JUMUIYA YA AFRIKA MASHARIKI

IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA
APPELLATE DIVISION

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

APPEAL NO 01. 0F 2017

BETWEEN

MANARIYO DESIRE ..... APPELLANT

AND

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

[Appeal from the Judgment of the First Instance Division (Monica K. Mugenyi, PJ; Isaac Lenaola, DPJ; and Audace Ngiye, J.) dated 2nd December 2016 in Reference No. 8 of 2015]

DISSENTING JUDGMENT OF AARON RINGERA AND GEOFFREY KIRYABWIRE, JJ.A:

A. INTRODUCTION

1. We have the misfortune to differ with the judgment which the majority of the Court have delivered holding that the First Instance Division of this Court ("the Trial Court") lacked Jurisdiction *ratione personae* to entertain the Reference subject matter of this Appeal on the ground that the Appellant was not resident in a Partner State of the Community at the time of filing the Reference because he was then not physically residing in Burundi.

2. For reasons which we shall set out in full when determining the aspect of the Appeal dealing with the Court's jurisdiction, we think that the majority in finding that the Appellant was not physically resident in a Partner State have not only adopted a literal and narrow interpretation of Article 30 (1) of the Treaty for the Establishment of the East African Community ("the Treaty") which does not commend itself to our minds, but have also misapprehended the pleadings and the facts as deposed in the Appellant's affidavit in support of the Reference. With the greatest of respect, we shall show that the method of interpretation adopted by the majority, which takes a narrow and restrictive interpretation of the Treaty was rejected in the very early days of this Court and therefore amounts to a retrogressive and backward move in Treaty interpretation for this Court.

3. Having taken that view of the matter, our Judgment will accordingly deal with both the jurisdictional issue and the substantive merits of the Appeal.

B. **BACKGROUND**

4. We have looked at facts as stated in the majority decision which provide the necessary background to this appeal and find that we are substantially in agreement with them and find that there is no need for us to duplicate them in our judgment as well. However for ease of reference, we shall remind ourselves of the issues agreed for resolution in this appeal which are:

(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:-

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

(c) 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; and

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

5. We shall now deal with the above issues sequentially.

C. OUR ANALYSIS AND DETERMINATION

Issue No.1: Whether The Trial Court Had Jurisdiction R*atione Personae* To Entertain The Reference.

6. The majority holds that the Trial Court did not have jurisdiction *ratione personae* to entertain the Reference because the Appellant was not physically residing in a Partner State and was, because of that, not a ***"...resident in a Partner State..."*** for purposes of Article 30 (1) of the Treaty.

7. In our opinion the holding by the majority that the Trial Court lacked jurisdiction to entertain the Reference following a fleeting remark in the Trial Court's Judgment (para.19) that ***"...In fact, the Applicant's Affidavit of 18th November 2015 does indicate that he is ordinarily resident in the United States of America..." (...***which we shall show was not even correct) and therefore for that reason, the Appellant was not physically resident in any one of the Partner States of the Community is erected on a literal and narrow interpretation of Article 30 (1) of the Treaty which does not commend itself to our minds for several reason which are set out below.

8. Article 30(1) of the Treaty for ease of reference provides:

"...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 institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or an infringement of the provisions of this Treaty..."

9. Before we give our specific reasons for this dissent we wish to recall, *albeit* briefly, the arguments of the parties on this issue.

Appellant's Submissions

10. Counsel for the Appellant argued that the Trial Court indeed did have jurisdiction *rationae personae* to entertain the Reference. He submitted that according to **Shabtai Rosenne: The Law and Practice of the International Court [1920-2005], Vol.II Chapter 9**, *jurisdiction rationae personae* means "...the ability of the parties to appear before the court as applicants or respondents or in any other capacity...". He further submitted that, in his understanding, this Court in **Attorney General v Anthony Calist Komu** [EACJ Appeal No. 2 of 2015,] held that three tests had to be fulfilled to meet the requirements for the existence of *jurisdiction rationae personae* namely:

(i). Whether a petitioner is a "legal or natural person";

(ii). 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

grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the Treaty; and

(iii). Whether the subject matter of the Petitioner's complaint has been reserved under the Treaty "to an institution of a Partner State".

Counsel argued that the Appellant met all the required tests as set out in the **Anthony Calist Komu Decision** (Supra) and therefore had the ability to appear before the Trial Court.

11. Counsel submitted that the Appellant is a natural person and a citizen in the Republic of Burundi, a Partner State. He further argued that the test had been met because the Appellant owned property in the Partner State which had been the subject of an infringement of the Treaty. He further submitted that the Appellant had litigated this dispute in the national courts of Burundi all the way to the Supreme Court. The Appellant further litigated this dispute at Trial Court and in none of the Courts was there a challenge to his nationality and or the Court's *jurisdiction ratione personae*. Counsel also argued that the Appellant's complaint has not been reserved to any other institution of the Partner States by any provision of the Treaty.

12. With regard to the issue of the Appellant's residence, counsel for the Appellant submitted that this was an issue brought up for the first time by the Respondent in his submissions in reply at the appellate hearing. He argued that this issue had not been pleaded, or raised as an objection or even argued at the Trial Court. The Respondent therefore should not be allowed to belatedly change his position and rely on new points that had not been pleaded or

traversed in the trial Court. On this argument he relied on the case of **Attorney General of Tanzania V African Network for Animal Welfare (ANAW)** [Appeal No. 3 of 2014].

13. He submitted nonetheless that it could not have been the intention of the framers of the Treaty to exclude some of the citizens residing outside the Community the right to access the Court, while at the same time allowing the same right to foreigners. He argued that if it was the intention of the Partner States to limit the rights of their citizens they would have expressly done so in the Treaty.

14. Counsel for the Appellant further relied on the principle of *Animus Revertendi* which according to Black's Law Dictionary means "The intention of returning. A man retains his domicil, if he leaves it *animo revertendi*..." This principle, he argued, protects the rights of one who leaves his/her domicil with the intention to return and assures that person that no matter how long the absence, domicil will not be lost. In support of the Appellant's intention to return to Burundi, Counsel for the Appellant argued that the Appellant had asserted that he is a Burundi national; that he owns properties therein; that he has rights as well as obligations and potential liabilities therein and that he has *de jure* political protection. He argued that in the absence of any evidence to the contrary the Appellant had not surrendered any of the above rights or obligations and had exercised his right to leave his country and at the same time had retained his rights to return to his country.

15. Counsel for the Appellant also pointed to what he referred to as the practice and jurisprudence of this Court where sometimes the term "residents" was assimilated to "citizens" without focusing on the

residency of the later. He contended that the Court had also granted access before it, to natural or legal persons residing outside the Community. He contended that this jurisprudence 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 foreigners residing in the Community. He specifically referred to the following cases:

i. ***Patrick Ntege and others V the Attorney General and others;***

ii. ***Union Trade Centre (UTC) Limited V The Attorney General of Rwanda and Succession Makuza Desire, Succession Nkurunziza Gerard & Ngofero Tharcisse, Interveners.*** *In this matter, even though the company was registered in Rwanda, the original application to the court was filed by Mr. Tribert Ayabatwa, the Majority shareholder, a Rwandan national, who did not reside in any Partner State.*

16. Counsel for the Appellant further submitted that to establish whether or not the Appellant was a resident in a partner State would require an assessment of the facts to show where the Appellant resides which this court held in the case of **Angella Amudo V the Secretary General of the EAC [Appeal No. 4 of 2014]** it does not do as *"...questions of fact are exclusively decided at the level of the 1st Instance Division. They are not appealable to the Appellate Division".*

17. When asked what interpretation this Court should give Article 30(1) of the Treaty, Counsel for the Appellant called for a broad and

purposive interpretation to meet the purposes, objectives and principles of the Treaty. In his view such an interpretation would lead to the conclusion that citizens of a Partner State irrespective of their physical location have *locus standi* before the Court.

Respondent's Submissions

18. Counsel for the Respondent submitted that the Appellant lacked jurisdiction *rationae personae* because he could not prove that he was a resident of any Partner State as provided for under Article 30(1) of the Treaty. Counsel argued that under Article 30(1) of the Treaty, it was not enough that the Appellant was a natural person and a citizen of a Partner State. The Appellant also had to be resident in a Partner State. He further submitted that the sworn affidavit of the appellant (pages 14 to 18 of the Record of Appeal) shows that he is a resident of 40 Alder Street, Apt box 9, Portland, Maine 04101, in the United States of America. Counsel argued that the onus was on the Appellant to prove that he was a resident of a Partner State and he had failed to do so.

19. Counsel submitted that the issue of jurisdiction was fundamental and the Court could raise it *Suo Moto* without even hearing the parties as was decided by this Court in the case of **Angella Amudo Vs The Secretary General of the East African Community** [EACJ Appeal No. 4 of 2014]. In this case therefore lack of jurisdiction *rationae personae* could be raised at any time.

20. Counsel for the Respondent argued that the Appellant (at pages 14 to 17 of the record of Appeal) in his sworn affidavit stated that he is a resident of 40 Alder Street, Apt Box 9, Portland, Maine 04101, in

the United States of America and is not a resident of any EAC Partner States.

21. Counsel further submitted that there is a legal principle that "he who alleges must prove" and so if the Appellant insisted that he is a resident of a Partner State then that was for him to prove.

