



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

**(Coram: Nestor Kayobera, JP; Kathurima M' Inoti & Cheborion
Barishaki, JJA.)**

APPEAL NO. 13 OF 2022

(ARISING FROM REFERENCE NO. 10 OF 2017)

1. OLOLOSOKWAN VILLAGE COUNCIL
2. OLOIRIEN VILLAGE COUNCIL
3. KIRTALO VILLAGE COUNCIL
4. ARASH VILLAGE COUNCIL } APPELLANTS

VERSUS

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

[An Appeal from the Judgment of the 1st Instance Division of the East African Court of Justice at Arusha by Hon. Lady Justice Monica K. Mugenyi (Principal Judge), Hon. Justice Audace Ngiye (Deputy Principal Judge) and Hon. Justice Charles A. Nyachae (Judge) dated 30th September 2022, in Reference No. 10 of 2017: Ololosokwan Village Council and 3 Others vs The Attorney General of the United Republic of Tanzania]

JUDGMENT

A. INTRODUCTION

1. This Appeal was filed in this Court on 4th November, 2022 under Article 35A of the Treaty for the Establishment of the East African Community (“the Treaty”) and Rule 86 of the East African Court of Justice Rules of Procedure, 2019 (“the Court Rules”).
2. The Appellants are legal entities and bodies corporate established by law in the United Republic of Tanzania, and are based in Ngorongoro District, Arusha Region, United Republic of Tanzania. Their address for service is care of: -

Donald Omondi Deya, Advocate;
Nicholas Opiyo, Advocate
Pan African Lawyers Union (PALU)
No. 3 Jandu Road, Corridor Area
P.O. Box 6065
Arusha, United Republic of Tanzania
Email: legal@lawyersofsarica.org

3. The Respondent is the Attorney General of the United Republic of Tanzania, the Chief Legal Advisor of the Government of the United Republic of Tanzania, a Member State of the East African Community, and his address for service is care of: -

The Honorable Attorney General
Attorney General’s Chambers
Kivukoni Front
P.O. Box 9050
Dar-es-Salaam, TANZANIA

B. REPRESENTATION

4. The Appellants are represented by Mr. Donald Omondi Deya, Advocate and Mr. Nelson Ndeki, Advocate. The Respondent is represented by Mr. Gabriel Pascal Malata, Solicitor General; Mr. Abubakar Mrisha, Principal State Attorney and Ms. Pauline Mdendemi, State Attorney.

C. BACKGROUND TO THE APPEAL

5. It is common ground between the Parties hereto that on incorporation, certificates of incorporation were issued to the said Appellants, in accordance with the laws of the Respondent. In addition, the Respondent granted the Appellants ownership titles to land adjoining the Serengeti National Park.
6. Sometime in 2012, there arose a series of disputes between the Appellants on the one hand and the Respondent and the management of the Serengeti National Park on the other. The disputes were on the exact location of the boundary between the National Park and the Appellants' land.
7. On 30th May 2013, the then Prime Minister of the Respondent, Honourable Mizengo P. Pinda, in his correspondence to the Arusha Regional Commissioner, Honourable Magesa S. Mulongo, expressed concern by the Government of the Respondent about the boundaries conflict and directed that the issue be handled very carefully and by involving the residents of the Appellants.
8. Ultimately, in August 2017, the Respondent ordered the Appellants to move, ostensibly as they were within the confines of the National Park, a position that the Appellants denied, maintaining that the

villages where they farmed and carried out their pastoralist activities were within their legitimate community land, and outside the boundaries of the Serengeti National Park.

9. Upon the Appellants' refusal to move as ordered by the Respondent, the latter gave written notice and proceeded to carry out forceful evictions of the Appellants' residents and their livestock from the area, the subject of the dispute. Save for insisting that the evictions were conducted with dignity and were not in any way brutal, the Respondent does not deny that it evicted the Appellants' residents. It is the Respondent's contention that the evictions were from areas within the Serengeti National Park.
10. The Appellants, however, contend that the land in question is their legitimate community land in which they have resided and carried out other activities for many years. They further contend that the land is outside the National Park and that the evictions were effected in a callous and brutal manner as well as in violation of the laws of the Respondent and International Laws.

D. THE REFERENCE

11. Aggrieved by the actions of the Respondent State through its agents, the Appellants filed Reference No. 10 of 2017 in the First Instance Division of this Court ("the Trial Court") under Articles 6 (c) and (d) and 7(2) of the Treaty; Article 15(1) of the Protocol on the Establishment of the East African Community Common Market (the Protocol); Rules 1(2) and 24 of the Court Rules, 2023 and all enabling provisions of law.

E. THE APPELLANTS' CASE IN THE TRIAL COURT

12. The Appellants' case in the Trial Court is set out in the Statement of Reference filed in the Trial Court on 21st September 2017, various Affidavits of witnesses, oral testimony of witnesses, as well as in the written submissions and Rejoinder to the Respondent's Response to the said Submissions. It is the Appellants' case that the land, the subject of the dispute is community land lawfully held by them, and that all the said land is outside the Serengeti National Park.
13. The Appellants relied on the documents of ownership annexed to the Reference, the supporting Affidavits, and oral testimonies of the several witnesses from the villages. The Appellants, thus, submitted that in effecting the evictions and moving the Appellants' residents from the land they were legally occupying, the Respondent had violated its own laws and, in so doing, had contravened specific provisions of the Treaty, in particular Articles 6(c) & (d) and 7 (2) thereof, and Article 15 (1) of the Protocol.
14. The Appellants, thus, sought orders as follows: -
 - a) *A declaration that the Respondent has violated the Treaty and the Protocol;*
 - b) *An Order to the Respondent to stop the evictions, the arrest, detention or prosecution of the Appellants' members and residents; the damage to their homes, homesteads, livestock and other properties;*
 - c) *An Order for restitution and reinstatement of the Appellants, their members and residents to their lawful property;*
 - d) *That the Respondent be ordered to make full reparations and further pay general damages of Tanzanian Shillings 1,000,000,000;*
 - e) *That the Respondent be ordered to pay costs; and*
 - f) *Any other relief deemed just and equitable.*

F. THE RESPONDENT'S CASE IN THE TRIAL COURT

15. The Respondent's case is set out in the Response to Reference, in the Affidavits and oral testimonies of its witnesses, as well as in the Response to the written submissions of the Appellants.
16. In a nutshell, the Respondent gave Notice of Preliminary Objection allegedly on points of law that:
- a) *The Court is devoid of jurisdiction to entertain this Reference;*
 - b) *The Reference is bad in law for failure to exhaust available local remedies;*
 - c) *The Appellants do not have the requisite authority to institute proceedings in this Court;*
 - d) *The Reference offends the principles of the National Land Policy which are the objectives of the Village Land Act under Section 3(1) of the Village Land Act No.5 of 1999; and*
 - e) *The Reference offends the Constitution of the United Republic of Tanzania, 1977.*
17. The Respondent further contended that the evictions were lawful and that the villages had been designated areas for relocation and the exercise was performed in compliance with the laws of the Respondent and in accordance with the Treaty. The Respondent thus denied all the prayers sought by the Appellants in the Reference. The Respondent pleaded that the evictions of the villagers was from the Serengeti National Park and not from the villages and that all the residents of the Appellants were at all times treated with respect and dignity and that no property was destroyed within the respective villages.

18. By way of evidence, the Respondent filed Affidavits from a number of witnesses who testified that the evictions of the Appellants' residents were done with respect and dignity.

G. ISSUES FOR DETERMINATION BY THE TRIAL COURT

19. In the Trial Court, the following issues were agreed upon by the parties for determination by the Court: -
- a) *Whether the East African Court of Justice has Jurisdiction to hear and determine the Reference;*
 - b) *Whether or not the Reference offends the principles of the National Land Policy which are the Objectives of the Village Land Act, Section 3(1) of the Village Land Act No. 5 of 1999;*
 - c) *Whether or not the Applicants were evicted from the Serengeti National Park or from their respective villages;*
 - d) *Whether the acts, omissions and conduct of the Respondent violate Articles 6(c), 6(d) and 7(2) of the Treaty and Article 15(1) of the Protocol; and*
 - e) *What Remedies are the Parties entitled to?*

H. DETERMINATION OF ISSUES BY THE TRIAL COURT

ISSUE NO.1 : Whether the East African Court of Justice has Jurisdiction to hear and determine the Reference:

20. On this issue, the Trial Court held that it derives jurisdiction from Article 27(1) of the Treaty and that as regards *locus standi* before the Court by parties other than the Partner States and the Secretary General of the Community, Article 30 of the Treaty allows any resident in a Partner State who alleges violation of the Treaty by a Partner State to file a Reference in the Court.
21. Relying on the decisions of this Court in **Martha Wangari Karua v The Attorney General of the Republic of Kenya & 2 Others,**

EACJ Reference No. 20 of 2019 and Henry Kyarimpa v The Attorney General of the Republic of Uganda, EACJ Appeal No. 6 of 2014, the Trial Court rejected the Respondent's contention that it was the domestic courts, to the exclusion of this Court, which had jurisdiction to handle disputes pertaining to land.

