IN THE EAST AFRICAN COURT OF JUSTICE

APPELLATE DIVISION AT ARUSHA

(CORAM: H.R. Nsekela, P.; P. K. Tunoi, VP.; E.R. Kayitesi, L. Nzosaba, J.M. Ogoola, JJA)

IN THE MATTER OF APPLICATION NO. 2 OF 2012

(ARISING FROM APPEAL NO. 1 OF 2011)

BETWEEN

INDEPENDENT MEDICO LEGAL UNIT ……APPLICANT

AND

ATTORNEY GENERAL OF THE

REPUBLIC OF KENYA …… RESPONDENT

JUDGMENT

The issue raised in this Application is relatively (but deceptively) simple – namely whether the Appellate Division of the East African Court of Justice ("EACJ") (i) has jurisdiction to review its own decisions, orders, rulings and judgments (hereinafter referred to collectively as "judgments"); and (ii) if so, whether in the instant Application

the Court should exercise that power to review its previous judgment in this matter, dated 15th March 2012?

In that judgment of 15th March 2012, this Division dismissed the appeal of the then Appellant: Independent Medicol Legal Unit ("IMLU"), against the decision of the First Instance Division dated 29th June 2011, which upheld a preliminary objection raised by the then Respondent: the Attorney General of Kenya. The fine details of the underlying Reference in this matter are not relevant to the instant Application. Suffice to summarise that the case involves the responsibility of a Partner State under the Treaty for East African Integration ("The Treaty") to investigate, prosecute, punish and sanction the perpetrators and compensate the victims of the atrocities committed in the Mt. Elgon area of Kenya during the 2006 - 2009 violent Sabaot Land rebellion in that area of Kenya.

In the course of hearing that Reference, the First Instance Division of this Court made a Ruling dated 29th June 2011, concerning the preliminary objection raised by the Attorney General of Kenya. Aggrieved by that Ruling, IMLU appealed to this Division of the Court. In its judgment of 15th March 2012, this Division upheld the Attorney General's appeal. It is this same judgment that IMLU now seeks the Court's indulgence to re-open and review . For this simple prayer, IMLU provided a long and formidable litany of justifying grounds – thirty grounds in all, namely:

1. ***" THAT*** *there are errors apparent on the face of the record.*

a) ***THAT*** *the Honorable Court erred in its Application of the principle of continuous violation and ongoing breach to the Treaty.*

b) ***THAT*** *the* ***Vienna Convention on the Law of Treaties*** *provides that every International Convention must be deemed tacitly to refer to general principles of International Law for all questions which it does not itself resolve in express terms and in a different way.*

c) ***THAT*** *continuous violation, ongoing breach and continuous situation are general principles of International Law.*

d) ***THAT*** *a continuing violation, a continuing situation and ongoing breach all refer to the same circumstances.*

e) ***THAT*** *the breaches of the Treaty set out in the Reference before the Court of first instance continue and/or have effects which themselves constitute violations to date.*

f) ***THAT*** *the Treaty does not provide for nor does it exclude the general principles of continuous violation, ongoing breach and continuous situations.*

g) ***THAT*** *the principle of continuous violation is a natural consequence of the Treaty Provisions.*

h) ***THAT*** *the Honorable Court erred in its interpretation of the principles of continuous violation in the decision of the Inter Americana Court on Human Rights in* ***Moiwana Community versus Suriname****.*

i) ***THAT*** *the Honorable Court ought to have applied liberal, purposive and broad principles in interpretation of the Treaty particularly* ***Article 30 (2)*** *and the principle of pacta sunt servanda.*

j) ***THAT*** *the principle* ***expressio unius est exclusion alterium*** *is a general principle of international law.*

k) ***THAT*** *the Honorable Court ought to have applied the principle of* ***expression unius est excusion alterium*** *in its interpretation of* ***Article 30 (2)*** *to exclude failures of omission by members of states from the time limit of two months.*

l) ***THAT*** *the Honorable Court ought to have found that the knowledge referred to under* ***Article 30 (2****) only applied to a positive action and not an omission.*

m) ***THAT*** *the Honorable Court out to have interpreted* ***Article 30(2)*** *in light of the Treaty as a whole and not in isolation.*

n) ***THAT*** *the Honorable Court in interpreting* ***Article 30(2****) erred in strictly interpreting the time within which the Reference ought to have been filed.*

o) ***THAT*** *the Honorable Court ought to have applied a practical construction in interpreting* ***Article 30(2)*** *of the Treaty.*

p) ***THAT*** *in finding that the Reference was time barred this Honorable Court made findings of fact and thereby made errors of law by exercising powers outside its jurisdiction.*

