



IN THE EAST AFRICAN COURT OF JUSTICE
APPELLATE DIVISION AT ARUSHA

(Coram: Suda Mjasiri VP, Kathurima M'Inoti & Cheborion Barishaki,
JJA)

APPLICATION NUMBER 4 OF 2022

(Arising from Appeal No. 2 of 2022)

BETWEEN

ISAAC E. N. OKEROAPPLICANT

AND

KITUO CHA SHERIA – LEGAL ADVICE CENTRE ... 1ST RESPONDENT

GEOFFREY YOGO..... 2ND RESPONDENT

RAYMOND OLENDU..... 3RD RESPONDENT

JARED SAL..... 4TH RESPONDENT

MOSES M.OM.....5TH RESPONDENT

THE ATTORNEY GENERAL OF THE
REPUBLIC OF UGANDA.....6TH RESPONDENT

THE SECRETARY GENERAL OF
THE EAST AFRICAN COMMUNITY7TH RESPONDENT

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East African Court of Justice
Dated. 24/2/2023.....

THE EAST AFRICAN
COMMUNITY.....8TH RESPONDENT
LAKE VICTORIA BASIN COMMISSION.....9TH RESPONDENT

AS CONSOLIDATED WITH APPLICATION NUMBER 5 OF 2022

(Arising from Appeal No. 2 of 2022)

BETWEEN

KITUO CHA SHERIA – LEGAL ADVICE CENTREAPPLICANT

AND

ISAAC E. N. OKERO1ST RESPONDENT
GEOFFREY YOGO.....2ND RESPONDENT
RAYMOND OLENDU.....3RD RESPONDENT
JARED SALA.....4TH RESPONDENT
MOSES M. OMONDI.....5TH RESPONDENT

AND

THE ATTORNEY GENERAL OF THE REPUBLIC
OF UGANDA6TH RESPONDENT

THE SECRETARY GENERAL OF
THE EAST AFRICAN COMMUNITY.....7TH RESPONDENT

THE EAST AFRICAN COMMUNITY..... 8TH RESPONDENT



LAKE VICTORIA BASIN COMMISSION.....9TH RESPONDENT

(Arising from the order of the First Instance Division at Arusha by Mr. Justice Yohane Masara, P.J. dated 15th December 2021)

RULING OF THE COURT

Background

1. The two applications were brought under Rules 4, 5, 93 and 94 of the East African Court of Justice Rules of Procedure 2019 and other enabling provisions of the law seeking for extension of time to file appeals to this Court out of time.
2. The Applicant in Application No 4 of 2022- Mr. Isaac E.N. Okero (herein referred to as 1st Applicant in the consolidated application) filed an application on 12th April 2022 seeking for an order that time be extended for filing a notice of appeal dated 24th March 2022 and lodged in court on the same date and that the said notice be validated and deemed to have been lodged within time. The Application is supported by an affidavit sworn by the Applicant himself.
3. The Applicant in Application No. 5 of 2022 - Kituo cha Sheria – Legal Advice Centre is a non – governmental organization registered in Kenya (herein referred to as the 2nd Applicant in the consolidated Application). It filed an application seeking to be granted leave to file



and serve an appeal out of time having lodged a notice of appeal in Court on 13th April 2022. The Application is supported by an affidavit sworn by Annette Mbogoh, the Executive Director of the 2nd Applicant.

4. Both intended appeals seek to challenge the decision of the Principal Judge issued by letter dated 15th December 2021 responding to an application for *amicus curie* in **Isaac E.N. Okero & Others vs Attorney General of the Republic of Uganda Reference Number 14 of 2020**.
5. The 1st Applicant filed Reference No. 14 of 2020 on the 22nd of March 2020 seeking declarations that the failure by the Government of Uganda to adhere to a policy for release of water into the Nile River at Jinja violated the Treaty. He also sought for compensation for loss said to have ensued from the said violation.
6. The 1st Applicant stated that the decision of the Principal Judge which was made on 15th December 2021 was not communicated to him by the Court.
7. That he learnt of the dismissal of the 2nd Applicant's Application on the 18th March 2022 during a meeting with the 2nd Applicant and it was then that he became aware that the Principal Judge had on 15th December 2021 disallowed the 2nd Applicant's request to be admitted as *amicus curiae* in Ref. No. 14 of 2020.
8. He further states that he is aggrieved by the said decision of the Principal Judge because it purports to express a predetermination of the criterion upon which the pending Reference shall be decided.
9. By application No. 19 of 2020 the 2nd Applicant sought for leave under Rules 52 and 60 of the EACJ Rules of Procedure to appear as *amicus curiae* in Reference No. 14 of 2020 but the application was denied by the Principal Judge.

