



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



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

REFERENCE NO. 24 OF 2019

HEIR NIKOBAMYE MATHIAS APPLICANTS

VERSUS

**THE ATTORNEY GENERAL OF THE
REPUBLIC OF BURUNDI RESPONDENT**

27TH MARCH 2024

JUDGEMENT OF THE COURT

A. INTRODUCTION

1. The Applicants in this Reference are the Heirs of the estate of the late Nikobamyé Mathias, represented in this matter by Mr Fini Fany Placide and Mrs Anita Kanyambo of Rutegama Commune, Muramvya Province in Burundi. The Applicants address of service for purposes of the Reference is: **Boulevard Patrice Lumumba, 2nd Floor Building Paride Sella, and Apartment No.11.**
2. The Reference was filed on the 22nd November 2019 under Articles 3(3)(b), 6(d), 7(2), 8(4) & (5), 23, 27, 30(1) & (2) of the Treaty for the Establishment of the East African Community (“the Treaty”).
3. The Respondent is the Attorney General of the Republic of Burundi, sued on behalf of the Government of Burundi in his capacity as the principal legal advisor of the Government of the Republic of Burundi.

B. REPRESENTATION

4. The Applicants were represented by Advocates Janvier Nsabimana and Anita Kanyambo while Mr Diomede Vyizigiro and Mr Pacifique Barankitse who are both State Attorneys from the Chambers of the Attorney General, appeared for the Respondent.
5. The parties filed written submissions.

C. BACKGROUND

6. This matter, as narrated in the Reference, has a convoluted and long standing history of dispute and litigation mainly between the Heirs of the late Nikobamyé from whom the Applicants derive and those of a

one Sinankwa Laurent (deceased), six other families and the Government of Burundi. The dispute dates as far back as 1967.

7. The subject matter of the dispute is land which the Heirs of the late Nikobamyé say was granted to him by King Mwambutsa IV and that which he is said to have inherited from the said King.

D. THE APPLICANTS' CASE

8. Briefly, the facts as stated by the Applicants in the Reference are that Nikobamyé Mathias acquired three parcels of land from King Mwambutsa IV. These include land at Gasange, land at Rushemeza Mpira and a third one whose dimensions are unknown acquired in 1956.
9. During the 1960s, Nikobamyé Mathias and Sinankwa had a dispute over that land whose dimensions were unknown. The dispute was ultimately resolved by the Rurenda Primary Court. The case was however escalated to the Cassation Chamber of the Supreme Court which then referred the matter back to the Provincial Tribunal of Muramvya, leading to a final decision that was rendered in 1971, confirming the decision of the Rurenda Primary Court.
10. Despite the final decision, Sinankwa contested the implementation process from 1971 until 2017. He continually objected to execution of the judgment until 2017 when he sought intervention from the President's office, leading to the involvement of the National Commission on Land and Other Assets ("the Commission"), in a bid to determine the rightful ownership of the land in question.

11. Subsequently, the Heirs of Nikobamye, in disagreement with the Commission's decision sought recourse through the Special Court on Land and Other Assets ("the Special Court").

12. The Applicants contend that by its decision RSTBA 0344 rendered on 28/8/2019, in which the Special Court proceeded with the case without their participation and went on to confirm the National Commission's decision, the Respondent is in violation of the national laws, including Article 102 of the Constitution, the Land Code, Article 58 of the Law governing the Special Court and Articles 6(d) and 7(2) of the Treaty. Hence, the instant Reference in which they seek the following declarations and orders:

- a) **A declaration that the decision RSTBA 0344 taken by the Special Court against the successors of Nikobamye is unlawful and is an infringement of the Treaty;**
- b) **A declaration that the State of Burundi must respect the right to property, of the successors of Nikobamye, according to the provisions of the Land Code of Burundi and the Constitution of the Republic of Burundi;**
- c) **An order requiring the Respondent to return the entire ownership of the land to the Applicants;**
- d) **An order directing the Respondent to pay the costs and incidental costs of the Reference; and**
- e) **That this honourable Court be pleased to make any other order that may be necessary in the circumstances.**

E. THE RESPONDENT'S CASE

13. The Respondent contends that after the land dispute between The Heirs of Nikobamye and Sinankwa began in the 1960s, the Primary

Court of Rurenda rendered judgment on 7th November 1967 in **Case 486/C/66**. This judgment was challenged in the Supreme Court but the matter was rendered as *res judicata* and execution of the judgment started in 1971.

