



IN THE EAST AFRICAN COURT OF JUSTICE

AT KIGALI, RWANDA

APPELLATE DIVISION

**(Coram: Nestor Kayobera, P.; Anita Mugeni, VP; Kathurima M'Inoti;
Cheborion Barishaki; and Omar O. Makungu, JJA.)**

APPEAL NO 2. OF 2023

BETWEEN

PONTRILAS INVESTMENTS LIMITED..... APPELLANT

AND

CENTRAL BANK OF KENYA.....1ST RESPONDENT

**THE ATTORNEY GENERAL OF
THE REPUBLIC OF KENYA.....2ND RESPONDENT**

[Appeal from the Ruling of the First Instance Division dated 17th November 2022 at Kampala (Yohane Masara, PJ; Dr. Charles Nyawello, DPJ; Charles Nyachae; Richard Muhumuza; and Richard Wabwire Wejuli, JJ.) in Application No. 6 of 2022 Arising from Reference No. 8 of 2017]

JUDGMENT OF THE COURT

INTRODUCTION

1. This is the second time that this Court is seised of an interlocutory appeal against a Ruling of the First Instance Division of this Court (the Trial Court) arising from Reference No. 8 of 2017. The first interlocutory appeal was by the Central Bank of Kenya (the 1st Respondent) from the Ruling of the Trial Court dated 15th June 2020 in Application No. 14 of 2019. That Appeal was determined by the Judgment of this Court dated 18th November 2021. The current interlocutory appeal is by Pontrilas Investments Ltd. (the Appellant) and emanates from the Ruling of the Trial Court dated 17th November 2022 in Application No. 6 of 2022 arising from the same Reference.
2. The Appellant is a limited liability company incorporated in the Republic of Kenya, a Partner State to the Treaty for the Establishment of the East African Community (the Treaty). The Appellant is incorporated under the Companies Act No. 17 of 2015 and is represented in these proceedings by Messrs. Katende, Ssempebwa & Company Advocates of Kampala in the Republic of Uganda.
3. The 1st Respondent is a body corporate established by Article 231 of the Constitution of Kenya and Section 3 of the Central Bank of Kenya Act, Cap 491 Laws of Kenya. The 1st Respondent is responsible for, among others, formulating monetary policy, promoting price stability and issuing currency in the Republic of Kenya. In this Appeal, the 1st Respondent is represented by Messrs. TrippleOKLaw Advocates, LLP., of Nairobi in the Republic of Kenya.



4. The 2nd Respondent is the Attorney General of the Republic of Kenya, the legal representative of the Republic of Kenya. In this Appeal the 2nd Respondent is represented by Mr. Charles Mutinda, Chief State Counsel in the State Law Office of the Republic of Kenya.

REFERENCE TO THE TRIAL COURT

5. The Appellant filed Reference No. 8 of 2017 in the Trial Court in its capacity as legal assignee of deposits made at Imperial Bank Ltd. in the Republic of Kenya. The Appellant alleged, as against the 1st and 2nd Respondents, breach of duty, negligence, failure to adhere to good governance, misfeasance, conspiracy, and deceit in the management of the said Imperial Bank Ltd, which the 1st Respondent had put under supervision and management. As a result of the pleaded breaches, the Appellant further alleged that the Respondents violated its rights under the Constitution of Kenya, namely, the right to property (Article 40); the right to consumer protection (Article 46); and the right to fair administrative action (Article 47). By extension, the Appellant alleged that the Respondents' said breaches constituted violation of Articles 6, 7, 8(1) and 82(1) of the Treaty and Articles 3 and 14 of the Protocol Establishing the East African Community Monetary Union (the Protocol).
6. The Appellant expressly pleaded that the 1st Respondent is functionary an institution of the East African Community.
7. By way of relief, the Appellant prayed for the following remedies:
 - (a) a declaration that, in allowing its deposit to be lost, both the 1st and 2nd Respondents were in breach of their obligations under the Treaty and the objectives of the Protocol;



