IN THE EAST AFRICAN COURT OF JUSTICE

AT ARUSHA FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Isaac Lenaola, DPJ and Audace Ngiye, J)

REFERENCE NO.8 of 2015

MANARIYO DESIRE ..... APPLICANT

VERSUS

THE ATTORNEY GENERAL OF BURUNDI .....RESPONDENT

2nd DECEMBER 2016

JUDGMENT OF THE COURT

A. INTRODUCTION

1. This Reference was brought under Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community (hereinafter referred to as **'the Treaty'**); Article 15(1) of the Protocol on the Establishment of the East African Community Common Market (hereinafter referred to as '**the Protocol**'), and Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure, 2013 (hereinafter referred to as **'the Rules'**).

2. The Applicant is a citizen of the Republic of Burundi, aggrieved by the handling of matters in respect of his land by the Judiciary of the Republic of Burundi, and seeks to enforce the said Partner State's obligations under the legal provisions cited hereinabove.

3. The Respondent is the Attorney General of the Republic of Burundi, and is sued as the legal representative of the Government of the Republic of Burundi.

4. At the trial the Applicant was represented by Mr. Donald Deya, while Mssrs. Nestor Kayobera and Elisha Mwansasu appeared severally for the Respondent.

B. BACKGROUND

5. In 1997, the Applicant bought three (3) parcels of land in Bujumbura, Burundi, including a piece of land that was sold to him by a one Simon Nzophabarushe. The Applicant allegedly complied with all the land conveyance procedures by law required with regard to agreements for the sale of land in Burundi. Specifically, the Applicant and the 3 sellers did execute a single Attested Affidavit (*Acte de*

Notoriete) that outlined the parties to the sale agreement; size of the land, as well as the purchase price paid therefor. The Applicant thereupon secured a certificate of title in respect of the consolidated parcel of land, which he subsequently sub-divided and sold to other buyers.

6. In 2010, vide Case No. R.C 16.839, Mr. Simon Nzophabarushe filed a case against the Applicant in respect of the piece of land he had sold the latter in 1997. In 2012, the Tribunal of First Instance (*Tribunale de grande instance*) ruled in favour of Mr. Nzophabarushe without availing the Applicant the opportunity to cross examine the said claimant's witnesses or present oral submissions before the Tribunal, and allegedly disregarded the Applicant's written submissions on record.

7. In 2013, despite confirming the authenticity of the Attested Affidavit availed to it by the Applicant that formed the basis of his proprietorship over the disputed piece of land, the Court of Appeal (*Cour d'appel*) upheld the decision of the Tribunal of First Instance. A subsequent appeal to the Cassation Chamber of the Supreme Court was similarly unsuccessful. The Applicant received a copy of the said judgment on 21st September 2015.

8. Aggrieved by the purported violation of his property rights, the Applicant instituted the present Reference in this Court seeking orders obliging the Republic of Burundi to comply with its obligations under Articles 6(d) and 7(2) of the Treaty, as well as Article 15(1) of the Protocol.

C. THE APPLICANT'S CASE

9. The Reference is premised on the failure of the cited courts in the Republic of Burundi to acknowledge the legal and probative value of the Attested Affidavit No. 356/99 of 27th July 1999, despite it having been executed by State organs.

10. The Applicant challenges the failure by the Republic of Burundi to abide by its commitment under the Treaty to the principles of rule of law, good governance and the recognition of his human rights, specifically, the right to property and peaceful enjoyment thereof.

11. The Applicant sought Declarations and Orders to which we do revert later in this Judgment.

D. THE RESPONDENT'S CASE

12. The Respondent's rebuttal is premised on two (2) points of law. First, it is Respondent's case that the Supreme Court decision that is in contention in the Reference was delivered on 21st June 2015, therefore any challenge in respect thereof should have been filed within two (2) months of that date so as to comply with the provisions of Article 30(2) of the Treaty. The Reference was filed on 20th November 2015.

13. Secondly, it is the Respondent's contention that this Court is not clothed with jurisdiction to determine matters decided by the Supreme Court of Burundi, its jurisdiction being restricted by Article 27(1) of the Treaty to the interpretation and application of the Treaty. The Respondent further contends that the Court does not have appellate jurisdiction over decisions of the Supreme Court of a Partner State.

14. The Respondent does, therefore, seek to have the Reference dismissed with costs.

E. ISSUES FOR DETERMINATION

15. The parties framed the following issues for determination:

    a. ***Whether the Reference is time barred.***

    b. ***Whether this Honourable Court has jurisdiction to determine the Reference.***

    c. ***Whether the Respondent violated Articles 6(d) and 7(2) of the EAC Treaty; Article 15(1) of the Common Market Protocol, and/ or Article 14 of the African Charter.***

    d. ***Whether the Respondent's failure to recognize the legal and probative value of the Attested Affidavit No. 356/99 of 27th July 199 is unlawful and violates the Applicant's rights.***

    e. ***Whether the Applicant's right to peaceful enjoyment of property was violated.***

    f. ***Whether the Applicant is entitled to the Remedies sought.***

F. COURT'S DETERMINATION

Issue No. 1: Whether the Reference is time barred

16. It is not disputed by either Party herein that the specific act or decision in issue in this Reference is the judgment of the Cassation Chamber of the Supreme Court of Burundi dated 24th June 2015. This is borne out by the Parties' pleadings and submissions. What does appear to be in contention is whether the time within which the

Reference should have been filed accrued on the date of delivery of the judgment or on the date it was received by the Applicant.

