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

(Coram: Yohane B. Masara, PJ; Audace Ngiye, DPJ; Charles O. Nyawello, Charles Nyachae, & Richard W. Wejuli, JJ)

CONSOLIDATED REFERENCES NOs. 3 & 4 OF 2019

FREEMAN A.MBOWE.....1st APPLICANT
ZITTO Z. KWABWE.....2nd APPLICANT
HASHIMU RUNGWE.....3rd APPLICANT
SEIF SHARIF HAMAD.....4th APPLICANT
SALUM MWALIM..... 5th APPLICANT
LEGAL AND HUMAN RIGHTS CENTRE.....6th APPLICANT

VERSUS

THE ATTORNEY GENERAL OF THE
UNITED REPUBLIC OF TANZANIA.....RESPONDENT

25th March, 2022

JUDGMENT OF THE COURT

A. INTRODUCTION

1. This is a consolidated Reference comprising of **Reference No. 3 of 2019,** filed by the First to Fifth Applicants, pursuant to Articles 6(d), 7(2), 8(1)(c), 27 and 30 of the Treaty for the Establishment of the East African Community (hereinafter "the Treaty") and Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure, 2013 (hereinafter "the Rules"); and **Reference No. 4 of 2019** filed by the Sixth Applicant, pursuant to Articles 4, 6(d), 7(2), 8(1)(c), 27(1), 30(1) and 38(2) of the Treaty and Rules 1(2) and 24 of the Rules.

2. The Applicants are Natural Persons and citizens of the United Republic of Tanzania.
   a) The First Applicant, Freeman A. Mbowe, is described as a natural person, a member and Party Leader of **Chama cha Demokrasia na Maendeleo**, a political party registered as such, in the United Republic of Tanzania;
   b) The Second Applicant, Zitto Z. Kabwe, is described as a natural person, a member and **Party Leader of Alliance for Change and Transparency – Wazalendo**, a political party Registered in the United Republic of Tanzania;
   c) The Third Applicant, Hashimu Rungwe, is described as a **Member and Party Chairman of Chama cha Umma,** a political party Registered as such in Tanzania;
   d) The Fourth Applicant, Seif Sharif Hamad, is described as a natural person, a **Member of Alliance for Change and Transparency – Wazalendo**, a political party Registered as

such in Tanzania and was formerly first Vice President of the Revolutionary Government of Zanzibar;

e) The Fifth Applicant, Salum Mwalimu is described as a natural person and the **Zanzibar Deputy Secretary General of Chama cha Demokrasia na Maendeleo**.

f) The Sixth Applicant, **Legal and Human Rights Centre,** is a Non-governmental Organization, registered as such under the Laws of the United Republic of Tanzania, a Partner State in the East African Community.

3. In the course of the proceedings subject of this Judgment, the Fourth Applicant passed on. This issue is adverted to later on in this Judgment.

4. The Respondent is the Attorney General of the United Republic of Tanzania, sued on behalf of the said Partner State; as its Principal Legal Adviser and whose address for the purpose of this Reference is in the care of Solicitor General, Solicitor General's Office, 20 Kivukoni Front, Dar-es-Salaam, Tanzania.

5. The First to Fifth Applicants were the Applicants in **Reference No. 3 of 2019** and the Sixth Applicant was the Applicant in **Reference No. 4 of 2019**.

6. At the hearing hereof, by agreement between the Parties, and with the approval of the Court, the two References were consolidated and heard together. Hereinafter, unless the context requires otherwise, the term "Reference" refers to the Consolidated Reference.

B. REPRESENTATION

7. The Applicants were represented by Learned Counsel, Jebra Kambole and Fulgence Massawe. The Respondent was represented by Mr Hangie Chang'a, Learned Principal State Attorney along with Mr Stanley Kalokola and Ms Vivian Method, Learned State Attorneys.

C. BACKGROUND

8. In the Reference, the Applicants challenge the **Political Parties (Amendment), Act No. 1 of 2019**, (hereinafter "the Act") enacted by the Parliament of the United Republic of Tanzania on 29th January, 2019 and assented to by the President of the said United Republic of Tanzania on 13th February, 2019. The Act was Gazetted in the Government Gazette on 22nd February, 2019.

9. The Applicants contend that the said Act, which amended the Political Parties Act, Cap. 258 of the Laws of the Tanzania, constitutes an unjustified restriction of democracy, good governance and freedom of association which are fundamental and operational principles of the Treaty; to wit, the principles of democracy, rule of law, accountability, transparency and good governance.

10. Specifically, the Applicants challenge the alleged violations of Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

D. THE APPLICANTS' CASE

11. The Applicants' Case in the Consolidated Reference is contained firstly in **Reference No. 3 of 2019** filed on 12th April, 2019 together with the Affidavits of John Mnyika, Williams Simon and Abdul Omary Nondo, all filed on 23rd September, 2020.

12. Secondly, in **Reference No. 4 of 2019**; also filed on 12th April, 2019, the Applicants' written submissions filed in **Reference No. 3 of 2019** on 5th October, 2021; the written submissions filed in **Reference No.4 of 2019** on 27th September, 2021, and the submission highlights orally presented to Court at the hearing.

13. The Applicants' case is that, by enacting certain provisions of the Act, the Respondent State violated Articles 6(d), 7(2) and 8(1)(c) of the Treaty. The specific impugned provisions of the Act are: Sections 3, 4, 5 and 29.

14. Articles 6(d), 7(2) and 8(c) of the Treaty provides as follows:

> "**Article 6(d):**
>
> ***The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:***
>
> ***"(a).....***
> ***(b).....***
> ***(c).....***
>
> ***(d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights."***

Article 7(2):

"The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights."

Article 8(c):

The Partner States shall:

(a).....

(b).....

(c) abstain from any measures likely to jeopardize the achievement of those objectives or the implementation of the provisions of this Treaty."

15. The Applicants contend that the Respondent as one of the Partner States of the East African Community, is obligated to comply with the Treaty.

16. The Applicants further contend that the Respondent, by enacting and applying the impugned provisions of the Act, is in violation of the Treaty as follows:

(a) That the Act under Section 3 which amends the Principal Act by introducing sub-section 5(b) violates freedom of association, democracy and rule of law, it thus violates Articles 6(d), 7(2) and 8(1)(c) of the Treaty by giving the Registrar of Political Parties (hereinafter "the Registrar") the power to monitor intra party elections and nomination

processes is unjustifiable and open for abuse and violates intra-party democracy;

(b)That Section 4 of the Act which amends the Principal Act by introducing Section 5A centralizes the civic education and capacity building training to the Registrar is unjustifiable and contrary to the freedom of expression and access to information in violation of Articles 6(d), 7(2) and 8(1)(c) of the Treaty;

(c)That the said Section 4 of the Principal Act by introducing Section 5B which provides for penalties where a party leader or a political party fails to furnish the Registrar with any information demanded by the Registrar, violates privacy, rule of law and protection of human rights, contrary to Articles 6(d), 7(2) and 8(1)(c) of the Treaty;

(d)That Section 5 of the Act which introduces Part IIA to the Principal Act under Section 6B(a) is discriminatory by requiring that persons that apply for registration of a political party must be Tanzanian with both parents who are also Tanzanians, the section is a violation of Articles 6(d), 7(2) and 8(1)(c) of the Treaty;

(e)That Section 29 of the Act which introduces section 21E in the Principal Act empowers the Registrar to suspend a member from conducting political activities is in violation of the principles of good governance, democracy, the rule of law, as well as the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples'

