IN THE EAST AFRICAN COURT OF JUSTICE
APPELLATE DIVISION AT BUJUMBURA, BURUNDI

(Coram: Geoffrey Kiryabwire, VP; Sauda Mjasiri and Anita Mugeni, JJA)

APPEAL NO.05 OF 2020

BETWEEN

NIYONGABO THEODORE.....1ST APPELLANT

NIYUNGEKO GERALD.....2ND APPELLANT

AND

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

[Appeal from the Judgment of the First Instance Division of the East African Court of Justice by Hon. Lady justice Monica K. Mugenyi, Principal Judge; Faustin Ntezilyayo, Deputy Principal Judge & Charles Nyachae, Judge dated 16th June 2020]

JUDGMENT OF THE COURT

A. INTRODUCTION

1. This Appeal arises from the decision of the First Instance Division of this Court (herein referred to as "The Trial Court") in Reference No. 04 of 2017 dated on 16th June 2020 in which the Trial Court dismissed the Reference and held that each party bears its own costs.

2. The Appellants Niyongabo Theodore [First Appellant] and Niyungeko Gerald [Second Appellant] sued the Respondent, the Attorney General of Burundi before the Trial Court in respect of the Judgment of annulment (*cassation*) of the First and Second Appellants' certificates of title by the *Tribunal de Grande Instance de Bujumbura* of the Republic of Burundi in the Case **RC 069/16.863** delivered on 27th December 2016 herein (after referred to as the impugned Judgment) without giving sufficient reasons or following the special procedure prescribed under the Burundian Law for annulling Certificates of Title.

3. The appellants were both in the trial court and in this court represented by Donald Omondi Deya, Nelson Ndeki, Esther Mwigai Mnaro, Advocates and the Respondent was represented by Diomede Vyizigiro, a State Attorney.

B. BACKGROUND

4. The background to this Appeal as gleaned from the Memorandum and Record of Appeal filed in this Court is as outlined below.

5. That in 1997, Mr. Desire Manariyo who was ('Third Applicant in the Trial Court) 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').

6. That in 1999, Mr. Desire Manariyo and the sellers had their sale contracts authenticated before the Tribunal of Residence of Musaga, in Bujumbura and executed a single attested Affidavit with number 356/99 of 27th July 1999, in respect of all the three parcels of the land.

7. That the Mr. Desire Manariyo subsequently consolidated the three (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 Appellant) and Mr. Gerald Niyungeko, (The Second Appellant) who bought two (2) plots each.

8. Mr. Desire Manariyo'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 appellants took possession of their respective plots, engaged in farming on them, and later on 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.

9. That in 2010, Mr. Jean Ndayishimiye (son of the late Mr. Pascal Bindariye) and Mr. Nicola Mpitabavuma (son of the late Francois Biniga) lodged separate cases against Mr. Theodore Niyongabo (the First Appellant) before the *Tribunal de Grande Instance de Bujumbura,* claiming parts of the said land were owned by him. Mr. Gerald Niyungeko (the Second Appellant) and Mr. Desiré Manariyo (who was a third Applicant in the Trial Court) were later enjoined as parties to the proceedings and, together with the First Appellant, tendered before the Tribunal evidence that sought to prove their legal ownership of the properties in question.

10. That on 27th December 2016, the Tribunal rendered its Judgment in the case **RC 0069/16.863** and annulled the First and the Second Appellants' certificates of title. The Appellant's lawyer was notified of the said Judgment on 18th January 2017.

11. That aggrieved by the manner in which the Burundi Judiciary had handled the matter, Mr. Manariyo Desire filed a case Reference No. 8 of 2015 against The Attorney General of Burundi, before the Trial Court.

12. That the Trial Court dismissed the said Reference on 2nd December 2016, a decision that has been since successfully challenged before this Court albeit, on a point of law, vide **Manariyo Desire vs. The Attorney General of Republic of Burundi**, Appeal No. 1 of 2017.

13. Following the determination of Reference No. 04 of 2017 by the Trial Court, on 27th March 2017, The Appellants (the First and the Second Applicants) filed an appeal against the said Reference on the alleged

violation of the principles of the rule of law and human and peoples' rights by the Republic of Burundi.

C. THE REFERENCE

14. Manariyo Désiré who was the third Applicant in the Trial Court and the Appellants did on 27th March 2017 file Reference No. 04 of 2017 before the Trial Court premised on the alleged violation by the Respondent State (the Republic of Burundi) of the principles of the rule of law and human and people's rights under Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community, Article 15(1) of the East African Community Common Market Protocol, The African Charter on Human and People's Rights and Rule 1(2) of the East African Court of Justice's Rules of Procedure, 2013 (the Rules) challenging the legality of a decision of the *Tribunal de Grande Instance* of Muha/Bujumbura in a case RC 069/16.8633 for allegedly annulling the Applicants' Certificates of Title without giving sufficient reasons or following the special procedure prescribed under the Burundian law for annulling Certificates of Title.

15. The Appellants the then applicants averred that the decision of the *Tribunal de Grande Instance* of Bujumbura in **RC 069/16 863** illegally annulled their Certificates of Title without either giving sufficient reasons or following the special procedure prescribed for the annulment of certificates of title, and ignored the proof of the applicants' legal interest in the contested land as had been availed to it.