2. ***THAT*** *the decision of the Court has caused injustice and will continue to cause injustice on the Applicant, the residents of Mt. Elgon District and people of the community.*

    a) ***THAT*** *the Honorable Court is a Court of Justice.*

    b) ***THAT*** *the Honorable Court placed an artificial limit on the time within which a natural person can move the Court to enforce the obligations of a Member State.*

c) ***THAT*** *the Honorable Court has placed impractical and unreasonable limits on the enforcement of fundamental and operational principles of the Treaty by the people of the community.*

d) ***THAT*** *the Honorable Court has by strictly interpreting* ***Article 30(2)*** *of the Treaty, shifted to the people of the community the burden of ensuring that Member States fulfill their obligations under the Treaty thereby occasioning substantial injustice.*

e) ***THAT*** *by strictly construing the time limit under* ***Article 30 (2) of the Treaty*** *the Honorable Court has watered down the fundamental and operational principles under* ***Articles 6 and 7 of the Treaty.***

f) ***THAT*** *the Honorable Court ought to have interpreted the Treaty to give effect to its clear intention for member states to uphold the fundamental and operational principles of the Treaty.*

g) ***THAT*** *the decision of this Honorable Court on what constitutes continuous violation and its Application to the Treaty is clearly wrong and productive of injustice and it is only right that this Honorable Court reverses it.*

h) ***THAT*** *the interpretation of this Honorable Court on the Application of the principle of ongoing violation to* ***Article 30(2****) of the Treaty will set a precedent that may lead to injustice by unduly restricting the proper development of East African Community Law.*

i) ***THAT*** *the decision of the Honorable Court will be the foundation upon which financial, commercial, and fiscal arrangements will be based and is likely to cause injustice.*

j) ***THAT*** *the decision of the Honorable Court will lead to administrative and procedural difficulties in access to Justice for the people of the community.*

k) ***THAT*** *the Honorable Court has limited access to Justice under* ***Article 30 (2).***

l) ***THAT*** *by applying a narrow interpretation to the Treaty the Court has caused injustice by restricting the rights of natural persons to bring a reference for breach of the Provisions of the Treaty.*

m) ***THAT*** *the Honorable Court in failing to consider individually and in totality the written and oral submissions of the Applicant caused an injustice by failing to accord the Applicant a fair hearing."*

Upon subsequent scheduling of the matter under Rule 99 of the EACJ Rules of Procedure (the "Court Rules"), the Parties agreed to collapse all the above 30 grounds into only one issue for determination – namely: **Whether the Application before this Court for review of the Court's earlier judgment was properly brought before the Court?** The Parties and the Court understood that intrinsic in this one formulation of the issue were a number of sub-issues – including, in particular, whether the reference in the pleadings to Article 35 (2) was correctly cited; and whether the Application falls within the threshold of Article 35(3): both as a matter of merit, and as a matter of jurisdiction. In this regard, learned Counsel for the Attorney General (Mr. Ngugi) readily conceded the prayer by IMLU's counsel (Ms. Kilonzo) to amend the Application, from wrongly citing "Article 35(2)", to correctly citing sub-Article (3) of that Article 35 as the basis for this Application to review. With that concession, the Court readily and formally granted the Applicant's prayer for that particular amendment of their pleadings.

As regards substantive consideration of the Application for review, the Court needs to address two inter-related issues: **first,** does the Appellate Division of this Court have jurisdiction to review its own judgments; and **secondly**, is the instant Application a proper application for the Court to review its earlier judgment? The first issue arises out of Mr. Ngugi's objection to this Division's jurisdiction. The second issue derives from Ms. Kilonzo's several contentions to the effect that the Court's judgment was riddled with numerous errors apparent on the face of the record.

I. JURISDICTION OF APPELLATE DIVISION

We will start with the first issue – namely **Jurisdiction** of this Appellate Division of the Court. We do so knowing that without jurisdiction we cannot take even one further step in this matter.

Mr.Ngugi contended very vigorously that the Appellate Division, unlike the First Instance Division, lacks jurisdiction to review its own judgments. He stated that the Appellate Division's jurisdiction is limited to the appellate confines of Article 35A of the Treaty: Under that Article, the Appellate Division of this Court may entertain appeals from judgments of the First Instance Division only on:

(a) points of law;

(b) grounds of lack of jurisdiction; or

(c) procedural irregularity.

Mr. Ngugi emphasized the point that Article 35A constitutes the substantive jurisdiction of the Appellate Divisiion; and, therefore, that the Division will enter into a dispute or a matter only in the exercise of its appellate jurisdiction and no other. Mr. Ngugi buttressed his proposition on the premise that:

> *"Article 35A sets this Court as an Appellate jurisdiction Court, that matters that come before it are not or do not originate from it, they originate from the First Instance Division and once they have been received there, they come to the Appellate Court as the final Court. That is the design of the Treaty."*

This Court is of the considered view that the above premise is misconceived. First, the Appellate Division is not restricted to **appellate** work only. The Division has and does entertain other work in its **original** jurisdiction. Starting from the Treaty itself, there are at least three provisions from which the Appellate Division derives "original" jurisdiction in specific areas of its work – namely:

- preliminary rulings of national courts (i.e. "case stated"): under Article 34;
- advisory opinions: Article 36; and
- arbitration jurisdiction : Article 32 and the Court's Arbitration Rules of 2012.