- (b) a declaration that the Appellant is entitled to compensation jointly and severally by the 1st and 2nd Respondents for the loss it suffered as a consequence of their pleaded breaches;
- (c) an award of special damages in the form of loss of deposits as follows: -
- i. Ksh. 606,508,497
 - ii. US\$ 2,363,143.86
 - iii. EUR. 46,544.00
 - iv. GBP. 5,308.00
- (d) an award of general damages
- (e) interest upon such sums as the 1st Respondent shall be found to be due;
- (f) costs of the Reference, and
- (g) further or other reliefs as the Court may deem fit to grant.
8. In its response to the Reference, the 1st Respondent denied liability and raised objections that, by dint of Article 30 of the Treaty, the Court lacked jurisdiction, that the Reference was time-barred, that the Appellant had no *locus standi* to institute the Reference and that the Reference was based on an illegality under the laws of Kenya.
9. On its part, the 2nd Respondent also opposed the Reference and denied liability. The 2nd Respondent averred that the Reference did not disclose a cause of action under Article 30(1) of the Treaty; that the Court lacked jurisdiction to entertain the Reference; and that the same was time-barred.



THE 1ST RESPONDENT'S PRELIMINARY OBJECTION IN THE TRIAL COURT

10. On 30th January 2018 the 1st Respondent took out a preliminary objection to the Reference founded on some eight grounds, namely:
- a. The Court lacks jurisdiction over the 1st Respondent;
 - b. The Court lacks jurisdiction to determine and grant the reliefs sought;
 - c. The Reference is time-barred;
 - d. The Reference is bad in law and has been filed contrary to the provisions of the Treaty;
 - e. The Appellant lacks *locus standi* to file the Reference;
 - f. The Reference is based on an illegality;
 - g. The Reference is an abuse of court process; and
 - h. The Reference is incompetent, fatally defective, does not lie and ought to be struck out or dismissed with costs.

11. Upon considering the objections, the Trial Court held that it would hear and determine the preliminary objection first, limited to only one issue, namely:

"Whether the 1st Respondent had been properly sued, was properly before the Court, and the Court thus has jurisdiction over it."

THE TRIAL COURT'S DETERMINATION ON THE PRELIMINARY OBJECTION

12. After hearing the preliminary objection, by a Ruling dated 4th July 2019, the Trial Court overruled the same. The Court found and held that:

- a. The preliminary objection raised both a question of law and fact and therefore was not a proper preliminary objection;
 - b. Reference No. 8 of 2017 should proceed to hearing on its merits;
 - c. The 1st Respondent was at liberty, if it so wished, to address the question of its *locus standi* as a matter of law and fact at the hearing of the Reference; and
 - d. Each party should bear its own costs.
13. Specifically on whether there was a proper preliminary objection before it, the Trial Court expressed itself as follows:

"We take the view that, as a matter of law, institutions of the Community would firstly be such institutions as are designated as such in Article 9(3) of the Treaty. Article 9(2), on the other hand, envisages that the Summit will from time to time as it deems fit or necessary establish various bodies, departments and services as institutions of the Community. This clearly is an ongoing process. At any given time, therefore, including at the time of filing or hearing the instant application, it cannot be discerned, by reading the said Article whether or not a particular entity is an institution of the Community having been so established by the Summit in terms of Article 9(2). Whether or not an entity has been so established, can only be demonstrated by adducing appropriate evidence either in support or negation of that contention.

It is clear to us that Articles 9(2) and 9(3) are separate and distinct legal bases under the Treaty for determining whether or not a particular entity is an institution of the Community in terms of Article 1 thereof, which provides 'institution of the Community' means the institutions of the Community established by Article 9 of this Treaty". An entity will thus be determined to be an institution of the community by one or the other of these bases. In the case of Article 9(2), such determination by the Court is a question of fact that would require proof of the Summit having established the entity as an institution of the Community."

14. The 1st Respondent did not prefer an appeal against the Ruling of 4th July 2019.

15. Subsequently, the Appellant applied to the Trial Court for summons against the Governor of the 1st Respondent to produce some particularised documents and, for leave to amend the Reference. While conceding to the prayer for leave to amend the Reference, the Respondents strenuously opposed the prayer for summons.
16. By an order dated 15th June 2020, the Trial Court allowed production of some of the documents and declined to order production of others. As regards the summons, the Trial Court declined to summon the Governor, but in lieu thereof, summoned the 1st Respondent's Head of Banking to appear and produce the documents whose production the Court had allowed. Parties were directed to bear their own costs.
17. Both the 1st Respondent and the Appellant were aggrieved and preferred respectively, an appeal and a cross-appeal, to this Court.