17. Article 30(2) of the Treaty, which prescribes the limitation period within which References may be filed in this Court, reads:

> "**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.**"

18. It was pleaded in paragraph 28 of the Reference that learned Counsel for the Applicant was served a 'Notification' of the Supreme Court judgment on 21st September 2015. The same averment was repeated in paragraph 28 of the Applicant's affidavit in support of the Reference. A translated copy of the 'Notification of Judgment' was attached to the said Reference as Annexure 2 and does confirm that, at the Applicant's request, a bailiff named Claudette Ndayiragije did on 21st September 2015 serve an advocate named Bosco Sindayigaya with a copy of the Supreme Court judgment that had been delivered on 24th June 2015. The judgment in reference was annexed to the Reference as Annexure 3.

19. We did not hear learned Counsel for the Respondent to question the authenticity of the annexed judgment, or otherwise challenge it's applicability to the matter before us. Neither have we seen any rebuttal to the averment by the Applicant that he only received the said judgment on 21st September 2015. In fact, the Applicant's affidavit of 18th November 2015 does indicate that he is ordinarily resident in the United States of America thus lending credence to his

request for notification of the judgment upon delivery thereof, as stated in the 'Notification of Judgment.' We are, therefore, satisfied that whereas the judgment in issue presently was dated and delivered on 24th June 2015, it was conveyed to and received on behalf of the Applicant on 21st September 2015.

20. Article 30(2) of the Treaty does address such an eventuality by providing for a limitation period within two(2) months '**of the day in which it came to the knowledge of the complainant'.** Quite clearly, the foregoing provisions of Article 30(2) of the Treaty would require proceedings in respect of a cause of action that accrued on 21st September 2015 to be filed by or on 20th November 2015. It is a well established fact herein that the Reference was filed on 20th November 2015. This is borne out by the Court Registry's stamp endorsed thereon.

21. We therefore find that the Reference was filed within the time by law prescribed, and do hereby answer Issue No. 1 in the negative.

Issue No. 2: Whether this Honourable Court has jurisdiction to determine the Reference.

22. The Respondent contests the jurisdiction of this court to determine a matter that is premised on a decision of the Supreme Court of Burundi. In submissions, it was argued for the Respondent that the Treaty does not vest this Court with the jurisdiction to 'revise, review or quash the decision of the Supreme Court of Burundi.' Rather, it was opined, the Court is restricted to such jurisdiction as is encapsulated in Articles 23, 27 and 30 of the Treaty.

23. By way of rebuttal, it was the Applicant's contention that the Reference seeks to draw to this Court's attention the alleged violation

by the Respondent State of its international obligations under the EAC Treaty 'and other relevant international legal instruments.' The Applicant cited the provisions of Articles 6(d) and 7(2) of the Treaty as the international obligations that had been violated by the Republic of Burundi, and sought to hold the said Partner State responsible for the decision of the Supreme Court. We understood the Applicant to contend that the Reference sought a determination by the Court of the legality of the Supreme Court's impugned decision.

24. The Applicant did concede that the Court's jurisdiction is spelt out in Articles 27(1) and 30 of the Treaty but, with regard to the latter provision, argued that no jurisdiction had been 'reserved under the Treaty' to the Partner States' institutions or organs as stipulated in Article 30(3). Mr. Deya strongly argued that under international law the wrongful actions of State organs – including decisions of judicial organs – were attributable to the State. He cited Article 4(1) of the International Law Commission's **Articles on the Responsibility of States for Internationally Wrongful Acts**, as well as case law from the International Court of Justice (ICJ) and African Court on Human and Peoples' Rights in support of this preposition.

25. We have carefully considered the arguments of both Parties. As quite rightly opined by both Counsel, this Court's jurisdiction is spelt out in Articles 27(1) and 30 of the Treaty. We reproduce the pertinent provisions thereof for ease of reference.

> *Article 27(1)*
>
> *The Court shall initially have jurisdiction over the interpretation and application of this Treaty:*

Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.

Article 30(1)

Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.

Article 30(3)

The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State.

26. Whereas Article 27(1) categorically designates the jurisdiction of this Court as the interpretation and application of the Treaty, Article 30(1) provides the context within which such jurisdiction would be exercised. This Court has had occasion to address the question of its jurisdiction in numerous decided cases. It has consistently found its jurisdiction to have been sufficiently established where it was averred on the face of the pleadings that the matter complained of constituted an infringement of the Treaty. See **Hon. Sitenda Sebalu vs. The Secretary General, East African Community & Others EACJ Ref. No. 1 of 2010** and **Prof. Peter Anyang' Nyong'o & 10 Others vs.**

The Attorney General of the Republic of Kenya & 2 Others EACJ Ref. No. 1 of 2006.

27. However, in the present Reference a judicial decision is in issue. As stated hereinabove, there is contention between the Parties as to the interplay between the locally designated jurisdiction of national courts viz this Court's jurisdiction as outlined in the Treaty. Furthermore, there is the question as to whether or not the conduct of a judicial organ can be attributable to the State, the principle of judicial independence notwithstanding.

28. On the question of state responsibility, it was argued at length by Mr. Deya that judicial organs of the State are not exempt from Article 4(1) of the Articles on State Responsibility, which provides for the attribution of their internationally wrongful actions to their respective states. Article 4(1) reads:

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

29. Mr. Deya did refer us to a number of decisions by international tribunals, as well as an advisory opinion by the ICJ, all of which categorically held that the conduct of any organ of the State must be regarded as an act of the State. See **Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, ICJ Reports**

1999, p.62 at pp. 87- 88, paras. 62, 63 and **Salvador Commercial Company, 1902, UNRIAA, vol. XV, p. 455 at p.477**.

