59. For the above reason, we find and hold that, bearing in mind the provisions of Article 26, this Court has jurisdiction to examine the acts complained of by the Applicant. In Halsbury's Laws of England, 4th Edition, Re-issue Vol. 10, the learned author defined jurisdiction as:

> ***"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted, and may be extended or restricted by similar means."***

60. Jurisdiction has often been described as being everything (see the case – ***THE MV LILIAN S (1989) KLR1).*** In our case, our limits are the Treaty and it is under that very Treaty that this Court is being invited to examine acts which are alleged to be unlawful and in so examining to determine if they are unlawful in accordance with the municipal laws of the parties. If we did not consider we had jurisdiction in this matter, we would not take any further steps in this matter because as stated in the case ***THE MV LILIAN S*** (supra) without jurisdiction, the Court should not proceed with a matter further. The justices in that case stated viz:

> ***"Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

61. A case decided in the same vein is ***DIANA KETHI KILONZO & ANOTHER =VS= THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 10 OTHERS (2013) eKLR*** where it was stated:

> ***"Jurisdiction is indeed comparable to a driving licence, for no motorist can lawfully embark on a journey without a valid driving licence. Once a judicial body establishes that it has no jurisdiction to handle a dispute, then it has***

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no business proceeding further with the matter. What also emanates from the Supreme Court decision is that jurisdiction emanates from express terms of the law."

62. The Government further argued that this Court lacks jurisdiction because MML did not raise before the Malawi courts the issue of breach of the Treaty. The Government therefore argued that MML's claim cannot proceed before this Court because if it did proceed, then it would be contrary to the proviso in Article 26 which states:

"Provided that where the matter for determination relates to any act, regulation, directive or decision by a Member State, such person shall not refer the matter for determination under this Article unless he has first exhausted local remedies in the national courts or tribunals of the Member State."

63. The Government in its submissions relied on the case ***THE REPUBLIC OF KENYA AND THE COMMISSIONER OF LANDS =VS= COASTAL AQUACULTURE*** – COMESA Court of Justice Ref. No. 3 of 2001.

64. The Applicant in that case sought various orders against the Republic of Kenya and the Commissioner of Lands. The COMESA Court of Justice in that case had this to say:

"Much as this Court may sympathize with the Respondent regarding the frustrations of his project on the said parcels of land by the Applicants, and the resultant shyness of the investor funding the projects, the Respondent may refer a matter to this Court and <u>this Court can exercise jurisdiction over such reference, only if the Respondent has exhausted all its remedies in the municipal court of the particular Member State."</u> (Emphasis ours).

65. To this argument, MML contended that it had exhausted all the local remedies since its case was the subject of appeal before the Malawi Supreme Court of Appeal which court finally delivered its judgment.

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66. We find, as stated before, that this Court is endowed with jurisdiction to entertain this matter.

67. The next issue that the Court should deal with is whether this Court is an original or appellant Court. The Treaty does define "Reference" as used in Articles 24, 25 and 26 whereby Member States, the Secretary General and legal or natural persons may refer their cases before the COMESA Court of Justice.

68. The Black's Law Dictionary respectively defines "Reference Case" and "Reference" as:

> ***"A Reference is exceptional because the opinion interprets and often resolves...."*** and as,
>
> ***"The act of sending or directing to another for information, service, consideration or decision...."***

69. In the Court's view, when a Reference is filed in this Court, this Court is mandated under the Treaty to determine the matter as an original court. The party filing the Reference need only satisfy the provision of the Article 26 by ensuring to have exhausted the local remedies before coming to this Court.

70. We are a court of original jurisdiction in so far as the matter satisfies the jurisdictional requirement of Article 19 and 23 of the Treaty.

71. When a court has original jurisdiction it has the power to hear a case for the first time as opposed to hearing it as an appellant court.

72. It follows that this Court does not necessarily sit to review the local court's decision. This Court has been given supremacy to interpret the Treaty by Article 29 (2) of the Treaty which provides:

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ARTICLE 29

Jurisdiction of National Courts

"2. Decisions of the Court on the interpretation of the provisions of this Treaty shall have precedence over decisions of national courts."

73. We, however, hasten to add that, in this case MML has not raised any new issue that was not before the national court, other than the issue of quorate of the Malawi Supreme Court of Appeal. We shall come back to the issue of quorate of that court later.

74. The issues that were before the Malawi court both the High Court, Commercial Division and the Supreme Court of Appeal was the alleged breach of contract by MACRA and the tort of inducement to breach a contract on the part of the Government. Those issues were litigated upon upto the highest court of Malawi and MML cannot be faulted for having raised those issues before this Court, and as stated, our finding is that these issues have relevance to the Treaty.

