



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



*(Coram: Monica K. Mugenyi, PJ; Isaac Lenaola, DPJ; Faustin Ntezilyayo, J;
Fakihi A. Jundu, J & Charles Nyawello, J)*

REFERENCE NO. 6 OF 2016

GRANDS LACS SUPPLIER S.A.R.L. & OTHERS.....APPLICANTS

VERSUS

**THE ATTORNEY GENERAL OF
THE OF BURUNDI.....RESPONDENT**

19TH JUNE 2018

JUDGMENT OF THE COURT

A. INTRODUCTION

1. This is a Reference filed on 28th September 2016 by Grands Lacs Supplier S.A.R.L and Others (hereinafter referred to as “the Applicants”), under Articles 3(e), 5(3)(d), 6(d), 7(1)(a)(c), 8(1)(a) &(c), 8(5), 27(1), 29, 30, 38, 71, 75, 76 and 105 of the Treaty for the Establishment of the East African Community (hereinafter referred to as “the Treaty”); Articles 2, 3, 4, 5 and 6 of the Protocol on the Establishment of the East African Community Common Market; Article 39 of the Protocol on the Establishment of the East African Community Customs Union, and Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure 2013 (hereinafter referred to as “the Rules”). The Applicant is a trading company duly incorporated in the Republic of Uganda. The company is also registered to do business in the Republic of Rwanda. The Applicant’s address of service for purposes of this Reference is care of Messrs. Ochich T.L.O. & Associates Advocates, Postbank House, 4th Floor Right Wing, Banda Street of Market Lane, P.O. Box 79367-0020 Nairobi. Email: ochicht@gmail.com; Telephone: +254 722 687291/+254 721 335162.
2. Grands Lacs Suppliers S.A.R.L brings this Reference on its own behalf and on behalf of other general traders resident in the East African Community, namely Byansi Edward, Bizabishaka Eric Kamuhanda Moses and Murerwa Audreille who duly executed Powers of Attorney granting it authority to institute the instant Reference in pursuit of compensation for their seized goods.

3. The Respondent is the Attorney General of the Republic of Burundi who is sued in his capacity as the Principal Legal Advisors of the Republic of Burundi. His address is given as care of the Minister of Justice, Republic of Burundi, P.O. Box 1870, Bujumbura, Burundi.
4. Initially, the Applicant had also filed the Reference against the Secretary General of the East African Community as the 2nd Respondent, but during a hearing held on 7th March 2018, the Applicant, through his Counsel, withdrew the case against the Secretary General.
5. The Applicants alleged that the Respondent unlawfully seized their goods on 30th July 2016 in violation of the fundamental principles and objectives of the Treaty and the Protocols on Customs Union and Common Market in that the seizure hinders the free movement of goods by Partner States' nationals across their borders.
6. The Applicants seeks the following prayers and orders against the Respondent:
 - (i) A declaration that the decision taken by the Respondent through Mr. Ndayiragije Boniface, the Advisor of the Minister of Human Rights Affairs on 30th July 2016 is in violation of Articles 6,7 and 105 (1)(b) and (2)(g) of the Treaty Establishing the East African Community;
 - (ii) A declaration that the said unlawful decision of the Respondent is in violation of Article 2,3,4,5 and 6 of the Protocol on the East African Community Common Market;

- (iii) A declaration that the said decision of the Respondent is in violation of Article 39 of the Protocol for the Establishment of the East African Community Customs Union;
- (iv) An order compelling the Respondent to pay the Applicant USD 218,849 in compensation for losses on truck hire, loss of profits, loss of investments and loss of earnings;
- (v) An order compelling the Respondent to pay general damages to the Applicant for unlawful seizure of goods, breach and violation of EAC Treaty, Customs Union and Common Market Protocols, wrongful deprivation/denial of property and inconvenience to and hampering of Partner States' nationals' business, trade and economic activity;
- (vi) An order compelling the Respondent to pay interest on the amount in (v) above at court rates from the date of this Reference until paid in full;
- (vii) An order that the costs of and incidental to this Reference be met by the Respondent;
- (viii) That this Honorable Court be pleased to make such further or other orders as may be necessary in the circumstances.

B. REPRESENTATION

7. The Applicant was represented by Mr. Kennedy O. Wanyanga and Mr. Dieudonné Bashirahishize while Mr. Nestor Kayobera appeared for the Respondent.
8. During the Scheduling Conference, Counsel for the Respondent contested Mr Dieudonné Bashirahishize's appearance before this

Court alleging that the latter was disbarred by the Court of Appeal of Bujumbura for having violated Law No. 1/14 of November 2002 reforming the Status of the profession of advocates and Law No.1/28 of December 2013 regulating demonstration and public meetings and that the lawyer was under an international warrant of arrest for serious criminal charges being prosecuted under case No. RMPG.696/MA and 697/MA. But later on, Mr. Bashirahishize submitted to the Court a certificate issued by the Rwanda Bar Association showing that he was (and still is) duly enrolled to practice law and the lawyer's appearance was therefore found to be in compliance with the Court's Rules.

C. THE APPLICANTS' CASE

9. The Applicants' case is set out in their Statement of Reference filed on 28th September 2016, an Affidavit in support of the Reference sworn on even date by Mr. Rugerinyange Salvator, General Manager of Grands Lacs Suppliers S.A.R.L., Written Submissions filed on 17th July 2017 and submission highlights made on 7th March 2018.
10. The Applicants contend that sometime in July 2016, they sought to convey goods comprising foodstuffs mainly maize, beans and cassava through the Republic of Burundi having purchased them from the United Republic of Tanzania. They said goods, perishable by nature, were transported via road in 6 trucks, which journey was scheduled to take them from Tanzania via Burundi, Rwanda and finally to Uganda, the final destination of the goods.
11. The Applicants further contend that they paid all requisite statutory, and government levies, charges, fees and taxes as

required by Burundian laws, in order to permit the lawful and safe passage of the goods through and out of Burundi. The Applicants also contended that they had purposed to exit Burundi via the border point at Kobero, having chosen the Kirundo-Rutete-Kigali-Kampala route as the shortest and most economically viable.

