IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Charles O. Nyawello & Charles Nyachae, JJ)

REFERENCE NO. 6 OF 2019

MALE H. MABIRIZI K. KIWANUKA ..... APPLICANT

VERSUS

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

30TH SEPTEMBER 2020

JUDGMENT OF THE COURT

A. INTRODUCTION

1. Mr. Male H. Mabirizi K. Kiwanuka ('the Applicant'), a self-styled civically active Ugandan that is ordinarily resident in Uganda, lodged this Reference under Article 30 of the Treaty for the Establishment of the East African Community ('the Treaty'). He contests the legality of a host of actions, directives and decisions of the Executive, Legislative and Judicial branches of the Government of the Republic of Uganda ('the Respondent State') for their role in the conceptualization, processing and validation of Uganda's *Constitutional (Amendment) Act of 2018*.

2. The Reference is supported by an affidavit deposed by the Applicant and dated 3rd May 2019, as well as two affidavits in rejoinder to the Respondent's supplementary affidavits, both of which are also deposed by the Applicant and are each dated 2nd December 2019. The Applicant did also file a Reply to the Respondent's Answer to the Reference dated 25th July 2019, along with a supporting affidavit of the same date deposed by himself.

3. The Reference is opposed by the Attorney General of the Republic of Uganda ('the Respondent'), a self-defining office that was sued in its representative capacity as Principal Legal Advisor to the Respondent State. In its Answer to the Reference, the said office denies any breach of the Treaty in the terms proposed by the Applicant and contests the justiciability of some of the matters raised in the Reference. The Answer to the Reference is supported by the affidavit of Mr. George Kalemera dated 21st June 2019, as well as supplementary affidavits deposed by the same deponent and Mr.

Godfrey Anguandia Opifeni, both of which are dated 28th November 2019.

4. By consent of the Parties, the present Reference had been consolidated with **Reference No. 14 of 2017**[1] and **Reference No. 6 of 2018**[2], which raised similar questions in respect of the enactment of *Constitutional (Amendment) Act of 2018.* However, following the withdrawal of learned Counsel for the applicants in the above References from the prosecution thereof, **Reference No. 14 of 2017** and **Reference No. 6 of 2018** were dismissed with costs to the Respondent. We do therefore proceed to determine the present Reference (**Reference No. 6 of 2019**) on that basis.

5. The Applicant was self-represented at the hearing, while the Respondent State was represented by the Honourable Attorney General, Mr. William Byaruhanga, assisted by the learned Solicitor General, Mr. Francis Atoke; the Director of Civil Litigation, Ms. Christine Kaahwa; the Commissioner, Civil Litigation, Mr. Martin Mwambustya; Messrs. Phillip Mwaka and Richard Adrole – Principal State Attorneys, and Mr. Geoffrey Madete and Ms. Jacqueline Amusugut – Senior State Attorneys.

B. FACTUAL BACKGROUND

6. On 21st September 2017, when *Constitutional Amendment Bill No. 2 of 2017* was due to be considered by the Parliament of Uganda, Members of Parliament (MPs) from the Opposition side of the divide engaged in the repeated singing of the National Anthem of Uganda. The Right Honourable Speaker of Parliament was forced to adjourn

[1] Winnie Kiiza & 6 Others vs. The Attorney General of Uganda
[2] Betty Namboze & 2 Others vs. The Attorney General of Uganda

the House to 26th September 2017 at 2.00 pm. However, on that date when the constitutional amendment was again due for consideration, the House became rowdy and was consequently adjourned to the next day, 27th September 2017.

7. Meanwhile, the Applicant having been denied access to the public gallery on both occasions for lack of clearance from the Speaker, resorted to following the parliamentary proceedings by the televised broadcast of the Uganda Broadcasting Corporation (UBC). On 27th September 2017, unable to follow the parliamentary proceedings on UBC (which had gone off air), the Applicant deduced from *Twitter* social media accounts that upon the resumption of the parliamentary proceedings the Speaker had suspended twenty five MPs from three consecutive sittings of the House. She then adjourned the House for thirty minutes to allow the suspended MPs to leave the House. 'Strangers' did thereupon enter the House, indiscriminately beat persons seated on the Opposition side thereof, violence ensued and some Opposition MPs were arrested.

8. Upon the resumption of the parliamentary sitting, the Leader of Opposition led some MPs out of the House and the motion for the constitutional amendment was moved. It was seconded and approved by the remaining MPs. The Speaker then ruled that leave had been duly granted to the mover of the motion, Honourable Raphael Magyezi, to present a private members' Bill titled *The Constitutional (Amendment) Bill No. 2 of 2017*. She did, in addition, underscore the centrality of the people of Uganda to the legislative process that was underway, given that the matter touched on their sovereignty.

9. On 3rd October 2017, Honourable Magyezi informed the House that he had secured a Certificate of Financial Implications and the Bill had been duly published in the Uganda Gazette in anticipation of its First Reading. Following the First Reading of the Bill, it was referred to the Legal and Parliamentary Affairs Committee of the House, with another reminder from the Speaker to MPs to consult their electorate prior to its Second Reading. On 18th December 2017, the majority report of the Legal and Parliamentary Affairs Committee was presented. On the same day, Rule 201 of the Rules of Procedure of Parliament (which prescribes three sitting days between the tabling of a bill and debate thereon) was suspended, and debate on the Bill commenced. On 20th December 2017, the Uganda *Constitutional (Amendment) Bill No. 2 of 2017* was passed by the Parliament of Uganda. It was assented to by the President of the Respondent State on 27th December 2017.

10. The Applicant thereupon filed *Constitutional Petition No. 49 of 2017* in the Constitutional Court of Uganda challenging the enactment of the resultant law, the *Constitutional (Amendment) Act of 2018*. Dissatisfied with the judgment of the Constitutional Court in that petition, he lodged *Constitutional Appeal No. 2 of 2018* in the Supreme Court of Uganda. On 18th April 2019, the Supreme Court rendered its judgment in the said constitutional appeal, whereupon the Applicant lodged the present Reference in this Court. He essentially contests the legality of the Supreme Court's decision in so far as it upheld the allegedly flawed trial process and judgment of the Constitutional Court.

C. APPLICANT'S CASE

11. As gleaned from his long winding and unduly verbose pleadings, in a nutshell it is the Applicant's case that the process that underpinned the enactment of the *Constitutional (Amendment) Act of 2018*, and the trial processes and decisions of the Constitutional and Supreme Courts of Uganda in respect thereof, were fraught with illegalities and thus violated Articles 6(d) and 7(2) of the Treaty. It is his contention that the said illegalities violate the principles of democracy, rule of law, accountability, transparency and universally accepted standards of human rights as encapsulated in the notion of good governance under Articles 6(d) and 7(2) of the Treaty.[3]

12. The alleged illegalities include the non-participation of the Ugandan citizenry in the constitutional amendment process; securing the constitutional amendment by violence and/ or threatened violence; non-compliance with the laws and procedural rules that govern parliamentary processes in Uganda, and the flouting of rules that guide the assent of a bill into law in the same Partner State. On that premise, the Applicant contests the legality of the Supreme Court decision, which upheld the validity of the constitutional amendment, for flouting the laws of Uganda and the East African Community (EAC) Treaty. It is his case that the impugned Supreme Court decision was rendered by judges that were dogged by conflict of interest. He thus considers the resultant partiality and procedural shortcomings that supposedly obtained in both the Supreme Court and Constitutional Court of Uganda to have impeded on the legality of the said judgment.

[3] See paragraphs 3 and 4 of the Statement of Reference.

13. The Applicant subsequently clarified in oral submissions that it is solely the Supreme's Court's decision of 1[8th] April 2019 that is in issue in this petition. According to him, the contested parliamentary proceedings and what transpired in the Constitutional Court were only pleaded to illuminate the illegitimacy of the apex court's judgment.

D. RESPONDENT'S CASE

14. On its part, the Respondent raised four preliminary points of law in addition to its response to the substance of the Reference. In terms of the points of law, it is the contention that this Court lacks jurisdiction to entertain appeals from the decisions of domestic courts; the Reference is time barred; the matters raised in the Reference are *res judicata*, and thus the Reference is in essence a disguised appeal.

15. With regard to the substantive dispute, it is the Respondent's case that the Ugandan citizenry did participate in the constitutional amendment process in accordance with the law pertaining in that Partner State, and the Respondent State duly complied with the Uganda Constitution, applicable parliamentary laws and relevant procedural rules. It is the contention that neither the assent to the constitutional amendment, nor the trial process and judgment of the Constitutional Court, as upheld by the Supreme Court, offend any Treaty provision. It is opined that the Applicant is thus not entitled to any of the reliefs sought.

E. ISSUES FOR DETERMINATION

16. At a Scheduling Conference held on 30[th] October 2019, the parties to the then Consolidated Reference framed issues in respect thereof.

Upon the withdrawal of References 14 of 2017 and 6 of 2018, the present parties maintained the issues as framed. Consequently, with necessary adaptation, the issues for determination are thus as follows:

I. *Whether the Reference is time barred.*

II. *Whether the Honourable Court has jurisdiction to determine the Reference.*

III. *Whether the Reference is* Res Judicata.

IV. *Whether the process leading to the enactment of* Constitutional (Amendment) Act, 2018 *was consistent with the principles of Articles 6(d), 7(2), 8(1)(c), 30 and 123(3)(c) of the Treaty.*

V. *Whether the process and decisions in* **Constitutional Petition No. 49/ 2017: Male H. Mabirizi K. Kiwanuka vs. The Attorney General of the Republic of Uganda** *and* **Supreme Court Constitutional Appeal No. 2/ 2018: Male H. Mabirizi K. Kiwanuka & Others vs. The Attorney General of the Republic of Uganda** *were consistent with the principles in Articles 6(d) and 7(2) of the Treaty.*

VI. *What remedies are available to the Parties.*

F. COURT'S DETERMINATION

17. We must clarify from the onset that whereas the Reference was instituted under the East African Court of Justice Rules of Procedure of 2013, the said Rules have since been revised, the applicable Rules presently being the East African Court of Justice Rules of 2019 ('the Court Rules'). The Court Rules shall therefore be applied without prejudice to the validity of anything previously done under the 2013 Rules and provided, as enjoined by Rule 136, that if and so far as it is impracticable to apply the 2019 Rules **'the practice and procedure heretofore followed shall be allowed.'**

18. The Court deems it prudent to address Issues 1 and 4 together given that both issues pertain to the question of limitation of time. *Issue No. 3* would then be considered prior to the determination of *Issue No. 2* for purposes of parity with the approach adopted by the Respondent - the party that raised the preliminary objections inherent therein. The Court's interrogation shall thereupon terminate with the determination of Issues 5 and 6 in chronological order.

Issue No. 1: **Whether the Reference is time barred.**

AND

Issue No. 4: **Whether the process leading to the enactment of *Constitutional (Amendment) Act, 2018* was consistent with the principles of Articles 6(d), 7(2), 8(1)(c), 30 and 123(3)(c) of the Treaty.**

19. It is the contention that the Reference is time-barred, having been filed on 3rd May 2019 – more than two months after the actions complained of therein had occurred. Given the express provisions of Article 30(2) of the Treaty, it was argued that the Reference could only raise matters that had occurred on or after 3rd March 2019. The learned Attorney General outlined the actions that were considered to be time-barred to include the following: the enactment of the Constitutional (Amendment) Act on 27th December 2017; actions of the police and security forces with regard to the enactment process, and the decision of the Constitutional Court of 28th July 2018, including the trial proceedings in respect thereof. He was of the view that each impugned action constituted a separate cause of action with a distinct limitation period. It was the conclusion, therefore, that in so far as the Court is not vested with jurisdiction to extend time set by

the Treaty, the matters caught by limitation of time should be struck off the record.

20. Conversely, it was the Applicant's contention that no evidence had been adduced by the Respondent to prove that the Reference had been filed out of time. He sought to buttress his position with the decision of this Court's Appellate Division in **Union Trade Centre Ltd vs. The Attorney General of the Republic of Rwanda, EACJ Appeal No. 2 of 2015**. We reproduce below the specific text of that judgment that was cited:

> **With respect to the Response to the Reference, the affidavit in support thereof did not annex any documents that the Respondent relied on. We have seen in Paragraph 13 herein that the said affidavit did only two things: first, the deponent thereof deposed as to matters of law and affirmed on the basis thereof that the Respondent was wrongly sued; and, secondly, the deponent swore that from his reading of the Reference, the cause of action arose on 29th July, 2013. In short, neither the Reference nor the Response thereto as they stood before, during and after the Scheduling Conference was substantiated by any evidence as to the matters of fact averred in them.**

21. Mr. Mabirizi argued that not only had he asserted in his rejoinder to the Answer to the Reference that the Reference had been filed within time; that averment was not rebutted by the Respondent and therefore stood admitted. He opined that under Ugandan law a constitutional amendment entailed a ten-step enactment process that

was only concluded upon the endorsement of the amendment by the Supreme Court. In his view, therefore, the *Constitutional (Amendment) Act of 2018* was enacted on 18th April 2019 when the Supreme Court rendered its decision in *Constitutional Appeal No. 2 of 2018*. He sought to fortify that position with the decision in **Ssemogerere & Others vs. The Attorney General, Supreme Court Constitutional Appeal No. 1 of 2002** (per Kanyeihamba JSC) that **'an Act of Parliament which is challenged under Article 137(3) remains uncertain until the appropriate court has pronounced itself upon it.'**

22. In the Applicant's opinion, the conduct and decisions of both municipal courts[4] crystallized on 18th April 2019 when the Supreme Court decision was rendered. It was his view, therefore, that the cause of action in this matter was the impugned Supreme Court decision that upheld the illegalities in the parliamentary process and which, if nullified, would automatically lead to the annulment of the constitutional amendment. He clarified that the actions that had been contested under *Issue No. 4* are but a precursor to *Issue No. 5*. In any event, he argued that the validity of the constitutional amendment having only come to his knowledge on 18th April 2019 upon the delivery of the Supreme Court's decision; that would be the date of reckoning for purposes of computation of time.

23. We carefully considered the rival arguments of both Parties. We are constrained to point out forthwith that the Applicant has completely misdirected himself on the decision in the **Union Trade Centre (UTC)** Appeal. The *ratio decidendi* in that case is to be found in paragraph 39 of that judgment. It underscores the vitality of proof of

[4] Constitutional Court and Supreme Court of Uganda

matters averred to in pleadings save in exceptional circumstances as are elucidated in that decision. The Court observed that such proof could *inter alia* '**take the form of testimonial evidence (oral or affidavit), documents produced in Court, or things (real evidence)**.' It then clarified that any annexures to a document, unless the document was an affidavit and they were annexed thereto, could not be categorized as evidence.

24. In other words, documents could only be considered to be documentary evidence when they are annexed to an affidavit pending their formal admission on record at trial, or where they are directly produced at the trial as exhibits. It is in that context that the observations cited by the Applicant hereinabove were made. To contend, as the Applicant seeks to do, that preliminary objections must be proved by evidence would be to clearly run afoul of the law on preliminary points of law. Contrary to the Applicant's construction thereof, the text he cites categorically states that evidence would have been necessary to substantiate '**the matters of *fact***' (not law) averred to in the parties' pleadings.

25. To be clear, this Court has firmly pronounced itself on the position that preliminary objections that necessitate proof are not pure points of law as envisaged under Common Law, and therefore when so prematurely raised they are tantamount to an abuse of court process. Thus, in **The Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit**,[5] re-stating the position that had

[5] EACJ Appeal No. 1 of 2011, p. 6

been entrenched by the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd**,[6] it was held:

> **A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if a fact has to be ascertained.**

26. In the same vein, in **The Attorney General of the United Republic of Tanzania vs. Africa Network for Animal Welfare**[7] preliminary points of law were defined to exclude matters that entailed '**the clash of facts, production of evidence and assessment of testimony**.' In short, points of law pertain to matters that are determinable purely on the basis of law and not evidence, or a mixture of law and evidence. They require no proof beyond the facts as pleaded.

27. Turning to the merits of the issue under scrutiny presently, as quite correctly proposed by both Parties, Article 30(2) of the Treaty prescribes a two-month limitation period within which a Reference may be instituted in this Court. It reads:

> **The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be.**

[6] (1969) EA 696
[7] EACJ Appeal No. 3 of 2011

28. The sum effect of the Respondent's position on the question of time limitation is that all the actions attendant to the enactment of the *Constitutional (Amendment) Act, 2018*, as well as the decision and trial process in respect of *Constitutional Petition No. 49 of 2017* are time-barred. This would leave the impugned Supreme Court decision as the sole matter in contention between the Parties.

29. On his part, the Applicant adopted an ambivalent stance. He did, on the one hand, concede in submissions that the impugned decision being the final step in the enactment processes was the main bone of contention in the Reference. However, his pleadings bespoke to the contrary. Whereas the Reference depicted the enactment of the Constitutional (Amendment) Act as a cause of action in its own right,[8] in an attempt to clarify the matter, the Reply to the Answer to the Reference posits that the Reference is not time-barred given that it was filed within two months of the delivery of the impugned Supreme Court judgment. It thus seemingly designates the legality of the impugned decision as the sole cause of action in this matter.

30. To compound matters, in written submissions as offensively verbose as his pleadings, the Applicant dwelt extensively on the illegality of the enactment process viz the Treaty; only to backtrack in submissions in rejoinder and oral submission highlights to reiterate the legality of the Supreme Court decision as the sole cause of action in this matter. It is now his singular contention that the 'bundle of facts' that constitute the cause of action in this case commenced with the parliamentary proceedings and terminated with the validation of the impugned law by the Supreme Court, their sole value being as a mere pre-cursor to *Issue No. 5*.

[8] See paragraph 3(1) of the Reference.

31. The Applicant's flip-flopping begs the question as to whether his position on the Supreme Court decision being the sole cause of action in this matter is borne out by his pleadings. And, should it transpire that the enactment processes and the Constitutional Court's intervention were in fact pleaded as a specific cause of action rather than evidential background to the impugned Supreme Court decision, would they surmount the time limit hurdle that is prescribed by Article 30(2)?

32. The importance of pleadings in directing the course of judicial proceedings cannot be over-stated. As was quite persuasively observed in **Fangmin vs. Belex Tours & Travel**,[9] (per Odoki, Ag. JSC), they **'define and deliver clarity and precision of the real matters in controversy between the parties, upon which they can prepare and deliver their respective cases and upon which the court will be called upon to adjudicate between them**.' Pleadings thus form the substratum of judicial proceedings.

33. In the instant case, paragraph 3(1) of the Reference contests the legality of the parliamentary process that was adopted by the House, as well as the procedure entailed in the presidential assent. It thus depicts the said actions of the Respondent State as matters in direct contention in this case. The same actions are alleged to contravene the fundamental and operational principles of the Community. Indeed, the said averments are identical to similar contestations made in paragraphs 3(2) and (3) in respect of actions attributed to the Constitutional Court and Supreme Court. The events that transpired within the House, as well as the proceedings and decisions of both municipal courts are all alleged to have violated the '*fundamental and*

[9] Supreme Court Civil Appeal No. 6 of 2013

operational principles of the community which include good governance including adherence to the principles of democracy, the rule of law, accountability, transparency and the maintenance of universally accepted standards of human rights.' That is a succinct replication of the provisions of Articles 6(d) and 7(2) of the Treaty.

