



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



FIRST INSTANCE DIVISION

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

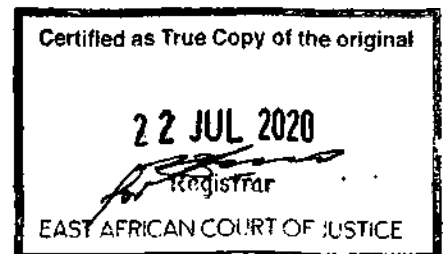
REFERENCE NO. 8 OF 2018

1. HASSAN BASAJJABALABA
2. MUZAMIRU BASAJJABALABA APPLICANTS

VERSUS

**THE ATTORNEY GENERAL OF
THE REPUBLIC OF UGANDA RESPONDENT**

22ND JULY 2020



JUDGMENT OF THE COURT

A. INTRODUCTION

1. This Amended Reference was brought under Articles 5, 6(d), 7(2), 8(1)(c) and (4), 23(1) and (3), 27(1) and 30 of the Treaty for the Establishment of the East African Community ('the Treaty'), and Rules 1, 24 and 48(a) of the East African Court of Justice Rules of Procedure, 2013. It sought to challenge the legality of various actions of the Respondent State in so far as they purportedly breach Articles 6(d) and 7(2) of the Treaty, and Articles 7(1)(d) and 26 of the African Charter on Human and Peoples Rights.
2. The Reference was supported by two (2) affidavits, both of which were deposed by Mr. Hassan Basajjabalaba ('the First Applicant') for and on behalf of himself and his brother, Mr. Muzamir Basajjabalaba ('the Second Applicant'). They are dated 1st June 2018 and 1st July 2019 respectively. The Applicants are citizens of the Republic of Uganda, resident in Munyonyo, Kampala – Uganda. They seek to enforce their rights against the impugned actions of the Respondent State.
3. On the other hand, the Respondent is a self-defining office that was sued in a representative capacity as Principal Legal Advisor to the Government of the Republic of Uganda. The Respondent State opposed the Amended Reference and filed a Response to the Reference that denies any breach of the Treaty in the terms proposed by the Applicant and questions the justiciability of the matter before this Court. The Respondent's Response to the Reference was supported by the affidavits of Mr. Jimmy Oburu Odoi dated 17th July 2018 and Ms. Emelda Adong dated 22nd October 2019.
4. At the hearing the Applicants were represented by Messrs. Caleb Alaka and Joseph Kyazze, while Ms. Patricia Mutesi, Ms. Goretti Arinaitwe and Ms. Charity Nabaasa appeared for the Respondent.

B. FACTUAL BACKGROUND

5. On 14th January 2013, the Applicants were vide Criminal Case No. 003 of 2013 of the Buganda Road Chief Magistrates Court charged with the offences of

conspiracy to defeat tax laws and uttering a false document contrary to sections 392(a) and 351 of the Penal Code Act respectively. They denied both charges; successfully sought bail, and the matter was adjourned to 12th February 2013 for hearing.

6. However, the following day (15th January 2013) Mr. Hassan Basajjabalaba ('the First Applicant') was re-arrested by officials of the Uganda Police Force while on his way to Nairobi and detained at the Uganda Police's Special Investigations Unit on account of the same charges in respect of which he had secured bail. He was, on 16th January 2013, indicted of the same offences before the Anti-Corruption Division of the High Court of Uganda. Meanwhile, on the same date, parallel proceedings were going on at the Buganda Road Chief Magistrates Court where the charges against him were withdrawn by the Director of Public Prosecutions.
7. The First Applicant was remanded by the Chief Magistrates Court of the Anti-Corruption Division to Luzira Maximum Prison until 18th January 2013, when he was released on a cash bail of US\$ 60,000,000/= (sixty million) while his sureties executed a non-cash bond of US\$ 4,000,000,000 (four billion). On 6th March 2013, the Applicants were committed to the High Court for trial and their bail cancelled without according them a hearing, only to be subsequently released on bail pending trial on 13th March 2013.
8. The Applicants thereupon filed Constitutional Petition No. 12 of 2013 in the Constitutional Court of Uganda. They did also file Constitutional Applications No. 9 and 10 of 2013 seeking to stay the hearing of the criminal trial until the constitutional petition had been disposed of. On 8th May 2013, the Constitutional Court of Uganda issued the following injunctive orders (paraphrased):
 - i. It stayed all pending criminal charges and proceedings against the petitioners in Buganda Road Chief Magistrates Court Miscellaneous Application No. 22 of 2013 and in the Anti-Corruption Division of the High Court, as well as any other pending criminal charges related thereto.

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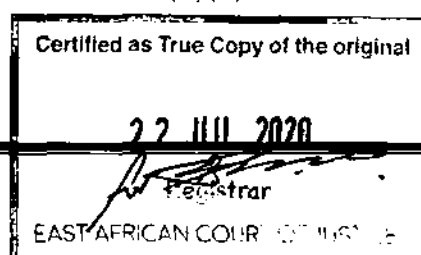
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- ii. The Respondent and its agents were prohibited from using the processes of any court so as to initiate and prosecute the Applicants for any charges whatsoever arising out of or in connection with the compensation extended to the Haba Group (U) Ltd as detailed in Constitutional Petition No. 12 of 2013 until the final disposal of that Petition or such other orders of the Constitutional Court.
 - iii. The Applicants' bail terms as issued by the Anti-Corruption Division of the High Court in Criminal Case No. 3 of 2013 were varied by having their passports deposited with the Registrar of the Constitutional Court, subject to their availability to the Applicants upon due application therefor.
 - iv. The requirement for the Applicants to report to the Director of CID every two (2) weeks was replaced with an order that they report to the Constitutional Court's Registrar on monthly basis until the final disposal of the Petition.
9. The constitutional petition was eventually heard on 1st July 2014 before a coram comprised of Hon. Justices Stephen Kavuma (Deputy Chief Justice), Remmy Kasule, Solomy Bossa, Eldard Mwangusya and Ruby Aweri Opio but the resultant judgment was only delivered on 2nd May 2018.

