



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



(Coram: Monica K. Mugenyi, PJ; Faustin Ntezilyayo, DPJ; Fakihi A. Jundu, Audace Ngiye & Charles O. Nyawello, JJ)

REFERENCE NO.5 OF 2016

ISMAEIL DABULE & 1004 OTHERS APPLICANTS

VERSUS

ATTORNEY GENERAL OF UGANDA RESPONDENT

28TH NOVEMBER 2018

Reference No.5 of 2016

JUDGEMENT

A. INTRODUCTION

1. This is a Reference filed on 6th September 2016, and amended on 27th October 2016, by Ismail Dabule and 1004 Others (hereinafter referred to as 'the Applicants'), made under Articles 6(d), 7(2), 27 and 30 (1) and (2) of the Treaty for the Establishment of the East African Community (hereinafter referred to as 'the Treaty'); and Rules 24(1), (2) and (3) of the EACJ Rules of Procedure, 2013 (hereinafter referred to as 'the Rules').
2. The Applicants are ordinarily resident in Uganda, and their address for the purposes of this Reference is: C/O Omongole & Co. Advocates, Plot 30 Kampala Road, 2nd Floor Greenland Towers, P.O. Box 28511, Kampala. E-mail: omongole@yahoo.com.
3. The Respondent is the Attorney General of the Republic of Uganda, pursuant to Article 119(4) of the Constitution of the Republic of Uganda.

B. BACKGROUND

4. In 1979, the National Consultative Council of Uganda enacted the Banking Act 1969, which was amended by the Banking Act (Amendment) Statute 18 of 1980 to introduce section 26A and 26B which gave the Minister of Finance power to make Legal Notices 2 of 1982, and 2 and 3 of 1984 freezing the Applicants' bank accounts.

5. Pursuant to the *Banking (Freezing of Accounts) Legal Notice No.2 of 1982* and *Legal Notices No.2 and No.3 of 1984*, the then Minister of Finance instructed Bank of Uganda to take over the Applicants' Accounts in commercial banks in Uganda so as to freeze the various personal and business accounts belonging to the Applicants. Upon freezing the Applicants' accounts, the Central Bank had all the funds transferred to itself.
6. On 3rd February 1995, the then Minister of Finance wrote to the banks to defreeze the said accounts, on the basis of which learned Counsel for the Applicants wrote a letter to the Bank of Uganda on 21st March 2003, seeking to implement the Minister's letter.
7. In April 2004, the Applicants filed Constitutional Petition No.2 of 2004, *Ismail Dabule and 2 Others vs. Attorney General and Bank of Uganda*, seeking a defreezing order, compensation for the continued defreezing of the accounts in question, and payment of the principal amounts and interest. The court dismissed the petition by its Ruling delivered on 14th September 2007.
8. Dissatisfied with that Ruling, the Applicants lodged Constitutional Appeal No.3 of 2007 before the Supreme Court of Uganda. By its Judgment of 30th October 2015, the Supreme Court dismissed the Constitutional Appeal on the authority of both *Ismail Serogo vs. Kampala City Council and Attorney General, Constitutional Appeal No.2 of 1998* and *Attorney General vs. Major General D. Tinyefuza, Constitutional Appeal No.1 of 1997*.

9. The thrust of the present Reference is that after the clarification by the national courts on the matter of the accounts in question, the continued refusal by the Government of Uganda to release those funds constitutes a violation of Articles 6(d) and 7(2) of the Treaty.
10. At the hearing, the Applicants were represented by Mr. Richard Omongole, while Mr. Elisha Bafirawala, Mr. Gerald Batanda and Mr. Bichachi Ojambo appeared for the Respondent.

