



**IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA
FIRST INSTANCE DIVISION**

(Coram: Jean Bosco Butasi, PJ; Isaac Lenaola, DPJ; Faustin Ntezilyayo, J; Monica Mugenyi, J & Fakihi A. Jundu J)

REFERENCE NO. 4 OF 2013

HENRY KYARIMPA..... APPLICANT

VERSUS

THE ATTORNEY GENERAL OF THE
REPUBLIC OF UGANDA.....RESPONDENT

28th November, 2014

JUDGMENT

A. Introduction

1. This Reference was filed on 26th June 2013 by Henry Kyarimpa, the Applicant herein, under the provisions of Articles 6, 7(2), 8(1) (c) , 23, 27(1) and 30 of the Treaty for the Establishment of the East African Community (hereinafter “the Treaty”) as well as Rule 24 of this Court’s Rules of Procedure.
2. The Applicant is resident in the Republic of Uganda, a Partner State in the East African Community and was represented in the present proceedings by M/S Nyanzi, Kiboneka & Mbabazi Advocates of P.O. Box 6799, Kampala, Uganda. In his Reference, he described himself as a procurement consultant and specialist operating as such in Uganda.
3. The Respondent is the Attorney General of the Republic of Uganda and his address is Plot No.1, Parliament Avenue, P.O. Box 7183, Kampala, Uganda.

B. Background

4. The subject of the Reference is principally a challenge to the signing of a Memorandum of Understanding (MoU) between the Government of Uganda and M/S Sinohydro Corporation Limited (hereinafter “Sinohydro”), a Chinese Company, and whether the said MoU was shrouded in mystery, secrecy and manipulation by officials of the Government of Uganda. Further, the Reference is premised on a resolution of the issue as to whether the signing of the MoU was transparent, objective, fair and competitive and also whether it was full of illegalities, arbitrariness, discrimination and involved scheming by power brokers and influential members of the Government of Uganda. The specific issues to be determined as a result thereof, including the

alleged refusal by the Government of Uganda to comply with Court orders, will be detailed out later in this Judgment.

5. The history of the dispute before us can in any event be traced to the request, sometime in 2013, for bids by the Government of Uganda for the construction of the 600MW Karuma Hydroelectric Plant and its associated transmission lines. The Applicant in his capacity as a procurement consultant aligned himself with a company known as M/S China International Water & Electric Construction Corporation (hereinafter “China International”) which placed a bid in line with the contents of a tender known as Ref. MEMD/WRKS/10-11/00099/ERD/EP for purposes of the Karuma Hydroelectric Project.
6. Before the award of the tender was made however, the Inspector General of Government (hereinafter “the IGG”) received a complaint regarding the transparency of the tender process and after investigations, issued a report dated 22nd March, 2013 recommending that *“the whole procurement process should be cancelled and the process repeated right from the beginning”*.
7. Subsequently, one Andrew Baryavanga Aja, instituted Judicial Review Misc.Application No. 11 of 2013 at the High Court of Uganda at Nakawa seeking orders *inter-alia* that the Office of the IGG had overstepped its mandate in making the above recommendation and that the Permanent Secretary, Ministry of Energy and Mineral Development should be ordered to declare the best evaluated bidder of the procurement of services for the Karuma Hydroelectric Project. On 20th May, 2013, Hon. Lady Justice Faith Mwendha, after hearing all Parties to the Application, granted all the orders sought by Mr. Aja aforesaid.

8. On 21st May 2013, the Government of Uganda signed the MoU with Sinohydro for the construction of the Karuma Hydroelectric Plant and it is the process leading to the said MoU that is faulted through this Reference in the context of the Public Procurement & Disposal of Assets Act, No.1 of 2013 (hereinafter 'the PPDA Act') together with its Regulations. The import of the Court orders issued in Misc. Appl. No.11 of 2013 and Misc.Appl. No.162 of 2013 as well as Constitutional Application of No.3 of 2013 will also be addressed in the same context.

C. The Applicant's Case

9. The Applicant's case is contained in the Reference dated 24th June, 2013; his Affidavit in support sworn on the same day together with its annexures; the Written Submissions and List of Authorities filed on 28th March, 2014 and 8th April, 2014, respectively, and the Reply to the Respondent's Written Submissions filed on 2nd May, 2014. He also filed an Affidavit in support of the Reply to the Respondent's Response, sworn on 20th February, 2014 together with annexures thereof. His case is as summarized here below.