THE FIRST INTERLOCUTORY APPEAL

18. The 1st Respondent's first interlocutory appeal to this Court raised five issues, but only one is relevant for purposes of the Appeal now before the Court. That issue was framed as follows:

"Whether the Trial Court committed a procedural irregularity in not considering or properly weighing the Appellant's points of law and submissions"

19. At the heart of that issue was the 1st Respondent's contention that it had raised before the Trial Court valid objections regarding the Court's jurisdiction to hear and determine the Reference, the question of limitation of time, and the capacity of the Appellant. The 1st Respondent argued that the Trial Court ought to have determined those issues first, but failed to do so. It was further contended that the organs and institutions of the Community are set out in Articles 9(1) and 9(3) of the Treaty and that the 1st Respondent is not listed among those organs and institutions and further, that there is no Protocol in



existence making the 1st Respondent such an organ or institution. The 1st Respondent therefore, maintained that it was a procedural irregularity for the Trial Court to progress the Reference without first resolving the jurisdictional issues raised.

20. After hearing both the appeal and the cross-appeal, by a Judgment dated 18th November 2021, this Court upheld the decision of the Trial Court that the preliminary objection raised by the 1st Respondent raised both questions of law and fact and was therefore not a pure preliminary objection. This was because the list of organs and institutions of the Community set out in Articles 9(1) and 9(3) is not exhaustive and further that the Treaty gives the Summit the power to create additional organs and institutions. Accordingly, the Court dismissed both the appeal and the cross-appeal with no order on costs. The Court directed that Reference No. 18 of 2017 should proceed for hearing and determination in the Trial Court.

21. In arriving at that conclusion the Court expressed itself as follows:

"We have re-examined the pleadings in the Reference and are satisfied that it is a contested issue whether the Appellant is an institution of the Community, with the 1st Respondent asserting that it is, while the Appellant denies that it is such an institution. In the circumstances, we are satisfied that the Trial Court did not commit a procedural irregularity in holding whether it had jurisdiction over the Appellant was an issue of mixed law and facts which could not be determined as a preliminary point, but had to be determined in the Reference after hearing evidence". (Emphasis added).

THE 1ST RESPONDENT'S APPLICATION FOR BIFURCATION OF THE REFERENCE

22. Up to that point, it was the common position of the Trial Court and this Court that the 1st Respondent's Preliminary Objection raised mixed



issues of fact and law and that to determine whether the 1st Respondent was an Institution of the Community required the taking of evidence. It was the clear expectation that the issue would be determined after taking evidence of the parties as regards the petition as a whole. The express finding by the two Courts that the issue involved was one of mixed law and facts did not contemplate anything less.

23. After several false starts regarding the hearing of the Reference, on 17th November 2022, at Kampala, Uganda, the Trial Court, against the Appellant's objection, heard an application by the 1st Respondent for bifurcation of the proceedings. In the Application, the 1st Respondent invited the Court to hear and determine first and separately whether it was an Institution of the Community. On the same date, the Trial Court allowed the Application for bifurcation and discharged the 1st Respondent from the proceedings. The Court reserved the reasons for the Ruling to a date to be given on notice and, ultimately rendered the reasoned Ruling on 2nd December 2022.

THE SECOND INTERLOCUTORY APPEAL

24. The Appellant was aggrieved by the Ruling of the Trial Court bifurcating the Reference and discharging the 1st Respondent and preferred the appeal now before us vide a Notice of Appeal lodged on 8th December 2022. On 10th November 2023, this Court, with the consent of the parties, stayed further proceedings in Reference No. 8 of 2017 before the Trial Court, pending the hearing and determination of the present Appeal.



25. The Appellant's Appeal is founded on 8 grounds, which we do not find necessary to set out here, because, at the Scheduling Conference, those grounds were reduced to three issues only. By way of relief, the Appellant prayed that:

(a) the Appeal be allowed;

(b) the Ruling of the Trial Court be set aside; and

(c) the Appellant be awarded costs of the Appeal.

26. At the Scheduling Conference, the parties agreed on following three issues for determination by the Court:

(i) whether the First Instance Division erred in law and committed a procedural irregularity by bifurcating and hearing separately, the issue of jurisdiction;

(ii) whether the First Instance Division erred in law and committed a procedural irregularity by holding before taking all the evidence that the Central Bank of Kenya is not an institution of the East African Community; and

(iii) what remedies should the Court grant?