Applicants' Case

11. The Applicants' case is set out in their Amended Statement of Reference filed on 26th October 2016, an Affidavit sworn on by Ismail Dabule on 18th October 2016 and filed on the same date as the Amended Statement of Reference, written submissions filed on 29th November 2017, and oral submissions made during the hearing.
12. In Submissions, Counsel for the Applicants contended that, after the decisions of the national courts clarifying the unfreezing of the accounts in question, the persistent refusal of the Government of Uganda to release the funds constituted a violation of Articles 6(d) and 7(2) of the Treaty.
13. With respect to time-limit stipulated by Article 30(2) of the Treaty, learned Counsel relied on the precedent of **Audace Ngendakumana vs. The Attorney General of Burundi, EACJ Ref. No.11 of 2014**, and maintained that the Applicants had filed the present Reference in strict compliance with the time limit set by Article 30(2) of the Treaty. On the protection of right to property and non-discrimination, learned

Counsel for the Applicants further relied on **Venant Masenge vs. The Attorney General of Burundi, EACJ Ref. No.9 of 2012** to conclude that the act of the Government of Uganda contravened Articles 6(d) and 7(2) of the Treaty. On the matter of competence of the EACJ, as a Judicial body, to ensure adherence to law "*in the interpretation and application of and compliance with the Treaty*", he invited this Court to consider its decision in **Sitenda Sebalu vs. The Secretary General of the East African Community and 3 Others, EACJ Ref. No.1 of 2010**. Finally, learned Counsel invoked three (3) Articles from the Constitution of Uganda to support his position: Article 21(1) pertaining to equality before the law; Article 24 covering such elements of Human Rights as torture, cruel inhuman, and degrading treatment or punishment; and Article 26 dealing with the right to property.

14. On that premise, Counsel sought the following Declarations from this Court:

- a. That the refusal by the Government of Uganda to release to the Applicants the money that was wrongfully frozen on their accounts and unfrozen as declared by Courts of Uganda is a breach of Treaty establishing the East African Community in Articles 6(d) and 7(2) that enjoin all partner states to govern while adhering to the rule of law ;***
- b. A Declaration that in violation of the Applicants' fundamental rights and freedom against discrimination, right to fair and just administrative decision, right to***

property and livelihood, the Government of Uganda by continued refusal to pay or give back the Applicants their money equivalent to date is acting illegally, unlawfully and is in violation of Uganda's obligations under Articles 6(d) and 7(2) of the Treaty;

- c. A Declaration that the continued holding onto the Applicants' money by the Government of Uganda without any justification, without a due process of law or any form of administrative process before the refusal to release the said money is illegal, unlawful and in violation of the Applicants' right to property, right to fair hearing, freedom from discrimination, right to fair administrative action and contrary to the provisions of Articles 6(d) and 7(2) of the Treaty ;*
- d. A Declaration that the continued holding onto the Applicants' Bank documents and account balances details relating to frozen accounts after the courts pronounced the accounts unfrozen is an infringement of the Treaty ;*
- e. An Order that costs of and incidental to this Reference be met by the Respondent; and*
- f. That this Court be pleased to make such further or other orders as may be fit and just in the circumstances of the Reference.*

Respondent's Case

15. The Respondent's case is as stated in his Response to the Amended Reference filed on 28th February 2017, an Affidavit in support thereof deposed on 24th February 2017, written submissions filed on 30th May 2017, and oral submissions made on the day of the hearing.
16. In Submissions, Counsel for the Respondent denied the claims of the Applicants *in toto*, principally on grounds of *res judicata*, arguing that no national court had determined the Applicants' entitlement to payment; the Respondent had at all material times respected the Applicants' right to property; the Respondent was not in custody of any of their frozen accounts; rather, the Applicants had been treated fairly and neither discriminated against nor subjected to any form of torture or cruel, inhuman and degrading punishment, and the Respondent had not, by any act or omission, violated or infringed any provisions of the Treaty.
17. Counsel relied upon Ibrahim Ulego & Others vs. Attorney General, High Court Civil Suit No. 138 of 2004, which had been dismissed on account of being time-barred; Attorney General of Kenya vs. Independents Medic Legal Unit, EACJ Appeal No. 1 of 2011, on the rationale of time limitation enshrined in Article 30(2) of the Treaty, and Attorney General of the Republic of Uganda & Another vs. Omar Awadh & Others, EACJ Appeal No. 2 of 2012, which clarified the concept of legal certainty embodied in Article 30(2) of the Treaty. He did also cite Benkay Nigeria Ltd vs. Cadbury Nigeria, Suit No. 29 of 2006 (Nigeria Supreme Court), as well as

