



**IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA  
APPELLATE DIVISION**

**(Coram: Anita Mugeni, VP; Kathurima M’Inoti; Barishaki Cheborion,  
JJ.A)**

**APPEAL No. 12 OF 2022**

**BETWEEN**

**THE ATTORNEY GENERAL OF  
THE REPUBLIC OF BURUNDI..... APPELLANT**

**VERSUS**

**FRANCIS NGARUKO ..... RESPONDENT**

*[Appeal from the Judgment of the First Instance Division of the East African Court of Justice at Arusha by Hon. Justice Yohane B. Masara (Principal Judge), Hon. Justice Dr Charles O. Nyawello (Deputy Principal Judge), Hon. Justice Charles Nyachae, Hon. Justice Richard Muhumuza, and Hon. Justice Richard W. Wejuli, JJ. dated 30<sup>th</sup> September 2022 in Reference No. 9 OF 2019].*

**February 2024**

## **JUDGMENT OF THE COURT**

### **A. INTRODUCTION**

1. This is an appeal by the Attorney General of the Republic of Burundi (The Appellant) against the Judgment of the First Instance Division of this Court (hereinafter referred to as the ("Trial Court") dated 30th September 2022 in Reference No. 9 of 2019, in which Francis Ngaruko (The Respondent) was successful.
2. Being dissatisfied with the judgment of the Trial Court, the Appellant filed Appeal No. 12 of 2022 on the 17<sup>th</sup> of October 2022, requesting this Court to reverse the judgment of the Trial Court and order that the decision of the Special Court on Land and Other Assets cancelling title File No. E.XXXVI folio 129 did not contravene Article 6(d) of the Treaty for the Establishment of the East African Community ("the Treaty").
3. The Appellant is a State Party to the Treaty and is represented in this Appeal by Counsel Vyizigiro Diomede and Barankitse Pacifique, State Attorneys.
4. The Respondent is a natural person and resident of the Republic of Burundi. In this Appeal, the Respondent is represented by Mr. Hannington Amol, Advocate.

### **B. BACKGROUND**

5. The background of the Appeal as set out in the Memorandum and Record of Appeal is as follows:

6. It originates from Reference No. 9 of 2019 which was brought before the Trial Court under Articles 6(d), 7(2), 8(1)(a) & (c), 23(1), 27(1) and 30(1) & (2) of the Treaty challenging the proceedings and the finding that both the Respondent and the estate of his late father, Evariste Sebatutsi, were fraudulently in possession of the land Registration File No E.XXXVI folio 129 of 28.8.1972 ("the Property").

### **C. THE REFERENCE.**

7. The Reference was hinged on the allegation that the proceedings which culminated in the finding that both the Respondent and the estate of his late father were fraudulently in possession of the Property violated the Treaty.
8. The dispute concerns a piece of land which the Respondent claims belongs to him and his late father, Evariste Sebatutsi. In 1938, a Belgian named Theys Pierre acquired the Property for agricultural use. When the colonial period ended in 1963, Theys Pierre returned to Belgium but was still recognised as the owner of the Property. Between 1961 and 1972, while in Belgium, Theys Pierre attempted to sell the property with the help of the land authorities in Burundi.
9. On 28<sup>th</sup> July 1972, the Respondent's late father took possession of the Property and a land registration certificate was issued to him by the Registrar of Lands. During the transaction, Theys Pierre was represented and helped by a duly appointed attorney.
10. The family of Evariste Sebatutsi left the country during the civil war and on their return from exile took possession of the Property and

developed it. The Respondent acquired a further 10 hectares of land adjacent to the property acquired by his father. After the death of Evariste Sebatutsi, his successors shared the land acquired in 1972. The Respondent acquired 19 hectares in addition to the 10 that he had previously acquired.

11. In 2014, a group of residents filed a complaint with the National Commission of Land and other Property ("The Land Commission"). Their complaint which was dismissed was that they had been deprived of their land by Sebatutsi Evariste in 1973.
12. The Land Commission ruled that the Respondent and his father were not entitled to the Property and declared the land to be State property. The Respondent appealed the decision to the national level of the Land Commission, and his appeal was dismissed, because the Commission declared that it lacked jurisdiction to hear the case.
13. The Respondent then appealed to the Special Court on Land and Other Property, first degree ("the Special Court"), which affirmed the Land Commission's decision. The Special Court further cancelled the Respondent's title to the land and ordered Sebatutsi estate to pay the State of Burundi costs. The Respondent was dissatisfied and appealed to the Special Court, second degree, which appeal was dismissed.
14. On 31<sup>st</sup> March 2019 the Respondent filed in the Trial Court Reference No. 9 of 2019, in which he prayed for the following remedies: -