22. The Trial Court further concluded that the subject matter of the Reference was one over which it had jurisdiction in terms of Article 27 of the Treaty and that the Appellants had the legal capacity to bring the Reference pursuant to Article 30 of the Treaty, as legal persons resident within the East African Community.
23. In the premise, the Trial Court held and ruled that it had jurisdiction to hear and determine the Reference.

ISSUE NO.2 Whether or not the Reference offends the Principles of the National Land Policy which are the Objectives of the Village Land Act Section 3 of the Villages Act

24. On this issue, the Respondent made reference to section 3(1) of the Land Disputes Act, Cap 216 (Tanzania), and submitted that since the subject matter of the dispute in the Reference was land, under the Act the dispute could only be adjudicated by the courts specified therein rather than by the East African Court of Justice.
25. On their part, the Appellants submitted that the Treaty has no requirement for the exhaustion of local remedies as a precondition to approaching this, Court. Hence, the Applicants did not need to first bring the dispute before any land dispute court, in the Respondent State.

26. The Trial Court held, relying on Abba Ltd vs the Attorney General of the Republic of Rwanda, EACJ Reference No. 18 of 2018 and Attorney General of the Republic of Rwanda vs Plaxeda Rugumba, Appeal No. 1 of 2012, that exhaustion of local remedies is not required prior to filing a dispute before this Court.
27. The Trial Court further found that the allegations by the Appellants were within the legitimate powers of the Court's jurisdiction, notwithstanding that the subject matter touched on what may be described as a land dispute, and which possibly the Appellants had the option to take before the tribunals envisaged in the domestic law.
28. It was the final determination on this issue by the Trial Court that the Reference did not offend the principles of the National Land Policy which are the objectives of the Villages Land Act Section 3(1).

ISSUE NO. 3: Whether or not the Appellants were Evicted from the Serengeti National Park or from their respective Villages

29. While the Appellants contended that the Respondent forcefully and brutally evicted them from their villages, and destroyed their homesteads, which were outside the boundaries of the Serengeti National Park, the Respondent, maintained that although it gave the Appellants eviction notice which they did not comply with, the evictions were done in a humane manner and in accordance with law. The Respondent maintained that, in any event, the area from which the villagers were evicted was within the boundaries of the Serengeti National Park.
30. In considering this issue, the Trial Court was guided by the law and practice that the party making the claim or allegation bears the

burden of proof and that it was incumbent upon the Applicants to prove, on a balance of probability, that indeed the evictions were conducted forcefully from the villages outside the parameters of the Serengeti National Park. In that regard, the Trial Court relied on the decisions in Niyongabo Theodore & 2 Others vs The Attorney General of the Republic of Burundi, EACJ, Reference No.4 of 2011 and Henry Kyarimpa vs The Attorney General of Uganda (supra).

31. On where the evictions took place, the Trial Court considered the Appellants' witnesses PW1, PW2, PW3, PW4, PW5 and PW6 who stated that the villages were outside the boundaries of the Serengeti National Park; that the villagers were aware of the position of their boundaries but that at no point did they trespass into the Serengeti National Park; and that the eviction exercise was conducted in their villages outside the National Park.
32. The Trial Court found that, beyond bare assertions by the Appellants said witnesses, there was lack of specificity on the location of the beacons marking the boundary of the Serengeti National Park. The Trial Court also found that the report by the Appellants' expert witness (PW7) was not credible because it did not indicate where exactly the boundaries of the Park were, or that, as a non-citizen, he carried out his survey work in accordance with the requirements of the laws of Tanzania. However, as regards the evidence adduced by the Respondent, the Court found that it was consistent that the evictions were conducted within the boundaries of the National Park.
33. The Trial Court further took Judicial Notice of **Government Notice No. 235 published on 21st June, 1968** in which by a Proclamation

pursuant to Section 4 of the National Parks Ordinance, Cap 412, the President of the Respondent altered the boundaries of the Serengeti National Park. The Trial Court found that the boundaries of the Serengeti National Park are as set out in the schedule to the Proclamation.

34. Ultimately, the Trial Court concluded that the Appellants had failed to discharge the burden of proof that the villages in question were outside the boundaries of the Serengeti National Park.

ISSUE NO.4: Whether the acts, omissions and conducts of the Respondent violate Articles 6(c) &(d) and 7(2) of the Treaty and Article 15(1) of the Protocol.

35. On this issue, the Trial Court found that its determination directly hinged on its findings in respect of Issues Nos. 2 and 3 above and in particular Issue No. 3 where it found that the Appellants had not proved that the evictions were carried out outside the Serengeti National Park. The Court also found that most of the Appellants' evidence was inconsistent hearsay evidence and did not prove injury or actual loss during the eviction.

36. Accordingly, on this issue, the Trial Court held that, the Appellants had not demonstrated that the acts, omissions or conduct of the Respondent violated Articles 6 (c), (d) and 7(2) of the Treaty and Article 15(1) of the Protocol.

ISSUE NO.5: What Remedies are the Parties entitled to?

37. As to remedies, the Trial Court ruled that in view of its findings, the Appellants were not entitled to the remedies prayed for. The Court therefore dismissed the Reference.

I. CONCLUSION

38. In concluding, the Trial Court declared and ordered that it had jurisdiction to hear and determine the Reference, dismissed the Reference for lack of merit and ordered that each party bears its own costs.

J. THIS APPEAL

39. Dissatisfied with the decision and orders of the Trial Court, the Appellants filed this Appeal in the Appellate Division of the East African Court of Justice against part of the above-mentioned decision and orders on the following grounds: -

- I. That the Trial Court erred on a point of law by failing to examine all affidavits filed in support of the Reference and give them weight as required by law.
- II. That the Trial Court erred on a point of law by holding that the Appellants did not provide sufficient proof of violation of Articles 6(c) & (d) and 7(2) of the Treaty.
- III. That the Trial Court committed a procedural irregularity by not properly considering expert evidence presented in support of the Reference.
- IV. That the Trial Court erred on a point of law by failing to seek from the parties any information the lack of which was going to form the basis for its Judgment.
- V. That the Trial Court erred on a point of law by failing to consider the inhuman and degrading nature of the process used in evicting the Appellants' villagers regardless of whether they were within Serengeti National Park or village land.

- VI. That the Trial Court erred on a point of law by inappropriately applying a standard of proof other than the balance of probabilities.
- VII. That the Trial Court erred in law by holding that the Appellants were not entitled to the remedies sought.
40. The Appellants prayed the Appellate Division of this Court to: -
1. Set aside the orders of the Trial Court on issues 3, 4 and 5 and declare the said issues in favor of the Appellants.
 2. Order the Respondent to make full reparation and further pay general damages of Tanzania Shillings 1,000,000,000 as prayed in the Reference.
 3. Grant the orders as prayed in the Reference.
 4. Make such further or other orders it deems just in circumstances; and;
 5. Order that costs be borne by the Respondent.

K. THE RESPONDENT'S OPPOSITION TO THE APPEAL

41. The Respondent opposed the Appeal on the grounds that it did not meet any of the requirements of Article 35 A of the Treaty and prayed that it should be dismissed.
42. The Respondent further contended that the eviction of the Appellants' residents was due to trespass into the borders of the Serengeti National Park, and that it was conducted in an orderly manner and in accordance with the national law and in full compliance with the Treaty.
43. The Respondent finally prayed that the Judgment and orders of the Trial Court be upheld and the Appeal be dismissed in its entirety with costs.