C. APPLICANTS' CASE

10. It is the Applicants' contention that there was inordinate delay in the disposal of Constitutional Petition No. 12 of 2013, the judgment therein having been delivered more than three (3) years after the hearing of the petition, even then its delivery having allegedly been prompted by the filing of the present Reference. To compound matters, the impugned judgment was only signed by four (4) of the five (5) judges that had constituted the petition coram. The Applicants question its validity on that premise, faulting the Government of Uganda for elevating some of the judges to a superior court whilst endorsing the retirement of others before the delivery of the judgment, thus depriving the Applicants of timely justice. They consider the foregoing actions of the Constitutional Court to have been a violation of Articles 6(d) and 7(2) of the Treaty, and Articles 7(1)(d) of the African Charter on Human and Peoples Rights.



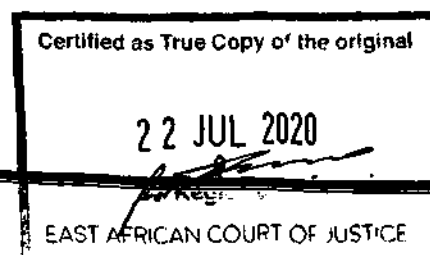
11. In the Applicants' view, the Uganda Police Force and the Directorate of Public Prosecutions sought to take advantage of the inordinate delay in the disposal of the constitutional petition to defy subsisting court injunctions by summoning them for interrogation and attempting to commence their prosecution in Criminal Case No. 3 of 2013 before the Anti-Corruption Division. They opined that these actions amounted to an infringement of Articles 6(d) and 7(2) of the Treaty, as well as Article 26 of the African Charter on Human and Peoples Rights.
12. Meanwhile, rather than take measures to forestall the impugned actions by the afore-cited organs and agents of the Respondent State as requested of him, it is the Applicants contention that the then Minister of Justice and Constitutional Affairs ignored their concerns and thus seemingly condoned the impugned actions.
13. In the Applicants' estimation, the foregoing actions render it improbable that they would get a fair and impartial hearing in the Ugandan courts therefore any such trial in respect of the charges in issue presently, whether sanctioned by the Anti Corruption Division of the High Court, the Constitutional Court or the Supreme Court, would further undermine the principle of rule of law.
14. In the event, as summed up in their written submissions, the Applicants sought the following remedies (paraphrased):
- i. Declarations that the various actions/ omissions of the Respondent State, its organs, agents or servants as against the Applicants constitute a violation of the provisions of Article 6(d) and 7(2) of the Treaty, and Articles 7(1)(d) and 26 of the African Charter on Human and Peoples Rights.
 - ii. A permanent injunction issue staying all criminal charges and proceedings against the Applicants and restraining the Respondent State, its agents or persons claiming through it from reinstating the said charges or otherwise re-commencing the prosecution of the Applicants.

D. RESPONDENT'S CASE

15. The Respondent contends that, contrary to the Applicants' assertions, the Constitutional Court was unable to deliver the judgment in *Constitutional Petition No. 12 of 2013* for good reason and when the judgment was eventually delivered, its non-endorsement by the fifth judge did not invalidate or otherwise render it illegal. It is the contention that to the extent that there was reasonable justification for the late delivery of the judgment and in so far as the Applicants were the beneficiaries of injunctive orders, there was neither inordinate delay on the part of the Constitutional Court nor any prejudice to the Applicants.
16. The Respondent further asserts that the Constitutional Court's orders of 2nd May 2018 did not contravene any provision of the Treaty; on the contrary, upon rendering its decision in the constitutional petition, the temporary injunctive reliefs it had extended to the Applicants lapsed, whereupon the Uganda Police acted well within its constitutional mandate in pursuing the actions complained of by the Applicants in summoning the Applicants for interrogation.
17. It is the Respondent's contention that the orders sought by the Applicants in this Court are intended to frustrate their criminal trial; curtail the independence of the Judiciary and the office of the Director of Public Prosecutions, as well as inhibit the constitutional mandate of the Uganda Police Force. It thus concludes that the Amended Reference does not disclose a cause of action but, rather, is frivolous, vexatious and devoid of merit.

E. ISSUES FOR DETERMINATION

18. At a Scheduling Conference held on 18th June 2019, the Parties framed the following issues for determination:
- i. *Whether the actions of the Government of Uganda through the Constitutional Court of delivering the judgment dated 2nd May 2018, 3 ½ years after the hearing of the Petition, signed by four out of the five justices is a violation of the rule of law and an infringement of Articles 6(d) ad 7(2) of the Treaty and Article 7(1)(d) of the African Charter on Human and Peoples Rights.*




- ii. *Whether the orders of the Constitutional Court of Uganda sanctioning the continued trial of the Applicants is in contravention of Articles 6(d) and 7(2) of the Treaty and Article 7(1)(d) of the African Charter on Human and Peoples Rights.*
- iii. *Whether the actions of the Government of Uganda through its agents in summoning the Applicants for interrogation in view of a subsisting order of a temporary injunction by the Constitutional Court violate Articles 6(d) ad 7(2) of the Treaty and Article 26 of the African Charter on Human and Peoples Rights.*
- iv. *Whether there were omissions by the Government of Uganda through the Minister of Justice and Constitutional Affairs to appropriately address the continuing persecution of the Applicants by the Police and the delay by the Constitutional Court to deliver judgment in the Applicants' Constitutional Petition No 12/ 2013 is a violation of Articles 6(d) ad 7(2) of the Treaty and Article 7(1)(d) of the African Charter on Human and Peoples Rights.*
- v. *Whether the action of the Government of Uganda in elevating the Justices of the Constitutional Court who heard the Applicants' Petition to the Superior Courts or other courts and in allowing them to retire before delivery of the judgment in the Applicants' Constitutional Petition No 12/ 2013 constitutes a breach of the principles of rule of law and an infringement of Articles 6(d) ad 7(2) of the Treaty and Article 7(1)(d) of the African Charter on Human and Peoples Rights.*
- vi. *What reliefs are available to the Parties?*

F. COURT'S DETERMINATION

19. It is imperative that we clarify from the onset that although the present Reference was instituted under the East African Court of Justice Rules of Procedure of 2013, the Court's procedural rules have since been revised, the applicable Rules presently being the East African Court of Justice Rules of 2019 ('the Court Rules'). Given the express provisions of Rule 136, we shall apply the Court Rules as amended '**without prejudice to the validity of anything previously done, provided that if and so far as it is impracticable to apply the (new) Rules, 'the practice and procedure hereto followed shall be allowed.'**
20. Secondly, the Respondent raised a point of law in its submissions in respect of Issue No. 1 and adopted the same submissions for Issue No. 5, albeit with emphasis on its arguments in respect of the merits thereof. We propose to

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address the point of law raised as a preliminary matter and shall therefore consider Issues 1 and 5 together prior to a determination of the residual issues.

