



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



(Coram: Monica Mugenyi, PJ; Isaac Lenaola, DPJ; Fakihi A. Jundu, J)

REFERENCE NO.2 OF 2015

**EAST AFRICAN CIVIL SOCIETY ORGANIZATION
FORUMAPPLICANT**

VERSUS

**THE ATTORNEY GENERAL OF
THE REPUBLIC OF BURUNDI.....1ST RESPONDENT**

**COMMISSION ELECTORALE NATIONALE INDEPENDANTE
(CENI).....2ND RESPONDENT**

**THE SECRETARY GENERAL OF
THE EAST AFRICAN COMMUNITY.....3RD RESPONDENT**

29TH SEPTEMBER, 2016

JUDGMENT OF THE COURT

INTRODUCTION

1. This Reference is premised on Articles 5(3)(f), 6(d), 7(2), 8(1)(a), 8(5), 27(1), 29, 30, 38, 39, 124(1), 143, 146 and 47 of the Treaty for the Establishment of the East African Community ("the Treaty") and Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure ("the Rules").
2. The Applicant states that it is an all-inclusive platform for Civil Society Organizations in East Africa, with the primary objective of building a critical mass of knowledgeable and empowered civil society in the region, in order to foster their confidence in articulating grassroots needs and interests for the East African Community and its various organs, institutions and agencies. It is registered as a Non-Governmental Organization in the United Republic of Tanzania.
3. In the present reference, it is represented by Mr. Donald Omondi Deya, Advocate of No.3 Jandu Road, Corridor Area, P.O. Box 6065, Arusha, Tanzania.
4. The 1st Respondent is the Attorney General of the Republic of Burundi, a Partner State in the EAC and has been sued as the Principal Legal Advisor to the Government of Burundi. His address for purposes of this Reference is Ministry of Justice, Office of the Minister and Holder of the Seal, P.O. Box 1880, Bujumbura Burundi.
5. The 2nd Respondent, the Commission Electorale Nationale Independante, (CENI) is the body charged with the mandate to organize national and communal elections in the Republic of Burundi

and its address is Commune Ngagara, Q. Industriel, B/v de **L'OUA**, Rue Nyankoni, Parelle No.690/C; B.P. 1128 Bujumbura, Burundi.

6. The 3rd Respondent is the Secretary General of the East African Community appointed under Article 67 of the Treaty and has been sued on behalf of the EAC. His address is EAC Headquarters, Afrika Mashariki Road, EAC Close, P.O. Box 1096, Arusha, Tanzania.

FACTUAL BACKGROUND

7. In the Reference, it is contended that on 28th August, 2000, the Arusha Peace and Reconciliation Agreement (“the Arusha Agreement”) under the facilitation of the late President Nelson Mandela, was executed between the Government of Burundi as the principal party and all the principal political parties in Burundi as the other parties. The said Agreement was guaranteed by several international institutions including the African Union and the European Union as well as the Presidents of Kenya, Rwanda, Tanzania and Uganda, all Partner States in the EAC. On 1st December, 2000, the Parliament of Burundi domesticated it as ordinary **Law. No.1/017 of 1st December, 2000**. On 1st March 2005, the People of Burundi adopted a new Constitution and in the preamble thereto, they confirmed their faith in the said Arusha Agreement.
8. On 2nd March 2014, the Parliament of Burundi rejected a proposal to amend the Constitution of Burundi to enable the incumbent President, Mr. Pierre Nkurunziza to vie for a contested “*third term*” as President of Burundi. Nonetheless, on 25th April, 2015, the political party, CNDD-FDD, announced the nomination of Mr. Pierre Nkurunziza as its candidate for election to the office of President of Burundi.