12. It is the Applicants' allegation that the goods were cleared at the Kobero border, but due to lack of a functional scanner at the said border point to enable validation/authentication of the goods, the Respondent directed that the Applicants should convey their goods out of the Burundian territory via the border point of Kanyaru-Haut, where there was a working scanner.
13. The Applicants further contended that contrary to the Respondent's allegations, there was no deviation in route, nor was there any flouting of Burundian internal law. Rather, it is the Applicants' case that having complied with the Respondent's directive to exit via Kayanza/Kanyaru-Haut, it thereafter transpired that the Applicants' goods were seized on 30th July 2016 by the Respondent at the same border post despite the payment of the requisite government transit taxes and the clearance for exit of the goods by the Respondent's Customs and Revenue Authority.
14. The Applicants do also assert that on 1st August 2016 when that allegedly unlawful seizure first came to their knowledge, they promptly wrote to the Commissioner of Customs and Excise in Bujumbura asking for clarification on the reasons for the seizure of the goods and demanding their immediate realisation.
15. The Applicants furthermore stated that on 3rd August 2016, having failed to receive any response from the Respondent to their letter

dated 1st August 2016, they communicated the matter to the Minister of Commerce of Burundi, the 2nd Vice President of the Republic of Burundi, and the Minister of Home Affairs and in that communication, they again reiterated their concern and demand for release of the goods. The Applicants also indicated that a further follow up on the incident was made by letter dated 8th August 2016 when they sought recourse from the Permanent Secretary in the Ministry for East African Community in Burundi.

16. The Applicants also contend that on 10th August 2016, and in a specific response to its letter, the Commissioner of Customs and Excise of the Burundi Revenue Authority wrote to them re-affirming that there was no lawful cause for their goods to be held as they had been cleared and that an "acquittal" had been issued at the Kanyaru-Haut border. The Applicants further contended that given the Respondent's continued failure to release the goods, they made several additional written appeals to the Respondent along with relevant government authorities in Rwanda and Uganda seeking their intervention, to no avail.

17. Finally, dissatisfied with the "*Respondent's egregious violation of municipal, Community and international laws,*" they had no other recourse but to institute the instant Reference. They thus pray that the Reference be allowed and that orders sought as reproduced herein above be granted.

D. THE RESPONDENT'S CASE

18. The Respondent's case is as stated in his Response to the Reference filed on 15th December 2016, an Affidavit in support of his Response sworn on 15th December 2016 by Mr. Arcade

Harerimana, Permanent Secretary in the Ministry of Justice, his Written Submissions filed on 12th September 2017 and submission highlights made on 7th March 2018.

19. The Respondent pleaded that:

- (a) On 24th July 2016, 5 trucks transporting goods were seized by communal, provincial administrative and security officials at the Kanyaru-Haut border in Ngozi Province.
- (b) The Applicants had, however, declared that they would use the Kirundo-Rutete-Kigali-Kampala Route.
- (c) The Applicants deviated from the original route and the one used to arrive at Kanyaru-Haut was different from the one declared at Kobero and all documents shown by the Applicant to the Government officials in Ngozi were just photocopies.
- (d) Since the route taken to arrive at Kanyaru-Haut and the loads of goods discovered at Kanyaru-Haut differed from the ones at Kobero, the Applicants and the destination of the trucks became suspicious.
- (e) The Government of Burundi had already taken a decision not to allow those kinds of goods to leave the country, especially for security purpose, and the goods were distributed to vulnerable people in order to discourage fraudulent business people.
- (f) The empty five trucks were given back to the Applicant.

(g) The decision taken was to protect the security of the country and of its people and does not violate any provision of the Treaty, the EAC Common Market protocol and/ or the EAC Customs Union Protocol.

(h) This Court does not have jurisdiction to entertain the Reference as doing so would contravene the provisions of Article 27(2) and 30(3) of the Treaty except in respect of prayers i,ii,iii, and ix.

(i) The Applicants are not entitled to the remedies sought and therefore, the Reference ought to be dismissed with costs.

E. ISSUES FOR DETERMINATION

20. Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on 6th June 2017 at which the following were framed as issues for determination:

(a) Whether this Court has jurisdiction to entertain this Reference.

(b) Whether the Reference is time-barred.

(c) Whether the Applicants are entitled to the remedies sought against the Respondent.

Issue No. 1: Whether this Court has jurisdiction to entertain this Reference:

21. The question as to whether the Court has jurisdiction to entertain this Reference was an issue raised by the Respondent. In that regard, it was submitted that this Court had jurisdiction to entertain and determine matters pertaining to the interpretation and

application of the Treaty as raised in the Applicant's prayers (i), (ii) and (iii) on the alleged unlawful seizure of the Applicants' goods, but that the Court lacked jurisdiction to grant prayers (iv), (v) and (vi) on damages and interest thereof. Counsel for the Respondent submitted that the Applicants' prayer (iv) to compel the Respondent to pay it \$US218, 819 in compensation for "*the so-called losses on truck hire, loss of profits, loss of investments and loss of earnings*" was unfounded since the Court does not have such a jurisdiction therefore this would be violating the provisions of Article 27(2) and 30(3) of the Treaty. Similarly, with regard to prayers (v) and (vii), Counsel contended that the power to compel the Respondent to pay compensations for "*so-called general damages and interests for losses (especially unproved losses)*" was only vested in national courts and tribunals of the Partner States in order to avoid violation of Articles 27(2) and 30(3) of the Treaty.

