IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

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

REFERENCE NO. 4 OF 2017

NIYONGABO THEODORE ..... 1ST APPLICANT

NIYUNGEKO GERARD ..... 2ND APPLICANT

MANARIYO DESIRE ..... 3RD APPLICANT

VERSUS

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

16TH JUNE 2020

JUDGMENT OF THE COURT

A. INTRODUCTION

1. This Reference was brought under Articles 6(d and 7(2) of the Treaty for the Establishment of the East African Community ('the Treaty'), Article 15(1) of the Protocol on the Establishment of the East African Community Common Market ('the Common Market Protocol'), Article 14 of the African Charter on Human and Peoples' Rights and Rule 1(2) of the East African Court of Justice's Rules of Procedure, 2013 ('the Rules').

2. It was instituted by Mssrs. Theodore Niyongabo, Gerard Niyungeko and Desire Manariyo ('the Applicants'), who are citizens of the Republic of Burundi, a Partner State of the East African Community (EAC). The Respondent is the office of the Attorney General of the Republic of Burundi, a self-defining office that was sued in its representative capacity as the Principal Legal Advisor of the Republic of Burundi.

3. The Reference sought to challenge the legality of a decision of the *Tribunal de Grande Instance* of Muha/Bujumbura in case **RC 069/16.863** for allegedly annulling the Applicants' Certificates of Title without giving sufficient reasons or following the special procedure prescribed under Burundian law for annulling Certificates of Title.

4. At the hearing the Applicants were represented by Mssrs. Donald Deya and Nelson Ndeki, while Mr. Diomede Vyizigiro appeared for the Respondent.

B. FACTUAL BACKGROUND

5. In 1997, Mr. Desire Manariyo ('the Third Applicant') allegedly bought three adjacent parcels of land in Kibenga Rural, Bujumbura from three individuals, namely, Mrs. Scholastique Niyonzima (daughter of the late Pascal Bindariye), Mr. Andre Habonimana and Mr. Simon Nzophabarushe ('the Sellers'). In 1999, he and the Sellers had their sale contracts authenticated before the Tribunal of Residence of Musaga, in Bujumbura and executed a single Attested Affidavit, Number 356/99 of 27th July 1999, in respect of the all 3 parcels of land.

6. The Third Applicant subsequently consolidated the 3 parcels of land and obtained a Certificate of Title for the consolidated piece of land from the Registrar of Lands, being Certificate of Title No.1/1875. He later sub-divided the consolidated parcel of land and sold the sub-divided plots to new buyers including Mr. Theodore Niyongabo ('the First Applicant') and Mr. Gerard Niyungeko ('the Second Applicant'), who bought two (2) plots each. The Third Applicant's Certificate of Title No.1/1875 was thereafter annulled by the Registrar of Lands, who kept the original Certificate and issued separate Certificates of Title to the new buyers. Both Applicants took possession of their respective plots, engaged in farming on them, later had them sub-divided further, and sold parts thereof to other *bona fide* purchasers that have since built their own houses thereon and are residing there.

7. In 2010, Mr. Jean Ndayishimiye (son of late Mr. Pascal Bindariye) and Mr. Nicola Mpitabavuma (son of the late Francois Biniga) lodged separate cases against the First Applicant before the *Tribunal de Grande Instance de Bujumbura*, claiming parts of the land owned by him. The Second and Third Applicants were later enjoined as parties to the proceedings and, together with the First Applicant, tendered before the Tribunal evidence that sought to prove their legal ownership of the properties in question. On 27th December 2016, the Tribunal rendered its judgment in case **RC 069/16.863** and annulled the First and Second Applicants' certificates of title. The Applicants' lawyer was notified of the said judgment on 18th January 2017.

8. Aggrieved by the manner in which the Burundi Judiciary had handled the matter, the Third Applicant filed **Manariyo Desire vs. The Attorney General of Burundi, Reference No. 8 of 2015** before this Court. The First Instance Division of this Court dismissed the Reference on 2nd December 2016, a decision that has since been successfully challenged before the Appellate Division of the Court, albeit on a point of law, vide **Manariyo Desire Vs. The Attorney General of the Republic of Burundi, Appeal No. 1 of 2017**. Meanwhile, following the determination of the Reference by this Division, the Applicants did on 27th March 2017 file the instant Reference premised on the alleged violation by the same Respondent State of the principles of the rule of law and human and peoples' rights.

C. **APPLICANTS' CASE**

9. In a nutshell, it is the Applicants' case that the decision of the *Tribunal de Grande Instance* of Bujumbura in **RC 069/16 863** illegally annulled the Applicants' Certificate of Title without either giving sufficient reasons or following the special procedure prescribed for the annulment of certificates of title, and ignored proof of the Applicants' legal interest in the contested land as had been availed to it. It is the contention that the Tribunal's actions contravened the principles of rule of law enshrined in Articles 6(d) and 7(2) of the Treaty and Article 15(1) of the Common Market Protocol, as well as the human rights outlined in Article 14 of the African Charter on Human and Peoples' Rights. This position was re-echoed in the affidavits of the First and Second Applicants of 17th March 2017.

10. The Applicant sought the following Declarations and Orders (reproduced verbatim):

    a. **A Declaration that the Respondent's actions and omissions are unlawful and an infringement of Articles 6(d) and 7(2) of the EAC Treaty; Article 15(1) of the EAC Common Market Protocol; and Article 14 of the African Charter on Human and Peoples' Rights;**

    b. **A Declaration that the Respondent has violated the property rights of the Applicants, and their heirs or assigns, and in so doing has violated the commitment that it has made under the EAC Treaty, the EAC Common Market Protocol and the African Charter aforementioned;**

    c. **An Order directing the Respondent to restore the property rights of the Applicants and their respective heirs or assigns;**

    d. **Orders for reparations to the Applicants;**

    e. **An Order directing the Respondent to appear and file before this Honourable Court no later than 60 days from the date of Judgment, a progress report on the remedial mechanisms and steps taken towards the implementation of the Orders issued by this Honourable Court;**

f. **An Order that the costs of and incidental to this Reference be met by the Respondent;**

g. **That this Honourable Court be pleased to make such further or other orders as may be just, necessary or expedient in the circumstances.**

D. **RESPONDENT'S CASE**

11. The Respondent did not contest the factual basis of this Reference; rather, its case hinges on two (2) points of law. It is the Respondent's contention that this Court does not have appellate jurisdiction over decisions from municipal courts and, even if perchance it did, the actions/omissions complained of herein with regard to the title deeds were time-barred and had been previously determined by this Court in **Reference No. 8 of 2015**. The Respondent also contended that the title deeds in respect of the land that was bought from the Third Applicant by the First and Second Applicants had previously been nullified by courts of competent jurisdiction in Burundi rendering nugatory the Applicants' contestations of violations of any provision of the Treaty, Common Market Protocol or the African Charter on Human Rights and Peoples' Rights. Finally, the Respondent faulted the annexures to the Reference for not being certified as required by Rule 39 of the Court's Rules of Procedure.

E. **ISSUES FOR DETERMINATION**

12. At a Scheduling Conference held on 5th September 2018, the following issues were framed for determination:

    a. *Whether this Honourable Court has jurisdiction to determine the Reference.*
    b. *Whether this matter is time-barred.*
    c. *Whether this matter is Res Judicata.*
    d. *Whether the Respondent violated Articles 6(d) and 7(2) of the EAC Treaty; Article 15(1) of the EAC Common Market protocol; and Article 14 of the African Charter on Human and Peoples' Rights.*
    e. *Whether the Respondent's failure to recognize the legal and probative value of the Certificate of Title associated with the Applicants and the*

disregard of its own laws and provisions was unlawful and violates the Applicants' rights to peaceful enjoyment of property.

f. Whether the Applicants are entitled to the remedies sought.

