

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
NATIONAL ASSEMBLY ELECTION PETITION NO. 002 OF 2012
IN THE MATTER OF ARTICLES 1, 50, 51(3) (b), AND 52 OF
THE TREATY FOR THE ESTABLISHMENT OF THE EAST
AFRICAN COMMUNITY

AND

IN THE MATTER OF THE NATIONAL ASSEMBLY ELECTIONS
OF UGANDA'S ELECTED MEMBERS TO THE EALA (EAST
AFRICAN LEGISLATIVE ASSEMBLY)

AND

IN THE MATTER OF AN ELECTION PETITION

BY

1. KAMURALI JEREMIAH BIRUNGI
2. TUMUSIIME ROBERT ARAALI
BYARUHANGA ::::PETITIONERS

VERSUS

1. THE ATTORNEY GENERAL OF UGANDA
2. THE SECRETARY GENERAL EAST
::::::::::RESPONDENTS
EAST AFRICAN COMMUNITY

BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE

RULING

The petitioners sued the Attorney General of Uganda, as the 1st respondent, for alleged acts and breaches of the National Assembly of Uganda, under Article 119, and 250 of the

Constitution of the Republic of Uganda (Constitution). The petitioners also sued the Secretary General of the East African Community for allegedly harbouring illegally elected members seating at the East African Community Secretariat at Arusha, Tanzania.

The petitioners allege that the election by the Uganda National Assembly of the persons declared duly elected to the East African Legislature Assembly (EALA) was illegal.

The persons so elected are:

- i) Hon. Margaret Nantongo Zziwa
- ii) Hon. Nusura Tiperu
- iii) Hon. Kidega Dan
- iv) Hon. Mulengani Bernard
- v) Hon. Ssebalu Mike Kennedy
- vi) Hon. Dora Byamukama
- vii) Nakawuki Susan
- viii) Mukasa Mbidde
- ix) Chris Opoka

The petitioners contend that the declaration of the persons named above as duly elected members of EALA by the National Assembly of the Republic of Uganda was illegal, arbitrary and

consequently unacceptable in so far as the spirit of Articles 1 and 50 of the Treaty and Rules 13(1) appendix B of the National Assembly Rules were not adhered to rendering the entire election “a sham, a simulacrum and void exercise,” the reason being that contrary to Article 50 of the Treaty for the Establishment of the East African Community (Treaty) and Rule 13(1) Appendix B no special interest groups persons to wit; youths and the disabled were duly returned for election by any political party.

Further, that unlike the independent candidates, political party candidates were not vetted by the committee of Parliament constituted for that purpose, an act which was discriminatory and contrary to Article 21 of the Constitution and the rules governing the elections. Further still, that the elected members were not gazzetted as required by the law. And the petitioners, who are youths, were denied a right to political participation without having been given a fair hearing.

The petitioners therefore contended that the ensuing elections were a sham and the Uganda EALA representatives were in Arusha illegally; while the 2nd respondent erred to allow such persons not duly elected and gazzetted, to take oath as members of EALA.

The petitioners prayed for the following orders:

- A i) A declaration that the EALA elections conducted by the Parliament of Uganda were not conducted in

accordance with Article 50 of the Treaty for the establishment of the East African Community.

- ii) A declaration that the said elections were conducted in breach of constitutional principles and National Assembly rules.
- B.
- (i) A declaration that the National Assembly EALA elections of Uganda were flawed by illegality and consequently illegitimate.
 - ii) A declaration that Uganda's EALA elections were void and voidable.
 - iii) A declaration that Uganda does not have duly elected members to EALA in the circumstances.
- C.
- An order annulling the National Assembly EALA elections, Ugandan chapter and recalling any persons holding out in Arusha as duly elected EALA members from Uganda.
- D.
- A declaration that the acts of the Clerk to Parliament and the verification or vetting committee established for the National Assembly EALA elections unlawfully prohibited the petitioners from political participation and consequently violated their rights enshrined in the constitution.
- E.
- Any other relief the court may deem fit to grant.

The petition was supported by the affidavit of the 1st petitioner dated 31/7/2012.

