IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

APPELLATE DIVISION

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

APPLICATION N0. 1 OF 2022 AS CONSOLIDATED WITH

APPLICATION N0. 3 OF 2022

BETWEEN

NIYONGABO THEODORE .....1ST APPLICANT

NIYUNGEKO GERALD.....2ND APPLICANT

AND

THE ATTORNEY GENERAL OF THE REPUBLIC OF BURUNDI

[*An Application for Review arising from the Judgment of the Appellate Division of the Court at Arusha by Hon. Justice Geoffrey Kiryabwire (Vice President) and Sauda Mjasiri, Justice of Appeal and Anita Mugeni Justice of Appeal in Appeal No. 05 of 2020 dated 26/11/2021*]

RULING OF THE COURT

INTRODUCTION

1. These are consolidated Applications No. 1 of 2022 and No. 3 of 2022. Application No. 1 of 2022 has been filed by NIYONGABO Theodore and NIYUNGEKO Gerard, Residents of Burundi who were the Appellants being dissatisfied with the outcome of the Judgment of Appeal No. 5 of 2020 dated 26th November, 2021 and through their Counsel, they filed an Application for Review on 01st February, 2022.

2. On 18th February, 2022, the Attorney General of the Republic of Burundi, who was the Respondent in Appeal No. 5 of 2020 (supra) also filed his own Application for review of the same judgment, being Application No. 3 of 2022. The two (2) applications with the consent of Court were consolidated.

3. Both Applicants in Application No. 1 (supra) were represented by Mr. Donald Omondi Deya and Ms. Esther Muigai Mnaro (who further represented the Respondents in Application No. 3 and while in Application No. 3 (Supra) the Applicants the Attorney General of the Republic of Burundi was represented by Mr. Diomede Vyizigiro and Mr. Pacifique Barankitse, State Attorneys (who further represented the Attorney General of Burundi in Application No. 1).

4. All Applicants in the consolidated Applications for review are seeking orders from this court to reverse its decision according to their own perspective.

A. BACKGROUND

5. On 26th February, 2021 the Appellate Division delivered its Judgment in Appeal No. 5 of 2020 where it awarded each Appellant a lump sum of US $50,000 as compensation for inconvenience and deprivation of property "without due process" (Paragraph 118 of the said Judgment).

6. The Applicants [Appellants in Appeal No. 5 of 2020 (supra)] were not satisfied with the outcome of the Appeal. Upon reviewing the Judgment, the Applicants, through their Counsel, filed an Application for Review, being the instant Application, No. 1 of 2022, on 01st February, 2022.

7. On 18th February, 2022 the Attorney General of the Republic of Burundi, who was the Respondent in Appeal No. 5 of 2020 (supra) also filed his own Application for review of the same Judgment, being Application No. 3 of 2022.

8. At the Scheduling Conference that was held on 25th February, 2022 parties requested the Applications be consolidated and the court

allowed it as prayed by both parties. The Court also, in agreement with the parties, settled on the following two (2) issues for determination: -

(a) Whether this Court should entertain the respective Applications, to *wit* Application No. 1 of 2022 and Application No. 3 of 2022;

(b) What remedies should the Honorable Court grant in this matter.

B. PROCEEDINGS BEFORE THE COURT

9. The parties filed their written submissions, which they adopted as their oral arguments when the consolidated applications came up for hearing.

I. APPLICANTS' CASE IN APPLICATION N0. 1 OF 2022.

10. Mr. Niyongabo and Mr. Niyungeko, applicants in Application N0. 1 of 2022 and Respondents in Application N0. 3 of 2022, through their lawyers filed consolidated submissions which entailed both its submissions on Application No. 1 of 2022, filed as Applicants and Application No. 3 of 2022 which was filed by the Attorney General of Burundi.

ISSUE NO. 1: WHETHER THE HONOURABLE COURT SHOULD ENTERTAIN THE RESPECTIVE APPLICATIONS, TO WIT APPLICATION N0. 1 OF 2022 AND APPLICATION N0. 3 OF 2022.

11. In their submissions, Applicants split this issue into two following issues:

A. Whether the Honourable Court should entertain Application No. 1 of 2022

B. Whether the Honourable Court should entertain Application No. 3 of 2022

A. Whether the Honourable Court should entertain Application No. 1 of 2022?

12. On this issue, Counsel for the Applicants relied on **Article 35(3) of the Treaty for the Establishment of the East African Community** which provides for avenues for review of Judgments by the Court as follows: -

> *"....An application for review of a judgment may be made to the Court only if it is based upon the discovery of some fact which by its nature might have had a decisive influence on the judgment if it had been known to the Court at the time the judgment was given, but which fact, at that time, was unknown to both the Court and the party making the application, and which could not, with reasonable diligence, have been discovered by that party before the judgment was made, or on account of some mistake, fraud or error on the face of the*

record or because an injustice has been done".

13. The Applicants submitted that the above provision is further elaborated in **the Rules of Procedure of the East African Court of Justice 2019 (The Rules)**. That **Rule 123** thereof provides that: -

"An application for review of a judgment under Article 35 of the Treaty shall be mutatis mutandis in accordance with Rule 83 of these Rules".

14. Rule 83 of the Rules provides as below: -

"(1) An application for review of a judgment under Article 35 of the Treaty shall be made in accordance with this Rule.

(2) A party who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within its knowledge or could not be produced by it at the time when the judgment was passed or the order made, or on account of some mistake, fraud or error apparent on the face of the record, or because an injustice has been done, desires to obtain a review of the judgment or order, may apply to the Court for review of the judgment without unreasonable delay.

(3) The Court shall grant an application for review only where the party making the application under sub-rule (2) proves the allegations relied upon to the satisfaction of the Court.

(4) When an application for review is granted, the Court may re-hear the case or make such other order as it thinks fit.

(5) Subject to the parties' right of appeal a decision made by

the Court on an application for review shall be final".

15. To buttress the above position, the Applicants referred this court, to the Decision of this Court in the **Independent Medico Legal Unit vs Attorney General of the Republic of Kenya**, Application No. 2 of 2012 of 1st March 2013, where this Court held that: -

> *"An application for review of a judgment may be made to the Court only if it is based upon the discovery of some fact which by its nature might have a decisive influence on the judgment if it had been known to the Court at the time the judgment was given, but which fact, at that time was unknown to both the Court and the party making the application, and which could not , with reasonable diligence, have been discovered by that party before the judgment was made or on account of some mistake, fraud or error on the face of the record or because an injustice has been done".*
>
> *To qualify for review under the above-quoted provision, an application needs to fulfil any, a combination or all the conditions specified immediately above. A prospective Applicant for review must adduce discovery of some new set of facts/ evidence which was not within the knowledge of the party and the Court at the time of the delivery of the judgment, and which the party or Court could not have discovered even if they deployed due diligence; or the impugned judgment must evince some mistake, fraud or error that is manifest on the face of the*

record; or, alternatively, the judgment, as is, must have given rise to a miscarriage of justice".

16. In the same spirit the Applicants referred this court to the case of **Paul John Mhozya vs The Attorney General of the United Republic of Tanzania**, Application No. 14 of 2018, that was delivered on 6th December 2019, Para 26, where the Court held that: -

> *"To qualify for review, an application needs to fulfil any or all the conditions specified therein. The Applicant must adduce discovery of some new set of facts/ evidence which was not within the knowledge of the party and the court at the time of delivery of judgment. The impugned judgment must evince some mistake, fraud, error that is manifest on the face of the record; or, alternatively the judgment, as is, must have given rise to a miscarriage of justice".*

17. To this effect, the Applicants submitted that during the hearing of Reference No. 4 of 2017, the Applicants did not have an opportunity to submit evidence on the value of the property because the prayers before the Court were not on compensation but on restitution (Paragraph 4 of the Applicants' submission).

18. That, subsequently, when the matter went to Appeal the Applicants (then the Appellants) did not adduce any evidence on the value of the property as again compensation in lieu of restitution was not in the prayers they had made before the Court.

19. That in both the First Instance and the Appellate Divisions of this Court, the Case Scheduling Conference Notes as directed by the respective Divisions only articulated restitution, and not compensation.

20. The Appellants averred that the Appellate Division of this Honorable Court has, in its wisdom and discretion, decided to order for compensation *in lieu* of restitution.

21. That however, there having been no record on the Court file that made reference to the value of the property in dispute, and neither documentary evidence nor testimony nor legal arguments submitted by the parties on the matter, the compensation of $50,000 given to each of the Applicants is extremely low and is an injustice to them. This is only with regard to compensation for the value of the plots of land, and not for the inconvenience suffered by the Applicants.