75. The Government in support of its contention that MML had not exhausted the local remedies submitted that Chapter 3 of the Laws of Malawi that is Supreme Court of Appeal Act provides under Section 29 that the Supreme Court of Appeal has power to review its judgment. It provides:

"The court shall not review any judgment once given and delivered by it save and except in accordance with the practice of the Court of Appeal of England."

76. The relevant Rule under England's jurisdiction is Part 52 of the England Civil Procedure Rules which provides:

52.17

"(1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless –

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(a) it is necessary to do so in order to avoid real injustice;

(b) the circumstances are exceptional and make it appropriate to reopen the appeal; and

(c) there is no alternative effective remedy."

The Court having examined the above Rule, we find it has no application to this Reference.

77. The Government submitted that since MML had failed to seek a review before Malawi Supreme Court of Appeal, as stated above, MML had not exhausted its local remedies.

78. In the Court's opinion MML did exhaust the local remedies. Its case was taken to the highest court of Malawi. It fulfilled the requirements of Article 26. In the Court's view, more than what was intended by the drafters of the Treaty should not be read in Article 26. It is for that reason that the Court cannot accept the argument raised by the Government.

79. Finally, the argument raised by the Government that MML's Reference cannot be entertained before this Court because the Licence Agreement, under Clause 29, provided that the applicable law in the performance of it was the Laws of Malawi. The Court cannot agree with that argument because we have made a finding in this Ruling, that the municipal law of the parties is applicable before this Court, so long as it is within the confines of the Treaty.

80. Government Counsel stated that this Court, if it allowed this Reference to proceed, it would lead to opening of floodgates for numerous litigation to be brought to this Court and which would have no relevance to the Treaty. In that regard, he stated that persons with claims on issues of witchcraft, family and chieftaincy would find their way into this Court.

81. Our response is simply this, that if such claims come within the ambits of Article 19 and 23 of the Treaty, this Court will have jurisdiction to entertain such matters. The

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drafter of the Treaty and the Member States must have intended to improve its residents' access to justice when they enacted the Treaty in the format that it is in and in so doing granting all persons (both natural and legal persons) the right to file a Reference before the COMESA Court of Justice.

82. An apt article is written by Toby J. Stern entitled ***"Federal Judges Fearing the Floodgates of Litigation"*** viz:

> ***"The argument against Judges ruling based on fears that their decision will open the floodgates of litigation in Federal Courts proceeds on two grounds: first, the floodgate argument represents a value caseload-based judicial economy that is simply not considered in the Constitution and thus ruling on its basis should not be assumed to effectuate the purpose of the Judiciary as delineated in Article 111...; secondly, the floodgates argument has a structural problem: it fosters inconsistencies between Judges, usually has no explicit factual basis and is ancillary to the central holding of a case and has high potential of misuse."***
> ***http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1346&context=jcl***

83. ***This Court finds that in the end, the Preliminary Application filed by the Government dated 5th June, 2015 is dismissed.***

B. PRELIMINARY APPLICATION BY MACRA

84. MACRA's Preliminary Application is dated 10th June, 2015. It is brought under Rules 82 and 83 of the Rules. It seeks one single prayer, that an order be issued removing MACRA as a party in this Reference on the ground of lack of jurisdiction. This is supported by the affidavit of its counsel, Mr. Roka.

The Court shall reproduce some of the paragraphs of that affidavit as follows:

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"The Applicant (MML) is a legal person by virtue of being a Limited Liability Company duly incorporated in the Republic of Malawi....."

The second Respondent (MACRA) is a body corporate established under Section 3 of the Communication Act is (sic) Malawi as the sole regular of the telecommunications service industry in Malawi...

The 2nd Respondent (MACRA) has the capacity to sue and be sued in its own corporate name.

The Republic of Malawi is a party to the Common Market for Eastern and Southern Africa (COMESA) Treaty....

Under Article 26 of the COMESA Treaty, both legal (as the Applicant herein) and natural persons can challenge an act, decision, regulation, directive or decision of Council or of a Member State for unlawfulness infringement of the provisions of the Treaty."

85. Mr. Roka proceeded to depone in that affidavit that MACRA in the year 2005 made a decision to revoke the licence it had awarded the MML to provide public mobile telephony services in Malawi.

86. Counsel further deponed that MACRA, having made the foretasted decision, it could not be the subject of this Reference because MACRA was neither Council nor a Member State as stated in Article 26.

87. MACRA, relying on the provisions of Article 26, cited the case of ***POLYTOL PAINTS & ADHESIVES MANUFACTURERS CO. LTD =VS= REPUBLIC OF MAURITIUS*** (supra) where the Court stated:

"The content of this Rule shows the extent to which the signatories of the COMESA Treaty have committed themselves to give some space in the COMESA territory not only to the Member States but also to the individuals. By giving the residents of any Member State the right to challenge the acts thereof on grounds of unlawfulness or infringement of the Treaty, the Member States have in some areas limited their sovereignty. The proper functioning of the Common Market is, therefore, not only a concern of the Member States but also that of residents.