The 1st respondent filed a response, supported by an affidavit deposed to by Mr. Elisha Bafilawala, dated the 7th day of August 2012. The 1st respondent averred that the petition was “without merit, misconceived, bad in law, frivolous and should be struck out.” He contended further that the petition was not grounded on any enabling statute, and the petitioners had no locus standi to bring the petition.

The 1st respondent also denied allegations of illegality, lawfulness and irregularity of the elections and contended that the election of Uganda’s representatives to EALA was conducted in accordance with the Treaty, the Constitution of the Republic of Uganda, the Rules and relevant Appendix there under; that the elections were open to all persons qualified in accordance with the Treaty; the vetting committee considered all candidates hence no discrimination as alleged; the EALA representatives and the Rules of Procedure were gazzetted; the petitioners did not qualify as candidates for EALA.

Lastly, the 1st respondent contended that the EALA representatives were properly executing their mandate and the EALA elections were conducted in substantial compliance with the law. The petitioners were therefore not entitled to the remedies sought.

The 2nd respondent also filed a response supported by the affidavit of Hon. Jesca Eriyo, Deputy Secretary General (Productive and Social Sectors) of the East African Community. The 2nd respondent contended that he was not involved in the supervision of the conduct of the disputed elections, and was subsequently not served with any court orders to restrain the EALA representatives from being sworn in; and that since there is no evidential support or prayers made against him in this petition, a cause of action did not arise against him.

The 2nd respondent contended further that the petition challenged the conduct and alleged non-adherence by Uganda with relevant provisions of the Treaty, and Rules of Procedure passed by Uganda Parliament; the election of the members of EALA was a function of the National Assemblies of the East African Community member states as provided by the Treaty. Uganda had indicated that it had determined the procedure for the elections and elected the members of the EALA whose names were communicated to the 2nd respondent. The 2nd respondent had also communicated the decision of the East African Court of Justice in EACJ **Ref. No. 6 of 2011 Democratic Party and Mukasa Mbidde Vs Secretary General of EAC and Attorney General of the Republic of Uganda**, and the 1st respondent had confirmed to the Registrar of the EACJ that Uganda had complied with the orders in the said judgment.

The second respondent concluded that he had discharged his obligations as prescribed in the Treaty, and since, therefore, there was no cause of action against him, the case against him should be dismissed.

When the petition came up for hearing, both respondents prayed that court disposes of the several preliminary objections they wished to raise, and then proceed with the petition if need be. Parties were directed to file written submissions in respect of the preliminary objections.

Representation of the parties

The petitioners were represented by learned Counsel, Mr. Hassan Kamba. The 1st respondent was represented by learned Counsel, Ms. Maureen Ijanga; while the 2nd respondent was represented by learned Counsel, Anthony Kafumbe.

I shall first deal with the preliminary objections raised by the 2nd respondent.

2nd respondent's submissions in support of their preliminary objections;

The 2nd respondent's preliminary objection was that considering that he was not involved in the supervision of the conduct of the disputed elections and that he was not subsequently served with any court orders to restrain Uganda's EALA members from being sworn in, and further given that there is no evidential support nor

prayers made against him in this petition, a cause of action against the 2nd respondent did not arise.

Counsel for the 2nd respondent relied on **Ref. No. 2 of 2007 Christopher Mutikila Vs the Attorney General of United Republic of Tanzania, The Secretary General of EAC and others;** and **Ref. No. 1 of 2006 Prof. Anyang Nyong & 10 Others Vs Attorney General of Kenya & 2 Others** to state that any petition contesting the legality of the elections into EALA shall be made under the respective national state laws as per Article 52 of the Treaty.

Counsel contended further that the procedure to be employed in such elections is determined by the National Assemblies of the partner states, The Secretary General's role was therefore limited, and therefore, he is an unnecessary party to the proceedings. The petitioners may have enjoyed rights which they claim were violated, but the 2nd respondent was not responsible for their violation, as he did not have the duty to conduct the elections. Counsel further relied on Order 1 rule 13 of Civil Procedure Rules to state that the 2nd respondent raised the objections at an early stage. On the ingredients of cause of action, Counsel relied on **Auto Garage Vs Motokov [1971] EA 514**. He further contended that the 2nd respondent did not supervise or have anything to do with the elections; if any rights of the petitioners were breached it was by the Parliament of Uganda; the function of election of EALA members was with the EAC Partner States (Article 50 of the

Treaty) (supra). Neither was the 2nd respondent served with court orders to restrain Uganda's nine EALA members from being sworn in. The matters whose legality the court has to determine are those done by the Republic of Uganda through its National Assembly. Further, the petitioners at no time informed the 1st respondent that Uganda was conducting EALA elections in a manner inconsistent with Article 50 of the Treaty so as to justify his being dragged into this matter.

