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

(Coram: Monica K. Mugenyi, PJ; Charles O. Nyawello & Charles Nyachae, JJ)

REFERENCE NO.3 OF 2018

G &T ENTERPRISE TRADING LTD..... APPLICANT

VERSUS

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

8th October 2021

JUDGEMENT OF THE COURT

A. INTRODUCTION

1. This Reference was brought on 24th of January 2018 under Articles: 3(3) (b), 6(d), 7(2), 8(4), 12, 27(1), 30(1) and (2) of the Treaty for the Establishment of the East African Community (hereinafter 'the Treaty'). It challenges decisions of the Office of the Tea of Burundi (OTB) penalising the Respondent, the decision of the Public Procurement Authority (ARMP) on ground of partial application of law, and the decision of the Administrative Court of Burundi dismissing the Applicant's case on ground of infringement of the Civil Procedure Code and the Treaty (also by extension).

2. The Applicant is a legal person registered in Rwanda and resident in Kigali, Rwanda, for the purposes of Article 30(1). The Respondent is the Attorney General of the Republic of Burundi, sued on behalf of the Government of the Republic of Burundi in the capacity of the principal legal advisor of the Government.

3. At the trial the Applicant was represented by Mr. Bharat B. Chadha, learned advocate, while the Respondent was represented by Mr. Diomede Vyizigiro, learned state attorney.

B. BACKGROUND

4. On 12th December 2011, G & T concluded a contract with the OTB for the delivery of 500 tons of fertiliser by the former to the latter within 90 days. In the course of effecting the delivery, the

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Black Sea got frozen, rendering the adjoining Russian ports in-operative, and the delivery impossible.

5. That difficulty led G&T to request a 45-day extension of the delivery period. That request was declined on the ground of OTB's investigation which revealed that the Dead Sea had been operational during the pertinent period. On the contrary the request was based on the freezing of the Black Sea, not the Dead Sea. At a later date (18 June 2012), G&T completed the delivery of the contracted quantity of fertiliser but found themselves faced with a penalty amounting to $43,387.5 for that late delivery.

6. G&T had resort to two Burundian authorities. First, they lodged a complaint before the Public Procurement Appeals Authority (ARMP), and had partial success which led to the recovery of "some of the monies held as penalty by OTB". Second, they filed a civil case at the Burundi Administrative Court (BAC) to recover what they thought was the remaining part of the entitlement held by OTB. The BAC found the case to be time-barred and dismissed the case. Unsatisfied with that judgement, the Respondent lodged this Reference on 24th of January 2018.

C. APPLICANT'S CASE

7. The Applicant's case is set out in the Statement of Reference, the Affidavits in support of the Reference, in the written submissions, and in the oral highlights thereof made during the hearing.

8. It is the Applicant's case that, via its agents, the Respondent violated its own domestic law, a violation that amounts to the infringement of Articles 6(d) and 7(2) of the Treaty. The Applicant specifically contends that OTB violated Code 109 of the Public Procurement Act when it decided to penalise it for late deliver, that ARMP chose to ignore the Public Procurement Act in spite of its (Applicant's) intervention, and that the Administrative Court of Burundi infringed the Code of Civil Procedure.

9. The Applicant seeks the following orders against the Respondent, reproduced verbatim:

(a) A declaratory order that the decision taken by OTB of penalizing G&T Enterprise Trading limited is an infringement of the public procurement act and the Treaty especially the Article 6(d) and 7(2);

(b) A declaratory order that the decision taken by the Administrative Court of Burundi is an infringement of the Civil Procedure code and the Articles 6(d) and 7(2) of the Treaty.

(c) An order that the money withheld by OTB should be reimbursed using the same formula as per article 10 of the contract which OTB used to calculate their penalties against G&T. This amount should be exclusive of any damages such as, punitive, compensatory and/or consequential damages; and

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(d) **Direct the Respondent to pay all the cost of this reference.**

D. THE RESPONDENT'S CASE

10. Similarly, the Respondent's case is set out in the Response to the Statement of Reference, in the Affidavit in support thereof, in the written submissions, and in the oral highlights made during the hearing.

