



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



FIRST INSTANCE DIVISION

(Coram: Yohane B. Masara, PJ; Charles O. Nyawello; Charles A. Nyachae; Richard Muhumuza & Richard W. Wejuli, J)

REFERENCE NO. 2 OF 2019

KALALI STEVEN..... APPLICANT

VERSUS

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

23RD JUNE, 2022

JUDGEMENT OF THE COURT

A. INTRODUCTION

1. This Reference was brought under Articles 5(2), 6(b), (c) & (d), 7(1)(c), (2), 8(1)(c), 74, 76, 104(1), (2) & (3)(c), 30 and 124(1) of the Treaty for the Establishment of the East African Community (“the Treaty”) as Amended; Rule 24 of the East African Court of Justice Rules of Procedure 2013 (“the Rules”) and all enabling laws.
2. The Applicant is a male adult Ugandan national residing in the Republic of Uganda. The Applicant’s address for purpose of this Reference is: Sebanja & Co. Advocates Plot No.47, Kampala Road, Mabirizi Complex, Level 6, P.O. Box 11754, **KAMPALA** and Odokel Opolot & Co. Advocates, Ambassador House Level 2, P.O. Box 9148, **KAMPALA**.
3. The Respondent is the Attorney General of the Republic of Rwanda, a Partner State in the East African Community and is sued as the Legal advisor to the Government of Rwanda. The Respondent’s address for purpose of this Reference is Ministry of Justice Chambers, P.O. Box 160, **Kigali, RWANDA**.

B. REPRESENTATION

4. At the hearing of this Reference, the Applicant was represented by Advocates Richard Wanada, Muwanga, Isaac Ernest, Mujuni Jannaro and Ssekidde Hamza. The Respondent was represented by Mr Emile Ntwali, Principal State Counsel, Mr Nicolas Ntarugera and Ms Kabibi Specioza, both Senior State Counsel.

C. THE APPLICANT'S CASE

5. In the Reference, the Applicant alleges that on or about 28th February 2019, the Respondent State closed its border points with the Republic of Uganda and restricted Ugandan traders and their goods from entering Rwanda, and further restricted Rwandan citizens from entering or travelling to Uganda. That these actions are in contravention of the Treaty, in particular Articles 5(2), 6(b),(c) & (d), 7(1)(c) & (2), 8(1)(c), 74, 76, and 124, as well as Articles 3, 5, 6, 7(7), 24 and 29 of the Common Market Protocol.

6. The Applicant sought the following Orders (reproduced verbatim):

- a) **A declaration that the acts of the Respondent through commission, omission or active direct or indirect participation of the President of the Republic of Rwanda or the agencies of the Republic of Rwanda in relation to the events relating to blocking border access to Rwanda are contrary to Articles 5(2), 6(b)(c)(d), 7(1)(c)(2), 8(1)(c), 74, 76 of the Treaty;**
- b) **A declaration that the acts of the Respondent through its agencies or stakeholder or officials, the president or ministers among others inclusive amount to an abdication of their (the Republic of Rwanda as a partner state) responsibility under the Treaty;**
- c) **A declaration that the acts of the Republic of Rwanda officials in denying or restricting free movement of Rwanda Nationals who are citizens of the East African Community against their wish contravenes and is**

contrary to Articles 6(b)(c), 123(1)(3)(a)(c)(e), 124 (2) and 7(2)(d);

- d) A declaration that the acts of the Republic of Rwanda or its officials undermine peaceful co-existence and good neighbourliness and as such are contrary to Articles 6(b)(c) and 123 of the Treaty;
- e) A declaration that all the aforementioned acts of the Respondent since 28th February 2019 to date are in breach and contrary to Articles 7(1)(c) and 8(1) of the Treaty;
- f) A permanent injunction doth issue against the Respondent or an order doth issue enforcing the compliance with adherence to the provisions of the Treaty and directing the Government of Rwanda to immediately adhere and comply with the Treaty by taking measures to immediately stop the impugned acts stated herein this Reference;
- g) A declaration that the acts of the government of Rwanda through its officials in denying goods enroute to Rwanda and Rwanda Nationals from accessing Uganda is/are contrary to Articles 104(1)(2)(3)(a)(c) and 124(1) of the Treaty;
- h) A permanent injunction restraining the Respondent from continuing to do acts that are detrimental or contravene the East African Community Treaty;
- i) A declaration that the conduct of the Republic of Rwanda officials in denying Uganda truck drivers access to the Republic of Rwanda with the products on board which