16. It was the Applicant's contention that the Tribunal's actions contravened the principles of the Rule of Law and Human and People's Rights under

Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community, Article 15(1) of the East African Community Common Market Protocol, The African Charter on Human and People's Rights.

17. In the premises, the Appellants moved the Trial Court for Orders that: -

a. A declaration that the Respondents' actions and omissions are unlawful and an infringement of Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community, Article 15(1) of the East African Community Common Market Protocol, The African Charter on Human and People's 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 of Human and People's Rights;

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

d. Order for reparations to the Applicants;

e. An order directing the Respondent to appear before the trial court not 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 the Trial Court;

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

g. That the Trial court be pleased to make further or other orders as may be just, necessary or expedient in the circumstances.

D. THE RESPONSE TO THE REFERENCE

18. In response, the Respondent did not contest the factual basis of the Reference, however the Respondent contended that the Trial Court did not have appellate jurisdiction over decisions from municipal courts and that even if per chance it did, that the actions/omissions complained of by the Appellants concerning title deeds, were time barred and that the same had been previously determined by the Trial Court in Reference No. 08 of 2015.

19. The Respondent also argued that the title deeds in respect of the land that was bought from the Third Applicant by the first and the second applicants had previously been nullified by courts of competent jurisdiction in Burundi rendering irrelevant the Applicant's contestations of violations of any provisions of the Treaty, Common Market Protocol or the African Charter on Human and People's Rights.

20. The Respondent further faulted the annexures to the reference for not being certified as required by Rule 39 of the Court's Rules of Procedure.

E. PROCEEDINGS BEFORE THE TRIAL COURT

21. Pursuant to the Scheduling Conference held on 8th November 2018, the Parties framed the following issues for determination by the Court.

    1. Whether the Trial Court had Jurisdiction to determine the Reference.

2. Whether the matter was time barred.
3. Whether the matter was *Res Judicta*.
4. Whether the Respondent violated Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community, Article 15(1) of the East African Community Common Market Protocol, The African Charter on Human and People's Rights.
5. Whether the Respondent's failure to recognise the legal and probative value of the certificate of title associated with the Appellants and the disregard of its own laws was unlawful and violates the Applicant's rights to peaceful enjoyment of property.
6. Whether the Applicants were entitled to the remedies sought.

F. THE DECISION BY THE TRIAL COURT

21. On 16th June 2020, the Trial Court rendered its Judgment in which it held in favour of the Appellants on issues 1,2, and 3 and dismissed issues 4,5 and 6; and held that each party bears its own costs.

G. APPEAL TO THE APPELLATE DIVISION

22. That Dissatisfied with parts of the Judgment in Reference No. 4 of 2017 delivered on 16th June 2020, the Appellants filed the present Appeal. During the Scheduling Conference held on 14th October 2020, the parties settled on the following issues:
    I. Whether the Trial Court committed a procedural irregularity by holding that the Appellants did not provide sufficient proof of

violations of Articles 6(d) and 7(2) of the East African Community Treaty; Article 15(1) of the Common Market Protocol and Article 14 of the African Charter on Human and People's Rights.

II. Whether the First Instance Division committed a procedural irregular*ity* by questioning *suo motu* the accuracy of appellant's assertions.

III. Whether the First Instance Division committed a procedural irregularity by failing to exercise its inherent powers to seek information that was vital to base on its Judgment.

IV. Whether the First Instance Division erred in law in failing to recognise Appellants as *bona fide* purchasers for value without notice.

V. Whether the parties are entitled to remedies sought.

H. ISSUES FOR DETERMINATION

ISSUE NO. 1: Whether the First Instance Division committed a procedural irregularity by holding that the appellants did not provide sufficient proof of violations of Articles 6(d) and 7(2) of the East African Community Treaty; Article 15(1) of the Common Market Protocol and Article 14 of the African Charter on Human and People's Rights.

a. Appellants' case

23. The Appellants submitted that the First Instance Division committed a procedural irregularity by holding that the Appellants did not provide sufficient proof of violations of Articles 6(d) and 7(2) of the East African Community Treaty; Article 15(1) of the Common Market Protocol and Article 14 of the African Charter on Human and People's Rights.

24. The Appellants based their Appeal on Article 35 (A) of the Treaty that lays down the grounds on which an Appeal against a decision of the First Instance Division of the Court should be based on Rule 86 of the Rules of Procedure. That the three grounds are in the event of:

    (a) point of law.
    (b) Lack of jurisdiction; or
    (c) procedural irregularity.

25. To support, the above argument, the Appellants cited the case of ***Simon Peter Ochieng' vs the Attorney General of the Republic of Uganda,*** Appeal No.4 of 2015 EACJ in which this Court categorically held that the right of appeal is limited to the grounds provided under Article 35 (A) of the Treaty. The Appellants submitted that that the onus of proof (*onus probandi)* falls on the party alleging the error. The Appellants further argued that in the same case it was decided that the party must advance arguments in support of the contention and explain how the error invalidates the impugned decision.