14. That the late Sinankwa, notwithstanding that he was the winner of the case, contested the execution of the judgment until 2017 when he asked the President of Burundi to intervene.
15. The case was then transferred to the National Commission to determine the land ownership between the Heirs of Nikobamye, Sinankwa and the State of Burundi, while also considering and preserving land that falls under the public domain.
16. The Commission made two decisions in November 2017, namely **TD 02/2017** and **TD 03/2017**, clarifying on the proportional ownership of the impugned land by the Heirs of Nikobamye, Sinankwa and the State of Burundi, respectively.
17. When the Heirs of Nikobamye moved to the Special Court, which has exclusive appellate jurisdiction, it upheld the finding of the National Commission clarifying on the proportional ownership of the impugned land.
18. The Respondent contends that the Special Court has not violated any national law and prays that the Reference be dismissed with costs.

F. ISSUES

19. At the Scheduling Conference held on the 2nd November 2022, the following issues were framed for resolution:

- I. **Whether the decision RSTBA 0344 taken by the Special Court violated The Treaty for Establishment of the East African Community, especially in Articles 6(d) and 7(2);**
- II. **Whether the land belonging to the Heirs of Nikobamye was acquired lawfully; and**
- III. **Whether the reliefs sought by the parties can be granted.**

G. PRELIMINARY OBJECTION

20. The Respondent raised a preliminary objection in which he sought to have the Applicants' written submissions struck out for having been filed and served belatedly and without leave of the Court. The Respondents also faulted the submissions for failing to comply with Rule 11(4) of the Rules, which requires that pleadings shall be divided into consecutively numbered paragraphs.

21. We shall deal with this preliminary objection upfront before delving into the merits.

22. Save for the fact that the delay and filing without leave of the Court was in violation of the Rules of this Court, the Respondent did not express any prejudice that the infraction by the Applicants may have occasioned or could occasion him.

23. Whereas the Court does not condone infraction of its own Rules and directives by litigants appearing before it, we are cognizant of the advanced stage at which this matter is and that no prejudice or injustice has been or will potentially be occasioned on the Respondent by the alleged infraction.

24. In the event, and so that litigation may without prejudice to either party come to an end, the Court invokes its mandate under Rules 4 and 5 of the Rules and hereby admits and validates the impugned pleadings and submissions.

25. The Respondents' prayer for the Applicants' written submissions and pleadings to be struck out due to procedural irregularities is accordingly denied.

H. COURT'S DETERMINATION

ISSUE 1: Whether the decision RSTBA 0344 taken by the Special Court violated the Treaty for Establishment of the East African Community, especially in Articles 6(d) and 7(2)

26. We have carefully reviewed the submissions filed by the parties and addressed ourselves to the national laws of Burundi and the provisions of the Treaty alleged to have been violated by RSTBA 0344.

27. It was submitted for the Applicants that the impugned decision, RSTBA 0344, made by the Special Court is understood to have violated the provisions of the Treaty in its Articles 6(d) and 7(2).

28. Article 6(d) of the Treaty provides that:

“The Fundamental Principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

(d) good governance including adherence to the principles of democracy, the rule of law, accountability,

transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights."

29. Article 7(2) in respect of the Operational Principles of the Community provides that:

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

30. The Applicants argued that the contested decision, RSTBA 0344, issued by the Special Court overseeing land and Other Property matters, is believed to contravene the stipulations outlined in Article 6(d) and 7(2) of The Treaty.

31. The Applicants contend that the disputed decision RSTBA 0344, issued by the Special Court, violates the provisions of Article 6(d) and 7(2) of The Treaty.

32. From the pleadings, the evidence and submissions filed by the Applicants, the precise bone of contention with RSTBA 0344 is primarily hinged on the procedural issues that arose during the trial of the matter, culminating into the decision that was rendered.

33. The Special Court is specifically empowered by the Burundi Code of Civil Procedure to hear appeals against decisions of the National Commission, with the authority to overturn or annul first instance

judgment or decisions that violate procedural or substantive rules and to invoke the doctrine and rules of *res judicata*. This position is not contested by either of the parties.