Counsel then contended that there were no matters complained of against him constituting a failure to discharge his functions as Principal Executive Officer of the EAC, as conferred by the Treaty. The complaints in the Petition under paragraphs 6, 8, 10, and 11 which form the basis of the petition, were not related to the 2nd respondent at all. None of the prayers were against him. The Government of the Republic of Uganda has informed the 2nd respondent that the Parliament of Uganda had pursuant to Article 51(1) of the Treaty and the Rules of Procedure of the Ugandan Parliament as amended;

- 1) Determined the procedure for the election of Members of the East African Legislative Assembly from Uganda; and
- 2) Elected the Members of the East African Legislative Assembly from the Republic of Uganda.

The 2nd respondent had also brought the ruling in the judgment of ***DP and Mbidde Mukasa Vs Secretary General of EAC Ref. 6 of 2011***

to the attention of the Government of Uganda, who then amended the above said rules. The 2nd respondent, therefore, did whatever was required of him under the Treaty to ensure the election for EALA members were conducted in accordance with the Treaty and relevant laws.

Counsel for the 2nd respondent also raised similar objections in relation to locus standi and time bar.

Counsel prayed that court dismisses the petition with costs.

Petitioners' response

In reply, it was submitted for the petitioners that the 2nd respondent was blowing hot and cold air at the same time when he stated that he was not concerned with EALA elections in Uganda yet he states that he took steps to ensure that the elections complied with the provisions of the Treaty.

Counsel for the petitioners submitted that Article 71(2) of the Treaty provides that the Secretary General of the Community shall where he or she thinks appropriate act on behalf of the Secretariat; and under Article 71(1) (h) the general administration of the community squarely lies on the Secretary General's shoulders. The Secretary General has a duty provided for under Article 29(1) of the Treaty to ensure that Partner States fulfill their obligations under the Treaty and to investigate and submit his findings where a Partner State has infringed provisions of the Treaty.

Counsel contended that the crux of the claim against the Secretary General in the petition was contained in paras 15 and 17 of the petition et al. Para 17 of the petition contended that the 2nd respondent erred to allow persons not duly elected and gazetted to take oath as members of EALA. The claims in the petition relate to infringement of Article 50 of the Treaty which the 2nd respondent is the custodian where it is claimed that that article was not complied with in so far as EALA elections did not cater for youths and persons with disabilities in contravention of the Treaty. The fact that Uganda was in continuous breach of Article 50 of the Treaty was a notorious fact as the 2nd respondent rightly conceded in para 9 (a)-(c) of its answer to the petition. As pleaded by the Secretary General, the list of purportedly elected EALA members with their particulars was sent to none other than the Secretary General who ought to have observed and verified that none of the elected members was a youth or person with disabilities in contravention of Article 50 of the Treaty and the decision in *Democratic Party and Mukasa Mbidde*.

Counsel also relied on ***James Katabazi & 21 Ors Vs Secretary General of the East African Community & A.G. of Uganda, EACJ Reference No. 1 of 2007***, where the East African Court of Justice at p.6 of its judgment held;

“Under Article 71(1) (d) of the Treaty one of the functions of the Secretariat of which the 1st respondent is head is:

'the undertaking either on its own initiative or otherwise, of such investigations, collection of information or verification of matters relating to any matter affecting the community that appears to it to merit examination.'

At page 8 dismissing the objection by the Secretary General that he was not a necessary party on similar grounds the court further held;

"Whether or not the 1st respondent had knowledge of what was happening to the complainants in Uganda can never be a point of law but one of fact to be proved by evidence and therefore it could not be a matter for preliminary objection and hence the dismissal."