26. The Appellants further contended that their submissions are mostly on procedural errors committed by the Trial Court, the Appellants referred

this court to the case of ***Attorney General of the United Republic of Tanzania Vs African Network for Animal Welfare (ANAW)***, Appeal No.3 of 2011 which is at pages 21 – 22 of the text, held that:

> *"Procedural irregularities are in character, irregularities that attach to the conduct of a proceeding or trial. It comprises such irregularities as the inadmissibility of documents or witnesses, denying a party the opportunity to be present or to be heard at all, hearing a matter in camera (where it should be heard in public and vice versa), failure to notify or serve in time or at all, etc. in this regard, "procedure" is defined in* ***Black's Law Dictionary*** *(9th Edn at p. 1324) as: "the regular and orderly progression of a lawsuit; including all acts and events between the time of commencement and the entry of judgment." Clearly, the emphasis in the above definition is on "regularity" and "orderliness" of the judicial progression of the process. "Irregularity" being a departure or variation from the normal conduct of action (****Black's Law Dictionary*** *supra, at p. 906). In short, procedural irregularities attach to a denial or failure of due process (i.e. fairness) of a proceeding or hearing. It seeks to ensure orderly, fair equitable, balanced, transparent, honest and just progress in the conduct of the steps encompassed in carrying out judicial proceedings from commencement of the action to delivery (and execution) of judgment".*

27. On the first issue, the Appellants further referred this Court to the holding of this Court in the case ***Angella Amudo vs. Secretary General of the***

East African Community, Appeal No.4 of 2014, as their basis for appeal, that in which this court held as follows:

"We are fully aware that a court commits an error of law or a procedural error when it:-

- *Misapprehends the nature, quality, and substance of the evidence:*
- *Draws wrong inferences from the proven facts;*
- *Acts irregularly in the conduct of a proceeding or hearing leading to a denial or failure of due process (i.e., fairness) e.g. irregularly admits or denies admission of evidence, denies a party a hearing, ignores a party's pleadings....*

28. The Appellants contended that the Trial Court committed a procedural irregularity by holding that the Appellants did not provide sufficient proof of violations of Articles 6(d) and 7(2) of the East African Community Treaty; Article 15(1) of the Common Market Protocol and Article 14 of the African Charter on Human and People's Rights. It was further contended the Trial Court committed a procedural irregularity for the following reasons which are stated hereunder.

29. That in paragraph 69 of the Judgment, the Trial Court rejected the only piece of evidence submitted by the Respondent by striking out the affidavit of the Respondent's advocate. That having struck out the only affidavit of the Respondent that the Trial Court had no evidence at all in support of allegations by the Respondent.

30. The Appellants argued that after the Trial Court struck the sole Affidavit of the Respondent, there was no evidence of the Respondent on Record to contradict the evidence given by the Appellants.

31. The Appellants submitted that it is trite law that parties are bound by their pleadings and in this regard the Court was referred to the case of **Oladeji (NIG) vs. Nigeria Breweries** where Adereji, JSC expressed himself on the importance and place of pleadings in the following way: -

> *"...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded .....*
>
> *. . . In fact, that parties are not allowed to depart from their pleadings is on the authority's, basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."*

32. The Appellants contended that the Trial Court in its Judgment, admitted to having struck out the only Affidavit filed by the Respondent, that this fact meant that the Respondent's only piece of evidence was no longer on the Court's record.

33. That, the Trial Court in paragraph 70 of the Judgment purported to look at other evidence on record, where it stated that "*Striking the sole Affidavit in support of opposites' case would not necessarily obviate the*

duty upon Court to evaluate the subsisting evidence or record to determine whether it can sustain the allegations in issue". Yet after striking the sole Affidavit of the Respondent, there was no longer any subsisting evidence left on the side of the Respondent to prove its case.

34. The Appellants submitted that the effect of a Court striking out an Affidavit was clearly articulated in the case of ***Oyugi vs Law Society of Kenya & Another*** Civil Suit 482 of 2004, *where* it was held as follows:

> *"It is not competent for a party's advocate to depone (sic) to evidentiary facts at any stage of the suit and by deponing (sic) to such matters the advocate courts an adversarial invitation to step down from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions and it is impossible and unseemly for an advocate to discharge his duty to the Court and to his client if he is going to enter into the controversy as a witness. He cannot be both Counsel and witness in the same case. Besides that, the counsel's affidavit is defective for the reason that it offends the provision to order 18, rule 3 (1) by failing to disclose who the sources of his information are and the grounds of his beliefs*".

35. Basing on the above the Appellants argued that in this case it was clear that once an affidavit is struck out, the evidentiary facts it had carried in it are rendered a nullity.

36. It was the submission of the Appellants that the Court contradicted itself by acknowledging that the struck out Affidavit was the only Affidavit in

support of the Respondent's case, which then would have been their only evidence on record based on the scheduling conference but instead decided to look at "other subsisting evidence on record". The Appellants submit that there was no other subsisting evidence on record in support of the Respondent's case.

37. That the finding by the Trial Court that there was no proof of violation of Articles 6(d) and 7(2) of the East Africa Treaty Article 15(1) of the Common Market Protocol and Article 14 of the African Charter on Human and People's Rights was baffling because the evidence placed before the Trial Court by the Appellants was uncontested; in which case the Court ought to have looked at that evidence as such.

38. The Appellants submitted that it is trite law when a party bearing the burden of proof meets its burden, the evidential burden of proof switches to the other side. Those burdens may be of different kinds for each party, in different phases of litigation. The burden of production is a minimal burden to produce at least enough evidence to consider a disputed claim. After litigants have met the burden of production, they have the burden of persuasion, that enough evidence has been presented to persuade that their side is correct. There are different standard of persuasiveness ranging from a preponderance of the evidence (where there is just enough evidence to tip the balance), to prove beyond reasonable doubt.