9. On 28th April, 2015, 14 Senators of the Burundi Senate filed a motion dated 17th April, 2015 in the Constitutional Court of Burundi seeking an interpretation of Articles 96 and 302 of the Constitution of Burundi on the election of a President for Burundi. The Court delivered its decision on 5th May, 2015, a day after the Vice-President of the Court had fled the country (alleging intimidation) and determined that Mr. Pierre Nkurunziza was eligible to run for the Presidency.
10. On the 8th June, 2015, the Chairman of the 2nd Respondent, CENI, announced new dates for the general elections but on 9th June, 2015, Mr. President Nkurunziza announced different dates for the said elections. Thereafter public demonstrations started in Burundi and many leaders and other Burundians fled the country while many others were killed during the violent and chaotic demonstrations.
11. It is the eligibility or otherwise of Mr. Pierre Nkurunziza to run for the Presidency of Burundi the aforesaid decision of the Constitutional Court, the conduct of the 2nd Respondent with regard to the Burundi general elections of 2015 and the alleged failure of the 3rd Respondent to properly advise the Heads of Partner States to take decisive steps against alleged violation of the Arusha Agreement and the Treaty by the Republic of Burundi, that is at the heart of this Reference.
12. It is now the Applicant's prayers that in the above context the following declarations and Orders ought to be granted against the Respondents:-

(a) A declaration that the Decision of the Constitutional Court of the Republic of Burundi in Case number RCCB 303 delivered on 5 May 2015 violates the letters and spirit of the

Arusha Peace and Reconciliation Agreement for Burundi, 2000 (the Arusha Accord) and in particular Article 7(3) of Protocol II to the Arusha Accord and the Constitution of Burundi;

(b)A declaration that by reason of the aforesaid breach of the Arusha Accord, the decision of the Constitutional Court of the Republic of Burundi in Case number RCCB 303 delivered on 5 May, 2015 equally violates Articles 5(3)(f), 6(d), 7(2),8(1)(a) & (c), 8(5) of the Treaty for the Establishment of the East African Community (the EAC Treaty);

(c)A declaration that the decision of the CNDD-FDD to nominate or put forward the President of Burundi as a candidate for election to the office of the Presidency in the Republic of Burundi violates the Arusha Accord aforesaid and is unlawful;

(d)A declaration that any decrees, decision or orders of the 2nd Respondent or the CENI of the Republic of Burundi for the purpose of organizing or supervising Presidential elections in which the 2nd Respondent is or may be considered a candidate for the office of the President of Burundi are and shall be considered incompatible with the Arusha Accord and the Constitution of Burundi and, therefore, unlawful;

(e)An order setting to quash and set aside the decision of the Constitutional Court of the Republic of Burundi in case number RCCB 303 delivered on 5 May, 2015;

(f) An order directing the 3rd Respondent to constitute and give immediate effect to the judgment of this Honourable Court in Reference No. 1 of 2014 and to advise the Summit of Heads of State and Government of the East African Community (EAC) on whether the Republic of Burundi should be suspended or expelled from the East African Community under Articles 29, 67, 71, 143, 146, and 147 of the Treaty for the Establishment of the East African Community;

(g) An order directing the 1st and 3rd Respondents to appear and file before this Honourable court not later than 14 days from the date of the present decision and orders a progress report on remedial mechanisms and steps taken towards the implementation for the Orders issued by this Honourable Court; and

(h) An order that the costs of and incidental to this Reference be met by the Respondents.

APPLICANT'S CASE

13. In the Reference, the supporting Affidavit of Mr. Dieudonne' Bashirahishize, a member of the Burundi Bar Association and Vice President of the East African Law Society and in Submissions dated 11th April, 2016, the Applicant's case is as hereunder.

14. Firstly, that the Arusha Agreement is binding on the Respondents and is enforceable by this Court and that the nomination of a person who had been elected twice as the President of the Republic of Burundi to stand for a third term is unlawful and also a violation of the letter, spirit and objectives of the said Agreement and the Constitution

of Burundi. In addition, that the decision of the Constitutional Court of Burundi in **Case No. RCCB 303** of 5th May, 2015 is unlawful and incompatible with the obligations of the Government of the Republic of Burundi under the Agreement and the said Constitution.