Rights and violates Articles 6(d), 7(2) and 8(1)(c) of the Treaty; and

(f) That the Act under Section 21D introduces the criminal sanction in the Principal Act which is contrary to the principles of good governance, democracy, the rule of law, as well as the recognition, promotion and protection of human and people's rights in accordance with the provision of the African Charter on Human and Peoples' Rights and violates the Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

17. The Applicants seek the following reliefs from the Court:

(a) In **Reference No. 3 of 2019**:

a) A declaration that the provision of Section 3 which amends Section 4 of the Principal Act in its subsection (5)(b) and (f), 5A(1), (2), (3), (4), (5) & (6); 5B(1), (2), (3) & (4), 6A(5); 6B(a); 8C(2), (3) & (4), 8E(1), (2) & (3), 11A(2), (3), (4) & (5), Section 23 which amends 18(6) of the Principal Act, 21D and 21E of the Act, violate the fundamental and operational principles codified in Articles 6(d) and 7(2) of the Treaty;

b) A declaration that Section 3 which amends Section 4 of the Principle Act, in its subsection (5)(b) and (f), 5A(1), (2), (3), (4), (5) & (6); 5B(1), (2), (3) & (4), 6A(5); 6B(a); 8C(2), (3) & (4), 8E(1), (2) & (3), 11A(2), (3), (4) & (5), Section 23 which amends 18(6) of the Principle Act, 21D and 21E are of no force of law for contravening the Treaty;

c) An Order to the Respondent State to cease the application of the Sections of the Act, and the Principal Act complained of herein; and

d) An Order that the cost of and incidentals to this Reference be met by the Respondent.

(b)In <u>Reference No. 4 of 2019:</u>

a) A declaration that the Provisions of the Act under Section 3 which amends the Principal Act by introducing sub-section 5(b) which gives the Registrar of the Political Parties the mandate to monitor intra party election and nomination process violates freedom of association, democracy and rule of law and thereby constitutes a violation of the Respondent's obligations under the Treaty to uphold and protect the Community principles of democracy, rule of law, accountability, transparency and good governance as specified in Articles 6(d) and 7(2) of the Treaty;

b) A declaration that the Provisions of Section 4 of the Act which amends the Principal Act by introducing Section 5A, which centralizes the civic education and capacity building training to the Registrar is unjustifiable and contrary to freedom of expression and access to information and thereby constitutes a violation of the Respondent's obligation under the Treaty to uphold and protect the Community

fundamental principles as specified in Articles 6(d) and 7(2) of the Treaty;

c) A declaration that the Provisions of Section 4 of the Act which amends the Principal Act by introducing Section 5B which provides for penalties where a party leader of a political party fails to furnish the Registrar with any information demanded by the Registrar violates privacy, rule of law and protection of human rights and thereby constitutes a violation of the Respondent's obligation under the Treaty to uphold and protect the Community fundamental principles as specified in Articles 6(d) and 7(2) of the Treaty;

d) A declaration that the Provisions of Section 5 of the Act which introduces Part IIA to the Principal Act under Section 6B(a) is discriminatory by requiring that persons that apply for registration of a political party must be Tanzanians with both parents who are also Tanzanians and thereby constitutes a violation of the Respondent's obligation under the Treaty to uphold and protect the Community principles of democracy, rule of law, accountability, transparency and good governance as specified in Articles 6(d) and 7(2) of the Treaty;

e) A declaration that the Provisions of Section 29 of the Act which introduces Section 21E in the Principal Act and empowers the Registrar to suspend a member from conducting political activities is in violation of

the right to participate in public affairs, freedom of association and thereby constitutes a violation of the Respondent's obligation under the Treaty to uphold and protect the Community principles of democracy, rule of law, accountability, transparency and good governance as specified in Articles 6(d) and 7(2) of the Treaty;

f) A declaration that the Provisions of the Act under Section 6(c), 8B(3), 8C(4), 8E(3), 11C(4) and 5A(3) introduce the criminal sanction in the Principal Act which is contrary to the principles of good governance, democracy, the rule of law as well as recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights and thereby constitutes a violation of the Respondent's obligation under the Treaty to uphold and protect the Community principles of democracy, rule of law, accountability, transparency and good governance as specified in Articles 6(d) and 7(2) of the Treaty; and

g) An Order to the Respondent State to cease the application of Section 5(b), 5A, 5B, 6(B)(a) and 21E introduced by the Political Parties (Amendments) Act, No.1 of 2019 in the Political Parties Act, Cap. 258 to bring it in conformity with the fundamental and operational principles codified in Articles 6(d) and 7(2) of the Treaty;

h) Each Party to bear its own costs of the Reference; and

i) Any other relief that the Court deems appropriate.

E. THE RESPONDENT'S CASE

18. The Respondent in **Reference No. 3 of 2019** filed a Response to the Reference and Notice of Preliminary Objection, on 18th June, 2019, as well as an Affidavit by Lukelo Samuel, filed on the same date and another by Yohana Marco filed on 27th November, 2020.

19. In **Reference No. 4 of 2019**, the Respondent filed a Response to the Reference, a Notice of Preliminary Objection as well as an Affidavit by Lukelo Samuel on 16th June, 2019.

20. In the Consolidated Reference, the Respondent's Case is that the impugned Act was enacted to promote institutionalism, intra-party democracy, political and financial accountability in conformity with the Constitution of the United Republic of Tanzania, the Treaty and other International Human Rights Instruments to which the said Partner State is a Party.

21. Further, the Respondent contends that the impugned Act provides for reasonable restrictions to monitor the conduct of the Political Parties' activities and affairs so as to ensure that there is a balance of rights between the right to freedom of association by allowing registration and conduct of political activities and increased alarm on deterioration of intra-party democracy.

22. The impugned Act, the Respondent argues, is not discriminative and does not contravene the principles of democracy, good governance and rule of law as provided under the Treaty, International Covenant on Civil and Political Rights, Universal Declaration of Human Rights

and the African Charter on Human and Peoples' Rights. Thus, there is no violation of the Treaty.

23. The Respondent therefore prays for Orders as follows:

(a)A declaration that the Provisions of the Act do not contravene the Treaty; and

(b)An Order that the costs of this Reference be borne by the Applicant.

F. ISSUES

24. In **Reference No. 3 of 2019**, on 9th September, 2020, via Video Conferencing, the Parties attended a scheduling conference at the Court.

25. Similarly, in **Reference No. 4 of 2020**, on 13th September, 2021, the Parties attended a scheduling conference at the Court. In each of the said Scheduling Conferences, it was agreed *inter alia*, that the following are the issues for determination:

(a)Whether the Court has Jurisdiction to hear and determine the Reference;

(b)Whether the cited provisions of the Act, to wit sections 3(5)(b), (e) and (f); 5A(1),(2),(3),(4),(5) & (6); 5B(1), (2), (3) & (4); 6A(5); 6(B)(a); 8C(2), (3) & (4);8E(1), (2), (3); 11A(2), (3), (4) & (5); 21D, 21E; 23 of the Political Parties (Amendments) Act No.1 of 2010 are a violation of Articles 6(d), 7(2) and 8(1)(c) of the Treaty; and

(c)Whether the parties are entitled to the remedies sought.