F. COURT'S DETERMINATION

13. We are constrained to observe from the onset that although the present case was filed and heard under then applicable Rules of Procedure, the East African Court of Justice Rules of Procedure, 2013 have since been revised and the applicable Rules presently are the East African Court of Justice Rules of Procedure that took effect in February 2020 ('the Rules as amended'). Rule 136 of the Rules as amended reads:

> **In all proceedings pending before the Court, preparatory or incidental to, or consequential upon any proceeding in court at the time of the coming into force of these Rules, the provisions of these Rules shall thereafter apply, without prejudice to the validity of anything previously done:-**
>
> > **Provided that if and so far as it is impracticable in any such proceedings to apply the provisions of these Rules, the practice and procedure heretofore shall be followed.**

14. Accordingly, the Rules as amended shall apply to the present Reference to the extent practicable, failure of which, recourse shall be made to the hitherto applicable Rules of Procedure, 2013.

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

15. In submissions, it was argued for the Respondent that this Court did not have appellate jurisdiction over cases tried at first instance by municipal courts therefore purporting to impute such a jurisdiction would contravene the provisions of Articles 3(3) and 27(2) of the Treaty. It was asserted that although exhaustion of local remedies was not a prerequisite under the Court's Rules; given the Court's role, the rationale behind the exhaustion of local remedies in international justice and for the good functioning thereof, it was worth considering whether a

party whose case had been tried at the first instance level in a Partner State and still had opportunity to appeal could file a case in this Court. In support of this position, the Respondent referred us to the ICJ decision in **South-West Africa Cases (Ethiopia vs. South Africa; Liberia vs. South Africa); Second Phase, International Court of Justice (ICJ), 1966** where it was held:

> **It is a necessary universal principle meanwhile that is like elementary in law of procedure that has to be distinguished on one hand, the right to seize a tribunal and the jurisdiction of a tribunal over the case and, on other hand the right toward the object of the reference that the applicant has to establish at the satisfaction of the tribunal.**

16. To buttress this argument, the Respondent cited the opinion of Jean Chapez[1] that the rationale of the rule of exhaustion of local remedies in international justice was to ensure respect for each country's sovereignty. In this regard, it was the Respondent's contention that since Case **RC 069/16863** had been decided at the first instance level by the *Tribunal de Grande Instance* of Muha, the Applicants ought to have lodged an appeal against the said decision before the Court of Appeal of Bujumbura in accordance with Article 197 of the Civil Procedure Code of Burundi. It was further submitted that failure to do so did not confer a right upon the Applicants to cloth this Court appellate jurisdiction. On the contrary in his view, were this Court to find that it had jurisdiction over the case it would have strongly interfered with the internal judicial system of the Republic of Burundi and created a bad precedent whereby whoever lost a case before a municipal court at the first instance level could ignore Burundi's procedural laws and lodge an appeal before this Court. In learned Counsel's view, such an eventuality would contravene Article 7(g) of the Treaty that provides for the principle of complementarity.

17. The Respondent did also challenge the jurisdiction of this Court on the ground that the Third Applicant was not resident in a Partner State as required by Article 30(1) of the EAC Treaty, his Affidavit in support of the Reference having been purportedly deposed at Portland, United States of America (USA).

[1] Chappez, Jean, *The rule of exhaustion of local remedies,* Edition A Pedone, Paris, 1972, pp. 25-39

18. Conversely, the Applicants contended that this Court did have jurisdiction to determine this Reference on the basis of Articles 23(1), 27(1) and 30(1) and (3) of the Treaty. It was argued on their behalf that they sought the interpretation and application of the Treaty, particularly Articles 6(d) and 7(2) which make reference to the African Charter on Human and Peoples' Rights, as well as the interpretation and application of Article 15(1) of the Common Market Protocol, which is an integral part of the Treaty. Specifically, it was submitted that in the present case the Applicants sought the Court's determination on:

    (a) **The legality under the EAC Treaty of a decision of a Partner State (Burundi) that is the Judgment RC 069/16863 [hereafter the Judgment] of the *Tribunal de Grande Instance* of Bujumbura [hereafter the Tribunal], dated December 27, 2016.**

    (b) **The legality of the said decision on the grounds that is a violation of Articles 6(d) and 7(2) of the EAC Treaty, Article 15(1) of the EAC Common Market Protocol and Article 14 of the African Charter.**

    (c) **Such a decision has not been reserved, under this Treaty, to an institution of a Partner State.'**

19. While conceding that this Court did not have appellate jurisdiction with respect to decisions of national courts, the Applicants nonetheless contended that in terms of Article 27(2) of the Treaty, in dealing with the present Reference this Court would not be exercising any appellate jurisdiction but, rather, the jurisdiction conferred upon it under Article 23 of the Treaty. In that regard, learned Counsel cited jurisprudence of the African Court of Human and Peoples' Rights in **Alex Thomas vs. The United Republic of Tanzania**[2] and **Mohamed Abubakari Vs. The United Republic of Tanzania**,[3] as well as the decision of this Court in **Burundi Journalists' Union (BJU) vs. The Attorney General of the Republic of Burundi, EACJ Reference No. 7 of 2013**.

[2] African Court of Human and People's Rights, Application 005/2013, Alex Thomas Vs. The United Republic of Tanzania, Judgment of 20th November 2015, para 130

[3] African Court of Human and Peoples' Rights, Application 006/2003, Mohamed Abubakari Vs. United Republic of Tanzania, para 28-29 [sic]

20. Referring specifically to the latter case, the Applicants argued that as a matter of principle, an appellate jurisdiction presupposes that the parties before the latter court are exactly the same as the ones before the first Court and, more importantly, the applicable law or legal system would be the same before both courts. It was the contention that none of those requirements existed in the present case because, first, the parties before the national Court (Heirs of Pascal Bindariye and Others vs. Theodore Niyongabo) were not the same as the parties before this Court; secondly, Burundian law that was applicable before the domestic court was not applicable to this Court presently, the applicable law being the Treaty, the African Charter on Human and Peoples' Rights to which the Treaty refers, and the Common Market Protocol.

21. In addition, the Applicants referred us to **Manariyo Desire Vs. The Attorney General of the Republic of Burundi, EACJ Reference No. 8 of 2015** where the Respondent had raised a similar objection but this Court had held that it had jurisdiction to consider the Burundi's Supreme Court's proceedings and the resultant judgment with a view to determining whether they contravened Burundi's obligations under Articles 6(d) and 7(2) of the Treaty. It was argued that in the said decision the Court had opined that doing so would not be invoking an appellate jurisdiction over the Burundi Supreme Court, since '**there is a clear distinction between what constitutes an appellate review of a subordinate court's decision, and the dialectical approach which is synonymous with international review of domestic judgments.**'

22. The Applicants further argued that the Respondent's contention that the Applicants were constrained to appeal the impugned judgment before the Court of Appeal of Bujumbura was totally ill-founded in so far as it invoked the rule on exhaustion of local remedies that was neither provided for by the Treaty nor by any other applicable EAC legal instrument. They refuted the Respondent's argument that non-exhaustion of local remedies would undermine the sovereignty of the Partner States, contending that it was precisely by virtue of the principle of sovereignty that Partner States had freely chosen not to require exhaustion of local remedies in the EAC judicial system.

23. With regard to the argument that this Court lacks jurisdiction to entertain this Reference on account of one of the Applicants residing outside the EAC Partner States, the Applicants urged that in the event that this Court found that the Third Applicant indeed had no *locus standi* before it, the First and Second Applicants' case should continue.

24. We carefully listened to the Parties' rival arguments on this issue. As quite rightly acknowledged by both Parties, the jurisdiction of this Court is encapsulated in Articles 23, 27 and 30 of the Treaty. We reproduce the relevant provisions of these articles for ease of reference.

Article 23(1):

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

Article 27 (1):

The Court shall initially have jurisdiction over the interpretation and application of this Treaty:

Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.

Article 30:

(1) Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.