The above provisions make it self-evident that the Appellate Division has authority to entertain matters of original jurisdiction as well as matters of appellate jurisdiction – all derived from specific provisions of the Treaty.

Secondly, Article 35 of the Treaty which provides for various aspects touching on the content and nature of the Court's judgments, is expressed in general terms. It speaks of judgments of "the Court" , without distinction as to:

- whether the judgments are of the First Instance Division or of the Appellate Division ; nor
- whether the expression “the Court” signifies any particular Division of this Court.

It is clear and incontestable that from its context, intention and spirit, Article 35 applies to the judgments of the First Instance Division just as it does to judgments of the Appellate Division. The Respondent’s further contention that the fact that Rule 72 of the Court’s Rules (*on judgment review*) is placed under Part B and not part C of the Rules applies only to the First Instance Division, is equally misconceived. The Rules must be read as a whole, irrespective of the textual location of the particular position or place of the individual provisions therein. In any case, the Rules are subservient to the Treaty. Rule 72 must be read to accord with Article 35 (3) of the Treaty, to avoid a clash or inconsistency between the Rules and the Treaty. Any lapses or shortcomings of shoddy drafting, must be construed with a presumption in favour of making the Rules effective and workable; not inept and inoperative – see **Murray v IRC, (1918) AC 541 at 553;** and

Fawwcett Properties v Buckingham County Council (1960) 3 All E.R. 503 at 516).

Mr. Ngugi would have us hold that the expression “the Court”, in Article 35 of the Treaty, is restricted only to the First Instance Division. Any such construction would be too restrictive; unnecessarily restrictive; indeed, unnaturally restrictive, and totally at variance with the plain, ordinary meaning of the expresson “the Court” that is expressly set forth in the definition of that term in Article 1 of the Treaty – namely: *“‘Court’ means the East African Court of Justice established by Article 9 of this Treaty”;*

That same holistic undivided sense of the expression “the Court” is replicated in Article 9(1) (e), Article 24 and Article 27. Indeed, the matter is put beyond any shadow of doubt by Article 23, whose sub- Article (2) states that:

“The Court shall consist of a First Instance Division and an Appellate Division.”

In other words, the **one** Court is comprised of **two** constituent units; **two** integral Divisions.

With due respect to the learned counsel for the Attorney General, Article 35A of the Treaty does not address itself to issues of jurisdiction. Jurisdiction of the Court is substantive manner elsewhere in the Treaty – in particular, in Article 23 (*role of the Court)*; Article 27 *(jurisdiction of the Court*), Article 28 *(references by Partner States)*; Article 29 *(references by Secretary General*); Article 30 (*references by natural and legal persons*), Article 31 *(employee disputes*); Article 32 (*arbitration);* Article 34 (*case stated*); and Article 36 (*advisory opinions).*

Article 35 A, unlike all the other Articles, merely establishes the right of appeal for those aggrieved or otherwise dissatisfied by the judgments of the First Instance Division. In this regard, it is to be remembered that Article 35A is a creature of the 2007 Amendment of the Treaty – an Amendment which for the first time introduced the two-Chamber Court, without disturbing the substantive corpus of the jurisdiction of the Court. To that extent, it is indeed a misnomer and misconception to talk of the “jurisdiction of the Appellate Division”. The First Instance Division and the Appellate Division; being integral parts of the same Court, do enjoy and exercise the same jurisdiction *mutatis mutandis*. The Appellate Division would not be able to entertain

appeals from judgments of the First Instance Division, if it did not in the first place enjoy the same jurisdiction of that First Instance Division. The only real distinction in this regard is that the First Instance Division exercises original jurisdiction, while the Appellate Division exercises appellate jurisdiction in the same matters. In Kenya, the equivalent of this same juridical structure is made explicit by statute – namely section 3(2) of the Appellate Jurisdiction Act, which provides that:

> *"…the Court of Appeal shall have, in addition to any other power, authority and jurisdiction vested in the High Court."*

As will be readily evident from all the above, the Appellate Division of this Court, just like the First Instance Division enjoys, in appropriate cases, the same authority and power to review its own judgments – namely if the application for review is in accord with the parameters etched in Article 35 (3) of the Treaty.

The above exposition is sufficient to dispose of Mr. Ngugi's objection to the jurisdiction of this Appellate Division of the East African Court of Justice to review its decisions and judgments. Nonetheless, for the sake of completeness [of our jurisprudence], we will briefly examine from a comparative standpoint, the state of the law in this Region and beyond concerning the power of the Courts to review their decisions.