30. We have carefully considered the foregoing legal antecedents. For ease of reference, we reproduce the pertinent aspect of the advisory opinion in **Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights** (supra):

> "**According to a well-established rule of international law, the conduct of an organ of a State must be regarded as an act of that State. ... the conduct of an organ of a State – even an organ independent of the executive power – must be regarded as an act of that State.**"

31. The foregoing legal position unequivocally holds States responsible for the conduct of their judicial organs. It follows then that we cannot fault the Applicant on the preposition that the Republic of Burundi would be responsible for the allegedly wrongful conduct of the Burundi Supreme Court. This principle would appear to be well settled law. We do respectfully uphold it.

32. Be that as it may, we are mindful of the principle advanced in the case of **B. E. Chattin (USA) vs. United Mexican States, 1927, UNRIAA, vol. IV, p.282 at 288**, where state responsibility for wrongful judicial acts was limited to '**judicial acts showing outrage, bad faith, willful neglect of duty, or manifestly insufficient governmental action.**"

33. Thus, in the case of **Ida Robinson Smith Putnam (USA) vs. United Mexican States, 1927, UNRIAA, vol. IV, p.151 at 153**, it was held:

"The Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country.[1] A question which has been passed on in courts of different jurisdiction by the local judges, subject to protective proceedings, must be presumed to have been fairly determined. Only a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law." *(Our emphasis)*

34. A common thread in the **Ida Robinson Smith Putnam** case and **B. E. Chattin (USA) vs. United Mexican States** (supra) is that judicial decisions of national courts, particularly those emanating from the apex court of a country, may only be categorized as wrongful acts for purposes of state responsibility where they reflect blatant, notorious and gross miscarriages of justice.

35. Indeed, in the case of **Henry Kyalimpa vs. Attorney General of Uganda EACJ Appeal No. 6 of 2014**, this Court's adjudication duty when faced with allegations of wrongful conduct attributable to a national state was espoused in the following terms:

"In short, in adjudging an impugned state action as being internationally wrongful this Court asks itself the question not whether such action is in conformity with internal law, but rather whether it is in conformity with the Treaty. Where the complaint is that the action was inconsistent with internal law

[1] See case of Margaret Roper, Docket No. 183, paragraph 8

and, on that basis, a breach of a Partner State's obligation under the Treaty to observe the rule of law, it is the Court's inescapable duty to consider the internal law of such Partner State in determining whether the conduct complained of amounts to a violation or contravention of the Treaty."

36. Consequently, having found that the actions of a judicial organ are attributable to a Partner State, albeit only where they constitute blatant miscarriage of justice, we do proceed to determine whether in fact the actions of the Burundi Supreme Court can be categorized as wrongful conduct.

37. In the instant case, the Reference is substantially premised on the alleged failure by courts in Burundi to acknowledge the legal and probative value of the Attested Affidavit No. 356/99 of 27th July 1999, despite its execution by State organs. The Applicant does also fault the said courts on the procedure adopted during the trial. In that regarded, it is the contention that the First Instance Tribunal ignored his written submissions; did not avail him the opportunity to cross examine the opposite party's witnesses, and did not inform him of the date of the court proceedings, thus curtailing his right to be heard. On the other hand, it is alleged that the Court of Appeal ignored the proprietary rights conferred by the Attested Affidavit despite having duly confirmed its authenticity. The Applicant did also fault the Supreme Court's application of the law in Burundi when it affirmed the lower courts' decisions. In a nutshell, the Applicant faults the Supreme Court decision that is in issue presently for misapplying the law of Burundi; not providing the reasons that underscored its conclusions; depriving him and possibly other Burundi and EAC nationals of their land, and for creating legal uncertainty by not

providing adequate guidance on the legal and probative value of Attested Affidavits.

38. The ultimate call of duty upon courts is to uphold the due process of law. Indeed, in the case of **Baranzira & Another vs. Attorney General of Burundi EACJ Ref. No. 15 of 2014**, this court did cite with approval the following definition of due process from Black's Law Dictionary:[2]

> **"The notion of due process advances the conduct of legal proceedings according to established rules and principles for the protection and promotion of private rights."**

39. Litigants do expect reasonable assurance that courts and judges will determine their disputes objectively, independently and with unassailable integrity. Integrity in this context would include judicial expertise and efficiency or, stated differently, the capacity of judicial officers to deliver coherent and logical decisions to parties. Indeed, the principle of independence in the Bangalore Principles of Judicial Conduct requires that the judicial function be exercised 'independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law.'[3] In the same vein, the principle of impartiality in the Bangalore Principles 'applies not only to the decision itself but also to the process by which the decision is made.'[4]

40. We have carefully considered the impugned judgment, as well as the rival submissions of the Parties in this matter. Without delving into intrinsic considerations of the merits of the said judgment viz a viz the

[2] Black's Law Dictionary (8th Ed.) pp. 538, 539
[3] Value 1(1.1)
[4] Value 2

principles of good governance and rule of law, at its face value we observe that the judgment depicts a cavalier approach to an extremely serious judicial function. As a basic requirement and in accordance with the principles of judicial conduct enumerated above, judgments should depict the laws or legal arguments that underscore their conclusions, stated in a coherent and logical manner. However, the judgment in issue presently depicts an unreasoned judgment that is quite dismissive of the issues raised on Appeal. It does not explain the court's deference to one position as against another; neither does it clarify the scope of the subject matter in issue before it.