(2) .....

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

25. It is clear from the abovementioned provisions of the Treaty that Articles 23(1) and 27(1) of the Treaty do give this Court the exclusive mandate to apply and interpret the Treaty, except in terms of the proviso to Article 27(2). Article 30(1) on its part provides the context within which such jurisdiction would be exercised. Further, this Court has had occasion to address the question of its jurisdiction in different decided cases. It has consistently found its jurisdiction to have been sufficiently established where it was averred on the face of the pleadings that the matter complained of constituted an infringement of the Treaty. See **Hon. Sitenda Sebalu vs. The Secretary General of the East African Community & Others**;[4] **Prof. Peter Anyang' Nyong'o & 10 Others vs. The Attorney General of the Republic of Kenya & 2 Others**;[5] **Burundi Journalists' Union vs. The Attorney General of the Republic of Burundi** (supra) and **M/S Quick Telecommunications Ltd Vs. The Attorney General of the United Republic of Tanzania**.[6]

26. In the present Reference, the Applicants contest the legality of a decision of the *Tribunal de Grande Instance* of Bujumbura, a course of action that the Respondent faults for being tantamount to an appeal, which is the preserve of the Court of Appeal of Bujumbura. A related issue was quite conclusively settled in **The East African Civil Society Organisations' Forum (EACSOF) vs. The Attorney General of Burundi & Others**.[7] It was held:

> **The reference before the Trial Court was not a further appeal from the Decision of the Constitutional Court of Burundi. It was a reference on the Republic of Burundi's international responsibility under international law and the EAC Treaty attributable to it by reason of an action of one of its organs namely the Constitutional Court of Burundi. The Trial Court had a duty to determine this**

[4] EACJ Reference No. 1 of 2010
[5] EACJ Reference No. 1 of 2006
[6] EACJ Reference No. 10 of 2016
[7] EACJ Appeal No. 4 of 2016

international responsibility and in so doing, it had a further duty to consider the internal laws of the Partner State and apply its own appreciation thereof to the provisions of the Treaty.

27. Similarly, recourse to this Court with regard to a decision of the *Tribunal de Grande Instance* of Bujumbura would not amount to the invocation of an unavailable appellate jurisdiction but, rather, the application of the jurisdiction conferred upon this Court under Article 27(1) of the Treaty. We so hold.

28. With regard to the question of the exhaustion of local remedies, we observe that the Respondent did concede that it was not provided for under the Rules of this Court but simply sought to persuade us to lavish an unduly creative construction to the absence of such a rule, an invitation that we respectfully decline. The Respondent's concession thus renders the exhaustion of local remedies a moot issue before us.

29. On the other hand, on the question of the Third Applicant *locus standi* in this matter, we stand duly guided by the decision of the Appellate Division of this Court in **Manariyo Desire vs. The Attorney General of the Republic of Burundi**[8] where the same deponent, Mr. Manariyo, attested in an affidavit to being in Portland, USA. On that premise, it was held that he was not **'resident in' any of the EAC States'** and the Court disavowed itself of the jurisdiction *ratione personae* to deal with the Appeal. In the matter before us, Mr. Manariyo attested in his supplementary affidavit to being in West Brook Main, USA. Whereas learned Counsel for the Applicants sought to argue that he might have been in the USA at the time he deposed the said affidavit but was otherwise ordinarily resident within an EAC Partner State, that fact was not affirmed either in the Third Applicant's affidavit or in any other evidence, leaving it unproven and speculative. Had he attested to being ordinarily resident in Burundi but had at the time he deposed the affidavit been temporarily in the USA, it would have been an entirely different matter. Needless to state, we are bound by the decision in the above Appeal. Consequently, we are constrained to find that Mr. Manariyo's apparent non-residence in an EAC Partner State negates his *ratione personae* to submit to this Court or the Court's jurisdiction to entertain his case. In the

[8] EACJ Appeal No. 1 of 2017

premises, we would strike the Third Applicant from this Reference but the First and Second Applicants' claims do subsist.

Issue No. 2: Whether the Reference is time barred

30. It was the Respondent's contention that, aside from the Reference being a disguised Appeal, the title deeds that were in issue before the *Tribunal de Grande Instance* of Muha/ Bujumbura had been issued in 1999 and 2001 thus rendering the present Reference time-barred. On their part, relying on the provisions of Article 30(2) of the Treaty, the Applicants stressed that the matter complained of in the present case was the judgment in **RC 069/16863** of 27th December 2016, which the Applicants' lawyer had been notified of on 18th January 2017. Thus, having filed this Reference on 17th March 2017, it had been filed within the prescribed two-month time frame from the date on which the impugned judgment had come to their knowledge. It was argued that under Rule 3(1)(a) of the then applicable Rules of the Court, time would have started to run on 19th January 2017 (a day after the notification of the impugned Judgment) and the last day of the two-month period would have been *Saturday* 18th March 2017, which by virtue of Rule 3(1)(d) of the Rules would have translated to *Monday* 20th March 2017.

31. It was an agreed fact at the Scheduling Conference held in respect of the instant Reference that the Applicants' lawyer had been notified of the impugned decision on 18th January 2017 and the Reference was filed on 17th March 2017. Consequently, even without recourse to Rule 3 that was invoked by the Applicants, we find no contestation as to whether the Reference is time barred. It was clearly filed within the two-month time frame that is prescribed by Article 30(2) of the Treaty. We would answer *Issue No. 2* in the negative.

Issue No. 3: Whether the Reference is *res judicata*

32. It was the Respondent's contention that the matters in contention in both **Reference No. 8 of 2015** and the present Reference were essentially the same, (in his view) the First and Second Applicants only joining the latter Reference to assist the Third Applicant. The Respondent asserted that the Third Applicant was the seller of the land in reference in *Attested Affidavit No. 356/99* of 27th July

1999 that was bought by the First and Second Applicants, and said Applicants' certificates of title that were in issue in the present Reference originated from the land reflected in *Attested Affidavit No. 356/99*, which had been nullified by the municipal courts. According to the Respondent, the claim in the present Reference was mainly based on the question of the probative value of the First and Second Applicants' title deeds that, if acknowledged, would revive the issue of the nullified Attested Affidavit.

33. The Respondent also contended that the similarity of both References was reflected in the nature of the orders sought in each of them, as well as the following statement in the judgment in **Reference No. 8 of 2015**:

> '*The Reference is premised on the failure of the cited courts in the Republic of Burundi to acknowledge the legal and probative value of the attested affidavit No. 356/99 of 27th July 1999, despite it having been executed by State organs.*'

34. On their part, the Applicants referred us to the following definition of *res judicata* in **Black's Law Dictionary**[9]:

> **An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.**

35. The Applicants also referred to the case of **Steven Dennis Vs. The Attorney General of the Republic of Burundi & Others**[10] where it was held that:

> **The doctrine is meant to ensure that parties and courts are not burdened with multiple resolutions of the same dispute between the same parties on the same subject matter before the same**

[9] 9th Edition, 2009, p. 1425
[10] EACJ Reference No. 3 of 2015, para. 44

court and which issue has previously been conclusively determined.

36. The Applicants argued that the *res judicata* principle was inapplicable to the present case given that whereas in **Reference No. 8 of 2015** the Third Applicant's complaint was in respect of a Burundi Supreme Court judgment, in the present case the impugned judgment was by the *Tribunal of Grande Instance* of Bujumbura. They further argued that in **Reference No. 8 of 2015** the Third Applicant had sought legal redress for the failure by the Supreme Court of Burundi to recognize the legal and probative value of the Attested Affidavit No. 356/99, while in the present case he was aggrieved by the annulment by the *Tribunal de Grande Instance* of Bujumbura of all the sale agreements between himself and Scholastique Niyonzima, Deo Nahimana, Andre Habonimana and Francois Biniga.

