



**IN THE EAST AFRICAN COURT OF JUSTICE AT  
ARUSHA**



**FIRST INSTANCE DIVISION**

*(Coram: Monica K. Mugenyi, Pj; Faustin Ntezilyayo & Charles Nyachae, J)*

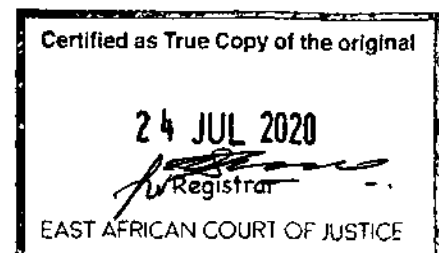
**REFERENCE NO. 9 OF 2017**

**HON. JUSTICE MALEK MATHIANG MALEK ..... APPLICANT**

**VERSUS**

- 1. THE MINISTER OF JUSTICE OF  
THE REPUBLIC OF SOUTH SUDAN  
(ATTORNEY GENERAL OF THE  
REPUBLIC OF SOUTH SUDAN)**
- 2. THE SECRETARY GENERAL OF  
THE EAST AFRICAN COMMUNITY..... RESPONDENTS**

**24<sup>TH</sup> JULY 2020**



## JUDGMENT OF THE COURT

### A. INTRODUCTION

1. This Reference was brought under Articles 6(d), 7(1)(b), 7(2), 27(1), 29(1), 30(1)(2), and 71(d) of the Treaty for the Establishment of the East African Community ("the Treaty"), Rules 24(1)(2) and (3) of the East African Court of Justice Rules of Procedure, 2013 ("the Rules"), The Vienna Convention on the Law of Treaties, 1969 ("the Vienna Convention"), and the inherent powers of the Court. The Reference sought to challenge the action of the President of the Republic of South Sudan in removing the Applicant herein from the position of Justice of the Court of Appeal of South Sudan, vide 'The Republican Decree No.100/2017 for the Removal of some Justices and Judges in the Judiciary of the Republic of South Sudan' dated 12<sup>th</sup> July 2017 for being in contravention of the Constitution of the Republic of South Sudan and the Treaty, specifically Articles 6(d) and 7(2).
2. Hon. Justice Malek Mathiang Malek ("the Applicant") is a citizen and resident of the Republic of South Sudan (a Partner State of the East African Community) who formerly served as a Justice in the Court of Appeal of South Sudan. He, together with a number of other Judges, formed "The Committee of Justices and Judges" that steered a strike demanding, *inter alia*, the resignation of the Chief Justice of South Sudan. Following the strike, on 12<sup>th</sup> July, 2017, the President of the said Partner State issued a Republican Decree for the removal of some Justices and Judges of the Judiciary of South Sudan, including the Applicant.
3. The First Respondent is the Attorney-General of the Republic of South Sudan, whose office has been sued in its capacity of Principal Legal Advisor of the Republic of South Sudan.
4. The Second Respondent is the Secretary General of the East African Community, whose office has been sued in its capacity as the Principal Executive Officer of the Community, head of the East African Community Secretariat and Secretary to the Heads of State Summit of the Community.

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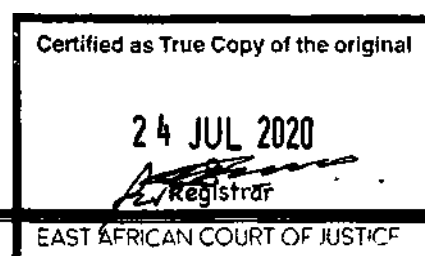
5. At the hearing hereof, the Applicant was represented by Mr. William Ernest, the First Respondent by Mr. Bieng Piek Kol, and the Second Respondent was represented by Ms. Christine Mutimura of the Office of the Counsel to the Community (CTC).