39. The Appellants submitted that the burden of persuasion should not be confused with the evidential burden, or burden of production, or duty of producing (or going forward with) evidence which is an obligation that

may shift between parties over the course of the hearing or trial. The evidential burden is the burden to adduce sufficient evidence to properly raise an issue in court.

40. The Appellants having discharged their burden by producing enough evidence through Affidavits as agreed during the scheduling Conference, the onus was now on the Respondents to bring evidence to disprove, and that they did not have any on record for the Court to rely on.

41. The appellants demonstrated to this court that at paragraph 70 of the Judgment the Court referred to the ***Bosnia & Herzegovina vs Serbia & Montenegro***, [2007] ICJ 2 which held as follows:

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

42. That, the Appellants submitted that at paragraph 71 of the Judgment of the First Instance Division, the Trial Court refers to the case of ***The Attorney General of the Republic of Burundi vs The Secretary General of the East African Community,*** Reference No.2 of 2018 which held as follows: -

> *"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 than the other..."*

43. That yet at paragraph 72, the Trial Court found that: -

> *"...Turning to the matter before us, the question is whether the Applicants have in fact satisfied the applicable standard of proof".*

44. Regarding the aforesaid, the Appellants submitted that Trial Court does not specify which of the applicable standards it was referring to, whether it was the one in the *Bosnia case* or the one in the ***A.G of Burundi vs. The Secretary General of the East Africa Community*** (supra)? The Appellants contended that the answer to the aforesaid question was however clear based on how the Court made its determination in the subsequent paragraphs of the Judgment as discussed on below.

45. That since the Respondent's only piece of evidence was struck out, if the Court had indeed applied the principle in paragraph 71 of the Judgment the balance of probabilities would have been in favour of the Appellants who had produced uncontested evidence and met their evidential burden of proof. That instead of drawing a clear conclusion, the Trial Court said that the Respondent Tribunal which rendered the impugned Judgment before it was bound to follow the Supreme Court's stand, except if the Appellants were *bona fide* purchasers from the original First Applicant. However, the Trial Court went on questioning *proprio motu*, the Appellants' *bona fide* purchaser's status, as discussed in Issue No.4 of the Appellants submissions. That by this, it is very apparent that the Trial Court chose to apply the principle in the ***Bosnia case***(supra).

46. The Appellants contended that the Court committed a procedural error by deciding to apply the standard of proof as discussed in the ***Bosnia case***

(supra). That the case in question must be distinguished in its nature from the case that was before the Trial Court. That relying on the ***Bosnia case*** (supra) which was a Criminal case led the Court to apply the wrong standard of proof. Whereas in criminal matters the burden of proof is beyond reasonable doubt, in Civil matters as was the one before the Court the burden of proof is on a balance of probabilities.

47. Finally, the Appellants submitted that the Trial Court misdirected itself on relying on the aforementioned authority based on the fact that the issues at hand were of a totally different nature and that it failed to apply the standard of proof discussed in paragraph 71 of the Judgment. The exceptional gravity referred to in the ***Bosnia case*** (supra) on the facts were criminal in nature. The **Bosnia case** (supra) was based on issues of genocide and the burden of proof in such a matter can never be used in determining proof in a simple property rights dispute which was civil in nature.

b. Respondent's case

48. On this issue, the Respondent noted that the Appellant's arguments were based on three points; accusing the Judges of the Trial Court to misapprehend the nature, quality and substance of evidence, and to draw wrong inferences from proven facts and to act irregularly in the conduct of the proceedings or hearing leading to denial of or failure of due process.

49. The Respondent questioned whether the court is blindly bound by whatever assertion made by a party when the affidavit produced by the other party is struck out for whatever reason.

50. The Respondent's counsel submitted that for the ends of justice to be met there is no article in the Treaty nor rule of the East African Court of Justice Rules of the Court, 2019, preventing the Judges of this Court from using their inherent powers to go through other documents produced by parties.

51. The Respondent further submitted that the Court cannot allow the Respondent's rights to have access to fair justice to vanished due to the Counsel for the Appellant's own inadvertence, negligence or mistake. The Respondent in this regard relied on the case of the Supreme Court of Uganda, **Crane Finance Co. Ltd Vs Makerere Properties**, S.C.C.A No of 2001.

c. Determination of the Court.

52. Having carefully considered the submissions of both parties, it is now the duty of this Court to assess whether the striking out of a sole Affidavit of one party (Respondent), while the other party's (Appellants) affidavit remained untouched automatically makes the party (Appellants) whose Affidavit was not struck to win the case for lack of sufficient evidence.

53. Again what this Court has to find out, is what is the subsisting evidence which the Trial Court relied upon to evaluate the Respondent's case against the Appellants.

54. The Court also has to assess whether there is any provision under the Treaty or a rule under the Court Rules which binds the Trial Court to be

subjected to only Affidavits presented by either party and in the event of striking out an affidavit, the Court cannot consider any other available evidence on record to meet the ends of justice.