22. In support of his argument that this Court should refrain from entertaining the Applicants' abovementioned prayers on damages and interest, the Respondent's Counsel referred us to the case of **Alcon International Limited vs. Standard Chartered Bank of Uganda and 2 other, EACJ Appeal No.3 of 2013** in which the Appellate Division of this Court cited with approval the Kenyan Court of Appeal case of **Owners of the Motor Vessels 'Lillian S' vs. Caltex Oil (Kenya) Limited** where it was held (Nyarangi, J.A.) that : "*Jurisdiction is everything. Without it, a Court has no power to make one step. Where a Court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other*

evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction.”

23. Counsel further argued that while the Applicants had requested this Court to compel the Respondent to pay them money in compensation for losses and interest as indicated herein above, they did not show under which Articles of the Treaty those amounts were to be paid by the Respondent who had no contract with them at all. It was thus his contention that since extension of the Court's jurisdiction had yet to be operationalized in Article 27(2) of the Treaty, this Court was not clothed with the jurisdiction to entertain the aforesaid prayers aimed at awarding damages and interest to the Applicants. In buttressing his arguments on the latter matter, reference was made to the case of **Masenge Venant Vs. The Attorney General of the Republic of Burundi, EACJ Reference No. 2012** and the case of **Ruhara Georges Vs. The Attorney General of the Republic of Burundi, EACJ Reference No. 4 of 2014**, where the Court had decided that those matters were outside its jurisdiction as provided by Articles 23 and 27 read together with Article 30 of the Treaty.

24. In reply, the Applicants submitted that this Court has jurisdiction to hear and determine the matter by virtue of Articles 27 and 30 of the Treaty as well as Article 39 of the East African Community Customs Union Protocol. In this regard, the Applicants argued that under Article 27 of the Treaty reiterates that *“the Court shall initially have jurisdiction over the interpretation and application of this Treaty”* and went on to provide that *“the Court shall have such other original, appellate human rights and other jurisdiction as will be determined by this Treaty.”* They further contended that the

Respondent's actions in unlawfully confiscating their goods on 30th July 2016 was patently discriminatory, a blatant violation of the fundamental principles and objectives of the Treaty, including the principle of the rule of law, as well as a violation of the East African Community Customs Union and Common Market Protocols in that it hindered the free movement of goods of Partner States' nationals across their borders and unreasonably curtailed the distribution of economic benefits and trade. They hastened to add that breach of Treaty and Protocols provisions is a matter for which this Court is fully competent to hear and determine pursuant to Article 30 of the Treaty.

25. It was also the Applicants' contention that prayers (i), (ii) and (iii) of the Reference comprised the primary and substantive court declarations of Treaty violations which the Applicants had sought, whilst prayers (iv), (v) and (vii) were consequential and procedural remedies which logically flowed directly from the preceding prayers and were meant to ensure that any judgment of this Honorable Court was capable of implementation and not issued in vain.

Court's determination on Issue No. 1

26. We have carefully read and considered the pleadings and submissions together with the supporting legal authorities cited by the parties.

27. As can be gleaned from the Applicants' pleadings and submissions, it seems quite clear that the Court's interpretative mandate as provided under Article 27 of the Treaty is not in dispute. What is in dispute before us is whether the Court is clothed with the jurisdiction to grant some of the prayers sought by

the Applicants, specifically whether the Court has jurisdiction to award damages and interest thereon. We propose to address this issue together with the question of remedies (if any) available to the Applicants under Issue No.3.

Issue No. 2 : Whether the Reference is time-barred

28. Counsel for the Respondent submitted that this Reference is time-barred as it was filed outside the time-limit of two months provided for under Article 30(2) of the Treaty. Counsel for the Respondent further submitted that, considering this Court's decisions in **Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit, EACJ Appeal No. 1 of 2011** and **Georges Ruhara vs. The Attorney General of the Republic of Burundi, EACJ Reference No. 4 of 2014**, the Court is limited by Article 30(2) of the Treaty to hear References filed within two months from the date of an impugned action or decision complained of or the date the Claimant became aware of such action or decision. He thus argued that while the Applicant knew about the seizure of the trucks transporting the goods as of 24th July 2016 as evidenced by a letter written by the Applicants on 12th August 2016 to the Ambassador of Burundi in Kigali, they filed the Reference on 28th September 2016, beyond the two month-period and for that reason alone, the Reference should be dismissed with costs to the Respondent.

29. Conversely, the Applicants' Counsel contended that the goods in issue were received on the 24th July 2016, but that due to a misunderstanding between the Burundi Revenue Authority and the local administration at the Kanyaru border post, they were kept at

the yards of the Burundi Revenue Authority to await a validation process for purposes of exiting the territory of Burundi. He added that for the period between 24th and 30th July 2016, the goods had not been seized and that it was only on 30th July 2016 that they got communication that one Mr. Ndayiragije Boniface, Advisor to the Permanent Secretary in the Ministry of Human Rights, Social Affairs and Gender had picked up or collected their goods from the Burundi Revenue Authority Customs Office of Kanyaru-Haut, an action amounting to seizure. It is thus the Applicants' submission that computation of time should start from 30th July 2016 instead of 24th July 2016 as alleged by the Respondent.