11. It is the Respondent's case that the subject-matter of this Reference cannot be brought before this Court on ground of both lack of jurisdiction and time-bar. With regard to lack of jurisdiction, it is the Respondent's case that this Court is not constituted an appellate court in place of the national appellate court. The Applicant had the opportunity to appeal the impugned decision of the Administrative Court of Burundi before the Administrative Division of the Supreme Court of Burundi within 30 days, but chose to lodge this Reference to this Court. In that manner, the Applicant was substituting this Court for the Administrative Division of the Supreme Court of Burundi. On the matter of time-bar, it is the Respondent's case that the only matter in dispute before this Court relates to the measure taken by OTB (on 9.10.2012 and notified to the Applicant on 5.6.2013), which is time-barred because it was filed on 24th of January 2018). Thus, the Reference was initiated six years after the occurrence of the incident that should have been brought before this Court within two months from the Applicant's knowledge of its occurrence.

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12. On the basis of the foregoing argument, the Respondent's prayer is that the Reference be dismissed with costs.

E. ISSUES FOR DETERMINATION

13. At the Scheduling Conference held on 18th June 2019, the Parties framed the following issues for determination:

    1. **Whether the Court has jurisdiction to entertain Reference No.3 of 2018;**
    2. **Whether the Applicant's claim is time-barred under Article 30 (2) of the Treaty or whether this Reference is time-barred;**
    3. **Whether the Respondent's act of retaining the Applicant's $19,081is an infringement of Articles 6(d) and 7(2) of the EAC Treaty;**
    4. **Whether the Applicant is entitled to the reliefs sought.**

F. COURT'S DETERMINATION

14. We commence our determination of this Reference by addressing the points of law raised in issues Nos. 1 and 2, which by their very nature shall be addressed in the reverse order, with the Respondent having the right to begin in submissions. A point of law takes precedence over a competing point of fact because the point of law has the potential of resolving the entire matter if the party that raises it succeeds.

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ISSUE NO. 1: <u>Whether the Court has jurisdiction to entertain Reference No.3 of 2018:</u>

15. The learned Counsel for Respondent submits that this Court does not have jurisdiction over this Reference for the reason that the subject-matter of the Reference was tried by a court of first instance in a Partner State. At the time of filing this Reference, the case was still having an opportunity to be appealed before the national appellate Court. Coming to this Court instead of the national appellate court would constitute the EACJ a court vested with power to substitute for the Appellate Courts of the Partner States.

16. Learned Counsel opined the rationale behind the establishment of the rule of exhaustion of local remedies in international justice would inform this Court's duty when faced with a challenge to its jurisdiction to try a matter that could have been one that have been but was not subjected to the appellate jurisdiction of domestic courts in the Partner State. He argues that a finding that this Court has jurisdiction in this matter would devalue the procedural rules applied by domestic courts and contravene Article 7(g) of the Treaty, which provides for principle of complementarity. He opined that the EACJ is enjoined in a complementary role to the national judiciaries of Partner States and should not, therefore, be substituted for any domestic court - appellate or otherwise - in the judicial hierarchy of Partner States. Rather, it should operate as a court of last resort when national courts are unwilling or unable to render justice to the population, No

evidence had, in his view, been presented to the Court that this was the case with the Administrative Court of Bujumbura.

17. Learned counsel cited the following observation in the case of **South-West Africa**[1], supporting his position with the following quotation:

> **"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."**

18. He further makes reference to Jean Chappe's the ***rule of Exhaustion of Local Remedies***.[2] In effect, the learned counsel for the Respondent argues for the exhaustion of local remedies before any matter is brought to this Court.

19. On his part, the learned Counsel for the Applicant contends that this Court has jurisdiction to entertain this Reference by virtue of Article 6(d) of the Treaty on three grounds:

    i. **The applicant is referring the decision of a company owned by a Partner State on the ground that the impugned decision is unlawful and infringes Articles 6(d) and 7(2) of the Treaty;**

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[1] ICJ, Reference No. 64 of 18th July 1966)
[2] Edition A, Pedone, Paris, 1972, pp.25-39

ii. **The Applicant is not required to exhaust local remedies before filing the reference in this Court and, by filing this Reference, the Applicant does not convert this Court into an appellate court; and**

iii. **The issues raised in the present Reference pertain to the interpretation of Articles 32, 6(d) and 7(2) of the Treaty, and issues relating to the interpretation of these Articles were not before the Administrative Court of Burundi.**

