IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA APPELLATE DIVISION

Coram: Nestor Kayobera, P; Sauda Mjasiri, VP; Anita Mugeni; Kathurima M'Inoti and Geoffrey Kiryabwire JJ.A)

APPEAL No. 10 OF 2020

BETWEEN

ATTORNEY GENERAL OF

RWANDA..APPELLANT

AND

UNION TRADE CENTRE LTD

(UTC)..RESPONDENT

AND

1. **SUCCESSION MAKUZA DESIRE**
2. **SUCCESION NKURUNZIZA GERARD**
3. **NGOFERO THARCISSE......................................INTERVENERS**

[Appeal from the Judgment of the first instance Division at Arusha - Monica K. Mugenyi PJ, Charles Nyachae and Charles O. Nyawello, JJ- dated the 26th day of November, 2020 in Reference No. 10 of 2013]

JUDGMENT OF THE COURT

INTRODUCTION.

1. This Appeal and Cross Appeal arises from the Decision of the First Instance Division of this Court (hereinafter referred to as the "Trial Court") in Reference No. 13 of 2013 dated 26th November 2020. The Appellant (who was the Respondent at the Trial Court) is the Attorney General of the Republic of Rwanda (hereinafter referred to as the "Appellant"). The Respondent/Cross Appellant (which was the Claimant at the Trial Court) is a company incorporated on 20th May, 1997 under the Laws of the Republic of Rwanda (hereinafter referred to as the "Respondent"). Together with these parties are three Interveners who are described as minority shareholders in the Respondent company who intervened in favour of the Appellant here and at the Trial Court.

2. At the Trial Court, Judgment was rendered in favour of the Respondent whereby the Appellant's actions in taking over the Respondent's Mall and subsequently selling it off were declared illegal and in contravention of Articles 5 (3) (g), 6 (d), 7 (1) (a) and (2) and 8 (1) (a) and (c) of the Treaty for the Establishment of the East African Community (hereinafter referred to as the "Treaty').

3. At the Appeal, the Appellant was represented by Mr. Emile Ntwali and Mr. Nicholas Ntarugera Senior State Attorney Ministry of Justice of the Republic of Rwanda. The Respondent was represented by Mr Francis Gimara SC (Senior Counsel) of ALP Advocates of Kampala, Uganda and Mr. Hannington Amol of ALP Advocates of Nairobi, Kenya. The

Interveners were represented by Ms. Molly Rwigamba of RR Associates Kigali, Rwanda.

BACKGROUND.

4. The facts of this dispute as is the history of the case in this Court, is quite long and convoluted. Briefly, the facts start with the filing of the Reference at the Trial Court in Reference No 10 of 2013 which then came on appeal to this Court in Appeal No 01 of 2015. This Court on appeal then Ordered that the original Reference at the Trial Court be tried *de novo,* which was done and the decision thereof dated 26th November, 2020 is now the subject of this present Appeal.
5. The facts of this dispute as can be gleaned from the Judgment of the Trial Court and pleadings on record can be summarised as hereinafter.
6. The Respondent was incorporated as a limited liability company under the Laws of the Republic of Rwanda in May 1997. By its Certificate of Domestic Company Registration, the Respondent was incorporated generally to engage in real estate but specifically to run a commercial Mall known as Union Trade Centre (hereinafter referred to as "the UTC Mall") in Kigali Rwanda. Its shareholders comprised Mr. Tribet Rujugiro (with 1933 shares); Mr. Theoneste Mutambuka (with 41 shares); Succession Makuza Desire (with 3 Shares) and Succession Nkurunziza Gerard (with 20 shares).
7. The business of the Respondent progressed well until on or about the 1st August, 2013 when the Office of the Committee (elsewhere in the records sometimes referred to as the "Commission") in Charge of Unclaimed Property in Nyarugengye (hereinafter referred to as "the

Committee in Charge of Unclaimed Property") established under Law No. 28/2004 ordered the Respondent to submit to it a list of documentation as to its operations and in particular the UTC Mall; which was done.

8. It would appear that thereafter, a series of meetings (the main one being the 27th September, 2013) ensued between the Respondent and the Committee in Charge of Unclaimed Property with the aim of understanding the reason for the intervention of the Committee in Charge of Unclaimed Property into the affairs of the Respondent company.
9. On or about the 2nd October, 2013 the Committee in Charge of Unclaimed Property notified the tenants of the UTC Mall that the said Mall had been placed under its control and that further rentals should be paid by them into a designated account at M/s Fina Bank in the names of the said Committee effective 1st October, 2013. The Tenants at the UTC Mall complied with this directive.
10. Meanwhile the Respondent instructed its lawyers who by a letter dated 2nd October 2013 demanded that the above directive be rescinded but this came to nothing as the letter was not replied to.
11. While this alleged take over was progressing, the situation surrounding the Mall escalated when the Rwanda Revenue Authority (hereinafter referred to as "the RRA") seized it on an assessment of unpaid taxes of USD 1,100,000 and eventually had the UTC Mall auctioned and sold off to a third party M/s Kigali Investment Company at RwF 6,877,150,000 (Approx. USD 1,100,000).

12. It is the case for the Respondent that by reason of the actions of these institutions, The Government of Rwanda incurred state responsibility at regional and international law in violating its own laws and in addition contravening Articles 5 (3) (g); 6 (d) 7 (1) (a) and (2); 8 (1) (a) (b) and (c) of the Treaty.

13. On the other hand for the Appellant, it is contended that it did not violate any of its laws or provisions of the Treaty as alleged and that the dispute filed in this Court is misconceived and devoid of merit. It is further the position of the Appellant that this Court lacks jurisdiction to adjudicate the matter.

14. It is noteworthy, before we trace the proceedings of this dispute in Court, to point out that while the matter was still in the Courts, the Interveners herein applied for the liquidation of the Respondent company in the domestic Courts of Rwanda and that a Court Order of liquidation was secured. It is therefore the contention of the Interveners that only the liquidator has power to sue on behalf of the Respondent and not the shareholders.

The first Reference.

15. For ease of recollection, we shall briefly restate how this dispute first came to this Court as summarised from the Decisions of this Court; the facts of which we take judicial notice. The Appellant initially on the 22nd November 2013 filed Reference No. 10 of 2013 at the Trial Court. The Respondent (then as Applicant) alleged that on 2nd October, 2013 the Committee in Charge of Unclaimed Property informed tenants in the UTC Mall that effective 1st October, 2013 they were required to redirect their rental payments to the said Committee. The Respondent

contended that the actions of the Committee in Charge of Unclaimed Property in so doing, contravened Articles 5(3), 6(d), 7(1)(a) and (2), and 8(1) of the Treaty.

16. The Appellant at the Trial Court raised two preliminary points of law; first, on the jurisdiction of this Court to entertain a Reference premised on actions of an entity that was neither a Partner State nor institution of the EAC and secondly, on the limitation of time within which a Reference may be brought before this Court.

17. The Trial Court in its Decision dated 27th November, 2014 noted that the issues raised in the Reference were of great importance to the East African Community and Partner States, and that the Court had not previously adjudicated this type of case. The Court found that it had jurisdiction and that State responsibility for the alleged misconduct of the Committee in Charge of Unclaimed Property has been established.

18. On jurisdiction regarding time limitation the Trial Court found that the Reference was not time barred and that the Respondent/ Applicant had got to know of the Committee in Charge of Unclaimed Property assumption of the UTC Mall's management on 2nd October 2013 by reason of a letter to that effect and since the Reference was filed on 22nd November 2013, the Reference was filed within the 2-month time limitation prescribed by Article 30(2) of the Treaty.

19. As to the cause of action, the Trial Court found the present Respondent had not proved that the Appellant had contravened Rwanda's internal laws and furthermore the Trial Court did not have jurisdiction to determine that issue. It therefore followed that there was no evidence that the impugned actions violated the principles as

enshrined in Articles 6(d) and 7(2) of the Treaty. Secondly, although Law No. 28 of 2004 under which the acts complained of were undertaken may be deemed to be a "measure" for purposes of Article 8(1)(c) and would therefore be open to scrutiny by this Court, that law was not in issue in the present Reference. Both parties then appealed this Decision of the Trial Court to this Court by way of Appeal and Cross Appeal in Appeal No. 1 of 2015.

20. This Court in Civil Appeal No 1 of 2015 in its Decision of 20th November 2015 found that the pleadings and the hearing of the appealed Reference was wrought with procedural irregularities because there was no evidence that had been adduced on record and this had occasioned miscarriage of justice. This Court then remitted the reference back to the Trial Court for hearing *de novo* with directions that the parties be afforded an opportunity to present evidence to support their respective cases.

<u>Trial of the Reference *De Novo*.</u>

21. On remitting the Reference to the Trial Court for a hearing *de novo,* The Respondent (as Applicant) filed an amended Reference. When the said Reference came up for hearing on the 6th September, 2016, the Respondent sought leave and was allowed to amend its Reference. Consequently, on 4th November 2016, an Amended Reference (hereinafter referred to as the "first Amended Reference") was filed at the Trial Court.