34. It is incorrect, therefore, to suggest that the actions attributed to the Respondent State in Parliament and the Constitutional Court were pleaded in the Reference as mere evidential background to the impugned Supreme Court decision. The Reply to the Answer to the Reference did little, if anything, to salvage matters. It did not replace or substitute the Reference. It only clarified what was already on record in paragraph 3(2) of the Reference, where the Supreme Court decision is challenged.

35. In any event, the manner in which the Reference was prosecuted would negate any suggestions that the enactment process was not in contention. We say so because the averments in the Reply to the Answer to the Reference notwithstanding, *Issue No. 4* herein was framed as an issue for determination with the acquiescence of the Applicant. Whereas the Reply to the Answer to the Reference had been filed on 25th July 2019; in apparent deference to the contradictory contestations in paragraph 3(1) of the Reference, the Applicant did on 30th October 2019 participate in a scheduling conference at which the legality of the enactment process was framed as an issue in contention. He did, in fact, go ahead to file elaborate written submissions on that issue as framed. The Applicant thus negated the gist of his Reply to the Answer to the Reference, only to prevaricate at the stage of submissions in rejoinder and seek to

subrogate the enactment process and Constitutional Court trial to the impugned Supreme Court decision.

36. We defer to the decision in **Fangmin vs. Belex Tours & Travel** (supra), where it was held that a party **'will not be allowed to succeed on a case not set up by him and be allowed at trial to change his case or set up a case inconsistent with what he alleged in his pleadings unless he amends his pleadings.'** Consequently, in response to the first question above, we find to be grossly misleading the Applicant's attestations that the cause of action herein accrues solely from the impugned Supreme Court decision, the actions complained of under *Issue No. 4* being but a mere bundle of facts in supplementation thereof. It is evident that the enactment process encapsulated in paragraph 3(1), as well as the Constitutional Court's role in respect thereof are pleaded as matters for direct interrogation viz the Treaty. They were intended to be and are as much in contention in this case as the conduct and decisions of the Supreme Court that are faulted under paragraphs 3(2) and (3) of the Reference.

37. That then brings to bear the second question raised earlier herein, as to whether the said events would meet the time limit prescribed under Article 30(2). Had the Applicant clearly and succinctly demarcated them in his pleadings as evidential background to the cause of action, the Court might perhaps have determined the Reference on that basis. As it is, the enactment process and the Constitutional Court's intervention having been pleaded, framed and argued (for the main part) as a distinct cause of action; we are obliged to interrogate their time limitation credentials.

38. Before doing so, however, it is necessary to settle the question as to when exactly an Act of Parliament in the Respondent State stands duly enacted. We find apposite instruction on this from the Constitution of Uganda. Article 91 of the Constitution lays down the legislative process that guides the formulation of laws in that Partner State. For ease of reference, we reproduce it in its entirety below:

> **(1) Subject to the provisions of this Constitution, the power of Parliament shall be exercised through bills passed by Parliament and assented to by the President.**
>
> **(2) A bill passed by Parliament shall, as soon as possible, be presented to the President for assent.**
>
> **(3) The President shall, within thirty days after a bill is presented to him or her –**
>
> **a. Assent to the bill;**
>
> **b. Return the bill to Parliament with a request that the bill or a particular provision of it be reconsidered by Parliament, or**
>
> **c. Notify the Speaker in writing that he or she refuses to assent to the bill.**
>
> **(4) Where the bill has been returned to Parliament under clause 3(b) of this article, Parliament shall reconsider it and if passed again, it shall be presented for a second time to the President for assent.**
>
> **(5) Where the President returns the same bill twice under clause (3)(b) of this article and the bill is passed for a third time, with the support of at least two-thirds of all members of Parliament, the Speaker shall cause a copy of the bill to be laid before Parliament, and the bill shall become law without the assent of the President.**
>
> **(6) Where the President –**
>
> **a. Refuses to assent to a bill under clause (3)(c) of this article, Parliament may reconsider the bill and if passed, the bill shall be presented to the President for assent;**
>
> **b. Refuses to assent to a bill which has been reconsidered and passed under paragraph (a) or clause (4) of this article, the Speaker shall, upon the refusal, if the bill was so passed with the support of at least two-thirds of all members of**

Parliament, cause a copy of the bill to be laid before Parliament, and the bill shall become law without the assent of the President.

(7) Where the President fails to do any of the acts specified in clause (3) of this article within the period prescribed in that clause, the President shall be taken to have assented to the bill and at the expiration of that period, the Speaker shall cause a copy of the bill to be laid before Parliament and the bill shall become law without the assent of the President.

(8) A bill passed by Parliament and assented to by the President or which has otherwise become law under this article shall be an Act of Parliament and shall be published in the Gazette.

39. Whereas Article 91(1) designates the constitutional bodies responsible for the legislative function of the State, demarcating their respective roles in that process; Article 91(8) specifically addresses the stage at which a Bill stands duly enacted into law. It would ordinarily become law once passed by Parliament and assented to by the President. The only exceptions to that general rule are where the presidential assent is not forthcoming under Article 91(3)(b), 3(c) and (7) thus necessitating recourse to the alternative legislative processes encapsulated in clauses 4, 5, 6 and 7 of that Article. That was not the scenario in the present case, where the *Constitutional (Amendment) Bill No. 2 of 2017* readily secured presidential assent.

40. We find no law on Uganda's statute books that posits anything to the contrary as far as the legislative function of the Respondent State is concerned, neither were we referred to any by the Applicant. In any case, such a law would be unconstitutional to the extent of its disparity with the Constitution. What the Applicant did cite was case law by Ugandan domestic courts. We revert to it forthwith, albeit with

the quick rider that case law from EAC Partner States would only have persuasive value on this Court.

41. In that regard, with the greatest respect, we are not persuaded to follow the view advanced in the case of **Ssemogerere & Another vs. The Attorney General** (supra), to which we were referred by the Applicant. While we do appreciate the reasoning therein that a constitutional amendment that has been correctly passed by parliament can nonetheless be challenged in court, we are disinclined to abide the proposition that an Act of Parliament that is under challenge remains uncertain until the appropriate court has pronounced itself upon it.

42. We take the view that there can be no such thing as a qualified law; a certain or uncertain law. A law that has been duly passed by the legislature and received presidential assent in Uganda would fully ascend the statute books, and remain valid and operational until it is either repealed or struck down by a competent court. The so-called uncertainty occasioned by a legal challenge would not in itself invalidate a law until the court conclusively pronounces itself on it. Neither, in our decided opinion, would such a challenge negate the constitutional undertakings expressed in Article 91(8) granting a duly enacted statute the force of law. Decisions taken under a contested law might stand on shaky ground (in the event that the law is eventually struck down) but the law itself cannot be deemed to be invalid on that account alone.

43. For present purposes, therefore, the *Constitutional Amendment Bill No. 2 of 2017* stood duly enacted into law upon securing presidential assent on 27th December 2017. It then assumed the character of a

law designated as the *Constitutional (Amendment) Act of 2018*. The parliamentary proceedings that culminated in the enactment of that Act had commenced on or about the 27th September 2017 when the *Constitutional Amendment Bill No. 2 of 2017* was first considered by the House.

44. In terms of computation of time, the case of **The Attorney General of the Republic of Uganda & Another vs. Omar Awadh & 6 Others**[10] underscores the position that '**the starting date of an act complained of under Article 30(2) ... is not the day the act ends, but the day it is first effected**.' In an earlier Appeal, **The Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit** (supra), the Court had similarly held that '**the Treaty limits References over such matters like these to two months after the action or decision was first taken or made**.' Needless to state, the decisions in the **Omar Awadh** and **Independent Medical Legal Unit** Appeals as to the date of reckoning for time computation are binding on this Court.

45. Therefore, 27th September 2017 having been more than two months before the institution of this Reference on 3rd May 2019, the process leading to the enactment of *Constitutional (Amendment) Act of 2018* would not pass the two-month limitation hurdle prescribed in Article 30(2) of the Treaty. It is thus improperly before the Court. The time-barred enactment process would of necessity include actions that transpired thereunder, including related actions of the police and security forces in respect thereof. Accordingly, the alleged breach of Articles 6(d), 7(2), 8(1)(c) and 123(3)(c) of the Treaty in that regard remains unproven and is duly dismissed. *Issue No. 4* is thus

[10] EACJ Appeal No. 2 of 2012, para. 60.

answered in the negative, save for the violation of the time limitation provision in Article 30(2) which is hereby allowed.

46. In terms of *Issue No. 1*, similarly time-barred would be a challenge to the enacted law itself given its enactment on 27th December 2017. In like vein, the Constitutional Court's judgment having been rendered on 27th July 2018, it - along with the proceedings that underpin it - would be time-barred for present purposes. It is so held.

47. However, it is not in dispute that this Reference does indeed challenge the endorsement by the Supreme Court of the validity of a law the enactment of which had been allegedly riddled with illegalities. To that extent, the said court is alleged to have flouted Articles 6(d) and 7(2) of the Treaty. This is borne out by paragraph 3(2) and (3) of the Reference. The cause of action inherent therein would accrue on 18th April 2019, the date of the Supreme Court's judgment. That being so, the Reference having been lodged in this Court on 3rd May 2019, it was filed two weeks after the delivery of the impugned judgment. This is undoubtedly well within the two-month time frame prescribed under Article 30(2) of the Treaty. We would therefore resolve *Issue No. 1* in the negative on that premise.

Issue No. 3: Whether the Reference is *Res Judicata.*

48. It was proposed that the Reference offends the doctrine of *res judicata* in so far as it raises matters that could have been canvassed before the Constitutional and Supreme Courts of Uganda, but were not so raised. The inference here is that the Applicant should have included the Treaty breaches that are in issue before this Court within *Constitutional Petition No. 49 of 2017* that was lodged in the Constitutional Court, the omission to do so rendering the Reference

res judicata. In that regard, the Court was referred to the definition of *res judicata* in **Black's Law Dictionary, 10th Edition**, as well as the decision in **The Attorney General of the Republic of Uganda vs. Tom Kyahurwenda, EACJ Case Stated No. 1 of 2014**[11].

49. **Black's Law Dictionary** defines *res judicata* as follows:

> **i. An issue that has been definitely settled by judicial decision.**
>
> **ii. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit.**

50. In **The Attorney General of the Republic of Uganda vs. Tom Kyahurwenda** (supra), the Respondent highlighted the following conclusion by the Court:[12]

> **The Court therefore holds that Articles 6, 7 and 8 are justiciable both before this Court and before the national courts and tribunals. ..... The second question is: Whether the provisions of Articles 6, 7, 8 and 123 read together with Articles 27 and 33 of the Treaty are self executing and confer sufficient legal authority on the national courts of the Partner States to entertain matters relating to Treaty violations, and to award compensation and/ or damages as against a Partner State? The Court is fully satisfied that the answers to the first question are**

[11] Arising from Miscellaneous Application No. 588/ 2012 in Civil Suit No. 298/ 2012 of the High Court of Uganda.

[12] Ruling in Preliminary Reference (Case Stated No. 1 of 2014), paras. 69, 73 & 74.

relevant to the first part of the second question posed in paragraph 73 (supra). The Court has held that Articles 6, 7 and 8 of the Treaty are justiciable before national courts. Accordingly, those Articles do confer legal authority to the national courts of Partner States to entertain allegations of their violation.

51. Conversely, the Applicant argued that the jurisdiction to determine Treaty violations was solely vested in this Court and it had never made a determination on the matters in contention in this Reference. In addition, he opined that the domestic courts had interrogated the impugned actions within the context of the Uganda Constitution therefore the interrogation of the same issues with regard to the Treaty cannot be *res judicata*. He cited this Court's decision in **Media Council of Tanzania & 2 Others vs. The Attorney General of the United Republic of Tanzania, EACJ Reference No. 2 of 2017**. In that case, the defence of *res judicata* was rejected on the premise that whereas a domestic court in the United Republic of Tanzania had determined the constitutionality of the matter viz the Tanzania Constitution, this Court was required to interrogate the same set of facts against the yardstick of the Treaty.

52. Mr. Mabirizi further argued that whereas *Constitutional Petition No. 49 of 2017* was rooted in Article 137 of the Uganda Constitution, the cause of action in the present Reference was premised on Treaty violations, and additional contestations that were never in issue before the domestic courts. He cited the example of the impugned process, conduct and majority decisions of the Supreme Court as matters that were not, and could not have been, in issue before the Constitutional Court.

53. We are compelled to dispel the notion propelled by the Respondent that the decision in the **Tom Kyahurwenda** case would render the present Reference *res judicata*. A careful reading of that Preliminary Ruling reveals that the Court held that '**it was the intent and purpose of the framers of the Treaty to grant this Court the exclusive jurisdiction to entertain matters concerning the interpretation of the Treaty.**'[13] It distinguished the function of Treaty interpretation from Treaty application for purposes of the preliminary reference mechanism, urging that the mechanism was rooted in the need for domestic courts to seek Treaty interpretation from this Court in order that they may *apply* that interpretation to matters before them.

54. The *raison d'etre* of the preliminary ruling procedure was held to be the harmonization of the Treaty's application or enforcement across the East African Community. In the event, the Court ruled that '**reading Articles 27, 33 and 34 of the Treaty together, this Court has exclusive jurisdiction on the interpretation of the Treaty.**'[14] A national court's mandate in that regard would be restricted to the application of this Court's interpretation to enable that court make a judgment.[15] It is within the context of preliminary references, therefore, that the Court did in the **Tom Kyahurwenda** case adjudge Articles 6, 7 and 8 of the Treaty to be justiciable before domestic courts.[16]

55. Against that background, could the matters before this Court presently have been submitted to the domestic courts alongside the

[13] Ruling in Preliminary Reference (Case Stated No. 1 of 2014), para. 50.
[14] Ibid. at para. 61(i).
[15] Ibid. at paragraph. 61(iii).
[16] Ibid. at para. 69

related constitutional litigation that ensued there? Stated differently, the Treaty interpretation function having been preserved as the exclusive prerogative of this Court, would it have been feasible for the Applicant to present the misgivings he raises in the instant Reference before the domestic courts?

56. Article 34 of the Treaty provides apposite direction on this. It reads:

> **Where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that Court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question.**

57. The rationale for the preliminary reference mechanism in regional courts could not have been articulated better than it was in the **Tom Kyahurwenda** case as follows:

> **It is of utmost importance to understand the significance of the preliminary ruling procedure. The procedure is the keystone of the arch that ensures that the Treaty retains its Community character and is interpreted and applied uniformly with the objective of its provisions having the same effect in similar matters in all Partner States of the East African Community. In the absence of this procedure, it is possible that legions of interpretation of the same Treaty would emerge drifting hither and thither, aiming at nothing. This would at best create a**

state of confusion and uncertainty in the interpretation and application of the Treaty; and at worst, ignite an uncontrolled crisis which would destabilize the integration process.[17]

58. In its most basic form, the preliminary ruling mechanism enjoins a domestic court that is faced with a question that necessitates either the interpretation and/ or application of any Treaty provision to halt the proceedings before it; refer the question to the Appellate Division of the East African Court of Justice (EACJ) and, upon securing the interpretation thereon vide a Preliminary Ruling, duly apply that interpretation in the determination of the matter before it. It is, however, tampered by a proviso that grants the domestic court the discretion to determine whether or not to refer a matter to the EACJ, such a prerogative to be exercised where the domestic court '**considers a ruling on the question is necessary to enable it to give judgment.**'

59. It will suffice to point out here that domestic courts and regional, supranational or international courts are enjoined in a symbiotic relationship as far as international adjudication is concerned. Thus in the retrial of **The East African Civil Society Organisations Forum (EACSOF) vs. The Attorney General of the Republic of Burundi**,[18] the Court cited with approval the following observations in **Tzanakopoulos, Antonios, *'Domestic Courts in International Law: The International Judicial Function of National Courts'***:[19]

[17] Paragraph 48.
[18] EACJ Reference No. 2 of 2015 (2), para. 24.
[19] 34 Loyola of Los Angeles (Loy. L.A) International & Comparative Law Review, 133 (2011) at 153, 154.

This means that the international law question can effectively be raised and answered at the domestic level. When the outcome is deemed unsatisfactory, international procedures will be called upon to review the 'facts' (including potential decisions of the domestic court) and determine whether a breach of an international obligation has taken place or whether the law has moved on. The process then at the international stage is merely subsidiary or supervisory; intervention will be limited to when the domestic process fails to address the issues appropriately and conform to the international obligation.

60. Although national courts apply domestic law, the States within which they operate are bound by international obligations that derive from the various international treaties and conventions to which they are party. Hence, for present purposes, the EAC Partner States do obligate themselves to foster the objectives of the EAC with due regard to the principles outlined in Articles 6 and 7 of the Treaty. To that extent, therefore, domestic courts in the EAC region are obligated to apply and enforce domestic laws in such a manner as would ensure compliance by themselves, as well as State parties, with these international obligations. Consequently, a domestic court is obliged to approach its judicial function with appropriate regard for the basic tenets of good governance, rule of law, transparency, equality and universally accepted human rights.

61. In the instant case, as was held in the **Tom Kyahurwenda** case, this Court has exclusive jurisdiction over the interpretation of the Treaty. Accordingly, perchance had the Applicant indeed sought the

enforcement of Articles 6 and 7 of the Treaty by the Constitutional Court of Uganda, that court would have been obliged to refer any Treaty interpretation matters to this Court under the preliminary reference mechanism. That procedural option would not, however, resolve the lingering question as to whether all the matters raised in the present Reference could have been feasibly justiciable before the domestic courts in Uganda. It is well appreciated that the constitutionality of the enactment process was appropriately submitted to the domestic adjudication process. However, can the same be said of the other matters that are in contention before this Court?

62. We think not. It would be grossly misleading to suggest that the Applicant could have formally lodged and prosecuted his misgivings about the procedure in the Constitutional Court in the course of the trial in that court; or indeed that he could have anticipated the Constitutional Court's decision, as well as what would have transpired in the Supreme Court, well before the event. These are matters that are in contention in the present Reference. They certainly could not have been submitted to the domestic courts of Uganda because the alleged Treaty breaches had not yet crystallized.

63. This Court has had occasion to extensively address the issue of *res judicata* in numerous decided cases. In the case of **James Katabazi & 21 Others vs. Secretary General of the East African Community & Another**[20] it held:

> **Three situations appear to us to be essential for the doctrine to apply: One, the matter must be 'directly and**

[20] EACJ Reference No. 1 of 2007

substantially' in issue in the two suits. Two, the Parties must be the same or parties under whom any of them claim litigating under the same title. Lastly, the matter was finally decided in the previous suit. All the three situations must be available for the doctrine of res judicata to operate.

64. In **Steven Dennis vs. The Attorney General of the Republic of Burundi & Others**[21] it was held:

> **The doctrine is meant to ensure that parties and courts are not burdened with multiple resolutions of the same dispute between the same parties on the same subject matter before the same court and which issue has previously been conclusively determined.**

65. In the more recent case of **Theodore Niyongabo & Another vs. The Attorney General of the Republic of Burundi**,[22] the Court cited with approval the foregoing decision in the **Steven Dennis** case, as well as the position advanced in **Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina vs. Serbia & Montenegro)**[23] that an issue that had been conclusively adjudicated need not be re-litigated. It then held:

> **The foregoing precedents resonate with the import of the defense of *res judicata*, which bars the litigation by the same parties and before the same court of a suit arising from the same subject matter as had been**

[21] EACJ Reference No. 3 of 2015, para. 44.
[22] EACJ Reference No. 4 of 2017, para. 40.
[23] Judgment, ICJ Reports 2007, p.43

conclusively determined by the court. It similarly forestalls the litigation of a claim arising from a transaction or series of transactions that could have been, but were not, raised in the original suit.