22. He further argued that subsequent to the Judgment of the Appellate Division, the Applicants sought the services of a duly licensed valuer to give a valuation of the properties in dispute and the said valuer indeed prepared valuation reports of the valued the properties as follows: -

Plot No. 01/1875j belonging to Niyongabo Theodore: **$183,754.79**

Plot No. 01/1875d belonging to Niyongabo Marie-Florido, represented by her husband Niyongabo Theodore: **$286,378.09**

Plot No. 01/1875b belonging to Niyungeko Gerard: **$246,103.37**

Plot No. 01/1875f belonging to Niyungeko Gerard: **$429,835.78**

23. The Applicants submitted that the Valuation Reports evidencing the value of the properties in dispute and which evidence would have helped this Court reach a decision as to the adequate or appropriate amount to give as compensation does fall within the scope of Article 35(3) of the Treaty and Rule 83 of the Rules on the basis that the amounts that the Court has ordered as compensation, when viewed against the actual values of the plots of land, evince a manifest injustice to the Applicants.

24. The Applicants averred that if the Court had the opportunity to consider evidence on the values of the plots of land prior to the judgment it would have arrived at a different figure for compensation for the actual value of the plots of land that would have given the Applicants just satisfaction, and therefore rendered justice; and that the failure to do the same has caused an injustice to the Applicants.

25. In support of the above position, the Applicants referred this Court to the case of **Krishan Bhardwaj and others vs State of H.P and Others,** Review Petition No. 39/2016 on 6 July 2017; pg. 6 where it was held that: -

> *"i. It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of last resort, whereby some accident, without any blame, the party has not been heard*

and an order has been inadvertently made as if the party had been heard.

ii. Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for the disturbing finality.

iii. The Court is thus not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for sake of justice".

26. The Applicants submitted that the Decision by this Court in Appeal No. 05 of 2022 awarding the Appellants USD 50,000 each as compensation for inconvenience and deprivation of property without due process is a miscarriage of justice as neither the Applicants nor the Respondent were given an opportunity to submit on the quantum for compensation since this was never a part of their prayers nor envisaged in the Agreed Issues as adopted in the respective Case Scheduling Conferences at either the First Instance or the Appellate Division of this Court.

27. Counsel for the Applicants mentioned that they were appreciative and are grateful for the Decision taken by the Court *suo motu* to grant compensation in lieu of restitution. The Court has noted that each of the two Applicants had two plots, coming to a total of four plots. In the said Judgment, the court awarded $50,000 to each of the two Applicants. A total of $100,000 for the four plots would work out to an

average of $25,000 per plot. The said Judgment does not explain or articulate how the Court arrived at these figures.

28. That the fact that this award is so low also violates the principle of just satisfaction which is one of the primary guiding principles behind the awarding of damages in common law that aim at ensuring awarding restoration to original condition. The following case illustrates this.

29. The Applicants relied also on the case of **Guiso-Gallisay vs Italy,** Application N0. 58858/00, European Court of Human Rights, para. 90 the ECHR held that: -

> *"As the Court has held on a number of occasions, a judgment in which the Court finds a breach imposes the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before breach".*

30. Based on the above, the Applicants also cited **The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law**, under Article 20, where it is provided that: -

"Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation".

31. That with the above jurisprudence and the Basic Principles and Guidelines, the Applicants submitted that the award given by this Court has not met the international principle to restore the Applicants as far as possible to the situation existing before breach as the said award is much less compared to the value of the land hence rendering an injustice to the Applicants.

32. The Applicants concluded on this issue by stating that, as the Judgment of the Court as it stands does not restore the Applicants to the situation they were in before the violations by the Respondent, and the lack of an opportunity for the Applicants (and also the Respondent) to submit on compensation before the same was awarded has resulted in a miscarriage of justice and thus meets the criteria for review provided in Rule 83(2) aforementioned.

B. Whether the Honourable Court should entertain Application No. 3 of 2022?

33. The Applicants in Application No. 1 of 2020 who are the Respondents in Application No. 3 of 2022 raised a Preliminary Objection on two points of law to Application No. 3 of 2022 based on the following: -

a. That the Application is fatally defective as it is **not** accompanied by an Affidavit, which is a mandatory requirement under Rules 52(5) and 83(1) of the Rules of Court.
b. The Application is fatally defective as it is an Appeal and a Cross-Application to Application No. 1 of 2022.

a) On Preliminary Objection 1: Whether the Application is fatally defective as it is not accompanied by an Affidavit.

34. Counsel for the Applicants raised a Preliminary Objection that Application No. 3 of 2022 is fatally defective as it is not accompanied by an Affidavit. This preliminary objection on the issue of Affidavit was dealt with in Application N0.6 of 2022 made by the Attorney General of the Republic of Burundi pursuant to Rule 48(c), 49, 51 and 52 of the East African Court of Justice Rules for the Court 2019 aiming to seek leave from this Court to amend the supporting affidavit in the Application No. 3 of 2022.

35. This Court in **Attorney General of the Republic of Burundi and Niyongabo Theodore and Niyungeko Gerard,** Application No. 6 of 2022 of 11th May 2022, allowed the amendments sought by the applicant. Therefore, the preliminary objection has been overtaken by events.

b) Preliminary Objection 2: Whether the Application is fatally defective as it is an Appeal to the Judgment rendered in Appeal No. 5 of 2020 and a Cross-Application to Application No. 1 of 2022.

36. The Respondent submitted that Application N0. 3 of 2022, is a Cross-Application as paragraphs 4 to 14 of the Notice of Motion for Application No. 3 of 2022 are exclusively dedicated to the issue of compensation which Counsel for the Applicants argued that this application needs to be struck out for being an afterthought and being a cross application to their own application which is not allowed by the Rules.

37. That in Application No. 3, the Applicant who is the Attorney General of Burundi has submitted two grounds for review. One, that there is a mistake or error apparent that has been committed by the Court in putting aside all the arguments that he provided with regard to issue No. 3 in Appeal No. 5 of 2020 and accusing him of not having submitted anything on the said issue No. 3. The second ground being that an injustice has been done to the Attorney General of Burundi.

38. Counsel for the Respondents argued that in his view, this Application No. 3 of 2022 does not fall under the scope provided for by Article 35(3) of the Treaty and Rule 83 of the Rules. He wondered if the applicant did really submit on issue No. 3. The answer is there is nothing in the paragraphs that the Applicant refers to that really make reference to issue No. 3. Furthermore, the failure to acknowledge the words that were used by the Applicant in submissions would in no way affect the substance of the judgment that this Court made.

39. That as to Application No. 3 of 2020 being an Appeal, the Respondents reiterated that the main ground for review that the Applicant

relied upon is that: -

> *"A mistake or error has been committed by the Court by putting aside all the arguments provided by the Applicant (The Respondent in the Appeal No. 5 of 2020) in relation to Issue No. 3 by accusing him to not having written anything on that issue".*

40. The Respondent further submitted that, the Applicant (in Application No. 3 of 2022) then proceeded to argue on the points that he had already submitted on during the Appeal.

41. That, in paragraph 2 of the Notice of Motion, the said Applicant refers the Appellate Division to his submissions of 13th January, 2021. That similarly, in paragraph 7, he reiterates his argument already submitted (and decided upon by the Appellate Division of this Court), that the Tribunal of Muha, by directing "...the parties to sort out themselves without ascertaining the compensation did not violate the principle of *bona fide* purchaser for value nor did it fail to guarantee the right to property as enshrined in national laws and international instruments". In paragraph 8, he added that "In fact by doing so, [the Tribunal of Muha] recognized that the Applicants (now the Respondents) had the right to property and as such they had to make arrangements with the Seller of the disputed land". The Respondent stated that these arguments in paragraphs 7 and 8 of the Respondent's Application for review were submitted in paragraph 22 of the Respondent's submissions of 13th January 2021, and summarized in the Appellate Division's Judgment of 26th November, 2021 at paragraph 104.

42. The Respondent relied on the case of, **Independent Medico Legal Unit vs the Attorney General of the Republic of KENYA**, Application No. 2 of 2012 arising from Appeal No. 1 of 2011 while dismissing an application for review that was brought before the court on the ground of mistake, fraud or error apparent on the face of the record, held that: -

> *"Thus, right from the start the confusion arises between whether the Applicant is seeking a review or an appeal. It is quite clear that the Applicant took great exception to a great number of the Court's findings, views and holdings contained in the impugned judgment. But then, the law on how to treat this kind of situation is equally clear:*
>
> *The review jurisdiction of the Court cannot be exercised on the ground that the decision of the Court was erroneous on merit. That would be in the province of a Court of Appeal.*
>
> *A review cannot be sought merely for fresh hearing or arguments or correction of an erroneous view taken earlier. A review proceeding cannot be equated with the original hearing of the case.*
>
> *The purpose of the review jurisdiction is not to provide a back door by which unsuccessful litigants can seek to re- argue their cases.*
> *As the expression "error apparent on the record" has not been definitively defined by statute, etc, it must be determined by the Courts sparingly and with great caution.*

The "error apparent" must be self-evident; not one that has to be detected by a process of reasoning.