Determination of Issue No.2

30. We have carefully considered Parties' submissions on this issue together with some documents annexed to the Reference. Two of the said documents have attracted our attention and were also referred to us during the hearing of 7th March 2018. The first document is from the Burundi Revenue Authority's Customs Office of Kanyaru-Haut dated 30th July 2016 entitled "Acquittal", and co-signed by Mr. Diomede Ndayikeza, Auditor of Customs and Mr. Boniface Ndayiragije, Advisor to the Permanent Secretary of the Ministry of Human Rights, Social Affairs and Gender. It states that the latter Officer had acknowledged receipt and insured transport of 5 trucks which were parked at the Customs Office at Kanyaru-Haut since 24th July 2016 and that those trucks had been escorted towards Bujumbura, specifically in the Ministry of Human Rights, Social Affairs and Gender.

31. Another document is the letter of the Commissioner of Customs and Excise to Mr. Fleury Muhimpundu dated 10th August 2016 in which the Commissioner stated that the Applicants' goods were picked up on 31st July 2016 by the Advisor of the Permanent Secretary in the Ministry of Human Rights, Social Affairs and Gender from the Customs Office of Kanyaru-Haut. In the same letter, the Commissioner indicated that the said goods had been declared in transit from Tanzania to Uganda at the Customs Office of Kobero in accordance with the rules and laws regarding the management of customs in the East African Community and that no infraction had been noticed by the Burundi Revenue Authority's services located at the border.

32. In line with the aforesaid documents, during the hearing, Counsel for the Respondent was unable to answer a question as to whether there could have been lawful seizure of the goods on 24th July 2016 while the Burundi Revenue Authority (Customs and Excise) had stated that the Applicant had complied with the rules and laws regarding the management of customs in the East African Community and that no infraction had been noticed by the Burundi Revenue Authority's services located at the border. Counsel only reiterated his submission that computation of time should start on that date.

33. It seems quite clear that the Applicants had no indication of the seizure of their goods prior to 30th July 2016, when they were informed that the goods had violated a national policy on transportation of goods. We do therefore agree with the Applicant that the official communication of the seizure of their goods came on 30th July 2016 as per the aforementioned document marked

“Acquittal”. It would therefore be from that date that time starts to run. In the premises therefore, we find that the Reference filed on 28th September 2016 was done within the time period prescribed by Article 30(2) of the Treaty.

Issue No. 3: Whether the Applicants are entitled to the remedies sought against the Respondent

34. As can be gleaned from the Applicants’ prayers as reproduced in paragraph 6 of this judgment, prayers (i), (ii) and (iii) touch on the alleged liability of the Respondent for breach of the Treaty as well as the EAC Customs Union and Common Market Protocols while prayers (iv), (v) and (vii) concern consequential orders for compensatory damages and interest thereof.

Liability for breach of the Treaty and EAC Customs Union and Common Market Protocols

35. The first question to be resolved is whether the seizure of the Applicants’ goods by the Respondent on 30th July 2016 violates Articles 6 (d) and 7(2) of the Treaty.

36. The Applicants alleged that they had arranged to transport goods from Tanzania to Uganda via Burundi and Rwanda. They added that hired trucks to transport the goods having exited Tanzania, had arrived at the Kobero border Customs Office where the goods were cleared by the Burundi Revenue Authority to use the Kirundi-Rutete-Kampala route, but that upon payment of the applicable customs transit fees, the Burundi Revenue Authority requested them to relay their goods via the Kanyaru-Haut border post so as to allow the local authorities validate the goods through a scanner that was only available there.

37. The Applicants further contended that while the goods and trucks were lawfully in transit within the Burundi territory at Kanyaru-Haut Customs Office en route to Uganda, they were, on instructions of an Advisor to the Burundi Government seized by security officers, communal and provincial administrative authorities and subsequently transported to and impounded at the Government Warehouses/Customs Offices in Bujumbura.

38. The Applicants also averred that after the alleged unlawful seizure and detention of their goods (including trucks belonging to third party contractors and suppliers which had been leased out for the transaction), they lodged a complaint to the Burundi Revenue Authority. The latter, on 10th August 2016, confirmed that it had not noticed any customs infraction perpetrated by the Applicants; that the Applicants were cleared of any customs obligations in the Republic of Burundi in respect of the goods; that it was not in possession of the said goods and that the Applicants should seek remedial action from the Ministry of Human Rights, Social Affairs and Gender as a government agent from that Ministry, one Mr. Ndayiragije Boniface, had signed a document in order to discharge the Burundi Revenue Authority from any liability and had taken the goods by force without any legal reason to Bujumbura. The Applicants thus urged this Court to declare that decision to be in violation of Articles 6(d) and 7(2) of the Treaty contending that the seizure of their goods in transit, after the same had been cleared for exit by the Burundi Revenue Authority, went against the principle of the rule of law enshrined in the Treaty. They further argued that the Government should be held vicariously liable for such an unlawful act of its agent.

39. Further, after having explained what entails the rule of law (see Wikipedia, Free Encyclopaedia and Justice George Kanyeihamba in Kanyeihamba's Commentaries on Law, Politics and Governance, at page 14), Counsel for the Applicants further contended that the intervention of armed security agents of Burundi to prevent the free movement of goods violated the principle of the rule of law and consequently contravened the Treaty.

40. Counsel also submitted that the subsequent seizure of the goods in transit and their disposal thereof was an abuse of power by a State agency, namely the Security Provisional Corps. In that regard, he argued that according to the well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State 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. Furthermore, Counsel submitted that an organ includes any person or entity which has that status in accordance with the internal law of the State. He also submitted that it is a well-established principle of international law that States are responsible for the conduct of State organs and that therefore, the Republic of Burundi was duly responsible for the unlawful conduct of its State organs. Reference was made to Article 4 of the UN Resolution on Responsibilities of States for International Wrongful Acts (2001) in that regard.