- i. A declaration that the decision of the Appellant to cancel the title of the Respondent and that of his late father contravened Article 6(d) of the Treaty;
  - ii. A declaration that the acquisition of the property by the Appellant without payment of compensation was in violation of Article 6(d) of the Treaty;
  - iii. A declaration that the delay by the Appellant to conclude the dispute violated Article 6(d) of the Treaty;
  - iv. An order directing the Appellant to restore the Respondent into possession of the Property;
  - v. In the alternative, an order directing the Appellant to compensate the Respondent in the sum of USD 4,000,000 together with interest at Court rates until payment in full;
  - vi. Costs; and
  - vii. Any other remedy the Court might consider expedient.
15. The Appellant's case to the Reference was set out in the Response to the statement of Reference and in the Affidavit of one Devote Nzeyimana dated 15th July 2019. He denied the allegations and claims of the Applicant on the following three grounds that:
- a) Article 3 of what purports to be the contract between Evariste Sebatutsi and Theys Pierre stipulates that Sebatutsi will have right over the land in dispute after the signature of an authenticated contract;

- b) The Applicant had failed to produce the said authenticated contract before the Special Court on Land and Other Assets; and
  - c) Judgement RSTBA 0263 delivered by the Special Court on Lands and Other Assets on 1<sup>st</sup> February 2019 does not violate Article 6 (d) of the Treaty.
16. He pleaded that failure to produce the authenticated contract clearly indicates that the disputed land was never the property of the plaintiff's father during his lifetime and hence at his death it has not become a part of his estate. Therefore, he urged the Trial court to dismiss the Reference.
17. During the scheduling conference held on 9<sup>th</sup> November 2020, the following issues were, with the assistance of Court, agreed upon by the parties: -
- i. Whether the decision of the Appellant, contained in the Judgment RSTBA, to cancel the Respondent's title and that of his late father, Evariste Sebatutsi, to the property contravened Article 6(d), 7(2) and 8(1)(a) & (c) of the Treaty;
  - ii. Whether the said decision by the Appellant violated Articles 6(d), 7(2), 8(1)(a) & (c) of the Treaty by declaring the Respondent's property an asset of the State, without due process and compensation; and
  - iii. Whether the parties are entitled to the remedies sought.
18. Having considered the pleadings and submissions from both parties, the Court decided to determine Issues No. 1 and No. 2

simultaneously, because they were related. The Court held that the decision of the Special Court violated the principles of good governance, and the rule of law as prescribed by Articles 6(d) and 7(2) of the Treaty. The Appellant was ordered to restore the property to the Respondent or pay him adequate compensation for the property, based on current market value. On costs, the Court followed the provisions of Rule 127(1) of the Rules of Court, and ordered the Appellant to pay costs of the Reference.

#### **D. THE APPEAL**

19. The Appellant was aggrieved and filed an appeal in this Court on the following grounds: -
  - i. That the Trial Court erred in law or committed a procedural irregularity by failing to agree with the Attorney General of the Republic of Burundi that the failure to produce an authenticated Deed of Sale concluded in 1972 or a Power of Attorney was sufficient ground to conclude that the Respondent's father did not acquire the disputed land.
  - ii. The Trial Court erred in law or committed a procedural irregularity by holding that it was equally wrong for the Special Court, Second Grade, to uphold the Special Court, first Grade's decision that the suit property was one without a master merely because of errors observed in the Deed of Sale.

- iii. That the Trial Court erred in law by holding that they were mindful of the fact that a person may be deprived of property if it is proved that the said property was fraudulently obtained.
  - iv. The Trial Court erred in law by holding that it was incumbent upon the legal machinery of the Republic of Burundi to subject the matter relating to the Deed of Sale to a forensic investigation before deciding to cancel the Respondent's title.
  - v. The Trial Court further erred in law by holding that it would have been understood had it been that the Government of Burundi was a party to the original dispute contending that the Respondent had acquired the property through fraud and that it was not the duty of a Court of Law to fetch pieces of land and give them to whomever they desire; and
  - vi. The Trial Court erred in law by deciding in favour of the Sebatutsi estate when they were seized by the Respondent who had pleaded before the Special Court on Land and other Assets as an intervener claiming only 29 ha. of land.
20. The Appellant asked the Court to allow the Appeal and to grant the following orders: -
- a. That the Judgment of the First Instance Division dated 30<sup>th</sup> September 2022 be reversed.
  - b. That the decision of the Special Court on Land and Other Assets cancelling title File No. EXXXVI folio 129 did not contravene Article 6(d) of the Treaty.

- c. That Costs in the Trial Court and in this Court be borne by the Respondent.
- d. That this Court makes such further or other orders as it deems just in the circumstances.