On the 15th November, 2017 when the first Amended Reference came up for scheduling, it transpired that the UTC Mall (the subject matter of the Reference) had recently been auctioned off by the RRA on account of its

alleged failure to pay taxes due to the Government of the Republic Rwanda. The Respondent, then sought leave of the Court to amend the first Amended Reference to introduce the fact of auction of the UTC Mall. Counsel for the Appellant on his part conceded on record that it was the Respondent's right to amend Pleadings and that he could neither object to nor support the application and it was within the powers of the Court to decide the matter. The Trial Court ultimately granted the Respondent leave to amend the first Amended Reference and the second Amended Reference was then filed in Court on 13th December, 2017.

22. In addition, it is important to point out at this stage that by reason of a Ruling in Application No. 4 of 2017 the Interveners to this Reference were admitted to the case and directed to file a Statement of Intervention in the matter.

23. On the 8th January 2018, the Appellant filed Application No. 1 of 2018 seeking to strike out or expunge the second Amended Reference on the grounds that the same was an abuse of the process of the Court in that: -

(i) it had introduced a new cause of action contrary to the principles governing amendments of pleading,

(ii) it prejudiced the Appellant as there was a matter pending for determination in the original Reference on both a Preliminary Objection to the effect that the same was time barred and the issue of the *locus standi* of the Respondent which had been raised by the Interveners; and

(iii) The amendments contravened this Court's Order of 15th

November 2015 to the effect that the Reference be tried *de novo.*

24. The Trial Court in an elaborate Ruling delivered on 29th March, 2018 found that the Appellate Court's Order for a *de novo* hearing did not preclude amendments to the pleadings already on record. Furthermore, the Appellant's Preliminary Objection and issue of *locus standi* of the Respondent were not prejudiced by the amendment as they did not raise a new cause of action. The Trial Court found that the second Amended Reference would neither prejudice nor delay the fair trial of Reference No. 10 of 2013; but rather the amendment clarified on the real issues in controversy between the Parties. In the final result, the Trial Court disallowed the Application to strike out the second Amended Reference with no Order as to Costs.

25. On further Appeal to this Court on the above Decision of the Trial Court, the parties raised the following issues at scheduling: -

i. Whether Trial Court erred in law by disallowing the Application to strike out the second Amended Reference; and

ii. What reliefs are the parties entitled to.

26. On the 29th May, 2019 this Court rendered a Ruling and found the Appellant had failed to establish any error of law or procedure on the part of the Trial Court in allowing the Second Amended Reference. This Court then decided and Ordered that the Appeal be dismissed with costs to the Respondent. With the Application disposed of, the Trial Court was now free to proceed with the second Reference.

Trial and hearing of the Second Reference.

Issues for determination.

27. In preparation for the trial the parties agreed on the following issues: -

    i. Whether the Reference is time-barred and should be struck off the record.
    ii. Whether the Applicant has *locus standi.*
    iii. Whether the Respondent was properly sued before this Honourable Court.
    iv. Whether the Respondent's actions of taking over the Applicant's UTC Mall and consequently auctioning it are inconsistent with and/or in contravention of Articles 5 (3) (g), 6 (d), 7 (1) (a) and 8 (1) (a) and (c) of the Treaty.
    v. What are the remedies available to the parties?

Case for and Decision on the Statement by the Interveners.

28. Before we recall the decision of the Trial Court on the issues, it is important that we address the case for and decision of the Court on the Statement of the Interveners in this matter. The interveners filed submissions dated 31st August, 2020 in which they raised issues of whether the Reference was time-barred, the Applicant's locus standi and whether the Respondent has been rightly sued.

29. The Trial Court found that Article 40 of the Treaty restricts an intervener's role in a Reference to matters of fact (or evidence) and not those of law. The Trial Court however found that the Intervener's submissions sought to address both questions of law and fact. The Trial Court therefore decided that it would not take into account the Intervener's submissions as to the law of the dispute.

30. The Trial Court further found that the Interveners had filed affidavits alongside their written submissions. This the Trial Court found offended the rules of natural justice because the said affidavits were filed at the time of the closing submissions when the opposite parties would not have an opportunity to respond to them. The Court then expunged the offending affidavits from the record and held that it would only consider what remained of the Intervener's submissions as appropriate.

31. The Trial Court in respect of issue number 1 resolved the issue in the negative and found that the second amended Reference was filed within the two-month period prescribed by Article 30 (2) of the Treaty. In respect of issue number 2 the Court found in the affirmative that the Applicant had *locus standi*. In respect of issue number 3 the Court found in the affirmative that the Reference was properly instituted against the Respondent. In respect to issue number 4 the Court found in the affirmative that the Respondent's actions of taking over the UTC Mall and subsequently auctioning it off to be inconsistent with Articles 5 (3) (g), 6 (d), 7 (1) (a) and (2) and 8 (1) (a) and (c) of the Treaty. However, the Court found that there was no violation of Article 8 (b) of the Treaty.

In the final result the Trial Court found and determined the Reference in the following terms: -

"

i. ***A Declaration is hereby issued that the Respondent's actions of taking over the UTC mall and subsequently selling it off are illegal and contravene Articles 5(3)(g), 6(d), 7(1)(a) and (2), and 8(1)(a) and (c) of the Treaty.***

ii. ***The Respondent is directed to furnish the Applicant with accountability for the rental and sale proceeds realized from the UTC mall between 1 October 2013 to 27th September 2017.***

iii. ***Compensation in general damages is awarded in the sum of USD 500,000 (Five Hundred Thousand).***

iv. ***Simple interest at 6% per annum is awarded against the compensation designated above from the date of this judgment until payment in full.***

v. ***Costs are awarded to the Applicant..."***

Being dissatisfied with the decision of the Trial Court, the Appellant herein lodged in this Court, and served upon the Respondents, a Notice of Appeal dated 30th November, 2020.

The Appeal to the Appellate Division.

Memorandum of Appeal

32. The Appellant filed an appeal with the following Grounds in its Memorandum of Appeal: -

1. That the learned Justices of the First Instance Division erred in

law wittingly in dispensing a judgment against the Appellant by allowing Reference No 10 of 2013 and all the orders sought by the Respondent thereto with costs,

2. That the Hon. Justices of the First Instance Division erred in law by issuing a judgment that was biased against the Appellant.

3. That the Hon. Justices of the First Instance Division erred in law by issuing a declaration against the Appellant deliberately declaring that the Reference was filed on time without considering the real date of 21st July2010 when the cause of action arose, thus mixing up the cause of action to be the letter dated 2nd October, 2013 yet it was implementing decisions taken on 29th September, 2013.

4. That the learned Justices of the First Instance Division erred in law by declaring that the Appellant's objection to UTC's *locus standi* is inadmissible with reference to Article 30(1) of the Treaty ignoring the fact that there is no board or shareholders' resolution allowing UTC to file a case at EACJ. In this respect the Court also ignored the fact that only one shareholder took the initiative to file the Reference on behalf of UTC without the informed approval and consent
of the other shareholders. The lawyers who purportedly indicated that they represented UTC only represented an individual shareholder who unilaterally instructed the lawyers.

UTC was not a litigant in the Reference.

5. That the Hon. Justices of the First Instance Division erred in law by declaring that UTC was properly represented before it by an advocate who was not duly appointed by UTC.

6. That the Hon. Justices of the First Instance Division erred in law by rejecting the Interveners' Statement of Intervention and their evidence yet it was the same Court that admitted them on the record to be parties to the matter. The court denied them their role to support the Appellant's position in the case by refusing them an opportunity to file an Intervener's Statement and evidence.

7. That the Hon. Justices of the First Instance Division erred in law by issuing a Judgment against the Appellant deliberately that the takeover and managing the UTC Mall by the Commission in Charge of the Abandoned Property and the auctioning of the same Mall by the Rwanda Revenue Authority was illegal and contravenes the EAC Treaty Articles 5(3) 6(d),7(1) and (2) and 8(1)(a) and (c), a decision that contravened Rwanda's internal laws yet this Honourable Court has no jurisdiction to determine on such issues concerning the applicability of national laws. Yet the said actions complied with domestic laws as well as with the cited Treaty provisions.

8. That the Hon. Justices of the First Instance Division erred in law by accepting and considering the Respondent's (Applicant in Reference N° 10 of 2010) written submission's together with the authorities filed on 1st August 2020, which were filed in violation of Rule 11 (2) and (3) of the Rules of this Honourable Court 2019. The same faulty documents which are improperly on the record were relied on by the Honourable Justices to wrongly decide the case in favour of the Respondent.
9. That the Hon. Justices of the First Instance Division erred in law by stretching their discretionary powers multiple times thus violating Rules 11 (2) and (3) of the Rules of this Honourable Court.
10. That the Hon. Justices of the First Instance Division erred in law by issuing a declaration awarding damages with interest to the Respondent.