34. In this case, the Applicants argue that the decision of the National Commission should have been immediately annulled by the First Division of the Special Court. That the first Division of the Special Court therefore failed in its mandate and should have been corrected by the Appellate Division upon appeal by the Applicants, which it also did not do but instead, in the course of determining RSTBA 0344, allegedly violated its own law, specifically Article 58 which stipulates that preliminary questions must be raised, debated, and exhausted before addressing merits.
35. That during the hearing of RSTBA 0344, when the Applicants requested to be heard on preliminary questions, their request was denied without legal basis, indicating a lack of impartiality and independence from the Burundi Government.
36. That the Special Court committed multiple legal errors, including misinterpreting Article 102 of the Law governing it and Article 5 of the Code of Civil Procedure, to validate proceedings that allegedly infringed Article 58 regarding the presentation of preliminary and substantive questions. Article 5 of the Code of Civil Procedure directs the Court to merge objections with the merits, while Article 102 of the Special Court's Law mandates referencing the Code of Civil Procedure or Criminal Procedure for procedural gaps. Despite this, Counsel argued that applying Article 5 clashed with Article 58, which stipulates prior consideration of preliminary issues. That consequently, the Special Court's misinterpretation and application of

these articles amounted to violating Articles 6(2) and 7(2) of the Treaty.

37. The Applicants argue that the matter should have undergone review and analysis at the Provincial level before being submitted to the National Commission, contrary to what happened in this case. That by affirming the decision of the first Judge, who failed to annul the Commission's decision for not adhering to the two-stage requirement, decision RSTBA 0344 effectively sanctioned the violation of Decree Law No. 100/03, thereby infringing upon Articles 6(d) and 7(2) of the Treaty. That the Appeals Chamber of the Special Court violated Article 7 of Decree Law No. 100/03 by upholding the First Chamber's decision without ensuring proper procedural review at the Provincial level, leading to a contravention of Decree Law No. 100/03 and subsequent breach of Articles 6(d) and 7(2) of the Treaty.
38. The Applicants argue that the decisions of the Special Court resulted in the violation of the rights of the parties involved, particularly the Heirs of Nikobamye estate.
39. Counsel aptly cited and sought to rely on the decisions of this Court in the cases of **Hon. Sitenda Sebalu vs The Secretary General of the East African Community and 3 Others, EACJ Reference No.1 of 2010; Plaxeda Rugumba vs The Secretary General of the East African Community & The Attorney General of the Republic of Rwanda, EACJ Reference No 8 of 2010; Samuel Mukira Mohochi vs Attorney General of the Republic of Uganda, EACJ Reference No. 5 of 2011** and **Rugo Farm Company vs The Attorney General of the Republic of Burundi, EACJ Reference No.14 of 2018** all of which uphold the position that a violation of a Partner State's

domestic law amounts to a violation of the Treaty; thus, constituting a matter justiciable before this Court, for the proposition that by contravening the respective national laws as stated above, the Respondent breached Articles 6(d) and 7(2) of the Treaty.

40. The Applicants rely on this Court's precedent cases to argue that a violation of a Partner State's domestic law constitutes a breach of the Treaty and that therefore, by contravening the national laws of Burundi, the Respondent breached Articles 6(d) and 7(2) of the Treaty.
41. In response to the allegations, Counsel for the Respondent argued that Articles 184 and 211 of Law No.1/010 of May 13, 2004, pertaining to the Code of Civil Procedure, were not applicable to the matter at hand, which was governed by the law establishing the Special Court under Law No. 1/08 of March 2019. This special law No. 1/08 of March 2019 supersedes the general one, the Code of Civil Procedure, and provides jurisdiction for the Special Court.
42. Regarding the invocation of Article 102, Counsel stated that it cannot be automatically applied to the Special Court. Instead, one must first establish that the matter in question falls outside the scope of law No. 1/08 of March 2019 governing the Special Court.
43. Challenges based on Articles 184 and 211 of Law No.1/010 of 2004 are therefore deemed irrelevant before the Special Court, according to the Respondent.
44. Article 58 states:

“Preliminary questions shall be raised at the first hearing, and shall be debated, adversarially and exhausted before the merits.”