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10. Like the 1st Applicant, the 2nd Applicant states that it was not notified of the delivery of the decision of the Principal Judge which had been made on 15th December 2021 until on 22nd February 2022 when she was served with it. She thus filed an application for extension of time to enable her lodge an appeal against the decision of the Principal Judge.

Representation

11. At the scheduling conference the 5th respondent was not represented. Ms. Kinduduhu who appeared for the 1st Applicant informed the Court that Appeal No 4 was preferred by the 1st Applicant alone and not by other Applicants in Ref No. 14 of 2020. Mr. Mulekyo appeared for the 1st Respondent and Mr. Kafumbe for the 7th Respondent and they both conceded to the Applications. The 6th Respondent was represented by Ms. Imelda Adongo, Senior State Attorney, Ms. Elizabeth Namakula and Ms. Sarah Bingyi, State Attorneys. The 6th Respondent opposed the Applications.

12. Based on the fact that the two applications arose from the same reference and were premised on the same facts, the Court exercised its discretion under Rule 6 of the Rules of Court and consolidated them.

6th Respondent's submissions

13. Counsel for the 6th Respondent raised two preliminary objections first that the applications were bad in law and in the case of application No. 5 for want of jurisdiction and for application No. 4 for want of jurisdiction and lack of locus standi on the part of Mr. Okero, the 1st Applicant.

14. Counsel submitted that this court does not have jurisdiction to hear the application because its jurisdiction as provided under Article 35A of the EAC Treaty and Rule 86 of the EACJ Rules of Procedure limit an appeal from the judgment or any order of the First Instance Division of

the Court to the Appellate Division to only; points of law, lack of jurisdiction or procedural irregularity.

15. Counsel further submitted that the letter of the Principal Judge dated 15th December 2021 responding to the application for admission as amicus curie by the 2nd Applicant was a mere correspondence in reply to a request and could not be equated to a judgment , order or ruling of court and for that reason, it was not appealable.
16. In support of her submission, she referred to the decision of this Court in ***Johnson Omunyakol Vs Attorney General of the Republic Of Uganda Appeal No. 4 of 2017***; where the court held that:-

“in the East African Community jurisprudence an appeal lies to the Appellate Division only to challenge a judgment or an order of the First Instance Division of the Court..... that is a condition precedent, for an appellant to exercise a right of appeal before the appellate Division that a judgment or an order of the trial court must be in existence.”

17. Counsel further submitted that if Court found that the said letter of the Principal Judge was a judgment of Court then, under rule 69(1) of the Rules of the Court the quorum required to sit and admit one as amicus curiae in the First Instance Division of the Court was 3 or 5 judges because the matter was not interlocutory and could not be determined by a single judge. Further that in the event that Court held that a single Judge constituted quorum then the Applicant ought to have applied to the full bench of that Court for review.
18. According to Counsel the request by the 2nd Applicant to be admitted as amicus curiae does not fall under matters to be heard by the First

Instance Division whose quorum is 3 or 5 judges and could not be determined by a single judge because it was not an interlocutory matter. She referend to Rule 69(1) of the Court Rules of Procedure which provide that the quorum of the Court shall be 3 or 5 judges one of whom shall be the Principal Judge or Deputy Principal Judge.