66. We have earlier in this judgment disallowed the proposition that the Applicant could have – but did not – raise the matters in contention herein before the domestic courts in Uganda. In addition, there is no shadow of doubt in our minds that the Treaty violations in contention before us have never been determined in a previous suit. They most certainly have never been entertained by this Court. We are satisfied, therefore, that the present Reference is not *res judicata*, and would accordingly resolve *Issue No. 3* in the negative.

Issue No. 2: Whether the Honourable Court has jurisdiction to determine the Reference.

67. It was opined for the Respondent that only the proceedings and decision of the Supreme Court in *Constitutional Appeal No. 2 of 2018* were validly before this Court, all the other actions that are in contention in the Reference being time-barred and *res judicata*. That notwithstanding, the Respondent alluded to the Applicant having instituted the present Reference as a disguised appeal, an assertion that was emphatically opposed by the Applicant. He cited numerous judicial authorities in support of his case that we do not deem it necessary to reproduce here.

68. The case of **The Attorney General of the United Republic of Tanzania vs. Anthony Calist Komu**[24] delineated three types of jurisdiction: *ratione personae, ratione materiae* and *ratione temporis*.

[24] EACJ Appeal No. 2 of 2015.

Lack of *ratione personae* would arise where one of the parties is devoid of the requisite capacity or *locus standi* to appear before a court. On the other hand, a court's *ratione materiae* may be questioned on the basis of the invoked subject matter, an international court being devoid of *ratione materiae* to try a matter where the treaty or convention under which it derives its mandate does not grant it jurisdiction over designated actions. In the case of the EAC Treaty, such *ratione materiae* is delineated in Articles 30, 31 and 32 thereof. R*atione temporis*, on its part, refers to the time-frame prescribed for the institution of cases in a court. In the instant case, the Respondent challenges the Court's jurisdiction on account of the *ratione materiae* (subject matter of the dispute*)* and *ratione temporis* (the time limitation). The Applicant's *locus standi* to institute the present proceedings was not challenged.

69. We did dispose of the issue of *ratione temporis* under our determination of *Issue No. 1* and found that, to the extent that the impugned Supreme Court decision of 18th April 2019 was lodged within time, the Reference was not time-barred. We did, however, adjudge the entire process leading up to the enactment of *Constitutional (Amendment) Act of 2018* and the Constitutional Court's decision of July 2018 (as well as the process attendant thereto) to be time-barred. On the other hand, the question of *res judicata* was determined in the Court's consideration of *Issue No. 3* and resolved in the negative. Consequently, whereas the enactment of the impugned law, the Constitutional Court's decision and the processes that underpinned them are time-barred and therefore no longer in contention, the challenge to the Supreme Court's decision is

still a live dispute before the Court. We would therefore over-rule the Respondent's contestations to the contrary.

70. It is to the issue of the *ratione materiae* that we now turn. Given learned Respondent Counsel's marked ambivalence as to whether or not they yielded to the Court's jurisdiction for purposes of the interrogation of a domestic judicial decision, it becomes imperative that the Court pronounce itself on the matter.

71. It is now well settled law that nation states can be held internationally responsible for the actions of any state organ, including judicial organs or courts. *See Article 4(1) of the International Law Commission (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts*. Further, the question as to the Court's jurisdiction to entertain a challenge to the judicial decision of a domestic court was conclusively settled in **The East African Civil Society Organisations' Forum (EACSOF) vs. The Attorney General of the Republic of Burundi & Others**.[25] It was held:

> **The reference before the Trial Court was not a further appeal from the Decision of the Constitutional Court of Burundi. It was a reference on the Republic of Burundi's international responsibility under international law and the EAC Treaty attributable to it by reason of an action of one of its organs namely the Constitutional Court of Burundi. The Trial Court had a duty to determine this international responsibility and in so doing, it had a further duty to consider the internal laws of the Partner**

[25] EACJ Appeal No. 4 of 2016.

State and apply its own appreciation thereof to the provisions of the Treaty.

72. Accordingly, this Court would be well within the purview of its mandate to interrogate the impugned Supreme Court decision with a view to determining its compliance with the Treaty. We would therefore over-rule the Respondent's proposition that the Court is not clothed with jurisdiction to determine the Reference. Accordingly, *Issue No. 2* is answered in the affirmative.

Issue No. 5: **Whether the processes and decisions in *Constitutional Petition No. 49/ 2017: Male H. Mabirizi K. Kiwanuka vs. The Attorney General of the Republic of Uganda* and Supreme Court *Constitutional Appeal No. 2/ 2018: Male H. Mabirizi K. Kiwanuka vs. The Attorney General of the Republic of Uganda* were consistent with the principles in Articles 6(d) and 7(2) of the Treaty.**

73. In his opening statement, the Applicant proposed that the true administration of justice is a firm pillar of good governance, and the quality of the administration of justice remains an important element in the quest for good governance.[26] He highlighted the following call on judges by Justice Thomas Von Danwitz of the European Court of Justice in that regard:[27]

> **But finally it is eminently important for a judge to have a sound attitude towards the right balance of power. .... When judges get carried away by their personal**

[26] See Von Danwitz, Thomas, *Good governance in the hands of the judiciary: lessons from the European example*, Potchesfstroom Electronic Journal, 2010 (as accessed from saflii.org/za/journals/PER/2010/1.html).
[27] Ibid.

convictions of where rightness and justice lie and stray too far from the established rules of the common law or words of statutes, they create uncertainty. If those convictions are held on issues which are political, broadly or narrowly so, then they will arouse animosity as well as support.

74. Mr. Mabirizi asserted that although Ugandan courts do have a duty to promote and uphold the rule of law, in the matters before this Court presently the Uganda Constitutional Court and Supreme Court fell way below the mark; were highly biased and partisan, and committed what he elected to term *judicial fraud*. He invoked a quote by Justice Thurgood Marshall, a Judge of the Supreme Court of the United States of America (USA) to urge that '**a judiciary which lacks the courage to do justice without fear and favour, is biased, suffers from the vice of self-interest, is tardy, indolent and incompetent and has no urge, will, passion and ability to decide the cases/ disputes put before it expeditiously**.'

75. He was of the emphatic view that the pronouncement by the learned Chief Justice of Uganda that he had lost *Issue No. 4* in the Supreme Court, yet he had succeeded on it by a 4:3 majority, was tantamount to judicial fraud. He opined that the said pronouncement contravened section 69(1) of Uganda's Civil Procedure Act, which provides for an appeal that is heard by two or more judges to be decided in accordance with the opinions of the judges in the majority. Citing the definition of fraud in the case of **Fredrick J. K. Zaabwe vs. Orient Bank & Others, Supreme Court Civil Appeal No. 4 of 2006** to buttress his position, the Applicant sought the rectification of that anomaly by this Court.

76. It is the Applicant's contention that the right to a fair hearing, as well as the competence and independence of the judiciary hold a pivotal place in international treaties and conventions. In his estimation, the Respondent State is bound by but had violated the principles enshrined in Article 2(3)(b) of the *International Covenant on Civil and Political Rights*; Article 27 of the *Vienna Declaration and Program of Action*; Principles 1, 2, 5 and 6 of the *Bangalore Principles of Judicial Conduct, 2002* ('the Bangalore Principles'), and Article 26 of the *African Charter on Human and Peoples' Rights.* He urges that Ugandan law not only guarantees the right to a fair hearing, but also safeguards it against any form of derogation, citing Articles 28(1) and 44(c) of the Constitution and constitutional case law from the Respondent State in support of this position.

77. Mr. Mabirizi also invoked related principles embodied in the *Uganda Code of Judicial Conduct, 2003* and the following decision in **Congo & Another vs. The Republic of Zimbabwe, South Africa Development Cooperation Tribunal Case No. SADCT: 05/ 2008**:

> **It is settled that the concept of the rule of law embraces ... the right to have access to an independent and impartial court or tribunal, the right to a fair hearing ... the right to equality before the law ... It is impossible to ensure the rule of law, upon which human rights depend, without guaranteeing that courts and tribunals resolve disputes ... free of any form of pressure or interference ... Without the rule of law and the assurance that comes from an independent judiciary, it is obvious that equality before the law will not exist ... The courts need the trust of the people in order to maintain their**

authority and legitimacy. The credibility of the courts must not be weakened by the perception that courts can be influenced by any external pressure ...

78. He further cited the opinion of one Okechukwu Oko as follows:

The attainment of justice represents one of the enduring promises of constitutional democracy ... More problematic for citizens who seek justice is the fact that judges, driven by lust for power and wealth, often align themselves with the rich and the powerful in society to frustrate the search for justice.[28]

79. He lamented that although public expectation was that the rule of law would be respected above all by the judiciary; that did not happen in the impugned municipal courts' handling of the matters complained of in the Reference. Rather, in dealing with the disputes in respect of the impugned Act, the Uganda Judiciary (in the words of Nisar, J – former Chief Justice of Pakistan) allegedly **'lacked courage to do justice without fear and favour, was biased, suffered from the vice of self-interest, was tardy, indolent and incompetent and had no urge, will, passion and ability to decide the cases/ disputes before it expeditiously, it fell in the romance of aggrandizement and populism hence becoming dangerous to the State and the society**.'

80. According to Mr. Mabirizi, the above conduct manifested itself in the following actions of Uganda's Constitutional and Supreme Courts:

[28] Oko, Okechukwu, Seeking justice in transitional societies: An analysis of the problems and failures of the judiciary in Nigeria, 2005, p.9.

I. Non-disqualification of judges who were not competent to sit, concealment of their credentials, and failing to take steps to address the complaints against them and keeping their decisions on record.

II. Unfair treatment of the Applicant in courts in favour of the Respondent.

III. Failing to determine the disputes expeditiously.

IV. Making decisions which are neither logical nor coherent.

V. Failing to make decisions in compliance with Ugandan law and their own decided cases.

VI. Declaring final results different from actual results.

81. He alluded to conflict of interest in the Constitutional Court arguing that, though the President of the Respondent State was the purported beneficiary of the constitutional amendment, one of the judges in *Constitutional Petition No. 49 of 2017* had spousal relations with Ministers appointed by the said Head of State; while another judge was a brother to a ruling party MP. The Ministers and the MP had allegedly voted in favour of the constitutional amendment. According to Mr. Mabirizi, both judges should have disqualified themselves but, even after his prompting, they declined to do so. He opined that the Constitutional Court should have complied with Uganda's recusal procedure as outlined in **Shell (U) Ltd vs. Muwema & Mugerwa Advocates & Another, Supreme Court Civil Appeal No. 2 of 2013**.

82. With regard to the alleged conflict of interest in the Supreme Court, it is the contention that Honourable Justice Jotham Tumwesigye, an

Acting Justice of the Supreme Court, was not competent to participate in *Constitutional Appeal No. 2 of 2018* in the wake of substantive judges, Lady Justices Esther Kisakye and Faith Mwondha. His being on the Coram purportedly bespoke ulterior motives, while his serving in acting capacity supposedly inhibited his independence as a judge. Paragraph 26(1) of the Commentary to the Bangalore Principles was cited to support the notion that whereas the tenure of a substantive judge cannot be interfered with by the Executive, not so with an acting judge. Further, under Article 128(8) of the Uganda Constitution the office of a Supreme Court judge cannot be abolished during the tenure of a substantive holder thereof, but that is not necessarily the case with an acting judge; hence the insecurity of tenure that could impede his/ her independence. It was also opined that under Article 142(3) of the Constitution, the appointment of an acting judge is susceptible to whimsical revocation by the President.

83. Furthermore, it was suggested that Justice Tumwesigye could not have been independent, having studied with His Excellency the President in secondary school and served as Director Legal Services in the Movement Secretariat, a political outfit that had the Head of State at its helm. It was the contention that proof of that relationship was in the possession of the Electoral Commission but, upon his inquiry, the Commission had referred the Applicant to the relevant issuing authority for access to the President's secondary school qualifications.

84. The Applicant attested to Chief Justice Bart Katureebe having been a friend to the President when he presided over the constitutional appeal, relying upon a radio interview where the

learned Chief Justice had highlighted his historical knowledge of the Head of State dating back to 1980, and his having served in Cabinet in various ministerial capacities before he was appointed Chief Justice. He opined that the Chief Justice's relocation of his upcountry home from Bunyaruguru to be closer to the President underscored the close relationship between them. In his view, it was unethical of the learned Chief Justice to have presided over the constitutional appeal given his close ties with the President. He cited, as further evidence of unethical behaviour, past cases that the Chief Justice had presided over well-knowing that an advocate from a law firm that he founded was part of the legal team. In his estimation, the Chief Justice being a man with a demonstrably unethical track record could not have been expected to be independent in a matter involving his presidential friend.

85. In addition, Mr. Mabirizi asserted that the Honourable Lady Justice Stella Arach Amoko's husband, Ambassador Idule Amoko, is an ambassador serving beyond the retirement age for civil servants on account of contracts of service that have been routinely renewed by the President. He suggested, therefore, that Lady Justice Arach Amoko could not have been independent when she presided over his constitutional appeal in the Supreme Court yet her spouse's continued deployment is dependent on the Head of State.

86. The Applicant relied upon the case of **Henry Kyalimpa vs. The Attorney General of the Republic of Uganda, EACJ Appeal No. 6 of 2014**, as well as section 106 of the Uganda Evidence Act, to portend that the Respondent bore the burden of proving the innocence of the learned judges but fell short on it. He emphasized that the Respondent stood to lose if no proof of their compliance with

the Treaty was adduced. He urged the Court to follow the decision in **R. vs. Bow Street Metropolitan Stipendiary Magistrate, Ex Paerte Pinochett 1 AC (1999) 61**, where the House of Lords had set aside its decision because one of their lordships had participated in it, yet his wife was an employee and the judge himself an Executive Director in an entity that had been admitted to the case as an Interested Party. The Applicant similarly enjoined this Court to set aside the impugned Supreme Court judgment.

87. Mr. Mabirizi complained about his 'eviction' by the Constitutional Court from seats reserved for the Bar on account of his having been self-represented. He considered this to be an act of partiality that contravened Articles 28(1) and 44(c) of the Uganda Constitution and the fundamental and operational principles of the Treaty. He particularly took issue with the use of purportedly derogatory terms such as being referred to as a 'stranger' to the Bar and being asked to 'find his level'. We pause here to reiterate our earlier ruling herein that the trial proceedings before the Constitutional Court, being time-barred, are not in issue before this Court.

88. Be that as it may, the Supreme Court was similarly alleged to have discriminated against him on account of self-representation by allocating him a separate desk away from the Bar and, in its judgment, upholding the wrongful actions of the Constitutional Court. The Applicant concluded that the Supreme Court thus negated the right to a fair hearing and the principle of equality before the law.

89. He further faulted the Supreme Court for endorsing the Constitutional Court's decision to deny him professional fees on account of being self-represented. He cited paragraph 61 of the

Commentary to the Bangalore Principles to support his submission that the Constitutional and Supreme Courts of Uganda fell short on the requirement for courts to strike a balance between the parties that appear before them to avert a perception of partiality and the resultant loss of public confidence in the judiciary.

90. Paragraph 61 of the Commentary provides:

> **A judge is obliged to ensure that judicial proceedings are conducted in an orderly and efficient manner and that the court's process is not abused. An appropriate measure of firmness is necessary to achieve this end. A fine balance has to be drawn by the judge, who is expected both to conduct the process effectively and to avoid creating in the mind of a reasonable observer any impression of a lack of impartiality. Any action that, in the mind of a reasonable observer, would (or might) give rise to a reasonable suspicion of a lack of impartiality in the performance of judicial functions must be avoided. Where such impressions are created, they affect not only the litigants before the court but public confidence in the judiciary generally.**

91. In addition, the Applicant referred the Court to the case of **Cabana vs. Newfoundland and Labrador (2016) NLCA 75** that upheld the award of costs to self-represented litigants in the following terms:

> **There is a trend to movement away from the traditional idea of denying any compensation, or equivalent counsel fees, to successful unrepresented litigants ... Both self-represented lawyers and self-**

represented lay litigants may be awarded costs and that such costs may include counsel fees .... It seems to me difficult to justify a categorical rule denying recovery of costs by self-represented litigants.

92. On that premise, it was the Applicant's contention that he was entitled to professional fees, and the said courts' discriminatory behaviour contravened Articles 28(1) and 44(c) of the Constitution; Principle 6 of the Uganda Judicial Code of Conduct, and Rule 23(1) of the Uganda Court of Appeal Rules, together with applicable case law.

93. The Applicant did also question the failure by the Constitutional Court, with the acquiescence of the Supreme Court, to advance reasons for its refusal to summon the Speaker for cross examination, as had been requested by him. He faulted the Supreme Court for its handling of un-pleaded remedies. In his view, the approach adopted by both courts run afoul of the decision in **Hon. Dr. Margaret Zziwa vs. The Secretary General of the East African Community, EACJ Appeal No. 2 of 2017** on courts deciding matters within the strict ambit of parties' pleadings.

94. The Supreme Court also drew the Applicant's wrath for framing the issues for determination on behalf of the parties, an action that in his view denoted a pre-determined mind-set. He opined that Order 15 rule 1(5) of Uganda's Civil Procedure Rules (CPR) did place the duty to frame issues upon courts albeit **'after reading the pleadings, if any; and after such examination of the parties or their advocates as may appear necessary**,' so as to ascertain the areas of divergence between the parties.

95. The Supreme Court compounded the Applicant's misery when, on its own motion, it accepted and validated late submissions from the Respondent without hearing from him. He construed the said action to be an affront to due process, the impropriety of which was aggravated by the court ignoring his protests. In further display of partiality, from the Applicant's viewpoint, the said court reduced the time for his oral submissions in rejoinder from forty to ten minutes.

96. The apex court was lambasted for its failure to render its judgment within the sixty days designated by paragraph 6.2 of the Uganda Judicial Code of Conduct, a provision that is re-echoed in Rule 33(2) of the Court of Appeal Rules that calls for delivery of judgment without delay. In the Applicant's view, the foregoing provisions require that judgments are delivered without delay and, in any case within sixty days; but where courts are unable to meet those time lines, they are obliged to communicate the reason for such delay to litigants, failure of which the delayed judgment should be nullified.

97. He questioned the validity of the Chief Justice's judgment, having been written while the learned Justice was allegedly under an infirmity that negated his competence to write a judgment. The Applicant invoked Article 144(3) of the Uganda Constitution, as well as paragraph 192 of the Commentary to the Bangalore Principles, to suggest that judicial competence may be diminished or compromised when a judge is physically impaired.

98. The Applicant took issue with the Supreme Court's reliance on non-existent evidence with regard to the parliamentary process, specifically that the Motion to suspend the three-day rule (that prescribes three days between the moving of the motion and

commencement of debate) was at Committee stage, whereas it was not. In his view, there was no evidence either to support the Constitutional Court's decision that the motion to suspend the three-day rule had been seconded or that the said rule was not required because the motion was moved before the Committee of the Whole House. He opined that a decision that was unsupported by evidence was a blemish on the integrity of the Supreme Court.