APPELLANT'S CASE

27. On the first issue, the Appellant submitted that the Trial Court erred by bifurcating the reference and determining the issue of jurisdiction separately whereas the Trial Court and this Court had already ruled that whether or not the Trial Court had jurisdiction over the 1st Respondent was a question of mixed facts and law and could not be determined as a pure point of law. It was contended that the essence of the Rulings by the Trial Court and this Court was that the hearing should proceed on all the framed issues, including the issue of jurisdiction. It was also contended that when the Reference was listed for hearing on 28th March 2022 but could not proceed, the Trial Court



made an order which would only be understood to mean that the next hearing would be hearing of the Reference. This is because the Trial Court made it clear that it would not entertain the application for bifurcation in light of its earlier Ruling on the Preliminary Objection, which Ruling was upheld by this Court.

28. It was the Appellant's further submission that by its nature, the application for bifurcation was a disguised appeal against the earlier Ruling of the Court and an invitation to the Trial Court to reverse its order that the hearing of the Reference should proceed on all issues.
29. The Appellant also complained that it was ambushed in the hearing of the Application for bifurcation, which was listed for hearing on 16th November 2022, even though its Counsel had not seen the hearing notice and that when the matter was adjourned to 17th November 2022, the Trial Court committed a procedural irregularity when it failed to make a formal Ruling on the Applicant's objection to the bifurcation application and by allowing the bifurcation application in contradiction of its earlier Ruling.
30. Turning to the second issue for determination, the Appellant submitted that the Trial Court committed a procedural irregularity when it determined that the 1st Respondent was not an institution of the Community without considering all the evidence on record and without affording the Appellant a fair opportunity to identify its evidence already on record. It was contended that the Appellant had informed the Trial Court that its evidence was already on record and that up until when the Court decide to hear the bifurcation application, all its indications were that it was going to hear all the issues in the Reference.



31. The Appellant argued that when the parties turned up for the hearing on 16th and 17th November 2022, its understanding was that the Trial Court was going to hear all the issues in the Reference as it had earlier indicated and that its witnesses were available for cross-examination. It was contended that the Appellant had not turned up expecting a hearing on only one particular issue identified by the Court and that its application for time to identify the relevant evidence for that issue was rejected by the Trial Court, thus denying the Appellant a fair opportunity to present its case. The Appellant further complained that the Trial Court denied it the opportunity to file submissions, which would have demonstrated the evidence the Appellant was relying on. In the Appellant's view, the haste with which the Trial Court conducted the hearing denied it a fair hearing of the Reference, which it was entitled to.
32. Relying on Article 6(d) of the Treaty, the Appellant submitted that rule of law is a fundamental principle of the Treaty and that one of the attributes of the rule of law is fairness in judicial proceedings. The Appellant contended that under the Treaty, the Partner States were obliged to adhere to fair hearings and that, the Court was the custodian of fair hearing. In support of the submission the Appellant cited the cases of **Baranzira Raphael and another v. Attorney General of the Republic of Burundi**, Reference 15 of 2014 and **Martha Wangari Karua v. Attorney General of the Republic of Kenya**, Reference 20 of 2019. It was also the Appellant's contention that in proceedings before the Court, fairness demanded that the parties be afforded equal opportunity to present their cases.



33. Lastly, as regards the issue of remedies, the Appellant submitted that this Court ought to remit the matter back to the Trial Court for hearing in accordance with its Ruling dated 4th July 2019 and the Judgment of this Court dated 18th November 2021. The Appellant concluded by urging the Court to award it costs of the Appeal.

1ST RESPONDENT'S CASE

34. The 1st Respondent opposed the Appeal, submitting on the first issue, that the Ruling from which this Appeal arose was legally and procedurally sound and that the Trial Court properly exercised its discretion by bifurcating the reference and determining the issue of jurisdiction separately. It was contended that the Ruling of the Trial Court of 4th July 2019 and the Judgment of this Court of 18th November 2021 did not require all the issues in the Reference to be heard and determined together.
35. As regards the application for bifurcation, the 1st Respondent submitted that the same was on record, had not been heard or determined and that the Trial Court was right to list it for hearing. The 1st Respondent blamed the Appellant's Counsel for being unprepared to proceed on 16th November 2022 and noted that the Trial Court indulged him and adjourned the hearing to the next day, when all the parties were given an opportunity to make submissions relying on the evidence on record. The 1st Respondent added that it had already filed affidavit evidence from Florence Ochango, which showed that the 1st Respondent was not an institution of the Community. In the circumstances, it was contended, the Trial Court properly discharged the 1st Respondent from the proceedings.