OUR DETERMINATION

22. The difference in opinion giving rise to this dissent stems from the long established principles espoused by this Court on the issue of Treaty interpretation from which the majority opinion appears to depart. Such principles can be derived from the earlier decisions of this Court and also from academic writings on the said decisions. We shall start by a review of those principles.

23. We begin by reminding ourselves of the role and status of this Court in the community. As was held by this Court in the case of **Attorney General of Tanzania vs. African Network for Animal Welfare** [EACJ Appeal No. 3 of 2011]:

> *"The Partner States have freely and voluntarily bound themselves in the Treaty to observe a variety of express undertakings and obligations based on common objectives and principles. The Treaty therefore is an international agreement. In furtherance of this agreement by the Partner States, Article 23(1) establishes the Court and provides that it "...shall be a judicial body which shall ensure the adherence to the law in the interpretation and application of and compliance with this Treaty..."*

Furthermore, in the case of **Attorney General of Uganda vs The East African Law Society and another** [EAC.J Appeal No. 1 of 2013], this Court held that it is a supranational Court and therefore in its work it is obliged to rely on its own Rules of Procedure; international conventions of a general nature (like the Vienna Convention on the Law of Treaties); as well as the practice and jurisprudence of similar International Judicial Tribunals.

24. The earliest discussion relating to Article 30 of the Treaty can be found in the Reference of **The East African Law Society and 5 others V The Attorney General of the Republic of Kenya and 4 others** [Reference No 3 of 2010] (hereinafter referred to as "The East African Law Society Case"). In that case, this Court then sitting as the only division at the time pointed to the unique and progressive approach of the Treaty when compared to other international treaties as to the question of locus standi. It stated:

> *"...Ordinarily at international law, a treaty between and among states, like a contract protects interests of or creates rights for the parties thereto and imposes duties and obligations on the parties to it. Neither another State that is not a party, nor a legal or natural person, may directly claim any interest or right under it, notwithstanding that that other State or person derives benefit from the implementation and operation of the Treaty. However, nothing prevents the State Parties to a treaty to vest in any person or other State an enforceable right..."*

The point being made is that ordinarily at international law, international treaties and enforceable rights thereunder are

between contracting states. However nothing stops contracting states to expand those enforceable rights to persons. In the case of the EAC, the Treaty in a progressive move conferred enforceable rights to legal and natural persons as well.

25. The rationale for the Treaty extending enforceable rights to legal and natural persons is well articulated in **The East African Law Society Case** (Supra). While clearly rejecting a call by counsel for the Respondent in that case to give a strict interpretation to Article 30 of the Treaty, the Court held:

> *"...It is clear from the provision of Article 30 that the residents of the Partner States are vested with the right to access this Court for the purpose of challenging any form of infringement of provisions of the Treaty. Several provisions in the Treaty lend weight to the view that this was a deliberate provision to ensure that East Africans for whose benefit the Community was established participate in protecting the integrity of the Treaty. The following excerpts from the Treaty in particular, stand out to illustrate that deliberate intent. First, in the Preamble to the Treaty, the fourth recital recalls and highlights that one of "the main reasons that contributed to the collapse of the (previous) East African Community" in 1977, was "lack of strong participation of the private sector and civil society in the cooperation activities"; and the eleventh recital records that the parties to the Treaty "are resolved to create an enabling environment in all the Partner States in order to attract investments and allow the private sector and civil society to play a leading role in the socio-economic development activities"...*[Emphasis ours]

The Court clearly made a finding that given the past history of the EAC the Treaty was inter alia deliberately crafted to benefit East Africans, to allow them challenge any form of its infringement and to allow the private sector to play a leading role in socio-economic activities.

26. The Court further held:

> *"...Secondly, Article 7 provides: "1. The principles that shall govern the practical achievement of the objectives of the Community shall include: (a) people-centered and market-driven co-operation;" In our view, therefore, it would be a negation of that deliberate intent to bar the reference on the ground that the applicants had no capacity to bring a reference challenging a sovereign function of the Partner States. Lastly, we are not persuaded by the respondents urging that we give to article 30, a narrow interpretation..."*

This finding defines in many ways the long standing interpretation of the Treaty in a progressive and purposive approach. So in this particular case, in order to give full effect to the purpose of the Treaty, the Court interpreted the word "Institutions of the Community" in Article 30 of the Treaty to include "Organs" of the Community.

27. Furthermore, this Court has acutely been aware of its role within the East African Community especially on the question of access to justice and articulated it in the case of **Steve Deniss vs Attorney General of Burundi** and five others [Reference No. 3 of 2015] where it held:

"...the over-riding purpose of the Treaty can be deduced from its long title, namely, the establishment of the East African Community. However, the objectives of the Community so established by the Treaty are set out in detail in Article 5 thereof. The principles governing the achievement of the said objectives are then laid out in Articles 6 and 7 of the Treaty. This Court is a pivotal organ in the attainment of the Treaty objectives. It is thus required to exercise its mandate under Article 23(1) with due cognisance of the fundamental principles enshrined in Articles 6 and 7. It cannot have been envisaged by the framers of the Treaty that access to justice would include unequal or disproportionate access thereto..."

We agree with this holding of Trial Court that it could not have been the intention of the framers of the Treaty that access to justice under the Treaty would be unequal or disproportionate.

28. The Vienna Convention on the Law of Treaties 1969 (hereinafter referred to as the "Vienna Convention") in Article 31(1) and (2) provides for the need to interpret treaties in "good faith" and states:

"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 light of its objects 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;..."

It is clear therefore that whereas the terms of a treaty are to be interpreted in good faith in accordance with their ordinary meaning, such meaning must be one that resonates with their context and is informed by the treaty's objects and purposes. In a nutshell, a good faith contextual and purposive approach is to be adopted in Treaty interpretation. In the matter of the **Attorney General of Uganda and Tom Kyahurwenda** [Case Stated No. 1 of 2014],this Court held that the Vienna Convention reflects pre-existing customary international law and can be applied as valid canons of interpretation of treaties such as the EAC Treaty. In the earlier decision of this Court in the case of **The Democratic Party vs The Secretary General EAC and 4 others** [EACJ Appeal No. 1 of 2004], this Court held that it would be illogical and absurd if the Court, itself a creature of a Treaty, did not apply the provisions of the Vienna Convention.

29. The Good Faith principle of treaty interpretation was espoused by this Court in the case of **Timothy Alvin Kahoho vs The Secretary General of the EAC [Appeal No. 2 of 2013]**.In that case, this Court cited with approval the text in the Commentary on the **1969 Vienna Convention on the Law of Treaties** by Mark E. Villiger, Martinus Nijhoff Publishers,2009 at page 426, where use of the principle of Good Faith was explained as follows:

> *"Good faith prevents an excessively literal interpretation of a term by requiring consideration of its context (N.9) and of other means of interpretation. In particular, good faith implies consideration of the object and purpose of a treaty (N.12). It plays a part in establishing the 'acceptance' in sub para. 2(b) (N.19) and in evaluating subsequent practice as in*

sub para. 3(b) (N.22). Finally, good faith assists in determining recourse to the supplementary means of interpretation in Article 329 (q.v.,N.11)."

It follows therefore that a Good Faith interpretation does not import a simple literal interpretation of words and terms as would be had from a dictionary, but rather a consideration of those terms and words in light of the object and purpose of the Treaty. Context under Article 31 of the Vienna Convention includes text as well as preamble and annexes for the purpose of interpretation.

30. The reason for not applying an excessively literal interpretation of a term was further discussed by this Court in the **Timothy Alvin Kahoho case** (supra). The first is that:

> *"...Consideration of a Treaty's objective and purpose, together with good faith will assure the effectiveness of the terms of that Treaty..."*

Secondly, an overly literal and strict reading of the terms of the Treaty may drastically constrain and unjustifiably constrict the reasonable and logical exercise of powers under the Treaty. Thirdly, flexibility in interpretation is needed if the Treaty is to achieve its entire scope in terms of its objective and purpose. It was for the above reasons that this Court adopted a more liberal, purposive and functional approach to interpretation.

31. Furthermore this Court in the **Timothy Alvin Kahoho case** (Supra) also noted the danger of having several interpretations to a Treaty and relying on the International Law Commission (ILC) Report of 1966 agreed with the text in that Report that:

"[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effect, good faith and the object and purpose of the treaty demand that the former interpretation should be adopted – [see YBILC 1966 II 219, para.6]".

32. In this matter a lot of emphasis and argument has centred on the wording "Any person who is resident in a Partner State..." in Article 30 of the Treaty. The invocation therefore of the words "...**any person who is resident in a Partner State...**" in Article 30 of the Treaty as a bar for the Appellant to bring a reference to the First Instance Division of this Court and to subsequently launch an appeal to this Court must be carefully looked at in their context and in light of the objects and purpose of the Treaty. First, with respect to matters factual, we wish to observe that Counsel for the Respondent in his written submissions stated that the Appellant swore an affidavit that he is "...**a resident (sic) of 40 Alder Street, Apt box 9, Portland, Maine in the United States of America...".** In our view, that does not *ipso facto* mean that the Appellant is not a resident of any EAC Partner State as Counsel for the Respondent would have it.

33. It is important to clarify that the word "resident" can be used as an adjective or a noun (https://dictionary.cambridge.org/dictionary for the word "resident"). As an adjective it will refer to a class of persons "living or staying in a place" while as a noun it will signify a class of persons "who lives or has their home in a place"; thus it is possible to have a main or non-main residence. For purposes of Article 30 (1) it would have been useful to have **the *travaux preparatoires*** of the Treaty to resolve this definitely (acte clair); but we do not. We note,

not without a little sadness, that all efforts by counsel for the Appellant to trace those documents at the EAC have been futile. The absence of the aid of the *travaux preparatoires* notwithstanding, we take the view that the wider meaning of residence, that is to say not being physically present in a Partner State, would better meet the object and purposes of the Treaty.