The Appellant further prayed that this Court grant the following remedies: -

1. For a declaration that UTC was neither a litigant nor legally represented before the EACJ;
2. For declaration that on the date of 22nd November 2010 the purported UTC that filed Reference No. 10 of 2013 lacked

locus standi to file the Reference, thus the Reference was not properly introduced before the Honourable Court;

3. For an Order that Reference No. 10 of 2013 was filed out of time;
4. For an Order that the actions of taking over the Mall and auctioning it was in accordance to Rwanda's laws and do not in any way contravene Articles 5(3) 6(d),7(1) and (2) and 8(1)(a) and (c) of the EAC Treaty;
5. For a declaration that the written submissions and the authorities thereto filed by the purported UTC were wrongly filed and admitted on the record thus they could not be relied on for any determination in the Reference by the Court;
6. For a declaration that the interveners were denied an opportunity to support the Appellant's position through their Statement of Intervention and evidence;
7. To reverse the decision of the First Instance Division entirely;
8. For a declaration that each party bears its costs; and
9. For a declaration that this Honourable Court is not vested with powers to interpret the applicability of national laws and thus does not fall under its jurisdiction.

The Cross-Appeal

33. The Respondent/Cross Appellant company also partly

dissatisfied with the Decision of the Trial Court filed a Cross Appeal wherein it prayed that the above-named decision ought to be varied or reversed on the grounds hereinafter, namely: -

1. THAT the trial Court erred in law when it omitted to make clear orders for the remittal of rental proceeds realised from the UTC Mall between 1st October 2013 to 27th September 2017 by the Appellant.
2. THAT the trial Court erred in law when it omitted to make an order for restitution of the UTC Mall on finding that it was illegally seized and sold by the Appellant.
3. THAT, in the alternative to ground No 2, the trial Court erred in law when it omitted to make an order for compensation for the value of the UTC Mall on finding that it was illegally seized and sold by the Appellant.

The Respondent/Cross Appellant further prayed for Orders that: -

1. An Order that the Appellant remit to the Respondent the rental proceeds realised from the UTC Mall between 1st October 2013 to 27th September 2017.
2. An Order for the restitution of the UTC Mall against the Appellant and, in the alternative, an Order for compensation for the value of the UTC Mall against the Appellant.
3. Costs of the Cross-appeal.

The Scheduling Conference for the Appeal and Cross Appeal.

34. The Appeal and Cross Appeal came up for scheduling on the 27th May 2021. At the Scheduling Conference, the Appellants sought leave of the Court to amend the Grounds of Appeal by merging some grounds while rephrasing others which leave was granted. The adjusted Grounds are: -

(1) The Hon. Justices of the First Instance Division erred in law when they acted with bias by allowing the filing of several References that differed in substance with the original Reference in No. 10 of 2013 contrary to the Ruling of the Appellate Division and the Rules of Procedure of the Court thereby arriving at a wrong decision.

(2) The Hon. Justices of the First Instance Division erred in law when they stretched their discretionary powers by allowing the Respondent to combine two causes of action arising at different times into one cause of action contrary to the Court Rules thereby exceeding the powers granted by the provisions of the Treaty and the Rules of the Court.

(3) The Hon. Justices of the First Instance Division erred in law by holding that Reference No.10 of 2013 was properly before the Court yet there was no lawful authority allowing the Respondent to file the Reference before the East African Court of Justice.

(4) The Hon. Justices of the First Instance Division erred in law by

rejecting the Interveners' Statement of Intervention and the accompanying affidavit evidence yet it was the same Court that admitted them on record as Interveners in the matter.

(5) *The Hon. Justices of the First Instance Division erred in law when, without the requisite jurisdiction, they entertained Reference No. 10 of 2013 which related to matters reserved for domestic Rwandan institutions thereby arriving at a wrong decision.*

35. The parties also agreed to the following grounds of the Cross-Appeal bringing the total of the grounds in issue to eight: -

(6) That the Trial Court erred in law when it omitted to make clear orders for the remittal of rental proceeds realised from the UTC Mall between 1st October 2013 to 2nd September 2017 by the Appellant,

(7) That the Trial Court erred in law when it omitted to make an order for the restitution of the UTC Mall on finding that it was illegally seized and sold by the Appellant,

(8) That in the alternative to ground No. 2, the Trial Court erred in law when it omitted to make an order for compensation for the value of the UTC Mall on finding that it was illegally seized and sold by the Appellant.

Having amended and adjusted the Grounds of Appeal, the Appellant further adjusted the prayers of the Appeal as follows: -

(a) For a Declaration that the First Instance Division had no jurisdiction to entertain Reference No. 10 of 2013;

(b) For a Declaration that Reference No. 10 of 2013 was improperly filed before the East African Court of Justice;

(c) For an order reversing the entire decision of the First Instance Division;

(d) For an order dismissing the Cross-Appeal.

(e) For an order that each parties party their own costs

(f) For any other order that the Court may deem fit in the circumstances.

The Respondent/Cross Appellants retained their prayers as filed in this Court. The Parties then also agreed to the following issues for trial: -

1. *Whether the appeal is filed in accordance with the Rules of this Court?*
2. *Whether the Trial Court erred in law by holding that the filing of the Reference was not time barred?*
3. *Whether the Trial Court erred in law in holding that Rujugiro Tribert who sued on behalf of the respondent had locus standi to institute the suit Reference?*
4. *Whether the Trial Court erred in holding that the Appellant's action of taking over the Respondent's UTC Mall and its*

subsequent auctioning was inconsistent with Articles 5(3)(g), 6(d) , 7(1) (a) and 8(1)(a), (b) & (c) of the Treaty for the Establishment of the East African Community?

5. *Whether the Trial Court erred in law when it omitted to make further orders beyond requiring the Appellant to furnish the Respondent with accounts for rental and sale proceeds realized from the UTC Mall between the 1st October 2013 and 27th September 2017 by the Appellant?*

6 *Whether the Trial Court erred in law when it omitted to make an order for restitution of the UTC Mall or in the alternative full compensation for the value of the UTC Mall on finding that it was illegally seized and sold by the Appellant?*

7. *What are the Remedies available to the parties?*

36. The Interveners were also allowed to file a Statement on Appeal as the decision of the Trial Court had a bearing on their participation.

37. However, before we proceed to resolve the issues as agreed by the parties and the Court at the Scheduling Conference, it is necessary to point out that when we reviewed the submissions, the Appellant wrote (at page 18 of the written submissions) that they had further amended Issue Number 3 to read: -

"Whether the Trial Court erred in holding that the Respondent had locus standi and that Tribert Rujugiro had lawful and or proper authorization to institute the suit?" **other than** *"Whether the trial Court erred in law in holding that Rujugiro Tribert who*

sued on behalf of the respondent had locus standi to institute the Reference"

Counsel argued that since the Trial Court had found that the: -

> *"...Appellant had mixed up Rujugiro's (sic) rights or power to initiate the proceedings with the principle of locus standi, it should be understood that the Appellant's intended argument at all times was that Tribert RUJUGIRO had no authority to initiate proceedings at the EACJ..."*

38. Counsel for the Appellant (at page 19 of the written submissions) further submitted that he had found it necessary to add another issue which in his opinion would better elucidate the allegation of bias by the Trial Court as stated in the agreed Issue No. 1. The new issue was crafted as follows: -

> *"Whether the Hon. Justices of the First Instance Division erred in law and procedure by allowing the filing of several amendments to the Reference that substantially changed the original Reference filed by the Respondent thus arriving at a biased wrong decision against the Appellant"*

39. We wish to make it categorically clear that under Rule 110 (1) (a) of the Rules of this Court, the primary purpose of holding a Scheduling Conference is to ascertain the points of agreement and disagreement in the Appeal. Furthermore, under Rule 110 (2) the parties should as far as is practicable jointly agree on the matters required at the Scheduling Conference and file them in Court. Where

under Rule 110 (3) of the Rules of this Court the parties cannot agree on these matters then each party may file and serve its own Memorandum of the Issues. However, Rule 110 (4) of the Rules of this Court then provides: -

"… After the Scheduling Conference, if the matter is to proceed to hearing, the Court shall fix the date for commencement of the hearing…"

So after the Scheduling Conference the matter then proceeds for hearing. In this matter however, after guidance to the parties by the Court at the Scheduling Conference, issues were framed and the Court had a date for hearing. Clearly the Appellant unilaterally continued to modify the issues framed at the Scheduling Conference without the express leave of the Court and or agreement of the Respondents. This was highly irregular and unacceptable.

40. Ordinarily this Court would have struck out all matters that were introduced into the hearing after the Scheduling Conference without the leave of Court. Indeed, counsel for the Respondent declined to address these new and additional matters. However, after careful consideration of the said adjusted and newly added issues by the Appellant, we are of the view that some of the said new matters are just arguments or sub-issues under the Issues already agreed to at the Scheduling Conference. That notwithstanding, as a result of these changes, the written submissions of the parties are not fully aligned and synchronized. We shall as a result have to align and synchronize the arguments in the written submissions of the parties

ourselves. For now, we simply caution against any variation to what has been agreed to at the Scheduling Conference and after the matter has been fixed for hearing.

Issue No. 1: Whether the Appeal is filed in accordance with the Rules of this Court?

The Appellant's submissions.

41. Counsel for the Appellant with regard to this issue argued very briefly and submitted that this Appeal is properly before the Appellate Division and in accordance with the Treaty and the Court's Rules of Procedure.

The Respondent's submissions.