55. We shall start our analysis by referring to Article 4 of the Rules of the Court, which provides:

> *"Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders or give such directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court".*

56. Therefore, we find that the Trial Court had inherent power to consider any other subsisting evidence even though the Respondent's affidavit was struck out in order to meet the ends of justice. The trial Court at paragraph 73 of the appealed Judgment is reproduced hereunder: -

> *"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 Applicants 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 wait for 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".*

The Trial Court had noted that the sale agreements in respect of the land that the First and Second Respondent bought from the Third Applicant had already been nullified by the Supreme Court of Burundi and the *Tribunal de Grande Instance of Burundi* relied on the said decision in nullifying the certificates of title of the land of the Appellants which originated from sale agreements which had been nullified.

57. For the above reasons therefore, this Court finds that Trial Court did not commit a procedural irregularity by holding that the Appellants did not provide sufficient proof of violations of Articles 6(d) and 7(2) of the East African Community Treaty; Article 15(1) of the Common Market Protocol and Article 14 of the African Charter on Human and People's Rights. So we answer issue No.1 in the negative.

ISSUE No. 2:

Whether the First Instance Division committed a procedural irregularity by questioning *suo motu* the accuracy of appellant's assertions.

a. Appellants' case.

58. The Appellants submitted that the Trial Court, committed a procedural irregularity by questioning *suo motu* the accuracy of the Appellants' evidence, when at page 75 of its Judgment the Court found:

"The inference that the third applicant had conjured sale arrangements 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".

59. The appellants contended that the Trial Court raised an issue of fraud which was not an issue before it and which assertion had not been made by the *Tribunal de Grande Instance* whose decision was being challenged before the Trial Court.

60. The Appellants cited **Habig Nig Bank Limited Vs. Nashtex International Nig Ltd**, Nigeria Court of Appeal Kaduna Division CA/K/13/04, Where it was held as follows: -

> *" ...Even when a court raises a point suo motu the parties must be given an opportunity to be heard on the point particularly the party that may suffer a loss as a result of the point raised. The law is well settled that on no account should a court raise a point suo motu, no matter how clear it may appear to be, and proceed to resolve it one way or the other without hearing the parties...If it does so, it will be in the breach of the parties right to a fair hearing".*

61. The Appellants argued that not only did the Trial Court raise a point *suo motu* but it went ahead to conclude on an issue without giving a chance to the Appellants to submit on that particular point. The Appellants further argued that the Trial Court raised a point of fraud which involved a party who was no longer a part of proceedings and therefore left the impression that the said party (who was the seller) could not have passed a good title to the buyers (Appellants).

62. That the Court in fact drew wrong inferences on facts that were proven and not in dispute: -

    a. That in paragraph 12 of the Affidavit sworn by the 2nd Appellant on 14th March 2017 he avers that the only way to cancel a valid Title is through a special action of forgery which was not undertaken by the Respondent.
    b. That in paragraph 11 of the Affidavit sworn by the 1st Appellant on 14th March 2017 he too attests to the same facts.

63. The Appellants further submitted there was no evidence that was placed before the Trial Court to dispute the above position nor was there evidence that there had been a special action undertaken by the Respondent that had proved that there had been any fraud during the transactions leading up to the acquisition of the land by the Appellants.

64. It was the submissions of the Appellants, that the Trial Court by deciding to raise *suo motu* the issue of fraud misdirected itself and therefore committed a procedural error that led to denial of justice.

65. The Appellants further submitted that the Trial Court did not consider their submissions as to the reasons given for cancellation of their Titles which would then have led the Trial Court to critically analyse whether the Respondent's *Tribunal de Grande Instance* had indeed made a decision that was in violation of the Treaty by violating its own Municipal laws. This had been averred in the Appellant's Affidavits and further in their submissions (specifically on Paragraphs 56 – 158).

66. The Appellants submitted that it is settled jurisprudence of this Court that any violation of national laws by any of the organs of the Partner States amounts to a violation of the rule of law principle in terms of Article 6(d) and 7(2) of the Treaty. This is equally true in respect of violations of any provision of the EAC Treaty or other Community legal instruments.

67. The Appellants referred this court to the report of the UN Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, which was referred to in the case of **EACSOF vs. The AG of Burundi and others,** (supra) which report stated:

> *"The principle of governance (according) to which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are public promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency."*

68. The Appellants also cited the case of **Henry Kyarimpa vs The Attorney General of the Republic of Uganda**, Appeal No. 6 of 2014 where this Court held as follows:

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

69. The Appellants further referred this court to the case of **Simon Peter Ochieng' and John Tusiime vs The Attorney General of the Republic of Uganda,** Appeal No.4 of 2015 where this Court held as follows:

> *"... for a matter to be justiciable before this Court the subject matter in question must be an Act or Statute, or a regulation, directive, decision or action. Further, it must be one, the legality of which is in issue viz the national laws of a Partner State, or one that constitutes an infringement of any provision of the Treaty".*

70. It was further argued that the Trial Court ignored the evidence of the Appellants that their Title Deeds could only be annulled by proving fraud on the part of the purchaser. On the other hand, it was submitted by the Respondent that the Appellants had relied on Article 379 of the old Burundi Land Law of 1986 which was no longer applicable, instead of Article 344 of the Land Law of 2011 which is currently in force.

71. The Appellants submitted that from their submissions in the Trial Court, (paragraphs 38 and 39) that it is evident that the Court's *suo motu* issue raised a point on fraud which was a misapprehension of the nature, quality, and substance of the evidence because clearly even the *Tribunal de Grande Instance* whose decision was before the Trial Court had never found fraud on the part of the Appellants.

b. Respondent's case.