20. On the matter of the exhaustion of local remedies, Mr Chadha draws the attention of the Court to the case of **Emmanuel Mwakisha, Mjawasi & 748 Others vs. The Attorney General of the Republic of Kenya**[3], where it was held:

> **"Article 30 on the other hand, confers on a litigant resident in a Partner State the right of direct access to the Court for determination of the issues set out therein. We, therefore, do not agree with the notion that before bringing a Reference under Article 30, a litigant has to "exhaust the local remedy". In our view there is no local remedy to exhaust."**

21. The learned counsel for the Applicant also referred us to the case of **The Attorney General of the Republic of Rwands vs. Plaxeda Rugumba** where it was held:[4]

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[3] Reference no. 2 of 2010, p.9

[4] Appeal No. 1 of 2012, p.35, para. 35

"However, the EAC Treaty does not have any express provisions requiring the exhaustion of remedies."

22. He, further, cited the case of **Mr. Godfrey Magezi vs. the Attorney General of the Republic of Uganda** [5] where it was held (reproduced verbatim):

"Any plain reading of the aforementioned Article underscores that prior to submitting a Reference before the Court, any person must meet the following conditions:

a) Be a legal or natural person; and

b) Be resident of an EAC Partner State; and

c) Is challenging the legality of any Act, regulation, directive, decision, and action of the said Partner State or an institution of the Community."

23. Finally, Mr Chadha invites the court to have regard to the case of **Prof. Peter Anyang Nyong'o and 10 others vs. the Attorney General of the Republic of Kenya**[6] where it was held:

"Article 30 on the other hand, confers on a litigant resident in any Partner State the right of access to the Court for determination of the issues set out therein. We therefore [sic], do not agree with the notion that before bringing a reference under Article 30, a litigant has to "exhaust the local remedy". In our view there is no local remedy to exhaust."

[5] Reference No.5 of 2013, p.13, para.27.
[6] Reference No.1 of 2006, p.21, para.5

24. In conclusion he maintains that the Applicant, being a natural person resident in a Partner State, was competent to file a Reference directly without exhausting local remedies; that the Court has jurisdiction to entertain the present Reference, and that the filed Reference does not render this Court an appellate court in place of the appellate court in the national system of courts.

25. We have carefully considered the rival arguments of the Parties. The facts, as stated by the parties, point to the jurisdiction of the Court in relation to a matter tried by a court of first instance in Bujumbura - the Administrative Court of Bujumbura - but referred to this Court without the Applicant first going through the Burundian appellate court - the Administrative Division of the Supreme Court of Burundi. Thus, the contention of the parties hinge on the notion of the exhaustion of local remedies. Hence its resolution requires the interpretation and application of Article 30(1) and (2) of the Treaty, as illustrated by pertinent judicial precedents.

26. For ease of reference, we reproduce Article 30(1)-(2) of the Treaty. It reads:

> **"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; and

2. The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be."

27. Further, we refer to the pertinent parts of the cases of **Prof. Peter Anyang Nyong'o and 10 others vs. the Attorney General of the Republic of Kenya** (supra); **Emmanuel Mwakisha, Mjawasi & 748 Others vs. The Attorney General of the Republic of Kenya** (supra); **The Attorney General of the Republic of Rwands vs. Plaxeda Rugumba** (supra); and **Mr. Godfrey Magezi vs. the Attorney General of the Republic of Uganda** (supra). The relevant sections of these precedents are quoted above, and need not be reproduced here.

28. Careful reading of the sources in paras. 25 and 26 above does not reveal, expressly or implicitly, any requirement to exhaust local remedies as a pre-condition for referring a matter to the Court. The import of Article 30 (1) and (2) is that a resident of a Partner State can bring the matter to the attention of the Court at any point in time within the period of two months upon learning of the "Act, regulation, directive, decision or action" perceived by that party as **"unlawful or is an infringement of the provisions of this Treaty"**. Indeed, the sub-Articles neither refer to any domestic court processes nor mention the

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"exhaustion of local remedies" expressly or by necessary implication. Similarly, the jurisprudence of the Court negates the "exhaustion of local remedies".