99. As to whether or not the Committee Report delayed by forty five days, the Applicant disparaged the Chief Justice's reliance on the Respondent's unverified submissions. He did also fault the entire court for having found that the Constitutional Amendment Bill ought not to have been assented to owing to a defective Certificate of Compliance, yet it went ahead to uphold part of the resultant Act. He particularly took issue with Lady Justice Arach Amoko for, in his words, 'fabricating' evidence that the Speaker had realized that some of the provisions in the certificate were unconstitutional so she only included in it the provisions that were constitutional. In his view, this went to the core of the competence, propriety and independence of the judiciary, a cornerstone of the rule of law.

100. He castigated the Justices of the Supreme Court for denigrating constitutional and human rights violations to disciplinary matters, and urged that their upholding of an enactment that was procured by violence contravenes the spirit and letter of the **Katabazi** case. He opined that the **Katabazi** case had aptly defined the rule of law as a principle that is '**intended to be a safeguard against arbitrary governance, whether by a totalitarian leader or by mob rule. Thus the rule of law is hostile to both dictatorship and anarchy.**'

In his view, by upholding Parliament's procedural breaches, the rule of law was flouted by the Respondent State.

101. Conversely, the Respondent rejects the Applicant's contestations in their entirety and maintains that the processes and decisions in respect of *Constitutional Petition No. 49 of 2017* and *Constitutional Appeal No. 2 of 2018* duly complied with the dictates of Articles 6(d) and 7(2) of the Treaty, particularly the concept of rule of law under the principle of good governance. It is the Respondent's contention that the sole purpose of the Reference is to have this Court sit in an appellate capacity over matters that have been conclusively adjudicated by the Supreme Court of Uganda. It is the contention that although the Court is indeed clothed with jurisdiction to review the decisions of Partner States' apex courts, such review does not extend to the quashing of an impugned decision as ensues in the exercise of appellate jurisdiction.

102. To the extent that the Applicant had (at the time) sought a review of the impugned Supreme Court decision before the same court on account of 'judicial fraud', it was opined that the present Reference was prematurely before this Court. The Application in question is cited as *Civil Application No. 6 of 2019* and was availed to the Court in Annexure I to the Affidavit in support of the Reference. Learned Respondent Counsel urged the Court to adopt a flexible approach to the non-exhaustion of local remedies as was proposed in **Attorney General of the Republic of Rwanda vs. Plaxeda Rugumba, EACJ Appeal No. 1 of 2012** as follows:

> **The obligation to exhaust domestic remedies forms part of customary international law, recognized as such in**

the case law of the International Court of Justice. See *The International Case (Switzerland vs. United States) judgment of 21st March 1959*. It is also to be found in other international human rights treaties, for example, the International Covenant on Civil and Political Rights (Article 49(1)(c) and the Optional Protocol (Articles 2 and 5 thereto) and the African Charter on Human and Peoples' Rights (Article 46). However, the EAC Treaty does not have any express provisions requiring exhaustion of local remedies. In our view, therefore, though the Court could be flexible and purposeful in the interpretation of the principle of the local remedy rule, it must be careful not to distort the express intent of the EAC Treaty.

103. With regard to the 4:3 decision on the substantiality test, it is the Respondent's case that the error apparent in the learned Chief Justice's pronouncement can be cured by Rule 35 of the *Judicature (Supreme Court Rules) Directions, Statutory Instrument 13-11*. It reads:

Rule 35

(1)A clerical or arithmetical mistake in any judgment of the court or any error arising in it from an accidental slip or omission may, at any time, whether before or after the judgment has been embodied in an order, be corrected by the court, either of its own motion or on the application of any interested person so as to give

effect to what was the intention of the court when judgment was given.

(2)An order of the court may at any time be corrected by the court, either of its own motion or on the application of any interested person, if it does not correspond with the order or judgment it purports to embody or, where the judgment has been corrected under subrule (1) of this rule, with the judgment as so corrected.

104. It is the contention that the application of the slip rule in Rule 35 above is a matter for the Supreme Court, not this Court. It thus urges that the Applicant misdirected himself on the Court's jurisdiction, therefore the order for the rectification of the anomaly should be dismissed.

105. In terms of the Applicant's challenge to the domestic courts' processes and decisions, the Respondent denies any Treaty violation with regard to the Supreme Court's refusal to grant costs to the Applicant. It was argued that in so far as the Constitutional Court's decision was rendered on 26th July 2018, any contestation as to the said court's failure to give reasons for not summoning the Speaker is time-barred. By way of an alternative argument, it was opined that the matter was duly considered and adjudicated by the Supreme Court, and the non-elaboration of the detailed reasons for the refusal to summon the Speaker does not amount to a breach of any tenet of good governance as laid out in Article 6(d) of the Treaty.

106. The Respondent contests the Applicant's allegation of bias in its favour, asserting that the cross examination of Mr. Keith Muhakanizi

and General David Muhoozi might not have met the Applicant's expectations but that would not necessarily render it illegal or in breach of the good governance principle. It similarly dismisses the Applicant's complaint with regard to the severance doctrine and substantiality test with the assertion that, not only were both Parties given the opportunity to address the court on the remedy of severance (therefore the question of preferential treatment would not arise);[29] the grant of remedies not specifically pleaded is permitted by Article 137(4)(a) of the Uganda Constitution. It reads:

> **Where upon determination of the petition under clause (3) of this article the constitutional court considers that there is need for redress in addition to the declaration sought, the constitutional court may –**
>
> **i. Grant an order of redress.**

107. It is argued for the Respondent that the personal impartiality of a judicial officer in conduct of a matter must be presumed unless there is evidence to the contrary. Thus in the absence of contrary evidence against the Supreme Court judges, there is no basis for the Applicant's allegations of bias and partiality. In the Respondent's view, mere allegations of sibling and spousal relations without proof is not sufficient. The Respondent questions the Applicant's baseless allegation that an acting judge is less competent to sit and likely to be less independent than one that is substantively in office. It is the contention that there is no law that bars an Acting Justice of the Supreme Court from being part of the court's Coram and, as the head of the Supreme Court under Article 133 of the Constitution, the Chief

[29] See Volume 2 of the Respondent's Supplementary Affidavit, pp. 2186 – 2210.

Justice did have the prerogative to determine the court's Coram for the constitutional appeal.

108. It is posited that not only do judicial officers take an oath of office that governs the execution of their judicial functions; previous political affiliations are not considered an impediment to a judge's impartiality under paragraph 88 of the Commentary to the Bangalore Principles. Reference is further made to paragraph 89 of the same Commentary that explicitly negates the relevance of a judge's employment background to an objection premised on the principle of judicial impartiality. This observation is echoed in **Locabail (UK) Ltd. Regina vs. Bayfield Properties Ltd (2000) QB 451**, where it was held:

> **We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies.**

109. With regard to the partiality complaints leveled against the learned Chief Justice, it is the Respondent's contention that the electronic evidence alluded to in paragraphs 188 – 195 of the Applicant's affidavit in support of the Reference was not adduced in evidence as proof but, in any event, the said averments offend the law on affidavit evidence in so far as they attest to matters that were not in the Applicant's knowledge.

110. No evidence was deemed to have been forthcoming with regard to the allegations made in respect of Lady Justice Arach Amoko's spouse either. On the contrary, learned Respondent Counsel contests the authenticity of the allegation that the learned Chief Justice, Lady Justice Amoko, Justice Tumwesigye, Lady Justice Musoke or Justice Barishaki declined to recuse themselves from the respective proceedings. It is suggested that at the commencement of the proceedings in the respective courts, the Applicant abandoned his recusal applications in respect of the Honourable Chief Justice and Justices Tumwesigye, Musoke and Barishaki. To that end, it is the Respondent's case that although the Applicant did write to the Supreme Court about the matter, he subsequently withdrew his recusal applications and requested that they be expunged from the record.[30] The Applicant's written submissions to the contrary are thus considered to be misleading and an abuse of court process.

111. The Respondent enlists the procedure governing applications for recusals as laid down in **Shell (U) Ltd vs. Muwema & Mugerwa Advocates & Another** (supra) and **The Attorney General of Kenya vs. Prof Peter Anyang Nyong'o, EACJ Application No. 5 of 2007** to emphasize that the Applicant did not follow the right procedure in seeking the said judges' recusal. Learned Counsel sought to distinguish the present case from **S. vs. Dube & Others 3All SA 223 (SCA)**, arguing that whereas the marital relationship between the state prosecutor and the judge had been established in that case, no evidence was adduced in the instant case of either association by parentage or spousal relationships between Lady Justice Musoke and the two Ministers. The Applicant purportedly bore the burden of proof

[30] See paragraphs 9 – 11 of the affidavit of Anguandia Godfrey Opifeni of 29th November 2019, and Annexures C, D and E to the same affidavit.

thereof but, in any event, the issues emanating from the sought recusals by all four judges are now argued to be time-barred.

112. The Respondent invites the Court to agree with the decision of the Supreme Court that the Bar is reserved for barristers and enrolled advocates, of which Mr. Mabirizi is neither. It is proposed that his removal from the Bar neither amounted to discrimination nor did it derogate on the Applicant's right to a fair hearing. Further, non-compliance with the sixty-day rule for delivery of judgments was not a Treaty violation given that it is not a legal requirement. The Constitution simply enjoins the Constitutional Court to determine constitutional petitions 'as soon as possible.'[31]

113. In learned Respondent Counsel's view, the constitutional right to a fair hearing in Uganda is as was observed in **Isadru vs. Aroma & Others, Civil Appeal No. 33 of 2014** that '**courts should deal with cases justly, in a way which is proportionate to the amount of money involved, the interests and rights involved, the importance of the case, the complexity of the issues and the financial position of each party.**' It is thus the contention that the complexity and gravity of *Constitutional Petition No. 49 of 2017* and *Constitutional Appeal No. 2 of 2018* warranted the amount of time that was spent on them by the courts, therefore the Applicant's cases were accorded an expeditious hearing in the circumstances.

114. We carefully considered the parties' elaborate submissions on this issue. Given their conflicting positions as to who bears the burden of proof in this case, it is imperative that we engender from the onset a common understanding of the evidential rules that govern claims

[31] See Article 137(7) of the Uganda Constitution.

before this Court. The burden of proof in international claims is most persuasively articulated in the case of **Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina vs. Serbia & Montenegro), Judgment, ICJ Reports 2007, p.43** in the following terms:

> **On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it; as the Court observed in the case of** Military and para-military Activities in and against Nicaragua (Nicaragua vs. United States of America,[32] **"it is the litigant seeking to establish a fact who bears the burden of proving it."**

115. The foregoing decision depicts a two-pronged process of proof: proof of an applicant's case against a respondent, and proof of a specific fact by the party asserting it.[33] The first limb thereof reflects the binding position advanced in ***Henry Kyarimpa vs. The Attorney General of the Republic of Uganda*** *(supra)* that '**the court will require the party putting forward a claim or a particular contention to establish the elements of fact and of law on which the decision in its favour might be given.**' We do therefore abide by it. *See also* ***Eric Kabalisa Makala vs. The Attorney General of the Republic of Rwanda***[34], ***British American Tobacco (U) Ltd vs.***

[32]Judgment, ICJ Reports 1984, p.437, para. 101

[33] See also Theodore Niyongabo & Another vs. The Attorney General of the Republic of Burundi, EACJ Reference No. 4 of 2017, paras. 62, 63 and The Attorney General of the Republic of Burundi vs. The Secretary General of the East African Community, EACJ Reference No. 2 of 2018

[34] EACJ Reference No. 1 of 2017

The Attorney General of the Republic of Uganda[35] *and* ***Raphael Baranzira & Another vs. The Attorney General of Burundi***.[36]

116. **Halsbury's Laws of England** supplements the two-tier onus of proof espoused in the **Bosnia & Herzegovina** case above by clarifying the *legal* and *evidential* burden of proof. It urges as follows on the legal burden of proof:

> **The legal burden (or the burden of persuasion) rests upon the party desiring the Court to take action; thus a claimant must satisfy a court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon that party for whom the substantiation of that particular allegation is an essential of his case.**[37]

117. Accordingly, in the instant case the Applicant would bear the legal burden to establish the totality of his case as against the Respondent. This would entail proof to the required standard of all the allegations that he imputes to the Respondent State. However, each party bears the onus of proof of the specific allegations made by it that, if not substantiated, would leave the gravamen of its complaint or defence (as the case may be) unproven.

118. In addition, **Halsbury's Laws of England** clarifies that the *evidential burden* (or the burden of adducing evidence) will rest '**initially upon the party bearing the legal burden but, as the weight of evidence given by either side during the trial varies,**

[35] EACJ Ref. No. 7 of 2017
[36] EACJ Ref. No. 15 of 2014
[37] Halsburys Laws of England, Civil Procedure Vol. II, 5th Edition, 2009, para. 770

the evidential burden may be said to shift to the party who would fail without further evidence.'[38]

119. It seems to us that the evidential burden simply refers to the duty upon a party to adduce evidence in proof of specific facts as opposed to the obligation to establish its entire case; the latter scenario entails the establishment of both the points of law and fact that underpin a case. Simply stated, therefore, the party that bears the legal burden of proof has a duty to establish the matters of law and fact that underpin its case, as well as the evidential burden to prove each specific allegation of fact that is fundamental to its case.

120. The evidential burden may shift to the opposite party, however, once a complainant's case has been established on *prima facie* basis. Indeed, the general rule is that the complaining party should establish a *prima facie* case of the alleged inconsistencies with a cited treaty, before the legal and evidential burden shift to the opposite party to demonstrate their consistency. *See* ***British American Tobacco (U) Ltd vs. The Attorney General of the Republic of Uganda*** *(supra)*[39] *and* ***Trebilcock, Michael J. and Howse, Robert, The Regulation of International Trade, 1999 (2nd Ed.), Routledge, p. 68***. A *prima facie* case is deemed to have been established once a contestation has been **'supported by sufficient evidence for it to be taken as proved should there be no adequate evidence to the contrary.'**[40]

121. Against that background, it becomes abundantly clear that the Applicant in the instant case bears the legal burden of proof of the

[38] Ibid. at para. 771
[39] At para. 56.
[40] See Oxford Law Dictionary, 2009, 7th Edition, Oxford University Press, p. 422.

entirety of his case as against the Respondent, as well as the legal burden to prove specific allegations made in that regard. He does thus bear the evidential burden to particularly prove each of the allegations of fact that form the substratum of his case. The legal and evidential burden would only shift to the Respondent State to establish the consistency of its actions with the Treaty upon the Applicant establishing a *prima facie* case of the Treaty violations alleged in the Reference. In short, the Respondent State would not be put to its defence in the absence of the demonstration of a *prima facie* case by the Applicant.

122. With regard to the Applicant's assertion that the evidence required in proof of his allegations against the judges lay with the Respondent, we would quickly state that Rule 66 of the Court's Rules of Procedure provides for such a scenario, where an applicant seeks to have opposite party produce documents in its possession that are relevant for the proof of the applicant's case. That was the correct procedure in the circumstances the Applicant found himself, where the requisite documentation in proof of his allegations against the judges was purportedly within the possession of the Respondent State. An adverse inference of Treaty violation could only have been drawn as against the Respondent had it declined to produce the evidence sought by the Applicant under that Rule. The mere contention that the said documentation was in the possession of the Respondent State did not *per se* shift the burden of proof of those allegations to that party.

123. Meanwhile, the **Bosnia & Herzegovina vs. Serbia & Montenegro** case highlights the standard of proof applicable to international claims as follows:

> **The Court** (ICJ) **has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive.**[41] **.... The same standard applies to the proof of attribution for such acts.**

124. The question is what category of cases would meet the description of 'exceptional gravity'? The case of **Ida Robinson Smith Putnam (USA) vs. United Mexican States**,[42] underscored the respect that was to be accorded to decisions from apex courts and prescribed an onerous standard of proof where they were challenged. It was held:

> **The Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country.**[43] **A question which has been passed on in courts of different jurisdiction by the local judges, subject to protective proceedings, must be presumed to have been fairly determined. Only** (proof of) **a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law.**

125. Accordingly, in the **Eric Kabalisa Makala** case, this Court took the view that challenges to the decisions of the apex courts of Partner States fell within the category of cases of exceptional gravity that

[41] See Corfu Channel (United Kingdom vs. Albania), Judgment, ICJ Reports 1949, p.17.
[42] 1927, UNRIAA, Vol. IV, p. 152 at 153.
[43] See case of Margaret Roper, Docket No. 183, paragraph 8

were subject to the onerous standard of proof prescribed by the **Ida Robinson Smith Putnam** case. We find no reason to depart from that position. The sum effect of the foregoing judicial authorities, for purposes of standard of proof in the present case, is that the *'fully conclusive evidence*' required of challenges to apex courts' judicial decisions should demonstrate '**a clear and notorious injustice, visible, to put it thus, at a mere glance**.'

126. Before progressing to the merits of the case, we are mindful of the Respondent's challenge to all the Applicant's contestations in respect of the Constitutional Court's decision of 26th July 2018, as well as the conflict of interest allegations brought against the cited judges. The Respondent State urges that the said actions are time-barred. We did under our consideration of Issues 1 and 4 adjudge the enactment of the impugned law, the Constitutional Court's decision of 26th July 2018 and the processes that underpinned them to be time-barred and hence no longer in contention. It follows, therefore, that the Constitutional Court's judgment and the trial process attendant thereto are not in issue hereunder.

127. Consequently, for the avoidance of doubt, the following complaints as encapsulated in paragraph 3(1) of the Statement of Reference and reflected in the Applicant's submissions on *Issue No. 4* are obviated by limitation of time.

i. Preventing the applicant, with proper identification documents, access the parliament's gallery during the seeking of leave and presentation of the Bill.

ii. Failing to take steps in the circumstances to ensure public participation of all Ugandans in the Constitutional amendment process.

iii. *Using the police and the military to disperse meetings organized by members of parliament and other political players to enhance public participation of citizens.*

iv. *Allowing defence forces to participate in partisan politics.*

v. *Deploying military in and outside parliament and throughout the entire country.*

vi. *Derogating the Members of Parliaments' fundamental rights against torture, inhuman and degrading treatment through:*

   a. *The invasion of Parliament by Uganda People's Defence Forces on 27/09/2017, the day of seeking leave to introduce a private members bill.*

   b. *Torturing and inhumanly treating members of Parliament by the Uganda Police (and/ or) Uganda Peoples' Defence Forces.*

   c. *Arresting members of parliament from the House and detaining them without any charge whatsoever.*

vii. *Reconvening Parliament on the same day and in the same place where Uganda Peoples Defence Forces had beaten up, tortured and arrested members of parliament.*

viii. *Proceeding in a multi-party parliament in absence of the leader of Opposition, Opposition Chief Whip and other opposition members.*

ix. *Allowing ruling party members to cross the floor and sit at the opposition side.*

x. *Entertaining presentation and grant of leave to table a Private Members Bill which had the effect of charging money from the consolidated fund of Uganda.*

xi. *Allowing signing of the report by new members on the Legal and Parliamentary Affairs Committee after it had finished hearings from the public.*

xii. *Allowing presentation of a Parliamentary committee report outside the 45 days period.*

xiii. *Proceeding on a motion to suspend a rule of Procedure of Parliament without secondment.*

xiv. *Closing the debate on the Bill before each and every member of parliament who wanted to debate and present the views of their constituents.*

xv. *Refusing to close the doors to the Chambers of parliament before voting on the 2nd reading and 3rd reading.*

xvi. *Failing to separate the 2nd reading and 3rd reading by at least fourteen sitting days of parliament.*

xvii. *The Speaker's preparing and forwarding to the president of a Certificate of Compliance different from what was agreed to by the entire parliament.*

xviii. *Failing to refer the Bill to the referendum of the people, and*

xix. *Assenting to the Bill by the President on strength of an invalid certificate of compliance and in absence of proof that 14 sitting days were separated between the 2nd and 3rd readings and/ or that the matter had been referred to a referendum.*

128. In any event, given the dictates of judicial hierarchy, in the wake of a Supreme Court decision there would scarcely be need to interrogate the decision of the Constitutional Court of Uganda (the court of first instance in constitutional matters in Uganda). The Supreme Court decision is the prevailing domestic case law on the matters in contention as between the parties, therefore the Respondent State's compliance with the rule of law principle would be primarily measured against it. Recourse would only be had to the Constitutional Court decision for necessary jurisprudential background to the Supreme Court's decision.