At page 23, the court held further after citing article 29(1);

"From the unambiguous words of that sub-rule, there was nothing prohibiting the Secretary General from conducting an investigation on his/her own initiative. Therefore, the glaring answer to the 2nd issue is; yes the Secretary General can on his own initiative investigate such matters."

On the cause of action as defined in *Auto Garage Vs Motokov* (No. 3) 197 EA 514, Counsel replied that the case established or was concerned with a common law cause of action and not a statutory one. On this Counsel relied on ***Sitenda Sebalu Vs The Secretary General of the EAC & Others EA CJ Ref. No. 1/2010***. The cause of action in the present position emanated from Statute (the Treaty). The petitioners were not seeking a remedy for violation of their common law rights.

In the alternative, Counsel submitted that the Secretary General failed in his duty to verify whether the persons elected were duly elected and in allowing them to take oath without verification or gazette he erred and is liable. Further the prayers in the petition were against both respondents. In any case, an amendment could cure any lacuna but prayer 'E' also asks court to grant any relief it deems fit and just. The contention by the 2nd respondent that he did all he was obliged to do is a matter of evidence for full trial.

On the issue of lack of locus standi because the petitioners were not losers in the elections, and neither were they supported by 500 voters; Counsel for the petitioners had a different view.

Counsel submitted that this court derived its jurisdiction to entertain such matters from Article 52 of the Treaty, inter alia, sub Article 1, which enjoins this court to entertain any questions relating to the EALA elections. It does not provide like the PEA and Local Governments Acts that only the loser can petition. The opening words of Article 52(1) states that '**any question that may arise**' meaning that any person with any question relating to the EALA elections can petition court. The Parliamentary Elections Act and the Local Governments Act provisions should thus be invoked sparingly and should be applied with modifications to suit or enhance not to limit the applicability of Treaty provisions. In support of his view, Counsel relied on the statement of Tsekoko JSC citing with approval the *Zambian case*

of *Anderson Kambela Masoka & Ors Vs Levy Patrick Mwanawasa & Anor, PEP No. SC. 2/EP/01/02/03 of 2002* in *Dr. (RTD) Kiiza Besigye Vs Yoweri Kaguta Museveni SCEP No. 1 of 2006*.

He submitted that municipal law could not modify the right to bring any question relating to EALA elections under Article 52(1) of the Treaty but can be modified to suit it. If the legislation in Article 52 of the Treaty intended that only losers should question the election then it should have expressly stipulated so. Article 52(1) is open and not restrictive as to who should file a petition.

On the objection that the Petition was time barred, Counsel submitted that other than Article 30(2) of the Treaty which provides that references to the EACJ shall be instituted within two months of the enactment, action or decision etc complained of Article 52 of the Treaty does not provide any time limit within which to raise questions against the election under that article. The case of Oulanya Jacob (supra) which raised matters relating to Article 50 of the Treaty inter alia was filed after a year since elections, but was heard by the Constitutional court. If time within which to file a petition were to be of essence, the framers of the EAC Treaty would have specifically provided so in Article 52 just as they did in Article 30 of the Treaty. The gazette obtained from Parliament by the petitioners shows that it was supplied to Parliament on 23rd July 2012.

Consideration of the Objections;

Is there a cause of action against the 2nd respondent? The court only needs to look at the Petition and its attachments, and nothing more, to determine this.

The 2nd respondent's grounds for wanting to get out of the petition as stated in his answer to the petition are mainly that he did not supervise the EALA elections (Uganda), nor served with injunctive court orders to stop swearing in; there are no prayers against him. He relied on ***Auto Garage Vs Motokov [1975] EA 514.***

I should state at the outset that the petition itself appeared flawed in when it presents common law rights together with statutory rights. It is clear from the heading of the petition that it was brought under Articles 1, 50, 51(3) (b) and 52 of the Treaty for the Establishment of the East African Community. The rights conferred under Article 52 (1) of the Treaty (supra) are statutory rights in which case ***Auto Garage Vs Motokov*** as relied on by the 2nd respondent in his preliminary objection, would have no application. I would, however, not blame the 2nd respondent much for bringing in ***Auto Garage Vs Motokov*** when the petition is based on statutory rights. The petition as I stated contains complaints relating to common law rights, as follows:

Paragraphs 5 and 6 and 12 of the Petition state as follows:

“5. That the humble petitioners did pick forms for participation in the elections and participated in the said

elections and were vetted by the vetting committee of Parliament which was constituted for that purpose.