41. We are mindful of the possibility that judgments from countries of a civil law background might take on a different form from those originating from common law jurisdictions. However, we take the view that the Bangalore Principles that provide minimum standards of judicial office holders are universal in outreach and application and are applicable to both civil and common law jurisdictions. On that premise, in the absence of coherent legal justification for the conclusions arrived at, a cursory glance at the impugned judgment would suggest a blatant disregard for due process of the law; as well as an apparent indifference to the universal standards of judicial practice embodied in the Bangalore Principles of Judicial Conduct. In our view, this is a clear injustice to the parties to the dispute.

42. We are, therefore, satisfied that the impugned decision of the Burundi Supreme Court would *prima facie* amount to wrongful practice that is attributable to the Republic of Burundi under Article 4(1) of the ILC Articles on State Responsibility. We so hold.

43. Having so found, we revert to the question as to whether or not this Court has jurisdiction to review the decisions of national courts in the East African Community (EAC), such wrongful judicial practice notwithstanding. Stated differently, is this Court appropriately adorned with the jurisdiction to review the decisions of national courts *per se*? Two issues emerge from the foregoing question: whether the Treaty acknowledges the jurisdiction of national courts at all, and if so, whether the said courts' jurisdiction would oust the jurisdiction of this court in a matter such as is before us presently.

44. On the question of domestic jurisdiction, whereas the proviso to Article 27(1) and the provisions of Article 30(3) do make reference to the reservation of certain matters to national courts 'under the Treaty', we do agree with Mr. Deya that to date no such reservation has been explicitly legislated.

45. The only reference to the jurisdiction of national courts in the Treaty is found in Article 33(1) thereof. It reads:

> *Article 33(1)*
>
> *Except where jurisdiction is conferred on the Court by this Treaty, disputes to which the Community is a party shall not on that ground alone, be excluded from the jurisdiction of the national courts of Partner States.*

46. Our construction of that legal provision is that it entails a tacit recognition of the inherent jurisdiction of national courts to try all matters that fall within the ambit of their locally designated jurisdiction, including the mandate to determine disputes to which the Community is a party *per se*. We deduce the phrase *'disputes to which the Community is a party shall not* ***on that ground alone*** *be excluded*

from the jurisdiction of the national courts…', when juxtaposed with the express provisions of Article 27(1), to mean that such disputes would only be excluded from the domain of national courts where there is a matter for Treaty interpretation. That would be the exclusive jurisdiction of this Court.

47. This interpretation is buttressed by the provisions of Articles 33(2) and 34 of the Treaty read together. They read as follows:

> *Article 33(2)*
>
> *Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter.*
>
> *Article 34*
>
> *Where a question is raised before any court or tribunal of a Partner State concerning the interpretation …, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question.*

48. Thus, whereas Article 33(2) acknowledges the inherent jurisdiction of national courts to try any matter brought before them, it subordinates their decisions on matters of Treaty interpretation to decisions by this Court. Article 34, in turn, underscores this Court's precedence on matters of Treaty interpretation by making provision for such questions to be subjected to a preliminary ruling by it.

49. We therefore find that, although the Treaty does not expressly confer or reserve national courts' jurisdiction, it does in fact recognize their inherent jurisdiction within locally designated parameters. We now

revert to a determination of whether the duly acknowledged jurisdiction of national courts would oust the jurisdiction of this Court.

50. It is well recognized herein that disputes before national courts are primarily determined on the basis of applicable domestic laws rather than related rules of international law. However, the States within which they operate are often bound by international obligations that derive from international treaties and conventions to which they are party. To that extent, therefore, it is incumbent upon national courts to apply and enforce domestic laws in such a manner as would ensure compliance by the State with its international obligations. This would be their judicial function in the international legal order.

51. The question is what happens when national courts fall short of this judicial responsibility, thus engendering a breach of its international obligations by the State. This question was posed in an Article, **Antonios Tzanakopoulos, *'Domestic Courts in International Law: The International Judicial Function of National Courts'*, 34 Loyola of Los Angeles (Loy. L.A.) International & Comparative Law Review, 133 (2011) at 153, 154**, in the following terms:

> "**But the question remains: who decides authoritatively, with binding force, whether the domestic court has – in any given case – lived up to the expectation of being the 'natural judge' of international law? Who decides whether in the instance the domestic court settled the dispute/ enforced the law, or rather created a dispute by not enforcing the law? The answer would have to be: States themselves do .... through the introduction of a third-party instance at the international level to 'supervise' the domestic court.**"

52. In the same Article (at p. 167), it was opined:

> **"This means that the international law question can effectively be raised and answered at the domestic level. When the outcome is deemed unsatisfactory, international procedures will be called upon to review the 'facts' (including potential decisions of the domestic court) and determine whether a breach of an international obligation has taken place or whether the law has moved on. The process then at the international stage is merely subsidiary or supervisory; intervention will be limited to when the domestic process fails to address the issues appropriately and conform to the international obligation."**

53. It does seem to us that States purposively create courts at international and regional level that would play a complimentary role to national courts with specific regard to their international obligations. Within the EAC, this Court was set up to specifically ensure adherence to the law in Treaty interpretation, application of and compliance with the Treaty.[5] The Partner States do, in turn, obligate themselves to achieve the objectives of the EAC with due regard to the principles outlined in Articles 6 and 7 of the Treaty. The principles in context presently include adherence to the rule of law and good governance.