15. As regards, the Treaty, it is the Applicant's case that the actions of the Government of the Republic of Burundi as outlined above are a violation of the principles of good governance, rule of law and respect for democratic principles as enshrined in Articles 5(3)(f), 6(d), 7(2), 8(1)(a) and (c), as well as Article 8(5) of the Treaty. Further, that this Court is justified in exercising its jurisdiction under Articles 27(1) and 30 thereof and in ordering for the measures under Articles 29, 38, 143, 146 and 147 of the same Treaty to be taken. Further, that the 3rd Respondent is under an obligation to verify that Partner States actually adhere to their obligations and commitments under the Treaty and to advise organs of the EAC on remedial actions that may be taken to enforce Partner States' compliance thereof under Articles 11, 29, 67, 71, 143, 146 and 147 of the Treaty.

16. Finally, the Applicant for the above reasons claims that it is entitled to the prayers elsewhere set out above.

1ST RESPONDENT'S CASE

17. In its response dated 11th September, 2015 and supported by the Affidavit of Sylvestre Nyandwi, Permanent Secretary, Ministry of Justice of Burundi, it is the 1st Respondent's case that while it is admitted that Mr. Pierre Nkurunziza was nominated by CNDD –FDD on 25th April, 2015 as its Presidential candidate in the 2015 General Elections in Burundi, any challenge to that nomination ought to have been filed in this Court on or before 25th June, 2015 and since the

Reference was filed on 6th July, 2015, the same is time-barred by dint of Article 30(2) of the Treaty.

18. Secondly, that under Article 281 of the Constitution of Burundi, the Constitutional Court of Burundi is the final and conclusive forum for resolution of any questions regarding the interpretation of the said Constitution and this Court does not have the Jurisdiction to revise, review or quash the decisions of that Court. Further, that this Court similarly has no Jurisdiction to interpret and/or apply the Agreement as is prayed by the Applicant.

19. Lastly, that the Reference is therefore misguided and ought to be struck off with costs.

2ND RESPONDENT'S CASE

20. The 2nd Respondent did not appear, upon being served with the Reference, and has not filed any pleadings nor participated in these proceedings at all.

3RD RESPONDENT'S CASE

21. The 3rd Respondent filed a response dated 18th August, 2015 and also filed a supporting Affidavit deposed to by Ms. Jessica Eriyo, Deputy Secretary General of the EAC in-charge of Productive and Social Sectors and his case is that the Reference is time-barred and this Court, in any event, lacks jurisdiction to determine the issues in context. Further, that no cause of action has been established against him and consequently, the Reference is incompetent and an abuse of Court process.

22. Lastly, the 3rd Respondent avers that upon the 2015 General Election being held in Burundi, the Reference was largely rendered

moot and there is nothing substantive left to be determined and it should therefore be struck off.

SCHEDULING CONFERENCE

23. On 7th March, 2016, Parties appeared for a Scheduling Conference under Rule 53 of the Rules and it was agreed that the following issues fall for determination:-

- i) Whether or not the Reference is time-barred;**
- ii) Whether or not this Honourable Court has jurisdiction over the interpretation and application of the Constitution of the Republic of Burundi and the Arusha Peace and Reconciliation Agreement of Burundi, 2000;**
- iii) Whether or not this Honourable Court has jurisdiction to revise, review or quash the decision of the Constitutional Court of Burundi in Case Number RCCB 303 delivered on 5th May, 2015;**
- iv) Whether or not the 2nd Respondent has legal personality to be sued before the East African Court of Justice under Article 30(1) of the EAC Treaty;**
- v) Whether or not the Reference discloses any cause of action against the 3rd Respondent; and**
- vi) Whether the Applicant is entitled to the remedies sought.**

24. Having reproduced the respective positions taken by the Parties in respect of the Reference and there being no preliminary issue to address, we now turn to the substantive issue falling for determination as above.