36. It was the 1st Respondent's further contention that the decision to bifurcate the proceedings was in exercise of the Court's inherent powers under rule 4 of the East African Court of Justice Rules of Procedure, 2019 (the Rules) so as to save judicial time or prevent abuse of the process of the Court. In support of that proposition, the 1st Respondent relied on **Halsbury's Laws of England**, 4th Edition, Vol. 37 Para 4 on the nature of the Court's inherent powers. It was also contended, on the authority of the decision of this Court in **Central Bank of Kenya v. Pontrilas Investments Ltd & another**, Appeal No. 3 of 2020, that exercise of discretion by the Trial Court does not constitute a procedural irregularity inviting the intervention of the Appellate Court, unless it is demonstrated that the discretion was exercised injudiciously.
37. The 1st Respondent added that it was the duty of the Trial Court to conduct and control proceedings so as to ensure that they were determined expeditiously and inexpensively and that the Appellate Court will not interfere with a decision of the Trial Court made in such circumstances. The 1st Respondent cited **Ashmore v. Corp of Lloyds** [1992] 1 2 All E.R 486 in support of the proposition.
38. Lastly, the 1st Respondent submitted that bifurcation of proceedings is a well-established principle and practice in international courts, particularly for the purpose of determining first the question of jurisdiction before considering the substantive merits of a case. By way of examples the 1st Respondent relied on the decisions in **Maritime Delimitation and Territorial Questions between Qatar and Bahrain**, I.C.J. Reports 1994 p. 112, **United States Diplomatic and Consular Staff in Tehran**, I.C.J. Reports 1980, p.3, and **Aegean Sea Continental Shelf**, I.C.J. Reports 1978, p.3.

39. On the second issue for determination, the 1st Respondent submitted that the Trial Court granted the parties ample opportunity to adduce their evidence, including on jurisdiction and that it even granted the Appellant an adjournment from 16th to 17th November 2022, when the Appellant failed to produce any evidence. In the circumstances, it was contended that having failed to adduce any evidence, the Trial Court properly held that the 1st Respondent was not an Institution of the Community.
40. Lastly, on the issue of remedies, the 1st Respondent urged the Court to dismiss the appeal with costs for lack of merit.

2ND RESPONDENT'S CASE

41. The Appeal was also opposed by the 2nd Respondent, who, in respect of the first issue for determination, submitted that the Trial Court had discretion under rule 4 of the Rules to proceed as it did in bifurcating the proceedings. It was contended that, after granting the order for bifurcation, the Trial Court proceeded to hear evidence on jurisdiction as contemplated in its earlier Ruling which was affirmed on appeal by this Court and properly concluded that the 1st Respondent is not an Institution of the Community.
42. On the second issue, the 2nd Respondent submitted that the order for bifurcation of the proceedings was not inconsistent with the earlier Ruling of the Trial Court which was affirmed by this Court and that the Court considered the evidence on record before discharging the 1st Respondent from the proceedings.



43. As regards the last issue, the 2nd Respondent urged the Court to dismiss the Appeal with costs.

APPELLANT'S SUBMISSIONS IN REJOINDER

44. While conceding that the Trial Court has discretion and control regarding conduct of proceedings, the Appellant argued that the proceedings must be conducted in a manner that is fair and just to all the parties. It was submitted that the Trial Court failed to determine the Applicant's objection to the application for bifurcation and denied it an opportunity to submit on its evidence on record.

45. The Appellant insisted that its Counsel had not seen the notice of hearing of the Application for bifurcation which was scheduled for 16th November 2022 and that even the 2nd Respondent confirmed that it had not seen the said hearing notice.

THE COURT'S ANALYSIS AND DETERMINATION

46. Having carefully considered the record of appeal, the agreed issues for determination, the written and oral submissions and the authorities cited by the parties, the Court determines the issues sequentially as follows.

Issue No. 1: Whether the First Instance Division erred in law and committed a procedural irregularity by bifurcating and hearing separately, the issue of jurisdiction.

47. To properly appreciate and contextualise this issue, it is important to peruse the record of appeal on how the hearing of the Reference proceeded after the Ruling of the Trial Court dated 4th July 2019 which was affirmed by this Court in the Judgment dated 18th November 2021.

It will be recalled that in the said Ruling and Judgment, the Trial Court and this Court were unanimous that the 1st Respondent's preliminary point on whether it was an Institution of the Community raised issues of mixed law and fact and that the jurisdictional issue that the Appellant had raised could only be determined after taking evidence.