one academic authority: Aduaka, Charles E. & Ifeyinwa Mercy Anyaegbu. 2013. *The Abuse of Legal Process in Nigeria: The Remedies.* Journal of Law, Policy and Globalization, Volume 20, pp. 126-134 at p.128, which define and set out the law on *abuse of court process*. In addition, the Counsel invoked Ismail Dabule & Others vs. Attorney General of Uganda & Another, Constitutional Appeal No.3 of 2007, which had confirmed the dismissal of the Constitutional Petition No.2 of 2004 by the Constitutional Court of Uganda and Ismail Dabule & Others vs. Attorney General & Bank of Uganda, Civil Suit No. 300 of 2017, which is pending determination before the High Court of Uganda, on the matter of those frozen bank accounts.

18. In conclusion, Learned Counsel for the Respondent invited this Court to invoke its power under Rule 1(2) of its Rules to stamp out what he perceived to be '*glaring abuse of court process*', and sought the dismissal of the Reference with costs.

Issues for Determination

19. Pursuant to a Scheduling Conference held on 11th September 2017, the following issues were framed by the Parties:
- a. Whether the Reference is time-barred;***
 - b. Whether the Applicants have locus standi. This issue was subsequently conceded by the Respondent. Therefore, it shall not be canvassed in this judgment;***

- c. *Whether the Ugandan Government's alleged continued refusal to allow the Applicants access their frozen funds or its equivalent to date, is a violation of Articles 6(d) and 7(2) of the Treaty;*
- d. *Whether the Government's alleged refusal to release the Applicants' documentation and account balances relating to their frozen funds is a violation of Articles 6(d) and 7(2) of the Treaty;*
- e. *Whether the alleged violations by the Government of Uganda of the Applicants' rights to a fair hearing, right to property and freedom from discrimination are a violation of Uganda's obligations under Articles 6(d) and 7(2) of the Treaty; and*
- f. *Whether the Applicants are entitled to the remedies sought.*

C. COURT'S DETERMINATION

Issue No.1: Whether the Applicants Reference is time-barred.

20. It was the Respondent's contention that this Reference is time-barred, as it was filed outside the time-limit of two-months prescribed under Article 30(2) of the Treaty. As stated earlier herein, Counsel for the Respondent cited **Ibrahim Ulego & others vs. Attorney General** (supra), which was dismissed on account of being time-barred.

21. Learned Counsel for the Respondent relied upon the following decision of the **Appellate Division of this Court in Attorney**

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General of Kenya vs. Independents Medic Legal Unit (supra) to argue that the Treaty made no provision of extension of time within which References may be filed:

“Again, no such intention (to exclude the time limit) can be ascertained from the ordinary and plain meaning of the said Article 30(2) or any other provision of the Treaty. The reason for this short time limit is critical. It is to ensure legal certainty among the diverse membership of the Community.”

22. He did also cite the case of **Attorney General of the Republic of Uganda & Another vs. Omar Awadh & Others** (supra), where the Appellate Division confirmed the position of legal certainty as follows:

“... the court[sic] is of the same view that the object of Article 30(2) is legal certainty. It still notes that the purpose of this provision of the Treaty was to secure and uphold the principle of legal certainty; which requires a complainant to lodge a reference in East African Court of Justice within the relatively brief time of only two months. Nowhere does the Treaty provided for any "exception" to the two-month period.”

23. Apart from the foregoing judicial precedents, the Counsel made reference to an academic article, **Tyler T. Ochoa, 'The Puzzling Purposes of Statutes of Limitation', Santa Clara Law Digital Commons, 1997, pp. 453 - 514**¹, where the concept of limitation was

¹ Available at: <http://digitalcommons.law.scu.edu/facpubs/81>

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most articulately espoused. We do revert to a more detailed consideration of this article later in this judgment.

24. Conversely, Counsel for the Applicants contended that the Applicants filed the present Reference in strict compliance with the time limit set by Article 30(2) of the Treaty. It was his contention that after the decisions of the national courts allegedly clarifying the unfreezing of the Applicants' accounts, the Applicants had, on 5th August 2016, written to the Minister of Finance demanding for the release of their money but the said Minister did not respond to their demand, whereupon, acting on the presumption that the Government had declined to release their money, they filed the present Reference on 6th September 2016. Thus, in his view, the cause of action in issue presently is the 2016 'refusal' of the Ugandan Government to release the funds sought. Learned Counsel sought to buttress his argument with the case of **Audace Ngendakumana vs. the Attorney General Burundi** (supra), where the Appellate Division held that "Article 30(2) of the Treaty demands strict application of the time limit stated therein".