#### **E. THE SCHEDULING CONFERENCE.**

21. At the scheduling conference of the Appeal held on 08<sup>th</sup> May 2023, the parties, with the assistance of the Court, framed the following issues for determination: -
  - i. Whether the Appellate Division has jurisdiction to hear and determine this Appeal.
  - ii. If the answer is in the affirmative, whether the Trial Court erred in law by holding that the decision to cancel the Respondent's title to the suit property was in violation of Article 6(d) of the Treaty.
  - iii. Whether the First Instance Division erred in law by deciding in favour of the Estate of Sebatutsi while the claim was filed by the Respondent, Francis Ngaruko.
  - iv. What remedies, if any, are available to the parties?

#### **F. PRELIMINARY ISSUE RAISED BY THE COURT.**

22. During the hearing on the 22<sup>nd</sup> of November 2023 and before considering the framed issues, this Court *suo moto* raised a question concerning the Trial's Court jurisdiction. The Court was interested to know whether the Reference lodged by the Respondent was time-

barred, bearing in mind when the cause of action arose and when the Respondent lodged the Reference, as this would *ipso facto* determine the Court's *ratione temporis* jurisdiction.

23. The Respondent's submitted that the cause of action arose well before the Reference was lodged but argued that that did not signify that the Reference was time barred because the Respondent was aggrieved by the Decision of the Special Court rendered on 1<sup>st</sup> February 2019, which decision was brought to the attention of the Respondent on 4<sup>th</sup> April 2019. The Respondent then filed his Reference on 31<sup>st</sup> May 2019, which was less than sixty days from the date he became aware of the decision.
24. The Respondent further contended that time started to run from the 1<sup>st</sup> April 2019 because the decision of the Special Court delivered on that date breached Article 6(d) of the Treaty, by intervening in a dispute between private parties to determine that the suit property belonged to the State of Burundi.
25. For those reasons the Respondent submitted that the Trial Court had jurisdiction *ratione temporis* to hear and determine the Reference.
26. Regarding this issue, the Appellant contended that the cause of action started with the decision of the National Commission on Land and other Assets on 20<sup>th</sup> May 2015, to which the State of Burundi was not a party.

## **DETERMINATION OF THE PRELIMINARY ISSUE**

27. In view of the differing opinion between the parties as to when the cause of action arose, it was crucial for the Court to determine when

the cause of action arose. It is evident from the Parties' stance that there have been multiple internal decisions regarding this case in the Respondent State. The decisions were rendered in **2014, 2015, and 2019**, in accordance with the principle of subsidiarity, which mandates a certain hierarchy among a State's judicial bodies. In view of these numerous decisions, the exact date of the decision that adversely affected the Respondent has to be determined.

28. The jurisdiction *ratione temporis* of the Court is set out in Article Article 30(2) of the Treaty and it provides that: -

*"The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be."*

29. The Respondent pleaded clearly in the Reference that it was aggrieved by the decision of the Special Court on Land and other Assets of 1<sup>st</sup> April 2019, which was notified to them on 4<sup>th</sup> April 2019.

30. In their oral submissions, counsel for the Appellant did not dispute the date on which the decision was brought to the attention the Respondent.

31. Based on the above, this Court finds that the Trial Court had jurisdiction *ratione temporis* to hear and determine the Reference.

**ISSUE No. 1: Whether the Appellate Division has jurisdiction to hear and determine this Appeal.**

**a. The Appellant's case**

32. On whether the Appellate Division has jurisdiction to hear and determine this Appeal, it was the Appellant's submission that Article 35 of the Treaty gives the Appellate Division the requisite jurisdiction to hear and determine the Appeal.

33. The Appellant cited **Attorney General of the United Republic of Tanzania v. Antony Calist Komu** [EACJ Appeal No. 2 of 2015] to support his position that jurisdiction of the Appellate Division is "to be understood in three different dimensions, namely: a) jurisdiction *ratione materiae*, b) jurisdiction *ratione temporis*, and c) jurisdiction *ratione personae*", which led to the formulation of three sub-issues:

- *Whether the Appellate Division has jurisdiction ratione materiae to hear and determine this Appeal;*
- *Whether the Appellate Division has jurisdiction ratione temporis to hear and determine this Appeal; and*
- *Whether the Appellate Division has jurisdiction ratione personae to hear and determine this Appeal.*

34. On the first sub-issue, the Appellant contended that jurisdiction *ratione materiae* is provided by Article 35A of the Treaty, and he lodged his appeal on the grounds that the Trial Court had committed errors of law and procedural irregularities. He cited **Simon Peter Ochieng v. The Attorney General of the Republic of Uganda** [EACJ Appeal No.4 of

2015] to support the proposition that “for an Appeal to be properly brought before this Court the condition *sine qua non* is that a party bringing the Appeal has to establish either points of law, grounds of lack of jurisdiction or procedural irregularity”. It was the Appellant’s submission that the Trial Court erred in interpreting and applying the law and committed procedural irregularities which ought to be reversed, and only the Appellate Division has that jurisdiction.