129. This was the stance adopted by this Court in the **Eric Kabalisa Makala** case, where it was observed:

> **It thus becomes superfluous to reconsider in detail either the processes that underlay the Applicant's dismissal by RURA or the judicial proceedings in the High Court of Rwanda where they were challenged. We take the view that, the legality of those processes and proceedings having been tested in the Supreme Court, due process ensued and there would scarcely be need for this Court to revisit them. Therefore, it is the final Supreme Court decision .... that is primarily in issue before us. ... we are constrained to refer to the High Court decision .... in so far as it sheds light on the Supreme Court decision.**

130. That said, however, the time connotations attendant to the conflict of interest allegations against some Supreme Court and Constitutional Court judges were neither raised nor considered under the issue of time limitation. They shall therefore be duly considered alongside the Court's interrogation of the allegations on their merits.

131. It is to the merits of the Reference that we now turn. It is the main contention herein that the outcome of *Constitutional Appeal No. 2 of 2018* was occasioned by the ineptness, partiality and lack of independence of the Supreme Court of Uganda, specifically the majority judges. In a thinly veiled personal attack, the Applicant literally relegates the said judges to the dark trenches of professional impropriety in their determination of the constitutional appeal. He contends that the resultant decision is inimical to the good

governance principles outlined under Articles 6(d) and 7(2) of the Treaty, and seeks to have the Court set it aside together with the constitutional amendment that it upheld.

132. The nature of the interrogation expected of the Court in this case was conclusively settled by the Appellate Division in **The East African Civil Society Organisations' Forum (EACSOF) vs. The Attorney General of the Republic of Burundi & Others, EACJ Appeal No.4 of 2016** in the following terms:

> **The Trial Court is not expected to review the impugned decision ... looking for new evidence or some mistake, fraud or error apparent on the face of the record. The Trial Court will however have to sift through the impugned decision and evaluate it critically with a view of testing its compliance with the EAC Treaty and then make a determination. In so making the said determination, the Trial Court does not quash the impugned decision as if it were a court exercising judicial review powers as known in municipal laws of the Partner States, but rather makes declarations as to the decision's compliance with the EAC Treaty.**

133. Inspired by that direction, this Court did (at retrial in the lower court) observe in **The East African Civil Society Organisations Forum (EACSOF) vs. The Attorney General of the Republic of Burundi**:[44]

> **A distinct feature of the international review of domestic judicial decisions is that the international court or**

[44] EACJ Reference No. 2 of 2015 (2)

tribunal approaches the set of facts that were before a domestic court from the perspective of international law (as opposed to domestic laws) and the state party's international obligations thereunder. ... The international court is restricted to an interrogation of a domestic decision's adherence to domestic laws only to the extent that such compliance would underscore the domestic court's compliance with the responsible state's international law obligations.

134. Accordingly, the duty upon us in the instant case is two-fold: first, to determine the Respondent State's international responsibility and, secondly, to interrogate the Supreme Court's decision so as to deduce its compliance with the EAC Treaty (or the lack of it).[45]

135. The international obligation that has been invoked in the issue under consideration is the rule of law principle as enshrined in Article 6(d) and 7(2) of the Treaty.[46] The cited Treaty provisions are reproduced below for ease of reference.

> Article 6(d)
>
> **The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:**
>
> *(a)* .....
>
> *(b)* .....
>
> *(c)* .....
>
> *(d)* **good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social**

[45] See The East African Civil Society Organisations' Forum (EACSOF) vs. The Attorney General of Burundi & Others (supra)

[46] See also paragraph 4(1) of the Treaty.

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

Article 7(2)

a. .....

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

136. In defining the parameters of the Respondent State's international responsibility in that regard, the Applicant relied upon the decision in **Congo & Another vs. The Republic of Zimbabwe** (supra) where the concept of rule of law is defined as follows (definition specifically reproduced in full):

> **It is settled law that the concept of the rule of law embraces at least four fundamental rights, namely, the right to have an effective remedy, the right to have access to an independent and impartial court or tribunal, the right to a fair hearing before an individual is denied of a right, interest or legitimate expectation, the right to equality before the law and the right to equal protection of the law.**

137. The foregoing definition of rule of law is constrained to due process and the right to a fair trial, which apparently are the mainstay of the Applicant's case herein. Nonetheless, it does resonate with the broader definition of rule of law as encapsulated in the ***Report of the UN Secretary General on the Rule of Law and Transitional***

Justice in Conflict and Post-Conflict Societies.[47] That definition has since been adopted by this Court.[48] It states:

> **It refers to the principle of governance** (according) **to which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publically 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.**

138. Simply stated, as espoused in the case of **James Katabazi & 21 Others vs. The Secretary General of the East African Community**, **'the principle that no one is above the law.'**[49]

139. Our consideration of the parties' submissions reveals two pre-eminent positions. On the one hand is the notion of constitutionalism *per se* and, on the other hand, the function of astute judicial conduct in fostering the rule of law and engendering public confidence in the judiciary. The *Commentary on the Bangalore Principles of Judicial Conduct, 2007*, to which the Court was extensively referred, expounds on them as follows.

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[47] UN Doc S/2004/616 (2004), para. 6.

[48] See Eric Kabalisa Makala vs. The Attorney General of Rwanda (supra) and Raphael Baranzira & Another vs. The Attorney General of Uganda (supra)

[49] EACJ Ref. No. 1 of 2007.

> **The idea of constitutionalism involves the proposition that the exercise of governmental power shall be bound by rules, rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their permissible content. Constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty.**[50]

140. However, constitutionalism only finds expression where the rule of law is thriving and buoyant. For present purposes, the interface between an independent and impartial judiciary, and the promotion of the rule of law is articulated in the following terms:

> **The reason why judicial independence is of such public importance is that a free society exists only so long as it is governed by the rule of law. ... the rule which binds the governors and the governed, administered impartially and treating equally all who seek its remedies or against whom its remedies are sought. However vaguely it may be perceived, however in-articulated may be the thought, there is an aspiration in the hearts of all men and women for the rule of law. That aspiration depends for its fulfillment on the competent and impartial application of the law by judges. In order to**

[50] Commentary to the Bangalore Principles of Judicial Conduct, paragraph 10.

discharge that responsibility, it is essential that judges be, and be seen to be, independent.[51]

141. The role of courts in enhancing public confidence in the judiciary is highlighted in paragraph 13 of the Commentary to the Bangalore Principles, where the following observation by Justice Frankfurter in the case of **Baker vs. Carr**,[52] was adopted:

> **The Court's authority ... possessed of neither the purse nor the sword ... ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.**[53]

142. It will suffice to note here that the Bangalore Principles were formally included in the Compendium of UN Standards and Norms relating to the Administration of Justice in 2016, making them the global standard for judicial conduct.[54] They give expression to traditional judicial standards acceptable to the main legal systems – common law and civil law. The Commentary to those Principles, on the other hand, '**gives depth and strength to the Principles, and contributes significantly to furthering the global adaptation of the Principles as a universal declaration of judicial ethics.**'[55]

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[51] Ibid. at paragraph 11.
[52] Supreme Court of the United States of America (1962) 369 US 186
[53] See also paragraph 13 of the Commentary on the Bangalore Principles of Judicial Conduct.
[54] Mugenyi, Monica K, *Bangalore Principles of Judicial Conduct: A Framework for Arbitrator Conduct?*, Alternative Dispute Resolution – A Journal of the Chartered Institute of Arbitrators (Kenya Branch), Volume 8 Issue 2, 2020, p. 41 at 42.
[55] Weeramantry, C. G, Preface to the *Commentary on the Bangalore Principles of Judicial Conduct*, 2007, p. 4.

143. Turning to the Reference, the Applicant commenced his submissions on the issue under review from the absolutely infallible premise that the true administration of justice is a firm pillar of good governance. Quoting the Hon. Justice Danwitz, he then admonished judges against getting so besotted with personal convictions as to stray away from established rules of common and statutory law and thus creating legal uncertainty. He thereafter castigated the Uganda Constitutional Court and Supreme Court for having been '*highly biased and partisan*', indicting no less than the Chief Justice for *judicial fraud*, before degenerating into a diatribe on Uganda's political past and how its judiciary could have but failed to intervene.

144. We pause here to remind Mr. Mabirizi that Principle 1 of the Bangalore Principles underscores judicial independence as '**a pre-requisite to the rule of law and a fundamental guarantee of a fair trial**', judges being enjoined to exemplify their individual independence, as well as uphold the institutional independence of the judiciary they serve in. Most certainly, as aptly observed by Justice Frankfurter of the US Supreme Court, the judiciary and judges are required to be completely detached from political entanglements or '**the clash of political forces in political settlements**.'[56] That is not to say that the judiciary would abdicate its constitutional duty of adjudication when faced with disputes with political connotations. Far from it. It would be duty bound, however, to adjudicate such disputes solely on the basis of the law and the evidence without deference to the political undertones that underpin them.

145. As succinctly expressed in paragraph 28 of the Commentary to the Bangalore Principles:

[56] See the Baker vs. Carr case.

> **A case may excite public controversy with extensive media publicity. ... Sometimes the weight of the publicity may tend considerably towards one desired result. However, in the exercise of the judicial function, the judge must be immune from the effects of such publicity. A judge must have no regard for whether the laws to be applied, or the litigants before the court, are popular or unpopular with the public, the media, government officials, or the judge's own friends or family. A judge must not be swayed by partisan interests, public clamour, or fear of criticism. Judicial independence encompasses independence from all forms of outside influence.**

146. Thus the judiciary would neither play fiddle to the public gallery nor to the whims of any section of society. It should abstain as much from partisan deference to the opposition side of the divide, as to the dictates of the government in office; or, indeed, any other form of influence peddling. That is the true essence of the notion of judicial independence. Consequently, for the Applicant – a supposed expert at judicial conduct and self-styled crusader of the rule of law – to denigrate the Uganda Judiciary for refraining from embroilment in the settlement of political questions, is as self-defeating as it is preposterous.

147. A publication of the International Commission of Jurists (ICJ) titled *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioner's Guide No. 1, International Commission of Jurists, 2007, p.68* posited of lawyers:

As other individuals with public responsibilities, lawyers must conduct themselves according to ethical standards. These codes shall include norms of behavior and the possibility for lawyers to be held accountable in cases of misconduct.

148. One such global code, the *United Nations (UN) Basic Principles on the Role of Lawyers*, provides that '**lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.**'[57] The International Bar Association (IBA) echoes this in the *IBA International Principles on Conduct for the Legal Profession, 2019*, Principle 2 of which enjoins lawyers to '**at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact.**'

149. It bespeaks clearly of the mentality of the legal professional before a court when a lawyer extends his disaffection with judges' judicial decisions to extremely uncouth attacks on the persons of the said judges and the judiciary they represent. The record reveals that Mr. Mabirizi is not an advocate and therefore not subject to (or apparently aware of) the ethical standards encapsulated in the Advocates Act of Uganda, Cap. 267. We should think that the bodies responsible for the regulation of the legal profession in Uganda might wish to interest themselves in the *lacuna* created by the non-regulation of persons, not otherwise accountable to the legal profession, that elect to trample roughshod over the confines of professional legal conduct. The dire need for an ethical code that delineates acceptable

[57] UN Basic Principle 12.

professional conduct to which lawyers that do not fall within the ambit of advocates can be held to account could not be over-stated.

150. At the heart of the principle of judicial independence is the liberty of judges to adjudicate matters without any external influence or pressure whatsoever from the State, pressure groups (including civil society organizations), individuals or even other judges.[58] Indeed, Principle 2 of the *UN Basic Principles on the Independence of the Judiciary* does similarly forestall pressure or threats from any quarter whatsoever in the following terms:

> **The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressure, threats or interferences, direct or indirect, from any quarter or for any reason.**

151. In the instant case, not only do we consider with disdain Mr. Mabirizi's snide remarks with regard to judges and the Uganda Judiciary; we categorically state here that should that *modus operandi* have been employed to exert any manner of pressure, blackmail or threats upon this Court, that misadventure has most certainly been an exercise in futility.

152. It is an inescapable reality of the rule of law that every matter that is submitted to adjudication will yield a winner and a loser. There is no space in courts, this Court inclusive, for belligerence and bigotry in the guise of the enforcement of legal rights. Parties submit to adversarial justice in the full knowledge that their legal arguments may not be as unassailable as they would wish, but must of necessity

[58] See paragraph 22 of the Commentary on the Bangalore Principles of Judicial Conduct.

be tested by the courts' appreciation of the justice of a matter. Hence the emphasis in the **James Katabazi** case, citing with approval Kanyeihamba, G, Kanyeihamba's Commentaries on Law, Politics and Governance, p.14, that '**the overriding consideration in the theory of the rule of law is the idea that both the rulers and the governed are equally subjected to the same law of the land.**'

153. The Court is very alive to today's reality that external interference with the independence of the judiciary is not a preserve of the State, as some quarters would have the unsuspecting observer believe. It is alive and well, flourishing quite undeterred in the actions of a multitude of non-State actors, and self-professed paragons of civic order and democratic virtue. In the words of the Commentary on the Bangalore principles; '**modern decisions are so varied and important that independence must be predicated of any influence that might tend, or be thought to reasonably tend, to a want of impartiality in decision making. Independence of the Executive Government is central to the notion, but it is no longer the only independence that is relevant**.'[59] *(Our emphasis)* The attempt by lobbyists, pressure groups and other civic groupings to influence judiciaries in a covert bid to promote their respective agendas does smirk of interference with judicial independence, and is just as inimical to the rule of law as related State interference.

154. In the instant case, according to Mr. Mabirizi, in dealing with the cases in respect of the impugned Act the Supreme Court *'lacked courage to do justice without fear and favour, was biased, suffered from the vice of self-interest, was tardy, indolent and incompetent and had no urge, will, passion and ability to decide the cases/ disputes*

[59] Commentary to the Bangalore Principles, paragraph 11.

before it expeditiously, it fell in the romance of aggrandizement and populism hence becoming dangerous to the State and the society.'
And this behavior allegedly manifested itself in the following conduct:

I. Non-disqualification of judges who were not competent to sit, concealment of their credentials, and failing to take steps to address the complaints against them and keeping their decisions on record.

II. Bias and/ or discrimination against the Applicant in favour of the Respondent.

III. Decisions that were neither logical nor coherent, or in compliance with Ugandan law or previous decided cases; a final pronouncement that was different from the actual decisions, and failure to determine the disputes expeditiously.

155. The first two complaints above speak to the subject of judicial ethics and/ or conduct, while the latter issue goes to the substance of the impugned judgment. In terms of unethical conduct, it is the Applicant's contention that judges that were riddled with conflict of interest owing to their purported proximity to the Ugandan Head of State declined to recuse themselves from the Appeal or otherwise address the complaints against them; concealed their credentials; were not otherwise competent to sit in the matter and kept their decisions on record. He urged the Court to set aside the impugned decision on account of the alleged conflict of interest considerations.

156. The Respondent countered the Applicant's allegations with the contention that a procedure contrary to that correctly advocated in the **Shell (U) Ltd** case had been adopted for the judges' recusal, but in

any case the Applicant had as at the commencement of the Appeal in the Supreme Court abandoned his recusal 'applications' in respect of Justice Katureebe and Justice Tumwesigye. The point was also made that the issue of recusals was time-barred.

157. For clarity on the correct procedure for an application for recusal of a judge, we reproduce the decision in the **Shell (U) Ltd** case that was relied upon by both parties:

> **The usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in chambers with the judge or judges in the presence of (the) opponent. The grounds for recusal are put to the judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being refused by the judge the applicant would, if so advised, move the application in open court.**

158. That decision resonates with a similar approach adopted by this Court in the case of **The Attorney General of the Republic of Kenya vs. Prof. Peter Anyang Nyong'o** (supra). It was held:

> **With regard to an application for a judge to recuse himself from sitting on a Coram, as from sitting as a single judge, the practice in the East African Partner States, and which this Court would encourage litigants before it to follow, is similar to what was succinctly described by the Constitutional Court of South Africa in** *The President of the Republic & 2 Others vs. South African Rugby Football Union & 3 Others (Case CCT 16/ 98) (the S.*

A Rugby Football Union case). **That court said at p. 59 of its judgment –**

'The usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in chambers with the judge or judges in the presence of (the) **opponent. The grounds for recusal are put to the judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being refused by the judge the applicant would, if so advised, move the application in open court.'**

159. In the instant case, letters were written to the judges from whom recusal was sought. Thereafter, whereas the Constitutional Court took no further action and the judges in question did not recuse themselves; the Supreme Court did, on the basis of the letters written, invite the Applicant to make his application before the cited judges. It seems to us that although the cited case law advocates for an oral application before the judge from whom recusal is sought as a first step in recusal applications, the Applicant herein opted to write to the judges to take the same action. Clearly, that was incorrect procedure. However, in our view, the more fundamental question would be whether a letter that puts judges on notice (albeit in the wrong manner) that they are the subject of possible recusal proceedings is fatal to an application for recusal. We would think not. Indeed, as demonstrated by the Supreme Court, such a letter could serve as a basis for judicial officers to either submit themselves to the oral application for recusal or pre-empt the application by disqualifying themselves on the basis of its contents.

160. Be that as it may, turning to the allegations themselves, the Affidavit of Mr. Opifeni dated 29th November 2019 is most instructive on what transpired in the Supreme Court. We reproduce paragraphs 7 – 11 below.

> 7. *THAT I know that in a letter dated 16th and 17th December 2018, the Applicant wrote to the Supreme Court expressing his desire to make recusal applications against Chief Justice Bart Katureebe and Justice Jotham Tumwesigye.* Copies of the letters are hereto attached and marked B and C respectively.
>
> 8. *THAT I know that on 18th December 2018, the Chief Justice and the Justices of the Supreme Court summoned all parties in Consolidated Appeal No. 2 of 2018;* Male H. Mabirizi versus Attorney General *to appear in Court on 9th January 2019 to give the Applicant an opportunity to raise the reasons for his recusal application.* A copy of the letter summoning the parties to court is hereto annexed and marked D.
>
> 9. *THAT I know that when the parties appeared before their lordships, the Applicant requested that the recording equipment be switched off so that he could make his recusal applications off the court record and this request was granted.*
>
> 10. *THAT I know that the Applicant then informed their lordships that after due consideration he had decided to voluntarily abandon his recusal applications and requested that the Court proceeds to hear his appeal on its merits.*
>
> 11. *THAT I know that upon the Applicant's withdrawal of his recusal applications, the Chief Justice directed the Applicant to put this position in writing for the Court record which was done.* A copy of the letter dated 9th January 2019 is hereto annexed and marked E.