L. ISSUES FOR DETERMINATION

44. Prior to the hearing of the Appeal, a Scheduling Conference was held on 6th February 2023 and the following issues were agreed upon by the parties and approved by the Court, for determination: -

1. Whether the Trial Court erred on a point of law by failing to examine and consider the evidence in support of the Reference.
2. Whether the Trial Court erred on a point of law in holding that there was no violation of Article 6(d) and 7(2) of the Treaty.
3. Whether the Trial Court erred on a point of law by applying a standard of proof other than the balance of probabilities.
4. What remedies, if any, are the parties entitled to?

M. APPELLANTS' SUBMISSIONS

45. Pursuant to Rule 63(4) of the Court Rules and the Order of the Court made on 8th February 2023, the Appellants duly filed and served their written submissions.

1. At the hearing of the appeal, Counsel for the Appellants indicated that each of the above issues would address the grounds raised by the Appellants in the Memorandum of Appeal as follows:
 - a) Issue No.1 to cover grounds of appeal numbers 1,3 and 4;
 - b) Issue No.2 to cover grounds of appeal numbers 2 and 5;
 - c) Issue No.3 to cover ground of appeal number 6 only;
 - d) Issuer No.4 to cover ground of appeal number 7.

46. Counsel for the Appellants started by giving a brief background of the case which we deem necessary to reproduce *verbatim* for clarity. Counsel submitted that the crux of this appeal is the

wanton violations of the rights of one of the minority and indigenous communities of the Respondent and that: -

- (i) *The Maasai communities have been identified by international communities as a Nilotic ethnic group and this group has been endorsed by the African Commission for Human and Peoples Rights as an indigenous and pastoralist group. This is perhaps the most popular community locally and internationally as it is one of the very few communities in the Respondent that has kept their distinct, elaborate, customs, way of life, and dressing among others. This case tells the sad story of a community that despite their decades and decades of bringing pride to the Respondent, protecting the environment, and bringing revenue through tourism have now been rendered homeless, injured, and some even killed by agents of the same Respondent. These vile actions of unlawfully evicting them from their ancestors' lands on which all their livelihood depends, including religious, cultural and traditional practices took place on 05th August 2017 and it is still ongoing. It highlights how despite a valid Court Order the Respondent was still not deterred from forcefully evicting the Appellants, destroying their property, killing their treasured herds of cattle, and rendering several members of the Appellants' villages homeless.*
- (ii) *On 30/09/2022 the Trial Court delivered its judgment, dismissing part of the Appellants' case, in Reference No. 10 of 2017 and it held that the Appellants had failed to prove their case as alleged.*
- (iii) *On 04/11/2022, the Appellants filed a Memorandum of Appeal which raised 7 grounds of appeal that are pegged on errors on points of law and procedural irregularities by the Trial Court.*

47. Counsel further identified what he considered to be uncontested facts in the Appeal, which were also summarized under the Points of Agreement in the Case Scheduling Conference Notes, signed by both parties, and filed in Court. Those are:-

1. *As part of the exercise of legalizing and registering the Appellants, land was set aside and clearly demarcated, and ownership titles were granted, which identified the boundaries of each Appellant village's land holding.*
2. *On 21/09/2017, the Appellants filed Reference No.10 of 2017 before the Trial Court.*
3. *On 25/09/2018, the Trial Court granted interim Orders restraining the Respondent and its agents from evicting members of the Appellants' villages from the disputed land, and further restraining the said State and its agents from destroying their homesteads, confiscating their livestock, or harassing or intimidating them pending the determination on the merits of the said Reference No. 10 of 2017.*
4. *On 30/09/2022, the Trial Court delivered its judgment through which it held in favour of the Appellants on issues 1 and 2 and dismissed issues 3, 4 and 5.*
5. *Dissatisfied with parts of the Judgment, the Appellants filed the present Appeal No.13 of 2022.*

48. Counsel submitted that since their submissions are mostly pegged on the errors on points of law committed by the Trial Court, they would prove that there were indeed errors on points of law and further show how the said errors affected or caused a miscarriage of justice to *"these innocent citizens who are still suffering until today and the decision of the Trial Court has only helped the Respondent to continue propagating the violations and actions of inhuman and*

degrading treatment towards the Maasai community in the affected villages."

ISSUE NO.1: Whether the First Instance Division erred on a point of law by failing to examine and consider the evidence in support of the Reference.

Appellants' Submissions on Issue No. 1

49. Counsel for the Appellants submitted that it is trite law that courts are best placed to hear, assess and weigh the evidence, including affidavits, and oral evidence given by witnesses at trial and that the evaluation of the same should be on substance as affirmed in the case of Angella Amudo v. Secretary General of the East African Community, Appeal No. 4 of 2014, p. 28, para 65 where this Court held that: -

"We are fully aware that a court commits an error of law or procedural error when it misapprehends the nature, quality and substance of the evidence..."

50. Counsel further referred to Rule 25(3) of the Rules, which provides that: -

"Where a Reference seeks to challenge the legality of an Act, regulation, directive, decision or action, the Statement of Reference shall be accompanied by an affidavit."

51. The Appellants submitted that an affidavit in its plain meaning is a sworn statement in writing made under oath or on affirmation before an authorized officer to attest to a certain set of facts and that by this meaning, it is obvious that an affidavit contains statements of facts which are evidence, and the Court is duty-bound to consider all evidence in arriving at its final decision.

52. The Appellants added that the filing of affidavits is a requirement of law under Rules 35(3) and 63 of the Court Rules, and that their consideration by the Court in making decisions is mandatory unless the Court gives reasons as to why it disregarded the affidavits evidence.
53. The Appellants further referred to paragraph 46 of the Judgment of the Trial Court where the Court considered the evidence of only 6 witnesses and ignored the following Affidavits of 9 other witnesses, without providing any reason: -
- i. Japhet S. Reiya found on pages 551-557 of the Record of Appeal;
 - ii. Kutiti Kelelwa Ketuta on pages 558-562 of the Record of Appeal;
 - iii. Ndurwai Karia on pages 621-625 of the Record of Appeal;
 - iv. Kapurwa Lindi on pages 627-644 of the Record of Appeal;
 - v. Silepu Mbusa on pages 656-667 of the Record of Appeal;
 - vi. Nooserenda Msoi on pages 673-677 of the Record of Appeal;
 - vii. Lazaro Sikoyo on pages 678-700 of the Record of Appeal;
 - viii. Maana Lilah on pages 706-710 of the Record of Appeal;
 - ix. Norkisaruni Lilash on pages 711-715 of the Record of Appeal.
54. It was the submissions of the Appellants that the Trial Court grossly erred on a point of law by disregarding the Affidavit evidence of the above witnesses which contained facts of which they had personal knowledge and proof of the violations by the Respondent. They further submitted that the evidence contained in those Affidavits was not controverted by the Respondent at all.

55. Regarding the 3rd ground of appeal, the Appellants submitted that, the Trial Court committed a procedural irregularity by not properly considering the expert evidence presented in support of the Reference, and discrediting the expert's witness's (PW7) report and oral evidence before the Court.
56. In the Appellants' view, they presented a detailed, well-researched and water-tight Report, found at pages 906-964 of the Record of Appeal, and prepared by Mr. Cesare Ngigi Mbaria, a citizen and resident of the Republic of Kenya, a Partner State to the EAC.
57. They complained that the reasons given by the Trial Court for disregarding the expert's affidavit and report were that: -
- (a) There was no evidence that the expert came to Tanzania for survey purposes and there is no evidence that he visited the place for the survey;
 - (b) The Report did not show the boundary of Serengeti National Park;
 - (c) The Report was fatal because the expert did not consider Government Notice No. 235 of 1968.
58. The Appellants further submitted that first and foremost, the Trial Court erred on a point of law by failing to seek from parties any information, especially when the lack thereof was going to form the basis of its judgment. The Appellants contended that during the trial (pages 1404-1407 of the Record of Appeal), the Court asked the expert witness PW7 whether he had a passport and had obtained the relevant permit. In answer, the witness confirmed that he had those documents and offered to produce the same if the Court needed them, because the issue was raised only on cross-examination.