No error can be said to be an error apparent where one has to "travel beyond the record" to see the correctness of the judgment.

It must be an error which strikes on mere looking at the record, and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions".

43. The Respondent further referred this court to the case of **Haridas Das vs Smt. Usha Rani Banik and others,** the Supreme Court of India on 21 March 2006 decided on the scope of review application on the ground of mistake or error apparent on the face of the record, where it held that: -

"There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error. Where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made".

44. Further to the above the Respondent submitted that there is nothing in Application No. 3 of 2022 that falls within the scope of what

would be a mistake or an error apparent. The arguments advanced by the Applicant (in Application No. 3 of 2022) are a rehash of his arguments made before the First Instance and Appellate Divisions of this Court and hence it is nothing but an attempt to appeal against the decision of the Court.

45. That neither the Treaty nor the Rules allow for any party to submit a "Cross- Application for review", i.e. an Application for review against an Application for review. While Rule 102 of the Rules allows explicitly for a possible "Cross-Appeal", no similar provision is provided for in the same Rules regarding the Application for review. If it was the intention of the authors of the Treaty and /or of the Rules to allow for a "Cross-Application for review", they would have provided for it in explicit and clear provisions like they did for appeal and cross-appeal. The Applicant filed Application No. 3 in *lieu* of filing a response to Application No. 1 of 2022 and hence this is a Cross-Application for review.

46. The Respondent argued that there is nothing that the Applicant (in Application No. 3) can plausibly say that cannot be adequately be said by way of a response to Application No. 1 of 2022.

c) Substantive Submissions on Application No. 3 of 2022

47. The Applicants in Application No. 1 (supra) and Respondents in Application No. 3 (supra) submitted that should the Court deem it fit to not

uphold either or both of the two Preliminary Objections, that the court should consider the Respondents substantive submissions as below.

48. The Respondents submitted that the Applicant in Application No. 3 of 2022 (the Hon. Attorney General of Burundi) has framed two grounds on which he is seeking a review, to wit: -

i. **A mistake or error apparent has been committed by the Court by putting aside all the arguments provided by the Applicant (The Respondent in Appeal No. 5 of 2020) towards issue No. 3 by accusing it of not having written anything on the issue.**

ii. **An injustice has been done to the Applicant (in Application No. 3 of 2022).**

49. The Respondents reiterated all the arguments under paragraphs 38 to 45, of the Respondent's submission, which demonstrate that this Application does not fall within the scope of Article 35(3) of the Treaty and Rules 83 of the Rules and should therefore be dismissed because it fails to satisfy the requirements of those provisions.

50. The Respondents mentioned that the issue for determination that the Applicant refers to as having given rise to a mistake and an error apparent is issue No. 3 as per the Scheduling Conference Notes for Appeal No. 5 of 2020 which was: -

"Whether the 1st Instance Division committed a procedural irregularity by failing to exercise its inherent powers to seek information that was vital to base its judgment".

That the question is: Did the Applicant really submit on this issue?

51. The Respondents contended that the Applicant stated that in paragraphs 17-20 of his submissions, filed in Court on 13th January, 2020 that he submitted on this issue.

52. However, looking at the said paragraphs it does not show any submission on the issue for determination by the Court. The Applicant merely reminded the Court that the issue that was before the First Instance Division was related to the absence of reasons in the Judgment rendered by the "*Tribunal de Grande Instance*". The Applicant further submitted at paragraphs 16 to 20 the reasons for the Annulment of the Attested Affidavit and then reiterated his submissions in the First Instance Division.

53. Counsel for the Respondents argued that the above mentioned paragraphs did not in any way address the issue as to "*Whether the First Instance Division committed a procedural irregularity by failing to exercise its inherent powers to seek information that was vital to base its judgment*". The issue is not even mentioned in the paragraphs that the Applicant alleged to have addressed this issue.

54. That there is also no connection as to how the failure to acknowledge the words that were used by the applicant in the submissions would affect the substance of the judgment of this Court.

55. That the alleged error or mistake by the Applicant would require scrutiny and re-opening of evidence to determine whether this exists or not and this goes against the rules that governs what qualifies as a mistake or error apparent because an error apparent should be self-evident and does not require elaborate argument to be established.

56. In support of this position, Counsel for the Respondent relied on the two authorities which are **Nyamogo & Nyamogo Advocates v Moses Kipkolum Kogo,** Civil Appeal No. 322 of 2000 and **National Bank of Kenya Ltd vs Ndungu Njau,** Court of Appeal, at Nairobi, the Republic of Kenya, Civil Appeal No. 211 of 1996, which decided that an error should stare one in the face and should be a clear case that does not need a long drawn out process of reasoning.

57. Counsel for the Respondents submitted that the second ground that the Applicant raised in his Application No. 3 of 2022 is that there was an injustice done by the Appellate Division of this Court when in its judgment, at paragraph 117, the Appellate Division of the East African Court of Justice held that: -

> *"The Tribunal of Muha had failed to ascertain compensation leaving it to the parties to sort out themselves without ascertainable and enforceable consequential orders and in so doing, therefore has abdicated its functions".*

Therefore, in so criticizing the decision of the Tribunal of Muha in that way, this Court has done an injustice.

58. Counsel for the Respondents submitted that this cannot be termed as an injustice. It is a fact that the Tribunal of Muha did not rule on compensation. The Tribunal of Muha merely annulled the title deeds of the respondent and then asked the parties to go out there and make their own arrangements or in other words: "go sort yourselves" out there. So, the

Appellate Division was right in pointing this out and doing so is not an injustice to the Attorney General who is the applicant.

59. Counsel for the Respondents submitted that the Attorney General argues that the Tribunal of Muha should not have been faulted on the question of compensation as this issue of compensation was not placed before it. Whereas the Tribunal of Muha acknowledged the current Respondents had the right to property and doing so it ought to have pronounced itself on compensation in order to protect that right and not to ask parties to "make other arrangements".

60. He quoted the famous case of **Earl Versus Sussex**, *ex parte* McCarty [1924] 1KB 256, [1923] All ER Rep. 233 where it was held that: -

"Justice must not only be done, but should be seen to be done".

Therefore, the decision of the Tribunal of Muha cannot by any stretch of imagination be said to have manifestly done justice to the respondents when it acknowledged their right to property and then told them, with regard to how to vindicate the said right property, to go and sort themselves out with the people with the parties with whom they have been litigating. Throwing the ball back to the parties to "make other arrangements" was therefore an abdication of the duties of the judicial officers in Burundi.

61. Counsel for the Respondents submitted further that the Attorney General in his Application No .3 of 2022 alleged that the land in question is in any case still in the hands of the Respondents. This is false, and is a misrepresentation of the true facts, which is that the Respondents in Application No. 3 do not enjoy the right of the land in dispute nor are they in

possession of the same. It is also prudent to note that this is the first time the Applicant is raising this allegation. If indeed the land never changed hands, the Respondents would not even be in Court now.

62. The Respondents submitted that in paragraph 11 of Application No. 3 of 2022, the Attorney General argued that "the failure of a Tribunal of First Instance should not lead to compensation to any party by the State while errors and irregularities of such Tribunal could be corrected by a higher Court in the system"

63. That the Applicant seems to suggest that the Respondents should have exhausted local remedies before filling the Reference at the First Instance Division of this Court. This legal position was sorted out a very long ago in the case of **Anyang' Nyong'o & 10 others v Attorney General & others, Reference No 1 of 2006** of which this Court has cited and relied upon on several occasions.

64. That paragraph 12 and 13 of Application No. 3 of 2022 suggests that in case this Court should decide to review its judgment, it humbly requests to take into account the Ministerial Ordinance No. 720/CAB/304/2008 of 20th March 2008 concerning the compensation in case of expulsion from land or property in the public interest which provides for rates of compensation depending on where the concerned land property is located; and that even by application of aforementioned Ordinance, the

compensation the Applicants would have obtained would have been less than what they have been awarded.

65. The Respondents argued that the Ministerial Ordinance which the Attorney General of Burundi is relying upon is inapplicable to the current case. That the Ordinance was supposed to guide compensation for land compulsorily acquired in the public interest which is not the case here. They also pointed out that the 2008 tariffs cannot in any case be used for the assessment of the market value of land properties in 2022, fourteen (14) years later given that the value of land has increased over years, as it is usually the case.

66. The Respondents submitted that experts in Burundi use a methodology in line with the international standards recognized in the field. According to that methodology, the market value of land in similar plots in the same site is the same taking into account the recent sale values of certain plots located in the same locality.