included perishables but allowing/clearing those enroute to Congo was discriminatory/threatens security and good neighbourliness/is against International Human Rights and Common Market standards and is inconsistent with and in contravention of Articles 76(1), 104(1), (2), (3)(a) and 104(3)(c) of the Treaty;

- j) An order that costs incidental to this Reference be borne by the Respondent; and**
- k) That this Honourable Court be pleased to make such other orders that it may deem necessary in the circumstances.**

D. THE RESPONDENT'S CASE

7. The Respondent denied the allegations contained in the Reference, and averred that:

- a) In a bid to expedite the constructions of a one-stop border point at Gatuna border, the ongoing construction work necessitated the diverting of all heavy trucks destined to and/or transiting via the said Gatuna border post to using a different border post at Kagitumba/Mirama Hills, and at Cyanika. This was to facilitate the smooth flow of goods and services; and**
- b) The Respondent did not at any point restrict Rwandan citizens from travelling to Uganda, it merely advised them not to travel and if they did travel, to do so with caution as many Rwandan citizens had been mistreated and detained in Uganda for no justifiable reasons, after which many were allegedly dumped at**

the border between the two countries, without any charges being preferred against them.

8. The Respondent, thus, prayed urged the Court to dismiss the Reference with costs.

E. ISSUES FOR DETERMINATION

9. At the Scheduling Conference held on 11th November 2019, the following issues were framed for determination:

- a) Whether the Respondent's acts of closure of her border point(s) and blocking of access to the border point(s) contravenes Articles 5(2), 6(b)(c)(d), 7(1)(c), 8(1)(c) 74 and 76(1) of the Treaty for the Establishment of the East African Community;**
- b) Whether the acts of the Respondent in restricting freedom of movement of Rwandan citizens to Uganda against their wish is in breach of Articles 6(b)(c), 123(1)(3)(a)(c)(e), 124(2) and 7(2)(d) of the Treaty for the Establishment of the East African Community;**
- c) Whether the Respondent's act of disallowing Ugandan traders from entering its border point(s) with the goods contravenes Article 7(7) of the East African Common Market Protocol; and**
- d) What remedies are available to the Parties?**

F. COURT'S DETERMINATION

10. Prior to giving the Court's substantive determination of the Reference, we consider it appropriate to set out the interlocutory proceedings that preceded the hearing.

11. At the said Scheduling Conference, the Court made the following Order:

“The Applicant shall file his additional Affidavit and serve the same on the Respondent by or on 25th November, 2019 at 5.00 pm. The Respondent shall file any additional affidavits and serve the same on opposite Counsel by or on 9th December, 2019 at 5.00 pm. Any affidavits in rejoinder shall be filed by 23rd December, 2019 at 5.00 pm.

The Applicant shall file their written submissions and serve the same on opposite counsel by or on 23rd January, 2022 at 5.00 pm. Respondent shall file its written submissions and serve the same on opposite Counsel by or on 24th February, 2020 at 5.00 pm.

The date for submission highlights shall be communicated on notice.”

12. The Respondent did not file the additional Affidavits within the period stated in the said Order of the Court. It filed **Application No. 1 of 2020**, seeking extension of time for filing of the said affidavit and that the said affidavit filed late, be deemed to be properly on record.