59. The Appellants further contended that while PW7 testified virtually from the secure premises of a law firm in Nairobi, the Appellants' Counsel were in Arusha, the Respondent's Counsel and witnesses were in Dar es Salaam, and Judges of the Trial Court also participated virtually.
60. The Appellants complained that although PW7 stated that he could produce the said evidence if required, the Trial Court never asked him to produce the same, but went ahead to use this as one of the reasons to discredit his Report. The Appellants submitted that if the Trial Court was going to base its decision on the PW7's alleged absence from Tanzania, the Court had discretion under Rule 66(3) of the Court Rules, in the interest of justice, to require PW7 to produce the documents in court at a later date. In the Appellant's view failure to do so led to a miscarriage of Justice.
61. It is the Appellant's further contention that, in addition to his Affidavit and Report, PW7 testified at the hearing as to when he and his Assistant entered the Respondent State, visited the Appellants villages, spoke with multiple representatives of the Appellants villages, and took measurements, including photographs that he submitted as part of his Report and Affidavit.
62. The Appellants relied on the case of Alcon International Limited v. The Standard Chartered Bank, EACJ Reference No.6 of 2010 where the Court stated that it has inherent powers under Rule 1(2), either on its own motion or on the application of a party, to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.
63. It was the Appellants' further submission that the Trial Court erred on a point of law by disregarding the expert's evidence based on the 2

grounds that the Report did not show the boundaries of the Park and that the expert did not consider the Government Notice (GN) which as per paragraph 55 of the Judgment, shows the altered boundaries of the Park. They contended that the issue before the Trial Court and what the expert intended to prove was where the boundaries of the villages are located and whether the alleged violations occurred in the villages. Accordingly, the expert was not required by law to examine the said GN or to examine the boundaries of the National Park, as the villages had been issued title deeds and the same sufficed for the expert to identify the boundaries of the villages and where the alleged violations occurred.

64. The Appellants further contended, in fact, that the expert had actually ascertained the boundaries of the National Park and had taken photographs of the beacons marking the boundaries, which he included in his Report.

65. Finally on this issue, the Appellants submitted that the Trial Court erred by failing to invoke its inherent powers under Rules 4 and 66(3) of the Court Rules and order any party to produce any evidence that would lead to the ends of justice, if the Court so required.

N. RESPONDENT'S SUBMISSIONS ON ISSUE NO.1

66. Pursuant to Rule 110(5) of the Court Rules, the Respondent filed its written submissions in reply to the Appellants' written submissions.

67. The Respondent submitted that the Trial Court considered all the evidence adduced in all the Affidavits in support of the Appellants' Reference contrary to the Appellants' averments that the Trial Court did not consider the Affidavits of several witnesses. The Respondent submitted further that the Judgment shows that the Trial Court

considered all the Affidavits of the Appellants as indicated at pages 1476, 1479 and 1480 of the Record of Appeal where the Court stated:

"This Court has carefully considered the Affidavits of the witnesses presented by both parties, the oral testimony and submissions, with particular reference to the issue of where the evictions took place."

"Contrary to the submissions of the Applicants' Counsel, in the Affidavit and oral testimony of the witnesses referred to in the previous paragraph, beyond bare assertions there was a lack of specificity on the location of the beacons marking the boundary of the Serengeti National Park.

Considering the evidence presented by both parties and the submissions by learned Counsel, we are not persuaded that the Applicants have discharged the burden of proving what they allege, that the subject villages were outside the boundaries of the Serengeti National Park.

In no case did any witness give evidence that proved either injury or actual loss during the exercise. Here again, therefore, the Applicant falls short on the burden of proof."

68. The Respondent further submitted that, contrary to Appellants' contention that the Trial Court considered the evidence of only six (6) witnesses, the Court in fact considered also the evidence of PW7 at page 1478 of the Judgment. The Respondent added that the mere fact that the Trial Court did not mention the names of all witnesses apart from PW1 - PW7 or reproduced all that was adduced, did not mean that it did not consider their evidence.

69. In the respondent's view, it was clear from the Judgment that all the evidence adduced by the Appellants was summarized and

considered by the Court in the background and concise statement of facts.

70. The Respondent further submitted that even if the evidence of all witnesses was not reproduced, the Trial Court was not bound to reproduce the same in its judgment.

71. The Respondent made reference to the case of Alice Nijimbere v. The Secretary General of the East African Community, EACJ Appeal No. 1 of 2016, at page 14 where the Court stated that what is required in the Judgment is a concise statement of the facts, not reproduction of pleadings and evidence.

72. The Respondent submitted that even if the evidence of the above-named persons were not reproduced in the Judgment, the Trial Court stated clearly that during the hearing such evidence was repetitive and that due to its repetitive nature, the Respondent, under the guidance of the Trial Court, did not cross examine all the deponents and that in the same vein, the Appellants opted not to cross examine all the Respondent's witnesses. In the Respondent's view, the 1st ground of appeal is baseless.

73. As regards ground three of the Appeal, the Respondent submitted that the Trial Court properly considered the evidence of the expert witness. It was argued that because the purported expert witness was from Kenya, it was incumbent on his part to provide proof that he indeed came to Tanzania for survey purposes; and that the proof should have included an extract of his passport showing entry into and exit from Tanzania and also documents indicating that he adhered to the procedures for conducting survey in Tanzania, including the requirements of Section 11 of the Professional Survey (Registration) Act, Cap 270 which regulates how a professional

surveyor who is not a resident of Tanzania acquires temporary registration to conduct survey in Tanzania.

74. The Respondent further submitted that since the expert witness failed to demonstrate that he visited Tanzania for the purposes of carrying out survey, his evidence was properly discredited by the Trial Court. Further, that the report, affidavit and evidence of the expert were given less weight by the Trial Court as the same did not indicate where exactly the boundaries of the Serengeti National Park were. It was also argued that PW7 admitted that he did not consider Government Notice No. 235 of 1968 that defines the boundaries of Serengeti National Park, which was crucial so as to prove that the villages were outside Serengeti National Park as claimed by the Appellants.

75. The Respondent relied on the case of **Attorney General of Kenya v. Honorable Peter Anyang' Nyong'o & 10 Others**, EACJ Appl. No.4 of 2009, at p.12 regarding the duty to produce evidence, where this Court held that the onus on a party is to produce evidence, not to assure the Court of the existence of the evidence.

76. The Respondent further submitted that taking all the above circumstances into account, the Trial Court had no choice but to hold that since PW7 failed to demonstrate that he came to Tanzania and carried out the survey, that undermined the efficacy of the evidence in his report, affidavit and evidence (page 1475 of the Record of Appeal).

77. The Respondent also submitted that Rule 66(3) of the Court Rules is not relevant and is applicable only where the Court, in its own motion, summons any person to give evidence or document and not where the witness has been called by a party. In this case, PW7 was called

by the Appellants and therefore they had a duty to ensure that he provided proof of his visit to Tanzania for conducting survey.

78. It was contended that the Court's discretion under Rule 66(3) of the Court Rules is only exercised when the Court satisfies itself that the evidence or document is crucial for the just determination of any matter before it and that the discretion cannot be exercised for the purposes of filling in evidential gaps as the Appellants were inviting the Court to find.

79. As regards ground four of the Appeal, the Respondent submitted that the Court has no legal obligation to seek any information from a party so as to assist it in proving its case. That, in line with Article 24 of the Treaty, the judges have to remain impartial at all times in the conduct of the trial.

80. The Respondent contended that it is an elementary principle of law that, a person who alleges the existence of a particular fact must prove it and that it was the duty of the Appellants to prove the existence of the alleged violations by the Respondent. The Respondent cited the case of Henry Kyarimpa (supra), at page 31, paragraph 71 in support of that proposition.

81. The Respondent also relied on the case of Alice Nijimbere case(supra) at pages 28-30, and UPRONA Party & 2 Others v. The Attorney General of the Republic of Burundi, EACJ Reference No. 2 of 2004 where this Court reiterated that it was not the duty of the Court to conduct investigations.

82. Finally on this issue, the Respondent invited this Court to find ground 4 of the Appeal without merit in view of the above submissions and authorities.

O. APPELLANTS' REJOINDER TO THE RESPONDENT'S SUBMISSIONS ON THE FIRST ISSUE.

83. The Appellants submitted in rejoinder that Rule 79(5) of the Court Rules requires Judgments of this Court to analyze all the presented evidence and that the Respondent's had misapprehended the Appellant's arguments in Issue No. 1 because the Appellant were not complaining of the failure of the Trial Court to mention the names of the other witnesses but the fact that the Trial Court relied only on the Affidavits and oral testimonies referred to on pages 1459 to 1464 of the Record of Appeal but failed to analyze the other evidence placed before it, and further that the Court failed to explain why it did not consider that evidence.