161. We have perused Annexes A, B and E as referred to above, and they do indeed reflect Mr. Opifeni's averments. That being so, not only were the recusal applications against the learned Chief Justice

and Justice Tumwesigye withdrawn by the Applicant, any attempt to revive them before this Court would not meet the time limit prescribed in Article 30(2) of the Treaty. It is therefore unconscionable, dishonest and a mockery of justice for the Applicant to suggest that no action was taken by the Supreme Court with regard to his recusal applications. The irrefutable fact of the matter is that he withdrew the said applications. It is not true, either, that the two learned judges declined to recuse themselves from the Appeal or otherwise address the complaints leveled against them. If anything, although the Applicant had used an incorrect procedure for recusal, to wit, a letter; the judges graciously availed themselves to him to present his recusal applications in accordance with the procedure stipulated in the **Shell (U) Ltd** case.

162. In any event, the Applicant's allegations against the two learned judges would appear to be devoid of merit. To begin with, paragraph 88 of the Commentary to the Bangalore Principles postulates that, provided that a judge leaves behind past political affiliations or partisan interests upon taking the judicial oath of office, '**experience outside the law, whether in politics or in any other activity, may reasonably be regarded as enhancing a judicial qualification rather than disabling it.**' Paragraph 89 of the same Commentary similarly negates the soundness of an objection on the basis of a judge's '**social, educational, service or employment background.**' We therefore find that the two learned judges' past political affiliations, if any, as well as their educational, service or employment

background were not a sound basis for their recusal, had the Applicant considered going down that route.[60]

163. The Applicant did further opine that the Honourable Justice Tumwesigye, as an Acting Justice of the Supreme Court, was incompetent to preside over the constitutional appeal when there were substantive Justices of the Supreme Court available. We find no such provision in the Constitution. For ease of Reference, the applicable constitutional provisions are reproduced below.

> 142. Appointment of judicial officers.
>
> 1. .....
>
> 2. **Where –**
>
> **i. The office of a justice of the Supreme Court ... is vacant;**
> **ii. .....**
> **iii. .....**
>
> **The President may, acting on the advice of the Judicial Service Commission, appoint a person qualified for appointment as a justice of the Supreme Court ... to act as such justice ... even though that person has attained the age prescribed for retirement in respect of that office.**
>
> 143. Qualifications for appointment of judicial officers.
>
> 1. **A person shall be qualified for appointment as –**
>
> a. .....
>
> b. .....
>
> c. **A justice of the Supreme Court if he or she has served as a justice of Appeal or a judge of the High Court or a court of similar jurisdiction to such a court or has practiced as**

[60] See also Locabail (UK) Ltd. Regina vs. Bayfield Properties Ltd (2000) QB 451.

an advocate for a period not less than fifteen years before a court having unlimited jurisdiction in civil and criminal matters.

164. Article 143(1)(c) is couched in such obligatory terms as would suggest that an Acting Justice of the Supreme Court must be as eligible for appointment as a Supreme Court judge as a substantive justice of the same court. They would thus *ipso facto* possess the same levels of competency. We might add that Basic Principle 14 of the *UN Basic Principles on the Independence of the Judiciary* explicitly delineates the assignment of cases to judges as an internal matter of judicial administration. Any objection to that internal judicial function would thus smirk of the very external interference that is sought to be forestalled in Basic Principle 1 of the same instrument. The cited Articles read as follows:

> **1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.** *(our emphasis)*
>
> **14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.**

165. Try as we might, we find nothing under Article 128(8) of the Uganda Constitution that would impede the independence of an acting judge. Whereas reference therein is made to a substantive holder of the office of a judge, there is no provision therein or elsewhere for the abolition of the office of an acting judge. We take

the view that it would be a tad speculative to impute insecurity of tenure on an acting judge on that account alone, as was done in this case.

166. With regard to the conflict of interest allegations against Lady Justice Arach Amoko, we find that no application for recusal was ever presented to her. Therefore, to the extent that they are being raised for the first time herein, the said allegations are not time-barred. However, we find no evidence on record either that the judge's spouse serves in the capacity of Ambassador as alleged; or, if so, that he serves in that designation at the behest of the President of the Respondent State and the said President was so intricately involved with his current and past appointments as to cloud the judge's impartiality in *Constitutional Appeal No. 2 of 2018*.

167. As was quite correctly opined by learned Counsel for the Respondent, judicial officers are bound by the oath of office they take upon assumption of office. In the absence of evidence to the contrary, they would be presumed to abide by that oath. Hence the presumption of impartiality unless there is evidence to the contrary as underscored by the European Court of Human Rights in the case of **Daktaras vs. Lithuania**.[61] The burden of proof of that allegation lay with the Applicant and did not ever shift to the Respondent. We would therefore decline to set aside the impugned judgment on the basis of unfounded conflict of interest allegations.

168. The Applicant did also raise a curious complaint against the foregoing judges for having kept their judgments on record. We construed this complaint in the context of *Civil Application No. 6 of*

[61] ECtHR Judgment of 10th October 2000, Series 2000-X, paragraph. 30.

2019 that sought a review by the Supreme Court of the impugned judgment. We should hope (with most bated breath) that the Applicant did not expect the learned Justices of the Supreme Court to simply smuggle their respective judgments off the court record at the prompting of his application. As it is, to our utter consternation, we learnt of the recent withdrawal of the application by no less than the Applicant himself. The Supreme Court then did the only prudent thing at its disposal, which was to record the withdrawal of the application but leave all the judgments rendered in *Civil Appeal No. 2 of 2018* intact on the record, as they very well should. We shall not belabor that issue further; clearly the Applicant totally misdirected himself on this. We revert to the withdrawn application later in this judgment.

169. It is to the question of bias that we now turn. The Applicant faulted the Supreme Court for endorsing the discriminatory treatment he had experienced before the Constitutional Court whereby he was 'evicted' from seats reserved for the Bar in court on account of being self-represented. He further faulted the Supreme Court for denying him costs on the same premise. In his view the alleged discrimination contravened Articles 28(1) and 44(c) of the Uganda Constitution, Principle 6 of the *Uganda Judicial Code of Conduct* and the fundamental and operational principles of the Treaty. He did also cite the framing of the issues for determination by the court, and the acceptance and validation of the Respondent's late submission (both actions *suo moto*), as well as the reduction of the time allotted to him for submissions in rejoinder, as illustrations of the Supreme Court's partiality towards the Respondent.

170. The *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioners'*

Guide Series No. 1, International Commission of Jurists, 2004, p.27 states of bias in courts:

> **The impartiality of a court can be defined as the absence of bias, animosity or sympathy towards either of the parties. However, there are cases in which this bias will not be manifest but only apparent. That is the reason why the impartiality of courts must be examined from a subjective as well as an objective perspective.**

171. We draw inspiration from the European Court of Human Rights that proposes two tests of impartiality as follows:

> **According to the court, a judge or tribunal will only be impartial if it passes the subjective and objective tests. The subjective test 'consists in seeking to determine the personal conviction of a particular judge in a given case.'[62] This entails that 'no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is presumed unless there is evidence to the contrary.'[63] The objective requirement of impartiality 'consists in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt' as to his or her impartiality.[64] Under the court's jurisprudence, if either test fails, a trial will be deemed unfair.[65]**

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[62] Tierce & Others vs. San Marino, ECtHR judgment of 25th July 2000, Series 2000-IX, para. 75.
[63] Daktaras vs. Lithuania, ECtHR judgment of 10th October 2000, Series 2000-X, para. 30.
[64] Padovani vs. Italy, ECtHR judgment of 26th February 1993, Series A257-B, para. 25.
[65] The *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioners' Guide Series No. 1, International Commission of Jurists, 2004, pp. 27, 28*.

172. Under the second test above, '**it must be determined whether, irrespective of the judge's personal conduct, there are ascertainable facts that may raise doubts as to his impartiality.**'[66]

173. In the instant case, we find no evidence on record of the personal prejudice or bias of the individual Justices of the Supreme Court that heard *Constitutional Appeal No. 2 of 2018*. Their impartiality is thus to be presumed. The said court would accordingly pass the subjectivity test. With regard to the objectivity test too, we find no ascertainable evidence of either external influence or other incidence of partiality, as alleged by the Applicant. The legal regime that governs legal practice in the Respondent State is instructive to our determination of this issue.

174. The legal profession in Uganda is regulated by the Advocates Act, Cap. 267 and subsidiary legislation enacted thereunder. That Act restricts the right of audience before courts of record in Uganda to such persons as are holders of a recognized degree in law,[67] are admitted on the roll of advocates[68] and have been certified to so appear by possession of a valid practicing certificate.[69] The requisite qualification for enrollment on the roll of advocates is laid out in Regulation 2(a) of the *Advocates (Enrollment and Certification) Regulations, Statutory Instrument 267-1*. For Ugandan citizens that are ordinarily resident in Uganda and earned their law degree from a Ugandan university (such as the present Applicant) the qualification expected of them would be a Diploma in Legal Practice awarded

[66] Paragraph 53 of the Commentary to the Bangalore Principles.
[67] Section 8(5) of the Act.
[68] Section 8(1).
[69] Section 11(3).

upon successful completion of a postgraduate bar course conducted by the Law Development Centre.

175. In the instant case, the Justices of the Supreme Court did justify the seating arrangements allocated to the Applicant on the very logical premise that presence at the Bar was the preserve of barristers and enrolled advocates. It is not indicative of bias that alternative sitting arrangements would be made for a self-represented party cum lawyer that is not qualified to practice his trade before the courts. In those circumstances, s/he would appear before the court as a litigant, his/ her being the holder of a degree in law notwithstanding. That indeed was the capacity in which the present Applicant appeared before the domestic courts in Uganda.

176. We find no act of discrimination in the sitting arrangements made in the Supreme Court for the Applicant and other litigants. Indeed, we find no evidence on record that the other litigants in the matters before that court were seated at the Bar. We are constrained to state here that whereas the office of the Attorney General appears before courts both as a party and legal counsel, section 6(1) and (2)(a) of the Advocates Act do classify attorneys from the Attorney General's Office in the category of persons that are qualified as legal practitioners that are exempt from possession of a practicing certificate in order to have full right of appearance at the Bar. They read:

> **6.** Certain persons exempted from provisions of the Act.
>
> 1. **Every person to whom this section applies shall, if duly qualified as a legal practitioner (by whatever name called) in any country at the time of his or her appointment to this office, be entitled in connection with the duties of his or her office to act as an**

advocate but shall not, unless the contrary is expressly provided by regulations made by the Law Council, be subject to this Act.

2. This section applies to—

a. any person holding an office in the service of the Government, a district administration, or any city, municipal or town council;

177. Accordingly, aside from the office of the Attorney General that enjoys differential status conferred by law, as a litigant the Applicant was entitled to equality of treatment with other litigants; not equal treatment with advocates, of which he is not. In fact, the evidence on record is that he was extended preferential treatment as compared to other litigants, and given special sitting arrangements on account of his being self-represented. We cannot fault that.

178. Quite to the contrary, we find that such arrangements are in tandem with paragraph 61 of the Commentary to the Bangalore Principles as cited to us by the Applicant. That standard places a duty upon judges (and by necessary implication, courts) '**to ensure that judicial proceedings are conducted in an orderly and efficient manner**.' This duty applies as much to the actual judicial proceedings as to the administrative arrangements made therefor. Litigants' sitting arrangements is one such administrative arrangement. Hence, a court faced with a self-represented litigant would be under a duty to make appropriate arrangements to ensure that s/he sits in a place where he can be seen and heard by the court without, as far as possible, accessing the Bar.[70]

[70] Unless such an eventuality is inevitable, for instance, the EACJ permits self-represented litigants a seat at the Bar on the pragmatic basis of ready access to the audio facilities provided by the Court.

179. The sitting arrangements in the Supreme Court thus entrenched rather than negated the principle of equality in the Bangalore Principles, which essentially enjoins courts to treat all litigants before them equally. In the matter before us, in being denied a seat at the Bar, the Applicant was treated in the same manner as was extended to other litigants before the court. We therefore find no violation of his right to a fair hearing in that regard, and accordingly no contravention of either Articles 28(1) and 44(c) of the Uganda Constitution or Articles 6(d) and 7(2) of the Treaty.

180. We state as much in the full knowledge of Basic Principle 19 of the *UN Basic Principles on the Role of Lawyers*, which reads:

> **No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles**.

181. In the same spirit, the *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioners' Guide Series No. 1, International Commission of Jurists* cautions courts against non-acknowledgment of lawyers' qualifications '**except in cases in which the lawyer has been disbarred or disqualified following the appropriate procedures.**'[71]

182. Our understanding of the foregoing global standards is that lawyers that are qualified to appear before courts shall not be denied appearance therein, unless they have since been disbarred or

[71] Supra at p.64.

otherwise disqualified. Inherent therein is the inference that there are certain parameters that would qualify a lawyer to practice his/ her trade before the courts. One must be called to the Bar or otherwise similarly qualified to prosecute matters before courts. In the instant case, it is common ground herein that the Applicant is not an enrolled advocate or otherwise called to the Bar. Accordingly, under section 8(1) of the Advocates Act of Uganda and Regulation 2(a) of *Advocates (Enrollment and Certification) Regulations*, he would not have right of appearance at the judicial Bar. He may access the court as a self-represented litigant, which he did, but that would not warrant him a seat at the Bar in court.

183. This would not amount to discrimination, in our considered view, but acknowledgment by the court that he can only be categorized as a party and (as such) be extended equal treatment with other parties; he could not have been treated as an advocate. Obviously, had the Applicant been a self-represented advocate but was treated differentially from other advocates at the Bar on account of doubling as a party, any connotations of discriminatory treatment would be valid. It does then follow that providing alternative sitting arrangements to the Applicant as was done by the Supreme Court of Uganda did not amount to discrimination but, rather, the valid acknowledgment that he did not warrant a seat at the Bar. The fact of being self-represented is, in our estimation, irrelevant to that consideration.

184. On the issue of professional fees, we note that before the Constitutional Court was a Consolidated Petition in respect of five

petitions.[72] The Constitutional Court awarded Uganda Shillings 20,000,000 (twenty million) as professional fees to Constitutional Petitions No. 5, 10 and 13 of 2018 but declined to award the same to the Applicant's *Petition No. 49 of 2017* on account of his having been self-represented.

185. On their part, the majority Justices of the Supreme Court declined to interfere with the professional fees awarded by the Constitutional Court. Whereas Justice Opio Aweri invoked the Applicant's not being an advocate to endorse the lower court's refusal to award him professional fees under the *Advocates (Remuneration and Taxation of Cost) Regulations*; Lady Justice Arach Amoko and Justice Tumwesigye (with the learned Chief Justice in general agreement with the former) premised their non-interference on the absence of proof of the improper exercise of the lower court's discretion. Lady Justice Amoko opined that an appellate court would only interfere with the discretion exercised by a court of original jurisdiction in the following instances:

i. **Where the judge misdirects himself with regard to the principles governing the exercise of discretion;**
ii. **Where the judge takes into account matters that he ought not to consider; or fails to take into account matters that he ought to consider;**
iii. **Where the exercise of discretion is plainly wrong.**[73]

[72] Constitutional Petitions No. 49 of 2017, Male Mabirizi Kiwanuka vs. The Attorney General; No. 3 of 2018, Uganda Law Society vs. The Attorney General; No. 5 of 2018, Gerald Karuhanga Kafureka & Others vs. The Attorney General; No 10 of 2018, Prosper Businge & Others vs. The Attorney General, and No. 13 of 2018, Abaine Jonathan Buregyeya vs. The Attorney General.
[73] See American Express International Banking Ltd vs. Atul (1990 – 94) EA 10 (Supreme Court of Uganda).

186. We agree with the principles stated above. The question then is whether the Supreme Court rightly declined to interfere with the Constitutional Court's decision not to grant the Applicant professional fees.

187. It is necessary to remind ourselves, as we now do, that a cause of action before this Court accrues from an 'Act, regulation, directive, decision or action' that is unlawful *per se* or one that is an infringement of any Treaty provision.[74] There is, therefore, a two-faceted duty upon the Applicant: either to prove that by endorsing the Constitutional Court's decision not to award him professional fees, the Supreme Court decision violated the laws of Uganda, was illegal *per se* and thus flouted the rule of law principle encapsulated in Articles 6(d) and 7(2); or that the said decision directly contravenes those or any other Treaty provision.

188. As we have observed hereinabove, the Applicant was given audience before the domestic courts in Uganda as a self-represented litigant not as an advocate or lawyer, for that matter. On the other hand, the professional fees that were awarded by the Constitutional Court were in respect of the professional legal services that had been rendered to the designated petitions in the public interest (public interest litigation). To the extent that he was in court as a self-represented litigant, the Applicant's petition could not have benefited from an award of professional fees reserved for advocates that had been retained by his co-petitioners.

189. The foregoing position is in tandem with the traditional approach to the non-award of costs to self-represented litigants. The rationale to

[74] See Article 30(1) of the Treaty.

that approach is aptly articulated in the Canadian case of **Franey vs. Franey**[75] as follows:

> **Inasmuch as the self-represented litigant has not expended any money to engage counsel, then the entitlement to an allowance for counsel as a partial indemnity does not exist.**

190. However, in the case of **Cabana vs. Newfoundland and Labrador** (supra), to which we were referred by the Applicant, it was observed that the law on that issue had since evolved. Citing the developments in the cases of **Fong vs. Chan**[76] and **Hope vs. Pylypow et al**[77], it was opined to be accepted today that **'the purposes of costs include compensation (something greater in scope than strict indemnification), deterrence and encouragement of settlement and facilitating access to the courts.'**[78]

191. In the **Fong vs. Chan** case, it was candidly observed:

> **Both self-represented lawyers and self-represented lay litigants may be awarded costs and such costs may include counsel fees .... It seems difficult to justify a categorical rule denying recovery of costs by self-represented litigants.**

192. The court in the **Cabana** case then held:

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[75] (1997) CanLii 14632 (NL CA).
[76] (1999) CanLii 2052 (ON CA), 46 O. R (3d) 330 at paragraph 22.
[77] (2015) SKCA 26 at paragraph 56.
[78] Reference was also made to **British Columbia (Ministry of Forests) vs. Okanagan Indian Band (2003) 3 S. C. R. 321 at paragraphs 19 - 26.**

Accordingly, I hold that in principle a successful self-represented litigant may claim, as part of taxed costs, an amount representing at least a portion of the time and effort he or she put into the case in the place of that which otherwise would have been expended on the case by a lawyer had one been retained.