29. From the foregoing analysis, there is no requirement to exhaust local remedies before bringing a matter to the Court. The Applicant, a resident of a Partner State, contests the action of the Respondent State on ground of breach of the domestic law and of the Treaty, and does so both within the two-month limitation period prescribed by Article 30(1) and without exhausting local remedies. Therefore, the Court has jurisdiction over the subject-matter of the Reference. It is so held. Accordingly, we resolve this issue in favour of the Applicant - the Court has jurisdiction to determine the matter.

ISSUE NO.2: **Whether The Applicant's Claim Is Time-Barred Under Article 30 (2) Of The Treaty Or Whether This Reference Is Time-Barred.**

30. The learned counsel for the Respondent contends that the subject-matter of the Reference is time-barred on the ground that Article 30(2) of the Treaty does not provide for any exception to the prescribed time limit. It is argued for the Respondent that a decision of *Otebe*, brought to the knowledge of the Applicant on the 5th of June 2013, cannot be referred to this Court for determination at the time the Reference was filed. For that reason, it is time-barred - it does exceed the two-month limitation period prescribed by Article 30(2). In his submission, Mr Vyizigiro neither cites any other provision of the

Treaty nor a precedent from the jurisprudence of this Court or any other court.

31. On the other hand, the learned counsel for the Applicant contends that no limitation of time applies to the decisions against which the Respondent complains because such decisions are null and void. It is his submission that the penalty in question was imposed in violation of the mandatory provision of Article 109 of the **Code of Public Procurements** under which a formal demand must be made before any penalty can be imposed. Omission to do so renders the entire decision a nullity, including such further decision as lodging an action before the Administrative Tribunal of Bujumbura, whose decisions are equally rendered a nullity. It is his further submission that anything added to a nullity is a nullity and outside any limitation period. The null and void decision can be challenged at anytime.

32. In support of his contention, Mr Chadha cited decisions from various jurisdictions. First, he refers to the case of **Mugisha Florence vs. Babirye Florence and Others**[7], where it was stated:

> **"It is thus a settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and *non est* in the eye of the law. Such a judgement, decree or order by the final court has to be treated as nullity by every court, superior**

[7] (Civil Suit No.22 of 2014) [2015] UGHCD 19 (July 2015).

or inferior. It can be challenged in any court any time, in appeal, revision, writ or even in collateral proceedings."

33. Second, he cites the case of **Dishon John Mtaita vs. The Director of Public Prosecutions**[8], where the Court held:

> **"In yet another case, Abbas Sherally & Another Vs Abdul S.H.M. Fazalboy Civil Application No. 33 of 2002** (unreported) **this Court did not hesitate to hold that:**
>
> > **"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."**

34. Third, he draws the attention of the Court to decision in: **Kohima District, Nagaland vs. 1. The State of Nagaland, represented by the Chief Secretary of the Government of Nagaland; 2. The Commissioner & Secretary, Department of Transport & Communication, Kohima, Nagaland; 3. The General Manager, Nagaland State Transport, Dimapur,**

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[8] Criminal Appeal No. 132 of 2004, Court of Appeal of Tanzania.

Nagaland; 4. The Deputy Commissioner, Kohima, Kohima[9].

In that case the court held:

Balvant N. Viswamitra & Others vs. Yadav Sadashiv Mule (Dead) Through Lrs. & Others reported in (2004) 8 SCC 706 this court stated thus:

> **"The main question which arises for our consideration is whether the decree passed by the trial court can be said to be "null" and "void". In our opinion, the law on the point is well settled. The distinction between a decree which is void and a decree which is wrong, incorrect irregular or not in accordance with law cannot be overlooked or ignored. Where a court lacks jurisdiction in passing a decree or making an order, a decree or order passed by such court would be without jurisdiction, *non est* and void *ab initio*. A defect of jurisdiction of the court goes to the root of the matter and strikes at the very authority of the court to pass a decree or make and order. Such defect had always been treated as basic and fundamental and a decree or order passed by a court or an authority having no jurisdiction is a nullity. Validity of such decree or order cab be challenged at any stage, even in execution or collateral proceedings."**

[9] In the Gauhati High Court (The High Court of Assam, Nagaland, Mizoram & Arunachal Pradesh) Kohima Bench, w.p.(c) No. 30(K) of 2016, Shri. Lhousakhotuo Vimero, s/o Lhounei-o, R/o Pfuchama Village