35. On the second sub-issue, the Appellant submitted that the Appellate Division has *ratione temporis* jurisdiction to determine this Appeal, because Rule 88 (2) of the Rules provides for lodging of a notice of appeal within 30 days from the date of the decision against which it is desired to appeal. The Applicant contended that Rule 89 (1) provides for 14 days within which, after lodging a notice of appeal, a party desiring to appeal shall serve the notice of appeal upon all persons who seem to him to be directly affected by the appeal and Rule 96 (1) provides for 30 days from the date when the notice of appeal is lodged, within which to institute the appeal. It was the Appellant’s case that the Appellate Division has jurisdiction *ratione temporis* to hear and determine this Appeal since all of the requirements had been complied with by the Appellant within the prescribed time. That the impugned judgment was rendered by the Trial Court on the 30<sup>th</sup> September 2022; the Appellant lodged his notice of appeal on the 4<sup>th</sup> October 2022 and served the same upon the Respondent by email on the same day; and instituted the Appeal on 17<sup>th</sup> October 2022.
36. On the third sub-issue, the Appellant argued that the Appellate Division had jurisdiction *ratione personae* to hear and determine this

Appeal, because he had the required *locus standi* under Article 30 of the Treaty to challenge the decision of the Trial Court in the Appellate Division.

37. The Appellant further highlighted the errors in law and the procedural irregularities he alleged were committed by the Trial Court in its judgment.
38. The Appellant therefore prayed to the Court to confirm that it had jurisdiction and proceed to hear and determine the appeal on its merits and set aside the impugned judgment.

**b. The Respondent's case**

39. It was the Respondent's position that the Appellate Division lacked jurisdiction to entertain the Appeal because the Appeal did not relate to an error of law or a procedural irregularity. The Respondent invoked Article 35A of the Treaty in support of his submission that the grounds raised by the Appellant did not disclose an error of law or a procedural irregularity. In his view, none of the grounds raised by the Appellant fell within Article 35A of the Treaty.
40. The Respondent then proceeded to analyze at length each of the Appellant's grounds of appeal as set out in paragraph 19 above and submitted that unfortunately none of the six grounds advanced by the Appellant, raised issues related to Article 35A of the Treaty. That they were mere lamentations and none raised questions on the findings of fact by the Trial Court.
41. He further submitted that the grounds were not pleaded with precision.

42. With regard to the first, second, third, fourth and fifth grounds raised by the Appellant, the Respondent contended that they lack substance since they did not specify what constituted an error of law or a procedural irregularity. In the Respondent's view, they did not constitute any of the grounds provided in Article 35 A of the Treaty.
43. As to ground 6, the Respondent contended that it was not based on any legal ground, procedural irregularity or lack of competence as required under Article 35A of the Treaty.
44. In addition, the Respondent submitted that the Appellant's Record of Appeal did not comply in substance and form with Rule 97 of the Rules of the Court and was deficient in that it did not contain all the documents referred to in Rule 98 of the Rules of Procedure. The Respondent prayed for the appeal be struck out *in limine*.

**c. Determination by the Court**

45. The Court has carefully considered the submissions of both parties and the relevant law, and we now determine whether the Appellate Division has jurisdiction to hear and determine this appeal.
46. In his submissions the Appellant relied on the case of **Attorney General of the United Republic of Tanzania vs. Antony Calist Komu** [EACJ Appeal no. 2 of 2015], to buttress his argument that the jurisdiction of this Court is divided into three categories which had all been met; jurisdiction *ratione materiae*, which he said to be linked to all the grounds set out in his memorandum of appeal; jurisdiction *ratione temporis*, on which he stated that he had filed the appeal within the time set in Rules 88(2), 89(1) and 96(1) of the Rules and finally,

jurisdiction *ratione personae*, where the Appellant contended that he had shown that, as the representative of the State and a party to the proceedings before the Trial Court, he had the capacity to bring this Appeal.

