IN THE EAST AFRICAN COURT OF JUSTICE

APPELLATE DIVISION AT ARUSHA

(Coram: Emmanuel Ugirashebuja, P; Liboire Nkurunziza, VP; Edward Rutakangwa, Aaron Ringera and Geoffrey Kiryabwire, JJ.A.)

APPEAL NO. 1 OF 2017

BETWEEN

MANARIYO DESIRE.....APPELLANT

AND

THE ATTORNEY GENERAL OF THE REPUBLIC OF BURUNDI..... RESPONDENT

[Appeal from the Judgment of the First Instance Division of the East African Court of Justice at Arusha by Hon. Lady Justice Monica Mugenyi PJ, Hon. Isaac Lenaola, DPJ, and Hon. Justice Audace Ngiye , J dated 2nd December, 2016 in Reference Number 8 of 2015]

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JUDGMENT OF THE COURT

Introduction

1. This is an Appeal brought before this Appellate Division of the East African Court of Justice [EACJ] by Manariyo Désiré [the"Appellant"] against the Judgment of the First Instance Division of this Court (hereinafter referred to as "the Trial Court") dated 2nd December, 2016, arising out of Reference No. 8 of 2015, by which the Trial Court dismissed the Reference and held that each party bear its own costs.
2. The Appellant, Manariyo Désiré sued the Respondent, the Attorney General of Burundi, in his capacity as the legal representative of the Republic of Burundi (hereinafter referred to as "Burundi"); before the Trial Court in respect of a Judgement of the Cassation of the Supreme Court of the Republic of Burundi in **Case Number RCCB 303** delivered on 24th June 2015 (hereinafter referred to as the "impugned Judgement").
3. The Appellant was represented by Mr Donald Omondi Deya, Advocate; and the Respondent by Mr. Nestor Kayobera, Principal State Counsel;

Background

4. The Appellant who is a citizen of Burundi brought to the Trial Court a Reference under Articles 6(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"); Article 14 of the African Charter on Human and Peoples" Rights ("the African Charter"); and Rules 1(2)

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and 24 of the East African Court of Justice Rules of Procedure, 2013 ("the Rules").

5. The Reference was against the Attorney General of the Republic of Burundi who was sued as the legal representative of the State of Burundi.

6. In the Reference, the Appellant who was the Applicant in the Trial Court, pleaded as follows: he bought three (3) parcels of land in Bujumbura, Burundi, including a piece of land that was sold to him by one Simon Nzopfabarushe; he subsequently consolidated the 3 parcels of land and had them surveyed by the Land Registry, Regional Office Bujumbura; two years later, all 3 sellers of the land and himself (as buyer) appeared before the Tribunal of Residence (*Tribunal de residence*) of Musaga, in Bujumbura, to procure from that Tribunal an authenticated single agreement, based on the Private Sale Agreements; the three sellers and himself executed a single attested affidavit [*Acte de notoriete*], number 356/91 of 27th July 1999 before the said Tribunal of Residence, in respect of all parcels of land; the law and practice in Burundi at the time was that the attested affidavit would be handwritten by the Registrar of the Tribunal, then the parties and their witnesses would either sign and/or thumbprint it, and it would then be signed by the President as well as the Registrar of the Tribunal; the Attested Affidavit would also indicate that the parties showed the Private Sale Agreement to the Tribunal; the said affidavits are kept in the Registry of the Tribunal, in a Register, in the form of a bound book which cannot be removed; and

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all of the above was duly done in respect of the 3 parcels of land that the Appellant had purchased, including the one he had purchased from Simon Nzopfabarushe.

7. The Appellant further pleaded that he obtained from the Registrar of Lands [*Conservateur des Titres Fonciers*] a Certificate of Title for the consolidated plot of land which he thereafter subdivided and sold the resulting subdivisions to new buyers. The Appellant also pleaded that he subsequently surrendered his Certificate of Title aforesaid to the Registrar of Lands, and, as required by Burundian law, the Registrar annulled it and kept the said original Certificate of Title and issued new Certificates of Title to the new buyers.

8. The Appellant further pleaded as follows: (i) at some point in 2010, Simon Nzopfabarushe filed a case against him in respect of the same parcel of land he had sold to him in the Tribunal of First Instance (*Tribunal de grande Instance*) of Bujumbura in case Number n.c.16.839 and the said Tribunal issued a judgment in favour of the said Simon Nzopabarushe without affording the Appellant a hearing or considering his written submissions which were on record; (ii) he appealed the Tribunal decision to the Court of Appeal [*Cour d' Appel*] of Bujumbura in Case no. R.C.A 42/2012 seeking reversal of the judgment of the Tribunal and specific recognition of his legitimate property rights, he produced in that Court the authenticated Sale Agreement, that is the Attested Affidavit [*Acte de Notoriete*] number 356/99 of 27th July 1999, the Court inquired from him and Simon Nzopfabarushe whether its own verification of the copy of the

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Attested Affidavit produced by the Appellant with the Tribunal of Residence of Musaga would be dispositive of the case and both of them replied in the positive, whereupon the Court of Appeal judges visited the seat of the Tribunal on 30th July 2013 and actually verified the copy of the Attested Affidavit Number 356/99 of 27th July 1999 that the Appellant had produced in Court conformed to the relevant original page of the Register; (iii) thereafter the Court, without any basis in law, demanded the original Private Sale Agreement between the Appellant and Simon Nzopfabarushe despite the fact that the authenticated Sale Agreement was already on record, and had been verified, and that it was sufficient for the purpose, and on 29th October 2013, the Court of Appeal confirmed the judgment of the Tribunal of First Instance; (iv) In the premise, the Appellant filed a petition before the cassation chamber of the Supreme Court, invoking several grounds of violations of Burundian Law by the Court of Appeal, and in particular the refusal by the Court of Appeal to recognise the legal and probative value of the Attested Affidavit Number 356/99 of 27th July 1999; and (v) On 21st September 2015; a Court bailiff served on the Appellant's Counsel in Burundi the notification of the judgment of the cassation chamber of the Supreme Court dated 24th June 2015, in RCC 25153, in which it rejected all the legal grounds invoked in the Applicant's petition and upheld the judgment of the Court of Appeal.

9. The Appellant further pleaded that he had made all diligent efforts to enable the Respondent to fulfil its obligations towards protecting his property rights within the Respondent State but the Respondent had not discharged its obligation to do so.

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10. The Appellant clarified that the Reference was not an Appeal from the decisions of the Respondent State's courts but was a Reference for the Respondent to fulfil its obligations to the Appellant in accordance with the Respondent State's commitments under Articles 6(d) and 7(2) of the Treaty; Article 15(1) of the Protocol; and Article 14 of the African Charter.