**B. APPLICANTS' CASE**

6. The Applicant's case is set out in his Statement of Reference lodged in this Court on 13<sup>th</sup> September 2017; his affidavit dated 13<sup>th</sup> September 2017; the Applicant's written submissions; as well as the highlights thereof. It is the Applicant's contention that in issuing the Republican Decree of 12<sup>th</sup> July 2017, the President of the Republic of South Sudan purported to exercise powers that he did not have under the Constitution of South Sudan and accordingly, by so doing, the First Respondent State violated its Constitution, as well as the provisions of Articles 6(d), 7(1)(b) and 7(2) of the Treaty.

7. In particular, it was the Applicant's case that:-

- i. The Court of Appeal of the Republic of South Sudan is structured under Article 123(b) of the Transitional Constitution of 2011, read together with Section 7(b) of the Judiciary Act, 2008.
- ii. The Independence of the Judiciary from the Executive is guaranteed under Article 124(1) of the Transitional Constitution, 2011.
- iii. The respect to Judiciary at all levels of legislative and executive arms is guaranteed under Article 124(5) of the Transitional Constitution, 2011.
- iv. The salaries, allowances, privileges, post service benefits, tenure and other conditions and terms of service of judicial offices are constitutionally stipulated and regulated by law.
- v. The immunity of Justices and Judges is guaranteed under Article 124(7) of the Transitional Constitution of South Sudan.



- vi. Under Article 134(2) of the Transitional Constitution, the Justices and Judges can only be removed on the recommendation of the Judicial Service Commission.
- vii. The President of the Republic of South Sudan has no powers whatsoever to remove a Justice of the Court of Appeal, such as the Applicant herein.
- viii. The President's purported removal of the Justices of the Court of Appeal, the Applicant inclusive, is not only unconstitutional; it is illegal and a breach of Articles 6(d) and 7(2) of the Treaty. It amounts to interference in the independence of the Judiciary since it instills fear, inhibiting the judiciary's performance of its functions as by law required.
- ix. The Second Respondent herein, being the head of the Secretariat of the Community, failed to undertake investigations or otherwise verify the veracity of the above matters as provided for under Article 71(1)(2). He also failed to fulfill his obligation under Article 29(1) of the Treaty.

8. The Applicant seeks the following reliefs (reproduced verbatim):-

- (a) *A DECLARATION THAT the act of the President of the Republic of South Sudan of removing the Applicant herein from the position of Justice of the Court of Appeal, vide the Republican Decree No.100/2017 for the removal of some Justices and Judges in the Judiciary of the Republic of South Sudan, 2017, AD; dated 12<sup>th</sup> July 2017 is in contravention of the Constitution of the Republic of South Sudan and is a breach of the Treaty Establishing the East African Community, specifically Articles 6(d) and 7(2).*
- (b) *A DECLARATION THAT the President of the Republic of South Sudan has no exclusive powers of removing a Justice of the Court of Appeal from office, the Applicant herein inclusive.*
- (c) *A DECLARATION THAT the act of the President of the Republic of South Sudan of removing Justices of the Court of Appeal and Judges of the High Court, First Grade County Judges and Second*

*Grade County Judges is in contravention of the Constitution of the Republic of South Sudan and applicable laws, and is in breach of the Treaty Establishing the East African Community in Articles 6(d) and 7(2).*

*(d) A DECLARATION THAT the Secretary General's failure to investigate, collect information from, and submit his findings to the Republic of South Sudan is an infringement of Articles 29(1) and 71(1)(d) of the Treaty for the Establishment of the East African Community.*

*(e) A DECLARATION THAT the Secretary General has failed to fulfil his obligations under Articles 29(1) and 71(1)(2) of the Treaty.*

*(f) Award costs of this Reference to the applicant.*

### **C. FIRST RESPONDENT'S CASE**

9. The First Respondent's case is set out in the Response to the Reference lodged in this Court on 24<sup>th</sup> April 2019, as well as its written submissions and the highlights thereof. It was the First Respondent's case that the removal of Justices and Judges (including the Applicant) by the President of South Sudan was legal and consistent with the Constitution of the Republic of South Sudan. It was further asserted that the issuance by the President of the Republican decree to remove the Justices and Judges did not violate any provision of the Treaty.