G. COURT'S DETERMINATION OF THE ISSUES

26. Prior to a substantive determination of the issues listed above, the Court makes the following clarification:

27. That although the Reference was instituted under the East African Court of Justice Rules of Procedure, 2013, those Rules were, with effect from 1st February, 2020, replaced by the East African Court of Justice Rules of Procedure, 2019 ("the Court Rules"). The latter Rules shall therefore be applied without prejudice to the validity of anything previously done under the 2013 Rules of Procedure as enjoined by Rule 136, that if and so far as it is impracticable to apply the 2019 Rules *"the practice and procedure heretofore followed shall be allowed."*

28. As regards the Fourth Applicant, who, as cited in paragraph 3 of the Judgment, passed on in the course of these proceedings, at the hearing hereof, by agreement of the Parties and with leave of the Court, it was agreed that the hearing would proceed to conclusion, notwithstanding the death of the Fourth Applicant.

ISSUE NO.1: Whether the Court has Jurisdiction to Hear and Determine the Reference.

29. In **Reference No. 3 of 2019**, the Respondent filed a Notice of Preliminary Objection as part of the Response to the Reference, as follows:

a) **The Reference is unmaintainable in that the Court has no jurisdiction to grant the reliefs sought;**
b) **The reference is incompetent and bad in law for being supported by defective Affidavits; and**

c) **The Reference is incompetent for being frivolous and vexatious.**

30. In **Reference No. 4 of 2019,** the Notice of Preliminary Objection forming part of the Response to the Reference stated as follows:

a) **The Reference is unmaintainable since the reliefs sought are untenable; and**

b) **The Reference is incompetent for being supported by untruthful Affidavits since on the date of signing the Respondent was attending a Parliamentary session in Dodoma.**

31. In the instant Reference, the issue of jurisdiction had a convoluted and tortured path. As can be seen from paragraph 29 and 30 above, in neither of the Notices of the Preliminary Objections in **Reference No. 3 of 2019** and **Reference No.4 of 2019**, was the term "jurisdiction" used. However, it is discernible that the objections, at least in part, relate to the issue of jurisdiction.

32. As stated in paragraph 25 of this Judgment in the event, the issue of jurisdiction was identified and agreed upon by the Parties, at the Scheduling Conference in each Reference, as the first issue for determination.

33. In their written submissions in both References, the parties addressed the issue of jurisdiction, in each case, in a most cursory manner. In the written Submission by the Applicants in **Reference No. 3 of 2019**, the Applicants argued that the Court has jurisdiction to consider and adjudicate upon the Reference. This, they submitted, was firstly, on a plain reading and application of Articles 27 and 30 of

the Treaty. The Applicants further relied on the pronouncement of this Court in **Anyang' Nyong'o and Others vs. The Attorney General of Kenya and Others, EACJ Reference No. 1 of 2006**, that there is *"no doubt about the primacy, if not supremacy of this Court's jurisdiction over the interpretation of Provisions of the Treaty."*

34. The Applicants further made reference to this Court's decision in **Geoffrey Magezi vs. The Attorney General of Uganda, EACJ Reference No. 5 of 2013**, where the Court interpreted Articles 27 and 30 to the effect that the Court will assume jurisdiction where the Applicant is: a legal or natural person; resident of an East African Community Partner State and is challenging the legality of any Act, regulation, directive, decision and action of the said Partner State or an institution of the Community. Additionally, the Reference must be filed within two months of the enactment, publication, directive, decision or action complained of or of the day in which it came to the knowledge of the Applicant.

35. The Applicant also referred the Court to the pronouncement of this Court in **Democratic Party vs. The Secretary General and the Attorneys General of the Republics of Uganda, Kenya, Rwanda and Burundi, EACJ Reference No. 2 of 2012** that:

> **"Once a party has invoked certain relevant provisions of the Treaty and alleges infringement, thereon, it is incumbent upon the Court to seize the matter and within its jurisdiction under Articles 23, 27 and 30 determine whether the claim has merit or not."**

36. In response, by its written Submissions in **Reference No. 3 of 2019**, the Respondent conceded that the Court has jurisdiction *ratione personae, ratione materiae and ratione temporis.*

37. In the Applicants' written Submissions in **Reference No. 4 of 2019**, the Applicants also relied on Articles 27 and 30 of the Treaty to argue that the Court has jurisdiction to hear and determine the Reference. The Applicant also relied on the decisions of the Court in **James Katabazi & 21 Others vs. The Attorney General of the Republic of Uganda & Another, EACJ Reference No. 1 of 2007; East African Law Society vs. the Attorney General of the Republic of Burundi, EACJ Reference No. 1 of 2014**, and **Burundi Journalists Union vs. the Attorney General of Burundi, EACJ Reference No. 70 of 2013.** The Applicant submitted that this Court has held that this jurisdiction is not voluntary and that once an Applicant can show an alleged violation of the Treaty, The East African Court of Justice must exercise jurisdiction.

38. In written Submissions, the Respondent conceded that the Court has jurisdiction *ratione personae, ratione materiae and ratione temporis*. The Respondents argued however, that whereas the Court has such jurisdiction to hear and determine the Reference, it has no mandate to grant one of the Orders sought by the Applicants; to wit, an order that the Respondent cease application of Sections 5(b); 5A; 6(B)(a) & 21E introduced by the impugned Act. As authority that this Court has previously refrained from granting such Orders, the Respondent relied on **British American Tobacco (U) Ltd vs. The Attorney General of Uganda, EACJ Reference No. 7 of 2017)** and **Media Council of Tanzania and 20 Others vs. Attorney General of the United Republic of Tanzania, EACJ Reference No. 2 of 2017).**

39. As we have observed earlier in this Judgment, having agreed that jurisdiction was an issue to be determined by the Court in this Reference, the Parties, with due respect, were not entirely helpful to the Court in making their submissions.

40. Notwithstanding the observation in the preceding paragraph, the issue having been raised for determination, the Court is bound to so determine. In any event, as stated by the Appellate Division of the Court in the case of **Angella Amudo vs. The Secretary General of the EAC, EACJ Appeal No. 4 of 2014,** jurisdiction is a fundamental matter which the Court can, on its own motion, raise and determine.

41. The jurisdiction of this Court is derived from Articles 27(1) and 30(1) which, respectively, provide as follows:

Article 27(1):

> **"The Court shall initially have jurisdiction over the interpretation and application of this Treaty: 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."**

Article 30(1):

> **"Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is**

unlawful or is an infringement of the provisions of this Treaty."

42. The Court has developed clear and consistent jurisprudence relating to its jurisdiction, as granted by the said Articles.

43. In **Eric Kabalisa Makala vs. The Attorney General of Rwanda, EACJ Reference No. 1 of 2017** the Court stated that "*whereas Article 27(1) categorically designates the jurisdiction of the Court as interpretation and application of the Treaty, Article 30(1) provide the context within which such jurisdiction would be extracted.*"

The Court further stated as follows:

"Thus, to succeed on a claim of lack of jurisdiction in this Court, a party must demonstrate the absence of any of the three (3) types of jurisdiction: *ratione personae/locus standi, ratione materiae and ratione temporis.* Simply stated, these 3 jurisdictional elements respectively translate into jurisdiction on account of the person concerned, matter involved and the time element."

44. The Appellate Division of this Court, in **Attorney General of the United Republic of Tanzania vs. African Network for the Animal Welfare, EACJ Appeal No. 3 of 2011**, underscored the fundamental need and obligation of the Court to address the question of jurisdiction:

"Jurisdiction is a most, if not the most fundamental issue that the Court faces in any trial. It is the very foundation upon which the judicial edifice is constructed; the fountain from which springs the flow of the judicial process. Without jurisdiction, a court

cannot even take the proverbial first Chinese step in its judicial journey to hear and dispose the case."