19. Counsel urged that the Principal Judge considered the matter in his administrative capacity provided in Article 24 (8) of the Treaty which provides that the Principal Judge shall direct work of the First Instance Division, represent it, regulate the disposition of matters brought before the court and preside over its sessions.
20. Counsel adverted that the 1st Applicant had no locus standi to bring the application because he was not a party to the request for admission as amicus curie in Reference No. 14 of 2020 and had not demonstrated that he was an aggrieved party to warrant him file the application and therefore had no locus standi to bring the present Application.
21. Counsel referred to section 2 of the EACJ Rules of Procedure which define an appellant as a party appealing from a decision, decree or order of the First Instance Division and a party as any person who is appearing in any proceedings before the Court as an appellant, applicant, claimant, respondent, third party or intervener.
22. She cited a decision of the Supreme Court of Uganda in ***Mohammed Alibhai vs W.E. Bukenya Mukasa and Another Civil Appeal No. 56 of 1996*** where the court held that:-

“ the appellant not having been a party to the proceedings which resulted in the consent judgment sought to be reviewed, and there being no facts at the material time from which he could be considered an aggrieved party within the meaning of section 83

of the Civil Procedure Act and Order 42 r 1 of the Civil Procedure Rules so as to clothe himself with the right to present an application for review, I would think, in all circumstances of the case , that he had no locus standi to present the application for review.”

23. In her view the 1st Applicant had not demonstrated in any way that he was aggrieved by the decision of the Principal Judge to warrant him file the Application and in any event the 1st Applicant was a party to Reference No. 14 of 2020 which was still pending in the First Instance Division and for that reason he still had opportunity to present his case when the matter is heard. She prayed that the Application be dismissed with costs.

1st Applicants Submissions

24. The 1st Applicant submitted that he had on 22nd May 2020 filed **Reference No. 14 of 2020; Isaac E.N. Okero & Others vs The Attorney General of the Republic of Uganda & Others** before the First Instance Division seeking for declarations the Republic of Uganda had failed to adhere to a policy for release of water into River Nile which failure amounted to a violation of the EAC Treaty and sought for compensation for loss suffered as a result of the said violation.

25. Learned counsel brought it to the attention of the Court that the 2nd Applicant had filed Application No. 19 of 2020 and written a letter to Court seeking to be granted leave to appear as amicus curie in Reference No. 14 of 2020 but the learned Principal Judge had not only disallowed the application but had also purported to express a predetermination of the criteria upon which Reference. No. 14 of 2020 would be decided that prejudged his case.

26. That he was aggrieved by the said decision of the Principal Judge and had filed Application No. 4 of 2022 seeking for extension of time to file an appeal against the said ruling.
27. He submitted that the decision of the Principal Judge contained in his letter dated 15th December 2021 was made pursuant to Rule 60 of the Rules of Court which grants the President or Principal Judge discretion to grant leave to a partner state, organization or person to appear as amicus curie.
28. That despite its informality the letter by the Principal Judge ought to be construed as a decision of the Court albeit made by a single judge because the Treaty and Rules define a judgment as any decision, ruling, order, opinion, directive or decree of the Court. For that reason, he urged the Court to find that the decision of the Principal Judge was a judgment of Court.
29. On the issue of quorum, the 1st Applicant invoked Rule 60(2) of the Rules of the Court which provide that the quorum in an application for amicus curie shall be a single judge in the person of the President of the Court or the Principal Judge and submitted that quorum was properly constituted.
30. In reply to the 6th respondents' submission that the letter of the Principal Judge should have been referred to the full bench of the First Instance Division for variation or review, the 1st Applicant submitted that rule 69(3) of the Rules of Court refer to decisions of a single judge on interlocutory matters made under rule 69(2) and not to proceedings under rule 60 of the Rules of the Court.
31. On the submission by the 6th Respondent that he lacked locus standi, it was submitted for the 1st Applicant that under Rule 88(1) of the Rules

of the Court, it is open to any person to file an appeal and the right is not restricted to parties to the proceedings from which the decision appealed from arose.