54. In the event then, as in the present case, that a national court that is mandated to enforce the law in a Partner State is alleged to have violated the domestic law of such State, as well as related Treaty obligations; would a court that is mandated to ensure adherence with

[5] See Article 23(1) of the Treaty.

the law in matters of Treaty compliance be exempted from determining the respective Partner State's compliance with its Treaty obligations? Would such a matter be ousted from the jurisdiction of this Court? We think not. Quite clearly, the foregoing Article postulates that where a domestic adjudication process is alleged by any of the parties thereto to have been unsatisfactory, an international adjudication process would be required to interrogate whether indeed there has been a violation of a State's international obligations.

55. In the instant case, the Supreme Court's adjudication process and the resultant judgment have been alleged to violate Articles 6(d) and 7(2) of the Treaty, as well as Articles 15(1) and 14 of the Protocol and African Charter respectively. Quite clearly, this Court does have jurisdiction to consider the said proceedings and judgment with a view to determining whether they contravene Burundi's obligations under Articles 6(d) and 7(2) of the Treaty.

56. That is not at all to suggest, as has been intimated by the Respondent herein, that this Court would be invoking an appellate jurisdiction over the Burundi Supreme Court. There is a clear distinction between what constitutes an appellate review of a subordinate court's decision, and the dialectical judicial approach that is synonymous with the international review of domestic judgments. Thus, in an Article, **Robert D. Ahdieh, '*Between Dialogue and Decree: International Review of National Courts*', 2004, New York University (N.Y.U) Law Review, p. 2029 at 2045, 2046**, appellate review was defined in the following terms:

"I identify four core characteristics of "appellate" review. First, and perhaps foremost, is the authority of an appellate court to undo the determinations of law, and sometimes even the findings of fact, reached by the court subject to review. Following naturally from this phenomenon is the binding nature of that review. Minimally, the judgment of an appellate court binds the trial court in the case at bar. More expansively, decisions on appeal consequently have some formal or informal *stare decisis* effect, binding lower courts in future cases as well. The pattern of review characteristic of the appellate interaction of courts, moreover, is largely unidirectional. With notable exceptions, appellate judgments are not, in the ordinary case, subject to substantive critique in a trial court. Finally, appellate review is constrained in its reach yet expansive in its depth. Appellate review is rarely de novo. Factual findings are subject to an exceedingly deferential standard of review, if they are subject to review at all. As to questions of law, however, courts of appeal possess relatively plenary powers of review and reversal."

57. For the avoidance of doubt, the foregoing definition highlights the following characteristics of appellate review:

i. Authority to undo the determinations of law (and sometimes of fact too) of the lower court.

ii. The binding nature of that review on the lower courts.

iii. The review is largely unidirectional ie whereas the appellate court can critique the lower court, the reverse is not usually tenable.

iv. The constrained reach of appellate review ie it is rarely *de novo*.

58. This, most certainly, is not the approach being adopted in the instant case. On the contrary, the international review of national courts' decisions that is in issue presently was explained in the same Article[6] explained as follows:

> **"If there is to be some occasion for international review of national courts - some transnational judicial engagement with some dimension of both review and power - what should be its precise character? ... How might those ends be achieved without unnecessarily challenging values of national sovereignty, and thereby risking a backlash against relevant international regimes? .... one can identify three essential features of an effective pattern of international engagement with national courts: (1) the operation of a bipolar power dynamic, in which both judicial participants possess some capacity for control, and hence power, but neither can assert complete authority over the other; (2) the presence of alternative, and perhaps competing, legal and institutional perspectives; and (3) the existence of structures designed to encourage and facilitate adjudicatory continuity."** *(Our emphasis)*

59. From the foregoing literature, it becomes apparent that the international review of national courts entails the non-subjugation of national courts to international courts or tribunals, as would be the case in a typical appellate review. Rather, it is characterized by the

[6] Ahdieh, Robert D, **'Between Dialogue and Decree: International Review of National Courts'**, 2004, N.Y.U Law Review, p.2029 at 2087, 2088

application of distinct legal perspectives: whereas national courts enforce domestic laws, international courts approach the same set of circumstances from the perspective of states' international obligations. Perhaps, most importantly, an international review is a trial *de novo* in the context of the international or treaty obligations the international court seeks to enforce. It is not binding upon the national courts as would be the case of a typical appeal, neither does it form *stare decesis* in domestic jurisdictions as would a decision of national states' apex courts. Simply stated, the international review of national courts' decisions is intended to highlight the international legal issues inherent therein with a view to engendering a harmonized legal position in respect thereof.

60. Before we take leave of this issue, we also wish to address ourselves to the decision of this Court in the case of **East African Civil Society Organisations Forum vs. The Attorney General of Burundi & 2 Others EACJ Ref. No. 2 of 2015**, where it was held that the court did not have jurisdiction to reopen the decisions of national courts to determine their compliance with either domestic laws or the Treaty. We are constrained to observe that what was sought in that Reference was the revision, review and quashing of the decision of the Constitutional Court of Burundi. That, to our minds, sought to attribute to this Court an appellate jurisdiction characterized by the authority to undo the determinations of law of the Constitutional Court. For the avoidance of doubt, we do reiterate here that this Court has not been granted appellate jurisdiction as envisaged in Article 27(2) of the Treaty. Its jurisdiction in this matter is limited to such international review of national courts' decisions viz

a viz Partner States' Treaty obligations as would engender the Court's function under Article 27(1) of the Treaty.

61. We would, therefore, disallow the Respondent's contention that by determining the present Reference, this Court would be usurping or undermining the appellate jurisdiction of the Burundi Supreme Court. We are satisfied that this is a matter that is justiciable before us under Articles 23(1), 27(1) and 30(1) of the Treaty. We do, therefore, answer Issue No. 2 in the affirmative.