45. Further, the said Appellate Division clearly set out the jurisprudence of the Court on jurisdiction in **Alcon International Ltd vs. The Standard Chartered Bank of Uganda, The Attorney General of Uganda and the Registrar, High Court of Uganda, EACJ Appeal No.3 of 2013** thus:

> **"In the practice of the International Court of Justice, the word jurisdiction is used as a unitary concept to denote three essential elements which enable the Court to operate. These are *jurisdiction ratione materiae, jurisdiction ratione personae and jurisdiction ratione temporis* (See *Shabtai Rosenne: The Law and Practice of the International Court [1920-2005], Vol II, Chapter 9). Jurisdiction ratione materiae is concerned with the power of the Court to entertain and decide the subject matter of the complaint before it. Jurisdiction ratione personae, on the other hand, pertains* to the capacity of the parties to appear before the Court as Applicants or as Respondents or in any other capacity. And *ratione temporis* focuses on the temporal conditions of the dispute before the Court, such as time bar or limitation. The East African Court of Justice (EACJ) as an International Court in its own right takes inspiration from the International Court of Justice's conceptualization of jurisdiction and shall adopt it for our analysis hereafter."**

46. Having considered the pleadings and Submissions from both sides, noting the concession by the Respondent that the Court has jurisdiction *ratione personae, ratione materiae and ratione temporis*; and taking into consideration the decisions of this Court on the issue of jurisdiction in

terms of Articles 27 and 30 of the Treaty, we have no hesitation in answering the first issue in the affirmative.

47. This Court does have jurisdiction to hear and determine the Reference.

ISSUE NO. 2: **Whether the impugned Sections for the Political Parties (Amendment) Act No.1 of 2019, are a Violation of Articles 6(d), 7(2) and 8(1)(c) of the Treaty.**

48. It is common ground that the Respondent herein, the United Republic of Tanzania, as a Partner State in the East African Community, is obliged to adhere to the provisions of the Treaty and, in this case, Articles 6(d), 7(2) and 8(1)(c) thereof, which the Applicants allege have been violated by the enactment of and application of the said impugned Act.

49. The Applicants urge the Court to find that the Respondent has violated the Treaty, in that the impugned Act, enacted and applied by the Respondent, in its current form, contains unjustified restriction on the freedom of association, is discriminative, and restricts people's rights to participate in public affairs, denies peoples' rights to personal security and safety and contravenes the principles of democracy, rule of law and good governance and human rights all of which the Respondent, through the Treaty, committed to abide by.

50. The Applicants identifies specific provisions of the impugned Act that they allege are a violation of the Treaty. These are stated to be Sections 5(b), 5A, 5B, 6A, 6(B), 8C, 8E, 11A, 18(6) and (7), 21D and 21E of the impugned Act.

51. In their submissions, the Applicants concede that the fundamental and operational principles set out in Articles 6(d) and 7(2) of the Treaty, are not absolute. However, it is their contention that such restrictions on the democratic principles as are imposed by the impugned Act are unjustifiable in a democratic society and in the context of the provisions of the Treaty.

52. This Court has, in several instances, had occasion to consider the content and effect of the Treaty provisions which the Applicants claim have been violated by the Respondent. In **Samuel Mukira Muhochi vs. the Attorney General of Uganda, EACJ Reference No.5 of 2011,** the Court, referring to Article 6(d) of the Treaty stated as follows:

> **"... these principles are fundamental and indispensable to the success of the integration agenda and were intended to be strictly observed. Partner States are not to merely aspire to achieve their observance; they are to observe these as a matter of Treaty obligation."**

53. So too, in **Plaxeda Rugumba vs. Attorney General of the Republic of Rwanda, EACJ Appeal No. 1 of 2012** it was stated:

> **"... we are of the firm view that the principles set out in Articles 6(d) and 7(2) were not inscribed in vain. The jurisdiction of this Court to interpret any breach of those Articles was also not in vain, neither was it cosmetic. The invocation of the provisions of the African Charter on Human and Peoples Rights was not merely decorative of the Treaty but was meant to bind Partner States, hence the words that Partner States must bind themselves to 'the adherence to the principles of democracy, the rule of**

law ... as well as the recognition, promotion and protection of the Human and People's Rights in accordance with the provisions of the African Charter on Human and Peoples Rights'."

54. In **Burundian Journalists Union vs. The Attorney General of the Republic of Burundi, EACJ Reference No.7 of 2013,** this Court formulated the test to be applied by the Court in determining whether a National Law is consistent with the Treaty.

55. This test is traced back to the Supreme Court of Canada decision in **R vs Oakes (1986) ISCR 103**, and was upheld in the High court of Kenya case of **CORD vs. The Republic of Kenya and others (HC Petition No. 682 of 2014)**.

56. This Court in **Media Council of Tanzania & 2 Others vs. The Attorney General of the United Republic of Tanzania, EACJ Reference No. 2 of 2017,** set out the test as follows:

"(a) Is the limitation one that is prescribed by law? It must be part of a statute, and must be clear, and accessible to citizens so that they are clear on what is prohibited;

(b) Is the objective of the law pressing and substantial? It must be important to the society; and

(c) Has the State, in seeking to achieve its objectives chosen a proportionate way to do so? This is the test of proportionality relative to the objectives or purpose it seeks to achieve."

57. To evaluate and determine the Applicants' claim that provisions of the impugned Act violate the Treaty, we now consider the said provision against the said tests.

SECTION 3

It is the Applicants contention that Section 3 of the impugned Act introduces a new section 5(b) to the Principal Act, which latter section, the Applicants consider to be offensive to the Treaty. It reads as follows:

"(5) Without prejudice to section (4), the functions of the office of the Registrar shall be to:

(a) supervise the administration and implementation of this Act;

(b) Monitor intra party elections and nomination process;

(c) Disburse and monitor accountability of Government subvention to political parties which qualify under the Act;

(d) Provide guidelines and monitor income and expenditures of political parties and accountability of party resources;

(e) Provide civic education regarding multiparty democracy, laws administered by the Registrar and related matters;

(f) Regulate civic education provided to political parties; and

(g) Advice the Government on issues related to political parties."

58. In Submissions, the Applicants urged that the new Section 5(b) was offensive in that it gives the Registrar of Political Parties powers to interfere with the internal functions of Political Parties, which undermines the democratic principles set out in Articles 6(d) and 7(2) of the Treaty. The Registrar of Political Parties is an appointee of the President who is the Chair of the Ruling Political Party. The Registrar cannot be said to be independent. The Applicants argued that the role of monitoring internal party elections assigned to the Registrar is open to abuse and is likely to be used to undermine democracy by frustrating parties other than those in Government.

59. On its part, the Respondent submitted that giving the Registrar of Political Parties powers to monitor intra party elections does not in any way derogate from the principles set out in the Treaty, nor do such powers undermine democracy as envisaged in the Treaty and other applicable international legal instruments. As in their Submissions on several of the impugned provisions of the Act, the Respondents base their argument on their perception of the role of the Registrar as "*guardian.*" They therefore, argue that *"the Registrar is the guardian of all Political Parties and therefore business of the political parties are the business of the Registrar of Political Parties."*

60. The Respondent further poses the question – "if any election can be monitored, why can't political parties' election be one of them and therefore, going by the same spirit of democracy, if a general election of a country can be monitored by independent bodies, why can't a Registrar of Political Parties, who is a guardian of all political parties monitor the same?"

61. That being the substance and extent of the submissions of the parties on that particular impugned provision, we apply the **Media Council of Tanzania** case (supra) three tier test to the said provision, that introduced section 5(b).