- 6. That the humble petitioners' names were not shortlisted for reasons not immediately known but established long after the said elections. (See Annexures A and B).***

- 13. That your humble petitioners who are all youths were denied a right to political participation without having been given a fair hearing only for the National Assembly to cover culpable scum by purporting to give flimsy reasons for their blocking long after elections had been concluded."***

Paragraph D of the prayers reads as follows:

"A declaration that the acts of the Clerk to Parliament and the verification or vetting committee established for the National Assembly EALA elections unlawfully prohibited the petitioners from political participation and consequently violated their rights enshrined in the constitution."

Further, the bulk of the affidavit in support of the petition dwells on how the rights of the petitioners were violated by the vetting committee of the Parliament of Uganda.

The above complaints and prayers which relate to common law rights are misplaced in this petition which is brought under the stated Articles of the Treaty. I would say that in their respect, there would be no cause of action against the 2nd respondent.

However, when it comes to the gist of the petition, there is a case established against the 2nd respondent when the petitioners state in Paragraph 2 of the petition that:

“The 2nd respondent is the Secretary General of the East African Community harbouring illegally elected members sitting at the East African Community Secretariat at Arusha, Tanzania, P O Box 1096, Arusha Tanzania.”

Paragraph 12 of the Petition states:

“That your petitioners further contend that the electoral process of members to EALA was flawed abinitio as no nominated or elected members to EALA were ever or have ever been gazette in accordance with the law.”

Prayer A (1) and C read as follows:

“A(i) A declaration that the EALA elections conducted by the Parliament of Uganda were not conducted in accordance with Article 50 of the Treaty for the establishment of the East African Community.

C. An order annulling the National Assembly EALA elections, Ugandan Chapter and recalling any persons holding out in Arusha as duly elected EALA members from Uganda.

The 2nd respondent states in his submissions in support of the preliminary objection (at page 10) that ***“he was reliably informed by the Government of the Republic of Uganda that Parliament of Uganda had, pursuant to the provisions of Article 50(1) of the Treaty and the Rules of Procedure of Parliament of Uganda as amended:***

a) Determined the procedure for the election of members of the

East African Legislative Assembly from Uganda; and

ii) Elected the Members of the East African Legislative Assembly from the Republic of Uganda.”

Further that he received a letter from the clerk to Parliament of Uganda dated 31st May 2012 informing him of the persons duly elected by Parliament of Uganda to the East African Legislative Assembly; he also brought the decision of **DP and Mbidde** (supra) to the attention of the Republic of Uganda and he knew that the orders therein had been complied with. He also received communication to that effect. He had no cause to doubt that the elections were conducted properly. Hence the 2nd respondent did what was required of him under the Treaty to ensure that elections for EALA members in Uganda were conducted in accordance with the Treaty.

The court notes that the 2nd respondent went even further than the scope of his preliminary objection to challenge the petition for lack of a supporting affidavit in respect of the 2nd petitioner; that the petitioners were not losers in the EALA elections; the petition is time barred.

It is court's view that the 2nd respondent went overboard in his effort to support his main preliminary objection. He ended up by actually demonstrating that he had obligations to discharge

during the process of the election of Uganda's representatives to EALA, only that his contention is that he had discharged the obligations.

By declaring that he had obligations to discharge, the 2nd respondent implied that he had a role to play in the said elections. However, since there are allegations against him in the petition, it means the petitioners feel that the 2nd respondent did not fulfill his obligations or play his rightful role in the elections. In court's view, the 2nd respondent's contentions that he had fulfilled the obligations required of him, therefore, belonged to the main suit, where the merits would be considered; not in a preliminary objection.

The principles to follow in raising preliminary objections were well stated in ***Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors [1960] EA 696*** where Law J at page 700;

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by implication out of pleadings, and which if argued as preliminary point may dispose of the suit.”