10. In particular, it was the First Respondent's case that:-

- i. The Reference was improperly brought against the Minister of Justice and Constitutional Affairs (Attorney General) of the Republic of South Sudan as the impugned act, *to wit*, the Republican Decree No.100/2017, was a Presidential act but the President of the Republic of South Sudan, enjoys immunity from suit, even before this Court.
- ii. The removed Justices including the Applicant were so removed (correctly so) for involving themselves in executive affairs instead of judicial affairs and, in any event, by forming the Committee of Justices and Judges and

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calling for the resignation of the Chief Justice, the said Justices and Judges violated the Constitution of the Republic of South Sudan and sought to pervert the due process of law. By their behaviour and actions, therefore, they had lost their right to constitutional protection and their removal was in line with the Constitution of the Republic of South Sudan, and other applicable laws.

#### **D. SECOND RESPONDENT'S CASE**

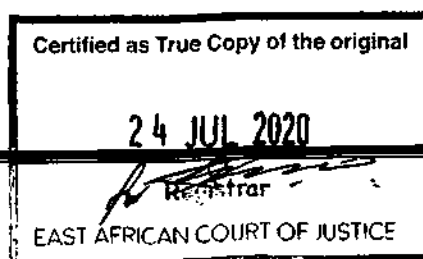
11. The Second Respondent's case is set out in its Response to the Statement of Reference lodged in this Court on 1<sup>st</sup> November 2017, as well as its written submissions and highlights thereof. The Second Respondent's case essentially is that the Reference does not disclose any cause of action against that office. In support of this position, the said Respondent submitted that:-

- i. For the purposes of Article 30 of the Treaty, through which he approaches this Court, the Applicant has failed to prove that there is any Act, regulation, directive, decision or action that is an infringement of the provisions of the Treaty and attributable to the Second Defendant.
- ii. The Reference does not demonstrate that the Second Respondent was in any way aware of the actions occasioned on the Applicant by the Partner State prior to the filing of the instant Reference.
- iii. In compliance with his obligations under Article 29 of the Treaty, when the impugned actions of the Partner State came to its attention upon the filing of the instant Reference, the Second Respondent did take action by initiating inquiries on the same.

12. The Second Respondent prayed that the Court be pleased to dismiss the Statement of Reference against it with costs.

#### **E. ISSUES FOR DETERMINATION**

13. At a Scheduling Conference held on 12<sup>th</sup> March 2019, the Parties framed the following issues for determination:



- (a) Whether the removal of the Applicant from the position of Judge of the Court of Appeal of the Republic of South Sudan vide "Republican Decree No.100/2017 for the Removal of some Justices and Judges in the Judiciary of the Republic of South Sudan" was lawful in respect to the Transitional Constitution of the Republic of South Sudan, 2011; the Judiciary Act 2008, the Judicial Service Council Act, 2008 and Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community;
- (b) Whether there is a cause of action against the 2<sup>nd</sup> Respondent; and
- (c) Whether the Applicant is entitled to remedies sought.

#### **F. COURT'S DETERMINATION**

14. Having carefully listened to the Parties and considered the pleadings before us, we wish at the onset to make two observations:

- i. The instant Reference was instituted under the **East African Court of Justice Rules, 2013**. Since then, the Court's Rules have been revised, the applicable Rules now being the **East African Court of Justice Rules, 2019**. In terms of Rule 136 of the latter Rules, we shall apply the 2019 Rules, "without prejudice to the validity of anything previously done provided that if and so far as it is impracticable to apply the (2019) Rules, the practice and procedure heretofore shall be followed."
- ii. In writing this judgment it has come to our attention that in the Scheduling Notes, under the heading 'Issues For Determination,' the impugned Decree is in error referred to as 'Republican Decree No. 277/2016 for the Promotion of Justices and Judges of the Judiciary of the Republic of South Sudan, 2016 AD.' From the pleadings, it is clear that the impugned Decree is 'Republican Decree No.100/2017 For The Removal of some Justices And Judges in the Judiciary of the Republic of South Sudan, 2017 AD.'