Determination of Issue No.1:

25. We have read and considered carefully the pleadings and submissions, together with the supporting legal authorities cited by the Parties. Article 30(2), on which the present issue hinges, 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

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thereof, of the day in which it came to the knowledge of the complainant, as the case may be."

26. In our view, a decision on limitation period entails the ascertaining of the distinct point in time when the period begins to run in each case. In this regard, the records of the present Reference reveals the following chronology:

- a. By Legal Notice No.2 of 1982 and Legal Notices No.2 and No.3 of 1984, the Government of Uganda froze the Applicants' accounts;*
- b. On 3rd February 1995, the Minister of Finance wrote to commercial banks to defreeze those accounts;*
- c. On 21st March 2003, the Applicants wrote to the Bank of Uganda, requesting the implementation of the Minister's directive above;*
- d. In April 2004, the Applicants filed Constitutional Petition No.2 of 2004, which was dismissed vide a judgement dated 14th September 2007. Thereafter, Constitutional Appeal No. 3 of 2007, an appeal from that decision, was similarly dismissed by the Supreme Court of Uganda by its judgment of 30th October 2015; and*
- e. On 6th September 2016, the Applicants filed this Reference in this Court.*

27. It seems to us that the action or decision that initially gave rise to the Applicants' cause of action would have been the decisions vide *Legal Notices No. 2 of 1982 and Nos.2 and 3 of 1984* to freeze their accounts. However, that decision was subsequently reversed vide the Minister of Finance's letter of 3rd February 1995, and it would appear that it was on the basis of that letter of reversal that the Applicants did, in 2003, write to the Central Bank of Uganda, seeking the implementation of the Minister's 1995 directive and unsuccessfully instituted legal action against the present Respondent and the Bank of Uganda in the Constitutional Court and Supreme Court of Uganda. Be that as it may, in paragraph 3(a), (b) and (d) of the Amended Reference it is quite clear that the action complained of by the Applicants is the Respondent's alleged refusal to release the monies in the previously frozen accounts despite the alleged 'decisions of the National Courts clarifying the unfreezing of the said accounts.' Therefore, the questions we would be occupied with would be, first, whether in fact the national courts of Uganda did clarify the position on the 'unfrozen' accounts so as to entrench the Applicants' claim herein thus giving rise to a cause of action and, if not, before a consideration of the time limitation, whether we have before us a sustainable cause of action; even before we consider whether it was brought within time.

28. We are constrained to observe from the onset that, despite having raised the issue of the alleged clarification of the legal position on the accounts, the Applicants did not in their Written Submissions indicate which national courts' decisions made the said clarifications. In oral

highlights of their Submissions, we understood learned Counsel for the Applicants to allude to the decisions in Constitutional Petition No. 2 of 2004 and the Appeal therefrom to wit Constitutional Appeal No. 3 of 2007 as the decisions in question. The Respondent, on the other hand, contended that the said decisions did not clarify the legal position on the accounts in issue in the present case, but simply observed that there was need for an 'ordinary' national court² to interrogate why the hitherto frozen had not yet been accessed by the Applicants.

29. We have carefully considered the judgments in **Constitutional Petition No.2 of 2004** and **Constitutional Appeal No.3 of 2007**, as invoked by Counsel for the Applicants. We do agree with Counsel for the Respondent that neither the Constitutional Court nor the Supreme Court of Uganda pronounced itself on the legal position governing the accounts in question, the latter apex court simply recommended the interrogation of the current status quo by the right court in Uganda. Indeed, whereas the Supreme Court acknowledged that the Applicants had a 'genuine grievance' that called for redress, it did not think the grievance in question called for constitutional interpretation by the Constitutional Court. In our view, the acknowledgment of the genuine grievance is tantamount to acknowledgment that the Applicants did have a 'cause of action' albeit in the ordinary courts, but is most certainly not a clarification of the legal position on the unfrozen accounts. Quite clearly, therefore, the Respondent did not act in contravention of any court decision or order, as alleged by the

² Ordinary courts as opposed to the Constitutional Court.