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The Treaty is more than an agreement which merely creates obligations between Member States. It also gives enforceable rights to citizens residing in the Member States."

88. MACRA relied on this case to confirm that MML as legal person had a right to bring an action before this Court for an alleged violation of the Treaty.

89. However, MACRA by its submissions stated that Article 26 restricted Reference to be filed against Council and State Members. That, that being so, MACRA being one of the institutions in a Member State, Republic of Malawi, no Reference could be filed against it.

90. It was on that ground that MACRA sought a finding that this Court did not have jurisdiction over this Reference in as far as MACRA was concerned.

91. MACRA's prayer was supported by the Government. The Government's submissions in respect of Article 26 were similar to those of MACRA. That is that MACRA, being neither the Council nor Member State, as provided under Article 26, could not be a party in this Reference.

92. The Government relied on what it termed customary international law and submitted that under that law, internal organizations of sovereign states were protected. The Government cited the principle of attribution set out in International Law Commission's (ILC) Articles on States Responsibility as follows:

Article 4: Conduct of Organs of State

" 1. The conduct of any State organ shall be <u>considered an act of that State under international law</u>, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. An organ includes any person or entity which (sic) has that status in accordance with the internal law of the State." (Emphasis added)

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93. It was submitted on behalf of Government that MACRA:

> ***"It is a Statutory Corporation set up by Parliament in Malawi and charged with the responsibility of regulating the telecommunications sector in Malawi. Regulation of the telecommunications sector is clearly a government function <u>and it so does as an agent of the Government.</u>"*** (Emphasis added)

94. MML opposed the application and began by drawing the Court's attention to the fact that MACRA was a party during the proceedings before the Malawi courts, and this was because it can sue and be sued as provided under Communication Act (Cap 68:01) of the Laws of Malawi.

95. MML cautioned the Court in regard to MACRA's application and submitted that there was a risk that if the application was allowed, MML faced a risk and dilemma of being left without a remedy.

96. MML also objected to the Attorney General's impropriety to represent MACRA, by pleading the case of MACRA which sought the removal of MACRA in this Reference.

COURTS ANALYSIS AND DETERMINATION

97. We wish to deal, firstly, with the issue raised by MML objecting to the Attorney General of Malawi pleading the case of MACRA when in one of the prayers in the Preliminary Application it sought the removal of MACRA.

Rule 51 of the Rules provides:

> ***"A party may address the Court only through his agent."***

Article 33 of the Treaty provides:

> ***"Every party to a reference before the Court shall be represented by Counsel appointed by that party."***

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98. Those provisions, in the Court's view, make it clear that it is only counsel who is the "agent" of a party or who has been appointed to represent a party that can appear and plead the case for such a party.

99. The Attorney General of Malawi was appointed, according to the documents in this Reference, to represent the Government of the Republic of Malawi. The Attorney General was in error to seek a prayer on behalf of MACRA, which party was represented by Mr. Roka. The Court therefore upholds the objection raised by MML.

100. The provisions of Article 26 have previously been reproduced in this Ruling. Suffice it to say that a party seeking to file a Reference is required by that Article to seek redress against the Council or the Member State.

101. The Government and MACRA, in the Court's view have correctly stated that MACRA is neither Council nor Member State. The Government in its submission went further to concede that the acts of MACRA were done as an agent of the Government.

102. The Court finds that it is in agreement with the submissions of the Government and MACRA. The Court is also alive to the submissions of MML that it risks being left without a remedy.

103. Although in this case we find that the MACRA should be removed from this Reference, we are aware of this Court's previous decision on such an issue in the case of ***STANDARD CHARTERED FINANCIAL SERVICES LTD =VS= COURT OF APPEAL FOR THE REPUBLIC OF KENYA*** – COMESA Court Ref No. 1 of 2003. That Reference related to a case that was litigated before the Court of Appeal of the Republic of Kenya.

104. COMESA Court in its Ruling ordered the Kenya Government to be substituted for the Court of Appeal and further ordered the joinder of a Limited Liability Company as a co-respondent, a company that had been involved in the case before the Court of Appeal of the Republic and had obtained judgment before that court and whose litigation was the subject of the Reference before the COMESA Court.

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C. PRELIMINARY APPLICATION BY MALAWI MOBILE LIMITED (MML)

110. MML by the above application is seeking the nullification of the judgment of the Supreme Court of Appeal of Malawi on the grounds that the aforementioned Court was irregularly constituted. MML also sought this Court for an award of 66,850, 000 USD in damages and 5% interest per annum, from the date of the commencement of the action until the date of full payment, as well as award of legal costs and any other relief as this Court may deem fit and expedient under the circumstances.