62. Is the limitation one that is prescribed by law? Certainly. The subject limitation to the relevant rights (freedom of association et al) in giving the Registrar powers is one that is provided for by Statute. The question that arises for determination in this context is, is the legal provision clear as to what is the nature and extent of this limitation on the rights?

63. Does the provision have sufficient clarity for the Parties to understand what the limitation of rights entails? We think not. It is not by any means evident what the "monitoring" of intra party elections entails.

64. Is the Registrar to merely observe and note, or does the law create powers beyond that, for example to give any form of directions or impose requirements arising from the "monitoring"?

65. In the **CORD Case** (Supra), addressing itself on the first of the three-tier test, the Court stated: *"it must be part of a statute and must be clear and accessible to citizens ....."*

66. In the **Tanzania Media Council** Case (supra), the Court cited with approval the pronouncement by the African Court on Human and Peoples' Rights in the case of **Konate vs. Burkina Faso, App No.004/2013/ (2014)** that:

> **"To be considered as law, norms have to be drafted with sufficient clarity to enable an individual to adapt his behavior to the rules and made accessible to the public."**

67. It is our view that the provision introduced as Section 5(b) must fail in the first test as being vague, unclear and imprecise. In application, the political parties would not know what the Registrar can or cannot do, in the exercise of the powers to *"monitor"* intra party elections. With such imprecision and lack of clarity, the provision cannot be justified as being consistent with the Partner States obligations under the Treaty.

68. Whereas the Court finds, as we do in respect of the provision of the impugned Section 5(b) considered in the preceding paragraph, that the provision fails the first test of the three-tier test, we consider it not necessary to subject the provision to the second and third tests.

69. The Applicant also challenges a new Section 5(f) to the Principal Act as introduced by Section 3 of the impugned Act. This provides as a function of the Registrar: *"regulate civic education provided by political parties."*

70. In submissions, the Applicants challenged the latter provision in that it interferes with the principles of democracy and the rule of law and in particular to the extent that the provision implies that civic education to be given by political parties to their members requires the approval of the Registrar. In any event, they argue, the section does not provide how this power will be exercised by the Registrar. Here again the Applicants expressed the apprehension that this power is open to abuse. It is in the circumstances, the Applicant argues, unreasonable and too wide a power to give to the Registrar of Political Parties in a democratic society, and it thus violates the principles set out in the Treaty.

71. In response, the Respondent submitted that the impugned provision is consistent with the Treaty. That the State has a sovereign right to know the nature and content of the civic education being provided by Political Parties to their members.

72. We subject this provision to the first of the three-tier test: The function herein given by the legal provision is clearly in a statute, the question that arises is, does the provision have the requisite precision and clarity? Here again, we think not. The term used to describe the functions is "regulate." This does not express the parameters within which the Registrar is to exercise the function, and which the political parties and their members should expect. For example, will the Registrar, in "regulating" determine the content and mode of delivery of the civic education? Is the determination to be a negotiated or directed process?

73. In our considered view, the term "regulate" in the context, is not sufficiently precise for the Registrar to appreciate the parameters of the power, and the political parties to know what to expect. By reason of such imprecision and lack of clarity, we hold that Section 5(f) introduced by Section 3 of the impugned Act, fails the first test of the three-tier tests.

SECTION 4

74. The Applicants challenge Section 4 of the impugned Act, which provides as follows:

> **"4. The Principal Act is amended by adding immediately after section 5 the following new sections:**

5A: (1) A person or institution within or outside the United Republic wishing or requested to conduct civic education or any kind of capacity building training or initiative to a political party, shall prior to conducting such training, inform the Registrar by issuing a thirty days' notice stating the objective and kind of training, training programme, persons involved in such training, teaching aid and expected results.

(2) Upon receipt of information under subsection (1), the Registrar may disapprove the training or capacity building programme and give reasons for such disapproval;

(3) Any person who contravenes this section, commits an offence and is liable, on conviction to a fine of not less than five hundred thousand shillings but not exceeding five million shillings or to imprisonment for a term of not less than three months but not exceeding twelve months or to both;

(4) Any institution which contravenes this section, commits an offence and is liable, on conviction to a fine of not less than five million shillings but not exceeding thirty million shillings;

(5) Any person or institution which contravenes this section shall, in addition to penalties under this section be ordered by the Registrar to submit the information on the training or training programme

within such period as prescribed by the Registrar; and

(6) A person or institution which fails to comply with an order under subsection (5) commits an offence.

5B: (1) The Registrar may, in the execution of functions and responsibilities under this act, demand from a political party or a leader information as may be required for implementation of this Act;

(2) A political party which contravenes subsection (1) shall be liable to a fine of not less than one million shillings but not exceeding ten million shillings;

(3) A leader of a political party who contravenes this section or provides false information to the Registrar, commits an offence; and

(4) Any person or institution which contravenes this section shall in addition to penalties under this section be ordered by the Registrar to submit the information within such period as prescribed by the Registrar.

75. The Applicants impugn the introduced Section 5A into the Principal Act as set out in the preceding paragraph. It is the Applicants contention that the power given to the Registrar by this new section is an affront to democracy and the rule of law. This is particularly so, as on the face of it, it is an absolute discretion with no parameters on how

it will be exercised. That there is no basis of protection from abuse of the power. The Applicants argue that there is no demonstrable justification for this limitation on the freedom of expression and right to information.

76. The Respondent submitted that transparency, democracy and accountability called for this level of regulation on Political Parties as regards to the civic education offered to their members. Further, that by challenging this provision it is the Political Parties that would be violating the principles of good governance, transparency, accountability and the rule of law.

77. Applying the three-tier test to the introduced Section 5A, we are persuaded that the provision is clear and precise, and in particular, to the extent that it does give the Registrar, an unfettered power to decide on what civic education may be given to the Political Parties. The provision thus, meets the first test.

78. Subjecting the said section 5A to the second test, is the objective of the law pressing and substantial? Is it important to society?

79. The Respondent submitted that "The requirement of notice under Section 5A (1) of the Act is to enable the Registrar, while regulating the Political Parties, to have information of the business, including the nature of civic education to ascertain its compliance with the political ideology for which a party was registered for."

80. The Respondent went further to justify the power given to the Registrar to disapprove the intended civic education, with the argument that the protection against abuse of this power is that it can

be challenged by way of judicial review, if the reasons are unfounded in law or the Registrar has exceeded his power vested by the law."

81. In his submissions, the Respondent did not justify the objective of the law as pressing or substantial. With respect, to state that the object of the law is to enable the Registrar to have information of the business of the Political Party including the nature of the civic education to ascertain compliance with political ideology, cannot be such justification. It begs the question: What is regulation? We are not persuaded that how a political party furthers its political ideology with and through its members, can be a legitimate area of regulation in a democratic environment, where the Political Party otherwise acts within the confines of the general laws of the land.

82. As regards the justifications offered by the Respondent with reference to the power to disapprove the civic education, we find this unhelpful where, as in this case, the law does appear to give the Registrar an unfettered discretion.

83. We are unable to identify a legitimate objective, and certainly not one that is pressing and substantial to justify the limitation of rights that is created by the said Section 5A. We find therefore, that Section 5A fails the second of the three-tier test.

84. If indeed there was such an objective, in our considered opinion, the said section would in any event fail the third test of being proportionate relative to the objective or purpose. So, section 5A would in any event fail the third of the three-tier test.

85. The Applicants also challenge Section 5B similarly introduced to the Principal Act, by Section 4 of the impugned Act.

86. It is the contention of the Applicant as submitted, that the said Section 5B is offensive to the Treaty in that it is "too wide and too broad." The Applicants argued that the Section does not define what notice period should be given by the Registrar in making demand for information under that Section, and that this is unjustifiable in a democratic environment.