34. In this case, the affidavit cited by Counsel for the Respondent and which formed the basis of the Trial Court's fleeting remark about the Appellant's residence, does not state nor does the Appellant depone that he is **"...a resident of Portland in the United States of America...".** The Appellant simply states that he is **"of 40 Alder Street, Apt box 9, Portland, Maine in the United States of America"** (emphasis ours). This erroneous description of the Appellant's legal residence by Counsel for the Respondent is fatal to his argument that the Appellant is resident in Portland. The Appellant on the other hand is however categorical in paragraph 1 of his affidavit that he is a *"...Burundian male..."*. Furthermore the Appellant as Applicant in his Reference in the First Instance Division of this Court was clear that he is a citizen of Burundi, a Partner State of the EAC, and that his address for service shall be *"...care of his Advocate Mr. Donald Omondi Deya, Advocate of ... Arusha, in the United Republic of Tanzania..."*. This is the same type of pleading that is found in the affidavit of **Mr Patrick Ntege in the Patrick Ntege case** (Supra) which involved Applicants operating in South Sudan (which at the time was not a Partner State).Secondly, with respect to the matter of interpretation, we think that a simple analogy to drive the point home may be made with a citizen of America who is ordinarily resident in Portland but who for purposes

of work is resident in a EAC Partner State. Such a person can file a Reference under Article 30 of the EAC Treaty. On the other hand, the Appellant who is a citizen of Burundi (with a consequential legal right to be resident in Burundi) but for some reason happens to be residing in Portland, USA cannot in the meaning the majority have given to the term "any person who is a resident in a Partner State" file a Reference under Article 30 of the Treaty because at the time of filing the Reference the Applicant is not physically present in a Partner State. The Majority have also suggested that if the Partner States had wanted all citizens whether resident in or out of their territory to have access to this Court then in Article 30 (1) of the Treaty they would have used words like *"...any person who is* ***a resident of*** *a Partner State..."* and not *"Any person who is* ***resident in*** *a partner State..."*. In our view, that clearly amounts to unequal and disproportionate access to justice as concerns foreign nationals on the one hand and East African Citizens on the other hand under the Treaty. The situation is worse when it is considered that on that reasoning Citizens of East African Community Partner States residing for any reason outside the Community would have lesser rights of access to their regional Court than their fellow citizens who are physically present within the East African Community.

35. Such a conclusion can only be the result of an excessively literal interpretation of the Treaty. For a Burundian citizen who has the right of residence in Burundi and actually has property there not being able to vindicate his rights as he has requested for under Articles 6(d) and 7(2) of the Treaty and Articles 15(1) of the Protocol simply because at the time of filing his Reference he was not physically present in Burundi or other Partner State of the EAC is to

unjustifiably constrict the reasonable and logical exercise of benefits powers and rights under the Treaty. It further means that the Treaty by reason of Article 30 with respect to EAC citizens resident for whatever reason outside any Partner State in the context of the Treaty, lacks the flexibility to meet its objects and purpose of a people centred integration in which the people of East Africa have certain direct benefits enforceable at law by themselves and even by strangers. This in our considered opinion cannot and does not pass the test of interpreting the Treaty in Good Faith as provided for under Article 31 of the Vienna Convention. On our part, we agree with Counsel for the Appellant that a Good Faith broad and purposive interpretation of the term **"any person who is a resident in a Partner State"** in Article 30 of the Treaty should be adopted in order to meet the purposes, objectives and principles of the Treaty. Adopting such an interpretation, we hold that any person resident in a Partner State inclusive of any citizen who by virtue of law has the right to residence in a Partner State has a right to file a Reference to vindicate his or her rights under Article 30 of the Treaty.

36. It is our view that treaty interpretation is akin to constitutional interpretation in that a treaty should be interpreted as a whole and not section by section as would an Act of parliament. To illustrate this point we look at Article 86 of the Treaty on the **"Movement of Capital"** which provides:

> *"...The Partner States shall in accordance with the time table to be determined by 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 or to invest in enterprises in other Partner States; and

(c) ....”

(Emphasis and underlining ours)

Here a literal meaning of the words “citizens of” and “persons resident in” a Partner State would suggest that citizens of Partner States where ever they may be residing should be allowed to move and invest their capital in other Partner States.

37. It is our considered view that the Framers of the Treaty could not have contemplated Partner States granting property rights (in stocks, shares and other securities) in their states to citizens of and residents in other Partner States and at the same time by reason of Article 30 (1) deprive those citizens not resident in a Partner State access to this Court to enforce and protect those same rights granted to them under the same Treaty. This in our view would be another absurdity which happily can be avoided by a correct interpretation of the Treaty.

38. We do not however agree with Counsel for the Appellant when he submitted that the cases of **Patrick Ntege (Supra) and Union Trade Centre** (Supra) pointed to what he referred to the practice and jurisprudence of this Court where sometimes the term “residents” was assimilated to “citizens” without focusing on the residency of the later. Both those cases did not involve citizens or corporations of Partner States said to be resident outside the territory of a Partner States and are therefore distinguishable.

39. We are alive to the decisions by the European Court of Human Rights that Member States can under their domestic laws restrict the exercise of certain rights for non-resident citizens like the right to vote is done in the United Kingdom [**Shindler V United Kingdom (19840/09) (2014) 58 EHRR 5) Doyle V United Kingdom 30158/06 (2007) ECHR 165]** even though qualifying commonwealth citizens who are resident in the UK are allowed to vote. However we find that this is not the Treaty position in EAC.

40. Academic and other writers have also had a chance to look at how courts interpret Treaties. David S. Jonas and Thomas N. Saunders writing on the subject "**The Object and Purpose of a Treaty: Three Interpretive Methods"** in the Vanderbilt Journal of Transnational Law (Vol 43 May 2010 N0 3), identify 3 schools of treaty interpretation. First is the textualist school which looks at the treaty text and its literal meaning. Secondly is the subjective school which primarily looks at the aim and intention of the parties. Finally the teleological school which first ascertains the object and purpose of the treaty then interprets it so as to give effect to that object and purpose. The authors suggest that the Vienna Convention is a compromise of all three approaches. According to them, treaty interpretation must rely primarily on the terms of a treaty while context and the treaty's object and purpose must inform its meaning. They however point out that the actual practice of interpretation has largely depended on the particular court in question.

41. Taking the European Union as an example, Anthony Arnull in his book **"The European Union and its Court of Justice"** observes that the European Court of Justice (ECJ) has taken a very restrictive

approach for granting access to it by private parties and has no place for public interest litigation. The author writes:

> ***"...if the Court took a liberal approach on the question of the category of Acts susceptible to review and on the status of the European Parliament in annulment proceedings, its attitude to groundings of private parties has on the whole been more restrictive..."***

The author then goes on to attribute this judicial self-restraint to the floodgate argument (the fear of being swamped with cases).

42. On the other hand Philomena Apiko of the European Centre for Development Policy Management (https://ecdm.org/) in his paper **"Understanding the East African Court of Justice"** points to how the court has actively ensured that the overall operational principles and objectives of the Treaty are enforced even where there has been debate over whether it had no express jurisdiction to do so; like in the area of human rights and trade. This suggests that this Court has always had a more liberal approach than the ECJ when it comes to the enforcement of Treaty rights. This position is well supported by another writer Ally Possi in his article "**The East African Court of Justice: Towards effective protection of human rights in East African Community"** (Max Planck Yearbook of United Nations Law, Vol 17. 2013). In that article, Ally Possi has pointed to the use by this Court of its interpretative jurisdiction in several cases to ensure that the Treaty principles and objectives are enforced. Other writers like Richard Frimpong Oppong (Asst Professor Faculty of Law, Thompson Rivers University, Canada) in his book **Legal Aspects of Economic Integration in Africa**

Cambridge University Press (2011) (Para 5.4.1) points at the important role individual have to play in economic integration and any integration without them "suffers from inertia". He goes to write:

> *"...A key role to enhancing individuals' roles in economic integration is to grant them direct or indirect access to community institutions including the courts..."*

Oppong however notes that of all regional courts the EACJ has the most liberal standing rules which save for the two month limitation period under Article 30 (2) of the EAC Treaty may lead to a flood of cases coming in. Prophetically he then goes on to state that standing under Article 30 of the EAC Treaty will have to be defined in a manner that:

> *"...balances the competing interests of member States, national courts, individuals and the ultimate goals of the community..."*

All these writers point to a liberal and purposive approach that this Court has always adopted.

43. However there is no evidence as yet, that the approach of this Court to treaty interpretation when compared with that of the ECJ and other regional courts has led to the apprehended floodgate theory and should not in any way be viewed as a negative consequence of this Court's approach to Treaty interpretation.

44. Indeed where the Partner States have expressly restricted access to the Court and the Court's jurisdiction like in the two month time limit within which to file a reference under Article 30 (2) of the Treaty and or where an act, regulation, directive, decision or action has

been reserved to an institution of a Partner State under Article 30 (3) of the Treaty then this Court has on the whole taken a restrictive approach to its application of these provisions with several filed references being dismissed for noncompliance with these provisions. Therefore the Court has always been mindful of the textual and subjective approach to interpreting the Treaty.