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35. Fourth, the learned counsel for the Applicant invites us to have regard to the case of **Cofer vs. Cofer**[10] where:

> **"The order, entered without notice, was *"void" and that a "void" decree or order is a nullity and may on proper application be vacate at any time."***

36. Fifth, he invokes the case of **Guevarra vs. Sandiganbayan**[11]. On the nature of null and void judgement it was held:

> **"... However, if the Sandiganbayan acts in excess or lack of jurisdiction, or with grave abuse of discretion amounting to excess or lack of jurisdiction in dismissing a criminal case, the dismissal is null and void. A tribunal acts without jurisdiction if it does not have the legal power to determine the case; there is excess of jurisdiction where a tribunal, being clothed with the power to determine the case, oversteps its authority as determined by law. A void judgment or order has no legal and binding effect, force or efficacy for any purpose. In contemplation of law, it is non-existent. Such judgment or order may be resisted in any action or proceeding whenever it is involved...[65]**
>
> **To give flesh to these doctrines, the Rules of Court, particularly the 1997 Revised Rules on Civil Procedure, provides for a remedy that may be used to assail a void judgment on the ground of lock of jurisdiction. Rule 47 o the Rules of Court states that an action for the**

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10 205 Va. 834, 837, 140 S.E. 2d 663, 665 (1965)

11 The Supreme Court of Manila - the Republic of the Phlippines

annulment of judgement may be filed before the CA to annul a void judgment of regional trial courts even after it has become final and executory. If the ground invoked is lack of jurisdiction, which we have explained as pertaining to both lack of jurisdiction over the subject matter and over the person, the action for the annulment of the judgement may be filed at any time for as long as estoppel has not yet set in. In cases where a tribunal's action is tainted with grave abuse of discretion, Rule 65 of the Rules of Court provides the remedy of a special civil action for *certiorari* to nullify the act..."

37. Sixth, Mr Chadha makes reference to the Supreme Court of Illnoise (USA) thus:

"The Supreme Court of Illinois in re N.G., a Minor (The People of the State of Illinois *et all.* held:

"Illinois law permits void judgments to be "impeached at any time in any proceeding whenever a right is asserted by reason of that judgment, and it is immaterial whether or not the time for review by appeal has expired...."

38. Seventh, the learned Counsel further relies on the precedent of **Macfoy vs. United African Co. Ltd.**[12], where Lord Denning said:

"... If and act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an

[12] (1961) 3 W.L.R. 1405 at p. 1409, P.C.

order of the court to set it aside. If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

39. Eighth, and finally, Mr. Chadha cites the case of **Craig vs. Kanseen**[13], where the court held:

> **"A person who is affected by an order of the Court which can properly be described as a nullity, is entitled *ex debito justitiae* to have it set aside There is an inherent jurisdiction to set aside a determination made where there has been a failure to observe the principle that a person against whom a charge or claim is made must be given a reasonable opportunity of appearing and presenting his or her case."**

40. In conclusion, the learned counsel for the Applicant maintains that on the basis of the above-cited authorities and submissions, the Reference is not time-barred, that a null and void decision can be challenged at any time, and that the Reference is based upon continuous cause of action, which renders it not time-barred by 60-day's limitation period.

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[13] 1943 Volume 1 All ER 108

41. We have carefully considered the submissions of both parties on this issue. In the jurisprudence of this Court, Article 30(2) is illustrated by a plethora of judicial precedents, including the case of **Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit**[14], where it is stated:

> **"It is clear that the Treaty limits References over such matters like these to two months after the action or decision was first taken or made, or when the Claimant first became aware of it. In our view, the Treaty does not grant this Court any express or implied jurisdiction to extend the time set in the Article above. Equally so, the Court below could not rule otherwise on the face of the explicit limitation in Article 9(4) to the effect that the Court must act within the limits of its powers under the Treaty.**
>
> **To borrow from European Community jurisprudence, it is also a well established principle of law that the European Court of Justice can only act within the limits of the powers conferred upon it by the existing Treaties or any later conventions. Its jurisdiction must therefore be from specific provisions and does not extend beyond the defined area ... It follows, therefore, in our view, that this Court is limited by Article 30(2) to hear References only filed within two months from the date of action or decision complained of."**

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[14] Appeal No. 1. of 2011, pp.16-17

42. In our view, there is no enabling provision in the Treaty to disregard the time limit set by Article 30(2). Moreover, that Article does not recognize any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the Claimant; nor is there any power to extend that time limit. Again, no such intention can be ascertained from the ordinary and plain meaning of the said Article or any other provision of the Treaty. The reason for this short time limit is critical – it is to ensure legal certainty among the diverse membership of the Community.