DETERMINATION BY COURT

Issue No.1: Whether or not the Reference is time-barred

25. Both the 1st and 3rd Respondents in their responses and submissions have argued that the Reference is predicated upon the alleged illegality of the nomination of Mr. Pierre Nkurunziza as the CNDD – FDD Presidential candidate on 25th April, 2015. That being the case and invoking Article 30(2) of the Treaty, it is their common Submission that the two months' period envisaged by that Article between the date when a cause of action arises and the date a Reference is filed before this Court ran out on 25th June, 2015 while the Reference was filed on 6th July, 2015. That the Reference is therefore time-barred.

26. In answer thereto, the Applicant has submitted that the cause of action giving rise to the Reference is not the nomination of Pierre Nkurunziza by his political party, CNDD – FDD but the decision of the Constitutional Court handed down on 5th May, 2015 meaning that the Reference ought to have been filed on or before 4th May, 2015 which was a Saturday and applying Rule 3 of the Rules, the next working day when the Reference ought to have been filed would have been Monday 6th July, 2015 when the Reference was duly filed. That the Reference is therefore within time and cannot be time-barred as alleged.

Determination of issue No.1

27. It is agreed by all parties that Article 30(2) creates the time limit for filing all References before this Court. For avoidance of doubt it provides as follows:-

“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.”

28. In interpreting the above sub-Article, the Appellate Division of this Court in Republic of Kenya vs. Independent Medical Legal Unit (IMLU), Appeal No.1 of 2011 stated as follows:-

“It is clear that the Treaty limits Reference over such matters like these to two months after the action or decision was first taken or made or when the Claimant first became aware of it. In our view, the Treaty does not grant this Court express or implied jurisdiction to extend time set in the Article mentioned above. Equally so, the Court could not rule otherwise on the fact of explicit limitation in Article 9(4) to the effect that the Court must act within its powers.” (Our emphasis)

29. The import of the above Article is therefore clear and in that regard, when exactly did the cause of action in this matter arise? We have noted the rival positions taken by the Parties and in our view, a resolution of the question of time bar must begin from a re-look at the Reference. Elsewhere above, we deliberately reproduced the prayers as set out in the Reference and it is clear that Prayers (a), (b) and (e) make specific reference to the decision of the Constitutional Court of Burundi made on 5th May, 2015 as being the main basis for the Reference. Prayers (d) and (f) are consequential orders upon the substantive prayers being granted and are predicated upon these substantive prayers. In effect, we have no difficulty in finding that the

cause of action is the decision of the Constitutional Court issued on 5th May, 2015. If that be the case, then the two months envisaged by Article 30(2) would end on 4th July, 2015 which as was correctly stated by the Applicant, fell on a Saturday.

30. Rule 3(1) of the Rules states as follows:-

“Any period of time fixed by these rules or by any order of the Court for doing any act shall be reckoned as follows:

(a) Where a period is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be counted as falling within the period in question; and the period shall end with the expiry of the last day of the period;

(b) Periods shall include official holidays, Sundays and Saturdays;

(c) Periods shall not be suspended during the Court vacations; and

(d) If a period would otherwise end on a Saturday, Sunday or an official holiday, it shall be extended until the end of the first following day.”

31. Applying the above Rule to the issue before us, it follows that the first working day after 4th July 2015 was 6th July, 2015 and that was the day the Reference was filed. Without belabouring the point, the Reference was filed within time and we so hold.

Handwritten initials or signature.

32. Having so said however, prayer (c) is misplaced and is time-barred in the context of our findings above because it is to the effect that “*the decision of the CNDD – FDD to nominate or put forward the President of Burundi as a candidate for election to the office of the Presidency in the Republic of Burundi violates the Arusha Accord aforesaid and is unlawful.*” That decision was made on 25th April, 2015 and therefore any challenge to it pursuant to Article 30(2) of the Treaty ought to have been filed before this Court on or before 3rd June, 2015. Since the Reference was filed on 6th July, 2015, it follows that Prayer (c) of the Reference is clearly time-barred and we so find.