11. The Appellant also pleaded that the Reference was founded on the failure of the Respondent to recognise the legal and probative value of the Attested Affidavit Number 356/99 of 27th July 1999 executed by the Respondent State's own organs and was premised on the failure of the Respondent to abide by its commitment under the Treaty to the fundamental and operational principles, and specifically the principles of the rule of law, good governance and the recognition and protection of human rights of the Appellant, especially his right to property and to the peaceful enjoyment of property that he lawfully owned.

12. The Appellant prayed for the following reliefs:

    (a) A Declaration that the Respondent's actions and omissions are unlawful and an infringement of Article 6 (d) and 7(2) of the Treaty; Article 14 of the protocol; and Article 14 of the African Charter;

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(b) A Declaration that the Respondent has violated the property rights of the Appellant and his heirs or assigns, and in so doing has violated the commitment that it has made under the Treaty, the Protocol and the African Charter;

(c) An Order directing the Respondent to restore the property rights of the Applicant and his heirs or assigns;

(d) An Order directing the Respondent to appear and file before this Court not later than 60 days from the date of the judgement a progress report on remedial mechanisms and steps taken towards the implementation of the Orders issued by the Court;

(e) An Order that the costs of and incidental to the Reference be met by the Respondent; and

(f) That the Court be pleased to make such further or other orders as may be just, necessary or expedient in the circumstances.

13. The Appellant annexed to the Reference a copy of the Attested Affidavit [*Acte de notoriete*] Number 356/99 of 27th July 1999 along with its English translation, a copy of the Notification of the Judgment of the Cassation Chamber of the Supreme Court dated 24th June 2015 in RCC 25153 along with its English translation, and a copy of the Judgment of the Cassation Chamber of the Supreme Court along with its English translation.

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14. The Respondent in its Response to the Reference lodged in the Trial Court on 7th March 2013 did not traverse the matters of fact pleaded by the Appellant, or the steps taken by the Appellant to ventilate his grievance in the Courts of Burundi or the legal and probative value of the Attested Affidavit, and it did not cast any doubt on the authenticity of the annextures to the Reference.

15. The Respondents defence was that: -

(a) The Reference was time barred as the decision of the Supreme Court complained of was made on 21st June 2015 but the Refence was lodged on 20th November 2015, more than the two months provided for under Article 30(2) of the Treaty to file any matter in the Trial Court;

(b) The Trial Court had no Appellate jurisdiction to determine matters already decided by the Supreme Court of Burundi as that would contravene Articles 27(2) and 30(3) of the Treaty;

(c) The Order sought in the prayers (a), (b) and (c) of the Reference constituted an appeal against the decisions of the Courts and Tribunals of the Republic of Burundi contrary to the Treaty; and the declaratory Orders sought in prayers (d), (e) and (f) were also unfounded and ought to be dismissed.

16. The Respondent prayed that the Reference be dismissed with costs.

17. In a short Rejoinder to the Response, the Appellant pleaded that time was to be computed from the date of service on the Appellant of the judgment of the Cassation Chamber of the Supreme Court, rather than from the purported date of delivery of the judgement of the Cassation Chamber of the said Court, rather than from the purported date of delivery of the judgment, which, the Appellant had neither notice nor knowledge of and that the Court had jurisdiction to entertain the Reference.

18. At the Scheduling Conference held on 13th June 2016 in the Trial Court, the parties in their Scheduling Conference Notes agreed on the following points: -

(a) Sometime in 1997, the Appellant alleged, he bought three parcels of land from Mr. Nzopfabarushe Simon, Mr. Habonimana Andre and M/s Niyonzima Scholastique.

(b) On 27th July 1999, the Tribunal of residence of Musaga [*Tribunal de residence*] made an Attested Affidavit, No. 356/99 in respect of the above transactions.

(c) In 2010, Mr. Nzopfabarushe Simon filed a case before the Tribunal of the High Instance [*Tribunal de Premiere Instance*] of Bujumbura against the Appellant laying a claim on the property on the land he had sold to the Appellant through an authenticated Act in 1999.

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(d) On 20th February 2012, the High Instance Court ruled in favour of Mr. Nzopfabarushe Simon.

(e) The Appellant appealed to the Court of Appeal seeking a reversal of the judgment of the High Instance Tribunal in case number RCA 42/2012.

(f) The Court of Appeal dismissed the Appellant's Appeal on 29th October, 2013 confirming the Judgment of the Tribunal of High Instance.

(g) The Appellant then filed a Petition before the Cassation Chamber of the Supreme Court. The Petition was dismissed on 24th June 2015.

(h) The Appellant's lawyer received the Notification of Judgment of the said Cassation Chamber of the Supreme Court on 21st September and filed his Reference on 20th November, 2015.

17. In the same Scheduling Conference, the following issues for determination by the Court were agreed-

(i). Whether the Reference was time barred.

(ii). Whether the Respondent violated Articles 6(d) and 7(2) of the Treaty; Article 15(1) of the Protocol; and /or Article 14 of the African Charter;

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(iii). Whether the Respondent's failure to recognise the legal and probative value of the Attested Affidavit Number 356/99 of 27th July 1999 is unlawful and violates the Appellants rights.

(iv). Whether the Applicant's rights to peaceful enjoyment of property was violated.

(v). Whether the Applicant was entitled to the remedies sought.

18. The Trial Court after hearing the Parties determined the issues framed for trial as follows:

(a) The Reference was filed within the time prescribed by law for the judgment complained of dated 24th June 2015 was conveyed to and received on behalf of the Appellant on 21st September 2015 and the Reference was filed on 20th November 2015, a date which was within the period of two (2) months prescribed by Article 30 of the Treaty.

(b) The Court had jurisdiction to entertain and determine the Reference for the reason that it was averred in the pleadings that the matter complained of constituted an infringement of Articles 6(d) and 7(2) of the Treaty as well as Article 15(1) of the Protocol and, accordingly, the Court did have jurisdiction to consider the adjudication process and the resultant Judgement of the Supreme Court of Burundi with a view to determining whether they contravened Burundi's obligations under Article 6(d) and 7(2) of the Treaty. In so holding, the Court was not usurping or undermining the Appellate jurisdiction of the Burundi Supreme

Court for the reason that the Court's review was not an Appellate review but a trial *de novo* in the context of the Treaty obligation the Court was requested to enforce.

(c) The Appellant had not satisfactorily proved the violation of the principles of the rule of law and good governance enshrined in Articles 6(d) and 7(2) of the Treaty, or of his property rights as protected by Article 15(1) of the Protocol and/or Article 14 of the African Charter for the following reasons.