In the East African region, the case law position was ably stated by the East African Court of Appeal (EACA), especially in the cases of **Lakamshi Brothers v. Raja & Sons [1966] EA 313** and **Somani v Shirinkhanu (No. 2) [1971] EA 79.** In **Lakamshi,** SIR CHARLES NEWBOLD, P**.** categorically stated that judgments of the EACA were

the end of litigation subject only to the limited application of the "slip rule". The Court observed that:

> *" This Court is now the final Court of Appeal and when this Court delivers its judgment, that judgment is, so far as the particular proceedings are concerned, the end of the litigation. It determines in respect of the parties to the particular proceedings their final legal position, subject, as I have said to the limited application of the slip rule*"

In the **Somani** case, the Court (both SPRY, Ag. P. , and LAW Ag. VP) recognized that:

(a) the finality of its decisions was paramount, subject only to one exception - (see (b) below;

(b) the Court had limited inherent jurisdiction to review its own decisions where a party is wrongly deprived of the opportunity to be heard;

(c) failure to hear a party was not the only ground for that Court's review power. The Court could do so in every case in which, for one reason or another, its decision is a nullity.

The above exposition of the law has subsequently been found to be too restrictive. Both the Supreme Court of Uganda (in the case of **Sewanyana v. Martin Aliker, Civil Application No. 4 of 1991**), and the Court of Appeal of Tanzania (in the case of **Transport Equipment Limited v. Devra P. Valambhia, 1998 TLR 89**), expressed their open sentiments for reconsideration of the holding in the **Somani** case. Indeed, the Ugandan Supreme Court noted that;

"Somani's judgment was given ex tempore… as the Court followed an obsolete law, …it had acted pro tonto without jurisdiction. …[Therefore] certainly the issues between the parties could not have been fairly and properly tried between them".

The position for setting aside or modifying a Court's judgments would appear to be no different in both Zimbabwe and South Africa even though both those countries apply Roman-Dutch law – see helpful comments to that effect by the Court of Appeal of Tanzania in the **Transport Equipment** case (*supra*) which quotes the leading textbook by HERBSTEIN & VAN WANES: ***The Civil Practice of the Superior Courts in South Africa, 3rd Edition:***

"*A final judgment being res judicata is not easily set aside, but the Court will do so on various grounds such as fraud, discovery of new documents, error and irregularities in procedure*."

The Kenya experience has been a mixed bag of jurisprudence, with a series of conflicting holdings by the then highest Court in the land: the Court of Appeal. In 1996 in the case of **Rafiki Enterprises Ltd v Kingsway & Automart Ltd, Civil Application No. Nai.375 of 1996**, the Court held that it had no jurisdiction to review its own decisions. In 2005, in the case of **Musiara Ltd v Ntimana [2005] EA 317,** the Court found jurisdiction to reopen an appeal particularly if judicial bias in the impugned/proceedings is established. Similarly, and again in 2005 in the case of **Chris Mahinda v Kenya Power & Lighting Co. Ltd, Civil Application No. Nai. 174 of 2005 (unreported**), the Court of Appeal reiterated its position that it had residual jurisdiction

to review, vary or rescind its decisions in exceptional circumstances, as held in the **Musiara's** case(supra). However, in 2007 in the case of **Jasbir Singh Rai v Tarlochan Singh Rai, Civil Application No. Nai. CA 307 of 2003 (154/2003)**, the Court of Appeal by unanimous decision denied review jurisdiction – in effect overruling the Court's earlier holdings in the two cases of 2005; and, thereby, reinstating the law of the **Rafiki** case (i.e denial of review of jurisdiction).

In Rwanda, the recent Law (No. 21/2012 of 14th June 2012) relating to the civil, commercial, labour and administrative procedure of the country, puts the point beyond dispute. An application for review of a Court's own decision can be made, but only with respect to judgments of the final court of resort, on the grounds of:

(i) fraud;

(ii) false evidence, testimony or oaths;

(iii) a criminal judgment which was subsequently quashed;

(iv) absence of permission to approve or confirm a party's participation in the proceedings/procedure;

(v) error(s) of procedure or of law.

In Australia, the case of **Autodesk Inc v. Dyason (No. 2) [1993] HCA 6; (1993) 176 CLR 300,** is instructive in setting forth the following principles:

(i) the public interest in the finality of litigation will not preclude the exceptional step of reviewing or rehearing an issue when a court has good reason to consider that, in its earlier judgment, it has proceeded on a misapprehension as to the facts or the law.

(ii) As this Court is a final Court of Appeal there is no reason for it to confine the exercise of its jurisdiction in a way that would inhibit its capacity to rectify what it perceives to be an apparent error arising from some miscarriage in its judgment.

(iii) It must be emphasized, however, that the jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered by the Court; nor is it to be exercised simply because the party seeking a rehearing has failed to present the argument in all its aspects or as well as it might have been put.