32. The 1st Applicant further submitted that he was challenging irregularities in the decision and denial of the 2nd Applicants' entry as *amicus curiae* who would assist the Court address the injudicious exercise of discretion by the Principal Judge and failure to follow the rules of natural justice

2nd Applicant's Submissions

33. Counsel for the 2nd Applicant submitted that she sought for leave to file and serve an appeal out of time based on a denied application to be *amicus curie* in Ref. No. 14 Of 2021

34. That the Applicant had filed a request to be joined as *amicus curie* in Reference No. 14 of 2021 before the First Instance Division and the request was by letter under Rule 60(2) of the Rules of Procedure of the Court. The Principal Judge who heard the application made a decision by letter dated 15th Dec. 2021 which was communicated but the 2nd Applicant averred that it received it on 22nd February 2022 when the time for filing an appeal had lapsed. That it filed an application for leave to file the appeal out of time and had lodged a notice of appeal in Court on 21st March 2022.

35. Counsel further submitted that Article 2 of the Treaty defines a decree as a formal expression of an adjudication in which the Court expresses its opinion or determines the rights of the parties regarding matters in controversy either preliminarily or in finality.

36. It was further submitted for the 2nd Applicant that this Court has jurisdiction to determine the Application for extension of time to file an

appeal out of time and the reason for the extension in its case was that it only became aware of the Principal Judge's decision on the 22nd day of February 2022. That applying for review of the order by the Principal Judge was not possible hence the present Application brought under Rules 4, 5, 93 and 94 of the Rules of the Court.

37. In his opinion the issue of quorum does not arise in matters brought under Section X of the Court Rules particularly Rule 60(1) and (2) which specifically provide for the President and Principal Judge to handle requests for amicus curiae.

38. That the provisions of Article 69(3) were procedural in nature and limited to the five instances provided in Rule 69(2) which are; applications for extension of time prescribed by the rules or by Court, applications for an order for substituted service, applications for examining a serving officer, applications for leave to amend pleadings and applications for leave to lodge one or more supplementary affidavits under Rules 52(6) and 54(2) of the Rules of the Court.

39. Counsel further submitted that Rule 69(3) of the Rules of the Court cannot be read in isolation of Rule 69(2) because the Rules prescribe that only when a party is dissatisfied with the decision of a single judge on any of the 5 grounds is when Article 69(3) applies. Counsel was emphatic that the list in Article 69(2) was comprehensive and amicus curie is not included therein.

The Court's Determination

40. We have carefully considered the consolidated Application and the submissions of all counsel. It is trite that where a preliminary objection

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raises points of law, then the points of law must be heard and determined first.

41. Rule 5 of the Rules of the Court grant the Court discretion, for sufficient reason, to extend the time limited by the Rules or any decision of the Court for performing any act authorized or required by the rules whether before or after expiration of such time and whether before or after the doing of the act. Any reference to such time has then to be construed as a reference to such time as so extended.

42. The Rules require that any party who intends to lodge in Court an application for extension of time to appeal, shall first lodge a notice of appeal in the Appellate Division and the Court shall have it stamped as "lodged out of time". Such applications are by notice of motion supported by affidavit. The rationale for stamping is to provide a clear distinction when the lodging was done because the Court has power to extend time before or after expiry of the prescribed time and a party can apply for extension of time after lodging an appeal.

43. The Consolidated Application and submissions of the parties raise the following three issues for determination;

1. Whether Court has jurisdiction to determine the application
2. Whether the letter by the Principal Judge dated 15th December 2021 was a decision of the Court
3. Whether the 1st Applicant had locus standi to appeal the decision of the Principal Judge contained in the letter dated 15th December 2021.

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44. The 6th Respondent submitted that an application for leave to be admitted as amicus curiae to the Court could not be handled by a single judge because Rule 69 of the Rules sets quorum of the First Instance Division to be 3 or 5 judges. That single judges can only handle interlocutory matters under Rule 69(2). That in any event, if the Applicants were dissatisfied with the decision of the Principal Judge sitting as a single judge, then they ought to have proceeded by way of an application to the full bench of that Division under Rule 69(3) of the Rules and not come to this Court. According to Counsel this Court has no jurisdiction to entertain the present Application arising out of those proceedings.

45. The Application, she submitted, does not meet the requirements of Article 35A of the Treaty and Rule 86 of the Court Rules of Procedure which provide that an appeal can be preferred against a judgment or order of the 1st Instance Division only on points of law, lack of jurisdiction or procedural irregularity.