(i). There was nothing in the Reference to suggest that effective mechanisms, processes and institutions through which the citizens may exercise their legal rights are non-existent in Burundi, so as to impute lack of good governance. On the contrary, the Appellant had an opportunity to submit a dispute to the right institution-the-judiciary-for determination. The existence of the necessary governance framework for the resolution of the dispute in Burundi could not therefore be questioned and the Respondent could not be faulted in that regard;

(ii). With respect to the rule of law principle and the property rights of the Appellant, the evidentiary threshold of proof was not met for several reasons. First, the property laws of Burundi were not availed to the Court and thus no inferences could be drawn as regards inconsistency of such laws with international human rights standards, unequal enforcements of the law, non-supremacy of the law, or

inequality before the law. Secondly, the Appellant did not avail the Court with the record of proceedings which was pivotal in proving unfairness, bias or arbitrariness in the application of the law as an indication of lack of independence or procedural impropriety, or whether the Burundi Supreme Court administered Burundian Law in an outrageous way, in bad faith, with wilful neglect of duty, or conducted the proceedings in blatant violation of the substance of natural justice such as would engender international liability. Third, the laws of Burundi that the Appellant sought to invoke to show the Supreme Court's lack of adherence to the rule of law were not availed to the Court. Fourth, there was no sufficient evidence of the abuse of the Applicant's rights to be heard and availed an opportunity for cross examination of witnesses as pleaded. And fifth, the Applicant did not discharge his duty to present "evidence that was fully conclusive" in proof of the elements of the rule of law principle.

(iii). In the absence of the record of proceedings, the Court could not determine the extent of the Supreme Court's alleged non-compliance with Burundi's legal regime so as to make a justifiable finding on whether the resultant decision was iniquitous and thus engendered the Respondent State's legal liability for a decision may only be rendered iniquitous, and therefore, susceptible to international liability

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where it is the culmination of such procedural defects as would make it impossible to be just.

(iv). The Appellant did not detail with specificity and/or avail to the Court the property laws he considered to have been contravened by the impugned judgment with the result that no nexus was established between the authentic notarised deeds and Attested Affidavits, and, accordingly, the legality of the Supreme Court's decision on the issue of the authenticity and probative value of the Attested Affidavit could not be faulted. In the result, and there having been no Reference to any Burundian property law that would engender the Appellant's proprietary interest in the disputed property, his claims to the said property remained unproven.

(v). In any event, the Appellant having averred in the Reference that he had subdivided the consolidated parcel of land and sold them out to new buyers and that his Certificate of Title to the Property had been annulled and new Certificate of Title issued to the new buyers, it followed that Appellant had relinquished all legal title to the disputed property to new buyers and, accordingly, he had no proprietary rights reserved to himself which could be violated contrary to Article 15(1) of the Protocol and Article 14 of the African Charter which could be restored to him.

(vi). The matters canvassed in the Reference were of grave importance to the advancement of Community Law and,

thus, it was just to order that each party should bear its own costs.

19. In the result, the Reference was dismissed with an order that each party bears their own costs.

C. APPEAL TO THE APPELLATE DIVISION

20 The Appellant being partially aggrieved by the above decision of the Trial Court initiated an Appeal by lodging a Notice of Appeal and a Memorandum of Appeal on 30th December 2016 and 30th January 2017 respectively. In the Memorandum of Appeal, the Appellant contended that the Trial Court erred in law: -

(1) By holding that the Applicant/Appellant did not provide sufficient proof of violation of Articles 6(d) and 7(2) of the Treaty; Article 15(1) of the Protocol; and/or Article 14 of the African Charter in a Reference that was, essentially, uncontested on the merits by the Respondent.

(2) By holding that the Respondents' failure to recognise the legal and probative value of the Attested Affidavit Number 356/99 of 27th July 1999 was either not proven or was not in violation of the rights of the Applicant or his heirs or assigns.

(3) By misapprehending the pleadings and submissions of the Applicant, which make it very clear that the Applicant was faulting the Respondent for non-compliance with its international

obligations, based on non-compliance with its national legal system; specifically that it was the "failure of the Respondent to recognize the legal and probative value of the Attested Affidavit Number 356/99 of 27th July 1999 executed by the Respondent State's own organs" under the Burundian legal system which constituted a failure of the Respondent to abide by its commitment, under the Treaty, the Protocol and the African Charter.

(4) By misapprehending the Pleadings and Submissions of the Applicant which made it very clear that the Applicant was not attacking any specific law of the Respondent State, contrarily, the Applicant was attacking the Judgement of the Supreme Court of Burundi, specifically the refusal by the Respondent State, through that Judgment, to recognize the legal and probative value of the Attested Affidavit, which had been executed in accordance with the legal system applicable in the Respondent State at that time.

(5) By misapprehending the Submissions of the Applicant by stating that the Applicant had addressed the Court at length on the alleged non-compliance of the impugned judgment with Burundian Law No. 1/004 of 9 July 1996 while in fact the Applicant in his submissions (at Paragraph 54 thereof) had merely referred to Article 46 of the said Law No. 1/004, only **by way of illustration of the general principle** accepted in the Burundian legal system, according to which any authenticated deed/Attested Affidavit constitutes genuine evidence of an

agreement between parties to it; and the content of such an authenticated deed/Attested Affidavit could only be challenged by taking a special action for forgery.

(6) By declaring that the Applicant had tendered insufficient evidence yet the Respondent did not deny, contest or contradict the Affidavit and documentary evidence of the Applicant; in so doing the Court failed to recognise and/or decide that the Applicant's evidence was admitted uncontroverted and unchallenged.

(7) By, belatedly, in its judgment, requiring the Applicant to produce the full record of proceedings of the Supreme Court of Burundi, as well as the laws of Burundi, while with regard to the laws, the Applicant was not invoking any specific enacted law, but a general principle of law that even the Respondent State did not contest; and while with regard to the record of proceedings, the judgment of the Supreme Court was fully self-explanatory on the way the Court determined the matter.

(8) By questioning, *suo motu*, the accuracy of the Applicant's assertions that the Respondent never challenged. In doing so, the Court favoured the Respondent, by raising a problem where there was none, and by basing its final disposal of the Reference on its own unfounded doubt, to the detriment of the Applicant.

(9) By inappropriately applying a standard of proof occasioned by charges/claims against a State that are of "*exceptional gravity*" to

a Reference that simply involved the failure to recognise individual property rights.

(10) By holding that the Respondent did not violate Articles 6(d) and 7(2) of the Treaty; Article 15(1) of the Protocol; and/or Article 14 of the African Charter.

(11) By holding that the rights of the Applicant or his heirs or assigns to peaceful enjoyment of property were not violated.

(12) By, belatedly, and *suo motu*, in its final Judgment, questioning the *locus standi* of the Applicant, an issue which the Respondent had never raised, and which, in any case, the Court should have considered in terms of admissibility of the Reference, and not in terms of its merits.

(13) By failing or omitting to exercise its inherent power, even in an adversarial system, to seek from the parties any information the lack of which it was going to base its judgment, especially in a case in which the facts were uncontested.