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Applicants, and any complaint in respect thereof is misconceived and unsustainable. Having so held, it does follow that the Respondent cannot be held to have contravened the principle of rule of law under Articles 6(2) and 7(d) of the Treaty in that regard. We so hold.

30. That then begs the question as to the import of the Respondent's alleged refusal to release the monies in the frozen accounts to the issue of time limitation under consideration presently. It was argued for the Applicants that the Respondent's alleged refusal is captured by the refusal of the Minister of Finance to respond to a letter from the Applicants' lawyer dated 5th August 2016, and captioned '*Final Demand for payment of Frozen Accounts Money after Court decision*'. We have categorically held above that there was no court decision that supported any claim in respect of the frozen or unfrozen accounts. In fact, in addition to the constitutional cases considered earlier in this judgment, a case on the same subject – **Ibrahim Ulego & Others vs. Attorney General** (supra), – had been dismissed by the High Court of Uganda for *inter alia* being time barred.

31. Can it then be maintained, as has been opined by the Applicants, that the letter of 5th August 2016, premised as it was on a misdirection of the facts but nonetheless seeking the commitment of the Minister of Finance on modalities of payment of the monies sought, be tantamount to a grievance giving rise to a cause of action before this Court? Related to that, would non-response to a request that is rooted in a false premise give rise to a cause of action under Article 30(1) of the Treaty? Stated differently, we have before us a

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contention by the Applicants that a letter that was premised on a misdirection of the law by them, as well as a self-determined presumption that non-response thereto by the Minister to whom it was addressed would be tantamount to refusal to act on the misdirected legal position, is being flouted as the premise for the cause of action in the present Reference.

32. With respect, we are unable to agree with the Applicants on this proposition. We deem it necessary to interrogate the nature of the cause of action in the Amended Reference before us to enable us address the question as to whether it has been instituted within the requisite time. It is apposite to state here that a distinction has been drawn between a cause of action under EAC law viz one under the traditional common law. A cause of action before this court has, in numerous cases, been held to exist **'where the Reference raises a legitimate legal question under the Court's legal regime as spelt out in Article 30(1); more specifically, where it is the contention therein that the matter complained of violates the national law of a Partner State or infringes any provision of the Treaty. Causes of action before this Court are grounded in a party's recourse to the Court's interpretative and enforcement function as encapsulated in Article 23(1) of the Treaty, rather than the enforcement of typical common law rights.'** See *Sitenda Sebalu vs. The Secretary General of the East African Community & Others EACJ Ref. No.1 of 2010; Simon Peter Ochieng & Another vs. The Attorney General of the Republic of Uganda, EACJ Ref.*

No.11 of 2013 and FORSC & Others vs. Attorney General of the Republic of Burundi (supra).³

33. In the instant case, the Applicants' cause of action would have been two-fold: first, that the Respondent violated the legal position on the unfrozen accounts as clarified by the national courts of Uganda and, to that extent, they do appear to challenge the purported violation of national law; and secondly, the Applicants contend that the said disregard for the national legal position is a breach of Articles 6(d) and 7(2) of the Treaty. Indeed, in the case of Simon Peter Ochieng & Another vs. Attorney General of Uganda (supra), where the material before the Court denoted silence from the President of the Republic of Uganda on the appointment of judges, a cause of action was held to have been disclosed in the following terms:

“The Reference raises issues of due process in the appointment of judges and the implication of in-action in that respect to the effective administration of justice and, indeed, the function of the Judiciary in the national governance structure. The subject matter that gives rise to a cause of action herein would be the inaction by the President with regard to the appointment of judges despite the recommendations of the Judicial Service Commission. Stated differently, the matter in issue presently is the ‘decision’ by the President not to act on the recommendations of the Judicial Service Commission. It is this decision that is

³ Cited with approval in British American Tobacco (BAT) Ltd vs. Attorney General of Uganda, Appl. No. 13 of 2017.