45. In the premise, our conclusion is that the Trial Court had jurisdiction to entertain the reference and accordingly Issue no.1 is answered in the affirmative.

46. In the result, the Appeal has to be determined on the merits, a task to which we now turn.

Issue No.2: Whether the Court erred in law finding that the Respondent did not violate or infringe Article 6(d) and 7(2) of the Treaty; Article 15(1) of the Common Market Protocol; and/or Article 14 of the African Charter on Human and People's Rights.

Appellant's Submissions

47. The pith and marrow of the Appellant's case was that the Respondent State through the decision of its Supreme Court violated its own law and in so doing violated the Treaty. To support that contention, Counsel for the Appellant attacked the Judgment of the Trial Court on six broad fronts as summarised below.

48. The first front of attack was that the Trial Court erred in law by misapprehending his pleadings and submissions which had made it clear that he was faulting the Respondent for non-compliance with its international obligations, based on non-compliance with its

national legal system. The Appellant drew our attention to Paragraph 62 of the Judgment appealed against which he claimed substantiated his complaint.

49. Counsel for the Appellants in further support of this front of attack submitted that the Trial Court erred in law by misapprehending the pleadings and submissions of the Appellant which had made it clear that the Appellant was not attacking any specific law of the Respondent state, but the judgment of the Supreme Court which had failed to apply a general principle of law and to recognise the legal and probative value of the Attested Affidavit which had been executed in accordance with legal system applicable at the material time. Paragraphs 62, 76, 81 and 83 of the Trial Court's judgment were invoked in attempted substantiation of the complaint. The Appellant's Counsel argued that in referring to the legal system of Burundi and the law and practice applicable in the country at the time, he was referring not just to Burundi's enacted laws, but also its customary rules, general principles of law, and accepted practices. He argued that his contention on the legal and probative value of the Attested Affidavit executed by the Respondent State's Tribunals of residence rested on a general principle of Burundian Law, according to which an authenticated act, like an Attested Affidavit, is the genuine evidence of the content of the agreement between parties and can only be challenged through a judicial action for forgery. The Appellant stressed that the focus in attacking the Judgment of the Supreme Court was not law No. 1/004 of 9th July 1996 (which applied specifically to notarised deed executed by private notaries) but on the general principles applicable in the Burundian legal system to all authenticated acts.

50. The second front of attack was that the Trial Court erred in law by holding that the Appellant did not prove the violation of the rule of law principle enshrined in Article 6(d) and 7(2) of the Treaty. In that regard, the Appellant's Counsel referred to and criticised Paragraphs 76 and 82 of the Trial Court Judgment wherein the said court found that (i) the Appellant had not availed to the Court any Property Laws and, accordingly, any inferences of unequal enforcement of the law, non-supremacy of the law or inequality before the law remained unproven and were therefore unsustainable, and (ii) the onus lay with the Appellant to present 'evidence that was fully conclusive' in proof of the elements of the rule of law and the Appellant had failed to discharge that onus for the reason that he had presented no evidence beyond the impugned judgement of the Supreme Court.

51. Counsel for the Appellant reiterated that the Appellant was not attacking any specific law and, accordingly, non-production of Burundi's Property Laws was not material. Counsel argued that what the Appellant was required to establish were three elements, namely, (i) that the Respondent failed to recognise the legal and probative value of the Attested Affidavit No. 359/99 of 27th July 1999; (ii) that execution of the Attested Affidavit by the Tribunals of residence was part of the legal system of Burundi; and (iii) that in Burundi's legal system, authenticated deeds like Attested Affidavits executed by the Tribunals of Residence constituted genuine evidence of the agreement between the parties to them and that the contents thereof could only be challenged by taking special action for forgery, which was not the case in the instant matter. The

Appellant's Counsel contended that the Appellant had proved those elements as elucidated below.

52. With regard to the proof of the allegation of the failure of the Respondent state to recognise the legal and probative value of the Attested Affidavit, the Appellant's Counsel submitted that the proof lay in the judgment of the Supreme Court of Burundi and the Attested Affidavit both of which were produced as attachments to the Reference. He further pointed out that the Respondent state did not challenge the production or question the veracity of either the said impugned Judgment or the Attested Affidavit.

53. With respect to the proof of the allegation that the execution of Attested Affidavits by Tribunals of Residence was part of the legal system of Burundi at the material time, the Appellant's Counsel placed reliance on the averments in the Reference, the Affidavit in support of the Reference and his own submissions in the Trial Court. Counsel pointed out that in its submissions, the Respondent never denied or contested the fact that the execution of Attested Affidavits by the Tribunals of Residence was part of its legal system at the material time and that, to the contrary, the Respondent recalled in its submissions that during the scheduling conference on 13th June 2016, both parties agreed that on 27th July 1999, the Tribunal of residence of Musaga made an attested affidavit No. 356/99 in respect of the transactions questioned in the Burundi Courts. The same was also an agreed point at the Scheduling Conference on 9th May, 2017 before the Appellate Division. In further strengthening of this part of the argument, Counsel submitted that the Respondent had not in any way challenged any of the facts, evidence or documents as narrated and produced by the Appellant

and, accordingly, his facts, evidence and documents were deemed to be admitted. Counsel further submitted that according to a well-known general principle of law, also applicable in international adjudication, uncontested allegations or admitted facts did not require further proof and the issue of burden of proof did not arise. Counsel invoked in aid the authority of the Permanent Court of International Justice and the International Court of Justice in the respective cases of **Case concerning certain German interest in Polish Upper Silesia** [PCIJ: Series A, No. 7] 73, and **Fisheries Case (United Kingdom V. Norway** [ICJ Reports, 1951] 140 for the proposition that factual assertions which are not disputed by the adverse party need not be proved. Counsel also invoked Rule 43 sub rule (1) of our Court's Rules which provides that *"any allegation of fact made by a party in a pleading shall be deemed to be admitted by the opposite party unless it is denied by the opposite party in the pleading."*

54. Regarding the proof of the allegation that in the Respondent's legal system, authenticated deeds like Attested Affidavits executed by the Tribunals of Residence constitute genuine evidence of the agreement between the parties to them and that the contents of such Affidavit can only be challenged by taking a special action for forgery, the Appellant's Counsel submitted that (i) from the narrative of facts in the Reference, the whole purpose of the process before the Tribunal of Residence of Musaga was to authenticate the sole Agreement between the parties; (ii) the Respondent had not contested the legal and probative value attached to those Attested Affidavits; (iii) in international law undisputed facts do not require further proof; (iv) Indeed the Respondent could not have challenged

the legal and probative value of Attested Affidavits because, as the Appellant's Counsel pleaded in his submissions, that was an accepted general principle of Burundian Law, one whose manifestation, by way of illustration, was Article 46 of the Law No.1 of 9th July, 1996 on the organization and functioning of the notary profession and the notaries statute, which provided that *"the notarised deeds prepared in conformity with the provisions of that law shall be authentic and the findings therein may be subject to challenge only by taking an action for forgery."*

55. Counsel for the Appellant also drew the Court's attention to Paragraphs 57, 58 and 59 of his submissions in the Trial Court the purport of which was that the Supreme Court of Burundi could not contest the authentic legal and probative value of the Attested Affidavits while recognizing the legal probative value of notarised deeds considering that notarised deeds are made by registered private notaries, while the Attested Affidavit, like the one in issue in the matter at hand, were made by a State Organ, namely, a Tribunal. Counsel wondered how one could accord legal and probative value to a notarised deed made by a private notary and yet deny the same to an Attested Affidavit. Counsel submitted that in avoiding to pronounce itself on the legal and probative value of the Attested Affidavit in issue, the Respondent state through the decision of one of its organs, the Supreme Court, violated the principle of rule of law and the principle of protection of human rights enshrined in Article 6(d) and 7(2) of the Treaty, read together with Article 15(1) of the Protocol and Article 14 of the African Charter.

56. The third front of attack was that the Trial Court erred by requiring the Appellant to product the full record of proceedings. Counsel for

the Appellant drew our attention to Paragraphs 80, 81 and 84 of the Judgment appealed from in which the Trial Court held that the record of proceedings would have enabled it to evaluate the conduct of proceedings against Burundi's substantive and procedural law so as to determine the Supreme Court's adherence to the rule of law, or to determine whether the Supreme Court administered Burundian Law in an outrageous way, in bad faith, with wilful neglect of their duties, or conducted the proceedings in blatant violation of the substance of natural justice such as would engender international liability, and, in the result, the Trial Court was unable to 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 or not the resultant decisions was iniquitous and thus engendered the Respondent state's legal liability. Counsel for the Appellant contended that the judgment of the Supreme Court of the Respondent state contained sufficient evidence of the way the court dealt with the matter before it, and it was not necessary to produce the full record of proceedings for that purpose. In his view, the failure of the Respondent state to recognise the legal and probative value of the Attested Affidavit in question was self-evident in the Judgment of the Supreme Court and was conclusive evidence. It was also his view that the full record of proceedings would not have shown anything more, since what was at stake was the way the Supreme Court determined the matter. Counsel submitted that the sufficiency of the Judgment of the Supreme Court as evidence was further demonstrated by the fact that the Trial Court itself was able to find on the basis thereof all the irregularities it did and to conclude there from that they constituted on the face thereof, an internationally wrongful act attributable to the Republic of Burundi as

law did not violate the rule of law principle. Counsel for the Appellant pointed out that in Paragraphs 32, 33, 36, 77, 79, 84 and 87 of its impugned judgment, the Trial Court took the position that the action(s) of a judicial organ of a state could only be categorised as wrongful acts for the purpose of state responsibility where they reflect, blatant, notorious and gross miscarriage of justice for having been done in an outrageous way, in bad faith, with wilful neglect of duty, or in blatant violation of the substance of natural justice. Counsel submitted that those standards which were adopted by the Trial Court from Mexican claims trials in the cases of **B.E. Chattin (USA) Vs United Mexican State** [1927 UNRIAA, Vol. IV] 282 and **Ida Robinson Smith Putnam (USA) Vs United Mexican States** [1927 UNRIAA, Vol. IV] 151 were now obsolete and are superseded by the modern principles of International Law as reflected in the International Law Commission (ILC) Rules on International Responsibility of States, 2001,according to which any internationally wrongful act will generate international responsibility of a State even if it is not outrageous, done in bad faith or with wilful neglect, or whether or not it reflects a blatant, notorious or gross misconduct of justice. Counsel drew our attention to the provision Draft Article 2 of the **ILC Draft Articles on State Responsibility, 2001** which reads:

> "*There is an internationally wrongful act of a state when conduct consisting of an action or omission . . . constitute a breach of an international obligation of the state.*"

He pointed out that the wrongful act is not qualified in any way. Counsel pointed out that the formulation of the applicable rule is consistent with international jurisprudence as propounded by both the I.C.J and its predecessor, the permanent Court of International

Justice in the **case of United States Diplomatic and Consular Staff in Teheran (United State of America v Iran** [I.C.J. Reports, 1980] and **Phosphates in Morocco Case** [PCIJ Reports, 1938, Series A/B, No. 74]. Counsel for the Appellant further argued that International Law, as reflected in the ILC Draft Articles, does not make any distinction between wrongful act made by the Executive or Legislative branches of the state on the one hand, and wrongful acts committed by the State's Judiciary on the other hand. As far as actions complained of are attributable to the State, all of them are internationally wrongful acts and generate the international responsibility of the State concerned, Counsel contended.

59. In the alternative, Counsel for the Appellant argued, if there was a requirement for the Appellant to prove that the Supreme Court of Burundi 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, it was clear from the Judgment of the Trial Court that it had found that the Supreme Court of Burundi's Judgment had depicted *"a cavalier judicial approach"* which was a violation of the rule of law principle.

60. The sixth front of attack was that the Trial Court erred in law in holding that the rights of the Appellant or his heirs or assigns to peaceful enjoyment of property were not violated. In that regard, Counsel for the Appellant drew our attention to Paragraphs 88 and 90 of the Trial Court's Judgment. In those Paragraphs, the Trial Court decried the Appellant's non-disclosure of the specific laws which were allegedly contravened by the Supreme Court Judgment and the consequential non-establishment of a nexus between authentic notarised deeds and Attested Affidavits, and concluded

that without such non-disclosure and nexus, it was unable to fault the legality of the Supreme Court's decision on the issue.

61. Counsel for the Appellant argued that the Appellant was not complaining of specific laws of Burundi but about the Supreme Court Judgment's violation of the Rule of Law Principle in the Treaty by dint of the Court's failure to recognise the legal and probative value of the Attested Affidavit No. 356/99 of 27th July, 1999 contrary to the general principle of law in Burundian Law according to which an authenticated act is genuine evidence of the agreement between the parties and cannot be challenged, except by taking a special action for forgery which was never undertaken; with the consequence that the Supreme Court violated the property rights of the Appellant. According to Counsel for the Appellant, the proof of the Appellant's Property rights was the Attested Affidavit itself which showed that at the material time, he bought the land in question as part of a triple transaction that was immortalised in a single Attested Affidavit. In further argument, Counsel for the Appellant contended that the Respondent state did not challenge that the sale occurred but to the contrary, the sale was admitted in the Respondent's submissions, in the Section on points of Agreement during the scheduling conferences in both the Trial Court and in the Appellate Division. He also contended that the Trial court itself had in Paragraph 92 of the Judgment implicitly recognised that the Appellant had in the past property rights on the parcel of land in question which he subsequently alienated by subdivision and sale to new buyers.

Respondent's Submissions

62. Counsel for the Respondent submitted that the Trial Court lacked Jurisdiction *ratione personae to* entertain the Reference and thus the Appeal was academic. He also took the stand that the Appellant had not passed the tests established by the Court in the case of **Angella Amudo vs The Secretary General of the East African Community, EACJ** Appeal No. 4 of 2014 [Unreported] **and Simon Peter Ochieng and Another vs The Attorney General of the Republic of Uganda,** EACJ Appeal No. 4 of 2015 [unreported]. Those tests were that it was for the Appellant to identify and establish what the alleged error of law was and how it would invalidate the decision complained of. We understood the gist of Counsel for the Respondent's submission to be that the Appellant had not identified the error(s) of law in the impugned Judgment or established them and/or demonstrated that such errors invalidated the Judgment of the Trial Court. Counsel fully supported the Judgment of the Trial Court and implored us to dismiss the Appeal with costs.

63. The above submission by Counsel to the Respondent was expressed to apply to not only issue number 2 but also to issue numbers 3, 4, 5 and 6. We will accordingly not reproduce the Respondent's submissions when we deal with the other issues.

OUR DETERMINATION

64. We have read the record of Appeal and weighed the rival submissions. Having done so, we have taken the following view of the matter.

65. The submissions made on behalf of the Appellant have with commendable lucidity and in detail identified the errors of law allegedly made by the Trial Court. The real issue for determination therefore is whether those alleged errors have been established and if so, whether a different conclusion would have been made by the Court but for those errors. We bear in mind and reiterate here that the cardinal complaint of the Appellant is that the Trial Court erred in law in finding that the Respondent did not violate or infringe Articles 6(d) and 7(2) of the Treaty, Article 15(1) of the Common Market Protocol and/or Article 14 of the African Charter. Indeed, all the six fronts of attack against the conclusion of the Trial Court are no more than sub-issues of that cardinal complaint. We now turn to an examination of those sub-issues.

66. The first alleged error of law with respect to the issue under consideration is that the Trial Court misapprehended the pleadings and submissions of the Appellant and thereby approached the case on a wrong basis. The foundation of this complaint is that the Trial Court understood the Appellant case to be one questioning the Supreme Court of Burundi's infringement or violation of specific internal laws whereas the Appellant's grievance was that the Supreme Court had failed to apply a general principle of law known in the Burundian legal system as it stood at the material time that all authenticated acts constituted genuine evidence of an agreement between the parties thereto unless voided for forgery, a situation which did not exist in this case.

67. In our view, the Appellant's complaint that the Trial Court misapprehended his case cannot be examined only in the context of the specific passages of the Judgment chosen by Counsel for

illustration, namely, paragraphs 62, 76, 81 and 88, but must be considered in the context of the said Judgement as whole. Now, when we examine the complaint in the context of the judgment as a whole, we find the same to be devoid of merit for the following reasons. The concise statement of the Appellant case was twice made in the judgment. The first statement is in Paragraph 9. It is in these terms: -

> *"The Reference is premised on the failure of the cited Court in the Republic of Burundi to acknowledge the legal and probative value of the Attested Affidavit No. 356/99 of 27th July 1999, despite it having been executed by State Organs."*

The second statement is in Paragraph 37 and is in the following terms:-

> *"In a nutshell, the Applicant faults the Supreme Court decision that is in issue presently for misapplying the law of Burundi; not providing the reason that underscored its conclusions depriving him and possibly other Burundi and EAC nationals of their land, and for creating legal uncertainty by not providing adequate guidance on the legal and probative value of Attested Affidavits."*

To our minds, those two Paragraphs demonstrate eloquently that the Trial Court perfectly understood the Appellant's case, which was that the Supreme Court of Burundi's Judgment complained of had failed to acknowledge the legal and probative value of the Attested Affidavit, and thus misapplied the law of Burundi and thereby deprived the Appellant of his property rights. And in Paragraph 62, the Trial Court made it clear that in its

understanding, the Appellant was not challenging the impugned Supreme Court Judgment's inconsistency with the internal law of Burundi *per se*, but rather, faulted the Respondent state for non-compliance with its international obligations under the Treaty and the African Charter. In our opinion, the reference to the Appellant's non proof of the Property Laws of Burundi went to the reason(s) why the Trial Court held against the Appellant in light of the Court's comprehension of the Appellant's case as demonstrated above. The validity of those reasons is not germane to the issue of the Trial Court's misapprehension of the Appellant's case and will accordingly be examined where they are pertinent.

68. With respect to the charge that the Trial Court erred in holding that the Appellant did not prove the violation of the rule of law principle enshrined in Articles 6(d) and 7(2) of the Treaty, it is apposite to concretize the said principle. The Trial Court in Paragraph 71 of the Judgment adopted the definition of the principle of the rule of law principle encapsulated in **a Report of the (UN) Secretary General on the Rule of law and Transitional Justice in conflict and post conflict societies** [UN Docs/2004/616 92004] which was rendered in the following words:

> *"It refers to the principle of governance to which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the*

application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency."

We entirely agree with the above formulation of the concept and principle of the rule of law and would endorse it for application in this Court in appropriate cases.