(14) By holding that the Applicant was not entitled to the remedies sought.

(15) By failing to provide or prescribe a remedy to violations of the Applicant's rights which the Court itself had expressly recognized when it found that the impugned judgment of the Supreme Court of the Respondent State depicted, *inter alia*, "a cavalier approach to an extremely serious judicial function", "an unreasoned judgment that is quite dismissive of the issue raised on appeal",

"a blatant disregard for the due process of the law", "a clear injustice to the parties to the dispute" and "unacceptable judicial conduct and wilful neglect of the (Supreme) Court's duty."

21. The Appellant asked the Court:

(a) To set aside the judgment and Order of the Trial Court dated 2nd December, 2016;

(b) To grant the orders prayed for in the Reference;

(c) To allow the Appeal with costs in the Trial Court and in the Appeal; and

(d) To make such further or other orders as the Court deemed just in the circumstances.

22. At the Scheduling Conference of the Appeal, the Court upon scrutiny of the physical address of the Appellant as stated in the Reference and in the supporting Affidavit thereto and having taken note of some fleeting remark by the Trial Court that the Applicant's affidavit of 18th November 2018 indicated that the Appellant was ordinarily resident in the United States of America, raised, *suo motu,* the issue of the Court's jurisdiction *ratione personae*. In light of the Court's concern and bearing in mind the grounds of Appeal proffered by the Appellant himself, the following issues were framed for determination by the Court:

(1) Whether the Court had jurisdiction *ratione personae* to entertain the Reference.

(2) Whether the Trial Court erred in law in finding that the Respondent did not violate or infringe Article 6(d) and 7(2) of the Treaty, Article 15(1) of the Protocol; and/or Article 14 of the African Charter.

(3) Whether the Trial Court erred in law and/or committed a procedural irregularity by questioning *suo motu*:-

(a) The accuracy of the Appellant's assertions which were not challenged by the Respondent, and/or

(b) The *locus standi* of the Appellant;

(4) Whether the Trial Court erred in law and/or committed a procedural irregularity by failing or omitting to exercise its inherent power to seek from the parties any information they lacked and which would have been decisive in the success of the Reference;

(5) Whether the Trial Court erred in law or committed a procedural irregularity by failing to provide or prescribe a remedy for the violation of the Appellant's rights to due process as recognised by the Trial Court;

(6) Whether the Trial Court erred in law by finding that the Appellant was not entitled to the remedies sought.

23. After the Scheduling Conference, the parties in compliance with the Court's directions filed their respective written submissions and on

15th May, 2018 they appeared before the Court and highlighted those submissions.

24. We propose to deal with the above issues sequentially.

The Parties' Submissions

ISSUE No. 1. Whether or not the Court had Jurisdiction *ratione personae* to entertain the Reference

Appellant's Submissions

25. Counsel for the Appellant submitted that his understanding of jurisdiction *ratione personae/locus standi* is that the Court must make a determination on 3 points :

1) Whether a petitioner to this Court is a " legal or natural person"
2) Whether the subject matter of the petitioner's complaint (in the reference or other pleading) concerns "the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community (...) on the grounds that such Act, regulation , directive, decision, or action is unlawful or is an infringement of this Treaty; and
3) Whether the subject matter of the Petitioner's complaint has been reserved under the Treaty to "any institution of a Partner State".

To buttress his argument he referred this honourable Court to the case of Attorney General of Tanzania Vs Anthony Calist Komu, Appeal No 2 of 2015 ,[paras.49-50; 58-64].

26. Counsel for the Appellant averred that Mr Manariyo Desire is a natural person, and a Citizen of the Republic of Burundi, a Partner State in the East African Community, and that he owns property in the respondent State but also has disposed some of the property that he owned therein, which is the subject matter of this Appeal. It is the case for the Appellant in its written submissions, that he has been sued, and has defended himself, in the national Courts of the Respondent State all the way to its highest Court, the Supreme Court of Burundi. He contended that neither in the national litigation, nor in the proceedings before the First Instance Division of this Court, nor indeed in instant Appellate proceedings, did the Respondent challenge the nationality, nor any other aspect of the jurisdiction ratione personae, with regard to the Appellant.

27. In his "Additional Submissions to the Rejoinder on the Issue of Appellant's Residence", the Appellant avers that the "Respondent is raising the issue of Residency for the first time in his Submissions in Reply at an appellate proceeding".

28. He further contends that "the Partner States could not have intended to exclude part of the citizens from the right to access the EACJ, while allowing the same right to foreigners" and that "excluding EAC citizens residing outside the Community from access to the Court would be against the object and purpose of the EAC Treaty and of Article 30 (1) of the Treaty itself". In a similar vein, he states that "if the Partner States intended to limit their citizens' rights they would have expressly said so.

29. The Appellant also relies on the principle of *Animus Revertendi* which is defined in the Black's Law Dictionary as "The intention of returning. A man retains his domicile, if he leaves it *animo revertendi".* He avers that: "...even if one is out of the country but has intention to return, her absence should not be used to curtail her right to a means of redress by any national or international court or tribunal" and that "The proof of the 'the intention to return' is the fact that the Appellant has expressly asserted that he is a national of Burundi; that he owns property therein; that he has rights as well as obligations and potential liabilities therein; and that he has *de jure* political protection." He further argues that this "can only be construed to mean that the Appellant has surrendered **none** of these rights or obligations, and has exercised his freedom to leave his country, and retained all his rights to return to his country and indeed to assert the same rights even when he is resident abroad".

30. The Appellant argues that the practice and jurisprudence of this Court clearly shows that "not only has it sometimes assimilated 'residents' to 'citizens' without focussing on the residency of the later, but also it has granted access before it, to natural or legal persons residing outside the Community". He holds that in the case of the **East African Law Society and others v. The Attorney General of Kenya and Others,** for instances, the Court "seems to have understood the terms 'residents' and 'citizens' to mean the same thing. He further points out that in the practice of this Court while determining its jurisprudence *ratione personae,* it "has referred only to the citizenship of the Applicant, without focussing on/specifying their residency" which,

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"shows that what is important above all is the citizenship of the Applicant, wherever might be his/her actual residency" and that this "...would suggest that in the end, the term 'resident' used in Article 30 (1) of the Treaty would cover all EAC citizens regardless of where they reside, and also foreigners residing within the Community" (see a host of cases cited by the Appellant in his "Additional Submissions to the Rejoinder on the Issue of Appellant's Residence" para. 70). He also advances that in some cases such as **Patrick Ntege and Others v. The Attorney General of Uganda and Others,** the **Union Trade Centre (UTC) Limited, Claimant v. The Attorney General of Rwanda, Respondent and Succession Makuza Desire, Succession Nkurunziza Gerard & Ngofero Tharcisse, Interveners,** this Court "has recognized its jurisdiction *ratione personae* even when the Applicant, a citizen of a Partner State, was presumably residing outside the Community".