87. The Respondent refuted the notion that the introduced Section 5B is in any way offensive to the principles that are set out in the Treaty. It was the Respondent's submission that the purpose of the Section, is to enable the Registrar to ensure the effective implementation of the Political Parties legislation, and for such Registrar to ensure that the Political Parties operate within the scope of the Act, and their constitutions.

88. In applying the three-tier test to the said introduced Section 5B, firstly, we are persuaded that, as worded, the said Section 5B is precise and clear in stating the function given to the Registrar; namely, the power to "demand from a political party or a leader any information as may be required for implementation of the Act." We take notice that in the event of any question as to whether any information would be required for implementation of the Act, such question could be determined by the Court on application of either party. So, Section 5B meets the first test.

89. In its brief submission as regards this introduced section, the Respondent satisfactorily demonstrated to the Court that the Respondent has an objective that is pressing and substantial, that is important to the society; namely, to facilitate the effective functioning

of the Political Parties Act. The Section meets the second of the three-tier test.

90. We also are persuaded that the said Section 5B meets the third tier in that in our view, the Respondent has chosen a proportionate way to achieve the objective referred to in the consideration of the second-tier test above.

SECTION 5

91. The Applicants challenge aspects of Section 5 of the Act that introduces a new Part IIA into the Principal Act. We find it useful to reproduce the said Section 5 in extenso, as follows:

> **"5. The Principal Act is amended by adding immediately after Part II of the following new part:**
>
> **6A: (1) A political party may, subject to the Constitution of the United Republic and this Act, be formed to further objectives and purposes which are not contrary to the Constitution of the United Republic, the constitution of Zanzibar or any other written law in the United Republic.**
>
> **(2) A political party shall be managed by adhering to the Constitution of the United Republic, the Constitution of Zanzibar, this Act, its Constitution, principles of democracy and good governance, non-discrimination gender and social inclusion.**

(3) A political party general meeting and national executive committee or any similar organ shall not delegate their core functions prescribed in the party constitution.

(4) For the purpose of subsection (3), a core function means:-

(a) In the case of the party national general meeting, be enactment and amendment of party national chairman, deputy national chairman and nomination of presidential candidate; and

(b) In the case of the party national executive committee, be enactment and amendment of the party rules, election of secretary general and party's national leaders.

(5) A political party shall promote the union of the United Republic, the Zanzibar Revolution, democracy, good governance, anti-corruption, national ethics and core values, patriotism, secularism, tranquillity, gender, youth and social inclusion in the: -

(a) Formulation and implementation of its policies;

(b)Nomination of candidates for election; and

(c)Election of its leaders.

6B A person shall qualify to apply for registration of a political party if –

a) That person is a citizen of the United Republic by birth and both parents of that person are citizens of the United Republic;

b) That person is a person of sound mind;

c) That person is undischarged bankrupt having been declared by the court of competent jurisdiction;

d) That person has attained or is above the age of eighteen years;

e) That person can read and write in Kiswahili or English; and

f) That person is a person who, within five years prior to the date of submission of application has not been convicted or sentenced for commission of an offence of dishonesty, economic crime, corruption, tax evasion or offence related to gender based violence."

92. As regards Section 5 of the impugned Act, the Applicants impugned Section 6A(5) introduced into the Principal Act, by the said Section 5.

This subsection is reproduced in the preceding paragraph of this Judgment.

93. The Applicants submitted that Section 6A (5) introduced by the amendment to the Principal Act constitutes an unwarranted interference and intrusion into the internal affairs and ideology of political parties, and that the subsection is subjective and vague. The Applicants gave the example of the positive obligation to **"promote the Union of the United Republic, the Zanzibar Revolution..."** as being vague and subjective.

94. The Respondents argued that the said Section 6A(5) embodies the spirit of the Treaty and in particular the principles stated in Articles 6(d) and 7(2).

95. Applying the first of the three-tier test to the introduced Section 6A (5), we are persuaded by the argument of the Applicant that the provision is vague, imprecise and lacks the clarity for a political party to understand its obligations. We deem, in particular, the word "promote" to be imprecise. In this regard, whilst we take judicial notice that pursuant to Article 20(2)(b) of the Constitution of the United Republic of Tanzania, it is unlawful for any political party to be Registered which advocates for the breakup of the United Republic; that does not provide for a positive legal duty, to 'promote' the Union.

96. In our considered view, therefore, Section 6A (5) fails the first test for lack of precision and clarity.

97. In challenging Section 6B (5) also introduced by Section 5 of the impugned Act, the Applicants argued that the provision is offensive

and a violation of the Treaty, in that it discriminates a class of Tanzanian citizens.

98. In response, the Respondent submitted that the issue of citizenship remains a sovereign decision "made in accordance with the local context". The Respondent further submitted that:

> **"What is important is that, the Applicant should be a citizen of the United Republic of Tanzania either by birth or by having both parents as citizens of the United Republic of Tanzania. To underscore this, the non-citizen has no right to vote or contest for any political post like in any other country, and then it will be absurd for a person who has no right to vote to have a right to run a political party."**

99. From the foregoing, it is clear that the Respondent in addressing the challenge to the introduced Section 6B(a), misapprehended the wording of the said Section. While of course non-citizens would be excluded by Section 6B(a) from applying for registration of a party, so too would a citizen by birth but whose one or both parents are not citizens. The Respondent's submissions were limited to justification for disallowing non-citizens from applying for registration of Political Parties.

100. The said Section 6B(a) in our view, would pass the first-tier test since as stated in the previous paragraph, it is clear as to who qualifies to apply for registration.

101. Applying the second of the three-tier test, however, we are unable to discern any legitimate objective of this law, which patently excludes and is thus discriminatory against citizens who do not have both

parents as citizens. Nor did the Respondent in its submissions, offer any justification in respect thereof. In our view, therefore, the said Section 6B(a) fails the second test.

SECTION 9

102. The Applicants challenge, as offensive to the Treaty, those provisions in Section 9 of the impugned Act, that introduce new sections 8C and 8E to the Principal Act. These provide as follows:

"8C (1) Every Political Party shall maintain updated Registers for:

a) Members of the Party;

b) Leaders of the party at each Party administrative level;

c) Members of party organ at each Party administrative level.

(2) The Registrar may, by notice in writing, require a political party to submit any of Registers mentioned in subsection (1) or any particulars relating to such Register, within a period stated in the notice.

(3) A political Party which fails to comply with the requirement of this section may be suspended in accordance with provisions of this Act.

(4) Notwithstanding subsection (3), a leader of political party which contravenes subsection (1) commits an offence and shall on conviction be liable to a fine of not less than one million shillings and not exceeding three million shillings or to imprisonment for a term of not less than three months but not exceeding six months or to both.

8E (1) A political party, a leader or a member shall not recruit, deploy or form a militia, paramilitary or security group of any kind or maintain an organization intending to usurp the functions of the police force or any government security organ.

(2) A political party shall not conduct, finance, coordinate or order to be conducted or coordinated, military style training or any kind of training on the use of force or the training on the use of force or the use of any kind of weapon to its members or any other person.

(3) A political party which contravenes the requirement of this section shall be deregistered and every leader or member of the party concerned shall be liable on conviction to imprisonment for a term of not less than five years but not exceeding twenty years or to both."

