view that our determination of Issue No. 1 also determined Issue No. 4. We merely wish to reiterate, that once Article 131 is properly read and invoked, then it is fallacious to state that only areas of co-operation detailed in Articles 74 – 130 can properly attract the conclusion of Protocols. We have conclusively found that Article 131 envisages areas of co-operation which may not have existed in 1999 and so the window to create Protocols "in other fields" was opened and retained in the said Article 131. We say no more.

Issue No. 5 – Whether the Applicant is entitled to the Prayers sought

63.Reading the Prayers in the Reference which are reproduced at the beginning of this judgment, prayers (a), (b), (c), and (d) have been found wanting and regarding prayer (f), the Applicant in his submissions stated as follows:

"Lastly, but not least is item (f) hereto, regards grounds 13 and 14 of the Affidavit. (sic). I earnestly request this Honourable Court to please consider awarding me US $60,000 as specific damages"(sic).

64. Neither in the Reference nor in submissions, written and oral, was the sum of US $60,000 justified or proved. The oral claim that because of the Communiqué, the Applicant suffered high blood pressure and was therefore entitled to compensation, was in our view not sufficient evidence that the Applicant was lawfully entitled to the said sum. In any event, once we have found all his claims untenable, no award in damages is justifiable.

65. On prayer (e), we think that the Applicant, impressive as his submissions were, was only a decent citizen who was pursuing a dream and although we have not found in his favour on any issue that he raised in the Reference, we do not consider it appropriate to award costs against him. He has always claimed to be an indigent and in fact this Court had to sit in Dar- es -Salaam, Tanzania, to hear the Reference close to his residence and in appreciation of the principle that this Court must be easily accessible to the people of East Africa.

66. We do not see any reason to punish him with costs and so we shall order that each party should bears its own costs.

67. The final Orders to be made are therefore that, the Reference is hereby dismissed but each Party shall bear its own costs.

68. It is so ordered.

Dated, signed and delivered at Arusha, this 17th day of May, 2013

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Johnston Busingye

PRINCIPAL JUDGE

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Mary Stella Arach- Amoko

DEPUTY PRINCIPAL JUDGE

.....

John Joseph Mkwawa

JUDGE

.....

Jean Bosco Butasi

JUDGE

.....

Isaac Lenaola

JUDGE