45. That when the Heirs of Nikobamye requested to be heard, first, on the preliminary questions of law submitted, which if responded to favourably, could potentially avert the need for any debate on the merits of the case, this was refused by the Special Court without legal basis. That this proves its lack of impartiality or independence from the government of Burundi.
46. Concerning the alleged violation of Article 58 of the Special Court's law, Counsel argued that the Applicants' interpretation was flawed. That the determination of preliminary questions does not imply separate hearings; rather, the judge must decide on these matters before addressing the merits.
47. The Respondent's Counsel invoked Article 102 of the law governing the Special Court to rely on Article 5 of the Code of Civil Procedure, which mandates joining objections related to jurisdiction with the merits. That the decision leading to RSTB 0527, from which RSTBA 0344 arises, was made in compliance with the adversarial principle, considering all submissions from the parties.
48. The essence of Article 6(d) and Article 7(2) of the Treaty lies in promoting and upholding the foundational principles of good governance within the Partner States of the East African Community.
49. The task before this Court is to verify or dispel the veracity of the Applicants' allegations in the context of the foregoing. To determine whether or not the alleged actions of the Respondent were in

contravention of the Treaty, we have considered the allegations and evidence thereof in the context of these provisions.

50. Article 6(d) of the Treaty emphasizes the importance of good governance by outlining specific elements including the rule of law, transparency, social justice and the protection of people's rights.

51. In the context of the instant case, adherence to the rule of law would be to ensure that legal proceedings are conducted in accordance with established laws and procedures.

52. Article 6(d) emphasizes accountability and transparency as fundamental principles of good governance. The Applicants contend that the decisions made by the Special Court were arbitrary and lacked impartiality. A violation of procedural rules and principles if proved, would undermine the rule of law and could be seen as a breach of this provision. A failure to provide a fair and transparent judicial process could therefore be interpreted as a violation of the foundational principles of the Treaty.

53. The violation of procedural and substantive rules by the Court could potentially infringe upon the rights of the parties involved, constituting a breach of Article 6(d) which underscores the importance of recognizing, promoting, and protecting human and people's rights.

54. The Applicants contend that the decisions of the Special Court were unjust and favoured the government of Burundi.

55. Article 38 of the Constitution of Burundi guarantees the right to a fair trial, while Article 34 of the Code of Civil Procedure provides that a Judge shall adjudicate disputes in accordance with the law.

56. Similarly, Article 7(2) of the Treaty underscores the commitment of Partner States to uphold the principles of good governance, including the rule of law, social justice, and universally accepted standards of human rights. This commitment extends to maintaining systems that respect the rule of law and promote social justice, which in our opinion would include ensuring fairness and equity in legal proceedings. The alleged bias and unfair treatment described by the Applicants would, once proved, be seen as a violation of this principle.

57. The provisions of Article 6(d) and Article 7(2) are invoked by the Applicants to argue that the actions of the Special Court, as described by the Applicants, contravene fundamental principles of the rule of law and good governance stipulated by the Treaty.

58. The Respondent invoked Article 102 of the law governing the Special Court, which allows for the incorporation of relevant provisions of the Code of Civil Procedure, ensuring that objections related to jurisdiction are addressed alongside the merits of the case.

59. The Applicants allege that the Special Court failed to adhere to procedural rules and principles outlined in Burundi law, specifically, the Court's misinterpretation of its own laws and the improper handling of preliminary questions during hearings. That the Appellate Chamber of the Special Court specifically violated Article 58 of its own law, the law governing the Special Court which states that:

“Preliminary questions shall be raised at the first hearing, and shall be debated, adversarially and exhausted before the merits”.

60. According to the judgment of the Special Court, *Annex 15 at page 162*, on the day of hearing, the Heirs of Nikobamyé refused to participate in the proceedings because they had been allegedly denied the opportunity to present the preliminary questions of law first, before delving into the merits. They left the Court and the Court decided to use the documentation on record without their presence.
61. Whereas the Special Court, premised on Article 102 of the law governing the Special Court, invoked Articles 5 and 7 of the Criminal Procedure Code as a basis for continuation with the proceedings in a manner seemingly contrary to Article 58 of the Law governing the Special Court, Counsel for the Respondent submitted that Article 102 cannot be automatically applied to the Special Court. In his Affidavit evidence and his submissions, the Respondent demonstrated that the Special Court operates under a specialized legal framework governed by Law No. 1/08 of March 2019, which provides specific jurisdiction and procedures. Resort to the Code of Civil Procedure is only where the special law makes no provision for a particular circumstance. That one must first establish that the matter in question falls outside the scope of Law No. 1/08 of March 2019 governing the Special Court. This was not controverted by the Applicants.
62. Premised on that rationale, Counsel submitted that the position taken by the Special Court to have both the preliminary questions and merits joined was mandated by Article 5 of the Code of Civil Procedure.
63. Notably however, decision RSTBA 0344 cites Article 5 of the Code of Criminal Procedure to justify the decision to have the preliminary questions and the merits jointly addressed.