37. In addition, the Applicants argued that the disputed properties were not the same in both References, the property in **Reference No. 8 of 2015** being a piece of land that the Third Applicant had bought from one Simon Nzophabarushe, while the land in contention presently was a piece of land that he bought from Scholastique Niyonzima and Andre Habonimana. It was further argued that this Court's judgment in **Reference No. 8 of 2015** was not final since it was subject to a then ongoing appeal, the Applicants citing **Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina vs. Serbia & Montenegro)**,[11] to propose that in international law the underlying principles in the concept of *res judicata* had been identified as **'first, the stability of legal relations that requires that litigation comes to an end, and secondly, the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again.'**[12]

38. We have carefully considered the rival submissions of both Parties on this issue. Clearly the First and Second Applicants were not parties to **Reference No. 8 of 2015** therefore the question of *res judicata* would not arise against them. On the other hand, whereas the Third Applicants was indeed a party in that Reference,

[11] Judgment, ICJ Reports 2007, p.43
[12] Ibid. at para. 116.

having struck him from the present Reference the issue of *res judicata* that might have otherwise been relevant to him now lies redundant.

39. Be that as it may, had we considered the issue on its merits, it is quite clear to us that the claims in both **Reference No. 8 of 2015** and the present Reference hinge on the Third Applicant's legal interest as reflected in *Attested Affidavit No. 356/99*. It was indeed on the basis of that primary legal interest that the First and Second Applicants herein subsequently purchased their respective pieces of land. In **Reference No. 8 of 2015**, Mr. Manariyo had faulted the Burundi Supreme Court for ignoring the legal and probative value of the Attested Affidavit in its handling of a challenge to his proprietary interest therein by Simon Nzophabarushe. In the present case, on the other hand, he questions the annulment by a different Burundi court of sale agreements that conferred legal interest reflected in the Attested Affidavit, as well as certificates of title the interest in which was derived from the same Attested Affidavit.

40. We respectfully abide by the ICJ's reasoning in **Bosnia & Herzegovina vs. Serbia & Montenegro** (supra) that litigation must come to an end therefore an issue which has already been adjudicated in favour of a party need not be argued again. In the same vein, we find no reason to depart from this Court's observation in **Steven Dennis Vs. The Attorney General of the Republic of Burundi & Others** (supra) that in terms of the efficient utilisation of scarce judicial resources courts should not be burdened with adjudicating **'the same dispute between the same parties on the same subject matter before the same court and which issue has previously been conclusively determined**.' The foregoing precedents resonate with the import of the defense of *res judicata*, which bars the litigation by the same parties and before the same court of a suit arising from the same subject matter as had been conclusively determined by the court. It similarly forestalls the litigation of a claim arising from a transaction or series of transactions that could have been, but were not, raised in the original suit.

41. Turning to the matter before us, it becomes apparent that although the parties in the 2 References are not identical, the First and Second Applicants in the present Reference did have privity with the legal interest that was in issue in the earlier Reference in so far as their interest in the property that is in issue herein is

derived from the same Attested Affidavit. In fact, they do derive title to their property from the Third Applicant's interest in the Attested Affidavit that was in issue in **Reference No. 8 of 2015**.

42. It seems to us, therefore, that the matters in contention before us presently ideally should have been raised in that Reference to ensure their conclusive determination and obviate the unnecessary duplicity of proceedings. This, however, was not feasible owing to time constraints. Although the underlying domestic claims in both References had been lodged in the municipal courts in 2010, the judgment that gave rise to **Reference No. 8 of 2015** was rendered in 2015 while that in respect of which the present Reference arises was only delivered in 2017. Given the restrictive 2-month limitation period that is applicable to matters before this Court, it is quite conceivable that Mr. Manariyo could not wait till 2017 to lodge a comprehensive Reference in this Court as the earlier judgment would have been rendered time-barred. Therefore, although the claims in both References are rooted in land conveyance transactions that derive their legitimacy from the legal title conferred in the Attested Affidavit, the separate claims could not reasonably have been consolidated and jointly filed before this Court. It would be surreal and unjust to utilize the bar of *res judicata* against the Applicants in those circumstances.

43. In any event, although rooted in the same land conveyance, the legal claims in the 2 References are at variance. In the earlier Reference Mr. Manariyo's claim to the suit property had in the case before the municipal courts been challenged by one of the sellers thereof leading to the cancellation of the Attested Affidavit. The present case, on the other hand, is grounded in a claim before the Tribunal by 2 persons that, though strangers to the sale agreements that conferred legal title to the Third Applicant, would nonetheless appear to lay concurrent and conflicting claim to the suit property *inter alia* as beneficiaries of deceased persons' Estates in respect of which it accrues. The present Reference thus poses a different set of issues including the circumstances under which a certificate of title that is conclusive evidence of title (as opposed to an Attested Affidavit) may be legally nullified, the legal rights of beneficiaries of deceased persons' Estates, the rights of *bona fide* purchasers etc. Consequently, the striking out of the Third Respondent notwithstanding, the bar of *res judicata*

would not have been applicable even as against him. We would therefore answer *Issue No. 3* in the negative.

Issue No. 4: Whether the Respondent violated Articles 6(d) and 7(2) of the Treaty, Article 15(1) of the Common Market Protocol and Article 14 of the African Charter on Human and Peoples' Rights.

AND

Issue No. 5: Whether the Respondent's failure to recognize the legal and probative value of the certificates of title associated with the Applicants and the disregard of its own laws and provisions was unlawful and violates the Applicants' rights to peaceful enjoyment of property.

44. We propose to address the above issues together because we find them repetitive. We understood it to be the preposition herein that by the provisions of Articles 6(d) and 7(2) of the Treaty the Partner States committed to *inter alia* abide by the principles of rule of law on the one hand, and the principle of respect for human rights as guaranteed by the African Charter on Human and Peoples' Rights, on the other hand. It is alleged that, having failed to recognize the legal and probative value of the First and Second Applicants' certificates of title (as sought to be illustrated in *Issue No. 4*) and thus violating Burundian law, the Respondent State (through the decision of its organ – the *Tribunal de Grande Instance* of Bujumbura) contravened both the principle of rule of law and the respect for human rights. The impugned decision was also alleged to have been unlawful *per se* in terms of Article 6(d) and 7(2) of the Treaty. *Issue No. 5* herein sought to clarify the nexus between that decision and the negation of the Applicants' right to quiet enjoyment of their property.

45. The Applicants relied upon the definition of the rule of law principle as stipulated in the United Nations Secretary General's Report of 23rd August 2004[13] and adopted by this Court in **Mary Ariviza and Okotch Mondah vs. The Attorney General of the Republic of Kenya & Another**[14] to propose that one of the core

[13] Report S/2004/616
[14] EACJLR (2005 – 2011) 212 at 222, para. 30

components of the rule of law is the principle of supremacy of law, whether substantive or procedural. The Applicants contended that in many cases, this Court had assimilated the rule of law principle to the principle of supremacy of the law, such law being the national laws of Partner States when the latter were the Respondents or Community law when the Secretary General of the Community was the Respondent. In that regard, we were referred to **James Katabazi & 21 Others vs. The Secretary General of the East African Community & Another**;[15] **Henry Kyarimpa vs. The Attorney General of the Republic of Uganda**;[16] **Simon Peter Ochieng & Another vs. The Attorney General of the Republic of Uganda**,[17] and **Manariyo Desire vs. The Attorney General of the Republic of Burundi**.[18]

46. The Applicants further asserted that this Court had severally held that any violation of national laws by any organ of a Partner State amounted to a violation of the rule of law principle in terms of Article 6(d) and 7(2) of the Treaty, arguing that that standard was applicable to the violation of any other provision of the Treaty or indeed any other EAC legal instrument. In addition, noting that Article 34 of the Burundian Code of Civil Procedure also obliged presiding judges to abide by applicable national laws, the Applicants contended that by violating its own laws through the impugned judgment the Respondent State had flouted the rule of law principle in terms of the supremacy of the law. The Applicants maintained that only 2 sale agreements related to the parcels of land that were in issue before the Tribunal: the sale agreement between the Third Applicant and Scholastique Niyonzima and the one between Third Applicant and Andre Habonimana, who in any case was not a party to the dispute before the *Tribunal de Grande Instance* of Bujumbura.