31. The Appellant contends that "any further determination of this issue would require an assessment of facts..." which the Appellate Division "might not be well placed to do" and that "[i]n principle, a determination of the residency of a litigant will require contestation of facts that would show where the litigant resides, what is her domicile, what is her nexus with a Partner State and so on". In support of his contention, the Appellant resorts to the *Angella Amudo* case where the Court stated that: "Questions of fact are exclusively decided at the level of the First Instance Division. They are not appealable to the Appellate Division."

Respondent's Submissions

32. On his part, Counsel for the Respondent argued that the Treaty is more than clear that Legal and natural persons shall only be resident in a Partner State in order to refer any matter for determination by this Honourable Court, and ***not just a national of a Partner State*** as it is in this Appeal. He stated that Article 30(1) of the Treaty provides that" **Subject to the provisions of Article 27 of this Treaty , any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision, or action of a Partner State or an Institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is infringement of the provision of the Treaty" .**

33. In the same vein, Counsel for the Respondent argued that as it clearly transpired in the Affidavit sworn in by the said, Manariyo Désiré from page 14 to 17 of the Record of Appeal, ***the Appellant is a resident of 40 Alder Street, Apt Box 9, Portland, Maine 04101, in the United States of America, and not a resident of any of the EAC Partner State***.

34. Counsel for the Respondent also argued that in **Angella Mudo Vs The Secretary General of the East African Community, Appeal No. 4 of 2014, paragraph 43,** this Honourable Court held that " **On a fundamental issue like that of jurisdiction a Court can Suo Motu , raise it and decide the case the ground of jurisdiction without**

even hearing the parties". He further pointed out that in para 44 of the aforementioned case, the Court held that "**Jurisdiction does not originate in the consent of the parties and acquiescence. It is a fundamental principle that no consent or acquiescence can confer on a court or tribunal with limited jurisdiction to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such Court or Tribunal has acted without jurisdiction**". Therefore, he argued that the applicable law in determining whether or this honourable Court has jurisdiction ratione personae is Article 30(1) of the Treaty for the Establishment of the East African Community and nothing else: the Legal and/or natural person referring any matter for determination by this honourable Court has to be resident of a Partner State and not just a national of that Partner State.

35. Counsel further argued that it is a general principle that "he who alleges must prove", and he contended that the Applicant has to prove that he is a resident of any of the EAC Partner States, and that failure to do so, this Honourable Court should rule that it lacks jurisdiction *ratione personae* to entertain the Reference.

Court's Determination

36. This Division of this Court has held in **Attorney General of the United Republic of Tanzania v. African Network for Animal Welfare** [EACJ Appeal No. 3 of 2011] that:

"Jurisdiction is a most, if not the most fundamental issue that the Court faces in any trial. It is the very foundation upon which the

judicial edifice is constructed; the fountain from which springs the flow of the judicial process. Without Jurisdiction, a Court cannot even take the proverbial first Chinese step in its judicial journey to hear and dispose of the case."

Further, this Division has clearly demonstrated in the **Angella Amudo v. The Secretary General of the East African Community** [Appeal No. 4 of 2014] that the Court can on its own motion raise a question of Jurisdiction and determine it.

Far from the assertion by the Appellant that the "Respondent is raising the issue of Residency for the first time in his Submissions in Reply at an appellate proceeding", it is we who introduced the issue of jurisdiction in our own motion after our curiosity was aroused by the statement on the Judgment of the Trial Court that "in fact the affidavit of 18th November 2015 does indicate that he (the Applicant/Appellant) is ordinarily resident in the United States...". True to the statement, in the abovementioned affidavit, the Appellant (the Applicant) avers that he is "...***of 40 Alder Street, Apt Box 9, Portland, Maine 04101, in the United States of America".***

Hence, the reason why we seek to dispose of the issue of jurisdiction which was raised by this Division *proprio motu*.

37. This Division extensively dealt with the conceptualization of jurisdiction for purposes of the adjudication of cases in the EACJ in the **Alcon International LTD. V. The Attorney General of Uganda and Others** [EACJ Appeal No. 3 of 2013]. Suffice it to say that the

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Appellate Division of this Court noted that the word jurisdiction "...is used as a unitary concept to denote three essential elements which enable the Court to operate" which are namely: *jurisidiction ratione materiae (subject matter), ratione personae (locus standi), and ratione temporis (temporal condition).* The absence of any of the above essential elements of jurisdiction would disavow this Court the mandate to entertain a dispute.

38. The jurisdictional element in question is whether the Appellant had the *locus standi* (jurisdiction *ratione personae)* to institute the Reference in this Court. The entry door for any legal or natural person such as the Applicant in this case to institute a reference is provided for in Article 30 (1) of the EAC Treaty which states:

"Subject to the provisions of Article 27 of this Treaty, <u>any person who is resident in a Partner State</u> (underlining ours) may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty".

39. In order for us to resolve the question of whether the Appellant who was the Applicant in the Trial Court had the *locus standi* to institute the reference in this Court, we shall first decipher the meaning of who is a resident for purposes of Article 30 of the EAC Treaty. Then we shall proceed to determine whether the Appellant falls under that category of natural persons who are considered as "residents in a Partner State". As has always been the case when this Court has been faced with a question of interpretation, we shall resort to the *Vienna Convention on*

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the Law of Treaties (VCLT) which provides us with the toolkit for interpretation of the EAC Treaty, especially in its Art. 31-33. The relevant provision of the VCLT is Article 31 which provides:

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

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40. It is useful to remember here, that when engaging in the exercise of treaty interpretation, the starting point is that treaties are creatures of concordant will of states. A correct interpretation of the Treaty is therefore the one that deciphers the parties' concordant will or intention. Even though the VCLTs, in its Articles 31-33 does not expressly mention the parties' intent, the commentary accompanying the International Law Commission's (ILC) Draft Articles on the Law of Treaties does clarify that the articles were designed to appreciate the "meaning which the parties may have intended to attach to the expressions that they employed in a document." (ILC, *Draft Articles on the Law of Treaties with Commentaries*, Yearbook of International Law Commission (YBIL) 18 (1966), Vol. 2, 89). The ILC further reiterated recently that interpretation "must seek to identify the intention of the parties" (See, *Commentary on Draft Conclusion 3* in ILC, *Report of the International Law Commission on the Work of its 65th Session,* UN Doc A/68/10 (2013), 27). The Commission further held, that "the text must be presumed to be the authentic expression of intentions of parties" (see, ILC, *YBIL, supra,* 220). According to A. Mc. Nair, interpretation under the Vienna rules aims at "giving effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances" (see, A. Mc. Nair, *The Law of Treaties,* repr. 2003, 365). The consequence of this is that, a court such as ours can either subscribe to a broad or a narrow interpretation of a given term of a treaty in accordance with the boundaries established by the intention of the parties.