42. Counsel for the Respondent opposed the Appeal. Counsel argued that the Appeal was not properly before the Court because it did not satisfy the mandatory conditions of Article 35A of the Treaty and Rule 86 of the Rules of this Court, which set conditions precedent which have to be met. He relied on the decision of this Court in **Simon Peter Ochieng & Anor V The Attorney General of Uganda,** Appeal No. 04 of 2015 for the proposition that the condition *sine qua non* under Article 35A and Rule 86 of the Rules of this Court requires that the Appellant first establish errors either on points of law, lack of jurisdiction, or procedural irregularity that the Trial Court committed. He further submitted that on the authority of **Simon Peter Ochieng** (supra) that the onus to prove

those conditions lay with the Appellant which they have failed to discharge.

43. Counsel for the Respondent further argued that the Appellant had failed to comply with Rule 99 (1) of the Rules of this Court, to effect service of the Memorandum of Appeal within seven (7) days after lodging the same. He submitted that the Appellant lodged their Memorandum of Appeal on the 30th December, 2020, and served the Respondent's lawyers on the 12th January, 2021 outside the seven (7) days period prescribed under Rule 99(1) of the Rules of this Court. He also submitted that the Appellant had not furnished any reasons for failing to comply with the mandatory requirements in Rule 99(1) of the Rules of this Court.

Counsel for the Respondent relying on our Decision in **Media Council of Tanzania & Ors. V The Attorney General of the United Republic of Tanzania,** Application No. 05 of 2019 argued that where a party has failed to take a step within the required time under the Rules of the Court, then the best remedy was to apply to the Court to extend the said time failing which a Notice of Appeal would be struck out.

The Appellant's submissions in rejoinder.

44. Counsel for the Appellant in their submissions in rejoinder submitted that the Appeal met the required conditions precedent under the Treaty and Rules of this Court. He submitted that the grounds of procedural irregularity and want of jurisdiction clearly come out in ground number 2 where the Appellant impugns the Trial Court Judgment as biased. He further referred us to ground 3 that impugns the Judgement for

entertaining the Reference filed out of time. Ground 4 that impugns the Judgement for entertaining a Reference that was improperly before the Court, ground 7 that impugns the Court's Judgment for determining matters that were outside its jurisdiction as these were reserved for domestic laws and institutions.

<u>The determination of the Court.</u>

45. We have considered the rival submissions of the parties and the authorities provided to us, for which we are grateful.

To launch an Appeal in this Court, one has to meet the requirements in Article 35A of the Treaty. An appeal can be made from any judgment or order on

A) Points of law

B) Grounds of lack of jurisdiction or

C) Procedural irregularity

These provisions are re-echoed in Rule 86 of the Rules of this Court (2019 as now amended).

This Court also gave the parameters against which an appeal would be measured to find if it meets the required tests in Article 35A in the matter of **Simon Peter Ochieng** (supra) where the Court held that: -

"...An Appeal brought before this Court outside the scope created by the above relevant provisions is certainly without merit and is untenable..."

The Court went further to hold that: -

"...Under Article 35A of the Treaty above quoted, a Party alleging an error of law, a ground of lack of jurisdiction or a procedural irregularity,

must advance argument in support of his allegations...Litigants should bear in mind that this Court is not tasked to undertake a rehearing de novo of questions of fact and law examined by the First Instance Division. The right to appeal to the Appellate Division is restricted to the extent that the appeal falls within the scope of Article 35A."

This Court further held that: -

"...It is not at the Appellate Division where the appellant establishes facts as if this Division is exercising original jurisdiction in this matter. Reproduction of facts presented in Trial Court does not help the Appellants to make tenable an Appeal before this Division..."

Finally, this Court held that: -

"...The fact that the losing party does not like the verdict of the Trial Court is not enough to sustain an appeal since the Appeal to the Appellate Division of this Court is restricted as we discussed above..."

46. This Court also made it clear that the burden to establish the alleged error of the Trial Court lies on the party alleging that error. The said party must explain what the alleged error is and how it led to a miscarriage of justice.

47. We have looked at the Grounds of Appeal and are satisfied that they point to alleged error and how the error is aligned with Articles 35A and Rule 86 of the Rules of this Court. As to the issue of time of service of the Memorandum of Appeal, we note that this objection is being raised late at the time of submissions and at best can be viewed as an

afterthought for which we are not able to entertain. We therefore on this issue agree with the submissions of counsel for the Appellant.
We therefore answer this ground in the affirmative.

Issue No. 2: *Whether the trial court erred in law by holding that the filing of the Reference was not time barred?*

The Appellant's submissions.

48. Counsel for the Appellant submitted that it is the Appellant's case that the cause of action in this matter arose on the 27th September 2013, however the Trial Court preferred to take an alternative date of 2nd October 2013, which is the date of the letter which instructed the tenants of UTC Mall to redirect their rent into an account in FINA Bank in the names of the Committee. Counsel argued that this conclusion by the Court was reached in error since the facts and evidence abundantly show that both the Respondent and the Court were aware that the date of the cause of action was not the 2nd October 2013.
49. Counsel further submitted that in determining the cause of action the Trial Court mixed up two events namely the take-over of the Mall and the enforcement actions by the RRA. Counsel argued that lumping together the two events in the second amended Reference to compute time was a grave error that occasioned injustice against the Appellant. Counsel argued that the second amendment of the Reference in order to include actions of the RRA was made in disregard for the Rules of Procedure of this Court by lumping in the same Reference new causes of action in the matter without regard to the law.

The Respondent's submissions.

50. The Respondent opposed this Issue. Counsel for the Respondent argued that the Trial Court was alive to how time should be computed for purposes of Article 30 (2) of the Treaty. He argued that the Trial Court followed the guidance of this Court in the matter of The **Attorney General of the Republic of Uganda & Anor. v Omar Awadh & 6 Others** Appeal No. 2 of 2012, where it was held (at paragraph 60 thereof) that in computing time: -

"... the starting date of an act complained of under Article 30 (2) ... is not the day the act ends, but the day it is first effected ... ".

Counsel argued that this was the same position taken by the Trial Court in the earlier matter of **Grands Lacs Supplier S.A.R.L. & Others v Attorney General of the Republic of Burundi**, Reference No. 6 of 2016.

Counsel contended that for the reasons stated above, the Trial Court was alive to the evidence that the decision to take over the management of the Respondent's Mall was effected on the 2nd October, 2013.

The Submissions of the Interveners

51. The Interveners supported the submissions by the Appellant. Counsel for the Interveners submitted that Trial Court tried to justify and differentiate an action from a decision by finding that the meeting of 29th July, 2013 (evidenced by minutes of a meeting on record) was a "decision" while the takeover of the UTC Mall (evidenced through a

letter of 2nd October, 2013) was an" action". However, counsel argued that this differentiation still did not preclude the fact that the first cause of action was crystalized by the meeting of 29th July, 2013 because all the subsequent actions were based on the decisions taken at this meeting.

52. Counsel for the interveners further argued that if the Court had admitted the Interveners evidence in the expunged affidavits as required by the law, the Court would have realised that in the meeting of 29th August 2013, Mr. Rujugiro was represented, he cannot therefore say that he got to know about the takeover through a tenant yet he was represented in the previous meetings.

The Appellant's submissions in rejoinder.

52. The Appellant largely in substance reiterated his submission in chief which in the interests of brevity and unnecessary repetition we shall not restate here.

The determination of the Court on the Appeal and the Cross Appeal.

The Appeal

53. We have considered the submissions of the parties and the authorities relied on, for which we are grateful.

The issue here as we see it is when does time attach in this dipute for purposes of Article 30 (2) of the Treaty? We shall recall the provisions of Article 30 (2) which provides: -

"...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..."

54. This Court has on a number of occasions addressed itself to the interpretation of this Article. Indeed, a determination of computation of time for purposes of establishing a cause of action is very important because it goes to jurisdiction. The period of two months may be measured from the time of the impugned: -

(i) Enactment

(ii) Publication

(iii) Directive

(iv) **Decision or Action** or in the alternative

(v) the day on which it came to the knowledge of the complainant.

55. It should be noted that the reference to Decision or Action under the above section is drafted in the alternative and that is an important distinction in this Appeal.

In the **Omar Awadh Decision** (supra) this Court held that when the computation is about an action then that computation must be from the date the action started not ended. So an impugned action may comprise a series of events but for purposes of time, time is computed from when the events started and the subsequent events therefrom will be judged from that start time and or date.

56. Even when it comes to enactments of legislation, one has to take into account a series of events in the legislative process before determining the date when the enactment came into force. This analysis came up in the matter of **Media Council of Tanzania V Attorney General United**

Republic of Tanzania Reference No. 02 of 2017 where the Court found: -

"...The Respondent appeared to have placed undue emphasis on the word 'enactment 'in Article 30(2). The Respondent, in its submission, proceeded on the basis that in the legislative process, 'enactment 'was equated to passing of a Bill in Parliament. Reading Article 30(2) of the Treaty, it was clear that the law known as Media Services Act, 2016, became law after firstly, being passed by the Parliament of the Respondent on November 5, 2016 and secondly, being assented to by the President of the said Respondent State on November 16, 2016. The passage of the Bill by Parliament was only one step towards the making of the law. Prior to the Act being assented to by the President, there was no law in respect of which there could have been a complaint. Indeed, as regards article 30(2) of the EAC Treaty, the focus was on 'the action complained of. 'The action complained of against the Respondent was the enactment of the Media Services Act, which became law on November 16, 2016 upon assent by the President. The Applicants were well within time, in terms of Article 30(2), in filing the Reference on January 11, 2017..."