48. From the record, the Reference was scheduled for hearing on 28th March 2022. However, on 16th March 2022 the 1st Respondent applied for bifurcation of the hearing of Reference No. 18 of 2017, so that the Trial Court could determine the 1st Respondent's jurisdictional objection first and independently of the merits of the Reference. In other words, and notwithstanding the determinations by the Trial Court and this Court, the 1st Respondent was once again seeking to separate and have determined separately the question whether it was an Institution of the Community and the merits of the Reference.
49. The record of the proceedings of the Trial Court of 28th March 2022 indicate that the hearing could not proceed because the 1st Respondent had not produced all the documents that it had been directed to avail. However, the parties agreed to proceed partly by oral evidence and partly by affidavit evidence. The Appellant informed the Trial Court that it would call one witness, while the 1st Respondent was to call two witnesses. The 2nd Respondent elected not to call any witness.
50. On that day the Trial Court granted the Appellant leave to file a supplementary affidavit by 10th May 2022 while the Respondents were granted until 10th June 2022 to file theirs, if any, after service by the Appellant. Up to that point, it is clear that the Trial Court was proceeding consistently with its Ruling, which this Court had affirmed.

51. Although the 1st Respondent's application for bifurcation was not listed for hearing on 28th March 2022, its Counsel made a spirited effort to address the Court on that Application. The Court took the view that what the 1st Respondent was doing in the bifurcation application was to attempt to raise through the backdoor the same issues that had been determined by the Trial Court and this Court. For example, in one exchange with Counsel for the 1st Respondent, the Trial Court informed him as follows (page 2298 of the Record):

"Counsel Oduol, what went to Appeal partly was because at one stage, this Court said that the issue of jurisdiction will be handled at the hearing of the main Reference and we are still at Scheduling. Now you want to bring in application that basically is telling this Court to go back to its decision from which an Appeal arose and the Appeal was basically dismissed on account that basically the decision that you appealed against stands. Now, you are making an application here basically inviting this Court to go back to that issue that was raised and Court decided that it will be dealt with in the main Reference. That is what the motion is about..."

"But Mr. Oduol, the Court has decided, it acknowledges that and has said it will deal with it when hearing the main Reference and that is why this motion is pre-empting Court to say change your mind, first hear this and then proceed in this manner but Court has said already we shall proceed by hearing it in the main Reference." (Emphasis added).

52. Ultimately the Court delivered itself as follows on the application for bifurcation:

"Mr. Oduol, I think you are trying to challenge our decision through a back door and we are not prepared to do that. So, the order stands as we have directed that you file affidavits and bring any evidence even including the evidence on whether this Court has jurisdiction or not and then we will convene here again, hear oral evidence or cross examination of those witnesses and then we give you a chance to file submissions and please put any submissions relating to jurisdiction and we are going to decide." (Emphasis added).



53. From the above exchange and order, it would appear to any reasonable person that the Court had determined that it would proceed as per its Ruling of 4th July 2019 and would not be distracted by the Application for bifurcation.
54. The Reference next came up for hearing on 16th September 2022. The Appellant's witnesses were not physically in Court and the Appellant's Counsel informed the Trial Court that he would not be calling any witnesses, after all. The 2nd Respondent maintained as well that he would not be calling any witness. For its part, the 1st Respondent informed the Court that it wished to cross-examine three witnesses from the Appellant's side. Once again, the Court adjourned the hearing to November 2022. On this Occasion the Trial Court directed as follows:

"Given what has been submitted by Counsel from the 1st Respondent, the Court reluctantly postpones this hearing to the next session which will be in November. So, the November session will be probably in Kampala. So, make available the three witnesses that the 1st Respondent has said he wants to cross-examine and the 2nd Respondent also requested that he has a right to ask a few questions and Prof. Ssempebwa you have a right to re-examine your witnesses. Those are the only three witnesses and notices be made that the witnesses be present in Court. So Professor, if you can make that arrangement so that when this matter is scheduled and I believe it will be just a one-day hearing, those witnesses be in Court for cross examination and re-examination. With regard to the witness who has come from the Central Bank, it was a Court's direction that the witness comes instead of the Governor because that was the order of the Court and now that Professor Ssempebwa is not intending to cross examine the witness, that witness is hereby discharged."
(Emphasis added).

55. Once more, reading the record, it is clear that up to that point the Court was focused on hearing the Reference in accordance with its Ruling of 4th July 2019 and gave directions to that effect. There was no



indication or mention of hearing and determination of the application for bifurcation before the hearing of the Reference.