69. In the context of Article 6(d) and 7(2) of the Treaty, the principle of rule of law means that a Partner State, through the instrumentality of its officials, organs and institutions at whatever level of the State, is accountable and subject to the law which should be publicly promulgated and the state should ensure that such law is equally enforced and independently adjudicated. A Partner State should also take measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, separation of powers, legal certainty, avoidance of arbitrariness, as well as procedural and legal transparency in its system.

70. It is apparent from the submissions made on behalf of the Appellant that his complaint was not with respect to any property law of Burundi but with the Supreme Court's failure to recognise the legal and probative value of Attested Affidavits, and specifically Affidavit No. 359/99 of 27th July, 1999. According to Counsel, such Affidavits, unless invalidated for forgery in proceedings for that express purpose, constitute genuine evidence of the Agreement between the parties in Burundi's legal system and their legal and probative value is an accepted principle of Burundi law. Counsel for the Appellant had referred the Trial Court to Law no. 1/004 of

Burundi which he contended was but an exemplification of the principle in Burundian Law that notarised acts have the effect he had submitted. Counsel's argument was that if a notarised deed prepared by private person's conferred authenticity on the facts stated therein, then by parity of reasoning, an Attested Affidavit which is made by a public official such as the Tribunal of Residence should confer the same character on the facts stated therein.

71. The Supreme Court of Burundi dealt with the matter of Attested Affidavits at Page 3 of its Judgment as follows:

> *"Article 46 of the Law No. 1/004 of 9th July 1996 on the organisation and functioning of the Notary Profession and the Notaries Statute provides that notarised deed prepared in conformity with the provisions of the present law shall be authentic. The findings therein may be subject to challenge only by taking action for forgery. It follows from this provision that the notarised deed has evidential value that confers undisputed character on the facts evoked and established by the notary except where the authenticity is challenged for forgery.*
>
> *This argument is legally baseless because Law No. 1/004 of 9th July, 1996 on the Organisation and functioning of the Notary Profession and the Notaries Statute does not confer authenticity to the Attested Affidavit established by the Tribunals of residence [**Tribunaux de residence**]."*

72. The Trial Court after setting out the above passage from the Judgement of the Supreme Court delivered itself as follows at Paragraph 90:

"Without the benefit of other internal laws that might have established the nexus between authentic notarised deeds and Attested Affidavit, we are unable to fault the legality of the Supreme Court's decision on that issue. Needless to say, the onus was on the Applicant to establish this nexus and prove its case to the required standard. In our considered view, he fell short of the standard of proof that was required of him."

73. Now, the crux of this aspect of the Appeal is whether the Trial Court erred in law in finding that the Appellant had not established that the Supreme Court of Burundi's Judgment could be faulted for not complying with the rule of law principle that the laws of the country must be certain and should be applied equally for the reason that the Appellant had not availed to the Trial Court the Property Laws of Burundi which might have established the nexus between authentic notarised deeds and Attested Affidavits and, consequently, the Trial Court could not establish whether the Supreme Court ignored the legal and probative value of the Attested Affidavit No. 359/99 of 27th July, 1999.

74. In International Courts such as the EACJ, as in National Courts, the burden of proof is on whoever asserts a fact or proposition of law essential to the success of his/or her case. This rule of adjective law is subject to an exception which covers admissions, presumptions, judicial notice and estoppel as may be appropriate (see **Union Trade Centre Limited (UTC) V The Attorney General of Rwanda,** [Appeal no.1 of 2015] [unreported] **and Henry Kyarimpa v The Attorney General of Uganda,** [Appeal No.6 of 2014] [unreported]. And we are in agreement with the submissions

of Counsel for the Appellant that the normal standard of proof in the civil causes canvassed before our Court is on the balance of probabilities, also referred to as the preponderance of evidence. In this connection, we again agree with Appellant's Counsel that the Trial Court erred in calling for evidence which was fully conclusive in proof of the elements of the rule of law violated. The Trial Court derived such a standard from the cases of **Bosnia & Herzegovina vs. Serbia & Montenegro** (Supra) which related to claims against a state involving criminal charges of exceptional gravity. The charge against the Republic of Burundi in this case was obviously not in that league.

75. We next ask whether the Trial Court's error of law in adopting the wrong standard of proof was material. In our view, it would have been so only if on a proper appreciation of the case, it could be concluded that had the Trial Court applied the normal standard of proof, namely, on a balance of probability, it would have arrived at a different conclusion. We shall thus answer the question definitively when we consider below whether the Appellant had proved his case on a balance of probability.

76. We further agree with the submissions of Counsel for the Appellant that what he was required to prove to succeed in his contention in the Reference that the State of Burundi, through its Supreme Court's decision, had violated the rule of law principle was that (i) execution of Attested Affidavits by the Tribunals of residence was part of the legal system of Burundi, (ii) in the Burundi legal system authenticated deeds like Attested Affidavits so executed constituted genuine evidence of the agreement between the parties to them and the contents thereof could only be challenged by taking special

action for forgery, and (iii) the Respondent state through the decision of the Supreme Court complained of, failed to recognise such legal and probative value with respect to Attested Affidavit No. 359/99 of 27th July, 1999. To that end, the Appellant contended that he had proved that the execution of Attested Affidavits was part of the legal system of Burundi and that such instruments constituted authentic evidence of the agreement between the parties thereto by his statements in the Reference and his supporting affidavit which were not contradicted by the Respondent, and also by the admissions and concessions of the Respondent in the Scheduling Conference Notes in both the Trial Court and the Appellate Division. As regards, the non-recognition of the legal and probative value of the said instruments, it was the Appellant's case that the proof thereof was to be found in the Judgment complained and the Attested Affidavit by themselves without further ado.

77. On a careful consideration of the matter we have come to the conclusion that the Appellant did not prove his case to the requisite standard of proof, namely, on a balance of probability for the following reasons. First, the averments in the Reference and the depositions in the Reference in the Supporting Affidavit to the effect that Attested Affidavits were part of the Burundi legal system and they constituted authentic evidence of the agreement between the parties thereto were not statements of facts. They were Statements of the law of Burundi. As statements of law, they were not amenable to the general principle of law in adversarial proceedings which is encapsulated in Rule 43 of the Rules of this Court that factual averments which are admitted or deemed to be admitted need not be proved. And obviously statement of law by a party in

his pleadings, in his affidavit or in his submissions, or howsoever else conveyed to the Court and however eloquently so are not binding on the Court. They remain no more than a party's or Counsel's view of the law. In our considered opinion, to prove that a particular proposition is a principle of law or is part of the legal system of a particular country, it is necessary to establish that it is either codified in the legal instruments of that country; or it is a custom or practice having the force of law in that country; or it is espoused in either the jurisprudence of the highest courts of that Country or in the juristic works of legal Scholars of eminence in books or in journals of reference; or expert evidence on the law of the country is adduced at the trial. And such proof can only be made by producing to the Court either the instruments or publications bespeaking to such matters or expert evidence on the legal system. They are not matters to be proved by the word of a party or his Counsel however solemnly expressed. The Appellant did not do anything of the sort. That being so, he did not obviously establish that the Attested Affidavits had the legal or probative value he claimed. In the premises, we are of the persuasion that the Appellant failed to discharge his burden of proving that the Supreme Court of Burundi failed to acknowledge the legal and probative value of the Attested Affidavit in violation of the law or principles of law in Burundi. And that is all the more so when cognizance is taken of the Supreme Court's categorical rendition that law no. 1/004 of 9th July 1996 on the organization and functioning of the Notary Profession and Notaries Statute does not confer authenticity to the attested Affidavits established by Tribunals of residence. In the premises, we uphold the Trial Court's findings that the Appellant having failed to avail to it any property laws or otherwise establish a

nexus between authenticated deeds and Attested Affidavits, he fell short of proving that the Respondent state failed to recognise the legal and probative value of the Attested Affidavit of 27th July 1996 and thereby infringed the rule of law principle in Articles 6(d) and 7(2) of the Treaty.

78. With respect to the Appellant's grievance that the Trial Court erred in law by requiring the Appellant to produce the full record of proceedings in the Supreme Court of Burundi for the purpose of enabling the Trial Court to evaluate the conduct of those proceedings against Burundi's substantive and procedural law so as to determine the Supreme Court's adherence to the rule of law, or to determine whether the Supreme Court administered Burundian law in an outrageous way, in bad faith, with wilful neglect of duty, or in breach of the rules of natural justice such as would engender international liability, we accept the Appellant's submission that the Trial Court erred in so demanding for the full record for the simple reason that it is evident that the Appellant's Reference was grounded on the alleged failure of the Respondent state through the Judgment of its Supreme Court to apply Burundian Law and deviation from a principle of the Burundian legal system by failing to recognise the legal and probative value of the Attested Affidavit Number 356/99 of 27th July 1999 and not in the conduct of the proceedings by that Court . In those circumstances, the production of the record of proceedings was wholly unnecessary. Having said that, we must also say that had the Appellant's case hinged on the conduct of proceedings in the Burundi Supreme Court rather than the resulting Judgment and its effect, the reasoning of the Trial

Court in decrying the non-production of the record of proceedings would have been faultless.