10. Firstly, that in selecting Sinohydro and signing the MoU without following the PPDA Act, the Government of Uganda acted in breach of and in violation of the principles of the rule of law, good governance, democracy and accountability as enshrined in Articles 6(d), 7(2) and 8(1) (a) and (c) of the Treaty. That the said action was in fact arbitrary, discriminatory and illegal and lacked transparency since the governing legal framework for the procurement was ignored.

11. Secondly, that the selection of Sinohydro to undertake the project was done in contempt of Court and in violation of the orders granted in the aforementioned cases and was thus a breach of the principles of the

rule of law, good governance and democracy as stipulated in Articles 6(c) and (d), 7(2) and 8(1) of the Treaty.

12. The Applicant therefore prays for orders as follows:

“ a) A Declaration that the selection by the Government of Uganda and signing of the Memorandum of Understanding between the Government of Uganda and Sinohydro Corporation Limited on the 20th June, 2013 for the construction of the 600 MW Karuma Hydro Power Project is a breach and infringement of Articles 6(c), 7(2) and 8(1) of the Treaty.

b) Enforcing or directing the immediate compliance with the Treaty and/or performing of the State obligation and responsibilities of the Government of Uganda under the Treaty by:

- i) Directing the Government of Uganda to cancel the Memorandum of Understanding signed between the Government of Uganda and Sinohydro Corporation Limited on the 20th June, 2013 for the construction of the 600 MW Karuma Hydro Power Project;*
- ii) Directing the Government of Uganda to comply with the Court Order in Nakawa High Court Miscellaneous Cause No.11 of 2013 – Hon. Andrew Baryayanga Aja vs. Attorney General ordering award of the contract to the best evaluated bidder for the Engineering Procurement and Construction Contract for the 600 MW Karuma Hydro Power Project;*
- iii) Reinstating the status quo before the selection of Sinohydro Corporation Limited and subsequent signing of the contract between the Government of Uganda and Sinohydro Corporation Limited.*

c) Costs of this Reference be paid by the Respondent.”

D. The Respondent's Case

13. The Respondent filed a Response to the Reference on 10th September, 2013 as well as an Affidavit in support sworn by Christopher Gashibarake on the same day, together with annexures thereto. He also filed written submissions on 28th April, 2014. His case is that the Applicant is engaged in frivolous, vexatious, scandalous and outrageous litigation aimed at derailing and/or delaying the construction of the Karuma Hydro Power Plant.
14. That the Applicant's interest in the matter, in any event, is that of an agent who has not been paid for his services by his client and so his remedy for that problem lies elsewhere than in the present Reference.
15. Regarding the manner in which Sinodydro was awarded the contract to undertake the Karuma Project, it is the Respondent's case that:
 - a) Upon the IGG recommending cancellation of the entire tender process, the Cabinet of the Government of Uganda decided to comply with that recommendation and on 23rd April, 2013, the Contracts Committee of the Ministry of Energy and Mineral Development rejected all bids for the tender under Section 75 of the PPDA Act and Regulation 90 thereof;
 - b) The said cancellation was thereafter communicated to all the bidders, including China International, whose agent was the present Applicant;
 - c) On 24th April, 2013, the Constitutional Court of Uganda issued an injunctive interim order in **Misc.Appl. No. 3 of 2013** restraining the Government of Uganda from implementing the IGG's recommendations but the said order was served well after the

cancellation of the procurement process and rejection of all bids. That thereafter, the proceedings in the Court were rendered spent and lifeless;

d) The same position in (c) above applied to the orders issued on 20th May, 2013 by Hon. Lady Justice Mwendha in Misc. Appl. No.11 of 2013;

e) That in any event, there is an appeal pending against the orders of Mwendha, J. and that fact notwithstanding, the said orders were also overtaken by events once the tender process was cancelled.

16. It was also the Respondent's case that the decision to select Sinohydro was neither arbitrary nor illegal and the same was carried out in a transparent manner and in uniformity with the provisions of the Constitution and Laws of Uganda. That the signing of the MoU with the said Company was also in line with a bilateral arrangement between the Government of Uganda and the Government of the People's Republic of China to secure funding through Exim Bank of China for the construction of the Karuma Hydro Electric Power Plant by Sinohydro, a wholly owned Government of China Company.