Issue No.2: Whether or not this Honourable Court has jurisdiction over the interpretation and application of the Constitution of the Republic of Burundi and the Arusha Peace and Reconciliation Agreement on Burundi, 2000.

33. On this issue, the 1st and 3rd Respondents, while acknowledging that this Court has jurisdiction to interpret and apply the Treaty under Article 27(1) as read with Articles 23 and 30(1) of the Treaty, have also urged the point that this Court can only review National Laws with a view to determining compliance with the Treaty but it cannot interpret the provisions of the specific Constitutions such as that of Burundi and/or specifically the Agreement aforesaid.

34. The 3rd Respondent on his part, relies on the decision in **Sitanda Ssebalu vs. Secretary General of the East African Community, EACJ Ref. No.1 of 2010** to make the point that where a court has no jurisdiction as granted by a statute, charter or commission, it cannot assume any such jurisdiction.

35. In response to the above Submissions, the Applicant submitted that the jurisdiction conferred on this Court by Article 30(1) of the Treaty includes the determination of the question whether *an “Act, regulation, directive, decision or action is unlawful or is an infringement of the Treaty.”* That the nuanced distinction between “unlawfulness” and “infringement” of the Treaty would therefore indicate that “unlawfulness” can only be resolved by reference to municipal or national Law and not any part of the Treaty alone. Relying on the decision in **Henry Kyarimpa vs. Attorney General of Uganda, EACJ Appeal No.6 of 2014**, the Applicant made the further point that where an internal law of a Partner State is being impugned, this Court need not await the determination of a municipal court on the same issue before it can render itself on the said issue. Further reliance has been placed on this Court’s decisions in **James Katabazi & 4 Others vs. Secretary General of EAC, Ref. No.1 of 2007**, **Attorney General of Rwanda vs. Plaxeda Rugumba, EACJ Appeal No.1 of 2006** as well as **R. vs. Secretary of the State for Transport ex-parte Factorame (No.2) [1991] AC 603** and **East African Law Society vs. Attorney General of Burundi and Secretary General of the East African Community, EACJ Reference No.1 of 2014** where in the latter case, this Court found that where certain laws enacted by the Parliament of Burundi were in violation of the Treaty, it had the Jurisdiction to declare them so irrespective of the decision of the Constitutional Court of Burundi on the same issue.

Determination of issue No.2

36. All Parties have aptly captured this Court’s approach to questions regarding its jurisdiction which was well articulated in **Katabazi**

(supra) where the Court expressed itself thus on its human rights' jurisdiction:-

“While the Court will not assume jurisdiction to adjudicate Human Rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegations of human rights violation. Similarly, in this Reference, the Court will not abdicate duty to interpret the Treaty merely because Human Rights violations are mention in the Reference” (Emphasis added).

37. The **Katabazi** (supra) holding was later followed in **Anyang' Nyong'o** (supra) and **Rugumba** (supra) among other cases all which expressed the Court's view that its Jurisdiction must flow from the Treaty and nothing else. The said decisions were therefore predicated on Articles 23(1) and 27(1) of the Treaty which provide as follows:-

“ARTICLE 23(1)

1. The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty.”

2.

3.

And

“ARTICLE 27(1)

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."

2.

38. The question that arises flows from the above is, what is "jurisdiction"? In Setanda Ssebalu (supra), the Court defined jurisdiction as:-

"The authority which a court has to determine matters that are litigated before it or to take the cognizance of matters presented in a formal way for its decisions. The limits of this authority are imposed by the Statute, by the Charter or commission under which the Court is constituted."

39. In that context, it must be remembered that the present Reference raises the issue whether the decision of the Constitutional Court in determining that Mr. Pierre Nkurunziza could run for the position of President of Burundi was *inter alia* a violation of Articles 5(3)(f), 6(d), 7(2), 8(1)(a) and 8(c) of the Treaty. Other issues raised are attendant to that central question as we have previously stated and in that regard, it cannot be denied therefore that taking into account the definition of Jurisdiction above and the provisions of the Treaty that grant this Court the express Jurisdiction to interpret the Treaty, then that is the valid issue to determine without doing so outside the lawful mandate of the Court. Further, the merit of such an issue is not a question of Jurisdiction and later in this Judgment we shall address the merits of the Applicant's claims within our Jurisdiction aforesaid.