Issues 3, 4 & 5:

62. In this Reference it is not readily apparent from the pleadings whether the Applicant questions the inconsistency of the impugned judgment with Burundi internal laws, as an indication of the Respondent State's contravention of the said Partner State's Treaty obligations, or rather, contests the legality of the said decision purely in relation to Burundi's internal law. Whereas, in submissions, the Applicant addresses this Court at length on the alleged non-compliance of the said judgment with Burundian Law No. 1/004; our construction of paragraphs 30, 33 and 34 of the Reference is that the Applicant purports not to challenge the impugned judgment's inconsistency with the internal law of Burundi *per se*, but rather, faults the Respondent State for non-compliance with its international obligations under the Treaty, the Protocol and the African Charter.

63. Given the lack of clarity highlighted above, for completeness, we propose to address both eventualities, that is, the property rights drawn from Burundi's international obligations or Community law, as well as those derived from her internal laws. We propose to address

the first scenario under Issue No. 3, and the second under Issues 4 and 5.

Issue No. 3: **Whether the Respondent violated Articles 6(d) and 7(2) of the EAC Treaty; Article 15(1) of the Common Market Protocol, and/ or Article 14 of the African Charter.**

64. In **B. E. Chattin (USA) vs. United Mexican States** (supra)[7], it was opined that, for an international claim to be sustainable, a court or tribunal was required to determine *'whether there exists an injury* and whether the act which causes it *violates any rule of international law'*. With specific regard to impugned judicial acts, as is the case presently, there was the additional prerequisite for a finding as to whether such act involved bad faith, willful neglect of duty, or very defective administration of justice. Thus, in principle, an injury arising from a decision that contravenes the Treaty would constitute a sustainable claim or cause of action before this Court.

65. Therefore, to the extent that the Applicant herein contends that his property rights have been violated as a result of a Supreme Court decision that allegedly contravenes Articles 6(d) and 7(2) of the Treaty; we are satisfied that the Applicant has established a cause of action or sustainable international claim against the Respondent State. Whether this claim is, in fact, duly proven by the Applicant is an entirely different matter.

66. The burden of proof applicable to international claims was stated in the case of **Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina vs.**

[7] At p.310

Serbia & Montenegro), Judgment, ICJ Reports 2007, p.43, para. 203 as follows:

> "**On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it; as the Court observed in the case of** Military and para-military Activities in and against Nicaragua (Nicaragua vs. United States of America[8], **"it is the litigant seeking to establish a fact who bears the burden of proving it".**"

67. Indeed, the Appellate Division of this Court has addressed the question of burden of proof in like vein. Thus, in **Henry Kyalimpa** (supra), the following preposition in **Shabtai Rosenne, 'The Law and Practice of the International Court', 1920 – 2005, Vol. III, Procedure, p.1040** was cited with approval:

> "**Generally ... the court will formally require the Party putting forward a claim or particular contention to establish the elements of fact and of law on which the decision in its favour is given.**"

68. Relatedly, in **Bosnia & Herzegovina vs. Serbia & Montenegro** (supra), the International Court of Justice (ICJ) re-asserted the standard of proof in international claims as follows:

> "**The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive.[9] .... The**

[8] Judgment, ICJ Reports 1984, p.437, para. 101
[9] See Corfu Channel (United Kingdom vs. Albania), Judgment, ICJ Reports 1949, p.17.

same standard applies to the proof of attribution for such acts."

69. Before progressing further with this issue, we deem it necessary to underscore the gist of the principles against which the Applicant would have us determine the Republic of Burundi's alleged non-compliance with its Treaty obligations. We reproduce the specific provisions he purports to invoke for ease of reference:

Article 6 of the Treaty

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

(d) good governance including adherence to the principles of democracy, rule of law .... as well as the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and People's Rights.

Article 7(2) of the Treaty

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

70. With regard to Articles 6(d) and 7(2) of the Treaty, the Applicant did specify the obligations that have been violated as the principles of rule of law and good governance; while the provisions of the Protocol and African Charter invoked herein clearly point to the Applicant's purported property rights. We deem it necessary to re-assert our

understanding of the principles enumerated above for purposes of clarity.

71. In **Baranzira Raphael & Another** (supra), the definition of the principle of rule of law encapsulated in a **Report of the (UN) Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies**[10] was cited with approval by this Court. It reads:

> **"It refers to the principle of governance to which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publically promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency."**

72. Similarly, in the **Baranzira Raphael** case, the following definition of 'good governance' by the United Nations Development Program (UNDP)[11] was cited with approval:

> **"The existence of effective mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences."** *(our emphasis)*

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[10] UN Doc S/2004/616 (2004), para. 6

[11] Cited in an Article published by the International Fund for Agricultural Development (IFAD), '**Good Governance: An Overview**', IFAD Executive Board – 67th Session, September 1999, p.6.

73. We must state forthwith that we find nothing in the Reference to suggest that effective mechanisms, processes and institutions through which the citizens may exercise their legal rights are non-existent in Burundi, so as to impute lack of good governance. The complaint herein is premised on the allegedly wrongful adjudication of a dispute by the Burundi Supreme Court. This would suggest that the Applicant did have the opportunity to submit a dispute to the right institution – the judiciary – for determination. The existence of the necessary governance framework for the resolution of disputes in Burundi cannot therefore be questioned, neither can we fault the Respondent State in that regard. The improper discharge of the said institution's function is an entirely different matter. We would, therefore, disallow the assertion that the Republic of Burundi contravened the principle of good governance as enshrined in Articles 6(d) and 7(2) of the treaty. We so hold.