Issue No. 1: Whether the actions of the Government of Uganda through the Constitutional Court of delivering the judgment dated 2nd May 2018, 3 ½ years after the hearing of the Petition, signed by four out of the five justices is a violation of the rule of law and an infringement of Articles 6(d) and 7(2) of the Treaty and Article 7(1)(d) of the African Charter on Human and Peoples Rights.

Issue No. 5: Whether the action of the Government of Uganda in elevating the Justices of the Constitutional Court who heard the Applicants' Petition to the Superior Courts or other courts and in allowing them to retire before delivery of the judgment in the Applicants' Constitutional Petition No 12/ 2013 constitutes a breach of the principles of rule of law and an infringement of Articles 6(d) ad 7(2) of the Treaty and Article 7(1)(d) of the African Charter on Human and Peoples Rights.

21. As quite correctly asserted by the Applicants, it is now well settled law that under international law nation states can be held responsible for the actions of any of their state organs, including judicial organs or courts. See Article 4(1) of the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts.¹ We shall not belabor that point.

22. The Applicants argued that the delivery of the judgment in Constitutional Petition No. 12 of 2013 3½ years after the matter had been heard contravened Article 28(1) of the Uganda Constitution and Rule 33(1) of the Judicature (Court of Appeal Rules) Directions ('the Court of Appeal Rules'). It was further proposed that the Constitutional Court acted in flagrant breach of Article 137(2) of the Uganda Constitution and Rule 33(3), (5) and (6) of the Court of Appeal Rules by rendering a decision signed by only 4 of the 5 judges that had heard the Petition, 3 of whom had ceased to be Justices of the Constitutional Court as at the date of

¹ That Article provides that 'the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.'

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the judgment. It was thus submitted for the Applicants that non-compliance with the domestic laws of Uganda in turn rendered the impugned decision a violation of the rule of law principle outlined in Articles 6(d) and 7(2) of the Treaty, while the delay in delivering the said judgment contravened the call in Article 7(1)(d) for individual's legal rights to be determined within a reasonable time.

23. On *Issue No. 5*, the Applicants contend that although Article 144(1) of the Uganda Constitution provides for a 3-month time frame within which a judicial officer that is due to vacate his/ her office may complete all pending work; this provision does not permit judicial officers that have already taken up their new assignments to return to the Constitutional Court and purport to deliver judgments as, in their view, transpired in this case.

24. Conversely, we understood it to be the Respondent's contention that where (as in the present case) applicants challenge a decision of a domestic court in this Court and simultaneously file an appeal in respect of the same decision in a domestic appellate court, it would not be in the interest of the fair administration of justice or legal certainty for this Court to consider the legality of the decision or otherwise determine matters that had been concurrently raised in the appeal. It was the contention that domestic courts bearing the primary mandate to interpret domestic laws, the principle of rule of law would require that they determine and remedy any illegalities in lower courts' decisions so as to avert the absurdity of such an eventuality rendering moot a decision of this Court or creating a parallel judicial system.

25. To buttress her case in this regard, Ms. Mutesi cited Article 132(3) of the Uganda Constitution that grants parties a right of appeal to the Supreme Court in respect of decisions of the Constitutional Court. She argued that the Respondent State's observance of the rule of law *per se* was manifested in the appellate jurisdiction conferred upon the Supreme Court to inquire into the legality of the decisions and processes of the Constitutional Court. That the present Applicants did in fact submit to that court's appellate jurisdiction was, in her view, testimony to the reality of the rule of law in the Respondent State. She opined, however, that the duplicity of the issues raised in both the Supreme Court and this Court was

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tantamount to forum shopping and rendered the same issues unjusticiable before this Court.

26. By way of an alternative argument, learned Counsel for the Respondent argued that there being no specified time frame for the delivery of judgments in the laws of Uganda, the present issue should be interrogated within the context of what, if any, injustice the parties had suffered or whether their right to a fair trial had been curtailed in any way. In her view, to the extent that the Applicants' Petition was heard and determined while they were under protective injunctive orders, they were shielded from any criminal prosecution and thus suffered no injustice. Indeed, she opined, to date they continue to benefit from similar protective orders issued by the Supreme Court.
27. With regard to the validity of the judgment on account of the impugned signatures, it was learned Counsel's contention that the same question was a ground of appeal in the Supreme Court therefore it could not be suggested that the Respondent State had violated its internal laws or the rule of law. In any event, it was her contention that a similar issue had been considered in the case of **Sarah Kulata Basangwa vs. Uganda, Supreme Court Criminal Appeal No. 03 of 2018** and it was held that the absence of a third signature did not invalidate the decision of the court given that there was a majority decision which constituted the judgment thereof.
28. In addition, Ms. Mutesi argued that the acknowledgment in **Orient Bank vs. Fredrick Zaabwe & Another, Supreme Court Application No. 17 of 2007** of the distinction between the signing of a judgment and the day it was pronounced, as well as the affirmation that the two actions did not necessarily occur on the same day, rendered speculative and unproven the Applicants' allegation that 3 of the judges signed the impugned judgment after they had ceased to be members of the Constitutional Court. She applied the same parameters to *Issue No. 5*, thus seemingly reiterating that in the absence of proof that the elevated and retired judges had not signed the judgment before they vacated the Constitutional Court, the Applicants fell short on proof of any breach of the Treaty or African Charter on Human and Peoples Rights.