40. In that context we shall now turn to address the question whether this Court has Jurisdiction to interpret and apply the Constitution of the Republic of Burundi and the Arusha Agreement aforesaid.

41. In that regard, it cannot be denied that the Agreement became domestic law in Burundi and is now known as **Law No. 1/07** promulgated on 1st December, 2000. It is therefore no longer an Agreement between the named Parties to it. Further, this Court has previously stated as follows with regard to interpretation of domestic laws and Constitutions in **Kyarimpa vs. Attorney General of Uganda, EACJ Appeal No.6 of 2014:-**

“When the Court has to consider whether particular actions of a Partner State are unlawful and contravene the Principle of the rule of Law under the Treaty, the Court has jurisdiction, and indeed a duty to consider the internal laws of the Partner States and apply its own appreciation thereof to the provisions of the Treaty. The Court does not and should not abide the determination of the import of such internal law by the National Courts.” (Emphasis added).

42. In addition to the above in the case of **Burundian Journalists Union vs. Attorney General of Burundi & Others, Reference No.7 of 2013**, this Court, upon interrogating the provisions of Burundian **Law No1/11** of 4th June, 2013 reached the conclusion that some of its provisions were enacted in violation of the principles in Articles 6(d) and 7(2) of the Treaty and made specific declarations in that regard. This Court’s Jurisprudence would therefore point to the fact that where a Partner State enacts Laws that contravene, in their normative content or effect, the Treaty, then this Court can lawfully

interrogate such Laws within its mandate. That position can only by extension mean that where a Partner State is said to have breached its own Laws and obligations, such conduct, if found to be true, would certainly be a breach of the principles of the Rule of Law as enshrined in Articles 6(d) and 7(2) aforesaid – see also **Democratic Party vs. Secretary General of the EAC, Appeal No.1 of 2014** and **R Vs. Secretary of State ex-parte Factortome** (supra). In stating so, we reiterate that the mandate of this Court is that granted to it by Articles 23(1), 27(1) and 30(2) of the Treaty and no more.

43. For the above reasons, we are unable to agree with the 1st and 3rd Respondents that this Court has no jurisdiction to interpret the Constitution of Burundi or the Arusha Agreement and if any action purportedly undertaken in furtherance of the said Constitution and Agreement are in any way found to amount to an infringement of or violation of the Treaty, this Court has Jurisdiction to determine such an issue and we so find.

Issue No.3: Whether or not this Honourable Court has jurisdiction to revise, review or quash the decision of the Constitutional Court of Burundi in Case Number RCCB 303 delivered on 5th May, 2015

44. The 1st and 3rd Respondents have argued in this regard that this Court has no jurisdiction to revise, review or quash the decision of the Constitutional Court of Burundi because by dint of Article 231 of the Constitution of Burundi *“the decisions of the Constitution Court are not susceptible to any recourse.”*

45. On its part, the Applicant has submitted that under Article 8 of the Treaty, as read with Article 31 thereof, EAC organs, institutions and law as well as decisions of this Court shall have precedence over

decisions of national organs and institutions as far as the interpretation and application of the Treaty is concerned. That therefore the act of seeking a revision, review or quashing of the decision of the Constitutional Court of Burundi is within the lawful mandate of this Court. Reliance in that regard was placed on the **Burundian Journalists' Case** (supra) and **Anyang' Nyong'o** (supra).