72. The counsel for the Respondent submitted that the Appellants are challenging findings as to fraud established by the Trial Court on the side of the Third Applicant (MANARIYO Désiré) who did not appeal against the

Reference. He further argued that all the arguments related to Fraud as found by the Trial Court against the third Applicant be disregarded as he is not a party.

c. Determination of the Court.

73. We have considered the submissions of both the Appellants and the Respondent and further having addressed ourselves to the relevant evidence on record, we find that the Trial Court indeed raised an issue of fraud *suo motu.* This is because that the issue of fraud was not a matter for determination before the Trial Court. What was argued by the Appellants is that the Tribunal did not follow a procedure of instituting a special action as demanded by Burundian Laws to determine whether indeed there was fraud on the part of the third Applicant in the acquisition of the land; which procedure which is mandatory under Burundian laws.

74. In our view therefore, what the Trial Court was supposed to determine is whether a special action to determine the presence of fraud was under taken by the Respondent. The said action would have determined whether the allegation as to fraud was valid or not under the Laws of Burundi. The Trial Court further found whether a special action for fraud was a pre-requisite for nullification of Certificate of Land Titles. It was not the role of the Trial Court to affirm the presence of fraud since this was not an issue submitted to it for determination neither was it a matter for appeal in respect of the impugned Judgment.

75. Regarding the argument submitted by the Respondent concerning the determination of Fraud by the Trial Court, it is only the First and Second Appellants who appealed and therefore it is not reasonable if issues related to the same are brought up on appeal in which the Third Applicant was not a party.

76. This Court therefore agrees with the argument of the Appellants that with respect to the finding of fraud against them by the Trial Court that, the Appellants ought to have been given a chance to submit on it hence it was important for the Appellants to submit on it as it affects the rights of the Appellants.

77. We therefore find that the Trial Court indeed committed a procedural irregularity by questioning *suo motu* an issue of fraud which was not an issue before it nor had this assertion been made by the *Tribunal de Grande Instance* whose decision was being challenged before the Trial Court. Consequently, the answer on Issue No. 2 is in the affirmative.

ISSUE NO. 3:

Whether the First Instance Division committed a procedural irregularity by failing to exercise its inherent powers to seek information that was vital to base on its Judgment.

a. Appellants' case.

78. The Appellants contend that in Paragraph 78 of the impugned Judgment, the Trial Court held that the *Tribunal de Grande Instance* did give reasons for its decision for the nullification of the First and

Second Applicant's Tittle deed. It was argued that the that the main reason given by the Tribunal is that the Third Applicant's attested affidavit having been nullified by the Supreme Court, it followed that the Title deeds of the First and Second applicants were also null and void.

79. It was argued that the Trial Court completely failed to consider the only valid reason to annul a registered Title Deed which is to establish fraud.

80. The Appellants submitted that the Trial Court did not scrutinise or call for explanation as to why a Partner State had deviated from the only prescribed way of cancelling a valid Title.

81. Counsel for the Appellants submitted that the court ought to have called for evidence that there has been fraud by the Appellants before reaching their decision.

82. The Appellants relied on the case of **Alcon International Limited vs Standard Chartered Bank of Uganda & others,** Reference No.6 of 2010, para 27 where it was held that:

> *"In any case the Court has inherent powers under Rule 1(2) to make such other orders as may be necessary for the ends of Justice or to prevent abuse of the Process of the Court This may be done at the* Instance of the parties or court itself".

83. The Appellants finally submitted that the Court erred by not invoking its inherent powers as per Rule 4 of the Rules of Procedure 2019, and order for production of any evidence that would meet the ends of justice.

b. Respondent submissions.

84. Looking at the Respondent's appeal submissions on record, the respondent did not submit on this issue and for that matter this issue shall be analysed based on the Appellant's submission on this issue and the impugned decision.

d. Determination of the Court.

85. A review of the Judgment of the Trial Court shows that the Court declined to adjudge as illegal the Tribunals' nullification of the first and second Applicants' certificates of title where it held that: -

> *"…. It is not true that the Tribunal gave no reasons for its final orders that including the cancellation 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 including the cancellation of the 1st and 2nd Applicants' Certificates of Title. It did furnish a lengthy recital of all considerations it had taken into account in arriving at its decision and, at its 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 absence of their having proved they were bona fide purchasers..."

86. The Trial Court found that the Tribunal provided a lengthy reason for arriving at its decision. The Trial Court referred to page 11 of the impugned Judgment of the Tribunal where it found that the Supreme Court had already nullified the attested affidavit.

87. The Trial Court found that the Applicants had cited an 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 which position was not controverted.

88. However, for reasons which are to follow, this court departs from the findings of the Trial Court.

89. First and foremost, the Trial Court did not establish whether there was a mismatch or incorrectness in the laws cited by the Appellants. The Trial Court should have dug out the actual differences in the said Articles, to discover the differences between Article 379 of 1986 land Law and Article 344 of the said current land Law of Burundi.

90. We find that the Trial Court did not establish whether a special action for fraud was determined either by the Tribunal in annulling the Appellants certificate of land title or the Supreme Court in annulling the right of ownership of the third Applicant.