103. As regards the introduced Section 8C, the Applicants submitted that the same is in violation of the Treaty in that it unreasonably and unjustifiably interferes with the right to privacy by political parties; that the section imposes unreasonable and unjust penalties. Further that, "the way the law was crafted the requirement of notice, it is too wide and does not provide a circumstance on which it will guarantee the fair hearing to the parties but also does not give the time duration or such particular information which can be demanded."

104. The Applicants further contended that the said section is offensive in that it creates a criminal offence, but lacks a requirement of *mens rea*.

105. On its part, and in response, the Respondent submitted that the said introduced Section 8C is reasonable and justified, "in order to achieve the purpose for which the Political Parties Act was enacted and in order to ensure smooth supervision of the Register of Political Parties, keeping a Register of members and leaders is important." Further, the Respondent submitted that the maintenance of the Registers as required by the section does not in any way occasion prejudice to the political parties.

106. As regards the penalties provided for in the introduced section, the Respondent submitted that "disclosure of the Register of members and leaders in itself is not an interference of privacy given the fact that the Parties have pledged to keep Registers and the same should be accessible to the Registrar when required."

107. We subject the introduced Section 8C of the Principal Act to the three-tier test:

(a) In our view the provision of law is clear and precise as to what powers the Registrar has, and what is expected of the political parties;

(b) We consider that there is a legitimate, substantial objective to the law, as regards the regulation of political parties, as a matter of public policy;

(c) We do further consider that the legal provision is a proportionate way to address the objective referred to above.

108. In our considered opinion, the introduced Section 8C meets all the parts of the three-tier test.

109. We turn to consider Section 8E as introduced into the Principal Act. The Section is reproduced above.

110. The Applicants argued that the Section unreasonably restricts political parties, leaders and members to organize personal security and safety. It is subjective, unjust and unjustifiably restricts the right to personal security and freedom of association. The Applicant further argued that the words "an organization intending to usurp the functions of the police force or a government security organ" are unjustifiably and unreasonably wide and they are vague.

111. The Respondent argued that the said Section 8E serves as a legitimate purpose to ensure that national peace and security are managed as envisaged in the Constitution of the United Republic of Tanzania. The obligation to ensure state security and peace of all individuals within the United Republic of Tanzania rests with the State and legally authorized bodies such as the Police Force and the Army. The introduced provision is necessitated by the experience of the increased violence in general elections, which violence is stimulated by the exercise of the political parties' paramilitary groups. The Respondent argues that "the impugned provision should be interpreted in the context of today's politics and the need to address every threat that may be occasioned by the parties' paramilitary groups".

112. Applying the first test to the introduced Section 8E, we are persuaded by the Applicants submission that the provision lacks the necessary clarity and precision. The phrase "*a militia, paramilitary or security group of any kind*" is not clear as to what it encompasses. Nor

indeed, is the phrase "usurp the functions of the police force or any government security organs."

113. The introduced provision read in its entirety falls short of the requisite clarity to inform the political parties, what exactly is prohibited. This is particularly so, in a situation where, as the Applicant argues and the Court takes judicial notice, there are other laws that govern and regulate ostensible groups that present an affront or political threat to public order and security.

114. The provision, Section 8E, thus fails the first of the three-tier test. We observe that, were we to consider the other two tests, while the object of ensuring public order and safety is legitimate and substantial, the provision to the extent that it is wide and imprecise, would in our view be deemed to be a disproportionate manner of meeting the otherwise pressing and substantial objective. It would in any event thus, fail the third test.

SECTION 15

115. The Applicants also impugn Section 11A introduced into the Principal Act by Section 15 of the impugned Act which provides as follows:

> **"11A: (1) Two or more political parties fully Registered in accordance with the provisions of this Act may form a coalition before or after general election and shall submit to the Registrar an authentic copy of the coalition agreement entered into between or among such parties.**
>
> **(2) The decision to form a coalition shall be made by a national general meeting of each political party intending**

to form coalition and shall be in writing and duly executed by persons authorized by political parties to execute such agreements on behalf of each political party intending to form a coalition.

(3) A coalition agreement entered into before a general election shall be submitted to the Registrar at least three months before that election.

(4) A coalition agreement entered into after the general election shall be submitted to the Registrar within fourteen days after the signing of the coalition agreement.

(5) A coalition agreement shall set out the matters specified in the second Schedule to the Act.

(6) Political parties to coalition under this section shall maintain their status as individual Registered political parties, and shall continue to comply with all the requirements governing Political Parties under this Act and any other relevant laws.

116. The Applicants submitted that the latter provision is unreasonable and subjective and is contrary to acceptable standards of freedom of association and; thus, is a violation of the Treaty. The Applicants further argued that the provision is unreasonable to the extent that it conditions political parties to make decisions on coalitions by way only of general meetings; as well also as unreasonable, is the requirement to deposit a coalition agreement entered into prior to a general election, with the Registrar, at least three months before such election.

117. The Applicants also challenge the section for lack of clarity, in that "coalition", is not defined, and seemingly coalition for purposes other than elections, are not envisaged.

118. The Respondent submitted that while Section 11A provides for the right for political parties to form coalitions and, therefore, guarantees the freedom of association, the limitation provided for in the section arises only in the case of pre-election coalitions, as this is a practical necessity in the context of preparations for such elections.

119. The Respondent further submitted that since Political Parties belong to members, the decisions relating to coalitions should only be made by the members in general meeting "and not by a caucus of individuals."

120. In our view, the provision, the introduced Section 11A, meets the first of the three-tier test. It is clear and precise as to what is required of the political parties. We are not persuaded by the argument of the Applicant that the term "coalition" is vague or imprecise. Nor in our reading, does the section exclude non-election related coalitions as the Applicant argues. It merely sets a clear time sequence, where pre-election coalitions are concerned.

121. In our considered opinion, Section 11A also passes the second test in that the provision for and regulation of coalitions of political parties is a proper and substantives objective that is important to society.

122. On the third test, however, we consider the requirement that coalition decisions can only be made by members in general meeting, to be a disproportionate way to achieve the said objective. It is not apparent why, if the political party's Constitution allows it, such

decision cannot be made by another organ of a party, on a delegated basis. This limitation of the right of political parties to organize themselves internally in accordance with their constitutions is in our view indefensible in a democratic environment.

123. We find therefore that the Section on that account fails the third of the three tests.

SECTION 23

124. The Applicants challenge Section 23 of the impugned Act. This Section amends Section 18 of the Principal Act, and provides as follows:

> **"23. The Principal Act is amended in Section 18 by adding immediately after subsection (5) the following new subsections:**
>
> **(6) The Registrar may suspend grant of subvention to a political party for specified period where he has evidence that management of the political party which includes its trustees is not able to account for or supervise accountability of such funds.**
>
> **(7) A political party which receives a disclaimer audit report shall be denied subsequent subvention for six months.**
>
> **(8) The Registrar may, at any time, where he is dissatisfied with management of the resources of a political party, request the Controller and Auditor-General to carry out a special audit."**

125. It was the Applicant's Submission that the introduced amendments/additions to Section 18, violate the principle of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights and thus, offends the Treaty. The provisions, the Applicants argued, are discriminative and unreasonable, and the term "disclaimer" in Section 18(7) is vague and unclear.

126. The Respondent in submission denied that the introduced Sections were a violation of the Treaty. Rather, the Respondent argued, these sections enhance financial accountability and transparency in the use of public resources by the political parties.

127. In our view, the introduced sections constitute legal provisions that are clear and concise as to what is being prescribed by the law. As regards section 18(7) as introduced, we take judicial notice of what a disclaimer audit report is in practice, and we are not persuaded that the term introduces any ambiguity or lack of clarity. In our view, the introduced section 18 passes the first test.