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construed by the Applicants as a refusal to effect judicial appointments as recommended. Further, the Reference raises questions to do with the President's compliance with the legal regime of Uganda, on the one hand; as well as whether or not his decision as described above is in compliance with the principles outlined in Articles 6(d) and 7(2) of the Treaty."

34. Suffice to note nonetheless that in that case,⁴ the Court further held that the Applicants bore the onus of proof of that 'decision' being tantamount to a 'refusal' by the President of the Republic of Uganda to appoint judges. Similarly, in the present case, the Applicants bear the burden of proof of the Respondent's alleged refusal to comply with Ugandan national law, as well as the existence of the national law that they sought to invoke. The circumstances of the present case are such that it is debatable whether there is a live dispute before us at all.

35. We are acutely alive to the fact that the validity of the dispute or whether indeed there is a live dispute before us is an issue that was not raised before us. Nonetheless, the Court's rules of Procedure provide sufficient latitude for a court to interrogate a point of law raised on its own motion. In that regard, we fall back to the inherent powers of the Court as encapsulated in the indefatigable Rule 1(2) of the Rules. It reads as follows:

"Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as

⁴ The **Simon Peter Ochieng** case

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may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

36. Having found as we have earlier in this judgment that there was no clarification of the legal position on the unfrozen accounts as was claimed by the Applicants, and in the absence of any other evidence to the contrary, we find that the circumstances of this case do not support the Applicants’ allegations of a violation of Ugandan national law by the Respondent, neither do they establish a Treaty violation on account of purported breach of Ugandan national law.

37. In any event, we do observe that the Applicants’ letter of 5th August 2016 (upon which they sought to premise the present Reference) essentially sought payment of the monies on their previously frozen accounts on the basis of alleged court decisions, rather than applicable national law *per se*. Indeed paragraph 3 of the said letter alluded to ongoing discussions on ‘how the payment was to be made’. Against the backdrop of the letter’s reference to non-existent court decisions, however, we cannot fault the Respondent for declining to respond to a letter premised on falsehoods, neither is it readily apparent to us what was the legal basis of the Applicants’ purported 2-week ultimatum to the Minister to either respond to the letter or be deemed to have refused to do so.

38. From the provisions of the *Financial Statutes (Amendment) Act of 1993*, as well as the Minister of Finance’s letter of February 1995, it is apparent that the Applicants’ hitherto frozen accounts had been unfrozen. Thus, the real issue in contention between the Applicants

and the Ugandan Government was whether an earlier currency reform process should apply to the payments due to the Applicants and not necessarily the implementation of any court decisions, real or imaginary. This is reflected quite succinctly in the Minister's letter of February 2018. Nonetheless, that issue was not raised in the pleadings before us, neither was it canvassed in submissions. We shall therefore not belabor it further, save to note that the Respondent's commitment to equivocally and equally apply to all Ugandans a reform process established by a Partner State would not constitute a violation of due process or the rule of law, as enshrined in the Treaty.

39. Consequently, it becomes abundantly clear that in the interrogation of Issue No.1 thereof, has transpired that the present Reference is premised on the false premise of non-existent court decisions; the Applicants have not established what, if any, Ugandan national law was contravened by the Respondent, and therefore there is no live dispute before us.

D. CONCLUSION

40. Having decided as we have in the preceding issue that there is no live dispute before the Court, it would be an exercise in futility to purport to determine the residual issues in this Reference. The Court finds that the matter was not properly before it. Accordingly, the Reference is dismissed with costs to the Respondent.

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Dated, signed and delivered at Arusha this *28th* day of November, 2018.

Monica K. Mugenyi

HON. LADY JUSTICE MONICA K. MUGENYI
PRINCIPAL JUDGE

Dr. Faustin Ntezilyayo

HON. JUSTICE DR. FAUSTIN NTEZILYAYO
DEPUTY PRINCIPAL JUDGE

Fakihi A. Jundu

HON. JUSTICE FAKIHI A. JUNDU
JUDGE

Audace Ngiye

HON. JUSTICE AUDACE NGIYE
JUDGE

Charles O. Nyawello

HON. DR. JUSTICE CHARLES O. NYAWELLO
JUDGE