17. Lastly, that the MoU signed by Sinohydro is no different from the one signed by China International, the Applicant's principal, to construct the Isimba Hydro Power Plant and so the said Company cannot, through the Applicant, complain about a process that it is a beneficiary of.

18. That therefore, the Reference should be dismissed with costs.

E. The Applicant's Rejoinder to the Respondent's Case

19. In his rejoinder to the Respondent's case, the Applicant made the point that there is no lawful bilateral arrangement between the

Governments of Uganda and that of the People's Republic of China as alleged, or at all. In any event, if such a bilateral arrangement existed, the same would have been unconstitutional by dint of Article 159 of the Constitution of Uganda which requires that all loan agreements by the Government must be executed as authorized by an Act of Parliament.

20. That a Cabinet directive as relied on by the Respondent cannot override a court order and the Cabinet of Uganda was bound to respect and abide by the decision made by Mwendha J. in Misc.Application.No.11 of 2013. Further, that the orders of maintenance of status quo issued on 22nd April, 2013 with the consent of the Respondent meant that the relevant Government authorities, including the Permanent Secretary, Ministry of Energy and Mineral Development, knew of the said orders and could not therefore change the status quo as they purported to do. In any event, that the Minutes of the Contracts Committee of the said Ministry purporting to cancel all bids for the Karuma Hydropower tender were fabricated and were an attempt at clothing an illegality with the garb of legitimacy.
21. The Applicant also contended that the award of the Isimba Hydro Power Project contract to China International could not make right the alleged unlawful MOU and contract with Sinohydro.
22. The Applicant also made the point that after the present Reference was filed, and in spite of the express provisions of Article 38(2) of the Treaty, the Government of Uganda proceeded to authorize the commencement of the Karuma Hydro Power Project. That the said action was a perpetuation of its unlawful conduct and so the intervention of this Court is necessary.
23. That therefore, the Respondent's response has no merit and should be dismissed.

F. Scheduling Conference

24. On 13th February, 2014, Parties attended a Scheduling Conference at this Court and it was agreed *inter-alia* that the following issues are the ones requiring determination:

- i) Whether the selection and subsequent signing of the Memorandum of Understanding between the Government of Uganda and Sinohydro Corporation was inconsistent with and an infringement of Articles 6(c) and (d), 7(2) and 8(1) of the Treaty for the Establishment of the East African Community;*
- ii) Whether the acts of the Government of Uganda in implementing the Memorandum of Understanding after the filing of this Reference is inconsistent with and an infringement of Article 38(2) of the Treaty as amended; and*
- iii) Whether the Parties are entitled to the orders sought.*

G. Determination

25. As earlier stated, the whole dispute forming the gravamen of this Reference relates to the manner in which the Government of Uganda awarded the Karuma Hydro Electric Power Project contract to Sinohydro. As a corollary to that singular issue, the conduct of the said Government as regards certain orders issued by the Municipal Courts of Uganda will also have to be addressed. Alongside the latter issue, the import of Article 38(2) of the Treaty will be determined in the context of the facts as earlier set out.

H. Issue No.1 - Whether the selection of Sinohydro and subsequent signing of the Memorandum of Understanding between the Government of Uganda and Sino Hydro Corporation was inconsistent with and an infringement of Articles 6(c) and (d), 7(2) and 8(1) of the Treaty :

26. In order to address the above issue, it is important to reproduce the contents of Articles 6 (c) and (d), 7(2) and 8(1) of the Treaty. They read as follows:

Article 6(c) and (d)

“The fundamental principles that shall govern the achievements of the objectives of the Community by the Partner States shall include:

(a)

(b)

(c) Peaceful settlement of disputes;

(d) Good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, human and people’s rights in accordance with the provisions of the African Charter on Human and Peoples’ rights;”

Article 7(2)

“1...The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.”

Article 8(1) – *The Partner States shall:*

(a) Plan and direct their policies and resources with a view to creating conditions favourable for the development and achievement of the objectives of the Community and the implementation of the provisions of this Treaty;

(b) Co-ordinated, throughout the institutions of the Community, their economic and other policies to the extent necessary to achieve the objectives of the Community; and

(c) Abstain from any measures likely to jeopardize the achievement of those objectives or the implementation of the provisions of this Treaty."