47. The Respondent who raised the issue of the jurisdiction of the Appellate Division simply refuted the grounds put forward by the Appellant by merely repeating that there is no error of law or procedural irregularity, whereas, the Appellant had set out in detail findings in the Judgment of the Trial Court which he considered to be errors of law and procedural irregularities. Given that it was the Respondent who raised the issue of the lack of jurisdiction of this Court, one would have expected the Respondent to elaborate more on this issue, rather than simply repeating that the Appellant had not demonstrated any errors of law or procedural irregularities.
48. This Court in the case of **Secretary General of East African Community v. Rt. Hon. Margaret Zziwa**, [Application No. 12 of 2015] of Jan. 29, 2016 page 15 held that: "*A party has an "automatic" right to appeal any judgment or order from the First Instance Division*".
49. In **Attorney General of the Republic of Kenya v. Prof. Anyang' Nyong'o & 10 Others**, [Appeal No. 1 of 2009 of 17<sup>th</sup> August 2010], page 6, the Court held that: "*litigants of the Court are afforded an unfettered right of liberty to appeal the judgments and orders of the First Instance Division, to the Appellate Division.*"
50. While in principle any decision of the First Instance Division is appealable before the Appellate Division, Article 35A of the Treaty and

Rule 86 of Rules of Court lay down the grounds upon which an appeal against a decision of the First Instance Division should be based. The three grounds are:

- (a) point of law;
- (b) lack of jurisdiction; or
- (c) procedural irregularity

51. In **Simon Peter Ochieng' vs the Attorney General of the Republic of Uganda**, [Appeal No. 4 of 2015] page 13, this Court was categorical that the right of appeal is limited to the grounds provided under Article 35A of the Treaty and Rule 86 of the Rules of Procedure, 2019.
52. These grounds provided under Article 35A are, however, not cumulative for a party to lodge an appeal. A single ground among the three provided by the Treaty and Rule 86 of the Rules of Procedure is sufficient to enable a party aggrieved by any Judgment, Ruling, Decision or Order of the First Instance Division, to refer an appeal to this Court.
53. In the case of **Angella Amudo v. Secretary General of East African Community**, [Appeal No. 4 of 2014] of July 30, 2015 at page 28 this Court explained what amounts to an error of law or procedural irregularity as follows: -

*“a court commits an error of law or procedural error:*

- a) when it . . . misapprehends the nature, quality, and substance of the evidence;*

b) *“draws wrong inferences from the proven facts,” or decides a case without evidence;*

c) *acts irregularly in the conduct of a proceeding or hearing, leading to a denial or failure of due process (i.e. fairness) e.g. irregularly admits or denies admission of evidence, denies a party a hearing, ignores a party’s pleadings, etc”.*

54. An analysis of the Appellant’s grounds of appeal and his counsel’s submissions show that he got lost in generalities regarding the jurisdiction of the Court and mixed up the requirement of procedural irregularities with points of law as set out in the **Calist Komu** case (supra). However, this was not fatal because the Court was able to decipher the irregularities he was complaining of.

55. The Appellant for example on pages 11-13 of his submissions, on ground No. 01, explained that the failure of Trial Court to examine and assess the condition and document required in Article 322 of the Burundi Land Act constituted, according to him, a misapprehension of the nature, quality and substance of the evidence adduced before the Trial Court.

56. Additionally, the Appellant contends that the failure by the Trial Court to make reference to the document which is a requirement of the law of Burundi amounted to commission of procedural irregularity, thus bringing the matter within the purview of Article 35A of the Treaty and Rule 86 of the Rules of Court.

57. We therefore, find that the Appellate Division has jurisdiction to hear and determine this Appeal. Issue No.1 is answered in the affirmative.

**ISSUE No. 2: Whether the First Instance Division erred in law by holding that the decision to cancel the Respondent's title to the suit property was in violation of Article 6(d) of the Treaty for the Establishment of the East African Community.**

**a. The Appellant's case**

58. It is the Appellant's case that the Trial Court erred in law by holding that the decision to cancel the Respondent's title to the property was in violation of Article 6(d) of the Treaty. According to the Appellant, the Trial Court wrongly determined that the "Special Court violated the principles of good governance, including the rule of law as prescribed by Article 6(d) and 7(2) of the Treaty". He supported his argument with definitions of good governance given by the United Nations and the International Monetary Fund. According to the definitions, it is the Appellant's view that the Trial Court did not demonstrate the manner in which the Special Court's decision violated the principles of good governance, as set out in Articles 6(d) and 7(2) of the Treaty.

59. The Appellant argued that the rule of law was not violated, because the Appellant's basis for cancellation of the Respondent's title was the absence of the authenticated Deed of Sale which the Court held was, "the only act that could justify the transfer of land ownership from the seller Theys Pierre to Sebatutsi Evariste." The Appellant relied on Article 322 of the Burundi Land Act.

60. It was further submitted for the Appellant that the finding that the land title produced by the Respondent had been obtained fraudulently by his late father, could only be called into question by the procedure of inscription in forgery.
61. The Appellant also submitted that the cancellation of the Respondent's title was just a corollary to the fraud committed by his late father in obtaining the Property, and that the Special Court's jurisdiction, in line with the subject matter, is to "identify and recover those properties which have been irregularly allotted". Basically, the Appellant's position on this issue is primarily based on the fraud allegedly committed by the Respondent's late father to acquire the Property, and as such, the Trial Court erred in law by determining that the Appellant, through the Special Court, breached its obligation to uphold the rule of law.