47. It was the contention that the Tribunal had based its nullification of the sale agreement between the Third Applicant and Ms. Niyonzima on Article 276 of the Civil Code which provides that '*the sale of someone's thing is null; this may give rise to damages where the buyer has ignored the fact that the item sold belongs to another.*' The Applicants faulted this decision for violating Burundian law.

[15] EACJLR (2005 – 2011) 51 at 58, paras. 44, 45
[16] EACJLR (2005 – 2011) 274, 280, paras. 32, 75
[17] EACJLR (2012 – 2015) 361 at 365, para. 14
[18] EACJ Reference No. 8 of 2015, para 71.

Citing Article 137(1) of the Code of Civil Procedure which provides that *'the statement of reasons must relate to every claim and plea in the parties' submissions'*, they asserted that the Tribunal had not addressed the Third Applicant's arguments that each of the late Bindariye's children had sold off their respective pieces of land separately, the alleged joint inheritance not having been in existence at the time of sale. They further argued that by nullifying the agreement on the ground that Ms. Niyonzima had sold a piece of land that she did not own, the Tribunal violated the principle of *'Nemo auditor propriam turpitudenum allegens'* that literally means that nobody may benefit from his/her own wrongdoing. They pointed out that Ms. Niyonzima ought to have been condemned for selling land that she did not own rather than being granted property that she had previously sold to a bona fide purchaser. In their view, the Tribunal thus deprived a bona fide purchaser of his right to the property contrary to a general principal of law in Burundi that bona fide third parties should be protected and not penalized.

48. The Applicants took issue with the fact that although Deo Nahimana had been recognized as having sold his land to the Third Applicant; both his sale agreement and the agreement between his sister (Scholatisque Niyonzima) and the Third Applicant had been nullified on the same ground – that the land they sold was held in joint inheritance and was therefore not theirs. Further, to the extent that the land in the sale agreement between Mr. Nahimana and the Third Applicant was never in dispute before the Tribunal, its nullification was opined to have been done in contravention of Article 142 of the Civil Code of Procedure that reads:

> *Under penalty of a decision being set aside on appeal or cassation, the judge shall pronounce on all that has been requested and only on what has been requested.*

49. The Applicants similarly contested the Tribunal's nullification of the private sale agreement between the Third Applicant and André Habonimana, who was a witness (not a party) to the dispute, arguing that it violated provisions of Burundian Laws on the inadmissibility of witness evidence against written

agreements;[19] the prohibition of *ultra petita* decisions;[20] ambiguous, dubious, or hypothetical reasons,[21] and decisions against a person who is not a party to a case,[22] and the legal binding force of agreements.[23] In the same vein, it was argued that by its nullification of the agreement between Jean Ndayishimiye and Liberata Kiburago without any valid reason, contrary to Article 140 of the Code of Civil Procedure, the impugned judgment violated Article 33 of the Civil Code, Volume III[24] on the binding force of agreements.

50. In addition, it was asserted that the agreement between the Third Applicant and Mr. Francois Biniga was in respect of a piece of land outside the disputed property therefore its nullification by the Tribunal violated legal provisions on the procedure to be followed when a party to an agreement challenged the authenticity of property that was not in contention; the rules of interpretation of agreement/contracts;[25] the various options for signing contracts,[26] and the binding force of agreements.[27]

51. On the other hand, despite having been furnished with certified copies of the First and Second Applicants' certificates of title in evidence, the Tribunal allegedly disregarded them and annulled the certificates without furnishing any reasons. By so doing it allegedly violated Burundian law on the prohibition of a judge changing the claims of parties,[28] the obligation to respond to all parties' pleadings[29]and due process for the nullification of certificates of title. The Applicants asserted that Burundian law[30] designated certificates of title as conclusive evidence of legal

[19] Article 217 of the Civil Code Volume III and Article 142 of the Civil Code of Procedure
[20] Article 142 of the Civil Code of Procedure
[21] Article 140 of the Civil Code of Procedure
[22] Article 151 of the Civil Code of Procedure
[23] Articles 33 and 2014 of the Civil Code Volume III
[24] This Article provides that '***legally constituted agreements serve as law for those who have made them. Such agreements may only be revoked by their mutual consent or for causes authorized by law. The agreement must be executed in good faith.***'
[25] Articles 54 and 55 of Civil Code Volume III
[26] Articles 205 and 206 of the Civil Code Volume III
[27] Articles 33 and 2014 of the Civil Code Volume III
[28] Articles 28, 132, 133 and 134 of the Civil Code of Procedure
[29] Article 207 of the Constitution, 2005 and Articles 132 and 137 of the Civil Code of Procedure
[30] See Articles 199 and 201 of the Civil Code Volume III; Article 313, 317 and 344 of the Land Code, 2011.

interest, which could only be challenged for fraud or forgery under procedures that were duly outlined under the Civil Code of Procedure.[31]

52. The First and Second Applicants also contested the Tribunal's directive to them to make alternative arrangements with the Third Applicant following the nullification of their certificates of title, arguing that it violated the legal prohibition against changing a party's claim or adjudging a matter beyond the parties' pleadings. They stressed that neither of them had sought such an order, their prayers having been restricted to the recognition of their respective proprietary interests as reflected in their certificates of title, therefore the Tribunal had no authority to introduce a claim that was never raised.

53. In terms of Article 15(1) of the Common Market Protocol, it was the Applicants' contention that the nullification of the Third Applicant's sale agreements and the First and Second Applicants' certificates of title without due process violated that legal provision given that the Respondent State did not apply Burundi property laws properly and thus arbitrarily deprived the Applicants of their property rights. The Applicants maintained that by illegally disregarding their proprietary interest in the disputed property, the Respondent State had (through the impugned judgment) violated their right to property as guaranteed by Article 14 of the African Charter on Human and Peoples Rights and specifically denied the First and Second Applicants their right to peaceful enjoyment of their property.

54. In support of their case, the Applicants cited the following decision in **Venant Masenge vs. the Attorney General of Burundi**,[32] where the Court held that it had jurisdiction over the land and property rights of parties:

> **For all those reasons given above, we hold that the failure by the appropriate authorities of the Republic of Burundi to ensure the protection of the Applicant's land property rights was fundamentally inconsistent with Burundi's express obligations under Article 6(d) and 7(2) of the Treaty to observe the principle of good governance including in particular the principles of adherence to the rule of law, and the promotion and protection of**

[31] See Articles 110, 117, 118 and 121 of the Civil Code of Procedure
[32] EACJ Reference No. 9 of 2012

human rights. This failure constitutes an infringement of the said provisions of the Treaty.[33]

55. Conversely, it was argued for the Respondent that the Applicants had not satisfactorily established any breach of Articles 6(d) and 7(2) of the Treaty, the contention seemingly being that in so far as their right of appeal had not been curtailed by the Respondent State, an appeal from the Tribunal's decision to the Burundi Court of Appeal would have sufficed for purposes of compliance with the rule of law principle. The Respondent reiterated the same argument with regard to the alleged violation of Article 15(1) of the Common Market Protocol and Article 14 of the African Charter of Human and Peoples' Rights, maintaining that the Burundian Court of Appeal (not this Court) was the appropriate appellate body to address the Applicants' misgivings about the impugned Tribunal decision.

56. In the same vein, on *Issue No. 5*, the Respondent reiterated its submissions on Issues 3 and 4 above. Citing the following observation by this Court in **Reference No. 8 of 2015**, it was argued that the present proceedings were an abuse of court process. We reproduce the opinion of the Court below.