64. We have had the benefit of looking at the provisions of the Code of Civil Procedure and the Code of Criminal Procedure. Whereas the Code of Criminal Procedure would appear to have been cited out of context or in error, as the specific provision referred to does not bear any relevance to the matter in issue, Article 5 of the Code of Civil Procedure states that:

“The Court may always join the declinatory exceptions to the merits and order the parties to conclude for all purposes.”

65. The import of Article 5 of the Code of Civil Procedure is that the Court has the authority to combine preliminary objections related to jurisdiction or competence (declinatory exceptions) with the substantive issues of the case (merits). Additionally, the Court can instruct the parties to present their arguments and conclude their submissions regarding all aspects of the case, including both preliminary objections and substantive matters.

66. Premised on the foregoing, we are in agreement with the Respondent concerning the alleged violation of Article 58 of the Special Court's law. The Applicants' interpretation of the law was flawed. The determinations of preliminary questions during hearings does not necessitate separate hearings but rather involves the judge's deliberation on these matters before addressing the merits of the case.

67. Essentially, Article 5 of the Code of Civil Procedure allows the Court to address procedural issues alongside the substantive merits of the case in a single proceeding.

68. Lastly, whereas the Court therefore guided on how the proceedings leading to RSTBA 0344 were to be held, the Applicants opted to vacate their participation in the proceedings. They voluntarily opted out of physical participation. Nonetheless, the Court proceeded to hear and determine the matter based on what the parties had placed on its record.

69. The Respondent's arguments regarding the specialized legal framework governing the Special Court, the interpretation of procedural norms, and adherence to legal principles have been persuasive and supported by the applicable law.

70. In light of the foregoing considerations, we find that the allegations raised by the Applicants against the Respondent, premised on the conduct and decision RSTBA 0344 of the Special Court, lack merit.

71. Consequently, Issue 1 is answered in the negative.

ISSUE 2: Whether the Land belonging to the heirs of the late Nikobamye Mathias was acquired lawfully

72. Whereas at the Scheduling Conference, this issue was framed as captioned above, in their submissions the parties paraphrased it to: *"Whether the land/properties of the late Nikobamye are legally acquired"*.

73. In our opinion, this does not pose a material deviation from what was agreed at the Scheduling Conference.

74. This issue is determined based on the submissions presented by both the Applicants and the Respondent, as well as the relevant legal

provisions cited, largely from the repealed 1986 Land Code and the Civil Code.

75. Counsel for the Applicants argued that it is customary for anyone promoted to lead a region to be endowed with property befitting of their status. He stated thus:

“Naturally, any person promoted to lead a region, the first thing was to be endowed with property worthy of a chief. In that regard, Nikobamye has the favour of occupying the three properties acquired from King Mwambutsa IV directly in 1942, 1943 and 1956 upon being promoted to head the region and that since then, he always occupied the three properties with the full view and knowledge of the competent state authorities.”

76. That the property at Mpira Rushemeza was registered and a Deed of Notoriety No. 36 issued by the competent authority.

77. That the property at Gasange was also legally acquired and a certificate of possession issued by the Communal authority.

78. That the three properties located in a rural area were acquired in accordance with the customs of ancient times. That almost 90% of the properties protected and respected by the current state authority were acquired under conditions customarily respected by the Land Code.

79. Counsel drew the Courts' attention to Articles 313, 380 and 381 of the Land Code of 2011 and Articles 313, 329 and 330 of Act No. 1/008 of September 1, 1986 on Burundi Land Code which provides for modes of acquisition of land and provides that:

“The right of land ownership may be established either by a land title issued by a registrar of land titles or by a land certificate issued by the communal land registry recognizing a regular ownership of the land resulting in a personal or collective, permanent and sustainable right of way, according to the customs of the time and place and according to the purpose of the land”- per Article 313.

80. That the Applicants have formal recognition on the two properties, issued by the municipality for the property of Gasange and a Deed of Notoriety no. 36 of 1949 issued by the competent authority. That the acquisition was therefore legal.

81. He cited Article 380 which provides that:

“All real rights exercised by any natural or legal entity governed by private law by virtue of custom or a title of occupation issued by a competent authority on non-state land, resulting in a personal or collective, permanent and durable right of way, according to the customs of the time and place and the purpose of the land, are recognized and protected by law. These private rights may be subject of a certificate issued by the communal land registry with territorial jurisdiction.”