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29. By way of rejoinder, the Applicants sought to rebut the preliminary point of law raised with the assertion that there was no provision in the Treaty for the exhaustion of local remedies before a party can access this Court; the Respondent State had not conceded the Appeal in the Supreme Court so as to render the present proceedings superfluous, and this Court was clothed with a distinct mandate from that enjoyed by the Supreme Court. It was their contention that the case of Henry Kyarimpa vs. The Attorney General of Uganda, EACJ Appeal No. 6 of 2014 had conclusively distinguished this Court's jurisdiction to interrogate impugned actions against Treaty provisions, as opposed to domestic courts that would interrogate the same actions against domestic laws. They therefore maintained that the Amended Reference was properly before the Court.

30. With regard to the merits, they reiterated their earlier assertions that Rule 33(1) of the Court of Appeal Rules does enjoin the Constitutional Court to render its decisions '*without any delay*', to that extent prescribes a time frame within which judgments in that court should be delivered and there was no need, therefore, for this Court to consider any other circumstances as had been advanced by learned Counsel for the Respondent. The Applicants faulted the Respondent for purporting to rely upon the decision in the Sarah Basangwa Kulata case, arguing that whereas that was a criminal appeal that fell squarely within the ambit of Rule 33(3) of the Court of Appeal Rules, the decision in issue presently had arisen from a constitutional petition that could not benefit from the same Rule. They rejected the Respondent's contention that the impugned judgment could have been signed on a different date from the date it was delivered, contending that the onus of proof of that assertion lay with the Respondent.

31. We have carefully considered the rival arguments of both Parties, as well as their respective pleadings. The point of law raised by the Respondent is grounded in the additional affidavit that was filed in support of that Party, which was deposed by Ms. Emelda Adong. Ms. Adong attested to the Applicants having lodged an appeal in the Supreme Court of Uganda in respect of the Constitutional Court's now impugned decision, and the reliefs sought therein were similar to those sought in this Amended Reference. She averred that the constitutional appeal in question was Constitutional Appeal No. 1 of 2018 and attached the Memorandum

of Appeal in respect thereof. The Memorandum of Appeal delineated the following grounds of appeal:

- i. THAT the Learned Justices of the Constitutional Court erred in law and fact when they delivered a judgment in the Petition, without being constituted as a Constitutional Court, thereby rendering the judgment a nullity.*
- ii. THAT the Learned Justices of the Constitutional Court erred in law and fact when they delivered a judgment in the Petition, yet three out of the four Justices who signed the judgment had since vacated the Constitutional Court, thereby rendering the Judgment a nullity.*
- iii. THAT in the alternative but without prejudice, the Learned Justices of the Constitutional Court erred in law and fact, when they failed to evaluate the evidence on record and apply it to the law, and thus arrived at the following wrong conclusions:*
 - (a) Despite the acts of the Director of Public Prosecution and the Uganda Police Force being high handed, inexplicable and deplorable, the same would not justify the dropping of charges against the Appellants or discharging the Appellants from facing trial for the charges against them.*
 - (b) The violations committed by the DPP and the Uganda Police Force on the Appellants were not of such an aggravated and prolonged nature to justify stay of criminal proceedings against them.*
 - (c) The **Section 392(a) of the Penal Code Act Cap 120** under which the Appellants were charged is not inconsistent with and or in violation of **Articles 2(1) & (2), 28(1), (3)(b), 28(12), 42, 44(c) of the Constitution.***
 - (d) The Appellants could not raise the issue of violation of **section 49 of the Anti-Corruption Act** as their trial had not commenced at the time of filing the Petition and no violation had been committed.*
 - (e) The allegation of defectiveness of the charge sheet under which the Appellants were charged was pre-mature, and the defect itself was not grave.*
 - (f) The charged and indictment preferred against the Appellants are not inconsistent with and or in violation of the Constitution.*
- iv. THAT the Learned Justices of the Constitutional Court erred in law and fact when, despite the evidence on record and their findings, they failed to grant all the reliefs sought by the Appellants in the Petition.*

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32. The totality of the foregoing affidavit evidence was not rebutted by the Applicants and therefore remains uncontroverted. It conclusively establishes that *Issues 1* and *5* before us are in issue before the Supreme Court under *Grounds 1* and *2* of the Memorandum of Appeal, *Issue No. 2* hereof is in contention before the Supreme Court under *Ground No. 4* of the Memorandum of Appeal and *Issue No. 3* is similarly under consideration before the same court in *Ground 3* of the Appeal. Even more significantly, in the constitutional appeal as in this Amended Reference, the Applicants *inter alia* seek their permanent discharge from prosecution in *Criminal Case No. 003/ 2018*. Accordingly, it seems abundantly clear that the substratum of the Amended Reference before this Court is materially the same in *Constitutional Appeal No. 1 of 2018* that was lodged in the Supreme Court of Uganda.
33. That being so, having submitted their misgivings in respect of the impugned judgment to the Supreme Court for interrogation as by law provided, it cannot be suggested that the Respondent State is in breach of either the rule of law principle enshrined in Articles 6(d) and 7(2) of the Treaty or the right to a fair trial as guaranteed under Article 7(1)(d) of the African Charter on Human and Peoples Rights. On the contrary, the Respondent has made available a right of appeal that offers the opportunity for remedial action by the Supreme Court against any shortcomings of the Constitutional Court. Having seized the Supreme Court of the matter on appeal, it would be premature to indict the Respondent State for non-compliance with either the rule of law or the right to a fair hearing without the benefit of the Supreme Court's decision. The rule of law is clearly work in progress through the due process of the Ugandan judicial system, while the right to a fair trial cannot be said to have been curtailed before the Supreme Court has so much as heard the Constitutional Appeal.
34. Perhaps more fundamentally, however, is the propriety of a party purporting to invoke 2 parallel judicial proceedings in respect of the same subject matter where it seeks the same or similar reliefs. This appears to be the crux of the point of law that was propelled by learned Counsel for the Respondent. As quite correctly argued by the Applicants, the Treaty indeed makes no provision for the exhaustion of local remedies before a prospective party can access this Court.

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However, would that necessarily translate into a carte blanche for parallel judicial proceedings in this and domestic appellate courts?