111. In order to establish their claim before the Court, MML relied on certain facts notably that the proceedings before the Supreme Court of Appeal of Malawi were null and void by virtue of operation of the law because the Court was not quorate or that the Court was not properly constituted. Equally, according to MML, the Supreme Court of Appeal of Malawi delivered its judgment in open Court on 10th March 2015, reversing the judgment by the Commercial Division of the High Court. During the delivery of the judgment, Justice Rezine Mzikamanda, sat on the panel of judges that delivered the judgment. MML argued that the said judge did not take part in the proceedings, and yet the said judge took part in determining the judgment.

112. MML further argued that in terms of the Constitution of Malawi only an odd number of Appellant judges of at least three are permitted to sit and hear an appeal. The delegation of judicial power is disallowed. MML argues that only the same panel of appellate judges which heard the matter had the power to deliver a judgment. Therefore MML conclude that Justice Mzikamanda, who was never a part of the initial panel did not have the right to sit during the delivery of the judgment or to participate in any proceedings of that case.

113. The Government of Malawi maintained that MML filed an application based on hypothesis, assumptions, and opinions, and not based on facts. In the Government's view this is because MML did not furnish proof that Justice Mzikamanda actually participated in the deliberations which led to the judgment by the Supreme Court of Appeal of Malawi.

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114. The Government maintained that Justice Mzikamanda only completed the quorum during the pronouncement of the judgment and that this was not in dispute. The Government submitted further that MML failed to show proof to the contrary, and seek a review concerning the presence of Justice Mzikamanda, and yet his presence was well explained by the Court in the first paragraph of the judgment.

115. The Government further stated that even if the judgment on this preliminary application was made in favour of MML this did not give MML the right to a ruling from this Court, because the result would be the annulment of the proceedings by the Supreme Court of appeal, which would lead to the re-opening of the case by the Supreme Court of Appeal without which the Applicant will not have exhausted the domestic remedies as required by Article 26 of the COMESA Treaty.

116. The Government further stated that, if this Court decided not to refer this case back to the Supreme Court of Appeal, it will have to examine all evidence submitted before it, to show that there never was any contract and that without a contract, there could not have been a breach of contract and that as a result, there is no need for awarding damages and interest.

117. Mr. Roka for MACRA submitted, as previously submitted by the Government, that MML had an alternative remedy of review of the judgment of the Supreme Court of Appeal and therefore MML's preliminary application did not conform to Rule 82 of the Rules. In support of their submission MACRA referred to Cap 3 Section 29 Supreme Court of Appeal Act which provides as follows:

> **"The Court shall not review any judgment once given and delivered by it save and except in accordance with the practice in the court of appeal in England"**

118. Therefore MACRA submits that preliminary application is premature which makes the application of MML inadmissible before this court.

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119. MACRA further stated that the preliminary application by MML is based on the composition of the Supreme Court of Appeal which ground goes to the essence of the reference and therefore cannot be the basis of the preliminary application. And that if this court granted MML preliminary application it will be as good as determining the Reference.

120. MACRA concluded that the learned judge did not take part in the deliberation and that MML was not able to prove to the contrary.

DETERMINATION

121. The court agrees with the submissions made by the Government and MACRA that a determination of the preliminary application by MML goes to the core of the Reference and in the circumstance is contrary to the provisions of Rule 82 of the Rules.

122. **In the end the Preliminary Application of MML dated 29th June 2015 is dismissed.**

D. COSTS

123. The only remaining issue to be determined is that of costs. To that end Rule 62 (1) provides as follows:

> ***"A decision as to costs shall be given in the final judgment or in the order which closes the proceeding".***

124. It is this court's view that this matter has not been finalized nor have the proceedings been closed. In the case of MACRA even though the preliminary application for its removal has succeeded the proceedings against it have not even closed.

125. **In the end there shall be no order as to costs.**

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126. The summary of the Court's decision on the three Preliminary Applications filed herein is therefore as hereunder:

a) ***The Preliminary Application filed by the Government dated 5th June, 2015 is dismissed;***

b) ***The Preliminary Application filed by MACRA dated 10th June, 2015 is hereby allowed and MACRA is henceforth removed from this Reference;***

c) ***The Government of Malawi shall henceforth appear on its own behalf and on behalf of its corporate organ known as MACRA;***

d) ***The Preliminary Application by MML dated 29th June 2015 is dismissed; and***

e) ***There shall be no order as to costs.***

DATED at **LUSAKA**, **ZAMBIA** this...20th.....day of ...November.....2015.

.....

Hon. Lady Justice Qinisile Mabuza

Acting Principal Judge

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Hon. Mr. Justice Ali Sulaiman Mohammed

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Hon. Lady Justice Mary N. Kasango

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Hon. Dr. Justice Leonard Gacuko

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Hon. Lady Justice Clotilde Mukamurera

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