41. In response, Counsel for the Respondent did not contest that the said goods had been impounded by the Respondent; rather, he

argued that the goods were legally seized as their transit in Burundi had become suspicious since the Applicant had deviated from the original route as the route taken to arrive at Kanyaru-Haut border was different from the one declared at Kobero border (i.e. Kirundo-Rutete-Kigali-Kampala). Counsel further alleged that it was also discovered that the loads declared at Kobero border were not the real truck loading when trucks and goods were detained at Kanyaru-Haut as they were trying to leave the border to Rwanda for an unknown destination.

42. Still on the same issue, Counsel asserted that in a Burundi Government Retreat, it had been decided that illegal goods detained while on transit should be distributed to vulnerable people in order to discourage fraudulent business people.

43. In reply, the Applicants' Counsel reiterated that the Applicants only opted to transport the goods via the Kanyaru-Haut border post as opposed to the previously scheduled Kobero border, on account of a lawful order and direction of the Burundi Revenue Authority which required that trucks and goods be passed through a scanner that was at the material time not available in Kobero.

44. Counsel further maintained that the goods and trucks were lawfully in transit within Burundi territory and that at no time had the Respondent notified or communicated to the Applicant its suspicion that the goods and trucks were illegal or that they intended to seize them for that purpose. On the contrary, an "Acquittal" and "Clean Bill of Health" were issued by the Burundi Revenue Authority, Counsel submitted.

45. Counsel also refuted the submission of the Respondent's Counsel that the Respondent had developed and implemented a policy for alleged "redistribution" of seized illegal goods transported or leaving the Burundi territory and contended that if such a policy had been adopted, the Respondent's Counsel would have annexed it to the Respondent's Response, which he did not.

Court's determination

46. We have carefully considered the Parties' rival submissions on this issue and scrutinized the various documents annexed to the Statement of Reference.

47. In the clearance documents annexed to the Reference and issued by Kobero Customs Office of the Burundi Revenue Authority/Customs and Excise Department on 23rd July 2016, we note that four consignees, namely Byansi Edouard, Bizabishaka Eric, Kamuhanda Moses and Murerwa Audrielle were indicated as importers of goods (i.e cassava, maize and beans) from Tanzania (country of origin) and that Uganda is mentioned as the country of destination while Kanyaru-Haut is indicated as office of entry/exit. It is also on record that the abovementioned consignees had signed with Grands Lacs Suppliers S.A.R.L. of Kampala, Uganda, contracts to supply cassava, maize grain and mixed beans and that the latter company had given advance payment on the goods to be delivered by each contractor.

48. It is also worth noting that on 1st August 2016, a lawyer called Fleury Muhimpundu, on behalf of Bizabishaka Eric, Murerwa Audreille and Byansi Edouard (i.e. business owners of the trucks), wrote a letter to the Commissioner of Customs and Excise, stating

that five trucks in transit belonging to his clients had been seized by the customs services in violation of the law regarding transit of goods and asking for the reasons for the seizure, the destination of the goods and the suspension of that illegal decision and release of the goods, otherwise a legal action would be filed against the Customs Authority.

49. In his response dated 10th August 2016, the Commissioner of Customs and Excise stated that the goods which belonged to the Advocate's clients had been declared in transit from Tanzania to Uganda at the Customs Office of Kobero in accordance with the rules and laws regarding management of customs in the East African Community and no infraction had been noticed by their services located on borders. He also stated that it was at the point of their validation at Kanyaru-Haut border before their exit from Burundi territory that the security agents and those of the municipal and provincial administration of Ngozi have forbidden the customs services to validate the goods. He also indicated in his letter that it was on 31st July 2016 that the Advisor of the Permanent Secretary in the Ministry of Human Rights, Social Affairs and Gender accompanied by Police officers had come to pick up those goods which were kept at Customs Office of Kanyaru-Haut. He ended his letter by referring the lawyer to a document marked "Acquittal" co-signed by the aforementioned Advisor to the Ministry of Human Rights, Social Affairs and Gender and directed him to the said Ministry for clarification as to the seizure of the goods.

50. The Applicants consistently contended that they had been left in the dark as regards the reasons for the seizure of their goods

despite several written complaints and reminders to the Government and agents of the Republic of Burundi and despite the confirmation by the Burundi Revenue Authority that they had complied with the relevant legal requirements for their good to exit the Burundi territory to their final destination in Uganda.

51. On its part, the Respondent, through its Counsel, pleaded that the goods were legally seized in compliance with the law and the policy of the country in order to protect the country's security especially taking into account the fact that the Applicants had deviated from their original itinerary.

52. We take the view that the Respondent's argument is untenable since, if an offense against the customs laws had been committed, at least a notification would have been made to the Applicants for them to eventually present their defence and more importantly, the Burundi Revenue Authority would not have given them green light that they had complied with all the legal requirements for goods in transit. Moreover, nowhere did the Respondent contest the sanctioning of the deviation from the original itinerary by the Burundi Revenue Authority, neither the Respondent did show how the said deviation hampered its security.

53. Having said that, the question that has to be resolved now is whether those impugned actions and decisions of the Respondent, through its agents, are an infringement of specific Treaty provisions to wit, Articles 6(d) and 7(2) as the Applicants allege.

54. For avoidance of doubt, Article 6(d) reads:

“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 principle of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.”

Article 7 provides:

“1. The principle that shall govern the practical achievement of the objectives of the Community shall include:

(...)

(c) the establishment of an export oriented economy for the Partner States in which there shall be free movement of goods, persons, labour, services, capital, information and technology.

(...)