**b. The Respondent's case**

62. For the Respondent, it was submitted that the Trial Court did not err in finding that the decision to cancel the Respondent's title violated the Treaty. The Respondent argued that there is no evidence that the title produced by him was obtained through fraud, as neither Theys Pierre nor anyone else claiming under him protested the authenticity of the Deed of Sale.
63. Further, the Respondent submitted that Sebatutsi Evariste followed the land registration processes and was issued a certificate of registration of title by the Lands Registrar. Additionally, the Property had never been abandoned by Theys Pierre and was therefore never a land without master, as claimed by the Appellant. It was contended that

correspondence between Theys Pierre and the Respondent's late father existed and was produced in court. That correspondence showed *inter alia* that the Deed of Sale was sufficiently authenticated, as seen in the Record of Appeal.

64. The Respondent further submitted regarding the procedure he followed in acquiring a copy of the notarial deed and explained that it was the only document required to be signed under the laws existing in Burundi at the time of the transaction leading to the acquisition of the Property. The Respondent urged that he based his actions on the decree of 17 November 1953 made enforceable by O.R.U no 11/66 of 12 April 1954, which was repealed by the Land Code of 1 September 1986 and Law No 1/004 of 9 July 1996 on the organization and operation of the notary as well as the status of notaries, and adverted that the Trial Court had properly based its decision on these legal instruments
65. The Respondent further submitted that a criminal case was instituted by Theys Pierre in 1973, against a certain Mbavu Francois, who was an impostor, for contesting Theys Pierre action of selling the Property to Sebatutsi Evariste. According to the Respondent, this was sufficient evidence to show that Sebatutsi had acquired the property legally, as Theys Pierre was willing to support Sebatutsi in his claim against Mbavu Francois.

**c. Determination by the Court**

66. In determining whether the First Instance Division erred in law by holding that the decision to cancel the Respondent's title to the suit property was in violation of Article 6(d) of the Treaty, the Court is only

required to determine whether or not the Trial Court committed an error of law in its determination of the merits of the case.

67. As it is the case in most Partner States' law, a title deed has specific characteristics by which the right to property is legally and constitutionally recognized and therefore forms an integral part of the right to property. Under the rule of law, the right to the property cannot be taken away arbitrarily. There is a rebuttable presumption that a title deed is unassailable, intangible and definitive and because of these characteristics, its authenticity is presumed, without further ado. The mere existence of a title deed is prima facie proof of its authenticity and there is a presumption that all the necessary processes and conditions for obtaining it have been met.
68. Nevertheless, it remains true that malicious and ill-advised people could resort to fraud to acquire title deeds. But because of the presumption of their genuineness and unassailability, they can only be challenged through contestation in a competent court and production of cogent evidence, including expert evidence.
69. This explains and justifies the Trial Court's holding at paragraph 50 of the judgment when it addressed the contention that the Appellant had not carried out a forensic evaluation of the Respondent's Title. The Court said that: -

*"it was incumbent upon the legal machinery of the Republic of Burundi to subject the matter relating to the Deed of Sale to a forensic investigation before deciding to cancel the Applicant's title. The investigation could have entailed summoning of persons who*

*are said to have dealt with the conclusion of the agreements and registration of title, if need be.”*

70. The Appellant argues that a document which is presumed to be authentic was forged, without producing any concrete and tangible evidence before the Court. That the investigation referred to by the Trial Court would have involved experts, to ascertain the authenticity or lack thereof of the act and deed.
71. In **Niyongabo Theodore and other v. Attorney General of the Republic of Burundi** [Appeal No. 5 of 2020] of 26 November 2021, at page 31, it was held that to cancel the Title Deed for fraud under Burundian law requires special action. The Court held thus: -

*“We agree with the Appellants and find that the Procedure for cancellation or nullification of the land titles under Burundi law can be only done through a Special action. We further find that the Court ought to have sought information as to whether there was an action for fraud as a mandated procedure under Burundi Laws and whether the Tribunal complied this procedure”.*

72. We find that the cancellation of the Respondent's Title Deed on the basis of assumptions or conjecture constituted a violation of the rule of law by the Appellant contrary to Article 6(d) of the Treaty. The burden was on the Appellant to prove that the Deed produced by the Respondent was forged. This had to be done through a forensic investigation and special procedure as provided under Burundian law, which the Appellant failed to do.
73. Consequently, the Court answers issue No. 2 in the negative.