84. The Appellants referred to the **Handbook on Improving the Quality of Judicial Decisions** (annexure 1 to their response), where it is stated that, it must appear from the judgment that all issues were considered and analysed, otherwise it will create the impression that only part of the submissions were considered. They also cited the decision of this Court in **Alice Nijimbere case (supra)** where the Court reiterated the importance of proper evaluation of the entire evidence adduced by the parties.

85. The Appellants, therefore, submitted that the Trial Court erred in law because its Judgment did not analyze the entire evidence brought by the Appellants and also omitted to take into account the documentary evidence submitted through Affidavits.

86. The Appellants further contended that the general statement by the Trial Court in paragraph 62 of the Judgment regarding the inconsistency and hearsay of the evidence, without clarifying which

evidence was inconsistent and which was hearsay, failed to meet the legal requirement and left a lot to be desired.

87. It was the Appellants' contention that the failure by the Trial Court to identify and summarize the evidence of the witnesses caused legal uncertainty and raised questions whether justice had been done. The Appellants therefore submitted that ground number one had merit and should be determined in their favour.

88. As regards the Respondent's assertion that the Professional Survey Registration Act provides for the mandatory registration of temporary assignments, the Appellants disagreed and submitted that the Act in question provides a mechanism for registration and that it was within the jurisdiction of the Trial Court to assess whether the evidence obtained by expert witness, complied with the Respondent's law and that the Trial Court should have limited itself to determining whether the presented evidence was accurate and of assistance to the Court in dispensing justice.

89. The Appellants submitted further that the Trial Court should have assessed the credibility of the expert witness, based on the submitted report and the qualifications of the expert but, could not just discredit the expert's Report based on the failure to produce the passport showing entry into the Respondent State.

90. It was contended that the expert witness entry into the Tanzania was not a subject matter to the dispute and that evidence of the same was not mandatory.

91. In addition, the Expert witness testified that he had entered the Country and could prove it through the stamps on his passport, if the Trial Court wished to see the evidence. The Trial Court however did not give him the opportunity.

92. The Appellants disputed the Respondent's interpretation of Rule 66(3) of the Court Rules and submitted that the Court has power to require production of a document by any witness called by the parties if it needs that evidence to help it determine an issue. The Appellants added that the expert's evidence was crucial to assist the Court to do justice.
93. It was the Appellants' contention that they were not requesting the Court to fill gaps in the evidence, but merely seeking compliance with Rule 66 of the Court Rules.
94. In response to the Respondent's contention that the Appellants failed to discharge their burden of proof that the villages were located outside the Serengeti National Park, the Appellants submitted that the Trial Court took judicial notice and both parties affirmed that Appellants' villages were established by the Respondent's laws and had titles, copies of which the expert witness used while carrying out his work.
95. Further, it was the Appellants' submission that, although the expert's evidence had not considered Government Notice No. 235, the expert was able to determine the boundaries of the villages because the villages' titles clearly indicate those boundaries and the expert's report showed that the Appellants did not cross the boundaries of the villages to which they hold titles.
96. Finally, the Appellants reiterated that the Trial Court erred in law by failing to examine and to consider the evidence adduced by the Appellants in support of the Reference and by limiting itself to selected evidence, without giving reasons as to why it did not examine all the evidence.

P. THE COURT'S ANALYSIS AND DETERMINATION

ISSUE NO.1: Whether the First Instance Division erred on a point of law by failing to examine and consider the evidence in support of the Reference.

97. We have carefully considered the rival arguments and authorities by both parties, on whether the Trial Court erred on a point of law by failing to examine and consider all the evidence in support of the Reference and we would like to make the following observations, analysis and determination.

98. Appeals to this Court are guided by Article 35A of the Treaty and Rule 86 of the Court Rules both of which provide that: -

“A party aggrieved by a judgment of the First Instance Division of the Court may appeal to the Appellate Division on the following grounds:

- (a) Points of Law;*
- (b) Lack of jurisdiction; or*
- (c) Procedural Irregularity”*

99. We have perused the Record of Appeal (page 551-557) where the Affidavits of the following witnesses of the Appellants are to be found:

- (a) Japhet S. Reiya;
- (b) Kutiti Kelelwa Ketuta;
- (c) Ndurwai Karia;
- (d) Kapurwa Lindi;
- (e) Silepu Mbusa;
- (f) Nooserenda Msoi;
- (g) Lazaro Sikoyo;
- (h) Maana Lilah;
- (i) Norkisaruni Lilash



100. We also observe that in paragraph 12 of the Trial Court's Judgment, the Appellants called the following witnesses who gave oral testimony and were subjected to cross-examination by the Respondent's Counsel:

- (a) Kerry Osesiay Dukuny (PW1);
- (b) Sangeny Rotiken (PW2);
- (c) Letiveti Soit (PW3);
- (d) Nalotweshs Sambeke (PW4);
- (e) Namuyuko Ole Ngololo (PW5);
- (f) Tate Mbootany (PW6); and
- (g) Cesare Ngingili Mbaria (PW7).

101. The gist of the Appellants' complaint as regards this issue is that the Trial Court erred on a point of law by disregarding the Affidavits of the witnesses captured in paragraph 99, which contained evidence of facts that they had personal knowledge of that proved the violations by the Respondent and which the Respondent did not controvert.

102. The **Black's Law Dictionary, 9th Edition (WEST)**, defines an appeal as: *"A proceeding undertaken to have a decision reconsidered by a higher authority, especially the submission of a lower court or agency's decision for review and possible reversal."*

103. On the other hand, the **Stroud's Judicial Dictionary of Words and Phrases, 7th Edition** (London Sweet & Maxwell 2006) Vol.1, at p.157 defines an appeal as follows: -

" ... An appeal in the context of an ouster clause means re-examination by a superior judicial authority of both the findings of fact and conclusions of law to the legal consequences of those facts made by an inferior tribunal in the exercise of a

jurisdiction conferred upon it by statute to decide questions affecting legal rights of others, and the substitution of the superior judicial authority's own findings of fact and conclusions of law for those of the inferior tribunal...(Attorney General v Ryan (1980) A.C. 718 at p.729, HL, per Lord Diplock)."

104. From the pleadings of the Appellants in the present Appeal, we deduce that the foundation of this Appeal is that the Trial Court disallowed three (3) of the framed issues under determination based on unreasonable and unprocedural considerations.
105. The issues which the Appellants fault the Trial Court for unreasonably disallowing were:
- (a) Issue No. 3: Whether or not the Applicants were evicted from the Serengeti National Park or from their respective villages;
 - (b) Issue No. 4: Whether the acts, omissions and conducts of the Respondent violated Articles 6(d) and 7(2) of the Treaty and Article 15(1) of the Protocol.
 - (c) Issue No.5: What remedies are the Parties entitled to?
106. For the Appellants, the Trial Court disallowed the three issues because it grossly failed to examine and consider the evidence of their witnesses in support of the Reference. On the other hand, it was the view of the Trial Court that the Appellants' witnesses' evidence was hearsay, inconsistent and not specific and that other witnesses' Affidavits were not considered because they were repetitive.
107. In paragraph 42 of the Judgment, the Trial Court stated (in regard the issue of whether or not the Appellants were evicted from the Serengeti National Park or from their respective villages) that:

“ in considering this issue, we are guided by the law and practice that the party that makes the claim or allegation bears the burden of proof of what they claim. In the instant case, therefore, it was incumbent upon the Applicants to prove, on balance of probability, that indeed the evictions were done in the villages outside the parameters of the Serengeti National Park.”

108. The Trial Court referred to the case of **Niyongabo Theodore and 2 Others vs The Attorney General of the Republic of Burundi**, (supra), where this Court stated that:

“The burden of proof lies with the Applicant to establish its case and the party that asserts a fact bears the duty to establish it.”

109. The Court went further to refer to the decision in the case of **Henry Kyarimpa** (supra), where it was stated that: *“Generally, in application of actori incumbent probation, the Court will require the party putting forward a claim or a particular contribution to establish the elements of fact and law on which the decision in its favor might be given.”*

110. In the case of **Simon Peter Ochieng and Others vs. The Attorney General of the Republic of Uganda**, EACJ Appeal No.4 of 2015, this Court held that: *“...he who alleges must prove. In that regard a party alleging whatever error must explain what the alleged error is and how it leads to miscarriage of justice.”*

111. It is obvious that the Appellants' means of proving their case (of course on balance of probability) were by way of their witnesses' Affidavits, oral testimony, documentary evidence, including the expert's report and written submissions of their Counsel.