56. The Reference came up for hearing on 16th November 2022 at Kampala, Uganda, when Counsel for the Appellant informed the Court that he had received a notice from the Court indicating that the hearing would be the next day, 17th November 2022 and that he had arranged for his witnesses to be in Court on 17th November 2022. However, it transpired that both the Reference and the Application for bifurcation were listed for hearing on 16th November 2022.
57. On the application of Counsel for the Appellant, who maintained that the Court had indicated that it would not hear the application for bifurcation, the matter was adjourned to the next day and the Appellant was granted leave to reply to the application for bifurcation before the end of the day. The Court indicated that it would start by hearing the application for bifurcation, followed by the Reference.
58. The next day, on 17th November, 2022, the Appellant objected to the hearing of the application for bifurcation on the grounds that it was raising the same issues which had been raised previously before the Trial Court and in this Court. The Trial Court overruled the objection and proceeded to hear the application for bifurcation which, as we have previously stated, it allowed and discharged the 1st Respondent from the proceedings. The Court then reserved the reasons for the Ruling to a date to be given on notice, and ultimately gave the reasoned Ruling on 2nd December 2022.
59. We agree with the 1st Respondent's submissions as regards the discretion of the Court to control and direct proceedings before it and



its power, depending on the circumstances of the case, to order bifurcation of the proceedings. However, what we understand to be the Appellant's grouse is not that the Court lacked the said discretion, but rather, the manner in which the Court exercised its discretion, which the Appellant argues constituted a denial of the right to a fair hearing.

60. From the peculiar circumstances of this Appeal, the issue of how the jurisdictional issue raised by the Appellant would be dealt with had been determined and settled by the Trial Court in its Ruling of 4th July 2019 and affirmed by this Court in the Judgment of 18th November 2021. Simply put, it was that the issue raised by the Appellant was a mixed matter of law and fact, which could only be determined after taking evidence. Further, on 28th March 2022, when the Application for bifurcation was still on record, the Trial Court had given a crystal-clear order that it would focus on hearing the Reference rather the application for bifurcation, which it perceived as a backdoor effort to undo the its earlier Ruling. And in its order of 16th September 2022, the Trial Court had informed the parties to prepare for the hearing of the Reference and made absolutely no mention of the hearing of the Application for bifurcation.

61. In these circumstances and taking into the account the course that the Trial Court had adopted, it does not surprise us that the Appellant should complain that it was literally ambushed to be told on 16th November 2022 to proceed with the hearing of the Application for bifurcation. Article 6(d) of the Treaty identifies the rule of law as one of the fundamental principles of the Community, together with the promotion and protection of human and peoples' rights in accordance with the **African Charter on Human and Peoples Rights**. In



interpreting and applying the Treaty the Court is called upon to pay due regard to these fundamental principles.

62. In ***Baranzira Raphael & another v. Attorney General of the Republic of Burundi*** (supra), the First Instance Division of this Court grappled with the meaning and implication of the concept of the rule of law and held that:

“...the rule of law is the king-pin that ferments, and by which nation states progressively aspire towards the ideal of good governance. For present purposes, the standard for rule of law captured therein is first, the existence of laws that are publicly promulgated, equally enforced and independently adjudicated, and secondly, measures that ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, and procedural and legal transparency.” (Emphasis added)

63. We further take into account that the **African Commission’s Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003** explain, among others, that in determining a person’s rights or obligations, everyone is entitled to a fair and public hearing by a legally constituted, competent, independent and impartial judicial body. Among the elements of a fair trial identified by the Principles and Guidelines are equality of arms between the parties to the proceedings; equality of all persons before the judicial body; and adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence.

64. In ***Zahira Habibullah Shaikh & another v. State of Gujarat & others*** (Crim App. No. 441-449 of 2009), the Supreme Court of India held as follows on the interface between the rule of law and a fair trial or hearing:

"The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted." (Emphasis added).