79. With respect to the complaint that the Trial Court was in error in holding that the actions of a judicial organ of a state could only be categorised as wrongful acts for the purpose of state responsibility where they reflect blatant, notorious and gross miscarriage of justice for having been done in an outrageous way, in bad faith, with wilful neglect of duty, or in blatant violation of the substance of natural justice, we completely agree with the excellent submissions by Counsel for the Appellant that the holding of the Trial Court is without support in international law as it stands today. The Trial Court's view was informed by the decisions of the Mexican claims commissions in the cases of **B.E Chattin (USA) vs United Mexican States** (supra) **and Ida Robinson Smith Putnana (USA) Vs United Mexican States** (supra). In our considered opinion, those decisions are not expressive of modern international law. In that regard, we recall that this Court held in the **Henry Kyarimpa Case** (Supra) that the law of state responsibility is well articulated in the **International Law Commission's (ILC) Draft Articles on responsibility of States, 2001** which we held to be a codification of customary international law. Draft Article 2 provides that:–

> *"There is an internationally wrongful act of a state when a conduct consisting of an action or omission . . . constitutes a breach of an international obligation of the State."*

Two things are clear from this provision. One, International Law does not differentiate between wrongful acts of different organs or institutions of the State. The governing principle is that of

undifferentiated attribution of State action. It matters not whether it is an executive, legislative, or a judicial act or omission which is complained of. Two, the act or omission need only be wrongful to engender international responsibility of the State. There is no general requirement that it should be shown to have been outrageous, done in bad faith or with wilful neglect, or to be a blatant miscarriage of justice.

80. The above view is fortified by a number of authorities cited by Counsel for the Appellant. In **Phosphates in Morocco Case** (supra), the Permanent Court of International Justice held that international responsibility derives from an act being attributable to the state which is contrary to the Treaty Rights of another State. And in the **United States Diplomatic and Consular Staff in Tehran Case** (supra), the International Court of Justice opined that in order to establish the responsibility of the Islamic Republic of Iran:

> *"First, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under the Treaties in force or under any other rules of international law that may be applicable."*

It is thus patently clear that it is the objective contradiction between the impugned act or omission of the State and its obligation(s) under International Law which gives rise to its international responsibility.

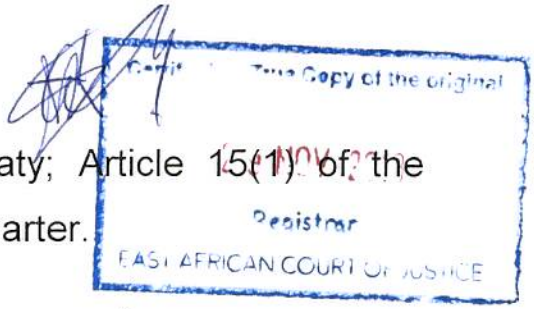
81. In the above premise, we find and hold that the Trial Court erred in the limited view it took that the rule of law principle in the Treaty

could not be said to be violated unless it was shown that the Burundian Judiciary had acted in a manner which could be categorised as a blatant, notorious or a gross miscarriage of justice. All that was required to engender international responsibility of the State was a finding that the impugned decision was inconsistent with Burundi's International Obligation under Articles 6(d) and 7(2) as read with the protocol and the African Charter.

82. We do not therefore consider it necessary or desirable to deal with Counsel for the Appellant's alternative submission that if there was a requirement for proof of a blatant, notorious and gross miscarriage of justice such proof was evident in the Supreme Court's impugned Judgment which was criticised by the Trial Court quite trenchantly. The reason for our declining that invitation is that the Appellant's Reference was not founded on the manner in which the Supreme Court of Burundi had conducted itself but on it alleged failure to apply Burundi's internal law.

83. As regards the complaint that the Trial Court erred in finding and holding that the rights of the Appellant or his heirs and assigns to peaceful enjoyment of property were not violated, we only need to state that as the alleged property rights were predicated on the alleged legal and probative value of an Attested Affidavit in the Burundi legal system, a claim which we have found to be unproven, the holding of the Trial Court could not in justice or logic be faulted.

84. The upshot of our consideration and determinations so far is that we agree with the Trial Court that the Appellant fell far short of discharging his evidential burden and accordingly the Trial Court was not in error 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.

85. In the result, issue no. 2 is answered in the negative.

Issue No.3: Whether the Trial Court erred in law and/or committed a procedural irregularity by questioning, *suo motu*, the accuracy of the Appellant's assertions which were not challenged by the Respondent and/or the *locus standi* of the Appellant.

Appellant's Submissions

86. The Appellant's complaint is that Trial Court held that he had not proved his case with regard to both the violation of the rule of law principle and his property rights by questioning the Appellant's averments regarding the Respondent's own legal system which the Respondent state had not challenged, and which it had therefore admitted.

87. Counsel for the Appellant submitted that the Respondent state knew its own legal system better than anyone else and had it found that the averments of the Appellant on the Burundi legal system were wrong, it would certainly have challenged them. He faulted the Trial Court for questioning *suo motu*, the accuracy of the Appellant's submissions which were not challenged by the Respondent. Counsel submitted that, in the circumstances, the Trial Court favoured the Respondent by raising a problem where there was none and finally disposing of the matter on its own unfounded doubt.

88. Counsel for the Appellant also complained that the Trial Court in finding that there was no evidence of any subsisting proprietary

interest vested in the Appellant had in effect questioned his locus standi, an issue which was not raised by the Respondent.

89. Counsel submitted that the Trial Court erred in law and/or committed a procedural irregularity by questioning *suo motu*, the *locus standi* of the Appellant. In his view, such an issue should have been considered in terms of admissibility of the Reference and not in terms of the merits of the case. Furthermore, Counsel argued, the Trial Court in questioning the Appellant's *locus standi contradicted* itself for it had held that the Appellant had established a cause of action or sustainable claim against the Respondent on the basis that he was contending that his property rights had been violated as a result of a Supreme Court decision that allegedly contravened Articles 6(d) and 7(2) of the Treaty.

Respondent's Submissions

90. The Respondent's submission, which is captured at Paragraph 40 herein in respect of issue no.2, was meant to be the answer to issue numbers 3, 4 and 5. That submission was to the effect that (i) the merits of the Appeal were an academic exercise unworthy of the court's time as the Trial Court lacked jurisdiction *ratione personae* to entertain the Reference, and (ii) the Appellant had not demonstrated that the Trial Court had committed an error of law or a procedural irregularity and that such error or irregularity affected the outcome of the Appeal.

OUR DETERMINATION

91. Having considered the above arguments, we take the following view of the matter.

92. The Appellant alleged definite errors of law and procedural irregularity on the part of the Trial Court, and thus this Appeal has passed the threshold test for consideration on the merits. And we have found in issue no. 1 that the Court had jurisdiction *ratione personae*. We must therefore examine the merits of the Appellant's complaints under this issue.

93. We are of the persuasion that the Appellant's complaints are on a careful consideration of the Judgement of the Trial Court devoid of merit. The Complaint about the Trial Court questioning the Appellant's averments regarding the legal system of Burundi when those assertions were not denied by the Respondent State is misconceived. We have stated elsewhere in this Judgment that the notion of implied admissions by dint of the law of pleadings applies only to factual averments. We have also stated that the Appellant's averments about the legal system of Burundi and legal principles were not factual averments but averments of law which were not binding on the Trial Court. Consequently, we hold that the Trial Court did no err in law as alleged by questioning such averments and delving into their proof or otherwise. With respect to the complaint about the Appellant's *locus standi*, we find the same to be predicated on a misapprehension of the substance of the Trial Court's Judgment. The said Court's finding that the Appellant had no vested proprietary interest in the land subject matter of the Reference was the inevitable sequel to the finding that the Appellant had not proved satisfactorily that the Attested Affidavit he relied on had the legal and probative value he claimed it to have under the legal system of Burundi. The finding was not a finding of the Appellant's want of *locus standi* strictly speaking and the criticism

that the Trial court raised the issue *suo motu,* is in our view, a mischaracterization of the Trial Court's conclusion on that aspect of the matter. With regard to the alleged contradictions in the Trial Court's Judgment, we find none. The Court was logical in its conclusions and expressed them lucidly. We find no contradiction whatsoever between a finding that a cause of action is disclosed and a finding that an alleged right is not established.

94. In the result, issue no. 3 is answered in the negative.

Issue No.4: Whether the 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 the lack of which would have been decisive to the success of the Reference.

Appellant's Submissions

95. This issue is predicated on the Trial Court's insistence that the Appellant ought to have produced the property laws of Burundi and the proceedings before the Supreme Court of Burundi to enable it determine the Appellant's contention that the Respondent had contravened the rule of law principle in Articles 6(d) and 7(2) of the Treaty as well as his property rights under Article 15(1) of the Protocol and/or Article 14 of the African Charter.

96. Counsel for the Appellant argued that if the Trial Court had a doubt on whether the execution of the Attested Affidavits by Tribunal of residence was part of the Respondent state's legal system at the relevant time, and whether according to the Burundian legal system such authenticated deeds have a special legal and probative value

which can only be questioned through the special action for forgery, the Trial Court should have used its inherent power to ask both parties to provide the information it needed. Counsel contended that as a matter of principle any International Court has the inherent power to require such additional evidence from the parties in the interest of justice. He drew our attention to the Rules of the International Court of Justice, the African Court on Human and Peoples' Rights, and our own Rule 1(2) which provides that –

> *"Nothing in these rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such Orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."*

97. Counsel further submitted that the Trial Court ought to have requested any further or better information from either or the parties in order to render substantive justice in the case.