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

55. It should be pointed out in that regard that the principle in Article 6(d) and 7(2) of the Treaty that the Applicants single out is the

principle of the rule of law. As generally understood, the principle of the rule of law entails that ***“nobody is above the law. (...) In a governing system based on the rule of law, everybody is held accountable under the same laws. One of the defining features of the rule of law is that, under such a system of the law, the law is applied equally to all citizens. Rule of law simply means that the law itself, rather than individuals or organizations, reigns supreme. Therefore, even people who enforce and administer the law, such as police officers, judges and lawyers are still subject to the same laws as everybody else. (...)The rule of law limits the arbitrary exercise of power by a single person or group.***¹

56. On the issue at hand therefore, in order to comply with the aforementioned essential elements of the rule of law, it would require that the seizure of the Applicants' goods be executed in respect of the applicable laws in Burundi, particularly the East African Community Customs Management Act 2004 as revised. In this regard, Section 213 on the power to seize goods liable to forfeiture and Section 214 on the procedure of seizure are most relevant. It transpires from Section 213 of the Act that any officer or a police officer or an authorized public officer may seize and detain any goods or other thing liable to forfeiture under this Act or which he or she has reasonable ground to believe is liable to forfeiture. And according to Section 214, when there is seizure, a Notice of seizure must be served upon the importer. The Notice must contain specific information about what was seized and must also state the laws applicable for the violation in justification of the seizure. When

¹ See <https://thelawdictionary.org/rule-of-law/>

served with the Notice of seizure, the importer can object to the Notice of seizure and can institute a legal proceeding against the seizing authority.

57. Reverting to the matter at hand, we have not seen any Notice of seizure of the Applicants' goods or at least a written communication to the Applicants indicating that their goods had been seized. In light of the abovementioned provisions of the East African Community Customs Management Act which are applicable in Burundi as a Partner State of the Community, it is our considered opinion that the decision of seizing the Applicants' goods without due process runs afoul of the principle of the rule of law stipulated in Articles 6(d) and 7(2) of the Treaty. Can then the violation be attributable to the Government of Burundi? In this regard, it is a well-established rule of international law that the conduct of any organ of a State must be regarded as an act of that State.² In light of the foregoing therefore, we hold the Government of Burundi responsible for the unlawful seizure of the Applicants' goods by its agents, and consequently, it is liable for the violation of Articles 6(d) and 7(2) of the Treaty.

58. The Applicants have also prayed that the Court should make a declaration that the aforesaid decision of the Respondent is in violation of Articles 2,3,4,5, and 6 of the Protocol on the Establishment of the East African Community Common Market and that the said decision is in violation of Article 39 of the Protocol for the Establishment of the East African Community Customs Union. Neither the Applicants' pleadings nor their submissions do

² Article 4 of the International Law Commission Draft Articles on Responsibility of States for International Wrongful Acts, with Commentaries, 2001

indicate that this matter has been canvassed so as to enable the Court make a finding on it. In light of the above therefore, the prayers are dismissed.

59. We now turn to the prayers on damages and interest thereof and in the same vein, the question as to whether this Court has jurisdiction to entertain the remedies sought in that regard. For ease of reference, we reproduce the Treaty provisions on the Court's jurisdictions below.

Article 27 provides that:

“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. The Court shall have such other original, appellate, human rights and other jurisdiction as will determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalize the extend jurisdiction.”

Article 30(1) (3) of the Treaty, on its part, provides that:

“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.”

(....)

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

Claim for compensatory damages

60. The compensatory damages that can be awarded in international law are those for pecuniary loss or damages (also referred to as “special damages”) and for what is termed moral, non-material or non-pecuniary loss or damage (also referred to as “general damages”).³ We shall start by examining the case of pecuniary or special damages claimed by the Applicants before turning to general damages.

61. As indicated in this judgment herein above, the Respondent submitted that this Court is not clothed with the jurisdiction to entertain prayers on damages and interest thereof. This issue was, however, been extensively examined and settled by the Appellate Division of this Court in the case of **Hon. Dr Margaret Zziwa vs. The Secretary General of the East African Community, EACJ Appeal No. 2 of 2017** (hereinafter “*Hon. Dr. Margaret Zziwa case*”). In that case, the Appellate Division started the determination of the matter by addressing the question as to whether the remedy of damages is in principle available in this Court. It stated that the Court’s mandate is not limited to only interpretation of the Treaty and that “*the Court is the guardian of the Treaty and is charged with ensuring adherence to the law in the application of and compliance with the Treaty. In plain*

³ See *Shanique Myrie vs. The State of Barbados*, CCJ Application No. OA002 of 2012, [2013] CCJ 3 (OJ), para. 95, <http://www.caribbeancourtofjustice.org/wp-content/uploads/2013/10/2013-CCJ-3-OJ.pdf>

language, it is the Court's duty to ensure that the Partner States and other duty bearers under the Treaty march in step with the Treaty and any breaches thereof are remedied as may be appropriate in the circumstances." Relying on the Opinion of the European Court of Justice in **Andrea Francovich and Danila Bonifaci vs. Italy (1991) ECR 1-5357**, the Appellate Division further opined that "the full effectiveness of East African Community Laws including the Treaty and the protection of the rights granted by such laws requires the Court to grant effective relief by way of appropriate remedies in the event of breach of such laws. Otherwise such laws would be no more than pious platitudes." The Appellate Division finally held on this matter that "Article 23(1) and 27(1) of the Treaty do not confine the Court's mandate to mere Treaty interpretation and the making of declaratory orders but confer on the Court, being an international judicial body, as an aspect of its jurisdiction, the authority to grant appropriate remedies to ensure adherence to law and compliance with the Treaty."⁴ On the nature of the remedies available, the Appellate Division held that "the remedies of compensation (usually known as damages in internal law) is very firmly established in international law, and is available for the Community's breach of its Treaty obligations where a claimant establishes that the Act, regulation, directives, decision or action of the Community complained of has caused such claimant a loss which is financially assessable."⁵

62. We do respectfully abide by the foregoing decisions and accordingly hold that this Court, as an international Court set up by

⁴ Hon. Dr. Margaret Zziwa case, para 35, p.19.