41. The immediate question that comes to our mind is whether the term "resident" as used in Article 30 (1) is clear enough if given its ordinary

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meaning and whether that meaning will be in harmony with the "object and purpose" of the EAC Treaty.

42. The starting point of our analysis is the language of the Treaty itself. The provision that "Any person who is resident in a Partner State." does seem to suggest that *locus standi* is granted to a person who is resident within the territory of East Africa. The use of "resident in" seems to make it a requirement that the person should ordinarily reside within any of the EAC Partner State. In the **Plaxeda Rugumba v. The Secretary General of the East African Comunnity and the Attorney General of Rwanda**, Ref. 8 of 2010, the Trial Court interrogated whether Plaxeda Rugumba was a "resident in" and held that:

> "It cannot be denied that the Applicant is a person who is resident in a Partner State as defined by the Treaty. In her Reference, she stated that she is a Ugandan of Rwandan extraction and a natural elder sister of the Subject. She added that her address is in Kampala Uganda and no party has raised issues with those facts (underlining ours)"

It is very clear that Plaxeda Rugumba was determined to be a "resident in" one of the EAC Partner State on the basis of her address in Kampala Uganda and not on the basis of her citizenship and as a result, the Trial Court went further to determine that "in terms of locus standi therefore, and from the facts pleaded (underlining ours),the Applicant is fit and proper person to file the reference. We agree with this exposition of the law.

43. Moreover, the word "resident in" in Article 30 (1) is used as an adjective. When a word is used as an adjective, it describes an attribute of a noun. The word "resident" when used as an adjective

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means "living or staying in a place" (see Cambridge Dictionary at https://dictionary.cambridge.org/dictionary/english/resident last visited on the 9th July 2018). Hence, the adjectival use of the word "resident" in Article 30 (1) would lead to the conclusion that the intention of the drafters of the EAC Treaty was to restrict *locus standi* to persons "living" or "staying" in a Partner State of EAC and not to all citizens including those who don't "live" or "stay" within any Partner State of the EAC. In other words, "Any person" as envisaged in Article 30(1) has to have the attribute of being a "resident (living or staying) in a Partner State".

44. Certainly, in the light of its ordinary meaning, the word "resident" as used in Art. 30 (1) of the EAC Treaty cannot be construed to mean that it was intended by the drafters of the Treaty to engraft "non-resident citizens" of EAC Partner States as part of the phrase "...any person who is resident in a Partner State...".

45. From the above it is very clear that it was not the intention of the parties to the EAC Treaty to give the term "resident in" a special meaning which differs from its ordinary meaning and usage. And neither can we give it a meaning which departs from the ordinary meaning since doing so would depart from the mandate of this Court which is to ascertain the intention of the parties to the treaty when engaging in interpretation.

46. The preceding finding is supported by the following argument which will point to the same conclusion. The intratextual review of the EAC Treaty provides further clarity of the context within which the term was construed. The intratextual review of the EAC Treaty entails establishing the use of the phrase "resident in" within the Treaty text

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since the text is the primary starting point for interpretation. In other words, as has been expressed above the text must be presumed to be the authentic expression of the intentions of the parties, and, therefore the starting point is the elucidation of the meaning of the text. Further, when interpreting a treaty, it is widely accepted that the assumption should be that the parties in expressing their intention, they do so in such a manner that no norm expressed logically contradicts another and that no part of the treaty should be rendered redundant. (see, for example, **Dispute Concerning Navigational Rights and Related Rights [Costa Rica v. Nicaragua]**, Judgment, 13 July 2009, ICJ Reports [2009] 213, at 239, para. 54; and,

47. Even though the EAC Treaty does not define the term "resident", a review of Article 86 of the Treaty makes it clear beyond doubt that "resident in" as used in Article 30 does not include "all citizens" regardless of whether they are resident or not as is claimed by the Appellant. Article 86 of the EAC Treaty provides in pertinent parts:

ARTICLE 86

Movement of Capital

The Partner States shall in accordance with the time table to be determined by the Council, permit the free movement of capital within the Community, develop, harmonise and eventually integrate their financial systems. In this regard, the Partner States shall:

(a)...

(b) ensure that the citizens of and persons resident in a Partner State are allowed to acquire stocks, shares and other securities

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or to invest in enterprises in the other Partner States (underlining ours); and

(c) ...

The distinction of "persons residents in" and "citizens of" a Partner State in Art. 86 (b) of the EAC Treaty dispels any lingering doubt that the term "resident in" in Article 30 (1) was not meant to include "all citizens" including those who are not "resident in" an EAC Partner State. An interpretation of the term "resident in" in Article 30 (1) to also mean all citizens including those who are not resident in a Partner State of the EAC would result in reducing the distinction made in Article 86(b) to redundancy or inutility. It is our view that the distinction made in Article 86 (b) is not redundant and inutile and therefore "resident in" in Art. 30 (1) does not include citizens who are not "resident in a Partner State" of the EAC. We decline to render the distinction made in Art. 86 (b) otiose, thereby offending the well-settled principle that all parts of a treaty, if possible must be given effect.

48. Based on the foregoing, we conclude that where a "citizen" of any of the Partner State of the EAC is not a "resident in" any of the EAC States, then this Court is disavowed of the jurisdiction *ratione personae* to deal with the case.

49. Before we depart from this point, we deem it necessary to make a distinction between the interpretation in this case where we have relied on the ordinary meaning of the term "resident in" and the context within which it is used and other two cases which this Court has declined to use the ordinary meaning of the words applied.

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50. In the *Tom Kyahurwenda* Preliminary Ruling (CASE STATED No. 01 of 2014) this Court departed from using the ordinary meaning of the words in Article 34 of the EAC Treaty because it could have led to ***"to a result which is manifestly absurd or unreasonable".*** The Court held in para. 35 of the Preliminary Ruling as follows:

> The Court deems it important to distinguish the application of the Treaty from interpretation of the same as found in Article 34. Whereas, as we held above, interpretation is the preserve of this Court, the same is not necessarily the case for the application of the Treaty by the national courts to cases before them. It would defeat the purpose of preliminary reference mechanism if the Court's interpretation of Article 34 of the Treaty extended to "application of treaty provisions". The purpose for the mechanism is for the national courts to seek interpretation of the Treaty provisions in order that they may then apply them to a case at hand. Hence, to interpret Article 34 as requiring *"application of the Treaty provision"* to be excluded from the purview of national courts would ***"lead to a result which is manifestly absurd or unreasonable".*** In this regard, Article 32 (b) of the Vienna Convention on the Law of Treaties cited above acknowledges an absurdity exception to the literal interpretation of any Treaty.