74. With regard to the principle of rule of law, on the other hand, the Applicant did dwell at length on the shortfalls of the impugned judgment. He did also allude to the failure by the Respondent State to redress the violation of his property rights and comply with its international obligations.[12] He thus imputes absence of the rule of law from these circumstances. The question that lingers in our minds, however, is whether he furnished this Court with sufficient proof of his allegations.

75. It seems to us that the elements of rule of law that are in issue before us are, first, the equal enforcement and independent adjudication of laws that are consistent with international human rights norms and standards; and secondly, measures that underscore

[12] See paragraph 29 of the Reference.

the supremacy of the law, equality before the law, fairness in the application of the law, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.

76. No evidence whatsoever was availed to the Court as to the inconsistency of the property laws in Burundi viz a viz international human rights standards and norms. The property laws were not availed to us at all so as to enable the Court make that determination. Consequently, any inferences of unequal enforcement of the law, non-supremacy of the law or inequality before the law remain unproven and are, therefore, unsustainable.

77. With regard to the residual elements of rule of law highlighted above, we find the following approaches by international tribunals most instructive. In the case of **L. F. H. Neer & Pauline Neer (USA) vs. Unted Mexican States, 1926, UNRIAA, Vol. IV, p. 60 at 62,** it was held with regard to the scope of an international tribunal's inquiry:

> "**It is not for an international tribunal such as this Commission to decide, whether another course of procedure taken by the local authorities of Guanacevi might have been more effective. On the contrary, the grounds of liability limit its inquiry to whether there is convincing evidence either (1) that the authorities administering Mexican law acted in an outrageous way, in bad faith, in willful neglect of their duties, or in a pronounced degree to improper action, or (2) that Mexican law rendered it impossible for them properly to fulfill their task.**"

78. In the case of **Cotesworth and Powell, 1875, British Columbia Commission**, it was observed that '**a plain violation of the**

substance of natural justice, as for example, refusing to hear the party interested, or to allow him opportunity to produce proofs, amounts to the same thing as an absolute denial of justice.'

79. Finally, in the **B. E. Chattin** case, it was persuasively opined:

> **"There are certain defects in procedure that ... are blotted out or disappear, to put it thus, if the final decision is just. There are other defects which make it impossible for such decision to be just. The former, as a rule, do not engender international liability; the latter do, since such liability arises from the *decision* which is iniquitous because of such defects."**

80. In the present Reference, although we did find that a cavalier judicial approach was depicted in the impugned judgment, we do not find sufficient proof of material on record that would support a finding that the Bench that adjudicated the matter and delivered the said judgment contravened the principle of rule of law on account of absence of judicial independence. The record of proceedings of the Supreme Court would have been pivotal in proving the incidence of unfairness, bias or arbitrariness in the application of the law as an indication of lack of independence or procedural impropriety. The Applicant did not avail the court with the record of proceedings. Such record would have also been useful to evaluate the conduct of the proceedings against Burundi's substantive and procedural laws so as to enable this Court determine the Supreme Court's adherence to the rule of law. The laws that the Applicant sought to invoke in that context were not availed either.

81. Even more specifically, the record of proceedings would have informed this Court's findings as to whether the Supreme Court administered Burundian law in an outrageous way, in bad faith, with willful neglect of their duties; or conducted the proceedings in blatant violation of the substance of natural justice, such as would engender international liability. Whereas the abuse of the Applicant's right to be heard and be availed an opportunity for cross examination of witnesses was indeed raised in pleadings, we find that insufficient evidence was adduced in proof thereof. In the same vein, whereas we do share the Applicant's concern about the uncertainty surrounding the property law regime in Burundi given the absence of clarity in the impugned judgment, we would not go so far as to conclusively state that it violated the element of legal certainty in the absence of proof of the property laws that provided the legal framework within which the decision was made, on the one hand, or legal antecedents from Burundi that reveal what the position of the law had been previously.

82. The onus lay with the Applicant to present 'evidence that was fully conclusive' in proof of the elements of the rule of law principle highlighted above. As it is, beyond the impugned judgment itself, no such evidence was adduced. We would, therefore, disallow any liability in rule of law in that regard.

83. With regard to the impugned judgment itself, we do find that the refusal or omission by any court to provide the legal reasoning and justifications that underscore its conclusions does constitute unacceptable judicial conduct and willful neglect of the court's duty. Where such court is the apex court of the land, such an unconventional approach to adjudication entails an unacceptable

affront to recognized standards of judicial conduct in so far as it negates the opportunity to coherently lay down *stare decesis* to guide the lower courts. Nonetheless, we do recognize that a decision may only be rendered iniquitous and, therefore, susceptible to international liability where it is the culmination of such procedural defects as would make it impossible for it to be just. *See* ***B. E. Chattin*** *(supra).*

84. In the instant case, in the absence of the record of proceedings, we are unable to determine the extent of the Supreme Court's alleged non-compliance with Burundi's legal regime so as to make a justifiable finding on whether or not the resultant decision was iniquitous and thus engendered the Respondent State's legal liability. We do, therefore, find that the Applicant has not satisfactorily proved the violation of the principle of rule of law enshrined in Articles 6(d) and 7(2) of the Treaty. We so hold.

85. On the other hand, Article 15(1) of the Protocol and Article 14 of the African Charter relate to the Applicant's purported property rights. They read:

> *Article 15(1) of the Protocol*
>
> *The Partner States hereby agree that access to and use of land and premises* ***shall be governed by the national policies and laws of the Partner States****.*
>
> *Article 14 of the African Charter*
>
> *The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and* ***in accordance with the provisions of appropriate laws****.* (Our emphasis)

86. Both legal provisions allude to the property rights encapsulated therein being premised on Partner States' national laws and policies. The question of the legal status of Attested Affidavits in Burundi raised in Issues 4 and 5 hereof does also relate to the property rights of the Applicant as stipulated in Burundi's internal laws. We do, therefore, propose to address the Respondent State's compliance with Article 15(1) of the Protocol and Article 14 of the African Charter when considering the ensuing issues.