We agree with this analysis of the First Instance Division on the computation of time and indeed when this particular Reference came on Appeal to this Division, the time for the cause of action was not listed as a Ground of Appeal.

57. In this matter, when it comes to when the time should have been computed, the Respondent and Intervener root for the date of a meeting

when the Respondent was notified of the decision to take over the UTC Mall being the 29th July, 2013 (evidenced by minutes of a meeting on record) while the Respondent on the other hand root for the actual date of the takeover of the UTC Mall (evidenced through a letter of 2nd October, 2013). The Appellant is also contesting the addition of the actions of the RRA into the second amended Reference because those actions in their view are separate and after the time of the takeover of the UTC Mall and therefore have nothing to do with the original Reference.

58. The Trial Court in making its findings and decision held as follows: -

"...We carefully considered the second amended Reference. It is abundantly clear that the management of Mr. Rujugiro's shares is not in issue therein. What is in issue is the alleged takeover of the UTC Mall by the commission and its subsequent sale by RRA while in the commission's hands. Those are the matters complained of by the Applicant. Indeed, Article 30(1) does not restrict a cause of action to decisions, but extend to actions as well. Therefore, the contention that the 29th July decision was the only decision taken in relation to the Applicant's property would appear to be misplaced... suffice to note at this stage that it is to the second amended Reference that the recourse would be had to determine the cause of action for purposes of computation of time..."

It would appear to us that the trial Court cannot be faulted in its finding. We say so because the takeover of the Mall involved a series of events and processes which included meetings like that of the 29th July 2013. The action of takeover of the UTC Mall has been placed by the

Respondent to be the 2nd October 2013 when tenants were by letter ordered to pay rent to the Commission's bank and not the management of the Respondent. This date of 2nd October 2013 to our mind was a date of actualisation because before that date, even though discussions of the takeover had taken place, the takeover had not been actualised. We say so because from the evidence it is clear that prior to the 2nd October 2013, the tenants, regardless of the discussions taking place at the time and earlier, continued to pay their rent to the Respondent company. The Respondent therefore was within their rights to compute time from the 2nd October 2013 as the time they lost control of the UTC Mall.

We answer this issue in the negative.

Issue No. 3: *Whether the trial Court erred in law in holding that Mr. Rujugiro Tribert, who sued on behalf of the Respondent, had locus standi to institute the suit Reference?*

The Appellant's submissions.

59. It is the contention of the Appellant that Mr. Tribert Rujugiro lacked the requisite authority to cause the Respondent to initiate proceedings in this Court either personally or by Attorney.

Counsel for the Appellant argued (at page 45 of his written submissions) that whereas the Trial Court found that the Appellant had mixed up the issue of *locus standi* with Mr. Tribert Rujugiro's right to initiate proceedings, the Appellant's intended argument at all times was that Mr. Tribert Rujugiro had no authority to initiate proceedings on behalf of the Respondent at the EACJ.

60. Counsel further argued that although Mr. Tribert Rujugiro testified that his authority to instruct lawyers for the Respondent Company was based on an Extra Ordinary General Meeting of the Respondent Company held on the 3rd October 2013 for which there were minutes, the said Minutes did not name Mr. Tribert Rujugiro as the specific person to represent the company or commence legal action at the EACJ or instruct lawyers. Counsel submitted that there was no evidence that any resolution from the said meeting of the 3rd October, 2013 was ever filed at the Office of the Registrar of Companies in Rwanda.

He concluded that all the above showed that Mr. Tribert Rujugiro was not authorised to initiate proceedings at the EACJ and so the matter was improperly before the Court.

The Submissions of the Interveners

61. The Interveners supported the arguments of the Appellant on this issue. Counsel pointed out that Article 27 of the Treaty read together with Article 30(2) of the Treaty in the context of Article 15 of the Protocol on the Establishment of the East African Community Common Market (hereinafter referred to as the "Common Market Protocol") excludes land and property issues from the regional policy and legal frameworks to be handled by the East African Court. Counsel argued that this means that such issues have to be governed and adjudicated over by National Laws and National Courts which have jurisdiction over such matters except where state actions in such cases are against the rule law. Counsel in this regard referred us to the Decision of **Katabazi & 21 Others vs.**

Attorney General of Uganda & Secretary General of the EAC Ref. No. 1 of 2007.

62. Counsel argued that the Trial Court therefore erred in law when they found: -

"*...We are constrained to respectfully state here that the domestic law of a Partner State would be irrelevant to the determination of locus standi in this Court. The Treaty would have supremacy on that issue. Thus, Article 8(4) of the Treaty gives pre-eminence to Community Laws in the implementation of the Treaty. It reads: Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of the Treaty...*"

Counsel further argued that it was wrong for the Trial Court to find that a person with a certificate of registration could initiate a court case on behalf of a company. Counsel for the Interveners submitted that the interveners never consented as shareholders and or board members of the Respondent company to file a claim against the Government of Rwanda at the EACJ. Counsel further argued that the interveners tried to explain this in their submissions together with evidence by way of affidavits but the trial Court did not give any consideration to them showing bias against the Respondents.

63. Counsel further submitted that Article 223 of Law N° 07/2009 of 27/04/2009 of Rwanda relating to Companies requires a shareholder to undertake a derivative action in order to file a claim or sue on behalf of a company. For avoidance of doubt the law provides that: -

"A company, a member of the board of directors, or a shareholder may request the court to file a claim on behalf of the company or its subsidiary."

Counsel submitted that the above provision of Rwandan law had not been complied with in initiating the Reference before the Trial Court.

64. Counsel argued that a company incorporated under the laws of Rwanda has a separate legal personality from its owners. The trial court therefore erred by assuming that Mr. Rujugiro can file a claim on behalf of the Respondent without presenting a notarized resolution to the Court indicating that the Respondent company had agreed to file the Reference at the Trial Court. Counsel argued that in so doing, the Trial Court completely ignored the minority shareholder's rights and position which was that they were not interested in suing the Government of Rwanda. This, she submitted, was not fair because it was the majority shareholders versus the minority shareholders trying to convince the Trial Court that the Reference was authorised by the company.

<u>The Respondent's submissions.</u>

64. Counsel for the Respondent opposed the issue. He argued that the Respondent (Applicant at the Trial Court) was the Company Union Trade Centre and not Mr. Tribert Rujugiro. It is therefore the Respondent company which had *locus standi* not Mr. Tribert Rujugiro in this matter and that is what the Trial Court laboured to explain in its Judgement.

65. Counsel submitted that the Trial Court (at paragraph 49 of the judgment) emphasised that representation has nothing to do with *locus standi* to institute the Reference and the Respondent at the time properly

appeared before the Court through its Advocates who in turn fulfilled what was expected of them under Rule 19(7) of the Rules of the Court.

The Appellant's submissions in rejoinder.

66. The Appellant largely in substance reiterated his submission in chief which in the interests of brevity we shall not restate here.

The Determination of the Court.

67. We have considered the submissions of the parties on this issue and the authorities relied on, for which we are grateful.

The arguments around this issue are multifaceted. However, we shall begin by recalling the Decision of this Court in **Simon Peter Ochieng** (supra) where it was held that: -

"...Litigants should bear in mind that this Court is not tasked to undertake a rehearing de novo of questions of fact and law examined by the First Instance Division. The right to appeal to the Appellate Division is restricted to the extent that the appeal falls within the scope of Article 35A...."

68. Counsel for the Appellant tried to re-state what their intended argument at the Trial Court was. He submitted that the Appellant's intended argument at all times was that Mr. Tribert Rujugiro had no authority to initiate proceedings on behalf of the Respondent at the EACJ. This Appellate Division does not under Article 35A and Rule 86 of the Rules of this Court deal with what intended arguments would have been at the Trial Court. This is the line of argument also taken up by the Interveners'. However, since the Trial Court found there was a mix up in

the legal arguments and concepts we are forced to bring clarity to these matters.

69. We find that the real question of law must be whether the Respondent company had the legal standing to bring the Reference. Article 30 (1) of the Treaty provides: -

"...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 the Treaty..."

70. We shall begin with the legal arguments of the Interveners which also captured the Appellant's submissions but in greater detail. Counsel for the Interveners has referred us to the exception in Article 27 (1) of the Treaty which provides: -

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

Counsel argued that the above provisions when read with Article 15 of the Common Market Protocol excludes land and property issues from the regional policy and legal frameworks of the East African Court of Justice. This means that this Court lacks jurisdiction to adjudicate land and property matters. With the greatest of respect this argument is totally misplaced. The dispute in this matter is one of a company (the Respondent) and not land. This distinction is very clear.