51. In a similar vein, in **The East African Law Society and 4 Others V The Attorney General of Kenya and 3 Others Reference No. 3 of 2007,** even though the Court did not expressly use the term absurdity

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exception, it was categorical that "... having regard to the purpose of the provisions, namely to ensure compliance with provisions of the Treaty and to provide for empowerment of inter alia any resident to seek judicial adjudication where there is allegation of non-compliance, we are inclined to the view that a restrictive interpretation would defeat that purpose". Any other interpretation which would have been restrictive and considered that "institutions" as used in Article 30 (2) as excluding "organs" would have led to an absurd result for only "organs of the Community" can under the Treaty make act(s), regulation(s), directive(s), decision(s) or undertake action(s) which can be challenged on the basis that it/they is/are "unlawful" or "an infringement of the provisions of the Treaty" and not institutions as defined in the EAC Treaty.

52. Counsel to the Appellant is of the view that any interpretation of the term "resident in" which excludes citizens (even those non-resident in any of the Partner States) would lead to absurd results. On the contrary, the exclusion of non-resident citizens from the exercise of certain rights, such as the right to vote by some national laws has not been found to lead to absurd results by the European Court of Human Rights. In **Shindler v. United Kingdom**(19840/09), (2014) 58 E.H.R.R. 5, the court reasoned "the residence of a citizen is not ... an arbitrary measure of connection with a country: far from it, residence is a relevant, rational and practicable criterion for assessing the closeness of the links between a British citizen and the UK (see also, **Doyle v. United Kingdom**, 30158/06, [2007] ECHR 165; **Melnychenko v. Ukraine** (17707/02), (2006) 42 E.H.R.R. 39). In the context of the above cases involving the United Kingdom, non-resident

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citizens who have not registered to vote in the UK for the last 15 years are not eligible to vote whereas qualifying commonwealth citizens who are resident in the UK are allowed to vote.

53. Counsel to the Appellant also argues that an interpretation that would exclude citizens of EAC partner states who are not resident in any of those states would run counter to the object and purpose of the EAC Treaty. We agree with Counsel to the extent that the object and purpose of the Treaty is a people centred approach to co-operation and integration as enumerated in the Preamble, Articles 5, 6 and 7 and elsewhere in the Treaty. However, a people-centred approach to cooperation and integration does not necessarily counter the intention of parties to the EAC Treaty to intend to grant *locus standi* to a certain set of citizens before the EACJ and not others. It is not unusual for parties to treaties to establish courts and restrict *locus standi* in one way or another. The EAC treaty itself has a restriction other than that of one being a resident in one Partner State which is the two months time limitation for legal and natural persons to institute a case whereas the same limitation does not apply to references by Partner States. In the context of the European Court of justice (ECJ), Anthony Arnull, is of the view that "If the Court took a liberal approach on the question of the category of acts susceptible to review and the status of the European Parliament (which was not mentioned in the Treaty before its amendment) in annulment proceedings, its attitude to standing of private parties has on the whole been very restrictive" (see Anthony Arnull, *The European Union and its Court of Justice,* 2006, Oxford University Press, at p. 69) despite the fact the purpose and objective of the European Union as espoused in its legal framework is further

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promotion of integration of the Union which is broadly similar to that of EAC. The ECJ has pronounced that there is no place for public interest litigation within the context of the European Union Treaty (*See,* **Greenpeace and Others v. Commission** Case T-585/93 [1995] ECR II-2205). In the African Court of Human and Peoples Rights, even though the purpose and objective of the African Charter of Human and Peoples' Rights is broadly preservation of fundamental human rights enumerated in the Charter, standing has been restricted to only individuals and NGOs of parties to the Charter who are also parties to the Protocol on the Establishment of the African Court of Human and Peoples' Rights and have made a declaration accepting competence of the Court to deal with cases instituted by individuals and NGOs. In as far as the Caribbean Court of Justice, the *locus standi* of private entities is restricted to "Nationals of a Contracting Party... with special leave of the Court" under circumstances provided for in Article XXIV on "Locus Standi of Private Entities" in the *Agreement Establishing the Caribbean Court of Justice*). It should be noted the Contracting Parties of the Caribbean Community do not require special leave of the Court to appear as parties in proceedings before the Court. The Southern African Development Community Tribunal is envisaged to be an *inter-state* dispute settlement court in the new Protocol establishing the Tribunal thereby effectively disavowing legal and natural persons' *locus standi* in the Court despite the purpose and objectives of the Community which are broadly similar to those espoused by the East African Community. All the above examples of practices of other regional courts illustrate that restriction of *locus standi* persons is not absurd and does not necessary go counter to the broad aspirations of

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treaties. And where parties to a treaty have restricted *locus standi* in whatever form, that restriction should be interpreted restrictively for that is what the partner states have intended however broad other sections of the treaty may be interpreted. In other words, some sections of a treaty may be interpreted broadly and purposively whereas others may be interpreted restrictively depending on what parties of that particular treaty intended the sections to mean. Indeed, according to some commentators, the EACJ has consistently in its case- law broadly and purposely interpreted Articles 6 (d) and 7 (2) to resolve cases which have human rights aspects while on the other hand it has restrictively construed the two months limitation "enabling governments to defeat several suits raising credible allegations of human rights violations" (See, the analysis of the **Katabazi v. Secretary General of the East African Community and Attorney General of the Republic of Uganda**, EACJ, Reference No. 1 of 2007, 1 November 2007, **Independent Medical Unit v. Attorney General of Kenya**, EACJ, Reference No. 3 of 2010, 29 June 2011, **Omar Awadh and 6 Others v. Attorney General of Uganda**, EACJ Appeal No. 2 of 2012 in J. Alter, J. Gathii and L. Helfer, "Backlash against International Courts in West, East, and Southern Africa: Causes and Consequences", *The European Journal of International Law,* vol. 27 no. 2, at p. 306).

54. From the foregoing, there is nothing in the text, structure, history, subsequent practice in the application of the EAC Treaty by the Partner States, and subsequent protocols which were ratified by the EAC member states that leads to the conclusion that "resident in" was intended to include citizens who are do not have a physical presence

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in any of the Partner States of the EAC and that it would not lead to an absurd result interpreting Article 30 of the EAC Treaty as disavowing such citizens *locus standi* before the EACJ.

55. We now turn to the question whether Desire Manariyo (the Appellant) is a "person resident in" any of the EAC Partner States and hence has *locus standi* to institute a reference in the EACJ hinged on Art. 30(1) of the EAC Treaty.