43. It is thus clear that a matter cannot be brought before the Court after the lapse of the two-month period, the time of reckoning commencing from the time the complainant learns of the enactment, publication, directive, decision or action complained of. **Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit** (supra) being a decision of the Appellate Division of this Court, is blinding upon us and is the position of EAC law on this matter.

44. For clarity, we deem it proper to re-state the sequence of events presented in the following chronological order:

- **On 12/12/2011 the Applicant and OTB concluded a contract for the delivery of a quantity of fertilizer within 90 days;**
- **The contract included a penalty clause for late delivery**
- **On 18/6/2012, the Applicant, having defaulted, effected late delivery; and acknowledgement of the receipt of the consignment was given later, though a penalty for**

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late delivery was imposed pursuance to the pertinent clause in the contract;

- **On 5/6/2013 the imposed penalty was brought to the attention of the Applicant;**
- **On 10/6/2014 the Applicant petitioned the Administrative Court of Bujumbura, protesting the OTB's decision of imposing the penalty for late delivery. The Administrative Court dismissed the case on the basis of time bar by its judgement notified to the Applicant on 27/11/2017;**
- **On 24/1/2018 the Applicant lodged the present Reference in this Court challenging the imposed penalty."**

45. The interval is just over 4 years from the time of the notification of OTB's penalty to the date of filing this Reference in the EACJ.

46. The law is that a matter cannot be brought before this Court after the lapse of the two-month period, counting from the time the complainant learns of the enactment, publication, directive, decision or action complained of. A matter has been brought to the Court after the lapse of four years from the date the Applicant became aware of the decision of which he complains, as established in the preceding paragraph. Therefore, the subject-matter of this Reference is time-barred. It is so held. Accordingly, this issue is resolved in favour of the Respondent.

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47. In principle, a finding of "time-bar" disposes of the case, as a point of law. In **Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd**[15] LAW, JA. of the East African Court of Appeal offers a brief exposition of a point of law in the following terms:

> **"... a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ..."** (emphasis supplied).

48. This exposition has been adopted by this Court in **James Katabazi and 21 others vs. Secretary General of the East African Community & the Attorney General of The Republic of Uganda**[16]. It thus becomes part of the jurisprudence of the Court.

49. Hence, our finding of time limitation on this issue renders unnecessary the determination of issues No.3 and 4. For the purposes of Issue No.3, both parties echoed their arguments under Issue No.2. Learned Counsel for the Respondent expressly declined making further submissions on issue No.3 on account of the matter being time-barred. Moreover, once a finding of time-bar has been arrived at, in relation to Issue No.4, the question of entitlement to the prayers sought under

[15] [1969] E. A. 696 at p. 700.
[16] Reference No. 1 of 2007, P.8.

that Issue does not arise. This finding of time-bar terminates those issues. It is so held.

50. On the question of costs, Rule 127 of this Court's Rules posits that costs should follow the event unless the Court, for good reason, decides otherwise. In **Schuller vs. Roback (2012) BCSC (British Columbia Supreme Court) 8**, citing with approval **Gold vs. Gold (1993) BCCA 82**, the following factors informed judicial discretion in departing from the general rule:

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

51. In the instant Reference, the Applicant has failed to prove his case on the ground of time limitation. Therefore, we see no good reason to depart from the principle that costs follow the event, and we make our order accordingly.

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CONCLUSION

52. In the final result, we hereby dismiss this Reference with costs to the Respondent. It is so ordered.

Dated, signed and delivered this 8th day of October, 2021.

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

Hon. Justice Dr. Charles O. Nyawello
JUDGE

Hon. Justice Charles A. Nyachae
JUDGE

****Hon. Lady Justice Monica K. Mugenyi signed this Judgement under Article25 (3) for the Establishment of the East African Community having since retired from the Court.***