71. Indeed, counsel for the Interveners later goes on to argue that the Respondents and in particular that Mr. Tribert Rujugiro did not comply with Article 223 of Law N° 07/2009 of 27/04/2009 of Rwanda relating to companies (not land) which requires a shareholder to undertake a derivative action in order to file a claim to sue on behalf of a company. Again we find this argument misplaced because the Respondent was not launching its Reference in the Courts of Rwanda but rather at the EACJ whose operative provision is Article 30 (1) which Article is not in ***pari materia*** with the Rwandan Law. So to launch a Reference at the EACJ all a party need to do is to comply with the Treaty provisions and not domestic law.

72. As to the Interveners submissions that the Company and the shareholders have different legal personalities and the Trial Court therefore completely ignored the minority shareholders position which was that they had no interest in the Reference. We find this argument very puzzling. In this matter it is not in dispute that the Respondent company comprises of 5 shareholders. Mr. Tribert Rujugiro had 1,933 shares (about 97.3%). The rest of the shareholders including the Interveners, Mr. Theoneste Mutambuka had 41 shares; Mr. Tharcisse Ngofero 3 shares; Succession Makuza Desire 3 shares; and Succession Nkurunziza Gerard 20 shares. Obviously Mr. Tribert Rujugiro was the majority shareholder by far and even though the minority shareholders together voted against going to Court this would not have changed any resolution of the company to the contrary as he had the majority vote. The majority vote would then reflect the will of the company. If there was a contrary resolution of the Respondent

company, then the onus was on the Appellant supported by the Interveners to produce it in Court; but they did not.

73. Counsel for the Interveners further argued (at para 27 of their submissions) that considering all the challenges that were associated with being shareholders in the Respondent company with Mr. Tribert Rujugiro, the Interveners decided to file for liquidation and dissolution of the company especially given the fact that their investment was dormant and making losses.

We have no evidence on record that the Respondent's internal governance documents showed that the minority shareholders could legally veto a majority vote which in any case would have been very unusual in Company Law and corporate governance. In any event, there are Minutes of an Extra Ordinary General Meeting of 3rd October, 2013 of the Respondent on record where it was resolved (and this is captured in the Judgment of the Trial Court at page 549 of the Record of Appeal) that: -

"...The Shareholders decided that they do not exclude the option of having recourse to the courts of law if possible for purposes of safeguarding the interests of the company..."

The Appellant and Interveners who allege lack of authority have not adduced any evidence from the company to the contrary.

74. In any event what do the Rules of this Court say about a Company authorisation? Rule 20 (5) of the Rules of this Court provides: -

"A corporation or company may appear by its director, manager or company secretary, who is appointed by a resolution under seal of the corporation or company, or may be represented by an advocate..."

The above Rule gives options to corporations or companies to appear in Court namely by: -

1. A director, manager or company secretary, who is appointed by a resolution under seal of the corporation or company; or
2. An advocate

In one of the few cases involving the position of a company suing at international law, the International Court of Justice in the matter of **The Barcelona Traction, Light and Power Co. Case** (Belgium V Spain), ICJ Reports 1970 held as follows: -

"... it cannot however, be contended that the corporate entity of the company has ceased to exist, or that it has lost its capacity to take corporate action...it has not become incapable in law of defending its own rights and interests of the shareholders. In particular, a precarious financial situation cannot be equated with the demise of the corporate entity, which is the hypothesis under consideration: ***the company's status in law is alone relevant, and not its economic condition, nor even the possibility of its being "practically defunct"*** *– a description on which argument has been based but which lacks all legal precision. Only in the event of the legal demise of the company are the shareholders deprived of the possibility of a remedy available through the company; it is only if they become deprived of all such possibility that an independent right of action for them and their government can arise.*

In the present case, Barcelona Traction is in receivership in the country of incorporation. ***Far from implying the demise of the entity or of its rights, this much rather denotes that those rights are preserved for***

so long as no liquidation has ensued. Though in receivership, the company continues to exist..." (Emphasis ours).

It would therefore appear to us, that under customary international law, for a company to sue and appear in an International Court such as this one, the company's legal status in law alone is relevant and this would still be the situation when the said company is said to be under receivership.

75. The Trial Court (at pages 547-578) held as follows: -

"...Article 30 (1) does hinge locus standi to institute a Reference on residence or domicile within any Partner State. Without a doubt, as deduced from its certificate of registration, the Applicant company is indeed domiciled within the Respondent State. No evidence to the contrary was adduced by either party, neither was it proposed or proven that it was not so domiciled. The certificate of registration would therefore be conclusive on the subject. To the extent that it depicts the Applicant as a company domiciled in the Respondent State, it does denote the Applicant's locus standi in the present case. We are constrained to respectfully state here that the domestic law of a Partner State would be irrelevant to the determination of locus standi in this Court. The Treaty would have supremacy on that issue..."

We are unable to fault this finding of the Trial Court and for the following reasons. First when the Reference first came up, it is common ground that the Respondent was in existence and therefore could initiate its own case under the Treaty and the Rules of this Court. The Respondent also meets the test under Rule 20 (5) of appearing by Advocate. Furthermore, even though under Rule 20 (5) there is no requirement for the Advocate to show

evidence of instructions or other resolution, we are fortified by the fact that the there is a Company Resolution of 3rd October, 2013 showing that the Company was inclined to go to Court. Even though the Interveners contest this, the onus is on them to prove the contrary. However, in our view the Interveners have failed to do so. They have not adduced evidence or minutes from the Respondent Company to the contrary. In any event, we are again fortified under company law that, by the level of shareholding the Interveners possessed, they would not have had the ability to stop the Respondent Company (as separate legal entity from them) from pursuing legal action at the EACJ to protect itself from the actions of the Appellant. A finding to the contrary, would offend all the principles of good corporate governance and company law. Indeed, it is almost incredible to believe that minority shareholders could have the voting power to enable them file for a company's liquidation. A company is a very important vehicle for trade and investment and such a legal situation would seriously discourage investment through companies in our region.

76. From the above findings, it is clear to us that it was not Mr. Tribert Rujugiro *per se* as a shareholder who sued on behalf of the Respondent company. The Respondent company as an entity in existence and separate from its shareholders filed the matter at the EACJ on its own behalf and indeed had *locus standi* under the Treaty to do so. We further find that in all their submissions the Appellant and Interveners have failed to establish bias by the Trial Court in its proceedings and or Judgment. Bias by the Trial Court needs to be actively established by the party that alleges it and not be founded on disagreement with the findings of the Court which in any event can be appealed.

Accordingly, we answer issue No. 3 in the negative.

Issue No. 4: *Whether the Trial Court erred in holding that the Appellant's action of taking over the respondent's UTC Mall and its subsequent auctioning was inconsistent with Articles 5(3)(g), 6(d), 7(1) (a) and 8(1)(a), (b) & (c) of the Treaty for the Establishment of the East African Community?*

The Appellant's submissions.

77. Counsel for the Appellant argued that the Trial Court lacked the jurisdiction under Articles 27 and 30 of the Treaty to interrogate the Appellant's taking over of the UTC Mall and its subsequent auctioning; but the Trial Court ignored this at the Scheduling Conference.

Counsel argued that the second Reference did not cure the need to interrogate whether the Trial Court had jurisdiction especially on the issue of time frame. He submitted that if the Trial Court had done so then the proposition as to jurisdiction would totally have disposed of the Reference.

He prayed that this Court finds that the Trial Court had no jurisdiction to make the Orders and Awards it did in favour of the Respondent.

78. Counsel referred us to our Decision in the matter of **The Attorney General of Tanzania V Anthony Calist Komu,** Appeal No. 2 of 2015 for the proposition of the law that if a court lacks jurisdiction, then it will have no cause for examining the substantive issues, however important or grave they may be.

The Submissions of the Intervener

79. The Interveners did not address this issue.

The Respondent's submissions.

80. Counsel for the Respondent opposed the issue and submitted that the Trial Court did not commit any errors of law or procedural irregularity. Counsel argued that the sum total of the Appellant's illegal actions towards the Respondent company violated the Treaty.

81. Counsel submitted that the Trial Court properly summarised the evidence presented before it at Paragraphs 110, 111, 112, 113, 114, 121 and 122 of the Judgment. He argued that the Trial Court had found that the Appellant had failed to controvert the evidence adduced on record which therefore stood un-rebutted.

The Appellant's submissions in rejoinder.

82. Counsel for the Appellant reiterated his earlier submissions that the Trial Court lacked jurisdiction to interrogate this issue.

83. In the alternative, Counsel submitted that the Respondent had failed to adduce cogent evidence to prove the impugned actions or decisions of the Appellant. He argued that a national corporation being dissatisfied with the actions of a Partner State cannot of itself amount to a violation of the Treaty and especially Article 5 thereof. Furthermore, Counsel submitted that there was no violation of Article 6 (d) of the Treaty because evidence showed that quasi-judicial administrative steps were taken against the Respondent and that provision was made for the Respondent to be heard during the

process. Counsel argued that Rwandan law and judicial process had been upheld but the Respondent was just dissatisfied.

84. Counsel further submitted that the Appellant was an ardent supporter of EAC Community programmes and ensured that a liberalised and free market economy operated in Rwanda and the EAC Community.

The determination of the Court.

85. We have considered the submissions of the parties on this issue and the authorities relied on, for which we are grateful.