13. The said Application was heard and dismissed by this Court.

14. The Respondent later filed Application No. 6 of 2020, again seeking that the Court extends time to enable the Applicant to file and serve the said Affidavit out of time.
15. The latter Application (No.6 of 2020), was dismissed by the Court as the matter was considered *res judicata*.
16. In the meantime, the parties had sequentially filed their written submissions.
17. When the matter came up for hearing (submissions highlights), the Respondent sought to orally apply to the Court to withdraw the Affidavit supporting the Response to the Reference. That Affidavit was sworn by Counsel Nicholas Ntarugera. This oral application was ostensibly based on the realization that the said affidavit, having been sworn by Mr. Ntarugera, who was the lawyer with the cachet of the case, was for that reason fatally defective.
18. This Oral Application was disallowed by the Court.
19. In the circumstances, at the point of the submission highlights, the Respondent, having conceded that the Affidavit supporting the Response could not be maintained, was left with a Response without any affidavit or other evidence to support it.
20. It is on this latter basis, that we now make our substantive determination.
21. Unlike in the case of an application, the Court Rules applicable at the time of filing the Response did not require that, as a matter of law or procedure, a Reference or a Response to a Reference, be supported by an Affidavit. In the case of an Application, the Court's Rules required that it be supported by an Affidavit. Where, therefore,

an Affidavit or all supporting Affidavits are struck out, the application cannot be sustained.

22. Thus, upon striking out an affidavit, the Court will need to examine whether the case can be sustained or not. If the case cannot be sustained in the absence of an affidavit, then the opponent's case will be deemed to be unopposed.

23. That, however, is not the end of the story. Where an Affidavit is struck out leaving no evidence, it is still incumbent upon the Court to consider the evidence of the opposing party, in the case of an Applicant probabilities, notwithstanding the absence of evidence on behalf of the Respondent.

24. In **Niyongabo Theodore and Others vs the Attorney General of the Republic of Burundi, Reference No. 4 of 2017**, this Court held that:

“Striking out 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.”

25. This reasoning was also adopted by the Court in **Attorney General of Burundi vs Secretary General of the East African Community, Reference No. 2 of 2018**.

26. In the absence of the evidence from the Respondent, we subject the Applicant's case to scrutiny. We turn therefore, to consider the Applicant's submissions on the issues agreed for determination.

ISSUE 1: Whether the Respondent’s acts of closure of her border point(s) and blocking of access to the border point(s) contravenes Articles 5(2), 6(b)(c)(d), 7(1)(c), 8(1)(c) 74 and 76(1) of the Treaty for the Establishment of the East African Community

27. The Applicant in submissions referred the Court to the Respondent State’s obligations under Articles 5(2), 6, 7(1)(c) and 7(7) of the Treaty. Further, the Applicant gave, now uncontroverted affidavit evidence of both the Applicant and Mr. Ngabonzinza Emmanuel that the Respondent blocked movement along the Katuna border.

28. Further, in his affidavit, the Applicant attached a Report made by the Uganda Ministry of East African Community Affairs illustrating that vehicles from Uganda had been denied entry into Rwanda at both the Katuna and the Cyanika border points. Again, in the circumstance, this evidence was uncontroverted.

29. In the submissions, the Respondent challenged the Affidavits of Ngabonziza Emmanuel and Buganizi Richard as well as that by the Applicant as being in violation of Rule 8(2) and 8(4).

30. We are, however, persuaded that this is a case where the technical mistake of Counsel should not be allowed to be visited upon the Applicant, to deny him substantive justice.

31. In the circumstances set out above, on Issue 1, we find, on the uncontroverted evidence on record in favour of the Applicant.

ISSUE 2: Whether the acts of the Respondent in restricting freedom of movement of Rwandan citizens to Uganda against their wish is in breach of Articles 6(b)(c), 123(1)(3)(a)(c)(e), 124(2) and 7(2)(d) of the Treaty for the Establishment of the East African Community

32. In support of the Application, in their Affidavits, Ngabonziza Emmanuel and Buganizi Richard placed on record uncontroverted evidence of specific Rwandan Nationals being denied to travel to Uganda.