82. Counsel submitted that since the acquisition of these properties, all the attributes of the right of ownership have been exercised by Nikobamyé and his successors in full view of the successive governments of Burundi.

83. Counsel further cited Article 381 which provides that:

“The following shall be considered as eligible for customary private rights, land actually used:

land property under cultivation shall be deemed to be cultivated if they contain crops or structures of any kind, if they are prepared for cultivation or of, they have just been harvested, and if they are pasture land on which individuals exercised private rights, either individually or in association or in any group.”

84. That even considering that the 1986 Land Code from which the forgoing provisions are cited was repealed, the Applicants seek to show Court that the acquisition according to customary law has always been respected by the Burundi legislator and it is for this reason that the two provisions were cited to demonstrate that the conditions of acquisition and occupation of these three properties have always been with the blessing of the legislators.

85. In further reliance on Articles 329 and 330 of the repealed 1986 Land Code, the Applicants cited Articles 329 and 330 thereof which provide that:

“All land rights exercised by any natural person or legal person governed by private law on non-federal lands are recognized and protected by law when they are:

- a) Either recorded in a registration certificate**
- b) following a transfer of state-owned land, an *inter vivos* transfer or a transfer due to death or as a result of acquisition;**

- c) **Either recognized to holders of proprietary rights exercised by virtue of custom or an occupation title issued by competent authority, even if they would not already be recorded in a registration certificate; and**
- d) **The rights thus recognized may be recorded in a certificate of registration subject to the rights of third parties and after verification of the reality and cope of the plaintiff's rights."**

86. Counsel submitted that based on the two provisions of the repealed law, it is obvious that acquisition according to customary rules does not call for any other form of proof except actual occupation and the legislators have recognized this acquisition since the advent of the Land Codes.

87. In response, the Respondent's Counsel argued that according to Article 36 of the Civil Code, which mirrors Article 2 of the Decree of March 28, 1949, private ownership of land is only legally established by a title registration certificate recognized or granted by the colony. Furthermore, Article 37 of the Civil Code stipulates those transfers of real estate property, whether between living persons or due to death, are only valid upon issuance of a new registration certificate.

88. The Respondent disputed the Applicants' claim that the disputed land was gifted to their late father, Nikobamy Mathias, by King Mwambutsa. They asserted that no contracts of gifts or documents of cession signed by the King were presented before the judiciary, indicating that the land, having outlived the king, remains the property of the State. The Respondent argued that properties received by

individuals by virtue of their administrative positions never became private and are still owned by the State.

89. Regarding the evidence presented by the Applicants, particularly the certificate where Nikobamye declared ownership of the land, the Respondent argued that no title to land can be established solely based on a claimant's declaration. They cited Article 334 of Law No. 1/008 of 1st September 1986, which states that land rights are only legally established by a certificate of registration issued by the Registrar of land titles, except for ancestral land. Since the disputed land is not ancestral, the Respondent contended that Nikobamye's occupation of it, being a civil servant, constitutes illegal occupation.
90. The Respondent emphasized that the lands that outlived the King and were illegally occupied by Nikobamye are owned by the State. They argued that Nikobamye never acquired legally recognized rights over the disputed land, and therefore, any claims to ownership based on such occupation are invalid.
91. The Applicants argue that Nikobamye acquired the properties through customary practices and occupation, supported by certificates and documents recognizing his ownership rights. They rely on provisions of the repealed 1986 Land Code, particularly Articles 329 and 330.
92. Articles 329 and 330 of the repealed 1986 Land Code, as cited by the Applicants, is to establish the recognition and protection of land rights exercised by individuals or legal entities governed by private law on non-federal lands. These Articles outline the conditions under which such land rights are recognized and recorded, *vide*:

- a) Land rights can be recognized and protected by law when they are recorded in a registration certificate following various types of transfers, including transfers of state-owned land, *inter vivos* transfers, transfers due to death, or as a result of acquisition;
- b) Land rights can also be recognized for holders of proprietary rights exercised by virtue of custom or an occupation title issued by a competent authority, even if they are not already recorded in a registration certificate; and
- c) The recognized rights may be recorded in a certificate of registration, subject to the rights of third parties, and after verification of the reality and scope of the plaintiff's rights.