65. We also agree with the decision of the Supreme Court of India in **Mrs. Kalyani Baskar v Mrs. M. S. Sampooram** (Crim. App. No. 1293 of 2006) that a fair trial includes fair and proper opportunities allowed by law to present a party's case, including to adduce evidence, and that denial of the opportunity means denial of a fair trial. Although those decisions of the Supreme Court of India were rendered in the context of a criminal trial, the principles propounded therein apply equally in all trials that are held in accordance with the law.
66. For the foregoing reasons and taking into account the Ruling of the Trial Court dated 4th July 2019 and the Judgment of this Court dated 18th November 2021, the proceedings before the Trial Court on 28th March 2022 and 16th September 2022 when the Court intimated to the parties how the hearing of Reference No. 8 of 2017 would be progressed, we answer issue No. 1 in the affirmative, namely that the Trial Court erred in law and committed a procedural irregularity by bifurcating and hearing separately, the issue of jurisdiction.

Issue No. 2: Whether the First Instance Division erred in law and committed a procedural irregularity by holding, before taking all the evidence, that the Central Bank of Kenya is not an institution of the East African Community.

67. The second issue for determination is closely intertwined with the first issue. The Appellant's complaint is that after unprocedurally hearing and determining the application for bifurcation of the proceedings having previously indicated otherwise, the Trial Court did not afford it sufficient time to refer to its evidence and to make submissions. It is the case of both Respondents that the Court afforded the Appellant ample time to present its evidence on whether the 1st Respondent was an Institution of the Community, but the Appellant failed to do so.
68. As indicated by the Supreme Court of India's decision in **Zahira Habibullah Shaikh & another v. State of Gujarat & others** (supra), whether or not a party's right to a fair trial has been infringed depends on the peculiar circumstances of each case and on whether taken as a whole, what happened deprived the trial of fairness to such a degree that it can be said that a miscarriage of justice did occur.
69. The record is fairly clear that the Trial Court had consistently indicated to the parties that it was going to hear the Reference by both oral and affidavit evidence and had signalled its unwillingness to entertain the application for bifurcation. Although the 1st Respondent has incessantly criticised the Appellant's Counsel for being unprepared for the hearing of the Reference, we are not persuaded, in light of the indications by the Court on how it would progress the hearing of the Reference, that Counsel was entirely or solely to blame. The order to hear the application for bifurcation when the Court had previously intimated otherwise would have taken even the most diligent Counsel by surprise.



70. Having answered issue No. 1 in the affirmative, meaning that the bifurcation was a procedural irregularity, it must follow as night follows day that, a determination that the 1st Respondent was not an Institution of the Community without conducting a hearing as contemplated by the Ruling of the Trial Court dated 4th July 2017 and affirmed in the Judgment of this Court of 18th November 2021, was in itself a procedural irregularity.
71. Accordingly, we answer Issue No. 2 in the affirmative, namely that the Trial Court erred in law and committed a procedural irregularity by holding that the Central Bank of Kenya is not an institution of the East African Community, before taking all the evidence.

Issue No. 3: What remedies should the Court grant?

72. While the Appellant urged the Court to allow the Appeal with costs, the Respondents prayed that the same be dismissed with costs. Having answered the first two questions in the affirmative, it means that the Appellant has prevailed in this Appeal. Taking into account that on 10th November 2023 this Court stayed further proceedings in Reference No. 8 of 2017, the order that best commends itself to us is to remit the Reference back to the Trial Court for hearing and determination in terms of its Ruling dated 4th July 2019, the Judgment of this Court dated 18th November 2022, and the Directions of the Trial Court of 28th March 2022.
73. On the question of costs, we take into account that by dint of rule 127 of the Rules, costs are at the discretion of the Court, although as a general rule, costs follow the event. For good reason the Court may determine that costs should not follow the event. Taking into account the nature of this dispute, the period it has taken in this Court, and the

overriding principle that award of costs must not inhibit or hinder access to justice, we direct that costs of this appeal shall abide the outcome of the Reference.

IT IS SO ORDERED

DATED, DELIVERED, AND SIGNED in Kigali on this 4th day of March 2025.



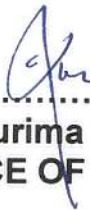
Handwritten signature of Nestor Kayobera in blue ink, with the date "4.02.2025" written below it.

.....
Nestor Kayobera
PRESIDENT



Handwritten signature of Anita Mugeni in blue ink.

.....
Anita Mugeni
VICE PRESIDENT



Handwritten signature of Kathurima M'Inoti in blue ink.

.....
Kathurima M'Inoti
JUSTICE OF APPEAL



Handwritten signature of Cheborion Barishaki in blue ink.

.....
Cheborion Barishaki
JUSTICE OF APPEAL



Handwritten signature of Omar O. Makungu in blue ink.

.....
Omar O. Makungu
JUSTICE OF APPEAL