The purpose of the jurisdiction is not to provide a back door method by which unsuccessful litigants can seek to re-argue their cases.

In India, the case for judicial review has been upheld in numerous court cases. To take just a random sampling, we list the following judgments – all rendered by the Supreme Court of India:

(1) **Aribam Tuleshwar Sharma v Ariban Pishak Sharma (1979) 45CC 389, 1979(11) UJ 300 SC,** which held that:

"The power of review may be exercised on the discovery of new and important matter or evidence which, after exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made, it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercise on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits. That would be the

province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court."

(2) **Rupa Ashok Hurra v Ashok Hurra; Writ Petition (civil) 509 of 1997** stating that:

"The principles in regard to the highest Court departing from its binding precedent are different from the grounds on which a final judgment between the parties, can be reconsidered. … However, when reconsideration of judgment of this Court is sought the finality attached both to the law declared as well as to the decision made in the case, is normally brought under challenge. It is, therefore, relevant to note that so much was the value attached to the precedent of the highest Court that in the London Street Tramways Company Ltd vs. The London Council [LR 1898 Appeal Cases 375], the House of Lords laid down that its decision upon a question of law was conclusive and would bind the House in subsequent cases and that an erroneous decision could be set right only by an Act of Parliament."

Nonetheles,

"*Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone. The rule of stare decisis is adhered to for consistency, but it is not inflexible in Administrative Law as in Public Law. Even the law bends before justice…*

Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order, the courts culled out such power to avoid abuse of process or miscarriage of justice."

(3) **Haridas v. Smt. Usha Rani Banik, Appeal (civil) 7948 of 2004** articulates the following pertinent principles:

"There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. Where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out."

"…there is in Article 226 of the Constitution [of India] to preclude the High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter of evidence …; it may be exercised where some mistake or error apparent on the face of the record is found; it

may also be exercised on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merit."

All the above jurisprudence of India has been conveniently and comprehensively summarized in a Document sytled: "REVIEW JURISDICTION OF SUPREME COURT OF INDIA: ARTICLE 137", available electronically at: **http:ssrn.com/abstract=2169967**. In its Introduction, that Document makes the following pertinent statements:

- The Supreme Court of India is the highest Court of the land as established by Part V, Chapter IV of the Constitution of India. It is the highest Court of Appeal.
- The Supreme Court has original, appellate, advisory and review jurisdiction.
- Article 137 of the Constitution of India, 1950, provides that subject to provisions of any law and rules made under Article 145, the Supreme Court has the power to review any judgment pronounced or order made by it. "Review" connotes a judicial re-examination or reconsideration of the case. The basic philosophy inherent in the concept of review is acceptance of human fallibility.

- Under Article 145 (e), the Supreme Court is authorized to make rules as to the conditions subject to which the Court may review any judgment or order. Pursuant to this, Section 114 of the Code of Civil

Procedure (CPC) has been laid down, giving a substantive right of review; and Order XLVII thereunder provides for the procedure.

- Review petition is a discretionary right of court. The grounds for review are limited.
- Ever since the adoption of the Constitution (of 1950), the law on review is the creation of statute. But even during times when there was no statutory provision, and when no rules were framed by the highest Court, Courts had culled out such power in order to avoid abuse of process of Court or miscarriage of justice
- A review cannot be sought merely for fresh hearing or arguments or correction of an erroneous view taken earlier. The power of review can be exercised only for correction of a patent error of law or fact which stares at you in the face, without any elaborate argument being needed for establishing it.

For the East African Court of Justice (EACJ), unlike its predecessor the East African Court of Appeal (EACA), the Treaty in its Article 35 (3) expressly provides for review of the Court's decisions and judgments. There can, therefore, be no room for argument concerning the authority or power of this Court to review its own judgments within the scope and ambit of Article 35(3) of the Treaty. The only issue now raised by the Respondent in the instant Application is whether the power of review under Article 35 (3) covers both Divisions of this Court, or whether it is available only to one Division: the First

Instance Division. This Court's answer – having regard to the specific Treaty provision, as well as considering all the rich international and comparative jurisprudence discussed above – is a resounding **Yes**: the power of review in that Article extends to both Divisions of this Court. Accordingly, there is absolutely no bar for the Appellate Division of this Court, to review its own decisions and judgments, whether such have been rendered on appeal, or pursuant to its own special original jurisdiction (such as in advisory opinions, case stated, arbitration, etc).

Mr. Ngugi's contention that a power to review is not available to a court (such as the Appellate Division of this Court whose judgments are final (i.e not open to any further appeal), is untenable. That point was put to rest, for regional courts, in the two cases of **PTA Bank v Martin Ogang, Reference Revision No. 1/2001,** and **Dr. Kabeta Muleya v COMESA & Erastus Mwencha, Revision Application No. 1/2002,** in which the COMESA Court of Justice readily found jurisdiction in Article 31(3) of the COMESA Treaty to review its previous judgments, even though at that time the COMESA Treaty did not provide for any appeals against the judgments of that Court. It is only in recent times that the COMESA Court, like the EACJ Court, has since been restructured (through express Treaty Amendment) into two integral Divisions: a First Instance Division, and an Appellate Division.