93. Based on these provisions, the Applicants argue that acquisition of land according to customary rules does not require any additional proof beyond actual occupation. They contend that legislators have recognized this mode of acquisition since the inception of the Land Codes. Basically, the essence of these provisions is to ensure that land rights obtained through customary practices are legally recognized and protected under the law, alongside rights obtained through formal legal procedures.

94. Additionally, they assert that Nikobamye's occupation of the properties, coupled with formal recognition by communal authorities, demonstrates legal acquisition under customary rules.

95. However, the Respondent challenges this assertion by emphasizing the requirements allegedly set forth in the **Civil Code Book II** which they assert reproduces **Article 2 of Decree of March 28, 1949**. They

submit that based on these laws, private ownership of land is legally established through a title registration certificate recognized by the State, and transfers of real estate property require new registration certificates.

96. The Respondent also questions the legitimacy of Nikobamye's claim, stating that no contracts of gifts from the King or documents of cession were produced to validate the alleged transfer of land from King Mwambutsa. They further assert that properties received by individuals by virtue of administrative positions remain State property. These submissions were not backed by any evidence.

97. While the Applicants rely on provisions of the repealed **1986 Land Code** to support their claim of customary acquisition, the Respondent emphasizes the formal requirements established for land ownership.

98. Insights into the Applicants' claim to ownership can also be discerned from their submissions, thus:

“Naturally, any person promoted to lead a region, the first thing was to be endowed with property worthy of a chief. In that regard, Nikobamye has the favour of occupying the three properties acquired from King Mwambutsa IV directly in 1942, 1943 and 1956 upon being promoted to head the region and that since then, he always occupied the three properties with the full view and knowledge of the competent state authorities.”

99. Further to this, the Applicants furnished Court with a certificate of ownership of a plot of land. The document is labelled **Annex 2** to the Reference.

100. We have had the benefit of looking at **Article 36 of the Civil Code Book II** which the Respondent seeks to rely on. It does not stipulate what the Respondent has alluded to regarding private ownership nor does **Article 37 of the Civil Code Book II** provide as alleged by the Respondent.

101. Most intriguingly, both the **Civil Code Book II** and the **Decree of March 28, 1949** which are cited by the Respondent have been repealed.

102. The import of Article 313 of the repealed 1986 Land Code which was cited by Applicants and not negated by the Respondent is to the effect that the right of land ownership can be established through two means; namely, land title issued by a Registrar of Land Titles which serves as formal recognition of ownership under the law and Land Certificate issued by the communal land registry which recognizes regular ownership of the land based on communal customs and practices prevailing at the time and place. It confirms a personal or collective right of ownership according to customary laws and traditions.

103. In essence, Article 313 provides flexibility in establishing land ownership, allowing for recognition through either formal legal procedures (Land Title) or traditional communal practices (Land Certificate). This provision acknowledges the importance of both legal frameworks and customary practices in determining land ownership rights. The legislation under which this provision was enacted is however repealed.

104. Be that as it may, we have perused the 2011 Land Code which replaced the 1986 Code. This Code recognizes both State and

private land. It recognizes the legitimacy of land rights acquired and held under customary law. However, it also states that all asserted rights must be registered. Unregistered customary rights do not have protection of the law.

105. We have had the benefit of examining Annex 2 on which the Applicants rely, among others, as proof of ownership. It is a certificate of possession of ownership of a plot of land, issued on 27th February 2008 by the Administrator of Rutegama Commune. It is in respect of 16 ha 68 to 25 ca 76% of land. It certifies that Nikobamye Mathias who is deceased, represented by Fini Fany Placide, is the owner of the plot of land located Rutegama. That the Certificate was issued to serve as information to whomsoever it so concerned.

106. Whereas the 2011 Land Code recognizes the legitimacy of land rights acquired and held under customary law, the legal status of such a certificate of land ownership (Annex 2), which is not a Certificate of title issued by the Registrar of Titles, is not entirely clear.

107. This Court has not had the benefit of verifying the credibility of this document of title in respect of the land at Rutegama Commune.

108. The onus and the burden to prove the legality of ownership lay firmly on the Applicants. Based on the evidence presented by the Applicants, and the interpretation and application of the laws regarding land ownership relied upon by both the Applicants and the Respondent, a conclusive determination of the legality of acquisition of properties by Nikobamye Mathias cannot be made.