> **Even more importantly, we are constrained to observe that it was averred in paragraph 14 of the Reference that the Applicant sub-divided the consolidated parcels of land and sold them out to new buyers. In paragraph 15, it is further averred that following the said sale, the Registrar of Lands (*Conservateur des Titres Fonciers*) annulled the Applicant's certificate of title to the property and issued new certificates of title to the new buyers. It would appear then that the Applicant had relinquished all legal title to the disputed property to the new buyers. What then are the property rights he purports to reserve for himself and alleges were violated? We did not find any evidence whatsoever of any subsisting proprietary interest vested in the Applicant. Consequently, we do not find any rights vested in the Applicant either with regard to the disputed property or to the purported peaceful enjoyment thereof; neither do we find any violation**

[33] At p.19

therein of Article 15(1) of the Protocol and Article 14 of the African Charter.

57. It is trite law that under international law the conduct of any organ of the State, including a judicial organ, is considered to be the act of that State.[34] In that regard, the duty upon this Court would be to interrogate the compliance of municipal courts' judicial conduct with Treaty provisions, a mandate that is well within its purview.[35] Thus in so far as the EAC Partner States did bind themselves to the international obligations demarcated in the Treaty, their domestic courts are obliged to so enforce domestic laws as to ensure compliance by themselves, as well as States parties, with these international obligations. Far from being an appeal, as learned Respondent Counsel would have us believe, the international review of national courts is characterized by the application of distinct legal perspectives whereby national courts enforce domestic laws while international courts approach the same set of facts from the perspective of State parties' international obligations. It has indeed been opined that the process at the international level would be merely subsidiary or supervisory; intervention being limited to when the domestic process fails to address the issues appropriately and conform to the international obligation.[36] To that end, the duty upon us is two-fold: first, to determine the Respondent State's international responsibility and, secondly, to interrogate the Tribunal's decision so as to deduce its compliance with the EAC Treaty (or the lack of it).[37]

58. It is not in dispute that the *Tribunal de Grande Instance* of Bujumbura is a judicial organ in the Respondent State. Indeed, Article 205 of the Constitution of Burundi does recognise 'Tribunals of Residence' alongside courts as organs that exercise judicial power. The tribunal in issue in the present case being the *Tribunal de*

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[34] See Article 4(1) of the *International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts, 2002*; **The East African Civil Society Organisations' Forum (EACSOF) vs. The Attorney General of Burundi & Others, EACJ Appeal No. 4 of 2016**, and the ICJ's Legal Advisory Opinion in **Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, ICJ Reports 1999, p. 62 at pp. 87 – 88, paras. 62, 63**.

[35] See Article 27(1) of the EAC Treaty and **The East African Civil Society Organisations' Forum (EACSOF) vs. The Attorney General of Burundi & Others** (ibid.)

[36] See *Tzanakopoulos, Antonios, Domestic Courts in International Law: The International Judicial Function of National Courts, 34 Loyola of Los Angeles (Loy. LA), International and Comparative Law Review (2011) 133 at 167.*

[37] See **The East African Civil Society Organisations' Forum (EACSOF) vs. The Attorney General of Burundi & Others** (supra)

Grande of Bujumbura, we are satisfied that it is a recognised *Tribunal of Residence* that is duly acknowledged as a judicial organ in Burundi. On the other hand, the Applicants have specifically invoked the Respondent State's international obligation to observe the rule of law. The gist of their contestation is that the *Tribunal de Grande Instance* of Bujumbura – a judicial organ of the Republic of Burundi – flouted Burundi national law and, consequently, the rule of law principle as enshrined in the Treaty. It is also the contention that the resultant judgment was an illegality, which is a Treaty violation in its own right.

59. We cannot fault the Applicants' approach in this regard. It does reflect the import of Article 30(1) of the Treaty that designates 2 scenarios under which an illegality giving rise to a cause of action before this Court would accrue. Such illegality would arise in respect of an '**Act, regulation, directive, decision or action**' that is either unlawful *per se* or on account of infringing a Treaty provision. Thus a decision that purportedly flouts the domestic law of a Partner State, as is the allegation herein, may be categorized as being unlawful *per se*. See also **Simon Peter Ochieng & Another vs. The Attorney General of Uganda** (supra).

60. In the instant case, the Applicants challenge the Tribunal's decision for flouting Burundi's domestic law, an illegality in itself; and one that does also constitute an infringement of the rule of law principle encapsulated in Articles 6(d) and 7(2). We reproduce the cited Treaty provisions for clarity.

> Article 6(d)
>
> **The fundamental principles that shall govern the achievement of the objectives of the Community by the 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, gender equality, as well as the recognition, promotion and protection of human and people's rights**

in accordance with the provisions of the African Charter on Human and Peoples' Rights.

Article 7(2)

1. .....
2. **The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.**

61. The duty to adhere to the rule of law would therefore be the Treaty obligation against which the impugned decision of the *Tribunal de Grande Instance* is evaluated. It is now well settled law that where an action complained of is alleged to be inconsistent with municipal law and, to that extent, a breach of a Partner State's Treaty obligation to observe the rule of law, it is the Court's inescapable duty to consider the internal law of such Partner State in its determination as to whether the action complained of amounts to a Treaty violation. See **The East African Civil Society Organisations' Forum (EACSOF) vs. The Attorney General of Burundi & Others** (supra) and **Henry Kyalimpa vs. Attorney General of Uganda**.[38]

62. The burden of proof lies with the applicant to establish its case and the party that asserts a fact bears the duty to establish it;[39] as was observed by the ICJ in the case of **Military and para-military Activities in and against Nicaragua (Nicaragua vs. United States of America)**,[40] **'it is the litigant seeking to establish a fact who bears the burden of proving it**.' The burden of proof in international courts was aptly summed up in **Henry Kyalimpa vs. Attorney General of Uganda** (supra)[41] as follows:

> **Generally, in application of the principle of *actori incumbit probation* the court will require the party putting forward a claim or a particular**

[38] EACJ Appeal No. 6 of 2014

[39] See **British American Tobacco Ltd (BAT) vs. The Attorney General of the Republic of Uganda, EACJ Ref. No. 7 of 2017** and **Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina vs. Serbia & Montenegro), Judgment, ICJ Reports, 2007, p.43**

[40] Judgment, ICJ Reports 1984, p.437, para. 101

[41] Ibid., para. 61 hereof.

contention to establish the elements of fact and of law on which the decision in its favour might be given.[42]

63. The foregoing summation of the burden of proof in international claims depicts a two-pronged process of proof before this Court: proof of an applicant's case against a respondent, as well as proof of a specific fact by the party asserting it.[43] We find no reason to depart from that position.

64. On the other hand, **Halsbury's Laws of England** propel the notion of a distinction between the *legal* and *evidential* burden of proof, urging as follows on the legal burden of proof:

> **The legal burden (or the burden of persuasion) rests upon the party desiring the Court to take action; thus a claimant must satisfy a court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon that party for whom the substantiation of that particular allegation is an essential of his case.**[44]

65. Conversely, the evidential burden is expounded as follows:

> **The evidential burden (or the burden of adducing evidence) will rest initially upon the party bearing the legal burden but, as the weight of evidence given by either side during the trial varies, the evidential burden may be said to shift the party who would fail without further evidence.**[45]

66. It does then follow that the Applicants in this case would bear the legal burden to prove the illegalities they seek to attribute to the Respondent State, to wit, the

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[42] See also **Raphael Baranzira & Another vs. The Attorney General of the Republic of Burundi, EACJ Ref. No. 15 of 2015** and Shabtai, Rosenne, The Law and Practice of the International Court, 1920 – 2005, Vol. III, Procedure, p. 1040.