This is the same position in England, where the final, ultimate court of appeal (The House of Lords) has on appropriate occasions, re-opened its concluded judgments for rehearing – see **R v Bow Street Metropolitan Stipendiary Magistrate Ex Parte Pinochete Ugarte (No. 20 [1999] 1 All E. R. 577.** In that case, Lord BROWNE-WILKINSON stated that:

> *"…the respondents to this petition do not dispute that your Lordships have jurisdictioin in appropriate cases to rescind or vary an earlier order of this House. In my judgment that concession was rightly made both in principle and on authority.*
>
> *In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered."*

Indeed, it stands to reason and rational logic that the final court – even more so than the subordinate courts – be clothed with authority to review their judgments. After all, a subordinate court's failure to review its judgment is readily cured and remedied by resort to an **appeal** to the Appellate court against that judgment. Not so with a judgment of a final court (such as the Appellate Division of this Court) – against which there can be no further appeal. Here, the only judicial recourse available against the fallibility or injustice of such a court is to advert to **review** of its earlier judgment. It is for this reason that the civil law system restricts this review power only to final

judgments of a court from which no appeal lies (see Rwanda's Law No. 21/2012 of 14/06/2012 discussed above). It is for the same reason that the House of Lords (the Court of last resort in the United Kingdom) took the stand it took in the **Pinochete** case (supra); and the Court of Appeal has likewise re-opened its concluded appeals – see **Taylor & Anor. v Lawrence & Anor.[2002] 2 All E. R. 353.**

II. CONSIDERATION OF THE REVIEW GROUNDS IN INSTANT APPLICATION

Having considered the issue of whether the Appellate Division of this Court has jurisdiction to review its own decisions, the question then remains as to whether the instant application is a proper case for that Court to exercise its review jurisdiction?

The starting point to answer that question is Article 35(3), which is the basis for the Court's power of review – namely:

> *"An application for review of a judgment may be made to the Court only if it is based upon the discovery of some fact which by its nature might have a decisive influence on the judgment if it had been known to the Court at the time the judgment was given, but which fact, at that time, was unknown to both the Court and the party making the application, and which could not, with reasonable diligence, have been discovered by that party before the judgment was made or on account of some mistake, fraud or error on the face of the record or because an injustice has been done".*

To qualify for review under the above-quoted provision, an application needs to fulfil any or all the conditions specified therein. The Applicant must adduce discovery of some new set of facts/evidence which was not within the knowledge of the party and the Court at the time of the delivery of the judgment. The impugned judgment must evince some mistake, fraud or error that is manifest on the face of the record; or, alternatively, the judgment, as is, must have given rise to a miscarriage of justice.

The grounds for the instant application were largely limited to the area of mistakes or errors of law apparent on the face of the record; and only tangentially touched on the element of injustice. Nothing at all was raised by way of discovery of new facts; nor of fraud.

Of the 30 grounds listed by the Applicant a hefty number raise allegations of error apparent on the record. To deal with each one of these grounds effectively, it will be necessary to examine upfront the general principles that govern this particular area of our law.

First and foremost, the term “error apparent on the face of the record” is not/hardly a term of art: one whose meaning has been definitively settled, once and for all. Rather, it is a nebulous legal concept the fluidity of whose content must be interrogated in every case – using the rich jurisprudence

that has grown up around it. **Second**, implicit in that term, is the notion that review of a judgment has a limited purpose. It must not be allowed to be an appeal in disguise. The purpose of review is not to provide a back door method by which unsuccessful litigants can seek to re-argue their cause. On these two principles hang all the law of "apparent error". In this regard, most significant among the principles (gleaned from the rich jurisprudence that we have alluded to), are the following:

- As the expression "error apparent on the record" has not been definitively defined by statute, etc, it must be determined by the Court's sparingly and with great caution.
- The "error apparent" must be self-evident; not one that has to be detected by a process of reasoning.

- No error can be said to be an error apparent where one has to "travel beyong the record" to see the correctness of the judgment – see paragraph 2 of the Document on "REVIEW OF JURISDICTION OF THE SUPREME COURT OF INDIA" (supra)
- It must be an error which strikes one on mere looking at the record, and would not require any long drawn process of reasoning on points where there may conceivably be two opinions – see **Smti Meera Bhanja v. Smti Nirmala Kumari (Choudry) 1995 SC 455.**
- A clear case of "error apparent on the face of the record" is made out where, without elaborate argument, one could point to the error and

say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it – see **Thugabhadra Industries Ltd v. The Government of Andra Pradesh 1964 AIR 1372; 1164 SCR (5) 174;** also quoted **in Haridas Das v. Smt. Usha Rani Banik & Ors, Appeal (civil) 7948 of 2004.**

- In summary, it must be a patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish – see **Sarala Mudgal v. Union of India M. P. Jain, page 382, Vol.I**
- Review of a judgment will not be considered except where a glaring omission or a patent mistake or like grave error has crept into that judgment through judicial fallibility – see Document: "REVIEW JURISDICTION OF SUPREME COURT OF INDIA" (supra).