27. In invoking the above Articles of the Treaty, Mr. Mbabazi, Learned Counsel for the Applicant in his very elaborate submission on the concept and principles of good governance and accountability, quoted from a number of United Nations documents including those from United Nations Development Programme(UNDP), UN Commission on Human Rights, United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) and United Nations Development Fund for Women(UNIFEM) as well as the World Bank and the International Fund for Agricultural Development(IFAD) to make the point that good governance concerns the principle that governance must be participatory, transparent and accountable. That it ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making processes.

28. On the principle of the rule of law, Mr. Mbabazi further relied on the decision of this Court in Katabazi & 21 Others vs. Secretary General of the EAC & Anwar EACJ Ref. No.1 of 2007 where the Court explained the rule of law to mean that "*both the ruled and the governed are*

equally subject to the same law of the land” and that the role of the Court is to maintain the rule of law and to ensure that Partner States also do so.

29. He also placed reliance on the decisions in Smit Indira Nehru Gandhi vs. Raj Narain & Anor Air 1975 SRC 2299, HEABC vs. Facilities Subsector Bargaining Association 2004 BCSC 603 and Re Manitoba Language Rights (1985), SCR 7 to submit that the rule of law, unlike many legal concepts, is simple, is written in plain language and has a number of aspects, but the aspect with which this Court must concern itself with is that *“the law in our society is supreme – no one – no politician – no government – no Judge – no union – no citizen is above the law.”*

30. Applying the above principles to the issue under consideration, Mr. Mbabazi’s submission was that the conduct of the Government of Uganda in signing the MoU in contest breached all the principles of good governance and the rule of law, a position not shared by the Respondent as elsewhere explained above.

31. On our part, we wholly agree with the exposition of the above principles and specifically in Articles 6(c) and (d), 7(2) and 8(1) as eloquently expressed by others before us including in the Katabazi Case (supra). In addition, we also wish to state that the framers of the Treaty and its signatories intended that the Principles in Articles 6 and 7 as well as the undertakings to implementation in Article 8 should have real value and meaning to themselves and to all citizens within the borders of the Partner States forming the EAC. They are therefore justiciable and are meant to bind all organs of the EAC including the Governments of the Partner States such as that of the Republic of Uganda.

32. In a nutshell, the activities of Partner States must be transparent, accountable and undertaken within the confines of both their municipal laws and the Treaty.
33. In the above regard, there is no doubt that the initial tender for the construction of the Karuma Hydro Power Plant was made within the provisions of the PPDA Act hence the fact that more than one bid was called for. The IGG later, in the Report dated 22nd March, 2013 recommended that the tender process be started afresh. We have perused the said report and the reason why the whole process was cancelled was the allegation that *“.... One of the bidders, China International Water and Electric Corporation (CWE), was being fronted by architects of the procurement fraud and was on the verge of being awarded the contract, yet it had presented falsehoods in its bid documents which were known to the Procurement Committee but it had turned a blind eye to the falsehood because members of the Committee had been facilitated (bribed) by CWE.”*
34. The IGG indeed therefore found that China International had presented false information in its bid as regards its past experience and capacity as an Engineering, Procurement and Construction (EPC) contractor and recommended that action against the said Company be taken by the Public Procurement and Disposal of Assets Authority.
35. We shall only pause here to note that the Applicant has confirmed that he represented China International in the bid above and also to note that the above decision dated 22nd March 2013 was subsequently quashed by the High Court (Mwondha J.) on 20th May, 2013. We also note that on 24th April, 2013, the Constitutional Court of Uganda in Constitutional Appl. No.3 of 2013 issued orders restraining *“The Uganda Government/Ministry of Energy and Mineral*

Development/contracts Committee to the Ministry of Energy and Mineral Development/the Cabinet or any of its/their authorized servants/employees or any person by whatever name called from acting on the recommendations of the Inspector General of Government's (IGG) report dated 22/3/1013."

36. We have also seen letters dated 24th April, 2013 from the Permanent Secretary, Ministry of Energy and Mineral Development giving notice of the rejection of all bids and cancellation of the procurement for engineering, procurement and construction works of Karuma Hydro Power Project. The Respondent is shown to have received copies of those letters on 25th April, 2013. The letters were also addressed *inter-alia* to Sinohydro, China International Water and Electric Corporation and Orascam Construction Company Limited. The rejection and cancellation aforesaid was based on Section 75 of the PPDA Act which provides as follows:

"The employer reserves the right to accept or reject any Bid and to cancel the bidding process and reject all bids, at any time prior to the award of Contract, without thereby incurring any liability to the affected Bidder or Bidders or any obligation to inform the affected Bidder or Bidders of the grounds for the Employer's action."