46. She further adverted that the letter of the Principal Judge was neither a judgment nor an order of the Court within the meaning of the said Article 35A of the Treaty and Rule 86 of the Rules of the Court. For that reason, the impugned decision of the Principal Judge could not be appealed.

47. The Applicants were of the firm view that the First Instance Division had proper quorum composed of the Principal Judge who is mandated under Rule 60(2) of the Rules of the Court to sit as a single judge. That the matter was not interlocutory and therefore does not fall under Rule 69(2) of the Rules of the Court.

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48. This application arose out of denial of an application for leave by a party to be admitted as *amicus curiae* in a reference before the First Instance Division. The Rules define *amicus curiae* as a person who is not a party to the proceedings in the Court but who petitions the Court or is invited by the Court to file a brief in the proceedings because he or she has an interest in the matter.

49. Jurisdiction is a creature of statute and Rule 60 of the Rules of the Court provide that when handling an application for leave to appear as *amicus curiae*, the court shall be quorate with the President of the Court or the Principal Judge sitting as a single Judge for the purpose of granting the said leave. The Rule specifically provides thus: -

“60. (1) At any stage of the proceedings, the Court may if it considers it desirable for the proper determination of the case, invite or grant leave to a partner state, organization, person to submit in writing any observation on any issue that the Court deems appropriate.

(2) For the purposes of sub -rule (1), leave to appear as *amicus curiae* may be granted by the President or Principal Judge as the case may be upon request in writing detailing therein that persons interest in the matter”

50. The decision of the Principle Judge contained in the letter of 15th December 2021, disallowing the 2nd Applicant's request to be admitted as *amicus curiae* in Ref. No. 14 of 2020 was made pursuant to the provisions



of Rule 60 of the Court Rules and is therefore a decision and or opinion of a single judge.

51.As to whether the said decision is appealable, the 6th Respondent submitted that a decision arising from an application for leave to be admitted as amicus curiae could not form the basis of an appeal to the Appellate Division of the Court because it does not meet the provisions of rule 69 of the Rules of the Court. According to Counsel the decision was made without quorum and could not be the basis of an appeal.

51.On their part, the Respondents adverted that the Application was brought under Rule 60 of the Rules of the Court which allow either the Principal Judge or President of the Court to handle the request when sitting as a single judge and the resultant decision was appealable.

52.Rule 69 of the Rules of the Court deals with quorum of the Court when handling matters other than applications for amicus curiae. The Rule provides that the quorum of the Court shall be three or five judges, one of whom shall be the Principal Judge or Deputy Principal Judge. It is appeals from the full Court that go to the Appellate Division of the Court and not from a single judge.

53.In the case of applications for admission as amicus curiae ,the quorum is set by Rule 60 (2) of the Rules of Court which provides that:-

“(2) For purposes of sub- rule (1), leave to appear as amicus curiae may be granted by the President or Principal Judge, as the case may be upon request in writing detailing therein that persons interest in the matter”

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54. There was therefore, quorum when the Principal Judge sat as a single judge to determine the request made by the 2nd Applicant to be admitted as *amicus curiae* in Reference No. 14 of 2020.

55. Regarding the argument that the application was not an interlocutory matter and could not be handled by the Principal judge as a single judge, Rule 69(2) specifies the following interlocutory applications as matters which can be handled and determined by a single judge;

1. applications for extension of time,
2. applications for an order of substituted service,
3. applications for examining a serving officer,
4. applications for leave to amend pleadings and
5. applications for leave to lodge one or more supplementary affidavits under rules 52(6) and 54(2).

56. Applications for admission as *amicus curiae* are not included in the above list of matters to be handled by a single judge, because an application for admission as *amicus curiae* is not an interlocutory matter.

57. The provisions of Rules 60(2) and 69(1) and (2) must be read and interpreted not only in accordance with their ordinary meaning, but also in the context of their objective and purpose. They have to be read together with a view to creating harmony between them and giving effect to each of them rather than one defeating the other.

58. It is common ground that the Principle Judge handled the application as a single Judge and for that reason the Applicants being dissatisfied with the decision ought to have proceeded under Rule 69(3) by making an

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application to the full bench of the First Instance Division and not come to this court.