II. RESPONDENTS' SUBMISSIONS IN APPLICATION N0. 1 OF 2022.

a) Preliminary Objection related to the delay of time by Applicants in Application No. 1of 2022.

67. In his submissions in Response to the Application No. 1 of 2022, the Attorney General of Burundi raised a preliminary objection relating to the delay by the Applicants in filing written submission in respect of Application No. 1 of 2022. That the Applicant filed the written submissions with the Registry of this Court on the 12th April 2022. While during the Scheduling Conference which was held on 25th February 2022, the court ordered the Applicants in the Application No. 1 of 2022 to file their written submissions within a period of 30 days which expired on 25th March 2022.

68. That the written submissions of the Applicants in Application No. 1 of 2022 lodged on the 12th day of April 2022 have been lodged 15 days after the expiry of the period of 30 days ordered by the Court within which the Applicants had to lodge them.

69. The Attorney General of the Republic of Burundi relied on two authorities to support this Preliminary objection, which are **The Attorney General of Uganda and the East African Law Society vs Secretary General of the East African Community,** Application No. 17 of 2014 arising from Reference No. 2 of 2011, whereby the key principles of the case are non-compliance with Court's orders and rules. It was held that since the application had not complied with the directions of the Appellate Division and Rules 22(1) and 23(1) of the Rules, it was struck out. Furthermore, in **La Dolce Vita Fine Dining Co Ltd v Zhang Lan,** HCMP page 585-586/2017 (14 March 2018; 5 March 2019), the Court held that the

first principle is that Court orders are made to be obeyed. They are not guidelines to be ignored or paid lip service to the disadvantage of the parties affected.

70. The Attorney General of the Republic of Burundi concluded on this preliminary objection praying to the Court that the written submissions lodged with a delay of 15 days with no leave of the Court be struck out because they are prejudicial.

b) Respondents' substantive submissions

ISSUE NO1: WHETHER THIS COURT SHOULD ENTERTAIN THE RESPECTIVE APPLICATIONS, TO WIT APPLICATION NO. 1 OF 2022 AND APPLICATION NO. 3 OF 2022?

a) Application No. 1 of 2022.

71. The Respondent in dealing with Issue No. 1 aforementioned, argued that the Applicants having mentioned that the content of Article 35 (3) of the EAC Treaty and Rule 83 read together with Rule 123 of the Rules of the Court of 2019, are trying to demonstrate that the in the First Instance Division and the Appellate Division of this Court did not pray for compensation but rather the prayer of restoration, that their Application for review based on the market value of the land is a new fact discovered after the Court has rendered its Judgment.

72. The Attorney General of the Republic of Burundi relied on that the content of Article 35 (3) of the EAC Treaty, to demonstrate that the act of

asking for restoration of the property and ignoring to ask for compensation if the property concerned is not restored amount to lack of reasonable diligence on the part of the party seeking the property to be restored.

73. That Article 35 of the EAC Treaty provides: -

> "*An application for review of a judgment may be made to the Court only if it is based upon the discovery of some fact which by its nature might have had a decisive influence on the judgment if it had been known to the Court at the time the judgment was given, but which fact, at that time, was unknown to both the Court and the party making the application, and which could not,* ***with reasonable diligence****, have been discovered by that party before the judgment was made, or on account of some mistake, fraud or error on the face of the record or because an injustice has been done" [our emphasis].*

74. That reading the relief sought by the Applicants, be it in Application No. 1 of 2022, or in the Reference No. 4 of 2017, or in Appeal No. 5 of 2020 seeking for an order to restore the property rights of the Applicants and their respective heirs or assigns, the Applicants' prayer can only be operationalized through the annulment of the Judgment in RC 069/16 863 rendered by the Tribunal de Grande Instance of MUHA.

75. That this Court is not vested with the jurisdiction to annul judgments rendered by the Partner States but rather to determine whether the judgments of National judicial Organs do violate the provisions of the

Treaty, a diligent Applicant would not have maintained a prayer that is impossible to grant.

76. The Respondent relied on the jurisprudence in, **Independent Medico Legal Unit vs the Attorney General of the Republic of KENYA**, Application No. 2 of 2012 arising from Appeal No. 1 of 2011 where this Court held that: -

> *"An application for review of a judgment may be made to the Court only if it is based upon the discovery of some fact which by its nature might have a decisive influence on the judgment if it had been known to the Court at the time the judgment was given, but which fact, at that time was unknown to both the Court the party making the application, and which could not, with reasonable diligence, have been discovered by that party before the judgment was made ....."*

77. The Respondent submitted that the fact that the Applicants instead of asking for compensation asked only for the property to be restored knowing well that this Court is not vested with the jurisdiction to annul the Judgments rendered by a partner State amounted to lack of diligence on their part.

78. The Attorney General of the Republic of Burundi further argued that the value of the properties was known by the Applicant at the time this Court rendered its Judgment so a diligent Applicant would have produced it to the Court.

79. The Attorney General of Republic of Burundi concluded on this issue by saying that if this Court fails to strike out the Application No. 1 of 2022 by striking out the written submissions filed out of time with no leave of the

Court, then it should hold that Application No. 1 of 2022 does not fulfill the requirements of Article 35 (3) of the EAC Treaty.

b) Application No. 3 of 2022

80. The Attorney General of the Republic of Burundi provided the following arguments in respect of Application No. 3 of 2022,

81. The Attorney General of Burundi, who is the Applicant in the present application, submitted that under their first preliminary objection raised by the Respondents, they mentioned in their written submissions that the Application No. 3 of 2022 is fatally defective as it is not accompanied by an Affidavit.

82. Although the Attorney General of Burundi submitted at length on this preliminary objection on the defective Affidavit, this has been sorted out in **Attorney General of the Republic of Burundi and Niyongabo Theodore and Niyungeko Gerard** (supra) where this Court allowed the amendments sought by the applicant. So, there is no need to reproduce the submissions here.

83. The Attorney General of Burundi further submitted that in the second preliminary objection, the Applicants submitted that Application No. 3 is fatally defective as it is an Appeal to the Judgment rendered in Appeal No. 5 of 2020 and a cross-Application to Application No. 1 of 2022.

84. From Paragraphs 38 to paragraph 45 of the Applicants' written submissions the Respondents are trying to show that the Application No. 3

of 2022 is an Appeal against Appeal No. 5 of 2020 and a cross Application to Application No. 1 of 2022 made by the Applicants.

85. In Application No. 3 of 2022, the Attorney General of the Republic of Burundi has given two grounds of review in which he is basing the application for review namely on mistake or error committed by the Court and injustice done to the State of Burundi in Appeal No. 5 of 2020.

86. That the two grounds put forward by the Attorney General of the Republic of Burundi in the said Application are all provided for under Article 35 (3) of the EAC Treaty but not under Article 35 A which provides for the appeal.

87. The Applicants were distorting the elements submitted to this Court in the Application No. 1 of 2022 as constituting a mistake or error committed by this Court in the Appeal No. 5 of 2020.

88. The Respondent submitted that, **in P.Parvatham vs The Secretary to Government, Social Welfare and Nutritious Meal Programme and Others,** Application for Review (MD) No. 38 of 2016 [paragraph 54-c, iv, (15)], the High Court of MARAS also held: -

> *"The term 'mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection therefore requires long debate and process of reasoning, it cannot be treated as an error apparent...To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in*

law or on the ground that a different view could have been taken by the Court/Tribunal on a point of fact or law."

89. That, the mistake or error committed by the Court in Appeal No. 5 of 2020 as already demonstrated by the Attorney General of the Republic of Burundi hereunder is the failure to consider by the Justices of Appeal of all the arguments made by the Attorney General toward the issue No. 3 in the Appeal No. 5 of 2020. This mistake or error is apparent.

90. That, in fact, the impugned Judgment reads as follows: -

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

91. That however, on paragraphs 17 up to 20 of the Respondent's written submissions on record of the Court (in Appeal No. 5 of 2020) lodged with the Sub-registry of Bujumbura on 13th January 2021, the Attorney General of the Republic of Burundi submitted as follows: -

"As far as issue C is concerned, the Respondent wishes to remind that the question that was before the 1st Instance Division of this Honorable Court was the one related to the absence of reasons in the judgment rendered by the "Tribunal de Grande Instance" of MUHA that would amount to the infringement of Burundian Laws thus the Treaty.

The Court by reading the said judgment discovered that the main reason given by the Tribunal of de Grande Instance "is that the 3rd Applicant's attested Affidavit having been nullified by the Supreme Court, the Title deeds of the 1st and 2nd Applicants are nullified as well.

In addition, the Respondent wishes to reiterate the arguments given in paragraph 15 of the present written submissions so as to strengthen that the case rendered by the "Tribunal de Grande Instance" of MUHA is well motivated on the question relating to the fraud on the side of the 3rd Applicant.