37. In the above context, we have not heard the Applicant to argue that the above section was improperly invoked but his case was that the decision to cancel the bids was taken in contravention of Court orders. We shall revert to the latter issue in due course but suffice it to say that the cancellation of the bids under section 75 aforesaid cannot be the sole basis for a Reference to this Court under the named Articles of the Treaty. Had evidence been tendered before us that the Government of

Uganda had expressly violated that section, then we may have rendered ourselves on the import of such a violation in the context of our jurisdiction to interpret the Treaty, including in matters relating to the rule of law and good governance under Articles 6(c) and (d), 7(2) and 8(1) (c) of the Treaty. That is all there is to say with regard to that matter.

38. The next issue to address is the actual selection of Sinohydro to undertake the Karuma Project and whether that action was an act in violation of the named Treaty provisions. To put matters into perspective, after the cancellation aforesaid, matters seemed to have remained largely in Court (both the High Court and the Constitutional Court) until the MoU with Sinohydro was executed on 26th June, 2013.

39. According to the Respondent, the decision to award Sinohydro the contract for the construction of the Karuma Hydro Power Plant was undertaken outside the PPDA Act unlike the cancelled tender, because it was based on a bilateral arrangement between the Governments of Uganda and that of the People's Republic of China. That argument is made at paragraph 6 of the Affidavit of Christopher Gashibarake but that bilateral arrangement was not attached to the said Affidavit in any format. Where then is the evidence of that arrangement in the present proceedings?

40. There are a number of references to the said arrangement in documents exhibited by the Parties and they are as follows:

i) In the MoU dated 20th June, 2013, at Clause 8, the Government of Uganda and Sinohydro agreed as follows:

"This MoU shall be subject to Sinohydro's producing a supporting letter regarding this project from the Chinese

Government within the bilateral agreement between the Government of Uganda and the Chinese Government.”

ii) In a letter dated 3rd July, 2013, addressed to Sinohydro, the Permanent Secretary, Ministry of Energy and Mineral Development stated as follows:

“You are also urged to expedite to the Government of Uganda the confirmation of support from your company by the Government of the People’s Republic of China and the Exim Bank of China to avail funds for the project under the bilateral agreement between the two countries.”

iii) In a letter dated 15th August, 2013, the Executive Director of the Public Procurement and Disposal of Public Assets Authority wrote as follows to the Permanent Secretary, Ministry of Energy and Manpower Development :

“The Authority has studied the contents of your letter and noted as follows:

i) The Memorandum of Understanding states that there is a bi-lateral agreement between the Government of Uganda and the People’s Republic of China pursuant to which the Chinese Government offered to fund the construction of Karuma to be undertaken by a Chinese firm and that Cabinet approved another bi-lateral arrangements to utilize funds from China Exim Bank to construct the Karuma Dam, with counterpart funding from the Government of Uganda.

ii) There is an agreed position by the Presidents of Uganda and the People’s Republic of China that the construction of Karuma dam be financed and developed under bi-lateral

cooperation between Uganda and the People's Republic of China".

In light of the above therefore, the Authority responds as follows:

The selection of M/S Sinohydro Corporation Ltd, a Chinese State owned Construction Company was guided by Uganda's obligation arising out of the agreements between the Governments of Uganda and the People's Republic of China.

Under Section 4(1) of the PPDA Act, "where the PPDA Act conflicts with the obligations of the Republic of Uganda arising out of an agreement with one or more States or with an International Organization, the provision of the agreement shall prevail." It appears from your letter that the bi-lateral agreement between the Governments of Uganda and China has an arrangement whereby China Exim Bank will provide financing and M/S Sinohydro Corporation Ltd will undertake the works.

This therefore means that the above bi-lateral arrangements prevail over PPDA Act, 2003 and in that regard, the Act does not apply to this type of procurement in view of the provisions of the various bi-lateral agreements mentioned in your above mentioned letter and the decisions taken by Cabinet in that regard.