112. In fact, the Affidavits are very key as regards to the party's proof of his/her case as per Rule 25(3) of this Court Rules, which provides that:

"Where a reference seeks to challenge the legality of an Act, regulation, directive, decision or action, the statement of reference shall be accompanied by an affidavit."

113. Is it true, as contended by the Appellants that the Trial Court considered and examined evidence of only 6 witnesses of the Appellants (PW1 to PW6) and decided to disregard the Affidavits of several other witnesses and did not give reasons for their decisions?

114. In paragraph 45 of the Judgment, the Trial Court indicated that: *"We have **carefully** considered the Affidavits of the witnesses presented by both parties, the oral testimony and submissions, with particular reference to the issue of where the evictions took place."* (Our emphasis).

115. On the other hand, we read on paragraph 46 of the Judgment that:

*" On that question, the Applicants' witnesses **PW1, PW2, PW3, PW4, PW5 and PW6** simply stated that the villages were outside the boundaries of the Serengeti National Park, that the villagers were aware of the position of their boundaries, at no point did they trespass into the Park, and that the eviction exercise was conducted in their villages outside the Park."*

On paragraph 47 of the Judgment, the Trial Court stated that: " We shall revert to PW7 below. PW1 to PW6 inclusive simply stated that the villages were not inside the Park."

116. We deduce from the above two paragraphs that affidavits, testimony and submissions of seven witnesses of the Appellants (PW1 to

PW7) were considered by the Trial Court. In other words, the Affidavits, testimony and submissions of the other witnesses of the Appellants were not considered by the Trial Court at all.

117. The Respondent's Counsel stated in paragraph 8 of their written submissions that the reason why the Trial Court disregarded the affidavits of other Appellants' witnesses was because they were repetitive, but did not indicate which paragraph in the Judgment of the Trial Court gave reasons for failure to examine or consider the affidavits and testimony of the other witnesses.

118. Counsel for the Respondent referred to the case of **Alice Nijimbere v The Secretary General of the East African Community** (supra) where the Court stated that:-

"In our respectful opinion, therefore, she ought to have realized that what both the Common Law and Civil Law Systems of justice require is not a reproduction of the pleadings and evidence but a "concise statement of the facts" as can be objectively gleaned from the pleadings and evidence of both parties."

119. However, Counsel for the Respondent did avoided paragraph 65 of the same judgment where the Court held that:

"We take it to be settled law that in judicial decisions, a proper evaluation of evidence involves an objective scrutiny of the entire evidence proffered by the parties, be it oral, documentary, real or demonstrative, with a view of reaching balanced conclusions of facts and/or reasonable inferences of fact and applying them to the governing law(s)". [Emphasis ours]

120. In paragraph 62 of the Judgment, the Trial Court made a general statement regarding the manner the evidence was presented in the following terms:

"As regards the manner in which the eviction exercise was carried out, the Applicants alleged violence and brutality. As stated earlier in the Judgment, much of the evidence presented was hearsay and in some cases was inconsistent. By way of rebuttal, the Respondent's witnesses maintained that the exercise was carried out in compliance with the law and with dignity to the affected Parties."

121. Some of the questions we ask ourselves here are: *"is there, in the Judgment, justification or the reasons why the Trial Court decided not to consider all the evidence presented by the Appellants, except that of being repetitive? Which aspects of the evidence were repetitive? Can the Appellants, who presented their witnesses and Affidavits in support of the Reference be assured that justice was done?"*

122. The simple answer to these questions is clearly **NO**, contrary to the letter and spirit of Rule 79(5) of this Court Rules which provides that the Judgment of the Court shall contain: -

(g) the decision arrived at;

(h) **the reasons for such decision**. (Emphasis ours).

123. The Appellants were not only aggrieved by the fact that the evidence of a number of their witnesses was not considered, but also and that the Trial Court did not properly consider evidence of their expert witness (PW7) in support of the Reference. The reason for disregarding of the expert's evidence was because heeded not show evidence of his entry into and exist from the Respondent

State. The Trial Court discredited the expert's Report, Affidavit and oral evidence for the reasons captured in paragraph 53 of the Judgment, where the Trial Court stated that:

"Where the witness was not able to demonstrate that he visited the site for purpose of carrying out the survey, it is our view that this fundamentally undermines the efficacy of the evidence in his report and the Affidavit, as well as his oral evidence." [Emphasis provided]

124. In fact, the Trial Court discredited the Report, Affidavit and evidence of the expert witness in support of the Reference on a number of reasons found in paragraphs 52 to 56 of its Judgment:

- *There was no evidence that the Expert carried out his work within the specific requirements of the laws of Tanzania and that the witness was not able to prove that he came into Tanzania for purposes of carrying out the survey.*
- *The Report did not show the boundaries of Serengeti National Park;*
- *The Witness did not consider the Government Notice No. 235 of 1968 in carrying out his survey.*

125. In the circumstances of this appeal, we are not persuaded that the Expert's evidence could be simply discounted on the basis that there was no evidence that he had entered the Respondent State. First and foremost, in its pleadings, the Respondent never disputed that the Expert witness had been in the Respondent State. Secondly, the issue of his entry into the Respondent State was raised only on cross-examination during the online hearing. There was nothing prior to the cross-examination to indicate that the presence of the Expert witness in the Respondent State was an issue, which would have allowed the Appellants to prepare their rebuttal evidence.

126. In the circumstances, the Expert witness's explanation that he did not have his passport with him but would have been able to present the same to the Trial Court if needed, was a reasonable explanation. There was no compelling reason why the Court did not ask the witness to produce the passport, if the failure to produce the same was going to be one of the grounds for rejecting the Expert's evidence. In short, the Appellants were unfairly ambushed.
127. Rule 66(3) of the Rules confers on the Court power and authority to ensure that justice is done, including by summoning, on its own motion, witnesses to produce evidentiary documents. The Rule provides that:
- "The Court may on its own motion summon any person to give evidence or to produce any document if in its opinion such evidence or document is essential for the just determination of any matter before it."*
128. If the Court has power to summon a witness who is not before it to produce evidence, how can the Court not have power to direct a witness who is before it to produce evidence that he says is available? We are satisfied that under the said rule the Court had power to direct the expert to avail his passport. The Trial Court also had inherent powers under Rule 4 to require the expert witness to show that he had entered Tanzania, so as to meet the ends of Justice.
129. We are mindful that the East African Court of Justice is the Judicial Organ establish under Article 9 of the Treaty to ensure the adherence to law in the interpretation, application of and compliance with the Treaty as provided for under Article 23(1) of the Treaty. For that reason, it is the obligation of this Court to make

sure all is done to meet the ends of justice as provided for in Rule 4 of this Court Rules that:

*"Nothing in these Rule shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders or give such directions as may be necessary for the **ends of justice** or to prevent abuse of the process of the Court."* [EMPHASIS].

130. The extent of the inherent powers of court was expounded in **Halsbury's Laws of England, 4th Edition Vol 37 Para.14**. where it was stated that:-

"The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law. It is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating proceedings, by preventing the abuse of process and by compelling the observance of the process..."

In sum, it may be said that inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

131. In the case of Ismail Dabule & 1004 Others v. The Attorney General of the Republic of Uganda, EACJ Appeal No.1 of 2018, this Court cited with approval the case of K.K. Velusamy v. N. Palaanisamy [2011], where the Supreme Court of India stated as follows on inherent powers:

“(d) The inherent powers of the Court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the Legislature.

(e) While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and the facts and circumstances of the case. The absence of an express provision in the code and the recognition and saving of the inherent power of a court, should not however be treated as a carte blanche to grant any relief.

(f) The power under section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fide of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of the process of court.”

132. Taking into account the above exposition on the nature and extent of the inherent powers of the Court, we are satisfied that this case did not call for invocation of the Court's inherent powers because

Rule 66(3) of the Court Rules expressly empowers the Court to call for evidence. However, if for any reason the Trial Court felt that Rule 66(3) did not apply, it still could have invoked its inherent powers to meet the ends of justice.