The preliminary objection raised by the 2nd respondent in his pleadings is not only limited to questions of law, but touch on facts which are not agreed by the parties. It will require evidence to deal with those questions, which evidence can only be produced at the main trial. The court, as I already stated, cannot look beyond the petition and its attachments to determine

whether there is a cause of action or not. It is court's view that the petition reveals a cause of action against the 2nd respondent.

The preliminary objection raised by the 2nd respondent to the effect that there is no cause of action against him is disallowed.

The other issues raised by the respondent in his submissions, and responded to by the petitioners in their reply to the petition, shall be dealt with when dealing with similar issues raised by the 1st respondent; that is to say, the issue of who can petition to declare an election void, and time within which to file a petition.

I now turn to the 1st respondent's preliminary objections.

1st Respondent's Preliminary Objections

The first objection by the 1st respondent is that the petition is not supported by any provision in law and the procedure adopted is unknown to Ugandan judicial process. It was submitted that none of the articles of the Treaty cited in the petition, that is to say, Articles 1, 50, 51(3) (b) and 52 provided for challenging EALA elections. The decision whether to make provisions for filing election petitions in respect of EALA representatives was left to the respective National Assemblies and nothing in Appendix B to the Rules of our Parliament provide for petitions. For these reasons, Counsel for the 1st respondent submitted that the petitioners were improperly before court; and that this court being a creature of the Constitution cannot exercise a jurisdiction not vested in it.

Counsel relied on ***Ndaula Ronald Vs Hajji Nadduli Election Petition No. 20 of 2006***; and ***Makula International Vs Cardinal Wamala Nsubuga*** to state that once an illegality is brought to the attention of court, it could not be ignored. The petition was therefore incompetent and should be dismissed.

The 1st respondent's second preliminary objection relates to locus standi of the petitioners to present this petition. It was submitted that the petitioners were not nominated following their failure before the vetting committee; they did not participate in the election and could not be said to be losers, hence they lacked locus standi to petition an election result.

Petitioner's Response

In response the petitioners submitted that Uganda, was a dualistic country where the two legal orders of municipal law and international law were completely separate and distinct, and the domestic court only applied domestic law and the international law that the domestic law directed it to apply. Further, the petitioners relied on ***MN Shaw in International Law, 2nd Edition at page 98, and the Vienna Convention on the Law of Treaties, 1969***, for the proposition that Article 52 of the Treaty had to be enforced basing on custom as to how such matters are handled in international jurisdictions and the EAC Treaty; and not by stifling or restricting the operation of the Article.

Counsel submitted further that by the Ugandan East African Community Act, the EAC Treaty and all laws made there under had force of law in Uganda; and by Article 52(1) of the Treaty, this court is the one to determine election petitions touching elected members to Parliament under our laws. Further, the 2nd respondent had in their response conceded jurisdiction of this court in paragraph 4 of their reply.

Counsel listed the following as applicable laws:

- a) The Treaty establishing the East African Community and Rules made there under. See: Articles 52 and 8(4) thereof.
- b) The Parliamentary Elections Act with modifications not to defeat the import of the Treaty and Rules made there under in terms of Article 8(4) of Treaty.
- c) All laws which govern a court hearing an election petition since this is the manner in which challenges to election of members to the National Assembly is determined in reference to these laws, inter alia.
- d) The Judicature Act S. 33 thereof with necessary modifications.
- e) The Civil Procedure Act S. 98 thereof, inter alia.
- f) The Parliamentary Rules App. B. thereto.

g) All laws made under the Treaty so long as they are applicable in line with the EAC Act of Uganda.

h) International customary law and norms relevant to the matter.

Counsel also relied on ***Jacob Oulanya Vs Attorney General Constitutional Petition No. 28 of 2008 (Oulanya case)*** where EALA elections were challenged in Uganda albeit in the Constitutional Court.

On the second preliminary objection that the Petitioner did not have locus standi, Counsel for the petitioners submitted that the matters argued by the 1st respondent on this point were contested facts, and pleadings had not closed. He further contended that the preliminary objection was misconceived since the petitioners were natural Ugandans resident within the community and no law barred them from instituting this action since they even participated in the elections substantially. Counsel relied on ***Alcon International Ltd Vs Standard Bank (U) Ltd and others Ref. No. 2 of 2011 (EAC)*** where ***Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distribution [1969] EA 696*** was cited; to state that a preliminary objection raises a pure point of law on the assumption that all facts pleaded are correct.