With regard to your request to clear the draft conditional contract between the Government of the Republic of Uganda represented by the Ministry of Energy and Mineral Development and M/s Sinohydro Corporation Ltd in respect of Karuma Hydropower Plant and Karuma Interconnection Project, the Authority advises that under Article 119 of the Constitution, the mandate for advising and clearing Government contract is vested in the Attorney General. The Entity should therefore seek clearance of the said contract from the Attorney General".

41. As can be seen above, in fact no written copy of the bilateral agreement or arrangement was seen by any of the named Parties before they gave advice or acceded to the MoU and in the contract agreement signed between the Government of Uganda and Sinohydro dated 16th August, 2013, although Clause 2.0 is with regard to contract documents, the MoU is one such document but no reference is made to the bilateral agreement or arrangement nor any evidence of it given.

42. When we asked Mr. Bafirawala at the hearing of the Reference as to where the said agreement was, his response was:

“My Lords, I do not have the physical document, but what I understand is that the arrangement does exist and it was reproduced in the documents that we attached and brought to the Court.”

43. In further submission, Counsel for the Respondent intimated that the arrangement was actually made under Article 123 of the Constitution of Uganda and it was not necessary that it should have been reduced to writing.

44. Mr. Mbabazi for the Applicant on this issue asked the Court to take it that since no such arrangement was shown to have existed then the Sinohydro contract was based on an illegality. What position should we take in regard to that controversy?

45. It cannot be gainsaid that this Court’s jurisdiction is limited to the interpretation and application of the Treaty. In doing so, there may be instances where the Court may have to look to municipal law and compliance thereto by a Partner State only in the context of the interpretation of the Treaty. That is why for example, in Rugumba vs. Attorney General of Rwanda, EACJ Ref. No.8 of 2010, this Court had to invoke the penal laws of the Republic of Rwanda to find that where a

Partner State does not abide by its own penal laws and procedures, then its conduct amounts to a violation of the rule of law and hence the Treaty.

46. Similarly, in Muchohi vs. the Attorney General of the Republic of Uganda, EACJ Ref. No.5 of 2011, the Court found that where a Partner State had declined to follow its immigration Laws in declaring the Applicant a prohibited immigrant, then it was in breach of the Treaty and the Protocol on the Common Market which includes the right of free movement of persons within the EAC.

47. We shall adopt the same approach in this matter and we agree with Mr. Mbabazi only to the extent that the alleged bilateral agreement or arrangement does not exist before us in any written form. But having said so, we heard Mr. Bafirawala for the Respondent as supported by his colleague, Mr. Adrole, to have been saying that under Article 123(1) of the Constitution of Uganda, the President of Uganda could *“make treaties, conventions, arrangements or other agreements between Uganda and any other country or between Uganda and any international organization or body in respect of any matter”*.

48. Article 123(2) however, provides that Parliament shall make laws to govern the matters provided for in Article 123(1) aforesaid and one of those laws, in the context of the dispute before us, is the PPDA Act.

49. That Article must therefore be read with Section 4(1) of the PPDA Act which ousts the provisions of that Act and for avoidance of doubt, we once again reproduce that section which reads as follows:

“Where the PPDA Act conflicts with the obligations of the Republic of Uganda arising out of an agreement with one or more States or with an International Organization, the provision of the agreement shall prevail”

50. Turning back therefore, to the bilateral arrangement and the selection, without a tender process, of Sinohydro to undertake the Karuma Hydro Power Project, did the Government of Uganda follow its own Laws in the said selection?

51. Taking all matters above into account, the bilateral arrangement may not be with us in writing but we have reflected over that fact and noting the terms of the contract signed on 16th August, 2013 as read with the MoU dated 20th May, 2013, it is clear to us that an arrangement under Article 123(1) of the Ugandan Constitution exists between the Government of Uganda and the People's Republic of China whereby the latter, through its subsidiaries and agencies, would finance projects in Uganda on such terms as may be agreed between them. We say so because, it is inconceivable, to us at least, that the President, the Attorney General, the Permanent Secretary in the relevant Ministry, the Executive Director of the PPA would all refer to *"an arrangement"* that does not exist. We have also noted that the obligation to produce evidence of such an arrangement in the context of the dispute before us was placed on Sinohydro. It is on the record that Sinohydro was initially a party to these proceedings but was struck out for being improperly joined. How then can we hold the Respondent responsible for actions of a party not present to speak for itself? We reiterate that Clause 8 of the MoU enjoined Sinohydro in the following terms:

"This MoU shall be subject to Sinohydro's producing a supporting letter regarding this Project from the Chinese Government within the bilateral arrangement between the Government of Uganda and the Chinese Government."