35. We find apposite instruction on this in the *Vienna Convention on the Law of Treaties, 1969* ('the Vienna Convention'). Article 31 advocates a literal interpretation of treaties in the following terms:

1. **A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.**
2. **The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:**

36. In addition, Article 32 of the Vienna Convention provides for supplementary modes of interpretation 'in order to confirm the meaning resulting from the application of article 31', or to determine the correct meaning where the literal interpretation under Article 31:

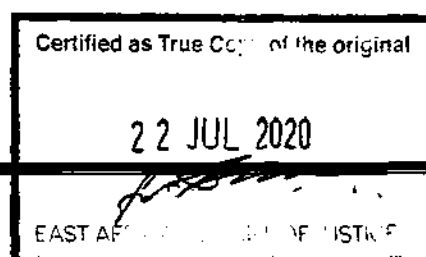
(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

37. Article 32 of the Vienna Convention was construed by the Appellate Division in **The Attorney General of Uganda vs. Tom Kyahurwenda**² to entail 'an absurdity exception to the literal interpretation of any Treaty.'

38. It is on that basis that we now turn to the matter before us. It seems to us that there being no provision in the Treaty for the exhaustion of local remedies prior to accessing this Court, the intention of the framers of the Treaty on the question of parallel proceedings may be deduced first, as urged in Article 31(1) of the Vienna Convention, by a literal interpretation of the Treaty '*in good faith*' and with regard to the Treaty's '*object and purpose*'; and secondly, by supplementary modes of interpretation for purposes of confirming the literal interpretation and avert either an obscure or absurd interpretation.

² EACJ Case No. 1 of 2014



39. It is to the text of the Treaty that we now turn to deduce the intention of its framers. In paragraph 10 of the Preamble to the Treaty, the Partner States resolved **'to adhere themselves to the fundamental and operational principles that shall govern the achievement of the objectives set out (t)herein.'** Article 6 of the Treaty then outlines the fundamental principles that shall govern the achievement of the East African Community's objectives, including the principle of good governance that not only takes centre stage in Article 6(d), but is also re-echoed in Article 7(2) of the Treaty.

40. This Court has had occasion to define the notion of good governance in the case of **Baranzira & Another vs. The Attorney General of Burundi**,³ citing with approval an Article published by the International Fund for Agricultural Development (IFAD)⁴ where 'good governance' was defined as follows:

The existence of effective mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences.

41. In addition, we do find most persuasive the following detailed definition of good governance as published on the website of The Social Research Centre (SRC) of The American University in Cairo, in an Article titled **'Definition of Governance, Good Governance and a Proposed Framework for Good Governance'**:

Governance is the exercise of political, economic and administrative authority to manage a nation's affairs. It is the complex mechanisms, processes, relationships and institutions through which citizens and groups articulate their interests, exercise their rights and obligations and mediate their differences. Good governance is therefore a subset of governance, wherein public resources and problems are managed effectively, efficiently and in response to critical needs of society.

³ EACJ Reference No. 15 of 2014

⁴ 'Good Governance: An Overview,' IFAD Executive Board – 67th Session, September 1999, p.6

Effective democratic forms of governance rely on public participation, accountability and transparency. (Our emphasis)

42. The vitality of the fundamental and operational principles of the Treaty to the East African Community, its organs and institutions cannot be over-emphasized. Indeed, in The Attorney General of Uganda vs. Tom Kyahurwenda (supra) it was said of them:

These Fundamental Objectives and Fundamental Operational Principles of the Treaty are just that: truly fundamental – solemn and sacrosanct. They are the rock foundation, upon which the solid pillars of the Treaty, the Community and the Integration agenda are constructed. They stand deeper, larger and loftier than ‘mere aspirations’ that certain Counsel for Partner States would make them out to be.

43. This Court was established under Article 23 of the Treaty with the primary duty to **‘ensure adherence to law in the interpretation and application of and compliance with this Treaty.’** That mandate of the Court is exercised within the framework of the fundamental and operational principles of the East African Community as encapsulated in Articles 6 and 7 of the Treaty. Good governance arguably being the king pin upon which the designated principles gravitate, the Court must of necessity execute its mandate and manage the public resources entrusted to it within the confines of good governance, that is, **‘effectively, efficiently and in response to the critical needs of society.’**

44. This brings to bear the renown notion of judicial economy. In its literal sense it denotes **‘efficiency in the operation of courts and the judicial system, especially the efficient management of litigation so as to minimize duplication of effort and to avoid wasting the judiciary’s time and resources.’**⁵ It is abundantly clear that deference to judicial economy would be the direct antithesis to parallel judicial proceedings and the connotations of duplicity and the inefficient utilization of scarce judicial resources that pertain thereto. Undoubtedly, we are enjoined by the dictates of good governance to

⁵ Black’s Law Dictionary, 10th Edition, p. 975

entrench the principle of judicial economy and obviate the undue duplication of judicial proceedings that could translate into the undesirable practice of forum shopping. In our considered view, such a purposive construction of Articles 6(d) and 7(2) would have been the intention of the framers of the Treaty.

45. That is not to say that parties' right to access this Court and experience a fair trial are not important considerations, neither would it deny litigants the Court's Treaty interpretation function, as was argued by the Applicants. Far from it. However, such rights must of necessity be juxtaposed against the duty upon the Court to entrench good governance in the performance of its function, in strict adherence to the fundamental principles of the East African Community. It will suffice to note that in the case of **Brown vs. Stott**,⁶ the *limited qualification* of the right to fair trial was duly underscored, with Lord Bingham observing that the European Court of Human Rights '**recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention.**' We would not hesitate to say that the need for a similar balance pertains to the East African Community under the Treaty.

46. In any event, it seems to us to be a gross abuse of the notion of access to justice and the right to a fair trial for the Applicants to purport to seize this Court of matters that they have simultaneously submitted to adjudication before a municipal court. As we have stated earlier, it would be premature to indict the Respondent State for breach of the rule of law with regard to the impugned actions of the Constitutional Court, the Directorate of Public Prosecution and Uganda Police Force yet the same matters are pending before the Supreme Court. It would also be an exercise in futility and an abuse of the notion of judicial economy for this Court to pronounce itself on the same matters in the terms sought only for the Supreme Court to duly rectify any alleged mis-directions of the Constitutional Court and possibly grant the same or similar remedies.