**ISSUE No. 3: Whether the First Instance Division erred in law by deciding in favour of the Estate of Sebatutsi while the claim was filed by the Respondent Francis Ngaruko.**

**a. The Appellant's case**

74. On this issue, the Appellant submitted that the Trial Court erred in law and committed procedural irregularity by deciding in favour of the Estate of Sebatutsi when it was seized with information by the Respondent, who was an intervener before the Special Court. The Respondent was seeking only 29 ha, while the estate of Sebatutsi was an integral party to the claim before the Special Court.

75. It is the Appellant's case that the land rights claimed by the Estate of Sebatutsi differ from those sought by the Respondent and that the Trial Court ignored the pleadings and failed to limit the case only to interest claimed by the Respondent.

76. The Appellant further adverted that the Respondent did not hold a power of attorney so as to legally represent the Estate of Sebatutsi, who is legally represented by his widow as per Article 122 of the Burundian Persons and Family Code.

**b. The Respondent's case**

77. It is the Respondent's case that the Trial Court did not err in law, in deciding in favour of the Respondent, in lieu of the Estate of Sebatutsi. Relying on Article 30 of the Treaty, the Respondent submitted that since any resident in a Partner State of the Community is entitled to institute proceedings on a question of violation of the Treaty, he was equally entitled to such rights. He added that the Trial

Court was not sitting on appeal from the decisions of the courts of the Appellant State, and that the questions before the Trial Court related to the violation of the Treaty.

78. The Respondent further contended that the Respondent and the rest of the Sebatutsi family acquired their title through their father, Sebatutsi Evariste and though the Respondent acquired part of the Property during Sebatutsi's lifetime, the bulk of it, just like the estate was bequeathed to him upon Sebatutsi death. It was his view that the Trial Court could not rule in favour of the Respondent and leave out the Estate of Sebatutsi, because the entire Property was acquired based on the sale which had been nullified by the Appellant. He added that he had expressly pleaded and prayed that the Court reverses the decision of the Appellant to cancel his title and that of his late father.

**c. Determination by the Court**

79. We have considered the submissions from both parties. we now have to assess and determine the issue: Whether the Trial Court erred in law by deciding in favour of the Estate of Sebatutsi while the claim was filed by the Respondent, Francis Ngaruko.
80. Before making a determination on this issue, we must revisit the impugned Judgment in order to understand the basis of the decision of the Trial Court to decide in favour of the Estate of Sebatutsi, while the claim before the Court was filed by the Respondent.

81. While determining this issue the Trial Court held thus: -

*“In our view, as the Applicant has proved to the satisfaction of this Court that the property in question legally **belonged to him**, the prayer to restore the **Applicant’s** title is well founded. We, therefore, direct that the **Applicant** be restored back to the property **taken from him** and given to the Respondent, or, in the alternative, be adequately compensated for the value of the property.” (Emphasis ours).*

82. In its decision, the Trial Court ordered the Appellant to restore the property to Respondent, Francis Ngaruko or in the alternative compensate him for the value of the property.
83. In deciding so, the Trial Court mistakenly treated the property forming the Estate of the late Sebatutsi as the suit Property. This was an error in law, because the Respondent did not initiate the proceedings as the representative of the Estate of the late Sebatutsi, but in his own name and in any event, he was claiming a specified acreage of the property as his own.
84. The Trial Court correctly identified the Respondent, Francis Ngaruko, as the person whose right to property was violated contrary to Article 6(d) of the Treaty, rather than the Estate of Sebatutsi. The Trial Court did not rule in favour of the Sebatutsi Estate, but in favour of the Respondent, who was the only party to the proceedings.
85. However, the Trial Court erred by awarding to the Respondent, Francis Ngaruko the entire property, which all parties involved, including the

Trial Court, understood to be the property measuring in size 107ha, 76a and 68ca acquired by Sebatutsi Evariste from Theys Pierre.

86. In his affidavit in support of Reference, paragraphs 11 and 12, Ngaruko stated that: -

*“11. I acquired, on my own account, 10 ha during my father's lifetime. The property I acquired is adjacent to what my father owned during his lifetime.*

*12. Following the death of Evariste Sebatutsi, his estate was shared among his successors including myself. I was given a proportion of the property equivalent to 19 ha”.*

87. It is our finding that from the record, the Trial Court erred in finding that the Respondent was entitled to the entire Property instead, of just a share of the property which he was claiming.

88. In the circumstances, the Trial Court erred in law by acting *ultra petita* and awarding to the Respondent more than what was rightfully his. **Black's Law Dictionary** 10<sup>th</sup> Edition, page 1755, defines *ultra petita* to mean “beyond that which was sought. It adds:

*“A judgment or a decision is said to be ultra petita when it awards more than was sought or sued for in the petition or summons; and the same thing is said of a sentence when it (does) not conform to its grounds and warrants. This affords a good ground for the reversal or reduction of such a decree”.*  
*John Trayne, Trayner's Latin Maxim 609-10 (4<sup>th</sup> ed. 1894)*

89. We find that the Trial Court erred in law by breaching the *non-ultra petita* rule by deciding in favour of the Estate of Sebatutsi while the claim was filed by Francis Ngaruko. Accordingly, we answer issue No. 3 in the affirmative.