This power of review has been allowed if the order sought to be reviewed is based on:

- a decision *per incuriam*; or
- an incorrect set of facts or assumption of law; or
- non consideration of a contention made; or
- if a judgment is inconsistent with the operative portion or an interim order which was granted subject to the outcome of the appeal to clarify an ambiguity.

A similar doctrine for review of Court judgments which is well established and widely practiced, especially by courts in the Common Law jurisdiction, is the "Slip Rule", by

which all courts (of whatever hierarchy) are empowered to, correct without much ado, inadvertent mistakes of computation (arithmetical calculations), clerical errors (of spellings, proper names, addresses, etc); and others of similar genre – which invariably slip into court orders and judgments by (so to speak) the 'slip of the pen'. A good example of the judicial treatment accorded to the Slip Rule is the Tanzanian case of **Transport Equipment v Devram Valambhia** (supra)**.**

III. SPECIFIC GROUNDS FOR REVIEW

Against the general backdrop of the above Principles and Rules, we will now proceed to assess/examine individually/one by one the several grounds adduced by the Applicant in the instant Application for a review of this Court's judgment of 15th March, 2012:

(1) Facts and the Appellate Division

The Applicant averred that this Court erred in looking into the facts of the case – especially in re-opening points of facts already decided by the First Instance Division. The Appellate Division, it was urged, should have restricted its appellate jurisdiction under Article 35A on assessment of the law, procedural irregularities, and grounds for lack of jurisdiction. The general thrust of this submission was correct – particularly so in situations where there is a clear demarcation between the facts and the law of the particular case. However, where (as in the instant case) there are issues of mixed fact and law, it becomes near impossible to separate the two into two neat boxes: one, of "fact"; and the other, of "law". The issue on appeal before this Court was one of mixed

fact and law. Consideration and determination of the issue of a time bar, necessarily involved computation of time and determination of the applicable law. One cannot determine the law on an issue of a time bar, without adverting to the factual time frames involved. Moreover, the central issue before the Appellate Division was whether under Article 30(2) the alleged breach was continuous or not. We held that it was not continuous. That was eminently a question of law, rather than of fact. Any fact in it was only tangential, incidental and coincidental.

In any case, in the course of their oral submissions before the Court, the Applicant stated that:

> *"When a court of Appeal, as this Court is constituted, is limited to points of law, it cannot re-open the evidence. It cannot reweigh the evidence. What it can do is to look at the findings or facts by the lower court and determine whether the Court in making those findings correctly addressed itself to the issues and facts that were before it."*

It is evident from Ms.Kilonzo's above submission that she conceded some role for this Appellate Court to *"look at the lower court's findings of fact to determine whether that Court correctly addressed itself"*. How then can the same counsel for the Applicant now turn around and claim that the Division had no jurisdiction to entertain anything touching on facts? No; the Applicant cannot be heard to speak from both sides of her mouth.

Be all that as it may, the Applicant's contention here amounts to more than an "error apparent on the record". It delves into the merits of the case, calling for elaborate

investigation and argumentation of the issues. That calls for an appeal; not a review of the judgment.

(2) Non-consideration of the Police Report

The Applicant contended that this Court, in determining the question of time bar, failed to consider the Police Report published in 2010 (i.e after the filing of the instant Reference in this Court). The failure, it is claimed, resulted in an injustice to the Applicant and to the people of the Mt. Elgon community, in as much as there was no fair hearing. While this ground accords with the third limb of Article 35 (3) of the Treaty (i.e. "injustice"), it falls short of the standard (required) under this Article. First, determination of the issue at hand (i.e time bar) did not necessitate exhaustion of all conceivable reports issued in the matter of the Mt. Elgon atrocities. In this regard, this Court did consider no less than five such reports that were exhibited in court (all listed and examined at page 18 of the Court's judgment of 15th March 2012).

Secondly, the Applicant's assertion is factually wrong. The truth of the matter is that the Court did indeed examine the matter of the Police Report. From its typed record, this Court did engage counsel Kilonzo in a spirited question-and-answer session – from which the following factors emerged:

- that the Police Report was a purely internal probe, carried out by a couple of Police Officers for the internal use of the Police Department;
- that the Report did not involve public sittings, investigations, etc;
- that the Report was not published to the public;

- that even the Attorney General of the Republic of Kenya was not aware of the Police Report; and came to know of its existence only when the Report was belatedly availed at this Court.