47. Such absurdities cannot have been the intention of the framers of the Treaty. Accordingly, a Treaty interpretation that purports to entrench them would run afoul of the good faith, literal interpretation advocated in Article 31(1) of the

⁶(2003) 1 AC 681 at 704

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Vienna Convention. We not only decline the invitation extended to us to fall prey to such procedural vagaries; we take the considered view that the intention of the framers of the Treaty cannot have been to engender the unconscionable practice of litigants purporting to invoke the rule of law principle before us in respect of judicial proceedings that are still pending before municipal courts. Given that our construction of the good governance principle and its applicability to the non-exhaustion of local remedies is neither obscure nor absurd, in so far as it clarifies the nexus between the principle of good governance and best judicial practice; we find no reason to revert to supplementary modes of treaty interpretation as proposed by the Vienna Convention.

48. In the result, we are satisfied that the matters under contestation in *Issues 1 and 5* are improperly before this Court and, to that extent, are an abuse of court process. We would therefore exercise our inherent powers under Rule 4 of the Court's Rules of Procedure to expunge *suo moto* all pleadings and submissions in respect of those *Issues* under Rule 47(1)(c) of the same Rules of Procedure. It is so ordered.

Issue No. 2: Whether the orders of the Constitutional Court of Uganda sanctioning the continued trial of the Applicants is in contravention of Articles 6(d) and 7(2) of the Treaty and Article 7(1)(d) of the African Charter on Human and Peoples Rights.

Issue No. 3: Whether the actions of the Government of Uganda through its agents in summoning the Applicants for interrogation in view of a subsisting order of a temporary injunction by the Constitutional Court violate Articles 6(d) and 7(2) of the Treaty and Article 26 of the African Charter on Human and Peoples Rights.

49. In our consideration of *Issues 1 and 5* above, it did transpire that *Issue No. 2* hereof is also in contention before the Supreme Court under Ground No. 4 of Memorandum of Appeal in *Constitutional Appeal No. 1 of 2018*. *Issue No. 3* is similarly under consideration before the same court in *Ground 3* of the Appeal.

50. Consequently, we reiterate our decision in the preceding issues that the matters under contestation in *Issues 2 and 3* are improperly before this Court and, to that

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extent, are an abuse of court process. We would therefore exercise our inherent powers under Rule 4 of the Court's Rules of Procedure to similarly expunge *suo moto* all pleadings and submissions in respect thereof under Rule 47(1)(c) of the same Rules. We so order.

Issue No. 4: Whether there were omissions by the Government of Uganda through the Minister of Justice and Constitutional Affairs to appropriately address the continuing persecution of the Applicants by the Police and the delay by the Constitutional Court to deliver judgment in the Applicants' Constitutional Petition No. 12/ 2013 is a violation of Articles 6(d) and 7(2) of the Treaty and Article 7(1)(d) of the African Charter on Human and Peoples Rights

51. We find nothing in the Memorandum of Appeal in respect of Constitutional Appeal No. 1 of 2018 that impugns or otherwise challenges the actions or omissions of the Minister of Justice and Constitutional Affairs that are in issue in the Amended Reference. Consequently, this issue shall be determined on its merits.

52. The Applicants' contestations under this issue are basically the alleged failure by the Minister of Justice and Constitutional Affairs ('the Minister') to address either their continued persecution by the Uganda Police or the delay by the Constitutional Court in delivering the now impugned judgment. It was argued for the Applicants that Articles 6(d) and 7(2) of the Treaty placed a duty upon the Respondent State to promote good governance and the rule of law in Uganda but no action was taken by it to redress the flouting of court orders by the Uganda Police and Directorate of Public Prosecution, or ensure delivery of the delayed judgment. The Applicants opined that the Respondent State was under an obligation to put in place effective mechanisms, processes and institutions through which its citizens could articulate their interests, exercise their legal rights, meet their obligations and mediate their differences but had reneged on that duty.

53. Conversely, it was the Respondent's contention this issue was moot and no longer in dispute given that the Court had, in its determination of the Application

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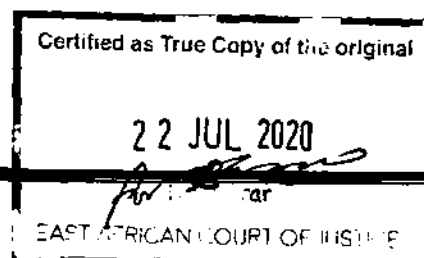
for interim orders,⁷ found that the summons for interrogation on 24th April 2018 had lapsed and the delayed judgment in Constitutional Petition No. 12 of 2013 had since been delivered, rendering any challenges thereto to have been overtaken by events. That position was roundly rejected by the Respondents who argued that although the summons had indeed expired and the delayed judgment had since been delivered, that finding did not render moot a determination of their challenges to the said summons and judgment.

54. We carefully listened to the Parties and dutifully considered the Ruling in question. Paragraph 25 of that Ruling succinctly states that the observation therein was made on the face value of the Amended Reference without the benefit of intrinsic arguments from either party. Non-recourse to the merits of a Reference while considering an application for interim orders is rooted in the reasoning in American Cyanamid Company vs. Ethicon Limited⁸ that intrinsic arguments as to the merits of a substantive suit were matters for trial. Consequently, such an un-interrogated finding would not obviate the detailed inquiry by the Court into an issue at trial. We would therefore over-rule the Respondent's submissions in that regard.

55. Turning to the issue on its merits, with respect, seeking the Minister's intervention in respect of the business of the Constitutional Court was a veiled affront to the Uganda Judiciary. Had the Minister taken leave of his better judgment and yielded to the Applicants' machinations, his actions would have run afoul of customary international law on the institutional independence of the judiciary. Thus, Principle 1 of the UN Basic Principles on the Independence of the Judiciary enjoins nation states to guarantee the independence of the judiciary and places a duty upon governmental and other institutions to '**respect and observe the independence of the judiciary.**' Indeed, as we did observe in Baranzira & Another vs. The Attorney General of Burundi (supra), as far as practicable it is incumbent upon nation states '**to ensure that the structure and operation of state power is founded on the true separation of its executive, legislative**

⁷ EACJ Application No. 9 of 2018

⁸ (1975) AC 396



and judicial branches, as well as the existence of an independent and impartial judiciary.⁹

56. Accordingly, the Applicants' plea to the Minister to prevail upon the Constitutional Court to deliver the delayed judgment was grossly misleading, to say the very least, and the Minister cannot be faulted for respectfully declining that invitation to soil his governance credentials. His being the line Minister for the Uganda Judiciary, as portended by the Applicants, did not transform him into its superintendant. On the contrary, Article 117 of the Uganda Constitution holds Ministers in Uganda '**accountable to the President for the administration of their Ministries**' not for straying in the affairs of independent entities like courts.