We find that the Appellant has largely reiterated his arguments against the Trial Court being seized with jurisdiction that we have already addressed under Issues Nos. 1 and 2 herein. We have already found against the Appellant in this regard and found that Trial Court had jurisdiction and therefore it would serve no purpose for us to address this matter of jurisdiction again. Indeed, the argument of lack of jurisdiction appeared to be the main thrust of the Appellant's defence at the Trial Court and therefore the Appellant unfortunately ended up not fully addressing the substance of the allegations against it.

86. At the Scheduling Conference there were attempts by the Appellants and the Interveners to provide fresh evidence on Appeal which is not possible under Article 35A of the Treaty, since the Appellate Division cannot take appeals on points of fact. Indeed, the Interveners in particular took exception to the affidavits accompanying their Statement of Intervention being struck out by the Trial Court.

87. Article 40 of the Treaty provides for Intervention and provides that: -

"A Partner State, the Secretary General or a resident of a Partner State who is not a party to a case before the Court may, with leave of the Court, intervene in that case, but the submissions of the intervening party shall be limited to evidence supporting or opposing the arguments of a party to the case..."

88. Furthermore, when the Court allows an application for intervention, Rule 59 of the Rules of this Court then further provides that the intervener shall accept the case as it is at the time of intervention. The meaning of these provisions is that the intervener comes in by way of "submissions" which shall be limited to the analysis of evidence supporting or opposing the arguments of a party to a case. The Intervener thus takes the case and its evidence on record as he or she finds it at the time of intervention but does not by reason of admission then become a party who brings his or her own independent evidence to the case. All the intervener does in practical terms therefore is to file a **Statement of Intervention** supporting or opposing the evidence on record of one of the parties to a Reference. The approach of the Intervener therefore in this matter was erroneous and the Trial Court was correct to strike out their evidence.

89. The above notwithstanding, the Respondent has directed us to the findings of the Trial Court on the substance of this Issue which we find are pertinent and we reproduce them below for ease of reference: -

"110. In the instant case, the UTC Mall did not amount to property that had been abandoned following the 1994 genocide so as to amount to abandoned property within the ambit of Law No. 28/ 2014. No evidence to

that effect was adduced at trial. On the contrary, it was the Respondent's contention that the Commission assumed management of Mr. Rujugiro's shares because he was out of the country. However, our earlier decision on the said shares notwithstanding, we find that Article 10 of Law No. 28/ 2014 points to the contrary. That provision states most categorically that the fact of being abroad would not disentitle him of his property, or the right to manage or otherwise deal with it, the only exception being if he was being or had been prosecuted for genocide. There is no such evidence on record.

111. Perhaps more importantly, the Commission's intervention in the management of the UTC Mall vide its October 2nd letter was without legal basis. If, as advanced by learned Respondent's Counsel, the Applicant had its own management there clearly was no reason for the Commission to illegally redirect the tenants' rent elsewhere. That conduct in itself would amount to a violation of the Applicant company's right to use and enjoyment of its property.

112. That provision has universal application within Partner States, placing as much an obligation upon regional Governments as their citizens, to abide by national policies and laws in land and property management. In the instant case, where the Commission applied an inapplicable law to dispossess the Applicant of its right to possession, operation and/ or use of the UTC Mall; it acted illegally viz the Respondent State's own municipal law, and thus occasioned an illegality within the precincts of Article 30(1) of the Treaty. The Commission's conduct does, to that extent, flout the rule of law principle espoused in Article 6(d) and 7(2) of the Treaty.

113. In addition, in so far as it contravenes the property rights that underpin Article 15(1) of the Common Market Protocol, the said conduct amounts to a measure likely to jeopardize the realization of the EAC Common Market as set out in Article 8(1) (c) of the Treaty.

114. The obligations highlighted above are, by virtue of the instruments from which they derive, international obligations. Consequently, not only is the Commission's wrongful conduct attributable to the Respondent State under Article 2(a) of the ILC Articles on State Responsibility, its breach of international obligations engenders the Respondent State's international responsibility therefor under Article 2 (b) of the same legal instrument.

121. In the instant case, as demonstrated above, the Applicant has so sufficiently demonstrated RRA's inconsistency with the Treaty as to shift the evidential burden to the Respondent to demonstrate its consistency. However, the Respondent's evidence falls short on the requisite rebuttal of the Applicant's contestations. In fact, aspects of the Respondent's evidence do in fact lend credence to and corroborate the Applicant's allegations.

122. We are satisfied, therefore, that by circumventing the express provisions of Article 27 of Law No. 25/2015, RRA's tax audit process contravened the rule of law principle in Article 6(d) and 7(2) of the Treaty. Furthermore, having omitted to declare the monies retrieved from UTC's garnished accounts so as to justify its seizure and auction of the Mall, RRA's conduct was riddled with a lack of transparency that contravenes Article 6(d) and 7(2) of the Treaty. The said entity did similarly offend the principle of accountability in the same Treaty provisions by not remitting to the Applicant the monies outstanding from the Mall's sale. RRA's impugned

conduct is attributable to the Respondent State under Article 2 of the ILC Articles on State Responsibility."

We agree with the above findings of the Trial Court and for the following reasons. First, the Appellant did not rebut the factual allegations of the take over and eventual auction of the UTC Mall; so that evidence was uncontroverted. Both of these actions together ultimately led to the sale of the UTC Mall[1]. Secondly and perhaps most importantly, there was throughout the trial a perpetual mix up by the Appellant between the actions of the Respondent company and one Mr. Tribert Rujugiro who is its majority shareholder. This in our view was a conceptual error because the two are legally different.

90. Even though, as counsel for the Appellant put it during the hearing, that it was general knowledge that Mr. Tribert Rujugiro had fled Rwanda on the apprehension of criminal charges being preferred against him and that he was unlikely to return, the Respondent company on the other hand did not legally leave Rwanda but rather continued to remain active with management in place. A proposition that because of the alleged run in with the law by Mr. Tribert Rujugiro (and that is for him to answer as an individual) and his subsequent fleeing the country, that this means that his shares and or the Company had been abandoned in Rwanda and cannot therefore operate would send a very dangerous negative signal for investment in that country and the region at large. A company has its life through its organs like Shareholders, Board of Directors and then

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[1] Article 15 of the of the ILC Articles on State Responsibility refers to a "...a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with other actions or omissions, is sufficient to constitute the wrongful act." See also Azurix Corp V Argentina ICSID Case No. ARB/01/12 para 417-18

Management. Even the allegation that Mr. Tribert Rujugiro as a shareholder had committed a fraud on the Respondent company would have to be placed on the shareholder personally to account without creating a threat to the existence of the company itself. It is the case for the Interveners that with respect to the said fraud, they had opened a criminal case against Mr. Tribert Rujugiro personally. This in our view was the right thing to do rather than seek the liquidation of a Company that from all the evidence was still a going concern.

Accordingly, taking our findings together, we answer the issue in the negative.

THE CROSS APPEAL

90. Counsel for the Respondent / Counter – Claimant (hereinafter still referred to as the Respondent) addressed issues No. 5 and No. 6 together. We shall equally resolve them together: -

Issue No. 5: *Whether the Trial Court erred in law when it omitted to make further orders beyond requiring the Appellant to furnish the Respondent with accountability for rental and sale proceeds realized from the UTC Mall between the 1st October 2013 and 27th September 2017 by the Appellant?*

and

Issue No. 6: *Whether the Trial Court erred in law when it omitted to make an order for restitution of the UTC Mall or in the alternative full compensation for the value of the UTC Mall on finding that it was illegally seized and sold by the Appellant?*

The Respondent's Submissions.

91. Counsel for the Respondent submitted that the Court has a duty to ensure adherence to the Treaty and in appropriate circumstances where a breach has been proved, to award effective redress. In this regard we were referred to the Decision of this Court in **Hon. Dr. Margret Zziwa V The Secretary General of the East African Community**, Appeal No 02 of 2017. Counsel argued that whereas the Trial Court found that the Appellant had violated the Treaty, it failed to give effective Remedies and Orders of reparation and redress to redress the wrong done.

92. He submitted that the Trial Court had only issued a Directive to the Appellant to furnish the Respondent company with accountability for rental and sale proceeds realised from the sale of the UTC Mall between 1st October, 2013 and 27th September, 2017 without any further Orders to remit the rental collections and sale proceeds to the Respondent company. The Trial Court further awarded damages in the sum of USD 500,000 and interest at 6% p.a. till payment in full which was insufficient and ineffective compensation given that the UTC Mall had been sold by the RRA for the sum of RwF 6,877,150,000.

93. Counsel submitted that the evidence adduced had shown that the Respondent company earned a monthly rental of USD 120,000 at the time of take over which translated into earnings of USD 1,440,000 yearly and a total of USD 5,760,000 for the four years the Mall was in the hands of the Commission. Counsel argued that the Trial Court ought to have granted the Respondent company USD 5,760,000 for the illegal takeover, seizure and auction of the UTC Mall. He argued that the compensation granted fell

below the accepted international standards as held by the Permanent Court of International Justice (PCIJ) in the matter of **The Factory at Chorzow**, Judgement No 13 of the 13th September 1928 (Series A. No 17) at P 47 where PCIJ found: -

"...The essential principle contained in the actual notion of an illegal act ...is that reparation must as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would in all probability, have existed if that act had not been committed. This can be accomplished through restitution in kind, or if that's not possible through just compensation meaning payment of a sum corresponding to the value of which restitution in kind would bear..."