15. We thereby deem the error to be corrected, so that the first issue for determination shall be:

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*Whether the removal of the Applicant from the position of Justice of the Court of Appeal of the Republic of South Sudan vide “Republican Decree No.100/2017 for the Removal of Justices and Judges of the Judiciary of the Republic of South Sudan, 2017 AD was lawful in respect to the Transitional Constitution of the Republic of South Sudan, 2011; the Judiciary Act 2008, the Judicial Service Council Act, 2008 and Articles 7(d) and 7(2) of the Treaty For The Establishment of the East African Community.*

16. On that premise, we now revert to a determination of the issues.

**Issue No. 1: Whether the removal of the Applicant from the position of Justice of the Court of Appeal of the Republic of South Sudan vide “Republican Decree No.100/2017 for the Removal of Justices and Judges of the Judiciary of the Republic of South Sudan, 2017 AD was lawful in respect to the Transitional Constitution of the Republic of South Sudan, 2011; the Judiciary Act 2008, the Judicial Service Council Act, 2008 and Articles 7(d) and 7(2) of the Treaty For The Establishment of the East African Community.**

17. Simply put, the Applicant’s grievance is that, by issuing the Republican Decree that removed him and other Justices of the Court of Appeal of South Sudan from office, the President infringed the Transitional Constitution of the said Partner State, as well as the Treaty. It was the Applicant’s case that there was no formal complaint against him; the President had no powers to effect the said removal, and the Applicant was not given an opportunity to be heard. These contestations being at the core of the Applicant’s case, they call for a consideration of the applicable provisions of the Respondent State’s laws and the Treaty, on the one hand, as well as the factual process adopted in the making of the impugned decision, on the other.

18. We find it appropriate to make reference to the operative part of the impugned decree titled “The Republican Decree No.100/2017 for the removal of some Justices and Judges in the Judiciary of the Republic of South Sudan, 2017AD.” It states as follows:-

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**In exercise of the powers conferred upon me under Article 134(2) the Transitional Constitution 2011 (as amended) read together with Section 61(a) of the Judiciary Act, 2008, I, Salva Kiir Mayardit, President of the Republic of South Sudan, do hereby issue this Republican Decree for the Removal of some Justices and Judges in the Judiciary of the Republic of South Sudan, with effect from 12<sup>th</sup> July 2017.**

19. Article 134(2) of the said Transitional Constitution 2011 (as amended) provides as follows:-

**Justices and Judges may be removed by an order of the President for gross misconduct, incompetence and incapacity and upon the recommendation of the National Judicial Service Commissions.**

20. Section 61(a) of the said Judiciary Act provides as follows: -

**Reasons for Termination of Service**

**The service of any Justice or Judge shall be terminated for any of the following reasons –**

- (a) removal or dismissal**
- (b) resignation**
- (c) retirement; or**
- (d) death.**

21. From the Applicant's submissions, we understood him to contend that before recourse is made to the provisions referred to by the President in the Decree as set out above, it is necessary that the procedure set out elsewhere in the *Judiciary Act of 2008* has been complied with. In particular, the Applicant referred us to Section 48(1)(2) and (3); Section 53(6) and (7), and Section 55 of the said Act, which sections collectively set up a procedure whereby a complaint against a Justice or a Judge is presented to the President of the Supreme Court, who then causes investigations to be carried out, culminating in a decision of a

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Board of Discipline, which decision has to be confirmed by the Judicial Service Council. Ultimately, the decision of the said Judicial Service Council is what is confirmed and enforced by the President of the Republic of South Sudan.