ISSUE 3: Whether the Reliefs sought by the parties can be granted

109. The Applicants sought to be granted the reliefs set out in Reference.

110. They seek:

- a) Declaration ordering the state of Burundi to respect the rule of law, particularly the right to property guaranteed by the constitution of the Republic and the African Charter on Human and People's Rights;
- b) Declaration ordering the state of Burundi to return the properties of the Nikobamye estate, which were arbitrarily seized, back into the hands of Mathias, who legally acquired and enjoyed these properties for more than 75 years;
- c) An order for the State of Burundi to cover the costs incurred by the plaintiff, which were necessitated by the objectionable behaviour of the state;
- d) That the State pay damages related to the deprivation of use of the properties during the entire duration of the legal proceedings; and
- e) Compensation in the amount of \$3 million, considering the incalculable damage suffered by the Nikobamye estate, which they allege, is currently unable to produce anything due to the deprivation of its properties. They emphasize the economic hardship allegedly suffered by the Nikobamye

estate as a consequence of being unable to utilize their assets.

111. The justification provided by the Applicants for their requests is primarily grounded in the alleged violation of domestic laws and international treaties by the State of Burundi. They argue that the decision RSTBA 0344 was rendered in violation of Burundi laws, specifically the rule of law and fundamental principles outlined in the constitution of the Republic of Burundi and the African Charter on Human and Citizens' Rights (*sic*).

112. Furthermore, the Applicants assert that the properties in question were legally acquired and enjoyed by the Nikobamyé estate for over 75 years before being arbitrarily seized by the State. They contend that the State's actions constitute a deprivation of property rights and demand restitution.

113. The Applicants also seek reimbursement for the costs incurred during the legal proceedings, attributing these expenses to the objectionable behaviour of the State.

114. The Applicants justify their requests based on perceived violations of legal principles, infringement of property rights, financial losses incurred, and ongoing economic harm suffered by the Nikobamyé estate.

115. The Respondent prayed that the Applicants' written submissions should be struck out for having been lodged in Court outside of the prescribed time limit and therefore did not adhere to procedural requirements. Further, that the submissions are not consecutively

numbered as required by the Rules of the Court, implying a lack of compliance with procedural guidelines.

116. The Respondent's response focuses on procedural irregularities in the Applicants' submissions rather than addressing the substantive issues raised regarding the issue of remedies.

117. In addition, the Respondent prayed for costs to follow the event in accordance with Rule 127(1) of the Rules that the party who is ultimately unsuccessful be responsible for covering the legal costs incurred by the prevailing party.

118. Regarding the order sought to require the State of Burundi to respect the rule of law and the right to property guaranteed by the Constitution of the Republic and the African Charter on Human and People's Rights, the Court finds that the substantive issues raised by the Applicants have not been sufficiently supported by evidence. Therefore, the request for such a declaration is denied.

119. Secondly, the request for a declaration ordering the State of Burundi to return the properties of the Nikobamye estate is also denied. Despite the allegations of arbitrary seizure by the State, the Court finds that the Applicants have failed to provide concrete evidence to substantiate their claim of legal acquisition and enjoyment of the properties for over 75 years.

120. Thirdly, the request for an order for the State of Burundi to cover the costs incurred by the plaintiff and pay damages related to the deprivation of use of the properties is also denied. While procedural irregularities have been alleged in the Applicants' submissions, there is no evidence to support the claim for damages and costs.

I. COSTS

121. Cognisant of the role that respective Counsels' own perceptions and interpretations of the relevant laws and procedures could have had in motivating this matter, we do, in exercise of Court's discretion under Rule 127(1) of the Rules, order that each party shall bear their own costs.

J. CONCLUSION

122. The Court finds that the Applicants have not discharged the burden of proof required to justify the reliefs sought.

123. Based on the findings arrived at in Issues 1 and 2, all the reliefs sought by the Applicants are denied.

124. The Reference stand dismissed with no orders as to costs.

125. It is so ordered.

Dated, signed and delivered at Arusha this 27th day of March 2024.

.....
Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE

.....
Hon. Justice Dr Charles O. Nyawello
DEPUTY PRINCIPAL JUDGE

.....
Hon. Justice Charles A. Nyachae*
JUDGE

.....
Hon. Justice Richard Muhumuza
JUDGE

.....
Hon. Justice Richard Wabwire Wejuli
JUDGE

*[Hon. Justice Charles A. Nyachae resigned from the EACJ with effect from 8th January, 2024 but he signed this Judgment in terms of Article 25(3) of the Treaty]