133. The Trial Court indicated in paragraph 52 of the Judgment that the expert witness was not able to demonstrate that he had carried out his work within the specific requirements of the laws of Tanzania without identifying those specific requirements of the laws of Tanzania that a surveyor in Tanzania has to comply with as a non-citizen.
134. In view of what we have stated hereinabove, it follows, as night follows day, that the Trial Court failed to carefully consider several affidavits, oral testimony and evidence adduced by the Appellants' witnesses and disregarding them without giving valid reasons for the decision, contrary to Rule 79(5)(g) and (h) of this Court Rules.
135. The Trial Court, contrary to Rule 66(3) of this Court Rules, failed to properly examine the Expert witness's Report, his affidavit and oral evidence and to summon relevant evidence to meet the ends of justice. The Court could also have invoked Rule 4 and the jurisprudence of this Court and other international courts on inherent powers of courts to seek information or to make any order or direction for the ends of justice. If it found Rule 66(3) inapplicable Therefore, Issue No.1 is answered in the affirmative.

ISSUE NO.2: Whether the acts, omissions and conduct of the Respondent State violated Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community.

136. In relation to issue number 2, we would like to make the following observation and determination after having found, as regards Issue

No. 1, that the Trial Court erred on a point of law by failing to examine and consider all the evidence in support of the Appellant's Reference.

137. In light of the above finding, we refrain from entertaining this issue at this stage, because its resolution depends on full consideration of all the evidence adduced by the parties, which we have found the Trial Court failed to do.

ISSUE NO.3: Whether the First Instance Division erred on a point of law by applying a standard of proof other than the balance of probability.

138. The jurisprudence of this Court leaves no doubt that the standard of proof before the Court is based on the balance of probability. Indeed, the Trial Court referred to that standard in paragraph 42 of the Judgment, where it stated that:

"In considering this issue, we are guided by the law and practice that the party that makes the claim or allegation bears the burden of proof of what they claim. In the instant case, therefore, it was incumbent upon the Applicant to prove, on balance of probability, that indeed the evictions were done in villages outside the parameters of the Serengeti National Park."

139. However, the Appellants contended that though the Trial Court stated that they would apply the balance of probability in considering whether or not the Appellants were evicted from the Serengeti National Park or from their respective villages, they applied the standard of proof of beyond reasonable doubt.

140. In support of their contention, Counsel for the Appellants referred to the case of the Attorney General of the Republic of Burundi v.

the Secretary General of the East African Community,

Reference No.2 of 2018, where this Court held that: -

"This Court cited with approval the proposition that proof by the balance of probabilities entails evidentiary weight that, though not sufficiently to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue than the other..."

141. The phrase "beyond reasonable doubt" also referred to as "rational doubt" is defined by The Black's Law Dictionary, Bryan A. Garner (2014), Thomson Reuters, 10th Edition, page 1457, as *"the standard used by a jury to determine whether a criminal defendant is guilty."* It indicates that: *"in deciding whether the guilt has been proved beyond a reasonable doubt, the jury must begin with the presumption that the defendant is innocent."*

142. In the case of Commonwealth v. Webster, 59 Mass. (5 Cush) 295,320 (1850) it was stated that:

"Reasonable doubt....is the term often used, probably pretty well understood, but not easily defined. It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."

143. The standard of proof of beyond reasonable doubt is applicable in criminal trials where there can be no conviction if there is a reasonable doubt in the mind of the Court on the guilt of the accused person. In the standard of proof on a balance of probabilities, the Applicant is not required to free the mind of the

Court of all reasonable doubt. All that the applicant is supposed to do is to present evidence that inclines the court to his case. This is sometimes called "preponderance of evidence."

144. As regards the issue of where the eviction took place, the Trial Court stated in paragraph 45 of the Judgment that:

*"On that question, the Applicants witnesses PW1, PW2, PW3, PW4, PW5 and PW6 **simply** stated that the villages were outside the boundaries of the Serengeti National Park, that the villagers were aware of the position of their boundaries, at no point did they trespass into the Park, and that the eviction exercise was conducted in their villages outside the Park" [Emphasis].*

145. As submitted by the Appellants, the above passage begs the question as to whether the Trial Court wanted the Appellants' witnesses to furnish evidence, real proof of their allegations as to avoid or to eliminate any doubt that their villages were outside the boundaries of the Serengeti National Park. In other words, to eliminate or avoid any doubt that they did not trespass into the National Park?

146. In the case of Darboe & AMP, ORS V. The Republic of the Gambia (ECW/CCJ/JUD/01/20) (2020) ECOWASCJ 1, cited by the Appellants in their response to the Respondent's reply, the Court stated (which we are also in agreement with) that:

"Under the principle of proof, where the Appellants make depositions on torture, inhuman and degrading treatment, the Respondent needs to go beyond mere denial to adduce evidence to show that the Appellants were treated with respect and dignity."

147. The Trial Court held in paragraph 47 of the Judgment that: *"Contrary to the submissions of the Applicant's Counsel, in the Affidavit and oral testimony of the witnesses referred to in the previous*

paragraph, beyond bare assertions there was a lack of specificity on the location of the beacons marking the boundary of the Serengeti National Park.” In paragraphs 50 and 51 of the Judgment, it is also clear that the Trial Court was trying to find out if there could be any discrepancy or weakness in the Appellants’ evidence. [Emphasis]

148.As regards the Expert witness (PW7), the Trial Court considered his report, affidavit and oral testimony but because of the fact that he had not demonstrated that he had entered Tanzania, all his evidence was dismissed.

149.In paragraph 53 of the Judgment, the Trial Court stated that:

“Where the witness was not able to demonstrate that he visited the site for purposes of carrying out the survey, it is our view that this fundamentally undermines the efficacy of the evidence in his report and the Affidavit, as well as his oral evidence.”

150.This raises the question whether the Trial Court wanted the expert witness to prove absolutely and beyond a shadow of doubt that he had entered Tanzania. In the same regard, the Trial Court held in paragraph 54 of the Judgment that:

” Whereas the report of PW7 is categorical that the Applicant villages which were the subject of the eviction, were outside the Serengeti National Park, the report in our view still begs the question, where exactly were the boundaries of the park?”
[Emphasis]

151.We are satisfied that granted the manner in which the Trial Court handled these issues, the Appellants were justified in contending that the Court had used a far much higher standard of proof against them. The Appellants had produced a report showing the villages

were outside the National Park, whilst the Respondent contended that the villages were within the Serengeti National Park. Granted the expert witnesses report, the Trial Court was expected to determine the matter on a preponderance of evidence, not on the basis of absolute certainty.

152. From the above analysis, reasoning and determination, we are of the considered view that the Trial Court did not properly use the applicable standard of proof, namely proof on a balance of probability.

In the result, Issue No. 3 is answered in the affirmative.

ISSUE NO. 4: What remedies, if any are the parties entitled to?

153. The remedies sought by the Appellants in this matter are set out verbatim in paragraph 40 hereof. We do not deem it necessary to reproduce them here. On the other hand, the Respondent sought the dismissal of the Appeal with costs.

154. The Respondent did not submit much on this issue, except imploring the Court to refrain from granting any orders as prayed by the Appellants.

155. Before we tackle the issue of remedies, we wish to underline that while deciding cases brought before them, Judges are required to take into account that the promotion of access to justice, equity and social justice prevail and that nothing should prevent the Court in upholding these *sacrosanct* principles.

156. In the context of the East African Community, our mandate is to ensure adherence with the law in the interpretation, application of and compliance with the Treaty.

157. In the case of Martha Wangari Karua v. IEBC & 3 others Petition No.3 of 2019, the Supreme Court of Kenya found that the Appellant had indeed been locked out of the seat of justice without any fault on her part. When the matter came before this Court in Attorney General of the Republic of Kenya v. Hon. Martha Wangari Karua & 2 others (supra), this Court stated as follows at Para 147:

"We take the considered view that it is against the totality of the foregoing legal background that Article 259(8) is couched in the terms it is.

A holistic interpretation of the provision would thus suggest that in the promotion of access to justice, equity and social justice, where a court sitting in interpretation of the constitution finds that a particular time frame is not prescribed therein, it is urged to construe and remedy the lacuna in such a manner as would ensure that 'the act shall be done without unreasonable delay'.

In the instant case, therefore, there was a duty upon the Supreme Court to redress the identified lacuna in the law so as to engender equity and social justice in the adjudication process.

This would not be tantamount to usurping the legislative role of the legislature. But rather a breath of judicial life into the provisions of Article 259(8) of the Constitution to underscore 'access to justice for all persons' as guaranteed in Article 48, and ensure that Kenyan Law is never silent, always speaking (Article 259(3) of the Kenyan Constitution)".