91 . The Appellants had submitted that the first, second and third Applicant (at the Trial Court) had all raised an objection regarding the nullification of their certificates of title since no special action for fraud had been heard. However, the Tribunal found without giving reasons that the dispute was not about the certificates of title but rather the sale agreements.

92. If the matter was about the sale agreements and not certificates of title, why then did the Tribunal nullify the certificates of title without a special action? In this regard we differ with the position taken by the Trial Court.

93. We agree with the Appellants and find that the Procedure for cancellation or nullification of the land titles under Burundi law can be only done through a Special action. We further find that the Court ought to have sought for information as to whether there was an action for fraud as a mandatory procedure under Burundi Laws and whether the Tribunal complied with this procedure. So we answer issue n° 3 in the affirmative.

ISSUE No. 4:

Whether the First Instance Division erred in law in failing to recognize the Appellants as *bona fide* purchasers for value without notice.

a. Appellants' case.

94. The Appellants submitted that the Trial Court misinterpreted and failed to apply properly the *bona fide* Principle and to recognise that the Appellants were *bona fide* purchasers for value without notice.

95. The appellants referred to this court case of **Katende vs. V Haridas & Company Limited** (2008) 2 E.A 173, where the Court of Appeal of Uganda described a *Bona fide* Purchaser:

> *"as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly".*

96. It was further held that "for the purchaser to successfully rely on the *Bona fide* doctrine he/she must prove that;

> *"he holds a certificate of title; he purchased the property in good faith, and he had no knowledge of fraud; he purchased a valuable consideration, the venders had apparent valid title; he purchased without notice of fraud and he was not party to any Fraud".*

97. The Appellants also relied on the **Black's Law Dictionary** for the definition of the *bona fide* purchaser as:

> *"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".*

98. The Appellants submitted that there is no evidence that disapproved the Appellants were not *bona fide* purchasers for value and yet in paragraph 74 of the Judgment of the Trial Court it faults the Appellants for not having made an attempt to demonstrate that this principle *bona fide* was indeed applicable under Burundian Law or that the Applicants were in fact *bona fide* purchaser. The burden of proof could only legally lie on those

affirming the positive assertion that the Appellants were not *bona fide* purchasers for value without notice of any fraud.

99. Counsel for the Appellants submitted that a *bona fide* purchaser is a universal principle applicable both in common law and civil law. This implies that the *bona fide* is always presumed, until adverse proof is produced, and that bad faith cannot be presumed. It is a principle also applicable in international law. That in this regard, in the case of **Lake Lanoux Arbitration France v. Spain1**, *International Law Report*, vol.24, p. 126, for instance, that the Tribunal held as follows:

> "...*There is a general and well established principle of law according to which bad faith is not presumed*". (Award of 16 November 1957)

100. The Appellants submitted that in fact, the they had clearly submitted at Paragraph 67 of their submissions that they were *bona fide* purchasers for value. The Appellants further submitted that the Court completely misapprehended the nature, quality, and substance of the evidence of the Appellants on this issue and that is what led them to this conclusion. The Appellants referred this Court to the Affidavit sworn by Mr. Niyungeko Gerard and specifically paragraphs 3 - 6 in which the Second Appellant averred that he was a *bona fide* purchaser for value. Furthermore, that his evidence was not disputed anywhere. The Appellants further referred this Court to the Affidavit sworn by the First Appellant, Mr. Niyongabo Theodore of the 14th March 2017 at paragraphs 3-11 on the same matter.

101. The Appellants further argued that the Trial Court completely failed to consider the Titles produced via the Affidavit of Mr. Deya, sworn on the 24th April, 2017.

102. Finally, the Appellants submitted that the Trial Court's misapprehension of the Appellants submissions led to a miscarriage of justice.

b. Respondent's Case

103. In reply, the Respondent submitted by reminding this Court that Third Applicant (MANARIYO Désiré) was not a *bona fide* Purchaser because the fraud on his side was well established in both the Supreme Court and the Trial Court.

104. The Respondent further submitted that although the Burundian law did not incorporate verbatim the principle of *"bona fide purchaser"* that it recognises and preserves all rights of a person who had acquired a land property in good faith and that it is against this background that the *Tribunal De Grande Instance* of MUHA, ***RC 069/16 863*** at page 11 while ordering annulment of the Certificate of land Title registered under number Vol ECXXIII Folio 118. Vol ECL XXIII 08. Vol ECXXXII Folio 83; Vol CXXX Folio 140 and Folio 177, further ordered in Kirundi on para 5 that:

> *"Niyongabo Theodore na Niyungeko Gerald bace bamenyana na Manariyo Desiré"*. Which mean that the Appellants will *"make arrangements"* with Manariyo Desire so as to preserve their rights.

c. Determination of the Court

105. In paragraph 74 of the Trial Court Judgment it found as follows: -

> *"In the matter before us the issue of a bona fide purchaser was propelled by the applicants with regard to the property of 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 3rd Applicant 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 claims. We find no proof whatsoever on the record that the land had been purportedly sold by two of the deceased Bindariye '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..."*

106. However, this court finds that, despite the above assertion the Trial Court in its Judgment did not show where it found that the Tribunal had established that the Appellants had bought the disputed land in bad faith from the Third Applicant, or that they knew or had notice about the existence of any claims on the suit property. It would be wrong to place on the Appellants the burden of proof to affirm a negative assertion.