⁵ Idem.

the Treaty, is vested with the jurisdiction to determine whether the Applicants are entitled to the damages and interest thereof sought as a remedy to the unlawful seizure of their goods by the Respondent through its organs.

63. We now turn to the assessment of the compensation claimed by the Applicants.

64. The Applicants alleged that they have suffered irreparable loss of business and earnings as a result of the Respondent's unwarranted decision and actions and that their only recourse was for this Court to award compensation as the goods subject of the Reference were of a perishable nature and had already been substantially and effectively appropriated by the Respondent.

65. In the Statement of Reference, the Applicants have given the description and contents of the consignment released on transit from Tanzania to Uganda, indicating for each truck, the truck registration number (6 trucks), truck model, content, consignment weights (kgs), consignment packaging and the consignment number. The Applicants have thus claimed the sum of \$US218,849 in compensation for losses on truck hire, loss of profits, loss of investment and loss of earnings. That amount comprised:

- (i) Advance on purchase of entire consignment on 6 truck: \$US105,000;
- (ii) Balance of purchase of entire consignment on 6 trucks as at the date of the seizure: \$US25,524;
- (iii) Cost of truck hire for 18 days from 18/07/2016 to 05/08/2016 : \$US83,221;

(iv) Loss of profit from sale of consignment on 6 trucks 20% of the value of the goods: \$US5,104

(v) Interest on (i,ii,iii) at Kenya Commercial Bank (Uganda Branch) Interest Rates from 1st August 2016 computed at 20% per annum.

66. The Applicants have, in support of the above claim, annexed to the Reference the following documents, among others:

- Grands Lacs Suppliers S.A.R.L.'s (Applicant) letters of award of contract to the traders: Byansi Edouard, Bizabishaka Erice, Kamuhanda Moses and Murerwa Audreille;
- Receipts and payment Vouchers for Applicants' advance deposits on purchase of the goods to all to all those traders;
- Truck rental Agreements for 6 trucks;
- Certificate of origin for the entire consignment in the 6 trucks;
- Tax Invoices, Tax Payment Receipts and Clearing Agency Certificates for the entire consignment in the 6 trucks.

67. All the above-listed documents are photocopies. On that matter, the Applicants alleged that the Respondent had retained their original transactions and transportation documents and that they would seek leave of this Court for production of the said original documents, failure to which the Applicants would be allowed to rely on the photocopies therein.

68. In response, Counsel for the Respondent asserted that in their letter to the Ambassador of Burundi in Kigali dated 12th August 2016, the Applicants had indicated that "*the Grand total of our*

items plus the expenses of our trucks and their transport are \$US 96,274” and at the same time, it was indicated on page 6 of the Reference that the “*Grand total was \$US218,849.*” Given the discrepancy in the amount claimed, Counsel contended that there was speculation as evidenced by the amount of \$US96,274 claimed for six (6) trucks.

69. Counsel further contended that all the documents annexed to the Reference were photocopies, most of them illegible and that for that reason they should be considered null and void as they contradicted the provisions of Rule 8 of the Court’s Rules. It was also Counsel’s submission that the Applicants’ argument that the documents had been retained by the Respondent was not tenable since they had not indicated who had retained those documents.

70. In the same vein, Counsel contended that at pages 5 and 6 of the Reference, the Applicants had indicated the amounts of money thought to have been lost but did not give proof of those calculations and therefore the unproved amounts became mere speculations and ought to be considered null and void.

71. We have carefully considered the Parties’ pleadings and submissions and scrutinized all the documents annexed to the Reference. We note indeed that most of those documents are illegible (see for example, all the documents on the following pages of the Reference: 36,38,39,40,41,42,47,48,49,50,51,52,53,54,56,57,58 and 59) and yet, they have been produced in support of the abovementioned compensatory damages claimed by the Applicants.

72. The Applicants had indicated that in case the photocopied documents were contested, they would seek leave of the Court to compel the Respondent to produce the original documents, failure to which the Applicants would be allowed to rely on the photocopies annexed to the Reference. Despite Counsel for the Respondent's strong contestation of the photocopied documents and the concern that most of the documents were illegible, no leave of the Court for production of the original documents by the Respondent was sought. In these circumstances therefore, we are unable to assess the quantum of the damages claimed by the Applicants and bearing in mind that special damages must be specifically pleaded and proved,⁶ we hereby dismiss the Applicants' prayers for the amount of \$US218,849 in compensation for losses on truck hire, loss of profits, loss of investments and loss of earnings.

73. The Applicants have also prayed for general damages for unlawful seizure of goods, breach and violation of EAC Treaty, Customs Union and Common Market Protocols, wrongful deprivation/denial of property and inconvenience to and hampering of Partner States' nationals' business, trade and economic activity.

74. In response, Counsel for the Respondent reiterated his earlier submission that this Court does not have jurisdiction to determine any claim of damages.