Since the question of fraud on the side of the 3rd Applicant (Manariyo Desire) is no longer an issue neither in national courts nor before this honorable court, there is no need of further information to be sought from parties..."

92. That the above premise is a proof that there has been a mistake or an error on the face of the record. And based on this position, the Respondent contended that the Application for Review No. 3 of 2022 is neither a disguised Appeal nor a Cross-Application.

93. The Attorney General of the Republic of Burundi contended that, in respect of those submissions made in Appeal No. 5 of 2020, that the Court clearly held that there was absence of the Respondent's submissions toward issue No. 3 of Appeal No. 5 of 2020.

94. That if it was a question of the quality of the arguments, the Court would have confronted those arguments with the arguments of the

Applicants and the content of the judgment made in Reference No. 4 of 2017 and come up with the conclusion that the arguments made are not appropriate to the said issue.

95. And that, the mistake or error committed by the Court is the failure of taking into account the arguments given by the Respondent (Attorney General of the Republic of Burundi) that put the latter in a disadvantage situation *vis-à-vis* the other party.

96. The Attorney General of the Republic of Burundi further submitted that the error committed by the Court in Appeal No. 5 of 2020 is an apparent error *per se* that does not require detailed examination. So, the Attorney General of the Republic of Burundi referred to, **National Bank of Kenya Limited vs Ndungu Njau** (supra) where the Court held that a review may be granted whenever the Court considers necessary to correct an apparent error or omission on the part of the Court. The Attorney General of the Republic of Burundi submits that this Court therefore has to correct the omission done by it in the Appeal No. 5 of 2020.

97. The Attorney General of the Republic of Burundi in response to the preliminary objections raised by the Respondents in Application No. 3 of 2022, on the omission of the arguments given towards the issue No. 3 of the Appeal No. 5, referred to his submissions at paragraphs 1-21 and in paragraphs 46 to 57 of Respondents' submissions, the responses are detailed under paragraphs 49 to 69 of the Attorney General's submissions.

98. On the arguments of who is in possession of the disputed lands, without reproducing verbatim the Attorney General's submission, he is saying that even the Applicants recognized that they were in possession of the land in paragraph 159 of their submissions in the First Instance Division. He referred also to paragraphs Nos. 50-57 of the Notice of Motion for review in Application No. 3 of 2022.

99. In summary from paragraphs 40 up to 48 of the submissions of Application No. 3 of 2022, the Attorney General of the Republic of Burundi is referring to the paragraphs where he responded to the preliminary objection of the Respondents on exhaustion of local remedies, the issue of compensation before the Tribunal of Muha and on the injustice done to the state of Burundi by awarding compensations to persons who are in possession of their properties and in general responding (but again this is repetition) on how Application No. 3 of 2022 does comply with Article 35 (3) of the EAC Treaty.

III. GROUNDS FOR REVIEW IN THE APPLICATION N0. 3 OF 2O22

A. Mistake or error committed by the Court

100. On this issue, the Applicant reproduced verbatim paragraph 86, of the judgment in Appeal No. 5 of 2020 where the court held that the then Respondent did not submit on issue No. 3. He also reproduced

paragraphs 17 to 20 of the Respondents' submissions on the Record of the Court in Appeal No. 5 of 2020 (which was reproduced supra paragraph 87).

101. The Applicant also reproduced the content of paragraph 15 cited in paragraph 19 which refers to the fraud established in the Reference by the First Instance Division.

102. He avers that the error or mistake committed by the Judge by putting aside his arguments toward issue No. 3 in Appeal No. 5 of 2020 (supra) amounts to violation of the adversarial principle and consequently violated his rights to a fair trial.

103. He further argued that by voluntarily excluding the facts and arguments as presented by the Attorney General of the Republic of Burundi towards issue No. 3 in the Appeal No. 5 of the Appellate Division has placed him in a disadvantage that amounts to substantive procedural irregularity that should not be accepted. Therefore, the error or mistake committed by the Judges of the Appellate Division of this Court is sufficient in itself to review the impugned Judgment.

104. In support of the above position, the Attorney General of the Republic of Burundi cited the following authorities: -

i) **Mr.N. Balakrishnan vs M/s.S. Prabha,** *Review Applications (MD) Nos 193 and 194 of 2018, High court of MADRAS* held: -

> *"It is the duty of the court to rectify, revise and re-call its orders and when it is brought to its notice that certain of its orders were passed on wrong or mistaken assumption of facts and that implementation of those orders would have serious*

consequences. An act of court should prejudice none". (See paragraph 19 of the said judgment).

ii) **P.Parvatham vs The Secretary to Government Social Welfare and Nutritious Meal Programme and others** (supra) the Court held: -

> *"If the court finds that the error pointed out in the review petition was under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice nothing would preclude the court from rectifying the error".*

iii) And the same Court in the same Application (paragraph 54, c, iv,15) held: -

> *"The term 'mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or legal position. If an error is not self-evident and detection therefore requires long debate and process of reasoning, it cannot be treated as an error apparent ...To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or of law".*

B. Injustice has been committed

105. Furthermore, the Attorney General of the Republic of Burundi submitted that, an injustice was committed in paragraph 117 of the said Judgment, the Appellate Division of this Court accused the judge of the Tribunal of MUHA: -

- **To have failed to ascertain compensation and leaving it to the parties to sort it out themselves without ascertainable and enforceable consequential orders, and**
- **To have abdicated to his functions**.

106. It is the Applicant's contention that the question of determining compensation had not been put before the Tribunal of MUHA by either of the parties, it was rather to decide on the legality of the sale agreements between MANARIYO Desire and NIYONZIMA Scholastique on one hand and between MANARIYO Desire and NAHIMANA Deo on the other hand.

107. To submit on this ground of review which is related to the injustice committed against the Republic of Burundi, the Applicant presented three arguments as hereunder.

108. The Applicant argued that the injustice committed by this Court is firstly related to the decision of the Tribunal de Grande Instance of Muha. That the Tribunal de Grande Instance of Muha has been criticized by this Court to have failed to ascertain compensation and therefore to have abdicated to its functions. Whereas the compensation was not an issue before the Judge of the Tribunal de Grande Instance of Muha thus being

omitted by the law in the answer to the question put forward before it, it had no obligation to the parties to ascertain compensation.

109. That as demonstrated in all its written submissions, the Tribunal had no obligation to the parties to ascertain compensation and it is not fair to find that the tribunal abdicated its judicial function through the only decision rendered by the First Instance Division that would have been reviewed by the Appellate Court.

110. The Attorney General of the Republic of Burundi further argued that the compensation of USD Fifty thousand (50,000) to each of the appellants in the Appeal No. 5 of 2020 is an injustice committed against the Republic of Burundi because first, the properties concerned are up to this day in the hands of the appellants in Appeal No. 5 of 2020 because the Judgment rendered by the *Tribunal de Grande Instance* of Muha had not yet been overturned. Secondly, the compensation of USD Fifty Thousand (50,000) to each of the two appellants for properties in the hands of a private individual is also a grave injustice done to the State of Burundi.

111. That thirdly, the Applicant submitted that even if they were in need of compensation which is not the case, the Court should have considered the Ministerial Ordinance No. 720/304/2008 of 20th March 2008 concerning the compensation in the case of expulsion from land properties for purpose of public interest. It is the only law that is in force in Burundi relating to compensation. It is the only law in land compensation.

112. By applying that Ministerial Ordinance, one square meter of an unbuilt plot of land in the areas where the concerned land property is located is compensated at the rate of Two Thousand Five Hundred (2,500)

Burundian Francs per sqm, that is, Two Hundred fifty thousand Burundian Francs (250,000) for one 1 acre, which is very different from the Burundian Francs 9,000,000 per 1 acre they are seeking.

113. For all the reasons mentioned above, the Attorney General of the Republic of Burundi submitted that this Court should grant the review of the Judgment in Appeal No. 5 of 2020 rendered on 26th November, 2021 as the Application No. 3 of 2022 is properly before this Court and falls in the scope of Article 35(3) of the East African Community Treaty.

DETERMINATION BY THE COURT

ISSUE NO. 1: WHETHER THE HONOURABLE COURT SHOULD ENTERTAIN THE RESPECTIVE APPLICATIONS, TO WIT APPLICATION N0.1 OF 2022 AND APPLICATION N0. 3 OF 2022

A. Whether the Honorable Court should entertain Application No. 1 of 2022.

a) Preliminary Objection related to the delay of time by Applicants in Application No. 1of 2022.

114. In his submissions, the Respondent raised a preliminary objection in respect of the delay in filing written submissions by the Applicant in Application No. 1 of 2022.