94. Counsel further submitted that in matter of **Sola Tiles Inc. V The Government of the Islamic Republic of Iran**, IUSCT Case No. 317 which involved the expropriation of company assets, the Tribunal there determined, among other factors, the market value of M/s Sola Tiles Inc. at the time of expropriation and factored in issues like lack of access to detailed documentation and awarded USD 3,207,782 for loss of assets, profits and goodwill.

The Appellant's submissions in reply.

95. The Appellant opposed the Cross Appeal. Counsel for the Appellant submitted that the remedies prayed for by the Respondent were neither pleaded nor backed by sufficient and cogent evidence. Counsel argued that the evidence that the UTC Mall earned USD 120,000 per month and that the UTC Mall had no debts was unreliable. This is because there was

evidence that the UTC Mall owed RwF 1,300,000 to Bank of Kigali; USD 2,900,000 to Neek International Ltd and a lot of money to the RRA.

The Submissions of the Interveners

96. The Interveners agreed with the submission of the Appellant. Counsel for the Interveners further wondered to whom compensation should be made since the Interveners even as minority shareholders were happy with the takeover of the UTC Mall since Mr. Tribert Rujugiro, the majority shareholder and Managing Director, had abandoned the management of the UTC Mall to the detriment of the minority shareholders.

97. Secondly, counsel for the Interveners submitted that the minority shareholders had filed a case for liquidation of the Respondent company at the Commercial Court of Rwanda, which Court had appointed a liquidator pursuant to a court ruling in Case N° 01304/2020/TC.

The Respondent's submissions in rejoinder.

98. The Respondents did not file a rejoinder.

The determination of the Court.

99. We have considered the submissions of the parties on this issue and the authorities relied on, for which we are grateful.

This issue relates to the remedies that the Trial Court awarded. Before we address the issue of what the Court awarded, it is necessary for us to clarify on a few matters. We wish to recall the Decision of this Court in **Hon. Dr. Margret Zziwa** (supra) on the issue of state responsibility for international wrongs where the Court found that whereas the Treaty does

not specifically provide for remedies still the applicable principles in this regard are: -

"... those expressed by the International Law Commission (ILC) in its Draft Articles on the Responsibility of International Organizations, with Commentaries, 2011. The Draft Articles detail the international responsibility of international organizations in Articles 3, 4, and 6 which are in Part Two, and the legal consequences for the breach thereof in Articles 30, 31, 33, 34, 35 and 36 which are in Part Three..."

100. This Court further held in **Hon. Dr. Margret Zziwa** (Supra) that where the Court found a breach then: -

"...The legal consequences of such breach would, if the complainant were a State or another international organization, be cessation and non-repetition (Article 30) and/ or reparation (Article 31). Article 34 makes it clear that reparation may take the form of restitution, compensation and satisfaction, either singly or in combination..."

101. In this matter the appropriate remedy would be that found in Article 31 of the ILC which provides: -

"...

Article 31.

Reparation

*1. The responsible State is under an obligation to make **full reparation** for the injury caused by the internationally wrongful act.*

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State..." (emphasis ours).

The obligation under Article 31 of the ILC therefore is to make *"full reparation"*. The leading case in this regard which also reflects the position at customary international law has already been cited to us by the Respondent and that is **The Factory at Chorzow** (supra). In that case "full reparation" was understood to mean: -

"that reparation must as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would in all probability, have existed if that act had not been committed..."

102. In this matter reparation would go to the Respondent company. There is no ambiguity here as counsel for the Interveners would have it. The UTC Mall may have been sold but the Company still exists until full and final liquidation after which the benefit would be for the shareholders.

103. How then would full reparations be assessed? The onus would be on the Respondent to adduce the necessary evidence of the injury caused by the internationally wrongful act whether it be material or moral. It has been argued for the Appellant and the Interveners that the Respondent did not pray for these remedies. From the record, what the Trial Court found is that the Respondent did not pray for or establish what they referred to as "special damages". What Article 31 of the ILC on the other hand dictates is *ipso facto* **full reparations** and so the difference of pleading at domestic and international law should not be lost.

104. Article 31 (2) ILC gives guidance full reparations which includes any damage, whether material or moral, caused by the internationally wrongful act of a State. However, where there is material loss we state that evidence of it should be adduced. Paragraph F of the second Amended Reference avers: -

"<u>Reliefs Sought</u>

Wherefore the Claimant prays this Honourable Court for:

i. *Declarations that the actions of the Respondent (now Appellant) of taking over the claimant's property and consequently selling it off are illegal and contravene Articles 5 (3) (g), 6 (d), 7 (1) (a) and (2) and 8 (1) (a), and (c) of the Treaty.*
ii. *An Order directing the respondent to account for all proceeds from the claimant's Mall from the 1st October 2013 to date.*
iii. **An Order directing the respondent to return to the claimant the said Mall and all properties therein***;*
iv. ***General damages*** *and costs of this reference*
v. *That this Honourable Court be pleased to* ***make such other orders as may be just and necessary in the circumstances."*** *(emphasis ours).*

105. We find these pleadings though drafted as if in the domestic courts sufficient to constitute a prayer for reparations for injury as understood under the ILC. Some of the injury however would require proof. In this matter the prayer under F (iii) under the head reliefs, is not realistic as the UTC Mall was sold and has new owners. It follows under international law that where restitution is not possible then compensation should be made.

However, in order to obtain full reparations, it would also have been necessary during the course of the hearing for an Order for discovery to have been made so that those figures could have been adduced in evidence and factored into the Judgment; which was not done.

106. In this matter, the Trial Court relied on its own Decision of **Grands Lacs Supplier S.A.R.L. V The Attorney General of the Republic of Burundi** (supra), Reference No. 10 of 2013 and held (para 133) as follows: -

"...The foregoing injury is virtually identical with that suffered by the Applicant (now Respondent) in this Reference. In the instant case, it was Mr. Rujugiro's uncontroverted evidence that the UTC Mall was fetching a monthly rental of USD $ 120,000 as at the date of its take-over. This would translate into a yearly earning of USD $ 1,440,000 and, over the four Year period it was in the Commission's hands, total income of USD $ 5,760,000. Although these monies were not proven for purposes of special damages, we would apply the pro rata rate in ***the Grands Lacs Supplier case*** *as the basis for an award of general damages. After discounting monies expended in the maintenance of the mall, we consider USD $ 500,000 a fair award of general damages..."*

107. We find that the reliance by the Trial Court on the **Grand Lac Supplier case** (Supra) of awarding USD 500,000 as a **"fair award of general damages"** does not meet the muster of the later **Hon. Dr. Margret Zziwa Appeal** (Supra) of **"full reparations"** as guided by the ILC. In any event if the Trial Court awarded general damages (or moral damages as they are better known under international law) as they did, it did not make

sense to have reduced the said award given by what was termed "the maintenance of the Mall" which figure was also not adduced in evidence. In this determination, it is not possible to know what was the Trial Court's starting point for the award of damages and then where they got the figure for maintenance that was deducted.

108. Given the age of this dispute and the challenges of transparency in the management of the funds as found by the Trial Court in their Judgment (at para 118) and with a view to bringing an end to litigation we in the interests of justice award a block figure well aware that full reparations may not be achieved. We accordingly find that the Appellant violated Articles 5 (3) (g), 6 (d), 7 (1) (a) and (2) and 8 (1) (a), and (c) of the Treaty we award an enhanced figure of USD 1,000,000 against the Appellant in favour of the Respondent. We further award interest at 6% p.a. from the date of the Judgment of the Trial Court until payment in full. We however drop the award of making an account of the proceedings because of obvious difficulties that will come with enforcing that Order without an earlier discovery of the figure during trial.

As to costs we grant costs to the Respondent here in the main Appeal and the Cross-Appeal and also in the Trial Court.

Final Orders.

109. The award at the Trial Court is hereby replaced and substituted as follows: -

1. A Declaration is hereby issued that the Appellant's actions of taking over the UTC Mall and subsequently selling it off are illegal and

contravene Articles 5(3)(g), 6(d), 7(1)(a) and (2), and 8(1)(a) and (c) of the Treaty.

2. For the Appellant's violation of Articles 5 (3) (g), 6 (d), 7 (1) (a) and (2) and 8 (1) (a), and (c) of the Treaty, the award granted by the Trial Court is enhanced from USD 500,000 to the figure of USD 1,000,000 against the Appellant in favour of the Respondent.
3. Costs are awarded to the Respondent here in the main Appeal and the Cross-Appeal and also in the Trial Court.

We so Order

Dated, delivered and signed at Arusha this 30th ....day of August 2022.

30-08-2022

Nestor Kayobera
PRESIDENT

Sauda Mjasiri
VICE PRESIDENT

Anita Mugeni
JUSTICE OF APPEAL

Kathurima M'Inoti
JUSTICE OF APPEAL

Geoffrey Kiryabwire
JUSTICE OF APPEAL