[43] Same observation was made in **The Attorney General of the Republic of Burundi vs. The Secretary General of the East African Community, EACJ Reference No. 2 of 2018**

[44] Halsburys Laws of England, Civil Procedure Vol. II, 5th Edition, 2009, para. 770

[45] Ibid. at para. 771

violation of Burundi law and infringement of the principles of rule of law and human rights as outlined in Articles 6(d) and 7(2) of the Treaty.[46]

67. The Applicants lodged 3 Affidavits in support of their case – 2 Affidavits deposed by the First and Second Applicants and a supplementary affidavit deposed by the Third Applicant. In a nutshell the First and Second Applicants attested to having each bought 2 pieces of sub-divided land from the Third Applicant on the strength of *Certificate of Title No. 01/1875*, and subsequently secured certificates of title for their respective pieces of land. On his part, the Third Applicant essentially laid out the background to his legal interest in *Certificate of Title No. 01/1875* and the circumstances surrounding his subsequent sale of the disputed property.

68. The Applicants did also avail the Court with the impugned decision of the *Tribunal de Grande Instance* of Bujumbura as Annexure 1 to the Reference. The dispute in that case was lodged by the respective heirs of Pascal Bindariye and Francois Biniga – Jean Ndayishimye and Scholastique Niyonzima, and Nicolas Mpitabavuma respectively. It was a consolidation of 2 separate claims against the First Applicant, **RC16863** and **RC16865**; which were consolidated as **RC16863** and later **RC 069**. The Tribunal stayed its decision in the consolidated case **No. 16863/16865** pending the Supreme Court's determination of **RCC 25153** between Simon Nzophabarushe and the Third Applicant in respect of validity of the Attested Affidavit. The Supreme Court having upheld the Tribunal's nullification of all the Third Applicant's certificates of title, the Tribunal determined the consolidated case in the following terms:

    (a) It highlighted irregularities in the sale agreements to declare void the land sale transaction between Francois Biniga and Third Applicant.

    (b) With regard to the land the Third Applicant had purportedly bought from Andre Habonimana, the Tribunal found grave inconsistencies in the evidence, which was riddled with many contradictions that went to the heart of the dispute. For instance, Mr. Habonimana's brother discredited his evidence by his

[46] The African Charter on Human and Peoples Rights was invoked by reference thereto under Article 6(d) of the Treaty.

testimony that their father did not own the land that Habonimana had purportedly sold to the Third Applicant, Habonimana's own evidence being self-contradictory as to whether their father was still alive at the time the land was sold. The Tribunal concluded that Habonimana had sold land that did not belong to him and nullified the purported sale in accordance with Article 276 of the Burundi Civil Code.

(c) The Tribunal gave a detailed recital of all the considerations it had taken into account in arriving at its decision and, at page 11 of the judgment, expressly advanced the reason for its non-reliance on the Applicants' evidence. It had earlier in the judgment highlighted the following evidential contradictions. Nicolas Mpitabakana who had been depicted as a witness to the sale agreement between Francois Biniga and the Third Applicant, denied affixing the signature attributed to him on the agreement and attested to the sale contracts being forged because his mother (wife to the deceased Francois Biniga) did not know about them. Deo Nahimana and Scholastique Niyonzima conceded to receiving money from 'some people' but denied executing sale contracts, conceding that the land they had purported to sale belonged to the deceased Bindariye's family. Andre Habonimana who accepted selling land to the Third Applicant that used to belong to his father, Juma Kibiriti was denounced by the plaintiffs who said he did not own any land in the area and, in any event, his evidence was riddled with grave inconsistencies as highlighted above.

(d) In its final orders, which were rooted in Articles 5 and 31 of the Code of Civil Procedure and Articles 276 and 303 of the Civil Code, the Tribunal *inter alia* nullified the sale transaction between the Third Applicant and Scholastique Niyonzima and Deo Nahimana; the sale transaction between the Third Applicant and Andre Habonimana, and the First and Second Applicants certificates of title that cascaded therefrom. Given the apparent

absence of guarantees as spelt out in Article 303 of the Burundi Civil Code, the Tribunal enjoined the First and Second Applicants to pursue arrangements with the Third Applicant that would resolve the question of the land improperly sold to them and, the Third Applicant is advised to pursue similar arrangements with the persons that had purported to sale him the land in question.

69. On its part, the Respondent relied upon the affidavit of Mr. Diomede Vyizigiro that was deposed by an advocate with personal conduct of this Reference. At the risk of getting repetitive, it will suffice to reiterate our earlier decision on this issue that '**an affidavit deposed by an advocate with sole personal conduct of a case raises connotations of procedural impropriety that cannot be ignored but, rather, would vitiate the entire affidavit.**'[47] We do accordingly strike the offensive affidavit off the Court record.

70. Striking the sole affidavit in support of opposite party's case would not necessarily obviate the duty upon a court to evaluate the subsisting evidence on record to determine whether it can sustain the allegations in issue. We did carefully and dutifully consider the totality of the evidence adduced by the Applicants, as well as the impugned judgment. We are acutely mindful of the standard of proof in international claims involving state responsibility as was re-stated by the ICJ in **Bosnia & Herzegovina vs. Serbia & Montenegro** (supra) in the following terms:

> **The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive.[48] .... The same standard applies to the proof of attribution for such acts.**

71. However, whereas in **Ida Robinson Smith Putnam (USA) vs. United Mexican States**,[49] challenges to the decisions of nation states' apex courts had been

[47] The Attorney General of the Republic of Burundi vs. The Secretary General of the East African Community (supra), para. 55
[48] See Corfu Channel (United Kingdom vs. Albania), Judgment, ICJ Reports 1949, p.17.
[49] 1927, UNRIAA, Vol. IV, p. 151 at 153

recognised as cases of exceptional gravity and an onerous burden of proof was placed on applicants, we take the view that decisions that emanate from lower domestic courts need not necessarily be held to the same onerous standard of proof. The international review of national decisions that are not from apex courts may be subjected to the ordinary balance of probabilities. The same standard would apply to proof of state attribution in cases involving a judicial decision from a non-apex domestic court.[50] In **The Attorney General of the Republic of Burundi vs. The Secretary General of the East African Community** (supra), this Court cited with approval the preposition that proof by the 'balance of probabilities' entails '**evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.**'[51]

72. Turning to the matter before us, the question is whether the Applicants have in fact satisfied the applicable standard of proof. As quite rightly argued by them, one of the core components of the rule of law is the principle of supremacy of law, whether substantive or procedural. Accordingly, fidelity to Burundi domestic law is the yardstick against which the Applicants' contestations in this matter would be evaluated both in terms of the rule of law principle, as well as the alleged illegality of the impugned decision *per se.*

73. On that premise, we are unable to fault the impugned judgment on the basis of the complaints advanced by the Applicants or at all. To begin with, the Third Applicant's primary legal interest in the disputed land had been the subject of an Appeal in the Supreme Court of Burundi. Quite clearly, the decision rendered by that court would have binding authority over the Tribunal. Therefore the Tribunal rightly decided to await the superior court's decision. That court having nullified the Third Applicant's interest in the Attested Affidavit, the First and Second Applicants' secondary interest would have been rendered nugatory but (in principle) for the Common Law notion of a bona fide purchaser. That notion

[50] Indeed that is the same standard of proof that this Court has considered to be similarly applicable to international disputes where the question of state responsibility does not arise. See **The Attorney General of the Republic of Burundi vs. The Secretary General of the East African Community, EACJ Reference No. 2 of 2018** and **British American Tobacco Ltd (BAT) vs. The Attorney General of the Republic of Uganda, EACJ Ref. No. 7 of 2017**.