56. Although the question of "who is resident" in EAC Partner States appears to be a factual question as rightly averred by Counsel for the Appellant, which can only be determined by the Trial Court as per Art. 35 B of the EAC Treaty, the Record of Appeal before us is unique. It includes significant and unrebutted evidence that the Appellant is not a person who "resides in" any of the EAC Partner State for purposes of Art. 30 of the EAC Treaty which we have extensively established in the foregoing paragraphs and hence has no *locus standi* to institute a reference before this Court. In the normal scheme of things, where the Appellate Division of this Court has determined an appealed question of law but is unable to finally determine the outcome of the case due to the necessity of re-examining the facts, then this Division has been impelled to remit the case to the trier of facts (the Trial Court) [see, **The East African Civil Society Organizations' Forum (EACSOF) v. The Attorney General of the Republic of Burundi**). However, where this Division has enough evidence in the Record to make a determination, this Division has done so to such an extent that it can correct the errors of the Trial Court itself in the interest of expeditious justice. (See **Margaret Zziwa v. The Secretary General of EAC, Appeal No. 2 of 2017** at para.80)

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57. We have sifted through the Record and it is undisputed that in the Affidavit in support of Mr. Desire Manariyo's Reference, he states that he is: "...***of 40 Alder Street, Apt Box 9, Portland, Maine 04101, in the United States of America"***. It is from the statement in the Affidavit that the Trial Court rightly concluded that: "[i]n fact, the Applicant's (Manariyo) affidavit of 18th November 2015 does indicate that he is ordinarily resident in the United States of America...". There is no other possible conclusion that the Trial Court could have or can arrive at in the light of the Affidavit in support of the Reference deponed by the Applicant (now Appellant) with regards to which State he is "resident in". And from the Affidavit in support of the Reference as well as the Judgement of the Trial Court, the State within which the Appellant (Applicant then) "resides in" is not a Partner State of the EAC. And the logical sequence thereof is that the Appellant did not have the *locus standi* to launch the Reference. Hence, the moment the Trial Court concluded as it did that Mr. Manariyo is a resident in a State other than the one envisaged in Art. 30 (1), it should have proceeded to engage the judicial handbrake and divest itself from entertaining the merits of the matter for want of jurisdiction *ratione personae*.

58. The illogic in part of the Appellant contention is palpable. The notion that the Appellant has "the intention to return" (*"Animus revertendi"*) has no place in the provisions of Art. 30 (1) for purposes of granting such a person *locus standi* before the EACJ. Article 30(1) is very clear that only persons "resident in" any of the Partner States of EAC and not those who intend to be "residents in" the said States are granted *locus standi.*

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59. Another baffling contention of the Appellant is that the practice and jurisprudence of this Court clearly shows that "not only has it sometimes assimilated 'residents' to 'citizens' without focussing on the residency of the later, but also it has granted access before it, to natural or legal persons residing outside the Community". This contention is at its best a colossal misconception of the cases relied upon by Counsel to the Appellant or at its worst a deliberate misinterpretation of the cases to create a smokescreen to cover the fact that the Appellant is not a "resident in" any of the Partner State and consequently disavowed the *locus standi* before the EACJ under Art. 30 (1) of the EAC Treaty. The Appellant has colossally misconceived the practice of the Court by relying on a number of cases and wrongly concluded that the issue of residency is of less importance. However, the contrary seems to be true as shall be demonstrated forthwith.

60. In all the cases that the Counsel to the Applicant has mentioned, the Affidavits in their support have clearly indicated that they are residents in one of the EAC Partner State. In the *Christopher Mtikila v. The Attorney General of the United Republic of Tanzania and the Secretary General of the East African Community and Others,* the Affidavit of Mr. Mtikila clearly states that "the Applicant is Mr. Christopher Mtikila, a natural person and citizen and resident of Dar Es Salaam Tanzania (which is a Partner State of EAC)"; In the *Emmanuel Mwakisha Mjawasi and 748 Others v. The Attorney General of the Republic of Kenya,* the Affidavit states that "the Applicants are adult male and female East Africans of sound mind currently residing within the Partner State of Kenya..."; In the *Timothy Alvin Kahoho v. The*

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Secretary General of the East African Community, the Affidavit states that "the Applicant is a natural persons (sic) resident of Dar Es Salaam and Citizen of Tanzania..."; In the *Rwenga Etienne and Moses R. Marumbo v. The Secretary General of the East African Community,* the Affidavit states that "the Applicants are natural persons, adult citizens of the Republic of Rwanda and the United Republic of Tanzania respectively" and that "they are resident in their respective Partner States". The same can be said of all other cases cited by the Counsel to the Applicant which share the same strand of mentioning which Partner State of the EAC they are "resident in".

61. From a rather similar misperception reference point, the Counsel to the Appellant cites the case of **United Trade Centre (UTC), Claimant v. The Attorney General of Rwanda, Respondent** and **Succession Makuza Desire, Succession Nkurunziza Gerard & Ngofero Tharcisse, interveners,** and rightly states that the Application was brought by the Company registered in Rwanda (a Partner State of the EAC) but the original Application was prompted by Mr. Tribert Rujugiro Ayabatwa who is not a resident in any of the Partner State. What is blatant is that the Case was instituted by UTC (a legal Person incorporated in a Partner State of the EAC) which is the starting point for determining *locus standi,* and we fail to comprehend how this case supports the contention of the Applicant. In a similar vein, Counsel to the Applicant invokes the Case of **Patrick Ntege and others v. The Attorney General of Uganda and Others** and claims that "the Applicants were operating in South Sudan (which was not a Partner State at the time the Reference was instituted) and presumably residing there". In our considered view, there is nothing in the Affidavit

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in support of the Reference that can lead one to make a presumption that the Applicants were resident in South Sudan at the time the Reference was instituted. The Affidavit states that Mr. Patrick Ntege Walusimbi (Applicant) is of M/S C/O Rwakafuuzi & Co Advocates , Kampala, Uganda (A Partner State of the EAC).

62. Based on the foregoing, we are convinced that the practice at the EACJ clearly demonstrates that Applicants have in the affidavits in support of their references indicated the Partner State of the EAC in which they "reside in" contrary to what Counsel for the Appellant wants us to believe.

63. We therefore come to the conclusion that Mr. Manariyo is not a "resident in" any of the EAC States and that this Court is disavowed of the jurisdiction *ratione personae* to deal with the case. Since we have no jurisdiction to entertain the Reference, we are precluded to rule on the merits of the Case.

Costs

64. This Court has on numerous occasions followed the general rule that costs follow the event. However, for this particular case, the issue of jurisdiction which in the end determined the Appeal was raised *suo moto* by this Division and not the Parties. We therefore think that the just order to make is that each party should bear its own costs of the Appeal.

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Conclusion

65. In the final result, the Appeal is dismissed with each party bearing its own costs.

It is Ordered accordingly.

DATED, Delivered and Signed at Arusha this 28th day of November 2018.

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Emmanuel Ugirashebuja
PRESIDENT

.....

Liboire Nkurunziza
VICE PRESIDENT

.....

Edward Rutakangwa
JUSTICE OF APPEAL