1st respondent's submissions in rejoinder;

In their submissions in rejoinder, Counsel for the 1st respondent reiterated the submission that Article 52 of the Treaty did not

provide a procedure for challenging the EALA elections. It left the discretion of setting down enabling procedures and laws to the respective National Assemblies. At present there was no way to enforce the said Article of the EAC Treaty. The implication by the Petitioners that the Parliamentary Elections Act could be applied with modifications was absurd, as courts could not modify laws. The same applied to Section 33 of the Judicature Act and Section 98 of the Civil Procedure Rules, which could not be modified by courts.

The reference to the ***Oulanya case*** was discounted as it was a Constitutional Petition where procedure was properly set down by law and it was, therefore, different from the present petition. In any case the judgment in Oulanya case was stayed by the Supreme Court and could not be relied upon.

Counsel further relied on ***Ngoma Ngime Vs Hon. Winnie Byanyima EP No. 11/2002; Ssali Godfrey Vs Uganda Electoral Commission and Kabaale Simon EP 35/2011*** to state that a person who never contested for the elections could not be a loser Section 60(1) of the Parliamentary Elections Act, 2005 (PEA); hence could not petition court over the elections. Moreover, the petition was time barred since it was not brought within 30 days from the date of gazetting of the elections. (Section 60(3) of PEA).

Consideration of the Objections;

I have considered the preliminary objections raised by the 1st respondent and the reply thereto, plus the rejoinder.

Before determining the validity or otherwise of the preliminary objection raised, I wish to put in view the relevant articles of the Treaty for the Establishment of the East African Community.

Article 50(1) states:

“The National Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State may determine.”

While Article 52(1) and (2) state;

1) 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.

2) The National Assembly of the Partner States shall notify the Speaker of the Assembly of every determination made under paragraph 1 of this Article.”

The 1st objection was that the petition was not supported by any provision in law, and the procedure used was unknown.

I note that Article 52(1) of the Treaty creates a cause of action under the Treaty and clearly the jurisdiction therein is vested in the institution of the partner states that determines questions of the election of members of the National Assembly responsible for the election in question. In Uganda, the provision vests the jurisdiction on the High Court which has the original jurisdiction to determine questions relating to the election of members of Parliament of Uganda, who are the ones responsible for the election in question.

Although Article 52(1) provides as it does above, the National Assembly of Uganda has never amended the relevant rules to provide for the challenging of the EALA elections, hence the argument by the 1st respondent that because petitions are not provided for, the petitioners are improperly before this court; and this court has no jurisdiction to try the matter.

Uganda is part of the East African Community (EAC) and a signatory to the Treaty. The treaty was domesticated in Uganda through the enactment of the East African Community Act 13 of 2002. Uganda is therefore bound by the provisions of the Treaty including Article 52(1) which creates a cause of action to be tried by the High Court.

Since there is no provision for determining the questions relating EALA elections, the court may use the law that is used to determine questions relating to Parliamentary Elections in Uganda. Indeed the petitioners have suggested so. And in my view this is not farfetched. Tanzania, which is a member of the East African Community, has made provision for election petitions to challenge election to the EALA. Rule 15 of the East African Legislative Assembly Elections Rules (the Tanzania Election Rules) provides:

“Pursuant to the provisions of Article 52(1) of the Treaty, the election of the candidate as a Member of the East African Legislative Assembly may be declared void only on an election petition.”

Rule 16 provides further that:

“The procedure, jurisdiction and the grounds for declaring void the election of such member, shall be the same as provided by law for the election petitions in respect of members of the national Parliament.”

See also (***Christopher Mtikila Vs The Attorney General of the United Republic of Tanzania and Anor Application No. 8 of 2007 arising from EACJ Reference No. 2 of 2007.***)

In light of the above, this court would not be so out of line if it decided to deal with the lacuna in our law by applying the PEA and Civil Procedure Rules, which are applicable to petitions to declare elections to the Ugandan National Assembly void.