128. We are persuaded by the argument of the Respondent as to the legitimate objective of introducing the impugned provisions in section 18, namely to enhance the transparency and accountability in the use of public resources. The provisions, therefore, pass the Second-tier test.

129. We do not consider that any of the introduced provisions to Section 18 of the Principal Act are in any way disproportionate to the legitimate objective set out in the last paragraph. The said provisions, in our view, therefore, pass the third-tier test.

SECTION 29

130. Section 29 of the impugned Act introduces Sections 21D and 21E to the Principal Act as follows:

> **"21D: (1) Any person who contravenes any provision of this Act to which no specific penalty is prescribed, shall be liable on conviction to a fine of not less than three million shillings but not exceeding ten million shillings or to imprisonment for a term of not less than six months but not exceeding one year or to both.**
>
> **(2) Any political party which contravenes any provision of this Act to which no specific penalty is prescribed shall be liable to a fine of not less than ten million shillings and not exceeding fifty million shilling or to suspension or to deregistration.**
>
> **21E: (1) without prejudice to the generality of the power conferred by this Act, the Registrar may suspend any member of a political party who has contravened any provision of this Act from conducting political activities.**
>
> **(2) Any party member who conducts party or political activities or participates in an election or causes any person to conduct party political activity or participate in an election during period of suspension of such party, commits an offence.**
>
> **(3) Where the Registrar is satisfied that a member of a political party has contravened this Act, the Registrar shall, in writing require the political party to take such**

measures against the member as prescribed in the party constitution within fourteen days.

(4) Where the political party fails to comply with the requirements of the Registrar under subsection (3), or where the measures taken by a political party are not satisfactory, the Registrar may, in writing notify the member and the political party of his intention to suspend that member from conducting political activities.

(5) Upon receipt of notification from the Registrar under subsection (4), the member shall, within fourteen days, make representation to the Registrar on the matter.

(6) Where the member fails to make representation to the Registrar within the period specified under subsection (3), or if the representation made is not satisfactory, the Registrar shall suspend that member from conducting political activities for a period not exceeding six months, and notify the relevant political party accordingly.

131. Firstly, the Applicants challenge the introduced Section 21D as being a violation of the Treaty by reason of being couched in wide terms, thus making the provision amenable to abuse. The Applicants also contend that the section is unreasonable and creates penalties that are disproportionate to the offences and thus the very *"core value of the existence of political parties"* is threatened.

132. On its part, the Respondent submitted that "the fines and penalties imposed aim to ensure that political parties and their leaders abide by the law and that is what the rule of law calls for". The introduced

section, the Respondent argued, is justifiable and does not violate the Treaty. The penalties provided for are proportional and reasonable.

133. As regards the introduced Section 21D to the Principal Act, we hold that the legal provision is clear and unambiguous; it has clarity and precision to the political parties as to what is provided for. The Section therefore, meets the first of the three-tier test.

134. To the extent that Section 21D as introduced is in effect a residual provision on offences and penalties in the Principal Act as amended, we opine that the objective of the law in respect thereof, is a legitimate one, pressing and substantial. This meets the second test.

135. As regards proportionality of the law to the said objective, beyond a bold assertion of disproportionality, on the part of the Applicants, no evidence or clear submission was presented to us to support such assertion. We consider the provisions in the said section to be reasonable and proportionate to the objective stated in the last paragraph. The section in our view meets the third of the three-tier test.

136. The Applicants impugned Section 21E introduced to the Principal Act, by Section 29 of the impugned Act. The said Section 21E is reproduced above. The Applicants submitted that the Section gives to the Registrar, powers that are arbitrary and discretionary and which constitute an unreasonable and unjustifiable limitation of the citizens' right to participate in public affairs; thus, a violation of the Treaty.

137. The Respondent in turn submitted that the said Section 21E does not violate the Treaty, the powers therein granted to the Registrar are well regulated with checks and balances within the same section. The

same said section provides for procedures and safeguards on how the power of the Registrar to suspend a member from conducting political activities may be exercised.

138. The Court applies the three-tier test to the said introduced Section 21E of the Principal Act. Reading the Section in its entirety, it is our considered opinion that the provision lacks clarity in certain material respects.

139. We consider that the term "political activities" does not describe with precision, what it is that the Registrar would be suspending the party members from? We consider therefore that the sections fail the first tier-test. In any event, whilst this Court is persuaded that the Respondent State has an objective that is substantial and important to society; namely, the regulation of political parties (and thus the second of the three-tier test would be met), it is our opinion that the provisions in the section, are not a proportionate way to achieve the objective.

140. In our view, Section 21E does not provide sufficient due process nor any sufficient safeguards for the political parties and their members, where the section gives such powers to the Registrar, as are therein contained. On the third test, the section would also fail.

ISSUE NO.3: <u>Whether the Parties are Entitled to the Remedies Sought</u>

141. The Applicants prayed that the Court grants the remedies set out in paragraph 18 of this Judgment.

142. The Respondent on its part, prayed for the Orders cited in paragraph 24 of this Judgment.

143. Having considered the issues before us and having considered the respective pleadings and submissions of the parties herein, we have found that certain sections of the impugned Act as hereinafter set out are in violation of the principles stated in Articles 6(d) and 7(2) of the Treaty.

144. For avoidance of doubt, where in this Judgment we have found that a provision of the impugned Act fails any one of the three-tier test promulgated in the **Media Council of Tanzania** case (supra), *ipso facto*, such provision violates the Treaty.

145. Further, each of the Parties herein prayed for costs. Rule 111(1) of the Court's Rules provide as follows:

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

146. The Reference raised matters of significant of public interests. For that reason, we exercise our discretion and order that each party herein bears its own costs.

H. CONCLUSION

147. From the foregoing, it is our conclusion that the Applicants have partly succeeded in their case. According we decide as follows:

(a) We declare that the provisions of sections 3, 4, 5, 9, 15 and 29 of the Political Parties (Amendment) Act, No.1 of 2019 violate Articles 6(d), 7(2) and 8(1)(c) of the Treaty for The Establishment of the East African Community;

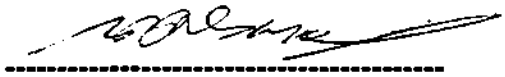
(b) The Respondent is directed to take such measures as are necessary, to bring the said Political Parties (Amendment)

Act, No.1 of 2019 into conformity with the Treaty for The Establishment of the East African Community; and

(c) Each Party shall bear its own costs.

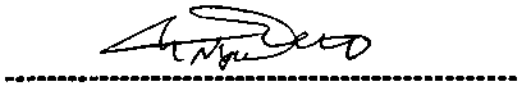
148. It is so ordered.

Dated, signed and delivered at Arusha this 25th March, 2022

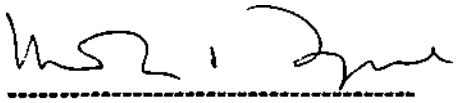


Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE

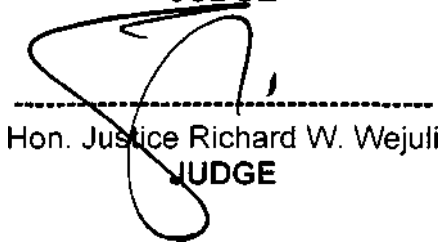
Hon. Justice Audace Ngiye
DEPUTY PRINCIPAL JUDGE



Hon. Justice Dr Charles O. Nyawello
JUDGE



Hon. Justice Charles Nyachae
JUDGE



Hon. Justice Richard W. Wejuli
JUDGE