158. In the case of Union Trade Centre Limited (UTC) v. the Attorney General of the Republic of Rwanda, EACJ Appeal No. 1 of 2015, the Court grappled with the question of the

circumstances under which it will remit a matter back to the Trial Court. At para 45 of the Judgment, this Court stated that:

"We have considered whether to proceed and dispose of the Appeal despite the above irregularity. We have come to the conclusion that to do so would be to condone and perpetuate, nay, participate in an irregularity which has occasioned an irreparable injustice to the parties. That is not a path which a Court of Justice should tread, and we unequivocally decline to do so."

159. In **para 46 of the same Judgment (UTC)** (supra), the Court had to say that:

"In the circumstances, we think this is an imperative case for the invocation of the Court's inherent power under Rule 1(2) which provides: -

"Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court." In the exercise of that power, we now remit the Reference back to the Trial Court for consideration de novo in accordance with the applicable law and the Rules of the Court."

160. Further, in the case of **East African Civil Society Organizations' Forum (EACSOFF) v. The Attorney General of the Republic of Burundi & 3 Others**, Appeal No.4 of 2018, para 76 of the Judgment, this Court held that:-

"The Court must therefore while not shying away from pronouncing itself on an alleged violation of the EAC Treaty, take into account all the circumstances of the case when pronouncing itself on the remedy. The Applicant seeks orders to annul, quash or set aside the Decision of the Constitutional Court of Burundi. The Court has a wide discretion in granting what it considers to be

an appropriate remedy and make such orders as may be necessary for the ends of justice.

As it is, Article 35A of the EAC Treaty does not grant this Court the power to hear the merits of the Reference No.2 of 2015.”

161. In the same vein, in **para 77 of the judgment in the EACSOE** case (supra), this Court stated that:

“The other alternative is to revert this case to the Trial Court to be heard on its merits with the view of establishing whether or not there was a Treaty violation as alleged. The passage of time notwithstanding, with the above guidance, we find that this is the only logical path that we can direct.”

162. As it was clearly stated in para 48 of the Judgment in the UTC case (supra):

“This Appeal illustrates the aphorism that although speed is good, justice is even better. And, oftentimes, justice hurried is justice buried.”

163. We also take note of Rule 120 of the Court Rules 2019, where the Appellate Division is given general powers, reproduced as under:

“The Court may in dealing with any appeal, confirm, reverse or vary the judgment of the First Instance Division or remit the proceedings to it with such directions as may be appropriate or order a new trial where it is manifest that a miscarriage of justice has occurred and to make any incidental or consequential orders including orders as to costs.”

164. From the submissions by the Parties, the Treaty provisions and applicable Court Rules of the Court as well as the cited jurisprudence, we have held in issue No.1 that the Trial Court erred on a point of law by failing to examine and consider all the

evidence in support of the Reference and in issue No.3 that the Trial Court erred on a point of law by applying a standard of proof other than the balance of probability which is applicable to this Court.

165. We therefore remit Reference No. 10 of 2017 back to the Trial Court for hearing and determination *de novo* in accordance with the applicable law and the Rules of this Court, and on the standard of proof on balance of probabilities. The issues to be determined are **Issue No.3** (Whether or not the Applicants were evicted from the Serengeti National Park or from their respective villages); **Issue No. 4** (Whether the acts, omissions and conducts of the Respondent violated Articles 6(d) and 7(2) of the Treaty and Article 15(1) of the Protocol on the Establishment of the East African Common Market) and **Issue No. 5** (What remedies are the Parties entitled to?).

166. As regards to costs, it is the general principle that costs follow the event. In fact, Rule 127(1) of this Court Rules provides that :

“Costs in any proceedings shall follow the event unless the Court shall for good reasons otherwise order.”

167. In the case of **Devram Manji Daltani v. Danda** (1949) EACA 35, it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted; and in the case of **Supermarine Handling Services Limited v. Kenya Revenue Authority**, Civil Appeal No.85 of 2006, the Court of Appeal of Kenya stated thus: -

“Costs of any action or other matter or issue shall follow the event unless the court or judge for good reasons otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover is left to the discretion of a

Judge who tried his case, the discretion is a judicial discretion, and if it be so, its exercise must be based on facts. If, however there be some grounds to support the exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance."

168. The Appellants submitted that, although as per the provision of Rule 127(1) of the Court Rules, the award of costs is discretionary. This is a proper case that the Court should grant an award of costs for a number of reasons. The Appellants cited the case of Schuller v. Roback (2012) British Columbia Supreme Court, where the Court interpreted what the remedy of costs entails in a prayer:

"Costs are a way of compensating someone for the overall expense and hassle they've been put as a result of having to go to Court."

Up to this juncture and looking at the nature of the case, the witnesses and logistics involved for the Appellants, it would be improper to imagine that the Appellants have not incurred expenses.

169. As regards the prayers for reparations and general damages, the Respondent submitted that they do not hold any water since it is trite law that the reparations and damages are awarded upon a finding of breach of the Treaty. In that respect, we are in agreement with the submissions by the Respondent even though they did not cite any authority.

170. However, regarding costs, the Respondent did not submit, either in its written submissions or during the hearing. The Respondent merely requested the Court to dismiss the Appeal with costs. We

have not seen any compelling reason to depart from the general rule on costs as provided in Rule 127(1) of the Court Rules.

In the result, we award costs to the Appellants.

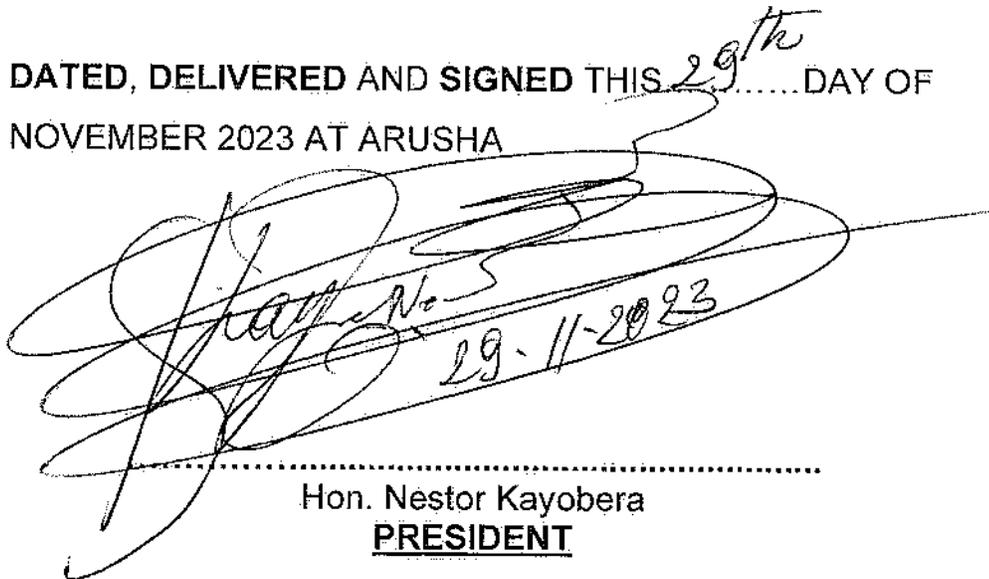
L. DISPOSITION

171. The upshot of our findings and consideration is that:

- (a) We hereby allow Appeal No. 13 of 2022 and set aside the Judgment of the Trial Court dated 30th September 2022.
- (b) Reference No. 10 of 2017 is hereby remitted back to the Trial Court with the directions to proceed with hearing and consideration *de novo* Issue No.3; Issue No. 4 and Issue No. 5 as framed in the Trial Court;
- (c) We award costs of this Appeal to the Appellants.
- (d) We also grant the Appellants costs in the Trial Court incurred up to 30th September 2022 when the Judgment subject matter of this Appeal was delivered.
- (e) The costs in the Trial Court shall be taxed after the hearing and determination of the remitted Reference.

IT IS SO ORDERED.

DATED, DELIVERED AND SIGNED THIS 29th DAY OF
NOVEMBER 2023 AT ARUSHA

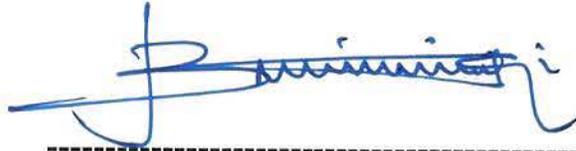


Case No. 5
29-11-2023

Hon. Nestor Kayobera
PRESIDENT



Hon. Kathurima M'Inoti
JUDGE OF APPEAL



Hon. Cheborion Barishaki
JUDGE OF APPEAL