193. Consequently, it would appear that in premising its decision not to award professional recompense to the Applicant on account of his being self-represented, the Constitutional Court adopted the traditional judicial approach to the issue of professional fees. The Supreme Court was reluctant to interfere with the Constitutional Court's exercise of its judicial discretion thus seemingly adopting the same approach. We cannot fault the Supreme Court on that. We find that the Constitutional Court decision, rooted as it apparently is in a longstanding judicial approach, the said trial court neither misdirected itself on the principles governing the exercise of discretion; nor took into account matters that it ought not to have considered, or otherwise exercised its judicial discretion wrongly.

194. The Applicant bore the onus of proof of a contrary position of the law in Uganda so as to impute illegality to the Constitutional Court's decision. He did not cite any statutory law that succinctly supports his claim to professional fees. Instead, the domestic case law that he did cite either pertained to the right to a fair hearing and was not pertinent to the issue under consideration, or originated from the High Court of Uganda and could not by any stretch of imagination constitute binding case law either on the Constitutional Court or Supreme Court.

195. On the other hand, he did refer us to case law from foreign jurisdictions to support his claim. However, that case law would not represent the legal position in Uganda given that it is not binding on the courts in that jurisdiction. Therefore, although the **Cabana** case might reflect the evolving position in Canada, until such time as that position is formally adopted by the courts in Uganda, it would only have persuasive value to them. Accordingly, the Supreme Court correctly refrained from interfering with the Constitutional Court's decision.

196. We would therefore disallow the proposition that the Supreme Court's decision on professional fees was driven by its partiality to the Respondent. That fact has not been established before us. On the contrary, the acknowledgment in the **Cabana** decision (a 2016 decision) that the **'movement away from the traditional idea of denying any compensation, or equivalent counsel fees, to successful unrepresented litigants'** is a new judicial approach, would lend credence to the view we do hereby take that the decisions of both domestic courts reflect their appreciation of a long-standing albeit apparently evolving judicial tradition.

197. We similarly reject the notion that judicial actions taken in pursuit of astute case management were in fact driven by bias and partiality. Judicial case management of civil litigation has been opined to be one of the central planks of civil proceedings. Thus in **Blackstone's Civil Practice**[79] it is stated:

> **Ultimate responsibility for the control of litigation should move from the litigants and their advisers to the court.**

[79] (2005), p. 448, para. 42.1.

> **Under the** (English) **CPR, the legal profession is intended to perform its traditional adversarial role in a managed environment governed by the courts. One of the purposes behind the CPR is to require the parties to focus their efforts on the key issues rather than allowing every issue to be pursued regardless of expense and time. Case management is seen as the principal means by which the judiciary will ensure this happens.**

198. We dare say that the foregoing position is equally applicable to Uganda's CPR and, most certainly, pertinent to the situation that the Supreme Court of Uganda found itself with regard to *Constitutional Appeal No. 2 of 2018*. Faced with a whopping eighty four (84) grounds of appeal, not to mention that those grounds of appeal were in respect of only one of the five consolidated appeals, it was imperative that the court guide the issue identification process with due consultation with the parties. That indeed is the import of Order 15 rule 1(5) of the Ugandan CPR. That rule places the duty of framing issues upon the court albeit **'after such examination of the parties or their advocates as may appear necessary'**, so as to ascertain the areas of divergence between the parties. We are of the decided view that once the parties' input was secured, they owned the issues as framed. We therefore disallow the allegation of bias by the Supreme Court on that account.

199. In like vein, we would disallow the proposition that the Supreme Court's proactive decision to accept the Respondent's submissions that had been filed out of time, or the reduction of the time allotted to the Applicant in submissions in rejoinder, are indicative of partiality in favour of the Respondent. Not only does paragraph 61 of the

Commentary to the Bangalore Principles recommend a degree of firmness in the management of judicial proceedings to ensure that they are conducted in an orderly and efficient manner; more importantly, Article 28(1) of the Uganda Constitution underscores the importance of an expeditious hearing to the notion of a fair trial. The possibility of unnecessary quibbling by the parties on the question of late pleadings would have been the direct antithesis to an expeditious hearing.

200. Paragraph 107 of the Commentary to the Bangalore Principles (as invoked by the Applicant), on altering the reasons for an oral decision, is completely irrelevant to reduced time for submissions. Time allotted to submissions is not a reasoned decision so as to fall within the ambit thereof.

201. From a judicial ethics perspective, therefore, we are unable to impeach the conduct of the Uganda Supreme Court in its handling of *Constitutional Appeal No. 2 of 2018*. We find that the Applicant's right to a fair hearing was not curtailed, the applicable laws of Uganda were not flouted, and neither was the principle of rule of law enshrined in Articles 6(d) and 7(2) of the Treaty infringed. It is so held.

202. It is to the jurisprudential worth of the Supreme Court judgment that we now turn. We commence our interrogation thereof with a consideration of the conflict of interest issues raised in respect of the two afore-named Constitutional Court judges. This begs the question as to whether, the said judges having opted to ignore the Applicant's letters, there is still a live dispute in that respect. In our understanding, on the basis of the **Shell (U) Ltd** and **Prof. Peter**

Anyang' Nyongo cases above, an application for recusal can only be placed before the judge(s) from whom recusal is sought during the pendency of the case. The judicial proceedings in the Constitutional Court terminated on 27th July 2018 when its judgment was rendered. The matter thereupon went on appeal to the Supreme Court. This Court has held earlier herein that it is the Supreme Court decision and proceedings that are in issue presently for purposes of the Respondent State's rule of law credentials, related matters in the Constitutional Court being decidedly time-barred. What then can be salvaged of the Applicant's complaints against the two Justices of the Constitutional Court?

203. In our considered view, the complaints would have been useful for purposes of interrogating the veracity of the Supreme Court decision that upheld the impugned judges' decisions, the purported conflict of interest notwithstanding. Indeed, in paragraph 3(3)(VIII) of the Reference, the failure of the two courts to '**ensure that objections to the participation of some justices of the two courts in the proceedings are adequately addressed**' was succinctly pleaded as a matter in contention. A related pleading is to be found in paragraph 3(3)(XI) where the Applicant faults the Supreme Court for '**refusing or neglecting to set aside the purported judgments entered by such conflicted justices despite applying for the same.**' Therefore, this Court would have been obligated to interrogate the Supreme Court's handling of the conflict of interest issues raised in the Constitutional Court for what it is worth in terms of compliance with the rule of law principle enshrined in the Treaty.

204. However, having carefully considered the material on record, we find that no issue whatsoever was framed in that court on the non-

recusal or partiality of Lady Justice Musoke and Justice Barishaki. The issues for determination as framed before the Supreme Court are reproduced below:

i. *Whether the learned Justices of the Constitutional Court misdirected themselves on the application of the basic structure doctrine.*

ii. *Whether the learned Justices of the Constitutional Court erred in law and fact in holding that the entire process of conceptualizing, consulting, debating and enactment of Constitutional (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda and the Rules of Procedure of Parliament.*

iii. *Whether the learned Justices of the Constitutional Court erred in law and fact when they held that the violence/ scuffle inside and outside Parliament during the enactment of the Constitutional (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda.*

iv. *Whether the learned Justices of the Constitutional Court erred in law when they applied the substantiality test in determining the petition.*

v. *Whether the learned majority Justices of the Constitutional Court misdirected themselves when they held that the Constitutional (Amendment) Act No. 1 of 2018 on the removal of the age limit for the President and Local Council V offices was not inconsistent with the provisions of the 1995 Constitution.*

vi. *Whether the Constitutional Court erred in law and fact in holding that the President elected in 2016 is not liable to vacate office on attaining the age of 75 years.*

7(a) *Whether the learned Justices of the Constitutional Court derogated the appellants' right to a fair hearing, unjudiciously exercised their discretion and committed the alleged procedural irregularities.*

7(b) *If so, what is the effect of the decision of the Court.*

8. What remedies are available to the parties?

205. As can be deduced from the issues, matters to do with the non-recusal of judges in the Constitutional Court trial process were never in contention before the Supreme Court. Nonetheless, given the generality of *Issue No. 7* above, we took the liberty to meticulously scrutinize the 84 grounds of appeal specifically advanced by the Applicant before the Supreme Court. None of them made any reference whatsoever to the non-recusal of the two Justices of the Constitutional Court. The grounds of appeal are indicative of his pleadings before the Supreme Court, from which the issues for determination would cascade. If they do not reflect an issue in contention, it cannot be framed as such. From the material on record, including the Applicant's very own submissions, the issues for determination in the Supreme Court were framed by the court and availed to the parties' lawyers for their input. There is nothing on record to indicate that Mr. Mabirizi, as a self-represented litigant, was not availed the said issues. Having endorsed them and indeed prosecuted his Appeal on that basis, we are unable to fathom how he can purport to impugn the resultant decision on matters that were evidently not in issue in it.

206. **Halsbury's Laws of England**[80] postulates as follows on estoppel by conduct:

> **Parties to litigation who have continued the proceedings with knowledge of an irregularity of which they might have availed themselves are stopped from afterwards setting it up.**

[80] Volume 16(2), p. 8, para. 1058.

207. In the instant case, the chronology of events is that the Applicant did by letter seek the recusal of Lady Justice Musoke and Justice Barishaki, but he neither got a response thereto nor the desired action of recusal. He nonetheless submitted himself to a Coram of the Constitutional Court that included the judges in respect of whom he had sought recusal. Despite the fact that a judicial officer's conflict of interest is an established ground of appeal or review, as demonstrated by the **R. vs. Bow** case that he cited before this Court, the Applicant did not raise the issue as a ground of appeal in the Supreme Court. We take the view that, having not only continued with the proceedings in the Constitutional Court with full knowledge of that procedural irregularity but also refrained from raising it in the Supreme Court, the Applicant is forestalled by the doctrine of estoppel from raising the issue before this Court.

208. As was observed by the Appellate Division of this Court in **Attorney General of the Republic of Uganda & Another vs. Omar Awadh & 6 others** (supra), '**he who claims a right, must not (like Rip Van Wrinkle) sleep or slumber on his right**.' Courts do not sit in vain, neither do they second-guess litigants' minds or entertain a litany of complaints that are not pleaded. They frame, interrogate and determine issues as raised in the pleadings. It is the Supreme Court decision that is in issue before us not the conflict of interest issues that were not raised before it. We cannot fault that decision for not straying into matters that were never put to the court. Most certainly we fail to deduce the wrongful judicial conduct or rule of law violation in the restriction of a judicial decision to the issues in contention before the court. We therefore find no Treaty violation as alleged.

209. We now revert to the matter of judicial fraud. It was raised by the Applicant in the Reference, as well as in *Supreme Court Civil Application No. 6 of 2019* – an application for the review of the impugned judgment by the Supreme Court. The Respondent protested this *modus operandi.* It was argued that the Applicant was before this Court prematurely and, pursuant to the flexible approach to the non-exhaustion of local remedies proposed in the **Plaxeda Rugumba** case, should be re-directed back to the Supreme Court to conclude the prosecution of the above application prior to accessing this Court. After submissions but before the rendering of this judgment, the Applicant did on 23rd July 2020 withdraw *Civil Application No. 6 of 2019* from the Supreme Court.[81] It is not lost on us that the Applicant's intention to withdraw the said application had been communicated to the Supreme Court vide a letter dated 16th July 2020, two days after the hearing of parties in this Reference in submissions. Quite clearly, the Applicant's action was intended to and did have the effect of defeating the point of law raised by the Respondent.

210. Be that as it may, the said point of law is not in the nature of a preliminary objection so as to benefit from the prohibition espoused in **The Attorney General of the Republic of Uganda vs. Media Legal Defence Initiative & 19 Others**,[82] that '**a party cannot be permitted to defeat a preliminary objection notice of which has already been given**.' In the instant case, the point of law on exhaustion of local remedies was not notified to the Applicant in the Answer to the Reference or otherwise. Paragraph 3 of the said Answer only

[81] The Court is in receipt of an Order of the Uganda Supreme Court dated 23rd July 2020 and granting the Applicant's application to withdraw *Civil Application No. 6 of 2019* from that court.
[82] EACJ Appeal No. 3 of 2016, p.11, para. 28(i).

highlights the points of law that were considered under Issues 1, 2 and 3 hereof.

211. Although it was clarified in **Attorney General of the Republic of Uganda vs. Media Legal Defence Initiative & 19 Others** (supra) that a point of law '**may be argued whether raised in the pleadings or not**',[83] the Court nonetheless observed that a preliminary objection in that context would be restricted to '**a point of law ... which if argued successfully may dispose of the suit.**'[84] That is not the effect of the point of law before us presently. Even if the Court did agree that the issue of judicial fraud was before it prematurely, that issue alone would not dispose of the Reference so as to categorize the point of law raised as a preliminary objection. Consequently, disagreeable as it might be, the Applicant's course of action cannot be impugned on the premise that it seeks to defeat a preliminary objection.

212. The Respondent did, however, raise the substantive defense that the Supreme Court's mistake in respect of the 4:3 decision on the substantiality test can be cured by Rule 35 of the *Judicature (Supreme Court Rules) Directions*. We are in complete agreement with this proposition. First and foremost, we are not persuaded that the mis-pronouncement by the Honourable Chief Justice corresponds to the definition of fraud in **Fredrick J. K. Zaabwe vs. Orient Bank & Others** (supra), to which we were referred by the Applicant. In that case, fraud was defined as follows:[85]

[83] Ibid. at p. 12, para. 28(iv).
[84] Ibid. at p.12, para. 28(v).
[85] Black's Law Dictionary, 6th Edition, p. 660 cited with approval.

An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to or to surrender a legal right. A false representation of a matter of fact, whether by words or conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth, or look or gesture ... A generic term, embracing all multifarious means with which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning dissembling, and any unfair way by which another is cheated. 'Bad faith' and 'fraud' are synonymous, and also synonymous of dishonesty, infidelity, faithlessness, perfidy, unfairness etc ...

213. Even more compelling is the distinction drawn in the same case between fraud, on the one hand; and an error, mistake or other incidence of negligence, on the other. The gist of that distinction is that '**as distinguished from negligence, it** (fraud) **is always positive, intentional**.' This definition of fraud thus bespeaks an intentionality that we neither detect in the learned Chief Justice's pronouncement, nor was it duly established before us. We take the view, therefore, that the pronouncement in question falls squarely

within the errors and mistakes envisaged under Rule 35 of the *Judicature (Supreme Court Rules) Directions*.

214. Perhaps more importantly, the Applicant's assertion that the mis-pronouncement denied him victory in the Supreme Court is not borne out by the record. It was the decision of Lady Justice Arach Amoko on the substantiality test that was erroneously included among those that had answered that issue in the negative. A reading of that judgment in its entirety reveals that despite finding for the Applicant on the substantiality test, in the final analysis the learned judge decided the Appeal in favour of the Respondent. Hence the pronouncement of the Honorable Chief Justice in the operative part of his judgment that by majority decision of 4 to 3, the decision of the Constitutional Court had been upheld and the appeal failed. Undoubtedly, the court having answered Issues 2, 5 and 7(a) as it did, there was nothing left of the substratum of the Appeal.

215. Rule 35, meanwhile, is couched in language that necessitates the presentation of an error in a judgment or order before the same court that occasioned it. That would be the Supreme Court of Uganda, and not this Court. We therefore decline the invitation extended to us to rectify the error apparent on the face of the impugned judgment. In any event, we impute no contravention of the rule of law principle on account thereof.

216. In terms of the substance of the judgment, the Applicant faulted the Supreme Court for endorsing the Constitutional Court's refusal to summon the Right Honourable Speaker of the House, and hence relying on non-existent evidence and unsubstantiated statements by the Respondent with regard to the parliamentary processes in issue.

217. In **Mani, V. S, *'International Adjudication: Procedural Aspects'***, it was opined that fundamental procedural rights in international adjudication find expression in the principle of *audi alteram partem* (or due process) and the principle of equality of parties, from which flow the following ancillary procedural rights: the right to due deliberation by a duly constituted court or tribunal, the right to be heard, the right to a reasoned judgment, the right to a tribunal free from corruption and the right to proceedings free from fraud.[86] That, in our considered view, would be the yardstick against which a municipal court's procedural propriety would be interrogated by this Court for compliance with the right to a fair trial that is inherent in the rule of law principle.

218. We are fortified in this approach by the decision in **The East African Civil Society Organisations' Forum (EACSOF) vs. The Attorney General of the Republic of Burundi & Others**[87] that draws a distinction between the international review of domestic decisions (as is at play presently) and the traditional judicial review as known at common law. It cautions against '**looking for new evidence or some mistake, fraud or error apparent on the face of the record**.' That is the preserve of the traditional judicial review, which is not the case presently. We do also remind ourselves of the applicable standard of proof applicable to decisions of apex courts as pronounced earlier in this judgment, that is, evidence that demonstrates a clear and notorious injustice that is literally visible at a mere glance.

[86] (1980), pp. 25 – 36.
[87] EACJ Appeal No. 4 of 2016.

219. In the instant case, the record of the Constitutional Court's proceedings reveals that following the submission by the Deputy Attorney General that the Speaker enjoys immunity from court proceedings, the Deputy Chief Justice held that the court found no reason to call her. Our understanding of that position is that, having listened to the Deputy Attorney General, the court was not fully persuaded that there was reason to summon the Speaker for cross examination. It was not obliged to allow the application to summon her. It seems to us that the failure to persuade it as to the merits of summoning the Speaker was the basis for its refusal to do so. That would not necessarily amount to curtailing the Applicant's right to a fair trial. Finding no reason to agree with an interlocutory application before a court is not the same thing as the court taking a substantive decision in a matter without furnishing any reason(s). The latter would curtail a party's right to a reasoned judgment; the former would not.

220. We now turn to the Supreme Court's decision to uphold the impugned law despite the alleged defects in the Certificate of Compliance and in the absence of supporting evidence on the parliamentary process; as well as the learned Chief Justice's reliance on unsubstantiated averments from the Bar.

221. The Applicant contends that the domestic courts' decision that the motion to suspend the three-day parliamentary rule (on commencement of debate after three sitting days) transpired in the Committee of the Whole House was not backed by any evidence. He particularly took issue with Justice Opio Aweri's decision on that matter for its alleged inconsistency. According to him, in one breath, the learned judge held that the motion was not seconded but, in the next breath, he held that it had been moved in the Committee of the

Whole House where, under Rule 59(2) of the Rules of the House, there was no requirement for the motion to be seconded.

222. The Applicant opined that the motion was moved in plenary because the Right Honourable Speaker was in the Chair yet, under Rule 132(1) of the parliamentary rules of procedure, the Speaker would not preside over the Committee of the Whole House. In his view, when the Speaker is reported to be 'in Chair' Parliament cannot be in the Committee of the Whole House but, rather, in plenary. He drew a distinction between the parliamentary proceedings of 18th December 2017 and those of 20th December 2017 at the Committee Stage[88]; arguing that whereas the former proceedings were in the plenary chaired by the Speaker, the latter took place in the Committee of the Whole House presided over by a Chairperson. The Applicant proposed that the fact that the Deputy Attorney General had referred to the presiding chairperson in the former proceedings as 'Madam Speaker' supported his proposition that the House was in plenary and not the Committee of the House. He faulted the Supreme Court for holding that the motion had been seconded in the absence of evidence to that effect.

223. We carefully scrutinized the Hansard proceedings on record. We do agree with the Applicant that the parliamentary proceedings of 18th December 2017 were in the plenary presided over by the Speaker, while those of 20th December 2017 were in the Committee of the Whole House chaired by the Speaker as Chairperson. Motions moved before the plenary would, as quite correctly argued by the Applicant, need to be seconded. This is the import of Rule 59(1) of the Rules of Procedure of Parliament. It reads:

[88] Starting at page 216 of the Reference, page 5234 of the Hansard.