[51] See Black's Law Dictionary, 10th Edition, p. 1373

hinges on the bona fides of a purchase; in other words, the purchase should have been '**made in good faith, without fraud or deceit.**'[52] Indeed, a bona fide purchaser has been defined as follows:

> **One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.**[53]

74. In the matter before us the issue of a bona fide purchaser was propelled by the Applicants with regard to the property purchased from Scholastique Niyonzima by the Third Applicant. However, they made no attempt to demonstrate that this principle was indeed applicable under Burundian law or that the Third Applicant was in fact a bona fide purchaser that had no knowledge of any other claim to the property; one who in good faith paid valuable consideration for the property without notice of pre-existing adverse claims. We find no proof whatsoever on the record that the land that had been purportedly sold by two of the deceased Bandariye's children was not subject to joint inheritance under their father's estate at the time this sale was executed, as was the Applicants' contention. On the contrary, both Ms. Niyonzima and her brother, Deo Nahimana, did in their evidence before the Tribunal concede that the land they had purported to sale belonged to their family. To compound matters, the same witnesses conceded to receiving money from 'some people' but denied executing any sale contracts.

75. The inference that the Third Applicant had conjured sale agreements after the event that were not executed by the alleged sellers would denote fraud on his part that effectively negates any claims of his having been a *bona fide* purchaser. Further, having established that Ms. Niyonzima and Mr. Nahimana did not own the property that had been sold to him, the Tribunal was bound by the provisions of Article 276 of the Burundi Civil Code that forbids the sale of any item that does not belong to the seller. We therefore cannot fault its decision to nullify the said sale. Indeed, contrary to the Applicants' allegations to the contrary, it rightly

[52] That is the definition of the term 'bona fide' in Black's Law Dictionary, 8th Edition, 2004, p. 186.
[53] Black's Law Dictionary, 8th Edition, 2004, p. 1271

returned the said property to the deceased Bandariye's family. In any event, the Applicants' argument that the sale agreement between Mr. Nahimana and the Third Applicant was not in issue is superfluous given that the Supreme Court had nullified the Attested Affidavit that highlighted properties that he had purportedly purchased, inclusive of the land sold under that agreement. We would therefore disallow the Applicants' contestations that the Tribunal illegally deprived the Third Applicant of his proprietary interest in the property that accrued to the late Bandariye's Estate.

76. In like vein, we cannot fault the Tribunal for nullifying the purported sale agreement executed between the Third Applicant and Andre Habonimana. Having found it to have been similarly grounded in the illegal sale of land that did not belong to the seller, and faced with evidence in that regard that was riddled with grave inconsistencies and contradictions, the Tribunal rightly invoked the provisions of Article 276 of the Civil Code to nullify the said sale. As was aptly captured in the impugned judgment, Mr. Habonimana's evidence was discredited by none less than his brother, who testified that their father did not own the land that Mr. Habonimana had purportedly sold to the Third Applicant; Habonimana's own evidence lack in cogency for being self-contradictory as to whether their father was still alive when the land was sold. We find no merit in the Applicants' reliance on Article 33 of the Civil Code Vol. III to assert the invincibility of the sale agreements in issue presently. That legal provision clearly and unambiguously hinges the unassailability of written agreements on their having been executed in accordance with the law and in good faith. It reads:

> **Legally constituted agreements serve as law for those who have made them. Such agreements may only be revoked by their mutual consent or for causes authorized by law. The agreement must be executed in good faith.**

77. In the instant case where the sale agreements between the Third Applicant and Ms. Niyonzima, Mr. Nahimana and Mr. Habonimana were executed in contravention of Article 276 of the Civil Code and their bona fides have been impeached, we are hard pressed to appreciate how they could have benefitted from this legal provision. The same considerations would apply to the sale

agreement between the Third Applicant and Francois Biniga that was similarly nullified by the Tribunal. The connotations of fraud raised by Ms. Niyonzima and Mr. Nahimana were seemingly corroborated by the testimony of Nicolas Mpitabakana, who had been depicted as a witness to the sale agreement between Francois Biniga and the Third Applicant but denied affixing the signature attributed to him on the agreement and attested to the sale contracts being forged because his mother (wife to the deceased Biniga) did not know about them. Curiously, although the Applicants had argued that this agreement was not in issue in this case, they did advance submissions in relation to it.

78. Against the foregoing background, we decline the invitation extended to us by the Applicants to adjudge as illegal the Tribunal's nullification of the First and Second Applicants' certificates of title. To begin with, it is not true that the Tribunal gave no reasons for its final orders that include the cancellation of the First and Second Applicants' certificates of title. It did furnish a lengthy recital of all the considerations it had taken into account in arriving at its decision and, at page 11 of the impugned judgment, expressly advanced the reason for its non-reliance on the Applicants' discredited evidence. In any case, the Supreme Court having nullified the Attested Affidavit, in the absence of proof of their having been bona fide purchasers either, and given the succinct provisions of Article 276 of the Civil Code; the cancellation of the First and Second Applicants' titles was inevitable in so far as they were deduced to have acquired the properties in question from a person (the Third Applicant) whose claim to ownership thereto had been nullified by the apex court of the land.

79. The assertion in paragraph 23 of the Reference that under Burundi law certificates of title could not be nullified save through a special action for forgery/ fraud was rebutted by the Respondent State which, in paragraph 11 of its Response to the Reference averred that the Applicants had cited old, inapplicable law – Article 379 of the Burundi Land Law of 1986 – that had since been replaced by Article 344 of the Land Law of 2011. That position was not controverted.

80. In addition, whereas the Applicants contested the 'arrangements' the Tribunal made reference to at the end of its judgment, we find those observations to

reflect third party proceedings against the Third Applicant (the person that sold the disputed land to the First and Second Applicants) who in turn could claim similarly against the persons that sold to him. It would appear that the Tribunal invoked the provisions of Article 5 of the Code of Civil Procedure that provides that '**the court can always join declinatory exceptions on the merits and order the parties to conclude for all purposes.**' No evidence was adduced by the Applicants as would impeach the propriety of this legal provision for that purpose.

81. Finally, it was the Applicants' contention that the Tribunal's nullification of the sale agreements and certificates of title violated Article 15(1) of the Common Market Protocol and Article 14 of the African Charter on Human and Peoples Rights given that the Respondent State did not apply national property laws properly and thus arbitrarily deprived the Applicants of their property rights. Our simple response to this assertion is that property rights would not accrue to a person that acquires property irregularly. As the old adage goes, *he who comes to equity must come with clean hands*. The Applicants bore the onus of proof of their claim but, in our judgment, did not discharge the duty upon them to the requisite standard.

82. In the result, we are satisfied that the domestic process applied by the *Tribunal de Grande Instance* of Bujumbura in this matter did address the issues that were before it in conformity with Burundian law. We find the resultant judgment to have been legal and, to that extent, is in compliance with the rule of law principle enshrined in Articles 6(d) and 7(2) of the Treaty. It is also in tandem with the property rights encapsulated in Article 15(1) of the Common Market Protocol and Article 14 of the African Charter on Human and Peoples Rights. We would therefore answer *Issues 4 and 5* in the negative.

Issue No. 6: Whether the Applicants are entitled to the remedies sought

83. The remedies sought by the Applicant in this matter are delineated verbatim in paragraph 10 hereof. We do not deem it necessary to reproduce them here. Be that as it may, having answered the 2 preceding issues in the negative, the remedies sought herein would be untenable, save for the order on costs to which we revert forthwith.

84. Rule 127 of this Court's Rules postulates that costs should follow the event unless the Court, for good reason, decides otherwise. In the instant case the subsisting Applicants were successful in *Issues 1, 2 and 3* although they were unsuccessful on the substantive Reference. Therefore, the success in the Reference is evenly balanced and renders moot the question as to which party won the event. We would therefore exercise our discretion to order each Party to bear its own costs.

CONCLUSION

85. In the final result, the Reference is hereby dismissed; each Party to bear its own costs. It is so ordered.

Dated and delivered and by Video Conference this 16th Day of June, 2020.

Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE

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

Hon. Justice Charles Nyachae
JUDGE

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

Certified as True Copy of the original
16 JUN 2020
Registrar
EAST AFRICAN COURT OF JUSTICE