75. With respect to non-pecuniary or general damages, the Caribbean Court of Justice (CCJ) in **Shanique Myrie vs. The**

⁶ See Stanbic Bank Tanzania vs. Abercrombie & Kent (T) Limited, Court of Appeal of Tanzania, Civil Appeal No. 21 of 2001, www.saflii.org/tz/cases/TZCA/2006/7.html and Attorney General vs. Lutaaya, Civil Appeal No. 16 of 2007 (SC), <https://ulii.org/ug/judgment/high-court/2012/249/>

State of Barbados⁷ stated that “an award of such damages is a well-established form of relief in international law. This principle has its genesis in the seminal *Lusitania* Opinion where the Umpire defined moral damages as compensation “for an injury inflicted resulting in mental suffering, injury to his feeling, humiliation, shame, degradation, loss of social position or injury to his credit or his reputation.” The CCJ also stated that the concept was crystallized in the *Chorzow Factory* case where the Permanent Court of International Justice opined that “the essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or if this is not possible, payment of sum corresponding to the value which a restitution in kind would have; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”⁸ This jurisprudence shed some light on how a claim for general damages should be understood and we do find it to constitute persuasive authority.

76. The Applicants claimed general damages for unlawful seizure of goods, violation of the Treaty and wrongful deprivation/denial of property and inconvenience to and hampering of Partner States’ business, trade and economic activity. As a result of those

⁷ *Shanique Myrie vs. The State of Barbados*, op. cit., para 96.

⁸ *Idem.*

next

impugned actions, they contended that they had suffered irreparable loss of business and earnings for which they seek compensation. We have found herein above that the seizure of the Applicants' goods is a breach of the Respondent's Treaty obligations in that it violates the principle of the rule of law embodied in Articles 6(d) and 7(2) of the Treaty.

77. It is trite law that the question of general damages falls within the judicial discretion of the Court and that the Court's discretion has to be exercised judiciously upon facts and circumstances presented to the Court from which it must draw a conclusion governed by law.⁹

78. In light of the foregoing and taking into consideration all the circumstances of the instant case, the Court considers that an award of American dollars twenty thousand (USD20,000) constitutes appropriate compensation for the loss suffered by the Applicants as a result of the unlawful seizure and subsequent disposition of their goods by the Respondent.

Interest on damages

79. The Applicants have prayed for interest on the amount of general damages awarded. With respect to interest on damages awarded by this Court, the Appellate Division held that the Court has the jurisdiction and discretion to award interest on compensation.¹⁰ Guided by this holding, we hereby decide that the Applicants will be awarded interest on the sum of American dollars

⁹ On this matter, see for example, *Air France vs. Mrs. Brenda Akpan*, Court of Appeal, Lagos Division, NDUKWE-ANYANWU, ABUBAKAR, NIMPAR JJ.CA and , <http://www.clrndirect.com/content/general-damages-award-must-be-judicially-and-judiciously-determined> and *Stanbic Bank Tanzania vs. Abercrombie & Kent (T) Limited*, Court of Appeal of Tanzania, Civil Appeal No. 21 of 2001, <http://www.saflii.org/tz/cases/TZCA/2006/7.pdf>

¹⁰ See Hon. Dr. Margaret Zziwa vs. The Secretary General of the East African Community, *op.cit.*, para.85

twenty thousand (USD20,000) at the rate of six (6) per cent per annum from the date of the judgment until payment in full.

Costs of the Reference

80. The gravamen of the Applicants' case being the unlawful seizure of its goods by the Respondent through its organs and having determined that the seizure of the goods was a breach of the Respondent's Treaty obligations under Article 6(d) and 7(2) of the Treaty, we find it appropriate that the Applicants be awarded the costs of the Reference to be paid by the Respondent.

G. CONCLUSION

81. The seizure of the Applicants' goods without due process and compliance with Sections 213 and 214 of the East African Community Customs Management Act 2004 is a breach of the Respondent's Treaty obligations under Articles 6(d) and 7(2) of the Treaty.

82. No finding is made as regards the Applicants' prayers to declare that the decision to seize their goods by the Respondent through its organs was a violation of the East African Community Customs Union and Common Market Protocols as the Applicants had not made any pleadings on this issue.

83. The special damages claimed by the Applicants in compensation for losses on truck hire, loss of profits, loss of investments and loss of earnings are not awarded as the Court has been unable to assess their quantum.

84. In exercising its judicial discretion in light of the facts and the circumstances of the instant case, the Court awards to the

Applicants an amount equivalent to American dollars twenty thousand (USD 20,000) as general damages at an interest of six (6) per cent per annum from the date of the judgment until payment in full.

85. The Respondent shall pay the costs of the Reference to the Applicants.

H. DISPOSITION

86. The Court:

(a) Declares that the decision to seize the Applicants' goods taken by the Respondent through its organs/agents, including Mr. Ndayiragije Boniface, Advisor to the Minister of Human Rights, Social Affairs and Gender breaches Articles 6(d) and 7(2) of the Treaty.

(b) Orders the Respondent to pay an amount of American dollar twenty thousand (US20,000) to the Applicants and interest rate of 6% per annum of this amount from the date of this judgment until full payment is made.

(c) Makes no order as regards special damages claimed by the Applicants

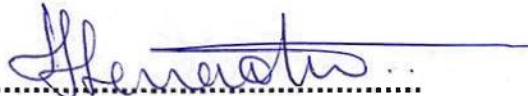
(d) Orders the Respondent to pay the costs of the Reference to the Applicants.

It is so ordered.


Dated, Signed and Delivered at Arusha this 19th Day of June 2018



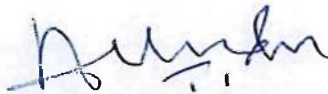
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MONICA K. MUGENYI
PRINCIPAL JUDGE



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ISAAC LENAOLA
DEPUTY PRINCIPAL JUDGE
JUDGE



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FAUSTIN NTEZILYAYO
JUDGE



.....
FAKIHI A. JUNDU
JUDGE



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CHARLES NYAWELLO
JUDGE