22. It was the Applicant's contention that none of the latter procedures were followed, thus making the decision and action of the President irredeemably flawed, a violation of the Constitution and law of the Republic of South Sudan. This violation of the Partner State's law, the Applicant opined, placed the said Partner State in breach of its obligations under Articles 6(d) and 7(2) of the Treaty.

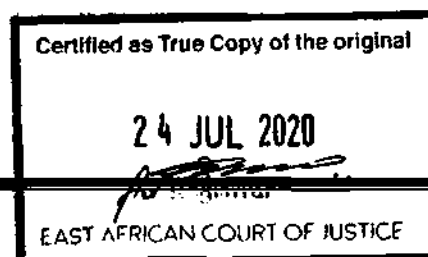
23. The Applicant referred us to the decision of this Court in **SIMON PETER OCHIENG & ANOTHER vs. THE ATTORNEY GENERAL OF UGANDA, EACJ REF. NO. 11 OF 2013**, where it was held:

**We hasten to point out that, within the context of the EAC jurisdiction, Partner States would be governed by their national constitutions --- stated differently, the Executive must be able to demonstrate a lawful authority for its actions, whether common law, or statutory law.**

24. As can be seen from the foregoing, the Applicant based his case primarily on the process set out in the Constitution, as well as the law for the removal of a Justice.

25. On its part, the First Respondent did not deem it necessary to address these processes nor did it demonstrate its compliance with them, beyond asserting that it did not violate either the law of South Sudan or the Treaty. In its Response to the Reference and in submissions, the First Respondent placed emphasis on two issues.

- i. That the impugned actions in question were Presidential actions in respect of which the President of South Sudan had immunity from suit, whether in the Courts of the said Partner State or indeed in this Court. For this proposition, the said Respondent sought to rely on Article 103 of the Transitional Constitution of the Republic of South Sudan.



- ii. The First Respondent went to great lengths to seek to justify the President's actions on the basis of the alleged actions and utterances of the Committee of Justices and Judges of which the Applicant was a member.

26. On the submission regarding the President's immunity from suit before this Court, while responding to questions from the Bench, Counsel for the First Respondent correctly conceded that the President's action in issuing the Decree was an act of the Partner State for the purposes of Article 30 of the Treaty, and therefore this Court did have jurisdiction to consider whether or not that action constituted a violation of the Treaty. 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.**

27. As regards the second issue above, we are fully persuaded by the submission of learned Counsel for the Applicant that the issue before this Court is not the legality or otherwise of the activities of the Justices and Judges Committee, but a determination on the compliance or otherwise of the President's action with the Constitution and laws of South Sudan, as well as the provisions of the Treaty. This is the approach that was adopted by this Court in **EAST AFRICA LAW SOCIETY vs. THE ATTORNEY GENERAL OF THE REPUBLIC OF BURUNDI AND ANOTHER, EACJ REFERENCE NO.1 OF 2014.**

28. The First Respondent has not challenged the Applicant's submissions as regards the process and requirements for the removal of a Justice in terms of the Constitution and laws of the Republic of South Sudan. Nor indeed has it controverted the Applicant's affidavit evidence that the President of the Republic of South Sudan failed to follow the said process prior to issuing the impugned Decree. It (the First Respondent) merely maintained that the impugned action of the President was consistent with that Partner State's Constitution.

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29. In its written submissions, the First Respondent states:

***As for the Treaty for the Establishment of the East African Community, the Republic of South Sudan as a Partner State, has never violated Articles 6(d) or 7 (2) of the Treaty --- but exercising its mandatory powers like any other member of the community. The Republic of South Sudan is committed and will remain committed to the Treaty.***

30. It is now trite law that where a Partner State is shown to have violated its own Constitution or domestic laws then, *ipso facto*, that State falls afoul of the rule of law principle in Articles 6(d) and 7(2) of the Treaty.

31. Articles 6(d) and (7)2 of the Treaty provide as follows:-

Article 6

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

- (a) .....
- (b) .....
- (c) .....
- (d) **good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, general 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

- 1. ....
- 2. **The Partner States undertake to abide by the principles of good governance, including adherence to the principles of**

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democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.