98. The Respondent did not argue this issue separately.

OUR DERTERMINATION

99. Although we are in no doubt that the Trial Court had the inherent power and discretion under Rule 1(2) to call for additional evidence to meet the interest of justice, the onus was on the Appellant to prove his case by calling such evidence as was relevant. The Trial Court cannot in fairness be criticized for not coming to the aid of the Appellant by invoking its inherent power to plug the gaps in the Appellant's case. In any case, procedural irregularities can only be committed where there is deviation from a prescribed practice and procedure. We observe that there is no prescription in the Rules for

the Trial Court to call for additional evidence or substantiation of asserted legal propositions.

100. In the result, issue no. 4 is answered in the negative.

Issue No.5: Whether the Court erred in law or committed a procedural irregularity by failing to provide or prescribe a remedy for the violations of the Appellant's rights to due process as recognized by the court

Appellant's Submissions

101. Counsel for the Appellant submitted that the Trial Court erred in law and/or committed a procedural irregularity by failing to provide or prescribe a remedy for the violations of the Appellant's rights to due process as recognised by the said Court.

102. Counsel supported his arguments by reference to the findings and observations of the Trial Court with respect to the impugned Judgment of the Burundi Supreme Court in Paragraphs 40, 41, 42, 83 and 84 of its Judgment. He submitted that the Trial Court's finding amounted to blatant, notorious and gross miscarriage of justice but the Court failed or neglected to draw the only logical conclusion therefrom, namely, that the Respondent State had violated its obligation to abide by the principles of rule of law as prescribed by Articles 6(2) and 7(2) of the Treaty and that the Appellant was entitled to seek a remedy.

103. Counsel further submitted that the Trial Court erred in law in finding an internationally wrongful act relating to the rule of law principle and attributable to the Respondent State and then concluding that there wasn't sufficient proof of the violation of the

rule of law principle and there was no remedy to be granted to the Appellant.

104. The Respondent did not argue this issue separately.

OUR DETERMINATION

105. It is necessary to set out *in extenso* the Paragraphs of the Trial Court's Judgment referred to by Counsel for the Appellant for a proper appreciation of the sting of his argument.

106. In the said Paragraphs, the Trial Court dealt with the matter as below:

> *"40. We have carefully considered the impugned judgment, as well as the rival submissions of the parties in this matter. Without delving into intrinsic considerations of the merits of the said judgment viz a viz the principles of good governance and rule of law, at its face value we observe that the judgement depicts a cavalier approach to an extremely serious judicial function. As a basic requirement and in accordance with the principles of judicial conduct enumerated above, judgements should depict the laws or legal arguments that underscore their conclusions, stated in a coherent and logical manner. However, the judgement in issue presently depicts an unreasoned judgment that is quite dismissive of the issues raised on appeal. It does not explain the court's deference to one position as against another; neither does it clarify the scope of the subject matter in issue before it.*
>
> *41. We are mindful of the possibility that judgements from countries of civil law background might take on a different*

form from those originating from common law jurisdictions. However, we take the view that the Bangalore Principles that provide minimum standards of judicial office holders are universal in outreach and application and are applicable to both civil and common law jurisdictions. On that premise, in the absence of coherent legal justification for the conclusions arrived at, a cursory glance at the impugned judgment would suggest a blatant disregard to due process of the law; as well as an apparent indifference to the universal standards of judicial practice embodied in the Bangalore Principles of Judicial Conduct. In our view, this is a clear injustice to the parties to the dispute.

42. We are, therefore, satisfied that the impugned decision of the Burundi Supreme Court would prima facie amount to wrongful practice that is attributable to the Republic of Burundi under Article 4(1) of the ILC Articles on State Responsibility. We so hold.

83. With regard to the impugned judgment itself, we do find that the refusal or omission by any court to provide the legal reasoning and justifications that underscore its conclusions does constitute unacceptable judicial conduct and wilful neglect of the court's duty. Where such court is the apex court of the land, such an unconventional approach to adjudication entails an unacceptable affront to recognized standards of judicial conduct in so far as it negates the opportunity to coherently lay down stare decesis to guide the lower courts. Nonetheless, we do recognize that a decision may only be rendered iniquitous and, therefore, susceptible

to international liability where it is the culmination of such procedural defects as would make it impossible for it to be just. See B. E. Chattin (supra).

84. In the instant case, in the absence of the record of proceedings, we are unable to 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 or not the resultant decision was iniquitous and thus engendered the Respondent State's legal liability. We do, therefore, find that the Applicant has not satisfactorily proved the violation of the principle of rule of law enshrined in Articles 6(d) and 7(2) of the Treaty. We so hold."

107. It is evident from those findings and observations that in the view of the Trial Court, the Judgment of the Burundi Supreme Court depicted a cavalier approach to the judicial function, it was unreasoned, it was a blatant disregarded for the due process of the law, it was indifferent to the universal standards of judicial practice, it was a clear injustice to the parties, and it was in totality tantamount to a wrongful practice that was attributable to the Republic of Burundi.

108. In those premises, the Appellant's complaint that the only logical conclusion by the Trial Court should have been that, by that decision, the Respondent infringed the rule of law principle in Articles 6(d) and 7(2) of the Treaty and a remedy ought to have been provided would *prima facie* appear to be unassailable.

109. However, in our considered opinion, the argument is, on a close examination of the pleadings in the Reference built on quick sand.

We say so for we have repeated time without number in this Judgment that the Appellant's complaint in the Reference was that the Supreme Court of Burundi failed to recognise the legal and probative value of the Attested Affidavit No. 356/99 of 27th July 1999 as an authenticated deed in the Burundian legal system and by so doing contravened the internal law of Burundi and consequently the Treaty. And the pertinent relief sought was that such actions and omission were unlawful and an infringement of Articles 6(d) and 7(2) of the Treaty; Articles 15(1) of the Protocol and Article 14 of the African Charter. Nowhere in the pleading did the Appellant complain of a violation of his rights to due process of the law or any of the matters that the Trial Court has so eloquently adverted to in the aforesaid cited passages. In our adversarial system of litigation, it is settled law that the Courts will not grant a relief which is not prayed for and that the reliefs prayed for must emanate from the pleadings. In the instant matter, it is clear that the Appellant was praying this Court to fault the Trial Court for declining to grant relief which was neither prayed for nor emanated from the pleadings. That prayer could not pass legal muster. The Appellant's arguments though academically sound must be and are rejected by us by reason of the matter having not been pleaded and argued.

110. We are nonetheless constrained not to pass this matter without observing that had the matter been pleaded and argued before the Trial Court, the Trial Court's *obita dictum* on the manner in which the Supreme Court of Burundi handled the matter before it could have amounted to a breach of the Treaty on the ground that the principle of the Rule of law sanctified in Articles 6(d) and 7(2) of the Treaty does not countenance a cavalier approach to the judicial function, it

does not contemplate unreasoned decisions which are in essence an exemplification of arbitrariness, it does not rejoice in a blatant disregard for the due process of the law, it calls for deference to the universal standards of judicial practice, and it is hostile to clear injustice to the parties.

111. In other words our dismissal of the Appellant's challenge to the Trial Court's Judgement under this limb is not to be construed as a finding that the reasoning of the Trial Court in the Paragraphs highlighted was not sound. On the contrary, it is solid reasoning which is manifestly justified by a cold logical appraisal of the impugned Judgment of the Supreme Court of Burundi and we entirely agree with the Trial Court's judgment. What we are positing is that such reasoning, flowing as it does, not from the pleadings in the Reference but from Trial Court's academic appreciation of the import of the rule of law principle in the Treaty is strictly speaking *obiter dicta* and, as such, cannot be used by the Appellant as a peg for relief.

112. We have said enough to answer issue no. 5 in the negative.

Issue No.6: Whether the Trial Court erred in law by finding that the Applicant was not entitled to the remedies sought.

113. The Trial Court held that the Appellant did not prove infringement of either Articles 6(d) or 7(2) of the Treaty; or Articles 15(1) and 14 of the Protocol and African Charter respectively; and that no property rights attributable to the Appellant were established. It accordingly declined to grant orders for the restoration of the Appellant's Property Rights or a progress report in respect thereof.

114. Needless to state, we could only find that the Trial Court erred as alleged if, and only if, we ourselves had come to a different conclusion. Now, from our answers to issue numbers 2, 3, 4 and 5, it is evident that we have upheld the ultimate conclusion of the Trial Court that the Appellant had not established the alleged violation or infringement of Articles 6(d) and 7(2) of the Treaty. The Common Market Protocol is part of the Treaty by dint of Article 151 which provides that protocols are an integral part of the Treaty. And of course, the African Charter on Human and Peoples Rights is not for application in this Court as an independent international legal instrument but as an integral part of the Treaty by dint of Article 6(d) of the Treaty which empowers the Court to apply that Charter as part of the community's human and peoples' rights regime.

115. In short, the answer to issue no. 6 is in the negative.

COSTS

116. The Appellant prayed for costs here and in the Trial Court and the Respondent prayed that we dismiss the Appeal with Costs.

117. In its impugned Judgment, The Trial Court declined to make any Order for costs against the Appellant despite his Reference having failed on the ground that the matters canvassed therein were of grave importance to the advancement of community law. The Trial Court deemed it just to order each party to bear its own costs.

118. We are of the same mind with the Trial Court. We will accordingly order that each party bears its costs here and below.

D. CONCLUSION

119. The upshot of our consideration of this Appeal is that the same is dismissed with no Order as to Costs.

It is so ordered.

DATED and delivered at Arusha this 28th day November, 2018.

AARON RINGERA
JUSTICE OF APPEAL

GEOFFREY KIRYABWIRE
JUSTICE OF APPEAL