115. The Respondent submitted that the delay was not justified. That the Applicant filed the written submissions with the Registry of this Court on the 12th day of April 2022. However, during the Scheduling Conference which was held on 25th February 2022, the court ordered the Applicants in Application No. 1 of 2022 to file with their written submissions within a period of 30 days which expired on 25th March 2022.

116. That the written submissions of the Applicants in Application No. 1 of 2022 lodged on the 12th day of April 2022 had been lodged 15 days after the expiry of the period of 30 days ordered by the Court.

117. The Attorney General of the Republic of Burundi cited following authorities relied on to support this Preliminary objection, that is **The Attorney General of Uganda vs The East African Law Society and the Secretary General of the East African Community,** Application No. 17 of 2014 (arising from Reference No. 2 of 2012), whereby the key words of the case are non-compliance with Court's orders and rules. It was held that since the application had not complied with the directions of the Appellate Division and under Rules **22(1) and 23(1) of the Rules,** the application was struck out.

118. The Respondent also relied on the case of **La Dolce Vita Fine Dining Company Ltd vs Zhang Lan, 2019** (supra), where the Court held that the first principle is that Court orders are made to be obeyed. They are not guidelines to be ignored or paid lip service to the hast of the parties affected.

119. The Attorney General of the Republic of BURUNDI who is the Respondent submitted that these written submissions lodged with a delay of 15 days with no leave of the Court have to be struck out because they prejudiced the Attorney General of the Republic of Burundi.

b). Applicants defense on the Preliminary Objection

120. To respond to the preliminary objection, Counsel for the Applicants made an oral application under Rules 4, 5 and 52(7) of the Rules of Procedure for their written submissions in chief to be admitted and to be deemed to have been filed on time. He admitted that indeed the filing of submissions delayed for two weeks. He apologized as this was due to another urgent and intense agenda that made the Counsel not able to make sufficient arrangements for the work to be concluded and filed in his absence and on time, so he apologized.

121. He argued that he believes that the respondent has not been inconvenienced in any way by that delay in view of his ability to respond and in fact to file an additional Application No. 6 of 2022 which this Court has just disposed of. That In any case, if he can claim and prove any inconvenience, Counsel for Applicants request that it be awarded in costs as against the Applicants.

c) Determination by the Court on the Preliminary objection in respect of Application No. 1 of 2022.

122. This Court has carefully analyzed the submissions by both parties, the Respondent submissions and the Applicants with regard to the objection submitted by the respondent in as far as Application No. 1 of 2022 is concerned.

123. The Court considered whether the delay by the Applicant to lodge their submissions by 25th March 2022, as instructed during the Scheduling Conferences held on 25th February 2022, caused any prejudice to the Respondent.

124. However, this Court finds that the Respondent did not in any way demonstrate the prejudice he suffered caused by the Applicant's delay to lodge submissions on the date they were supposed to be submitted. The Respondent did not even mention the law or provision violated by the act of the Respondents.

125. This court declines to be persuaded by the Respondent's claims based on technicalities, as this would stand to block the administration of justice without a justified reason.

126. This Court has been persuaded by the position which was arrived at, in the **Mr. N. Balakrishnan vs M/s. S. Prabha (supra)** where it was held that: -

"It cannot be denied that Justice is a virtue which transcends all barriers and the rules of procedures or technicalities of law cannot stand in the way of administration of justice"

127. Based on the above premises and under Rule 4 of the Rules of the Court 2091, this Court overrules the preliminary objection raised by the Respondent in Application No. 1 of 2022.

1. Applicants' submissions in application No. 1 of 2022.

128. In his submissions on the Application for review on the ground of an injustice that has been done to his clients. Counsel for the Applicants considered the lumpsum of USD 50,000 for compensation for both inconveniency and deprivation of property or the value of the property and found that it was grossly insufficient and it is on this basis that they filed Application No. 1 of 2022.

129. On this issue, Counsel for the Applicants relied on Article 35(3) of the EAC Treaty and the Rules of this Court, Rule 123 that refers back, *mutatis mutandis*, to Rule 83 of the Rules of the Court merely elaborate on the grounds of review.

130. To support the above position, the Applicants also referred this court, to the two decisions of this court. The first one being the **Independent Medico-Legal Unit vs The Attorney General of the Republic of Kenya** (supra) which outlines the conditions under which a review may be granted and the second one is **Paul John Mhozya**

vs The Attorney General of the United Republic of Tanzania (supra), which emphasizes the point that to qualify for review the judgment must have caused a miscarriage of Justice.

131. Counsel for the Applicants argued at length that the issue that was before the Court was restitution not compensation even though they did not have an opportunity to submit evidence on the value of the property. He further averred that the Appellate Division of this Court has, in its wisdom and discretion, decided to order an unreasonable compensation of $50,000 to each appellant *in lieu* of restitution which is extremely low and is an injustice to them.

132. He further argued that pursuant to the Judgment of the Appellate Division, the Applicants sought the services of a duly licensed valuer to give a valuation of the properties in dispute and the said valuer indeed prepared valuation reports evidencing the value of the properties (see paragraph 17).

133. The Applicants averred that if the Court had the opportunity to consider evidence on the value of the plots of land prior to the judgment it would have arrived at a different figure for compensation for the actual value of the plots of land that would have given the Applicants a just satisfaction, and therefore rendered justice; and that the failure to do the same has caused an injustice to the Applicants.

134. In support of the above position, the Applicants referred this Court to the case of **Krishan Bhardwaj and others, vs State of H.P and Others** Review Petition No. 39/2016 (of 6 July 2017); pg. 6 which

ruled on the necessity of reviewing an order for the sake of justice; when a party has not been heard on an issue.

135. The Applicants relied also on the case of **Guiso-Gallisay v Italy the ECHR, Application N0. 58858/00, European Court of Human Rights, para. 90** on the need for courts making reparations in such a way in order to restore as far as possible the situation existing before the breach.

136. Based on the above, the Applicants cited also **The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law**, at Article 20, which refers to the same principle of just, satisfaction and the succeeding litigant being put in as much as possible to the situation that he or she was in before the violation.

137. That with the above jurisprudence and the Basic Principles and Guidelines, the Applicants submit that the Judgment of the Court as it stands does not restore the Applicants to the situation they were in before the violations by the Respondent, and the lack of an opportunity for the Applicants (and also the Respondent) to submit on compensation before the same was awarded has resulted in a miscarriage of justice and thus meets the criteria for review provided in Rule 83(2) aforementioned.

2. Respondents' submissions in application No. 1 of 2022.

138. The Respondent dealing with the Issue No. 1 aforementioned, he argued that the Applicants having mentioned the content of Article 35 (3) of the EAC Treaty and Rule 83 read with Rule 123 of the Rules of the Court of 2019, that the Applicants are trying to demonstrate that it was never an issue of compensation but rather the prayer of restoration all along the proceedings from First Instance Division.

139. That the Applicants are trying to bring up a new issue of valuation and what would be adequate compensation which was not submitted on purely because it was not an issue that was before this Court.

140. That in the applicant's submissions and rejoinder, they submitted that they based their application for review solely on the fact that this Court *suo motu* granted each of the two applicants in Application No. 1 of 2022, a lump sum of USD 50,000 for the inconvenience and deprivation suffered without hearing them on the properties' market value is an injustice to them.

141. The Attorney General of the Republic of Burundi maintains his argument that the fact of not putting forward before the Court the issue of compensation of the parties on market value amounted to lack of due diligence on the side of the opposite party.

142. The Attorney General of the Republic of Burundi reiterated that the content of Article 35 (3) of the EAC Treaty, that so as to demonstrate that

the fact of asking to restore the property and ignoring to ask for compensation if the property concerned is not restored amounted to the lack of reasonable diligence on the side of the party claiming the property to be restored.

143. The Attorney General of the Republic of Burundi submitted that this Court should dismiss Application No. 1 of 2022 as it does not fulfil the requirements of Article 35(3) of the East African Treaty.

B. DETERMINATION OF THE COURT ON SUBSTANTIVE SUBMISSIONS IN APPLICATION No. 1 of 2022

144. On whether the Court should entertain Application No. 1 of 2022, with regard to this issue, the Applicants filed this Application under Article 35(3) of the EAC Treaty, Rule 83, and 123 of the Court Rules of procedure of 2019. It is true that either of the parties to the case, may seek review of the judgment rendered by this court based on these provisions as highlighted above, and the respective cited case laws.

145. Now, it is the duty of this court to find out the basis for review and whether the application is in line with the claims submitted by the Applicant. Based on the above case laws, it is undisputable that the grounds of review must be categorically justified and must be evident in the impugned Judgment.