32. In the case of HENRY KYARIMPA vs. THE ATTORNEY GENERAL OF UGANDA, EACJ APPEAL NO.6 OF 2014, the Appellate Division of this Court held:

The framers of the Treaty and its signatories intended that the Principles in Articles 6 and 7 as well as the undertakings to implementation in Article 8 should have that value and meaning to themselves and to all citizens within the borders of the Partner States forming the EAC. They are therefore justiciable and are meant to bind all organs of the EAC including the Governments of the Partner States.

33. The Court went further:

In a nutshell, the activities of the Partner States must be transparent, accountable and undertaken within the confines of both the municipal laws and the Treaty.

34. In considering the definition and import of the rule of law principle in Articles 6 and 7 of the Treaty, and its application in the context of domestic laws, the Court in JAMES KATABAZI & 21 OTHERS vs. THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY, EACJ REFERENCE NO.1 OF 2007 quoted with approval from *Wikipedia, The Free Encyclopedia* as follows:-

Perhaps the most important application of the rule of law is that governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedural steps that are referred to as due process. The principle is intended to be a safeguard against arbitrary governance, whether by a totalitarian leader or by mob rule. Thus the rule of law is hostile both to dictatorship and to anarchy.

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35. Measured against this Treaty standard and expectation, the actions of the First Respondent in issuing the impugned Decree clearly fell short, leading to the conclusion that it violated the rule of law principle set out in Articles 6 and 7 of the Treaty.

36. The impugned Decree does not on the face of it make any reference to a recommendation by the Judicial Service Council to the President for the removal of the Justices. There is also no evidence to show that this very specific and integral provision of Article 134(2) of the Constitution of South Sudan was complied with. Additionally, the uncontroverted evidence before this Court is that the Republic of South Sudan failed to comply with the specific and mandatory requirements provided for in the Judiciary Act, 2008 prior to the issuance of the impugned Decree.

37. In its Response to the Reference, the First Respondent averred that in issuing the impugned Decree the Republic of South Sudan was not violating Articles 6(d) and 7(2) of the Treaty, but was '*exercising its mandatory powers.*' We understood this to be a reference to the sovereignty of the Partner State. However, in **SAMUEL MUKIRI MUHOCHI vs. THE ATTORNEY GENERAL OF UGANDA, EACJ REFERENCE NO. 5 OF 2011** this Court considered the issue of Partner State's sovereignty viz a viz their treaty obligations and held:

**Sovereignty, therefore, cannot take away the precedence of Community law, cannot stand as a defence or justification for non-compliance with Treaty obligations and neither can it act to exempt, impede or restrain Uganda from ensuring that her actions and laws are in conformity with requirements of the Treaty.**

38. Further, the Appellate Division of this Court had this to say in **ATTORNEY GENERAL OF RWANDA vs. RUGUMBA, EACJ APPEAL NO. 1 OF 2012.**

**It is manifestly plain from a reading of Article 6(d) that the EAC Treaty was promulgated with a specific aim, namely to foster the Rule of Law. Also the EAC Treaty clearly enjoins a Partner State to govern its people in accordance with the principles of good governance including adherence to the principles of democracy,**

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**the rule of law, protection of human and peoples rights in accordance with the African Charter on Human and Peoples Rights.**

39. On the basis of the evidence before us, we are satisfied that the First Respondent, by its issuance of the impugned Decree, violated both the Constitution of South Sudan and the provisions of its Judiciary Act of 2008. This, in turn places the First Respondent in breach of Articles 6(d) and 7(2) of the Treaty. We so hold.