57. In the same vein, Article 120(6) of the Uganda Constitution designates the office of the Director of Public Prosecution (DPP) as being independent to the extent that it is not subject to the '**direction or control of any person or authority**' in the execution of its mandate. Article 120(4)(a) of the Constitution provides for certain functions of the DPP to be exercised by officers authorized by him or her. These functions include directing the police to conduct investigations and instituting criminal proceedings in courts.¹⁰ It would follow, then, that persons authorized to act for and on behalf of the office of the DPP are similarly not subject to the direction or control of any person.

58. On the other hand, the Uganda Police Force is established under Article 211 of the Uganda Constitution to perform the functions outlined in Article 212, including the preservation of law and order, and prevention and detection of crime.¹¹ Under Article 213(3), the Uganda Police Force performs its functions under the overall command of the Inspector General of Police, who in turn serves with exclusive fidelity to the laws of Uganda and is only subject to the direction of the President of the Republic of Uganda - even then, only on policy matters.

59. In the instant case, no evidence was adduced before the Court as would suggest that either the Minister of Justice and Constitutional Affairs was at the time the President of the Republic of Uganda or (perchance that being so) that the issues

⁹ See also *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioner's Guide No. 1, International Commission of Jurists, 2004, p. 19.*

¹⁰ See Article 120(3)(a) and (b).

¹² See Article 212(b) and (c).

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in respect of which his intervention had been sought pertained to matters of policy. Needless to state, the Applicants bore the burden of proof thereof but reneged on it. We would therefore answer this issue in the negative.

Issue No. 6: What reliefs are available to the Parties?

60. The Applicants sought the following remedies (reproduced verbatim):

- i. A Declaration that the action of the Judiciary of Uganda, and specifically the Constitutional Court, in delivering a judgment dated 2nd May 2018 in the Applicants' Constitutional Petition No. 12/ 2013 signed by only four of the five justices of the Constitutional Court, three of whom had since vacated the said court, constitutes a violation of the rule of law and is an infringement of Articles 6(d) and 7(2) of the Treaty, and Article 7(1)(d) of the African Charter on Human and Peoples Rights.
- ii. A Declaration that the action of the Judiciary of Uganda, and specifically the Constitutional Court, in delivering a judgment dated 2nd May 2018 in the Applicants' Constitutional Petition No. 12/ 2013 almost 3 1/2 years since the hearing constitutes a violation of the rule of law and is an infringement of Articles 6(d) and 7(2) of the Treaty, and Article 7(1)(d) of the African Charter on Human and Peoples Rights.
- iii. A Declaration that the action of the Judiciary of Uganda, and specifically the Constitutional Court, in delivering a judgment dated 2nd May 2018 in the Applicants' Constitutional Petition No. 12/ 2013 only as a response to the action by the Applicants of filing and serving the Reference challenging the delayed delivery of the judgment constitutes a violation of the rule of law and is an infringement of Articles 6(d) and 7(2) of the Treaty, and Article 7(1)(d) of the African Charter on Human and Peoples Rights.
- iv. A Declaration that the judgment and orders of the Constitutional Court, specifically the Order sanctioning the continued trial of the Applicants, constitutes a violation of the rule of law and is an infringement of Articles 6(d) and 7(2) of the Treaty, and Article 7(1)(d) of the African Charter on Human and Peoples Rights.
- v. A Declaration that the inordinate delay by the Judiciary of the Government of Uganda, and specifically the Constitutional Court, to expeditiously

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determine the Applicants' Constitutional Petition No. 12/ 2013, and respond to the legitimate query of 19th February 2018, thereby denying the Applicants timely justice, constitute a violation of the rule of law and is an infringement of Articles 6(d) and 7(2) of the Treaty, and Article 7(1)(d) of the African Charter on Human and Peoples Rights.

- vi. A Declaration that the actions of the Uganda Government through the Uganda Police Force in ignoring a subsisting order of a temporary injunction, taking advantage of the inordinate delay and/ or failure by the Constitutional Court of Uganda to determine the Applicants' Petition, to summon the Applicants to appear before its officers on 24th April 2018 for interrogation in preparation for the hearing of Criminal Case No. 003 of 2003, constitute a violation of the rule of law and is an infringement of Articles 6(d) and 7(2) of the Treaty, and Article 26 of the African Charter on Human and Peoples Rights.
- vii. A Declaration that the actions of the Uganda Government especially the failure by (the) Minister of Justice and Constitutional Affairs to appropriately redress the continued persecution of the Applicants by the Uganda Police Force, despite (the) existence of an order of court, and the failure to address the continued failure by the Constitutional Court to deliver judgment in the Applicants' Constitutional Petition, which they contend constitutes a violation of the rule of law and amounts to an infringement of Articles 6(d) and 7(2) of the Treaty, and Article 7(1)(d) of the African Charter on Human and Peoples Rights.
- viii. A Declaration that the continued actions of the Uganda Police, acting in concert with the Directorate of Public Prosecution of disrespecting court orders and trampling on the rights of the Applicants, with continued issuance of summons and threats of arrest to the Applicants during the subsistence of a valid order of a temporary injunction, regarding Criminal Case No. 003 of 2013, constitutes a violation of the rule of law and human rights, which amounts to an infringement of Articles 6(d) and 7(2) of the Treaty, and 26 of the African Charter on Human and Peoples Rights.
- ix. A Declaration that the several attempts by the Uganda Government through its organs the Uganda Police, Directorate of Public Prosecution and Anti-Corruption Division of the High Court to continue with the prosecution of the Applicants in Criminal Case No. 003/ 2013 in total disregard of

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subsisting orders of stay is a violation of the rule of law, which the Applicants contend amounts to a breach of Articles 6(d) and 7(2) of the Treaty, and 26 of the African Charter on Human and Peoples Rights.