107. In any event the Appellants averred that their certificates of title were lawful and it was up to others to assert and prove that the said certificates of title were obtained through fraud. Furthermore, even though the *bona fide* Principle has not been expressly codified under Burundian Laws, there

was nothing to impede the application of universally accepted principles of law like that of bona fide purchaser for value without notice of fraud. This is especially so when the effect of the non-application of the principle would lead to a person being deprived of his right to property in this case land which is even titled.

108. Therefore, we find that that the Trial Court erred in law by misinterpreting and failing to properly apply the universally applicable principle of *bona fides* and failing to recognise the Appellants as *bona fides* purchasers for value without notice because the *bona fide* Principle was not contested at the Tribunal. Consequently, the answer to the Issue No.4 is in the affirmative.

ISSUE No.5:

Whether the parties are entitled to remedies sought.

a. The Appellants'case

109. About the remedies, in their submissions the Appellants invoked the Rule 120 of the East African Court of Justice Rules of Procedure, 2019, which provides that: -

> *"The Court may in dealing with any appeal, confirm, reverse or vary the judgment of the First Instance Division or remit the proceedings to it with such directions as may be appropriate or order a new trial where it is manifest that a miscarriage of justice has occurred and to make any incidental or consequential orders including orders as to costs".*

110. They further invoked the principle of "*Ubi jus ubi remedium*" to wit "For every wrong, the law provides a remedy". The appellants reiterate that a court is entitled to give a litigant the orders that it seeks, or vary those orders and grant orders that are the most appropriate, expedient or just, based on the circumstances and context of the case.

b. The Respondent's case

111. For the issue No.5 about the remedies sought, the Respondent wishes to remind this Court that this unnecessary Appeal was initiated by the Appellants and caused the Respondent to incur unnecessary costs that have to be repaired. Therefore, all the orders sought by the Appellants cannot be granted.

112 . He further pleads that this Appeal be disallowed with costs in his favour in both the Appellate Division and the First Instance Division.

c. Determination of the Court

113. We have carefully considered the rival submissions of the parties on the issue remedies and costs sought and now find as follows:
The Rule 120 of the East African Court of Justice Rules of Procedure, 2019, provides that: -

> *"The Court may in dealing with any appeal, confirm, reverse or vary the judgment of the First Instance Division or remit the proceedings to it with such directions as may be appropriate or order a new trial where it is manifest that a miscarriage of justice has occurred and to make any incidental or consequential orders including orders as to costs".*

114. Having found as we have, that an error in law had been committed by the Trial Court by misinterpreting and failing to apply properly the principle of *Bona fides* to this land dispute, it would only be fair, equitable and just to remit his matter back to the Trial Court to rehear the matter on the question of what loss this deprivation of land occasioned the Appellants.

115. This Court in the case of ***Hon. Dr. Margaret Zziwa V Secretary General East African Community Appeal*** No 02 of 2017 found that the remedy of compensation, damages in internal law, is also very firmly established in international law, and is available for breach of Treaty obligations where a claimant establishes that the Act, regulation, directive, decision or action of the EAC complained of has caused such claimant a loss which is financially assessable. It is our finding that the cancellation of the Appellant's land titles without first establishing fraud by an organ of a Partner State is therefore attributable to that Partner State and the Appellants are entitled to compensation for consequential loss.

116. While like in the ***Zziwa Case*** (supra) this the case should have been remitted back to the Trial Court for assessment of compensation, we further acknowledge as this Court did in the ***Zziwa Case*** (supra) that given the convoluted nature of the litigation and the delays that might ensue before the final disposal of the matter that we grant in general terms compensation to the Appellants.

117. We further find, that it is just and equitable and in adherence to the principles of the rule of law, the equal opportunity and the promotion and the protection of human and people's rights that cancellation of the land

titles as occurred in this matter without the *Tribunal De Grande Instance* of MUHA assessing compensation and leaving it to the parties to sort themselves out (through "*bace bamenyana/making of arrangements*") without ascertainable and enforceable consequential orders was a clear abdication of the said Tribunal's function.

118. We now take into account the importance that should be attached to the right to property as provided for under Article 14 of the African Charter on Human and Peoples' Rights which provides: -

> *""The Right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and* ***in accordance with the provisions of appropriate laws****..." (emphasis ours)*

We further take into account passage of time since the decision of the Tribunal and grant each Appellant a lump sum of US$ 50,000 as compensation for inconvenience and deprivation of property without due process.

119. Interest on this liquidated amount is hereby granted at the rate of US$ six percent per annum payable from the date of filing of the Reference until payment in full.

120. As to costs, Rule 127 of the Rules of this Court further provides that:

> *"Costs in any proceedings shall follow the event unless the Court shall for good reasons otherwise order."*

In general, the principle is that costs follow the event; this means that the costs of an action are usually awarded to the successful party. However, it should be noted that any award of costs is at the discretion of the Court.

121.So we find that the Appellants are entitled to their costs for this Court and we order that the costs be borne by the Respondent in favour of the Appellants, the successful party.

IT IS SO ORDERED

Dated, Delivered and Signed at Bujumbura this 26th day of November 2021.

.....

Justice Geoffrey Kiryabwire
VICE PRESIDENT

.....

Sauda Mjasiri
JUSTICE OF APPEAL

.....

Justice Anita Mugeni
JUSTICE OF APPEAL