Further, the preamble Ugandan East African Community Act reads:

“An act to give the force of law to the Treaty for the Establishment of the East African Community and to provide for other connected or incidental matters.”

Section 3(1) of the said Act states that the Treaty as set out in the Schedule to this Act shall have the force of law in Uganda. Since, therefore, the Treaty has the force of law in Uganda, it is incumbent upon Uganda as a partner state to see that the provisions of the Treaty are implemented just like the domestic law since the Treaty has been domesticated. Indeed, jurisdiction is a creature of statute, and it is the Treaty, as domesticated, that imposes the jurisdiction to try questions relating to the EALA elections on the High Court. And as I already stated the court, once clothed with the jurisdiction, can determine the procedure to follow, which may not be different from the procedure used while determining questions relating to elections to the National Assembly.

I agree with the submission of the petitioners that a court cannot seat helpless when such a matter is presented before it. Indeed equity will not suffer a wrong to be without a remedy. This court may therefore use any procedure at its disposal to competently handle the issue at hand. The petitioners gave a list of the laws that may apply as already indicated.

The first preliminary objection of the 1st respondent is therefore overruled. The relevant jurisdiction is vested in the High Court, which may determine the procedure to follow.

On the second issue relating to the locus standi of the petitioners to present this petition, I stated earlier, that in the absence of provision for determining questions relating to the elections of Uganda's representatives to the EALA, the Parliamentary Elections Act of Uganda may apply *Mutatis mutandis*.

Section 60(2) of the Parliamentary Elections Act, Cap 2005 states:

“60. Who may present election petition;

1) Elections under this Act shall be filed in the High Court.

2) An election petition may be filed by any of the following persons.

a) A candidate who loses an election.

***b) A Registered voter in the Constituency concerned supported by the signatures of not less than 500 voters
.....”***

3) Every election petition shall be filed within 30 days after the date on which the result of the election is published by the Commission in the Gazette.”

The above provisions vest the original jurisdiction in the High Court. They also define who can challenge an election and within what period. S.60 (2) (a) states that a candidate who loses an election can challenge the election.

Election is defined in Blacks Law Dictionary as:

“The process of selecting a person to occupy an office (usually a public office).”

The petitioners participated in the process which culminated into the election of Uganda’s representatives to EALA. They, however, fell short of actually contesting in the elections, thereby failing to qualify either as losers or winners of the election. Since they were not the losers within the meaning of S. 60(2) (a), they had no locus standi to challenge the election of the representatives of Uganda to EALA.

S. 60(3) gives the time limit within which to file a petition. It is 30 days from the date of the gazetting of the result of the election. In this particular case, Annexure ‘A’ to the respondent’s rejoinder is a copy of the relevant gazette of the names of the elected representatives of Uganda to the EALA. It is dated 31/5/2012. This petition was filed in the High Court on the 31st July 2012, exactly two months after the publication of the results of the election in the gazette. The petitioners, being the proponents of the view that the PEA would apply to this petition, ought to have realized the time limits within which to file the petition. There is no obligation on the Clerk to the National Assembly to send the gazette to the petitioners.

On these issues, I see no conflict between the provisions of the PEA and Article 52 of the Treaty. I find the provisions of the PEA compatible with, and complementary to, the relevant Treaty provisions.

I agree with the 1st respondent that the petitioners had no locus standi to present this petition in court. It was also filed out of time.

The second preliminary objection is, therefore, upheld.

Before I take leave of this matter, I wish to express my gratitude to learned Counsel on both sides for the thorough research. I was impressed by the spirited fight put up by Counsel for the petitioner in opposition of this petition, even if I did not refer to all the authorities cited.

Having considered the pleadings/submissions by the parties, the first preliminary objection raised by the 1st respondent is disallowed while the objections on locus standi and time bar are both upheld.

The preliminary objection raised by the 2nd respondent that there is no cause of action against him is disallowed.

The resultant effect of upholding the 1st respondent's second objection is that the petition is incompetent. It is, therefore, hereby struck off.

I shall make no order as to costs because I consider the issues raised herein to be of great importance.

It is so ordered.

Elizabeth Musoke

JUDGE

5/04/2013