**ISSUE No. 4: What remedies are the parties entitled to.**

**a. The Appellant's case**

90. The Appellant prayed this Court to reverse the decision of the Trial Court dated 30<sup>th</sup> September 2022, find that the decision of the Special Court on Land and Other Assets cancelling titles in Kizingwe area, including File No E.XXXVI folio 129 of Sebatutsi does not contravene Articles 6(d) and 7(2) of the Treaty, and to award the costs in the Trial Court and in this Court to the Appellant. The Appellant further prayed this Court to make such further or other orders as it deems just.

**b. The Respondent's case**

91. The Respondent submitted that since this Court did not have jurisdiction to hear and determine this Appeal, the costs should be awarded to him as he was subjected to an unfounded appeal. Further, the Respondent prayed the Court to affirm the judgment of the Trial Court and dismiss the Appeal with costs. The Respondent relied on Rule 127 of the Rules of this Court and the decision in **The Attorney General of the Republic of Burundi v The Secretary General of the East African Community & Another** [ EACJ Appeal No. 2 of 2019].

92. The Respondent further submitted that, as established by the Trial Court, he had suffered financial losses as a result of the Appellant's actions as set out in the Reference and therefore requested that the judgment be revised to include, in addition to restoration of his possession, financial compensation for the sums pleaded in the Reference.

**c. Determination by the Court**

93. Rule 120 of Rules of the Court provides that: -

*"The Court may, in dealing with any appeal, confirm, reverse, or vary the judgment of the First Instance Division, remit the proceedings to it with such directions as may be appropriate, order a new trial where it is manifest that a miscarriage of justice has occurred, and make any incidental or consequential orders, including orders as to costs".*

94. Having examined all the issues raised by the parties, this Court finds that it has the jurisdiction to hear and determine this Appeal and that the Appellant's decision to cancel the Respondent's title breached Articles 6(d) and 7(2) of the Treaty.

95. Having found as we have, that an error in law had been committed by the Trial Court by acting *ultra petita* and awarding to the Respondent the entire property instead of the portion he was claiming, it would only be fair, equitable and just to remit this matter back to the Trial Court to rehear the matter restricted to the exact property claimed by Ngaruko.

96. The Respondent's claim for compensation resulting out of financial losses was not supported by any cogent evidence and therefore cannot be awarded. See **Attorney General of Rwanda v Union Trade Centre (UTC) & 3 Others**, EACJ Appeal No. 10 of 2020.

## **G. COSTS**

97. Regarding costs, Rule 127 (1) of the Rules provide: -

*"Costs in any proceedings shall follow the event unless the Court shall, for good reasons, otherwise order."*

98. It is a general principle that the costs follow the event, meaning that the costs of an action are usually awarded to the successful party. It is however important to note that even though this it is a general rule, the award of costs is at the discretion of the Court.

99. The Appeal has partially succeeded. In the circumstances the best order on costs is for each party to bear their own costs.

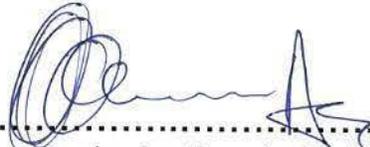
## **H. DISPOSITION**

100. In the final result: -

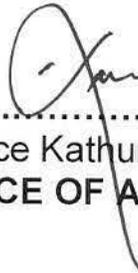
- 1) The Appeal is partly allowed.
- 2) The Judgment of the First Instance Division is varied to the extent set out herein.
- 3) The matter is remitted to the Trial Court for determination of a sole issue, namely the extent of the Respondent's claim.
- 4) Each party shall bear its own costs both in the Reference and in the Appeal.

IT IS SO ORDERED.

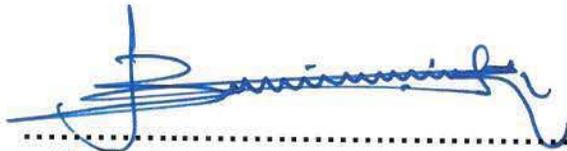
DATED, DELIVERED AND SIGNED THIS... 27<sup>th</sup> ... DAY OF FEBRUARY  
2024 AT ARUSHA



.....  
Hon. Lady Justice Anita Mūgeni  
**VICE PRESIDENT**



.....  
Hon. Justice Kathurima M'Inoti  
**JUSTICE OF APPEAL**



.....  
Hon. Justice Barishaki Cheborion  
**JUSTICE OF APPEAL**