52. Although it would have been expected that the Respondent should have produced evidence of compliance by Sinohydro, we find it difficult

to hold it against him that he has not done so in the context of the dispute before us.

53. Having held as above, we can only conclude by stating that it is not the role of this Court to superintend the Republic of Uganda in its executive or other functions. Whereas of course where there is obvious and blatant violation or breach of the principles of good governance and rule of law, this Court will, without hesitation, so declare, we are unable to do so in the present case.

54. The next issue to address is whether the Respondent disobeyed and committed contempt of Court when it failed to honour and enforce the Court orders issued in Misc.Appl. No.162 of 2013, Misc. Appl. No.11 of 2013 and Constitutional Appl. No.3 of 2013. The question was framed in the context of alleged violations of Articles 6 (c) and (d), 7(2) and 8(1) of the Treaty.

55. We propose to spend very little time on this question because as we understand it, the Applicant alleged that the Respondent committed acts of contempt of the High Court and Constitutional Courts of Uganda by selecting Sinohydro to undertake the Karuma Hydro Power Project while there were orders that the *status quo* as regards the project be maintained alongside other orders of an injunctive nature restraining the award of the contract to any party, Sinohydro included.

56. The Respondent denied the above allegation and added that all the orders issued by the Court aforesaid were rendered lifeless and spent once the tender process was cancelled well before the said orders were served on the Respondent.

57. More fundamentally, and that is our entry point in determining the above issue, the Respondent submitted that this Court cannot find

contempt when the affected Courts have not done so. We have no choice but to agree with the Respondent in that regard.

58. We say so because, contempt of Court has been defined to mean *“conduct that defies the authority or dignity of a Court....”* – Black’s Law Dictionary, Ninth Edition. If that be so, the law and practice as we know it, is that contempt proceedings are in the nature of criminal proceedings and ordinarily an enquiry ought to be made as to the circumstances in which the alleged contempt was committed. Issues of service of the Court order, its contents and manner in which it was allegedly contravened are then addressed by the Court that issued the said orders. In the instant Reference, we have seen no evidence that either the High Court or the Constitutional Court of Uganda were ever addressed on alleged disobedience of their orders. How then can this Court take their place and purport to determine that those orders were disobeyed or not, when the said Courts have not received any complaints in that regard?

59. Whatever our view on the orders issued by the said Courts and whether or not they were disobeyed is a matter that we deem unfit to delve into lest we fall afoul of our jurisdiction. Had those Courts found the Respondent to have acted in contempt of their orders, then this Court could properly take that decision and apply it in determining whether the Respondent by that fact had also acted in contravention of the principle of the rule of law under the Treaty.

60. Having declined the invitation to address the issue of contempt of a court other than contempt committed in this Court, it follows that we have nothing more to say on the subject.

61. Issue No.1 must in conclusion be answered in the negative.

I. Issue No.2 - Whether the acts of the Government of Uganda in implementing the Memorandum of Understanding after the filing of this Reference is inconsistent with and an infringement of Article 38(2) of the Treaty:

62. The Applicant's submission on the above issue was that after the Reference was filed, the Respondent ought to have advised the Government of Uganda not to proceed with the implementation of the impugned MoU with Sinohydro because of the express provisions of Article 38(2) of the Treaty.

63. The Respondent on the other hand submitted that Article 38(2) aforesaid is not an automatic bar to any action being challenged in a Reference before this Court and relied on the decision of this Court in Kahoho vs. the Secretary General of the EAC, Appl. No.5 of 2012 in support of that proposition.

64. On our part, we should begin by stating that Article 38(2) of the Treaty provides as follows:

"Where a dispute has been referred to the Council or the Court, the Partner States shall refrain from any action which might be detrimental to the to the resolution of the dispute or might aggravate the dispute."

65. In interpreting that Article, in the Kahoho case (*supra*), this Court partly stated that:

"As for the provisions of Article 38(2) of the Treaty, we hold the view that every case should be determined on its own facts since the grant of an injunction is a function of the Court in exercise of its discretionary power. Therefore, Article 38(2)

cannot be seen to be removing that long held position without expressly saying so”.