**Issue No. 2: Whether there is a cause of action against the Second Respondent.**

40. It was the contention and submission of the Applicant, that he has a cause of action against the 2<sup>nd</sup> Respondent herein, arising from the latter's alleged failure to comply with his obligations under Articles 29(1) and 71(1)(d) of the Treaty. These provide as follows:

Article 29(1)

**Where the Secretary General considers that Partner State has failed to fulfil an obligation under this Treaty, the Secretary General shall submit his or her findings to the Partner State concerned, for that Partner State to submit its observations on the findings.**

Article 71(1)

- (a) .....
- (b) .....
- (c) .....
- (d) **The secretariat shall be responsible for:-the undertaking either on its own initiative or otherwise, of such investigations, collection of information, or verification of matters relating to**

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any matter affecting the community that appears to merit examination.

41. The Applicant submitted that prior to the filing of the instant Reference, the Second Respondent had not taken any action to verify or investigate the matters raised in this Reference, particularly the actions of the President of South Sudan in issuing the impugned Decree.
42. On his part, the Second Respondent contends that there is no cause of action against him in terms of Article 30 of the Treaty given that there is no **“Act, regulation, directive, decision or action that is unlawful or is an infringement of the provisions of the Treaty.”** In any event, the Second Respondent argued that he was unaware of the impugned Decree and its consequences until the filing of the instant Reference; but upon being so aware, he had made inquiries seeking a comprehensive report from the Partner State.
43. In the case of **FORUM POUR LE RENFORCEMENT DE LA SOCIETE CIVILE (FORSC) & OTHERS vs. THE ATTORNEY GENERAL OF THE REPUBLIC OF BURUNDI & THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY, EACJ REFERENCE NO.12 OF 2016**, the Court considered the nature of the Second Respondent’s obligations under Article 29 (1) of the Treaty. It was held:

**This Court has had many occasions to address the question of the cause of action against the Secretary General. It has consistently found a cause of action against the Secretary General to have been sufficiently established where the matter relates to the violation of Article 29(1) and associated Articles of the Treaty. See SITENDA SEBALU vs. THE SECRETARY GENERAL OF THE EAC & ATTORNEY GENERAL OF UGANDA, EACJ REFERENCE NO. 1 OF 2010, THE EAST AFRICAN LAW SOCIETY vs. ATTORNEY GENERAL OF BURUNDI & THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY, EACJ REFERENCE NO. 1 OF 2014, and DEMOCRATIC PARTY vs. THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY & 4 OTHERS, EACJ REFERENCE NO. 2 OF 2012.**



44. The Court went further to quote from the case of JAMES KATABAZI & 21 OTHERS vs. THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY & ANOTHER, EACJ REFERENCE NO. 1 OF 2007 as follows:-

The Secretary General is required to “submit his or her findings to the Partner State concerned”. It is obvious to us that before the Secretary General is required to do so, she or he must have done some investigation. From the unambiguous words of that sub-Article there is nothing prohibiting the Secretary General from conducting an investigation on his/her own initiative. Therefore, the glaring answer to the second issue is: Yes the Secretary General can on his own initiative investigate such matters. But the real issue here is not whether he can but whether the Secretary General, that is, the 1<sup>st</sup> Respondent, should have done so. It was in this regard that there was heated debate in the preliminary objection on whether or not the Secretary General must have intelligence of some activity happening in a Partner State before he undertakes an investigation..... We are of the decided opinion that without knowledge the Secretary General could not be expected to conduct any investigation and come up with a report under Article 29(1).

45. In the FORSC case, the Court cited with approval the case of EAST AFRICAN CIVIL SOCIETY ORGANIZATION FORUM (EACSO) vs. THE ATTORNEY GENERAL OF BURUNDI & 2 OTHERS, EACJ APPEAL NO. 4 OF 2016 where the Court did not find the Secretary General accountable for alleged violation of duties and held:

Whereas the Secretary General's power 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. We reiterate that the Reference is predicated upon a specific decision of the Constitutional Court of Burundi issued on 5<sup>th</sup> May, 2015 with attendant events. What was the role of the Secretary General in that ~~matter?~~ **None whatsoever.**

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46. In the instant Reference, the Applicant has not shown that the Second Respondent was aware or ought reasonably to have been aware of the impugned Decree and the actions flowing therefrom prior to the filing of the Reference, so as to kick-start the obligations under Article 29(1). It is noted that the Second Respondent acted expeditiously upon receipt of the Reference to write to the First Respondent State and call for a Report.