Issues 4 & 5: Whether the Respondent's failure to recognize the legal and probative value of the Attested Affidavit No. 356/99 of 27th July 1999 is unlawful and violates the Applicant's rights & Whether the Applicant's right to peaceful enjoyment of property was violated.

87. The impugned judgment herein is faulted by the Applicant for not equating an Attested Affidavit to a notarized deed under Article 46 of Burundi Law No.1/004; for not giving clarity on legality of Tribunals of Residence *(Tribunax de residence)* that hitherto executed Attested Affidavits, and for not clarifying the law applicable to Attested Affidavit. Mr. Deya opined that the impugned judgment had created a lacuna in Burundian property law and violated his client's property rights, including the right to peaceful enjoyment of his property.

88. However, the Applicant does not detail with specificity which property laws he considers to have been contravened by the impugned judgment, or indeed avail any such laws to the Court for scrutiny. In submissions, learned Counsel for the Applicant simply makes reference to 'the Burundian legal system' and 'the law and practice applicable in the Respondent State at the time', but does not refer the

Court to the specific laws he alludes to or the manner in which the impugned judgment violates them.

89. The only internal law that is specifically referred to in submissions is Law No.1/004 of Burundi. Reference to it in the impugned judgment arises at p.3 thereof. The Supreme Court addressed the Appellant's complaint as follows:

> "*It follows from this provision* (Article 46 of Law No. 1/004) *that the notarized deed has evidential value that confers undisputed character on the facts evoked and established by the notary except where the authenticity is challenged for forgery. This argument* (ground of appeal) *is baseless because Law No. 1/004 of 9 July 1996 on the organization and functioning of the Notary profession and Notaries Statute does not confer authenticity to the attested affidavits established by Tribunals of residence (Tribunax de residence).*"

90. Without the benefit of other internal laws that might have established the nexus between authentic notarized deeds and attested affidavits, we are unable to fault the legality of the Supreme Court's decision on that issue. Needless to say, the onus was on the Applicant to establish this nexus and prove its case to the required standard. In our considered view, he fell short of the standard of proof that was required of him. We would, therefore, answer Issue No. 4 in the negative.

91. Having so found, it follows that the Applicant's alleged property rights remain unproven. Given that we were not referred to any Burundian property law that would engender the Applicant's proprietary interest

in the disputed property, his claims to the said property remain unproven.

92. Even more importantly, we are constrained to observe that it was averred in paragraph 14 of the Reference that the Applicant 'sub-divided the consolidated parcel of land and sold them out to new buyers.' In paragraph 15, it is further averred that following the said sale, the Registrar of Lands (*Conservateur des Titres Franciers*) annulled the Applicant's certificate of title to the property and issued new certificates of title to the new buyers. It would appear then that the Applicant had relinquished all legal title to the disputed property to new buyers. What then are the property rights he purports to reserve for himself and alleges were violated?

93. We did not find any evidence whatsoever of any subsisting proprietary interest vested in the Applicant. Consequently, we do not find any rights vested in the Applicant either with regard to either the disputed property or to the purported peaceful enjoyment thereof; neither do we find any violation herein of Article 15(1) of the Protocol and Article 14 of the African Charter. We so hold.

Issue No. 6: Whether the Applicant is entitled to the Remedies sought.

94. The remedies sought by the Applicant include Declarations, Orders, costs of and incidental to the Reference and any further Orders as deemed necessary by the Court. He sought Declarations that:

a. The Respondent's actions and omissions are unlawful and an infringement of Articles 6(d) and 7(2) of the Treaty; Article 15(1) of the Protocol, and Article 14 of the African Charter.

b. The Respondent violated the property rights of the Applicant, and his heirs and assigns, and in so doing violated the commitments that it made under the Treaty, the Protocol and the African Charter.

95. We did not find any proof of infringement of either Articles 6(d) and 7(2) of the Treaty, or Articles 15(1) and 14 of the Protocol and African Charter respectively; neither were any purported property rights attributable to the Applicant established before us.

96. The Applicant did also seek Orders directing that:

a. The Respondent restores the property rights of the Applicant and his heirs or assigns.

b. The Respondent files before this Court not later than 60 days from the date hereof, a progress report on remedial mechanisms and steps taken towards the implementation of the Orders of this Court.

c. The costs of and incidental to this Reference be met by the Respondent.

97. Having held as we have with regard to non-proof of the Applicant's purported property rights; we decline to grant Orders for the restoration of unproven rights or a progress report in respect thereof.

98. With regard to the question of costs, we are mindful of Rule 111(1) of this Court's Rules that postulates that costs should follow the event

unless the Court, for good reason, decides otherwise. In the instant case the Reference has not succeeded so ordinarily the costs thereof would be to the Respondent. However, we find that the matters that were canvassed herein were of grave importance to the advancement of Community law. We therefore deem it just to order each Party to bear its own costs.

CONCLUSION

99. In the result, the Reference is hereby dismissed. Each Party shall bear its own costs. We so Order.

Dated, delivered and signed at Arusha this 2nd Day of December 2016.

Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE

Hon. Justice Isaac Lenaola
DEPUTY PRINCIPAL JUDGE

Hon. Justice Audace Ngiye
JUDGE