66. In applying the above reasoning to the present Reference, we note that the Applicant obtained *status quo* orders as well as injunctive orders against the Respondent in both the High Court and the Constitutional Court of Uganda.

67. He also sought injunctive reliefs in this Court premised on Article 38(2) aforesaid. We have declined to delve into the issue whether the orders of the Ugandan Courts were disobeyed and our reasons for doing so are on the record. As regards interlocutory proceedings before this Court filed by the Applicant in Appl.No.3 of 2013 during the pendency of the Reference, we noted as follows:

“We have considered the matter before us in totality and whatever the merits or otherwise of the Applicant’s case, the construction of Karuma Hydro Power Plant has already commenced. Funds have certainly been pumped into it and the consequences of stoppage may not be bearable to the tax payer in Uganda.

Further, a number of parties have been named as having an interest in this matter but they are not before us. They include the principle player in the offending MoU, namely Sinohydro as well as China International and Exim Bank, China. To issue orders that may affect them adversely without hearing them would not enhance the rule of law and would instead violate it. In the end and with extreme reluctance, we are minded to the position that the balance of convenience must tilt in favour of the Respondent.

In saying so, we are aware that the grant of an interlocutory injunction is an exercise the Court's discretion which must be exercised judiciously at all times. (see Kahoho vs. Secretary General of the EAC, EACJ Appl. No.5 of 2012).

68. This Court having so stated, then declined to grant any orders to stop the implementation of the MoU as sought by the Applicant and premised on article 38(2) aforesaid.

69. We reiterate that finding as we also reiterate the reasoning in Kahoho (supra). To reason otherwise would open up the Court process to abuse whereby a party intent on disrupting an otherwise legitimate process would merely have to file a reference before this Court and relying on Article 38(2) of the Treaty, obtain an automatic stay of the process or action without the responding party being heard. The principle of the rule of law so painstakingly crafted into the Treaty would in such circumstances, have no meaning.

70. In the circumstances, we can only answer **Issue no.2** in the negative.

J. Issue No.3 - Whether the Parties are entitled to the Orders sought:

71. Elsewhere above we have reproduced the prayers sought in the Reference. Prayer (a) sought orders that this Court should direct the Government of Uganda to cancel the MoU signed with Sinohydro. We have shown that we see no merit in such an action and in addition, whereas it is a principle well established in this Court, that a party need not exhaust local remedies before coming to this Court, the same issue is live before Courts in Uganda and taking the same approach as we did in Alcon Intl. Ltd vs. Standard Chartered Bank of Uganda & others, EACJ Reference No. 6 of 2010, we respectfully decline to grant the said orders and would advise the Applicant that all is not lost and he

should pursue the pending matters in the local Courts to their logical conclusion.

72. On prayer (b) seeking orders that the Government of Uganda should be directed to comply with the *status quo* orders issued in Misc. Appl. No.11 of 2013 at the High Court of Uganda in Nakara, we have already addressed that issue and we need not repeat our findings.

73. The holding in (b) above also applies to prayer (c) of the Reference which we also decline to grant.

74. On costs, the issues raised by the Applicant were neither idle nor frivolous to the extent that they raise pertinent issues about the manner in which a Partner State should undertake its public procurement processes. The record would show that he was pursuing the said issues for both personal reasons and in the interest of the Uganda public which is entitled to fair, transparent and accountable procurement processes and the latter is a sufficient reason for us to order that each Party should bear its own costs.

K. Conclusion

75. The Reference before us brings to the fore the emerging reality within the Community that Partner States, while conducting bilateral matters, must do so openly, transparently and within their Constitutions and Statutes. To go outside those parameters may well mean that the principles of good governance and rule of law would be violated and this Court's intervention would be necessary.

76. Having come to the end of the matter, we thank Counsel for their courtesy and depth of research but it is clear by now that we are unable to accede to the Applicant's prayers and the final orders to be made are that:

- i) The Reference is dismissed;
- ii) Each Party shall bear its own costs.

It is so ordered.

Dated, Delivered and signed at Arusha this 28th day of November, 2014.

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JEAN BOSCO BUTASI
PRINCIPAL JUDGE

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ISAAC LENAOLA
DEPUTY PRINCIPAL JUDGE

.....
FAUSTIN NTEZILYAYO
JUDGE

.....
MONICA MUGENYI
JUDGE

.....
FAKIHI A. JUNDU
JUDGE