47. Consequently, we find that the Applicant has not established a case that the Second Respondent defaulted on his obligations under the Treaty. We so hold.

**Issue No. 3: Whether the Applicant is entitled to the Remedies sought.**

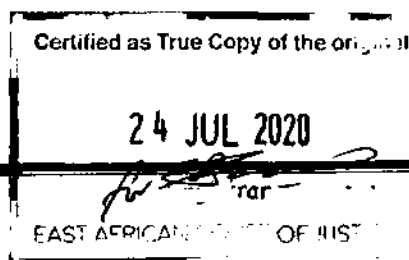
48. The remedies sought by the Applicant were set out in paragraph 8 of this judgment. As regards the First Respondent, it is our finding above that the said Respondent State violated its own Constitution and laws, which violation in turn constitutes a breach of the Treaty. We are thus inclined to grant the first declaration sought. It is our considered view that the said declaration encapsulates the further declarations sought under paragraph 8(b) and (c) hereof.

49. As stated earlier in this judgment, we are unable to agree with the Applicant as regards his claim against the Second Respondent. We therefore decline to grant the declarations sought under paragraph 8(d) and (e) above.

50. On the question of costs, Rule 127(1) of the Court's Rules of Procedure provides that costs shall follow the event unless the Court for good reason decides otherwise. We find no reason not to abide by the general rule on costs. In any event, we find fortitude in the decision of **THE ATTORNEY GENERAL OF BURUNDI vs. THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY & ANOTHER, EACJ APPEAL NO. 2 OF 2019**, where the rule that costs should ordinarily follow the event was emphatically reinforced.

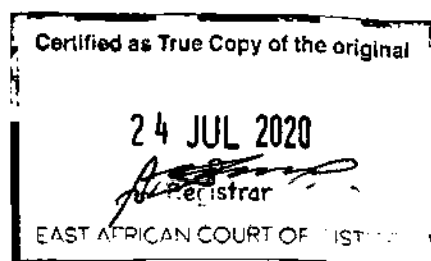
**G. CONCLUSION**

51. In the result, we hereby allow the Reference as against the First Respondent with the following orders:

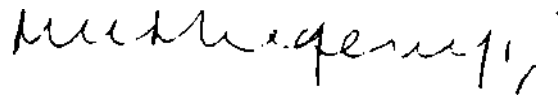


- i. A DECLARATION be and is hereby issued, that the act of the President of the Republic of South Sudan of removing the Applicant from the position of Justice of the Court of Appeal vide "*Republican Decree No.100/2017 for the Removal of some Justices and Judges in the Judiciary of the Republic of South Sudan, 2017 AD*" dated 12<sup>th</sup> July 2017 is in violation of the Constitution of the Republic of South Sudan and a violation of Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community.
- ii. We award costs to the Applicant as against the First Respondent.
- iii. We do also award costs to the Second Respondent as against the Applicant.

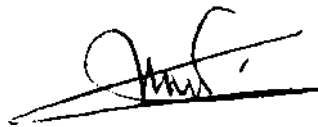
It is so ordered.



Delivered by Video Conference this 24<sup>th</sup> Day of July, 2020



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**Hon. Lady Justice Monica K. Mugenyi**  
**PRINCIPAL JUDGE**



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**\*Hon. Justice Dr. Faustin Ntezilyayo**  
**DEPUTY PRINCIPAL JUDGE**



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**Hon. Justice Charles Nyachae**  
**JUDGE**

***\*[Hon. Justice Dr. Faustin Ntezilyayo resigned from the Court in February 2020 but signed this judgment in terms of Article 25(3) of the Treaty.]***

Certified as True Copy of the original

24 JUL 2020

EAST AFRICAN COURT OF JUSTICE