Determination of Issue No.3

46. As we have stated elsewhere above, this Court has primacy in the interpretation of the Treaty but that mandate in our considered view does not extend to the interrogation of decisions of other Courts in a Judicial manner such as is being asked of us in the present Reference. An interrogation of the reasons, ratio decidendi and contents of such decisions would necessarily require that we exercise an appellate Jurisdiction over the said decisions which jurisdiction we certainly do not have. The independence of the Courts of Partner States is a paramount principle of the Rule of Law as envisaged in Articles 6(d) and 7(2) of the Treaty and we cannot in upholding those principles, interfere willy nilly with that independence.

47. What of the Jurisdiction to interpret the aforesaid decision of that Court in the context of the Treaty and whether it was made in violation of the said Treaty? The Applicant has submitted in that regard that we should assume jurisdiction to do so in the context of Article 30(1) of the Treaty. Try as we have, we are unable to see any Jurisdiction to reopen decisions of Courts of Partner States and decide whether such decisions are or are not in line with either the Constitution of Burundi or the Agreement or even the Treaty - See

East African Law Society vs. Attorney General of Burundi & Secretary General of the EAC Ref. No.1 of 2014.

48. In doing so, we reiterate that what is before us is not any question regarding due process before the Constitutional Court of Burundi but the correctness of its decision in the context of the interpretation of the Constitution of the Republic of Burundi and the Arusha Agreement. Only by undertaking an interrogation of that decision as to its correctness can we revise, review and quash it. Such remedies are available only upon a review or appeal against the said decision and not whether it was made in violation of the principles of the Rule of Law as was the approach taken by this Court in determining the issues raised in the **Burundian Journalists** case (supra).

49. For the above reasons, we can only determine Issue No. 3 in the negative.

Issue No.4: Whether or not the 2nd Respondent has legal personality to be sued before the East African Court of Justice under Article 30(1) of the EAC Treaty

50. The 1st Respondent has questioned the joinder of the 2nd Respondent as a party to this Reference maintaining that it has no legal personality to be sued as such.

51. The Applicant on the other hand has submitted that the action of the 2nd Respondent in accepting the nomination of Mr. Pierre Nkurunziza is amenable to interrogation by this Court and therefore it is a proper party to this Reference.

Determination of Issue No.4

52. In that context, Article 30(1) of the Treaty provides as follows:-

“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.”

53. Without belabouring the point, only Partner States and Institutions of the EAC can be sued for violations of the Treaty. The term Partner State needs no explanations but Institutions of the EAC are defined in Article 9(3) of the Treaty in the following terms:-

“Upon the entry into force of this Treaty, the East African Development Bank established by the Treaty Amending and Re-enacting the Charter of the East African Development Bank, 1980 and the Lake Victoria Fisheries Organisation established by the Convention (Final Act) for the Establishment of the Lake Victoria Fisheries Organisation, 1994 and surviving institutions of the former East African Community shall be deemed to be institutions of the Community and shall be designated and function as such.”

54. There cannot be any contestation of the fact that the 2nd Respondent is an Institution of a Partner State namely the Republic of Burundi and not of EAC. It cannot also be said that merely because it is such an Institution of a Partner State then it can be equated to the Republic of Burundi, a Partner State. We say so because, as was stated in

Modern Holdings Ltd. vs. Kenya Ports Authority, EACJ Reference N.1 of 2008, where an entity is created by a Partner State and not the Summit of the EAC, such an entity, whatever its functions, is not a proper party to be sued before this Court. The foregoing must then lead us to an alternative submission by the Applicant; that the 1st Respondent should be held liable for the actions of the 2nd Respondent which are allegedly in violation of the Treaty.

55. On that issue, with tremendous respect to the Applicant, joinder of a party to any litigation is a substantive question not to be treated lightly or flippantly. We say so because nowhere in pleadings was such a plea made and yet, Prayer (d) of the Reference is directed at the 2nd Respondent and not the 1st Respondent as representing the 2nd Respondent. By submissions, a specific pleading cannot be amended nor can alternative prayers be so introduced.

56. Our findings above would therefore lead to the inevitable conclusion that the 2nd Respondent, notwithstanding that it has never entered appearance, was improperly enjoined to this Reference and is struck off the proceedings.