146. In their submissions (paragraph 14), the Applicants submitted that they did not have an opportunity to submit evidence on the value of the

property because the prayers before the Court were not on compensation but on restitution and that subsequently when the matter went to Appeal the Applicants, the then Appellants did not adduce any evidence on the value of the property, and at that time, compensation in lieu of restitution was not in the prayers that they had made before the Court.

147. On the Applicants' grounds of seeking review of the disputed Judgment, they are of the view that the USD 50,000, compensation awarded to each Appellants in the disputed judgment, was a compensation for deprivation of property rights by the Respondent State, and that the amount awarded is not the value of the disputed plots.

148. The Applicants also seek review on the ground that there is new evidence that has been discovered (valuation report) which was not possible to bring forward at the time the Judgment was rendered to that effect, that there is an injustice committed to the Applicants in the disputed Judgment if the compensation was awarded without basing on the valuation reports and was extremely low.

150. On this issue of valuation, we are in agreement with the Attorney General of the Republic of Burundi, where he submitted that the value of the lands were known by the Applicants at the time this court rendered its Judgment. Therefore, this application does not fall under Rule 83(2) as no new evidence was discovered after the Judgment. So not only the applicants failed in their duty to produce it at the First Instance Division but the valuation report should have been produced from the beginning of the

proceedings.

151. Consequently, with regard to the valuation reports that have been submitted by the Applicants, which were never raised at the First Instance Division and neither were they included among the issues for determination at the Appeal Level, this Court reminds the Appellants, that based on Article 35 A of the Treaty of EAC and Rule 89 of the Court Rules 2019, this Court only has a mandate on appeals on points of law, matters of jurisdiction and procedural irregularity but not on new issues or new facts brought at the level of Appeal.

152. We make reference to the case decided by this Court in **Godfrey Magezi v. Attorney General of the Republic of Uganda, Appeal No. 3 of 2015 (May 26, 2016)** at paragraph 120, this court found that: -

> "*Appeals are therefore correctional in nature and not an opportunity for a party to take 'a second bite at the pie.'*"

As it was decided by this court in **Attorney General of the Republic of Tanzania vs Africa Network for Animal Welfare (ANAW),** Appeal No. 3 of 2014, pg 55. That: -

> "*Article 23 (3) confers on First Instance Division all original jurisdiction of the Court. Article 35A, on the other hand delineates in a limited and restricted fashion, the scope nature and extent of appeals that may be brought to the Appellate Division. The great divide here is essentially one of law versus facts. Only questions of law,*

jurisdiction or procedural irregularity may be appealed to the Appellate Division. Questions of fact are exclusively and conclusively decided at the level of the First Instance Division".

153. Therefore, based on the provisions and case laws aforementioned it should clearly be understood that, in a nutshell, this Court held that a new factual issue in a dispute cannot be introduced on appeal. Therefore, the valuation reports brought by the applicants as new evidence at this level was of no legal consequence.

154. The applicants submitted that the award of the compensation of $50,000 given to each of the Applicants is extremely low and is an injustice to them. This Court finds that the Applicants have wrongly interpreted the determination of this Court with regard to where to this Court's award of compensation of USD 50,000 to the Appellants in Appeal No. 5 of 2020. The Applicants have failed to comprehend the purpose for which the compensation was meant in the interpretation of the disputed Judgment on compensation and to understand the spirit in which the Court awarded the questioned compensation.

155. For the Purpose of clarity this Court will reproduce the part of determination of the Court with regard to the disputed judgment of the **Appeal No. 5 of 2020 of 26 November 2021, paragraph 118**; in particular on the issue of whether the parties are entitled to remedies sought: -

"*...We further take into account passage of time since the decision of the Tribunal and grant each Appellant a lump sum of US$ 50,000*

as compensation for inconvenience and deprivation of property without due process".

156. Based on the judgment on Appeal No. 5 of 2020, as demonstrated above, and in consideration of issues raised by the Applicants in Application No. 1 of 2022, we now wish to consider the following questions;

Whether the compensation awarded to each of the Appellants in the disputed Judgment, was a compensation for deprivation of property rights by the Respondent state, and whether the amount of USD 50,000 USD, awarded to each Applicant is meant for compensation for value of the disputed plots.

157. Having analyzed the determination of this Court in Appeal No. 5 of 2020, in paragraphs 121 of the disputed judgment, this court finds that the compensation of 50,000 USD was not awarded as a compensation for loss or deprivation of property from the Applicants but rather the remedy was awarded in the spirit of compensating the Appellants for the inconveniences suffered as a result of the Respondent State organs failing to adhere to the rule of law which led to the cancellation of the Applicants' land titles without first establishing fraud committed as required under laws of procedure of the Respondent State.

158. The position was the same in the Case of **Hon. Dr. Margaret Zziwa vs. Secretary General of the East African Community** Appeal No. 02 of 2017, this Court found that the remedy of compensation, damages in national law, is also very firmly established in international law, and is

available for breach of Treaty obligations where a claimant establishes that the Act, regulation, directive, decision or action of the EAC complained of has caused such claimant a loss which is financially assessable.

159. This Court therefore rejects change in the narrative of this Court's Judgment in Appeal No. 5 of 2020 by the Applicant with regard to remedies which were awarded, by calling it compensation for deprivation of property from the Applicants yet the compensation awarded was meant to be damages for inconveniences caused as stated above but not to compensate the Applicants for the value of their lost land.

160. And in relation to the above, this Court finds that the compensation of USD 50,000 awarded to Appellants as damages for inconvenience caused is adequate. Therefore, it is this court's finding that the contention of the Applicant as regard to this issue is wrong and thus the court finds that there is no injustice committed in the Court's Judgment in Appeal No. 5 of 2020.

161. To this effect, this Court declines to grant to the Applicants their prayer for Review of the Court's Judgment of the Appeal No. 5 of 2020. We, therefore answer to the Issue No. 1 in the negative.

B. Whether the Honourable Court should entertain Application No. 3 of 2022.

1. Determination on Preliminary objections

162. Before, this Court determines on Issue No. 1 on whether this court

should entertain the Application No. 3 of 2022, we will first look into the two Preliminary Objections to Application No. 3 of 2022 raised by the Respondents

a. The first Preliminary Objection is that the Application is fatally defective as it is not accompanied by an Affidavit, which is a mandatory requirement under Rules 52(5) and 83(1) of the Rules of Court.

163. This preliminary objection on the issue of the alleged defective Affidavit was dealt with in Application No. 6 of 2022 made by the Attorney General of the Republic of Burundi pursuant to Rule 48(c), 49, 51 and 52 of the East African Court of Justice Rules for the Court 2019 aiming to seek leave from this Court to amend the supporting affidavit in **Attorney General of the Republic of Burundi and Niyongabo Theodore and Niyungeko Gerard**, (supra) the Court allowed the amendments sought by the applicant and validated the Affidavit in dispute. Therefore, the preliminary Objection has been overtaken by events.

b. The Application is fatally defective as it is an Appeal and a Cross-Application to Application No. 1 of 2022.

164. Counsel for the Respondent submitted that the Attorney General of Burundi has submitted two grounds for review. Namely a mistake or error apparent that has been committed by the Court in putting aside all the arguments that it provided with regard to the then issue No. 3 and therefore an injustice done to him.

165. He submitted at length on this preliminary objection with case laws (supra at paragraph 30) pleading that this application be struck out for being an afterthought and being an appeal and a cross application to their own application which is not allowed by the Rules. He submitted also that there is nothing in Application No. 3 that falls within the scope of the Article 35(3) of the Treaty. The Applicant simply re-visited the points that he had already submitted on the Appeal.

166. We find that the Attorney General of the Republic of Burundi submitted to this Court on application No. 3 of 2020 for review of the judgment in Appeal No. 5 of 2020 rendered on 26th November 2021 on the grounds of mistake or error committed by the Court as well as on an injustice committed to the Applicant. These grounds are based on Article 35(3) of the Treaty and Rule 83 of the Rules of this Court.

167. We find that arguments raised on the Preliminary objection in the Respondents' submissions seem to be the same as the submissions on the substantive application.

168. We further find that to rule on this preliminary objection, the Court has to delve into the grounds of review already submitted by the Attorney General of the Republic of Burundi in his submission in chief. It is not a pure point of law.

169. Therefore, we reject the preliminary objection because one cannot raise a similar a point of law in a preliminary objection and in the substantive submission and not being an alternative argument.

2. Whether this court should entertain Application No. 3 of 2022.

170. The Attorney General of Burundi has submitted two grounds for review. The first one, is that there is a mistake or error apparent that has been committed by this Court in putting aside all the arguments that it provided with regard to the then Issue No. 3 in Appeal No. 5 of 2020 and accusing him of not having submitted anything on issue No. 3. and the second one, is that an injustice has been done to the Attorney General.

a) On the grounds of error or mistake committed by the Court towards the Applicant,

171. On this ground, the Applicant alleged that by arguing that the Respondent did not submit on issue No. 3 in Appeal No. 5 of 2020. The Court had to revisit the Judgment to find what was contained in issue No. 3 and we reproduce it here in below: -

> "*Whether the 1st Instance Division committed a procedural irregularity by failing to exercise its inherent powers to seek information that was vital to base its judgment*".