- x. A Declaration that the letter and summons by the Respondent's agents, the Uganda Police dated 9th April 2018 summoning the applicants to appear before them for the same subject matters that are in issue since 2013, amounts to a breach of Articles 6(d) and 7(2) of the Treaty, and 26 of the African Charter on Human and Peoples Rights.
- xi. A Declaration that the inaction and loud silence of the Government of Uganda, and specifically the Judiciary for over 3 1/2 years and the subsequent action of elevating justices of the Constitutional Court who heard the Applicants' Petition to Superior courts or other courts and or allowing them to retire before delivering judgment, thereby depriving the Applicants of timely justice, constitutes a breach of the principles of rule of law and an infringement of Articles 6(d) and 7(2) of the Treaty, and Article 7(1)(d) of the African Charter on Human and Peoples Rights.
- xii. A Declaration that the demonstrated reluctance (sic) by the Government of Uganda, through the Minister of Justice and Constitutional Affairs to intervene and appropriately address the Applicants' legitimate complaint regarding the inaction of the Judiciary and the continued threats by the Uganda Police to the Applicants, through continuous summons, amounts to failure to ensure that the Government of Uganda and its organs respect the Rule of law and human rights, which amounts to an infringement of Articles 6(d) and 7(2) of the Treaty.
- xiii. (This is a repetition of the preceding prayer.)
- xiv. A Declaration that the said violations of the Treaty, the flagrant abuse of the rights of the Applicants by the Criminal Justice system in Uganda, and the continued injustice occasioned to the Applicants by organs of the Respondent, all in breach the Rule of law enshrined in Articles 6(d) and 7(2) of the Treaty, render it highly improbable that the Applicants will be afforded justice by the criminal justice system in Uganda in respect of the impugned charges pending against them and ought to be discharged from all the pending charges in the Anti-Corruption Division of the High Court of Uganda.

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xv. A Declaration that in view of the actions and omissions of the organs of the Government of Uganda, and the breaches of the tenets of a fair, impartial and expeditious trial, it is no longer possible for them to be fairly, impartially and justly tried and judged in respect of the charges against them and any continued trial or retrial whether sanctioned by the Constitutional Court, Supreme Court of Uganda and or the Anti-Corruption Division of the High Court would further undermine the principles of the Rule of Law.

xvi. An order of a permanent injunction staying all criminal charges and proceedings against the Applicants in the Chief Magistrates Court of Buganda Road vide Misc. Application No. 22 of 2013, Criminal Case No. 003 of 2013 in the Anti-Corruption Division of the High Court and a further order staying any, re-hearing and determination (of) Constitutional Petition No. 12/ 2013.

xvii. An order directing the respective courts of Uganda seized of the said Criminal proceedings and the impugned charges against the Applicants to discharge the Applicants forthwith.

xviii. An order of a permanent injunction restraining the respondents or its organs and agents from using the process of any court so as to initiate, re-instate and or re-prosecute the Applicants on account of the impugned charges.

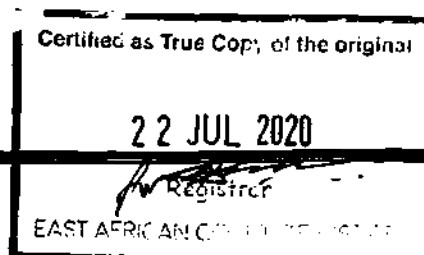
xix. The Applicants be awarded costs of the Reference.

61. Having decided as we have on the issues as framed, we find that all the reliefs sought by the Applicants are not tenable. 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. In the case of Eric Kabalisa Makala vs. The Attorney General of Rwanda,¹² the Court cited with approval the factors informing courts' discretion on costs as espoused in Schuller vs. Roback¹³ to justify its departure from the general rule. It held:

When the court should order otherwise is a matter of discretion, to be exercised judicially by the trial judge, as directed by the

¹² EACJ Reference No. 1 of 2017

¹³ (2012) BCSC (British Columbia Supreme Court) 8



Rules of the Court. ... Factors such as hardship, earning capacity, the purpose of the particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award itself are all matters which a trial judge, quite properly, may be asked to take into account. Assessing the importance of such factors within the context of a particular case, however, is a matter best left for determination by the trial judge.

62. Applying those principles to the **Eric Kabalisa Makala** case, the Court considered the hardship encountered by the applicant in self-prosecuting his case and the circumstances attendant to his loss of employment, the details of which were on record, to exercise its discretion as follows:

In terms of hardship, it is not lost upon us that the Applicant propagated his case personally without the benefit of advocacy services that, given his circumstances, he was seemingly unable to afford. Perhaps had he had the benefit of legal advice he might have forgone the present legal proceedings and spared himself and opposite party the costs incurred. It seems to us, therefore, that the circumstances of this case do warrant a departure from the general rule as espoused in Rule 127(1) of this Court's Rules.

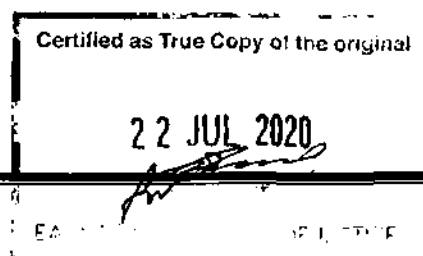
63. Similar circumstances do not prevail in this case. We therefore find no reason not to abide by the general rule on costs. In any event, we find fortitude in the decision in **The Attorney General of Burundi vs. The Secretary General of the East African Community & Another**,¹⁴ where the rule that costs should ordinarily follow the event was emphatically reinforced.

G. CONCLUSION

64. The upshot of the foregoing discourse is that we hereby dismiss this Amended Reference with costs to the Respondent. It is so ordered.

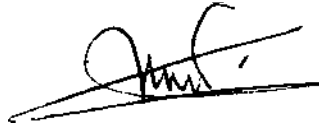
Delivered by Video Conference this 22nd Day of July, 2020.

¹⁴ EACJ Appeal No. 2 of 2019



Monica K. Mugenyi

Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE



*Hon. Justice Dr. Faustin Ntezilyayo
DEPUTY PRINCIPAL JUDGE



Hon. Justice Audace Ngiye
JUDGE



Hon. Justice Dr. Charles Nyawello
JUDGE



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.]*