59. We have had the benefit of reading the decision of this Court in **The Attorney General of Kenya and Prof. Anyang' Nyong'o and 10 Others Application No. 1 of 2010 arising from Civil Appeal No. 1 of 2009**, where the Court held that a litigant had the unfettered right of appeal against the judgment of the First Instance Division even where the decision was made by a single judge.

60. The genesis of that decision was a taxation ruling where the registrar of the Court had awarded costs of USD 2,033,164.33 and the unsuccessful party sought to have extension of time to file an appeal to this Court from the decision of a single judge of the First Instance Division. On Appeal, although the Court initially made a proper analysis of the law, it however, strayed at the end. At the beginning and rightly so, the Court stated thus: - *"However, as to whether the Attorney General being dissatisfied with the decision of the single judge could or could not then appeal to this Division, is quite another matter – requiring careful analysis of the law. On the face of it, this Courts' Rules of Procedure appear to bar any such direct appeal from a single judge of the First Instance Division to this Appellate Division. In this regard Rule 59(3) (now Rule 69(3)) states categorically that a party dissatisfied with a decision of a single judge may apply ... to the registrar ... to have the order ... discharged or varied by the full Court. It is true that a reading of Rule 59 together with Rule 83, appears to be unequivocal in suggesting that an appeal from the judgment of a single judge of the First Instance Division of*

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this Court should lie, not directly to this Appellate Division, but rather to a full Bench of the First Instance Division. ... on the surface, this was an eminently attractive and logical interpretation”.

61.Despite this correct analysis of the law, the Court went on to interpret Article 35 of the Treaty and Rule 77 of the Rules of Court and without addressing itself to the provisions relating to quorum as provided in the Rules, and arrived at a conclusion which was per in curium that there was a right of appeal from the decision of a single judge of the First Instance Division to the Appellate Division of the Court.

62.For emphasis, Rule 69(3) provides as follows:-

“A party dissatisfied with a decision of a single Judge may apply informally to the Judge at the time when the decision is given or by writing to the registrar within seven (7) days after the decision of the Judge to have it varied, discharged or reversed by a Full Court”

63.In light of the clear provisions of Rule 69(3) , we find that the jurisdiction to entertain matters for review arising out of proceedings by a single judge as was the case in this matter, lies with the full bench of that Court and not with the Appellate Division as the Applicants would wish this Court to believe. The Rules of the Court ought to be followed strictly so that the ends of justice are met.

64.It should be noted that the primary purpose of the Court Rules like any other rules of court procedure is to regulate and ensure the orderly conduct of court proceedings. It is only matters from the full Court of the First Instance Division that can be brought to this Court, for to do otherwise

would be giving parties room to do forum shopping because they will be having a choice either to take their appeals to the full Court of the First Instance Division or come directly to this Court. This will be a recipe for perpetuation of injustice. The law has to create certainty where parties have to take their disputes for resolution and the courts while exercising the mandate of legislative interpretation, have to ensure that no provisions of the law are rendered redundant.

65. We therefore, find that the Consolidated Application is misconceived for having been filed in the wrong Court.

66. We further find that this Court is not clothed with jurisdiction to determine the matter arising out of the proceedings before the Principal Judge relating to the application for admission as amicus curiae by the 2nd Applicant and for that reason alone, the Consolidated Application must fail. As a result, we do not find it necessary to delve into the other two issues in the Application.

Disposition

67. For the reasons given above, the Consolidated Application is hereby dismissed.

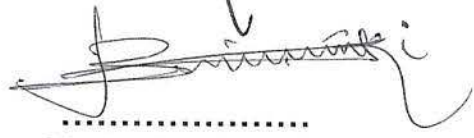
86. This being a matter of public interest, each party shall bear their own costs of the Application.


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Deputy Registrar
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Dated, Delivered and Signed in Arusha on this day of February 24, 2023.


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Sauda Mjasiri
VICE PRESIDENT


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Kathurima M'noti
JUSTICE OF APPEAL


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Cheborion Barishaki
JUSTICE OF APPEAL


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Deputy Registrar
East African Court of Justice
Dated. 24/2/2023