Issue No. 5: Whether or not the Reference discloses any cause of action against the 3rd Respondent

57. The 3rd Respondent, in its response to the Reference and Submissions, has argued that no cause of action is apparent against him and that it ought not to have been enjoined to the Reference at all.

58. In response, the Applicant submitted that as the custodian of the Treaty and EAC Law, the 3rd Respondent should be held

accountable for any failures on his part to discharge that duty as was held in **Sitenda Ssebalu vs. Secretary General of EAC, Reference No.1 of 2010** as well as **East African Law Society vs. Attorney General of Burundi & Anor Reference No.1 of 2014.**

Determination of Issue No.5

59. On our part, while indeed the above decisions point to the fact that this Court has been unhesitant to hold the Secretary General accountable, for any action on his part and which would in specific circumstances call for such accountability, we are unable to say so in the present Reference - see **Ssebalu** and **East African Law Society** cases cited above. In addition, whereas the Secretary General's powers and functions are clearly spelt out in Articles 67 and 71 of the Treaty, we have seen no evidence that he has breached any of his duties in the context of this Reference.
60. We reiterate that the Reference is predicated upon a specific decision of the Constitutional Court of Burundi issued on 5th May, 2015 with attendant events. What was the role of the Secretary General in that matter? None whatsoever and which also explains the fact that in the prayers as set out in the Reference, no substantive prayer is sought against the 3rd Respondent save for an order of implementation of any orders to be issued by this Court should the Reference succeed.
61. Without belabouring the point, there was no plausible reason why the 3rd Respondent was enjoined to this Reference and we so find.

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

62. We now return to the Prayers sought in the Reference in light of our findings above and in that regard, we note that Prayers (a), (b) and (e) relate to the decision of the Constitutional Court of Burundi and we have held that we decline the invitation to interrogate such a decision in content and effect.

63. Prayer (c) relates to the decision of CNND-FDD to nominate Mr. Pierre Nkurunziza as its Presidential candidate. We have stated that the said issue is time-barred.

64. Prayer (d) relates to the conduct of the 2nd Respondent and we have said that the said Respondent was improperly enjoined to this Reference and having struck it off the proceedings, no order can be issued against it.

65. Prayers (f) and (g) are directed at the 1st and 3rd Respondents and we have held that the prayers cannot stand on their own without prayers (a) (b) and (e) being granted. In any event, there is no evidence that the 3rd Respondent has failed to comply with the directives issued in **EACJ Reference No.1 of 2014** which Reference was decided on its merits which have nothing to do with this Reference and or its substratum. Its invocation in these proceedings is in any event most baffling to us. That being the case, the said prayers cannot be granted.

66. On costs we shall make the necessary orders at the end of this Judgment.

CONCLUSION

67. This Reference has brought to the fore the continuing and emerging questions regarding the rule of law in Partner States within the EAC. This Court, faithful to its mandate, has found that the present Reference does not meet the muster of the Treaty and the same has to fail.

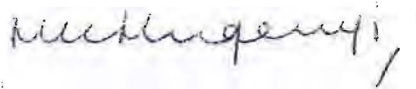
DISPOSITION

68. For the above reasons, the present Reference is dismissed.

69. Regarding costs, Rule 111 of the Court's Rules grants this discretion to determine whether any party is entitled to costs. In the circumstances our decision is that each party should bear its own costs noting the nature of the dispute before us and the fact that the Applicant filed the Reference in Public Interest.

70. Orders accordingly.

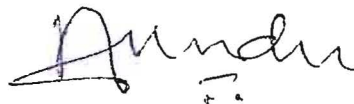
Dated, Delivered and Signed at Arusha this 29th Day of
September 2016.



.....
MONICA MUGENYI
PRINCIPAL JUDGE



.....
ISAAC LENAOLA
DEPUTY PRINCIPAL JUDGE



.....
FAKIHI A. JUNDU
JUDGE

ok