33. We are persuaded by the Applicants submission that it is trite law that where facts are sworn in an affidavit, the burden to deny them is on the other party. Failure to do so, they are presumed to have been accepted.

34. We find therefore that, in the absence of rebuttal evidence, the Applicant proved his case on Issue 2.

ISSUE 3: Whether the Respondent's act of disallowing Ugandan traders from entering its border point(s) with the goods contravenes Article 7(7) of the East African Common Market Protocol

35. The Applicant placed before the Court, the affidavit evidence of Nakabuye Sophia and Ntabaya James, to prove that the Respondent contravened the Treaty and the Common Market Protocol as regards free movement within the Community. Here again, the Affidavit evidence was not controverted.

36. In the circumstance, we find in favour of the Applicant as regards Issue 3.

ISSUE 4: What remedies are available to the Parties

37. From the foregoing, the Applicant having adduced evidence to support the Reference, and having no evidence to rebut the same, we have found in favour of the Applicant in Issue 1, 2 and 3 as set out above.

38. We find, therefore, that the Applicant is entitled firstly to the declaratory orders set out below, as well as an order to the Respondent to ensure compliance with the provisions of the Treaty and the East African Common Market Protocol, also as set out below in this Judgment.

39. The outcome of this Reference arises primarily from the manner in which the Respondent chose to handle the matters that arose along the way, particularly pertaining to the question of evidence. This has been set out earlier in this Judgment.

40. In the results, the final determination is of a Reference where the Respondent offered no evidence to rebut or contradict that placed before the Court by the Applicant.

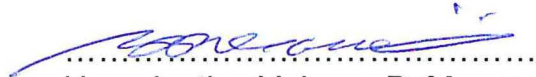
41. Ordinarily, we would be inclined to grant costs to the successful party; in this case the Applicant in accordance with Rule 127 of the Rules. However, taking into consideration the circumstances surrounding the dispute herein, granting costs to the Applicant may not serve the interest of justice.


G. CONCLUSION

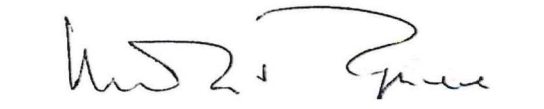
42. Accordingly, the Court hereby **DECLARES** and **ORDERS** as follows:

- a) that the Respondent's act of closure of her border point(s) and blocking of access to the border point(s) contravenes Articles 5(2), 6(b), (c) & (d), 7(1)(c), 8(1)(c), 74 and 76(1) of the Treaty for the Establishment of the East African Community;
- b) that the Respondent's act in restricting freedom of movement of Rwanda Citizens to Uganda against their wish is in breach of Articles 6(b) & (c), 7(2), 123(1), (3)(a), (c) & (e) and 124(2) of the Treaty for the Establishment of the East African Community;
- c) that the Respondent's act of disallowing Ugandan traders from entering its border point(s) with goods contravenes Articles 6(b) & (c) and 7(1)(b) of the Treaty for the Establishment of the East African Community and Article 7(7) of the East African Common Market Protocol;
- d) that the Respondent ensures compliance with its obligations under the Treaty for the Establishment of the East African Community and the East African Common Market Protocol; and
- e) Each Party to bear its own costs.

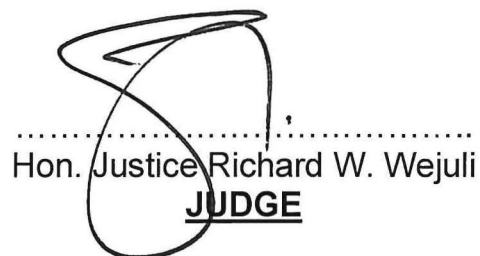
Dated, signed and delivered in Arusha this 23rd Day of June, 2022


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Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE


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Hon. Justice Dr Charles O. Nyawello
DEPUTY PRINCIPAL JUDGE


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Hon. Justice Charles A. Nyachae
JUDGE


.....
Hon. Justice Richard Muhumuza
JUDGE


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Hon. Justice Richard W. Wejuli
JUDGE