From all the above, it is self-evident that –

(i) the Court was conversant with and did consider the matter of the Police Report;

(ii) the Report did not amount to much in terms of its evidential value and efficacy;

(iii) far from causing injustice to anyone; the Court afforded all the parties, inclusive of the *amicus curiae,* appropriate due process – both procedurally and substantively.

But here, again, even if the Appellant's grievances were well-founded, the appropriate recourse to remedy them would not be a review of the impugned judgment. Rather, it would be a substantive appeal against that judgment – because the matters now raised go well beyond the face of the record. They entail a substantive challenge of the merits of the Court's decision. On this, the law is clear: what may be a good ground, even an excellent ground, for appeal, need not be a valid ground for review – see AIR Commentaries on The Code of Civil Procedure by CHITALEY & RAO (4th Edition), Vol. 3, p.3227. See also the COMESA Court's holding in the case of **Dr. Kabeta Muleya v COMESA** (supra).

Thirdly, in the course of her oral submissions before this Court, Ms. Kilonzo when queried by the Court in that behalf, readily conceded that:

(i) the impugned judgment of this Court is "correct"; and

(ii) nothing much turns on the Police Report – a fact which is duly borne out by the record of the appeal proceedings of this Division, in which counsel gave no value at all to the fact of the Police Report. We are satisfied that counsel's vigorous canvassing of this particular issue at this stage of the proceedings is but an afterthought.

(3) Non-consideration of Applicant's submissions

The Applicant's contention to the effect that this Court failed to consider the Applicant's written and oral submissions "individually and in totality", is simply mischievous. The Court's entire judgment of 15th March, 2012 is testimony to the express, detailed, comprehensive analysis, assessment, balancing and dissection of all the issues raised and submissions made by all the parties and the *amicus curiae* in this matter.

(4) Other Grounds

The rest of the grounds are far too numerous to examine one by one. Nonetheless, individually and collectively they all evince one defining characteristic: dissatisfaction and aggrievement by the Applicant at the Court's particular findings, views, opinions, conclusions, interpretations, constructions, applications and decisions on the numerous points now raised as grounds of the prayer for review. They all seek to overturn the Court's "erroneous" views on these points, and to transform them instead into the "correct" views desired by the Applicant. Unfortunately for the

Applicant, that cannot be. The Court cannot under the subterfuge of a “review”, engage in what is in truth an “ appeal”. A collective answer to all these will therefore suffice.

The long laundry list of the Applicant’s grounds was not far removed from a fishing expedition of sorts. Worse still, items on the list were manifestly repetitive in a great many aspects of its claims and contentions. Thus, right from the start the confusion arises between whether the Applicant is seeking a review or an appeal. It is quite clear that the Applicant took great exception to a great number of the Court’s findings, views and holdings contained in the impugned judgment. But then, the law on how to treat this kind of situation is equally clear:

- The review jurisdiction of the Court cannot be exercised on the ground that the decision of the Court was erroneous on merit. That would be in the province of a Court of Appeal.
- A review cannot be sought merely for fresh hearing or arguments or correction of an erroneous view taken earlier. A review proceeding cannot be equated with the original hearing of the case.
- The purpose of the review jurisdiction is not to provide a back door by which unsuccessful litigants can seek to re-argue their cases.
- The parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case or new versions which they present as to what should be a proper apprehension by the Court of the legal result. If this were permitted, litigation would have no end, except when legal

ingenuity is exhausted – see **Hoystead v Commissioner of Taxation [LR1926 AC155 at 165].**

- A power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of error committed by the subordinate court. In the instant case, there are of course no further appeals allowed from the decisions and judgments of this Appellate Division.
- With regard to the Applicant's numerous challenges of this Court's analysis, reasoning and basis by which the Court arrived at its findings, opinions and decision, the law provides that if a view held by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view (such as the ones now canvassed by the Applicant) was also possible – see the Kenyan Court of Appeal case: **Nyamogo & Nyamogo Advocates v Moses Kipkolum Kogo, Civil Appeal No. 322 of 2000 (unreported).**

CONCLUSION

(1) The Appellate Division of this Court has express jurisdiction under Article 35 (3) and Rule 72 of the Court Rules to review its own decisions in appropriate cases.

(2) All in all, the grounds adduced by the Applicant for this Court to review its judgment of 15th March 2012 in the matter of Mt. Elgon atrocities of 2006 - 2009 , may well be good grounds for a further appeal (which is not provided for in the EAC Treaty). They are not under our law valid for a review of that judgment.

The Application for review is hereby denied.

Each party shall bear its own costs of this Application.

It is ordered accordingly.

DATED AND DELIVERED at Arusha, this 1st .day of March 2013.

Harold R. Nsekela
President

Philip K. Tunoi
Vice President

Emily R. Kayitesi
Justice of Appeal

Laurent Nzosaba
Justice of Appeal

James Ogoola
Justice of Appeal