172. We also have to reproduce the part of the impugned Judgment which is alleged to raise a mistake or an error apparent on the face of the record which reads as follows: -

> "*Looking at the Respondent's appeal submissions on record, the Respondent did not submit on this issue and for that matter*

this issue shall be analyzed based on the Appellant's submissions on this issue and the impugned decision"

173. Then we examined what the Applicants' contended that he submitted on this issue in paragraphs 17 up to 20 of the Respondent's written submissions on the record of the Court (in Appeal No. 5 of 2020), which we reproduce hereunder: -

"As far as issue C is concerned, the Respondent wishes to remind that the question that was before the 1st Instance Division of this Honorable Court was the one related to the absence of reasons in the judgment rendered by the "Tribunal de Grande Instance" of MUHA that would amount to the infringement of Burundian Laws thus the Treaty.

The Court by reading the said judgment discovered that the main reason given by the Tribunal of de Grande Instance "is that the 3rd Applicant's attested Affidavit having been nullified by the Supreme Court, the Title deeds of the 1st and 2nd Applicants are nullified as well.

In addition, the Respondent wishes to reiterate the arguments given in paragraph 15 of the present written submissions so as to strengthen that the case rendered by the "Tribunal de Grande Instance" of MUHA is well motivated on the question related to the fraud on the side of the 3rd Applicant.

Since the question of fraud on the side of the 3rd Applicant (Manariyo Desire) is no longer an issue neither in national courts nor before this honorable court, there is no need of further information to be sought from parties…"

174. The question the court has to answer now is whether the Attorney General of the Republic of Burundi did really submit on this issue?

To answer to this question, we considered in depth the said paragraphs and we found that they do not refer in any way to the issue for determination by the Court.

175. We are in agreement with the Respondents that the said paragraphs did not in any way address issue No. 3 (supra) and it is not even mentioned in the relevant paragraphs that the Applicant allegedly addressed this issue.

176. The alleged error or mistake by the Applicant would require scrutiny and re-opening of evidence to determine whether this exists or not and this goes against the rules that governs what qualify as a mistake or error apparent on the face of the record.

177. Under Article 35 (3) and Rule 83(2) which provide that to apply for review a party has to prove that "…**a mistake** or **an error on the face of the record**…" has been done. This means that the alleged error or mistake by the Applicant should be self-evident and does not require elaborate arguments to be established.

178. We also referred to the authorities cited by the Respondents which are **Nyamogo and Nyamogo vs Moses Kipkolum Kogo EA** (supra) and **National Bank of Kenya Ltd vs Ndungu Njau**, (supra), which decided that an error should stare one in the face and should be a clear case that does not need a long drawn out process reasoning.

179. To respond to the question whether the Attorney General of the Republic of Burundi did really submit on this issue? The answer is in the negative and we confirm our Decision in Appeal No. 5 of 2020 that: -

> *"Looking at the Respondent's appeal submissions on record, the Respondent did not submit on this issue and for that matter this issue shall be analyzed based on the Appellant's submissions on this issue and the impugned decision".*

Therefore, there is no mistake or error on the face of the record to allow the review of the judgment.

b) <u>On the ground that an injustice has been done to the Attorney General of the Republic of Burundi</u>.

180. The Attorney General of the Republic of Burundi raised a second ground that is an injustice done by this Court, the Appellate Division, at paragraph 117 of its Judgment, where it found that the Tribunal of Muha had failed to ascertain compensation leaving it to the parties to do so, the Tribunal abdicated its functions. The applicant argued that in this Appellate Division, in criticizing the decision of the Tribunal of Muha in that way, that it has occasioned an injustice.

181. We find the Decision of this Court cannot be termed as an injustice. It is a fact that the Tribunal of Muha did not rule on compensation. The Tribunal of Muha only annulled the title deeds of the respondent and then asked the parties to go out there and make their own arrangements or in other words to go sort themselves outside the Tribunal (Muha).

182. This Court was therefore right in the impugned Judgment of Appeal No. 5 of 2020 in pointing this out which cannot be termed as an injustice done to the Applicant.

183. As we ruled on paragraph 158, and under Rule 4 of the Rules of the Court, 2019, the Court awarded of USD 50,000 to each Appellant for the inconveniences suffered as a result of the Respondent State organs failing to adhere to the Rule of Law which led to the cancellation of the Applicants' land titles without first establishing fraud committed as required under the laws of procedure of the Respondent State.

184. Having said so, that Ministerial Ordinance is inapplicable to the current case. That Ordinance was supposed to guide compensation for land compulsorily acquired in the public interest which is not the case here. Also, the rates for 2008 cannot be said in any way to be applicable in 2022, fourteen (14) years later.

185. Therefore, based on the above reasoning, we find that there has been no injustice to the Attorney General of the Republic of Burundi therefore this is not a ground for allowing a review of the Judgment in Appeal No. 5 of 2020.

186. Now on the issue of whether the Honorable Court should entertain Application No. 3 of 2022, after carefully reviewing the pleadings and the rival submissions of parties on this issue No. 1, we hold that application No. 3 of 2022 was not properly before this Court because the grounds do not fall in the scope of the Article 35(3) of the Treaty of the East African Community, therefore we answer Issue No. 1 in the negative.

ISSUE No. 2: WHAT REMEDIES SHOULD THE COURT GRANT

187. During the Scheduling conference for this application on 25th February 2022, the parties agreed and settled on two issues. One, whether the Court should entertain the respective applications to wit Application No. 1 and Application No. 3 of 2022 and then issue No. 2, what remedies should the parties be granted (paragraph 23).

188. Counsel for Applicants in the Application No. 1 of 2022, in their written submissions in chief, did not submit on this issue No. 2. Surprisingly, they have submitted to a different issue which was not framed and agreed by both parties and the court during the Scheduling conference. That issue is: -

> "*Issue No. 2: Whether the amounts indicated in the respective valuations report reflect the current value of the properties that are subject to this application*".

In **Margaret Zziwa v. Secretary General of East African Community,**

Ref. No. 17 of 2014, at page10 (Feb. 3, 2017); and in **James Alfred Koroso v. Attorney General of the Republic of Kenya & Others**, Ref. No. 12 of 2014, at page 24-25 it was ruled that: -

> *"Pursuant to Rule 63 of the 2019 Rules, at a Scheduling Conference, all matters in controversy between parties are considered and reduced into issues for determination by the Court."*

189. On this issue, the Attorney General of the Republic of Burundi, submitted that they are not in a position to respond on an issue that has not been framed at the scheduling conference therefore requested this Court to simply disregard whatever the Applicants have submitted under that issue.

190. By submitting on an issue which was not framed during the scheduling conference, the Applicants have breached **Rule 63 of the 2019 Court Rules,** consequently this Court would decline to consider and rule on the issue.

191. As to Issue No. 2, the Attorney General of the Republic of Burundi prays this court to dismiss Application No. 1 of 2022 with costs and to allow Application No. 3 of 2022 and consequently dismiss Appeal No. 5 of 2020 with costs. **Rule 127(1)** of this Court's Rules 2019, provides that: -

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

192. On the application of Rule 127(1), since none of the applications that is Application No. 1 of 2022 nor Application No. 3 of 2022 have been

granted, and we have provided further clarity as regards to applications for review in this Court we therefore find it fit and just that we make no order as to costs. Each party therefore is Ordered to bear its own costs.

CONCLUSION

193. In the light of the above findings, considerations and determination, the Applications for Review have not been allowed therefore, we hold as follows:

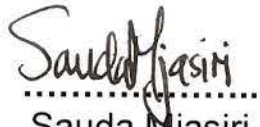
1. Applications No. 1 of 2022 and Application No. 3 of 2022 are hereby dismissed.

2. The decision in Appeal No. 5 of 2020 of the Appellate Division rendered on 26th November 2021 is upheld.

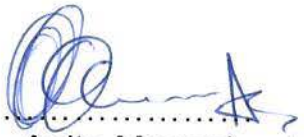
3. Each Party shall bear its own costs.

IT IS SO ORDERED

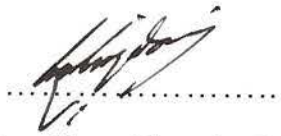
Dated, delivered and signed at Arusha this 31st day of August, 2022.



Sauda Mjasiri
VICE PRESIDENT



Anita Mugeni
JUSTICE OF APPEAL



Geoffrey Kiryabwire

JUSTICE OF APPEAL