In the House, the question upon a motion or amendment shall not be proposed by the Speaker nor shall the debate on the same commence unless the motion or amendment has been seconded.

224. However, **Black's Law Dictionary** defines the term 'second' in parliamentary parlance as '**a statement by a member other than the motion's maker that the member also wants the assembly to consider the motion.**'[89] In the instant case, we find that the Deputy Attorney General first raised the motion for the suspension of the three-day rule at page 13 of the Hansard of 18th December 2017. On that occasion, however, his motion was not seconded. He then moves the motion again at page 44. As quite correctly held by Lady Justice Arach Amoko, the Deputy Attorney General's motion was at the second instance seconded by Honourable Janepher Egunyu. This is evident at page 50 of the day's Hansard proceedings, where the Honourable MP states:

> *Thank you, Madam Speaker, for giving me a chance to speak on this matter. I have stood to support the Attorney General in suspension of this rule.*

225. It is not true, therefore, that the Supreme Court decision that the motion had been seconded was not supported by evidence. We find nothing inconsistent about Justice Aweri Opio's contrary view either. We understand it to have been the learned judge's view that the motion was not seconded precisely because it had been moved in the Committee of the House where there was no requirement for the secondment of motions. That is a very consistent position in so far as the learned judge correctly equated proceedings in the Committee of the Whole House with non-secondment. More importantly, this Court

[89] 8th Edition, p. 1380

having found that the motion was indeed duly seconded (contrary to the Applicant's contestations), we cannot fault the Supreme Court for upholding the parliamentary process.

226. The Applicant particularly singled out the learned Chief Justice for relying upon the unsubstantiated submissions of the Respondent in his determination as to whether or not the Report of the Committee delayed by 45 days. It is only the learned Chief Justice's approach to the issue that was questioned, therefore that is the matter specifically under interrogation.

227. We reproduce the allegedly offensive part of the learned Chief Justice's decision below:

> ***The Attorney General in his reply submitted that the Committee acted well within the provisions of Rules 128 and 140 of the Rules of Procedure of Parliament in that whereas the Bill was referred to the Committee on 3rd October 2017, the House was sent on recess on 4th October 2017. Further that during the recess, no parliamentary business is transacted without leave of the Speaker and, therefore, the days could not start running until the leave was obtained. The Attorney General further pointed out that by a letter dated 29th October 2017 the Chairperson duly applied for leave, which leave was granted by the Rt. Hon. Speaker on the 3rd November 2017. That both letters are on record. The Attorney General further stated that the 45 days therefore started running from the 3rd November 2017. In the Attorney General's view, the days would expire on 16th December 2017. The Committee reported on the 14th December 2017 two days before the expiry of the 45 days period.***

228. He then held:

> ***The submission by the learned Attorney General settles this point. The Committee could not commence with business until they secured leave of the Speaker. The days therefore started running from 3rd November***

2017 when the said leave was secured. There was therefore no breach of the 45 days rule.

229. It seems to us that, by making reference to the Respondent's submissions, the Chief Justice approbated the affidavit and documentary evidence that had been adduced by the Respondent. In the course of assessing the relevance and cogency of evidence, a judicial officer would have deference to one set of evidence over the other. That indeed is the essence of the determination of cases on the balance of probabilities. It simply means one set of evidence was weighed and found to more probably establish the facts of a matter than the other. This Court was not party to the evidence adduced by the Applicant in rejoinder (if any). Nonetheless, the learned judge clearly deferred to the Respondent's evidence and gave his reasons for how it settled the matter. He thus relied not on the Respondent's submissions *per se*, but on the evidence they made reference to. He could have cited the same evidence himself but he opted to refer to it as presented in submissions. Consequently, we are unable to appreciate how the learned Chief Justice flouted the rule of law principle as espoused in the Treaty.

230. The majority Justices of the Supreme Court were derided by the Applicant for upholding the Constitutional (Amendment) Act in spite of the court's unanimous decision that the President ought not to have assented to the Bill owing to a defective Certificate of Compliance. We reproduce below a snapshot of the learned judges' decisions on this issue.

Katureebe, CJ:

In my view, the prudent thing for the President would have been to send the Bill back to Parliament so that it would have been cleaned up to

conform to what the Speaker was certifying as having been passed in compliance with the Constitution. But it is not fatal to the whole bill that the President simply assented to it. My view is that in those circumstances, only those provisions that complied with the Constitution could be brought into law. The rest that were, according to the Constitution, not taken as passed, were void ab initio and could not be saved either by the certificate of the Speaker or the assent by the President.

Arach Amoko, JSC:

It is also not disputed that the Bill that the President assented to contained all the 10 Articles of the Constitution that were amended by Parliament. It is thus true that there was indeed a discrepancy between the Speaker's Certificate of Compliance and the Bill that the President assented to. My view is that the President ought not to have assented to a Bill that was at variance with the Speaker's Certificate of Compliance. He could have avoided this irregularity by refusing to assent to the Bill for non-compliance with the Constitution under Article 263. However, I find that the Certificate of Compliance did not lie as alleged by counsel for the appellants. It stated the truth; that the provisions of articles 259 and 262 of chapter 18 of the Constitution had been complied with in respect of the amendments to:

'(a) article 61 of the Constitution;

(b) article 102 of the Constitution;

(c) article 104 of the Constitution, and

(d) article 183 of the Constitution.'

It did not cover those articles that were not amended in compliance with the Constitution, namely, Articles 77, 181, 29, 291, 105 and 260 of the Constitution and the Justices of the Constitutional Court rightly found so. Had the Certificate stated otherwise, it would have told a lie. ... Assent cannot bring into law what is a nullity by the Constitution. Parts of the Bill were unconstitutional and therefore null and void. The Speaker was required to certify that the Bill was passed in accordance with the Constitution.

231. We pause here to observe that it was in that context that Lady Justice Arach Amoko concluded that upon the Speaker realizing that some of the provisions were unconstitutional, she only included in the certificate of compliance the provisions that were constitutional. With respect, we do not share the Applicant's opinion of this statement. In our view, that was the learned judge's appreciation of the situation. Given that it has no direct bearing on the issue under consideration presently, that is, whether the majority justices were right to apply the severance doctrine; we decline the invitation to veer after this procedural red herring. It will suffice to state that we neither deduce fabricated evidence in the learned judge's observation nor incompetence, as alleged.

232. On their part, Justices Opio Aweri and Tumwesigye held:

Opio Aweri, JSC:

The certificate sent to the President accompanying the Bill had some Articles and excluded other articles contained in the Bill. It is my opinion that the contents of the certificate have to rhyme with the contents of the Bill which was lawfully passed. ..... My considered view is that the Speaker's Certificate was not defective as it applied to the parts of the Bill which was lawfully passed. Article 263(2) provides assurance that the Bill was passed in accordance with the law.

Tumwesigye, Ag. JSC:

The case of Paul K. Ssemogerere (supra) must be distinguished from the instant case. In Ssemogerere's case the bill was not accompanied by the Speaker's Certificate of Compliance. In the instant case the bill was accompanied by the Speaker's certificate of compliance though defective. In Ssemogerere's case Parliament had no quorum and furthermore members who were present and voted to pass the bill voted

by voice so the will of Parliament was unascertainable. In the instant case Parliament had quorum and members voted by roll call. In deciding the petition leading to this appeal, by a unanimous decision, the Constitutional Court, rightly in my view, struck down sections 2, 5, 6, 8, 9 and 10 of the Amendment Act ... By majority the Court applied the severance doctrine and retained sections 1, 3, 4 and 7 of the (Bill) as being compliant with the Constitution. ...Accordingly, the Constitutional Court did not err in applying the doctrine of severance to the Amendment Act.

233. A common thread in the above decisions is that although all the learned judges did agree that the Certificate of Compliance contained some discrepancies, they applied the severance doctrine to uphold the constitutionality of the provisions of the assented Bill that did not contravene any provision of the Constitution. The Applicant faulted the majority justices for their recourse to the severance doctrine yet it had not been pleaded.

234. The pertinent constitutional provisions on the certificate of compliance provide as follows:

Article 259 Amendment of the Constitution

(1) Subject to the provisions of this Constitution, Parliament may amend by way of addition, variation or repeal, any provision of this Constitution in accordance with the procedure laid down in this Chapter.

(2) This Constitution shall not be amended except by an Act of Parliament –

a. The sole purpose of which is to amend this Constitution, and

b. The Act has been passed in accordance with this Chapter.

Article 262 Amendments by Parliament

A bill for an Act of Parliament to amend any provision of the Constitution ... shall not be taken as passed unless it is supported at

the second and third readings by the votes of not less than two-thirds of all members of Parliament.

Article 263 Certificate of Compliance

(1) .....

(2) A bill for the amendment of this Constitution which has been passed in accordance with this Chapter shall be assented to by the President only if –

a. It is accompanied by a certificate of the Speaker that the provisions of this Chapter have been complied with in relation to it;

235. As garnered from the material on record, it is common ground herein that the Certificate of Compliance that accompanied the Constitutional (Amendment) Bill for presidential assent affirmed the constitutionality of the amendments to Articles 61, 102, 104 and 183 of the Constitution. It specifically confirmed compliance of those amendments with Articles 259 and 262 of the Constitution, the applicable provisions thereto. It would appear that whereas Parliament had passed amendments to five additional provisions, the Speaker declined to certify compliance in respect of the additional amendments. In our considered view, that course of action was well within the Speaker's prerogative. S/he is not at liberty to certify non-compliant amendments. That indeed is the duty placed upon the holder of that office under Article 263 of the Constitution.

236. It brings to bear the contention herein that the certificate was so defective as to impugn the amendment law by 'infection'. With utmost respect we are unable to appreciate the bona fides of this position. The Supreme Court was referred to the case of **Ssemogerere & Another vs. Attorney General** (supra), which posits that a constitutional amendment that receives presidential assent in the

absence of a certificate of compliance remains null and void. However, the circumstances of that case are clearly to be distinguished from the instant case.

237. As quite aptly observed by Justice Tumwesigye in his decision as reproduced above, in that case there was no certificate of compliance furnished by the Speaker of the House at all. Our construction of Article 263(2)(a) of the Uganda Constitution is that it is couched in obligatory terms, meaning that a certificate of compliance is a mandatory condition precedent to the consideration of a bill for assent. Accordingly, its absence would automatically vitiate any presidential assent. That is not the case in the matter before us. In the instant case, there was a certificate of compliance albeit one that endorsed the constitutionality of some, as opposed to all, of the amendments as passed by Parliament. It clarified that whereas Parliament had indeed purported to pass all the amendments contained in the amendment law, the constitutionality of the omitted amendments was in question. Thus they did not pass the compliance test sought to be captured in a certificate of compliance.

238. What would the duty of a court be in these circumstances? We wish to dispel forthwith the notion propelled by the Applicant that un-pleaded reliefs cannot be considered by courts under any circumstances. He cited the case of **Hon. Dr. Margaret Zziwa vs. The Secretary of the East African Community** (supra)[90] in support of his position. We reproduce the pertinent decision below:

> **It is trite law that parties are bound by their pleadings, that no relief will be granted by a court unless it is**

[90] At para. 57 thereof.

founded on the pleadings, and that it is not open to the Court to base a decision on an un-pleaded issue <u>unless it appears from the course followed at the trial that the un-pleaded issue had been left to the Court for decision in the matter at hand</u>. *(Our emphasis)*

239. The foregoing observation clearly spelt out an exception to the general rule, to wit, where it appears from the course of the trial that the un-pleaded issue does require the determination of the court. In that case, it was observed to be clear from the submissions of counsel that whereas the respondent had raised the appellant's misconduct as a bar to the reliefs she sought; she sought refuge in the fact that the matter was un-pleaded and ought to be ignored or, if dealt with, answered in the negative coz the impeachment proceedings had not commenced at the time of the alleged misconduct. The Court then held:

Looking at the matter from that perspective, this Court finds that the issue of the Appellant's breach of Rule 9(6) of EALA's Rules of procedure was implicitly left to the Trial Court's determination. Accordingly, we cannot fault the Trial Court for addressing and determining the issue.

240. In turn, the irrefutable circumstances of this case are that the Applicant did in submissions before the Supreme Court raise the issue of the un-pleaded severance doctrine, claiming that the Constitutional Court did not have the authority to raise sub-issues as to the applicability of that doctrine and the substantiality test. In response, the Respondent argued that to the extent that Article 137(3)(b) and (4) of the Uganda Constitution provide for the grant of

appropriate redress by the Constitutional Court, the said court rightly applied the severance doctrine *suo moto*. The matter clearly being in contention, and thus by implication left to the court's determination, the majority Justices of the Supreme Court did address it. They upheld the lower court's application of the doctrine to retain sections 1, 3, 4 and 7 of the said law.

241. We find the circumstances of the present case to fall squarely within the exception to the general rule on un-pleaded reliefs as espoused in the **Margaret Zziwa** Appeal. Undoubtedly, the Supreme Court was required to interrogate the lower court's recourse to the severance doctrine in light of the express provisions of Article 137(3)(b) and (4) of the Constitution. The un-pleaded severance doctrine was in issue before it to the extent of its contested application by the Constitutional Court. Applying our own legal lenses to the same issue, we cannot fault the majority justices for the conclusions they arrived at for reasons we elucidate below.

242. In **Congo & Another vs. The Republic of Zimbabwe** (supra), the right to an effective remedy is underscored as one of the fundamental rights embodied in the rule of law principle. This speaks to the core duty of courts to grant remedies that effectively and conclusively resolve the dispute as between the parties. The severance doctrine is one such remedy. It is aptly expounded in the case of **Johannesburg City Council vs. Chesterfield House (Pty) Ltd**[91] as follows:

> (W)**here it is possible to separate the good from the bad in a statute and the good is not dependant on the bad, then that part of the statute which is good must be given**

[91] 1952 (3) SA 809 at 822.

effect to, provided that what remains carries out the main object of the statute ... however, where the task of separation is so complicated as to be impracticable, the whole statute must be declared ultra vires.

243. The foregoing decision resonates with the doctrine of separation of powers in so far as it enjoins courts to take due cognizance of the legislature's legislative mandate and seek, as far as possible, to give effect to it. Indeed in **Human Rights Awareness and Promotion Forum (HRAPF) vs. The Attorney General of the Republic of Uganda & Another**,[92] this Court cited with approval the following observation in **Joseph Borowski vs. Attorney General of Canada**[93] that cautions courts to be sensitive to parliaments' legislative function with regard to non-contentious matters:

> **The court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.**

244. That is not to say that a legislative body that strays into the realm of illegalities may hide behind the veil of separation of powers. We are alive to and do abide by the observation of the Appellate Division in the **Margaret Zziwa** Appeal that '**the doctrine of separation of powers is only sacrosanct where the independent organs of the State concerned are acting within the law. Any State organ or institution that marches out of step with the law, is liable to be**

[92] EACJ Reference No. 6 of 2014.
[93] (1989) 1 SCR 342 at 353.

brought in line by the courts with the sword of checks and balances.'[94]

245. In the instant case, the domestic courts having found some constitutional amendments to have been legally enacted and in compliance with the Constitution, the legal rights in respect thereof as between the parties were settled. Consequently, the said amendments being able on their own to reflect the intention of the House, there would scarcely be need for a court to tinker with the legislative mandate of Parliament by unduly striking them down alongside the offending provisions. It was prudent that they be preserved to address whatever mischief that the legislature had intended them to redress. Needless to state, the doctrine of separation of powers is a critical tenet of the rule of law.

246. In any event, Article 137(4)(a) of the Uganda Constitution explicitly provides latitude to the Constitutional Court to grant alternative albeit appropriate redress as it deems fit. Indeed, whereas parties are restricted to their pleadings as to the matters in contention between them, courts do have inherent powers to grant reliefs not pleaded that would otherwise engender the bona fides of a case. Accordingly, it is opined in **Halsbury's Laws of England** that, save where it is negated in unequivocal terms by statute or court rules, the inherent jurisdiction of courts does abound as a virile and viable doctrine; a residual source of powers that courts may draw from whenever it is just or equitable to do so, particularly to ensure the observance of the

[94] Supra at paragraph 45.

due process of the law, to prevent vexation or oppression; to do justice between the parties and to secure a fair trial between them.[95]

247. The circumstances of *Constitutional Appeal No. 2 of 2018* are that the sole condition precedent to presidential assent having been met, a court looking to equitably administer substantive justice as required by Article 126(2)(e) of the Uganda Constitution would consider the grant of a relief that upholds the legality of the compliant amendments while negating the unconstitutional ones. It would thus do justice between the parties without trampling over the legislative function of the legislature. We do therefore agree with the majority justices on their application of the severance doctrine to sever the unconstitutional amendments and uphold the constitutionally compliant ones.

248. Perhaps more importantly from the procedural perspective, the reasons underlying the majority justices' decisions and/ or indeed the decisions themselves cannot be suggested to depict a clear and notorious injustice that is visible at a mere glance. As held earlier in this judgment, that would be the standard of proof applicable to the international review of the judicial decisions of an apex domestic court such as the Supreme Court of Uganda. In so far as the severance doctrine is a recognized judicial remedy, we find the impugned decisions of the majority justices on this issue to have been firmly rooted in astute judicial reasoning as we have endeavoured to demonstrate above. To that extent, the Applicant fell short on the required standard of proof of his allegations as against the Respondent State.

[95] Civil Procedure, Volume 11, (2009), 5th Edition, para. 15.

249. With regard to the un-pleaded substantiality test, on the other hand, we find no reason to belabor that issue it having transpired earlier in this judgment that the majority justices of the Supreme Court did in fact reject its applicability to constitutional petitions. We would only reiterate our conclusion on the question of un-pleaded reliefs or contestations with the observation that they may in exceptional circumstances be considered and/ or granted, unless unequivocally forestalled by dint of statute.

250. The severance doctrine was also applied by the Supreme Court in respect of the provisions of the amendment Bill that flouted Article 93 of the Uganda Constitution. Article 93 reads:

> **Parliament shall not, unless the bill or the motion is introduced on behalf of the Government –**
>
> **a. Proceed upon a bill, including an amendment bill, that makes provision for any of the following –**
>
> **(i) .....**
>
> **(ii) the imposition of a charge on the Consolidated Fund or other public fund of Uganda or the alteration of any such charge otherwise than by reduction;**
>
> **(iii) the payment, issue or withdrawal from the Consolidated Fund or other public fund of Uganda of any monies not charged on that fund or any increase in the amount of that payment, issue or withdrawal, or**
>
> **(iv) .....; or**
>
> **b. Proceed upon a motion, including an amendment to a motion, the effect of which would be to make provision for any of the purposes specified in paragraph (a) of this article.**

251. It was argued in that court that, having found sections 2, 6, 8 and 10 of the amendment Act to infringe Article 93 of the Constitution, the

Constitutional Court should have nullified the entire Act. Mr. Mabirizi specifically opined that the proposed amendments had financial implications on the ensuing electoral and court processes, and to the extent that the Electoral Commission and Judiciary would draw the necessary finances from the Consolidated Fund, the amendment law did entail a charge on the Consolidated Fund.

252. However, opposite party contended that it was precisely to satisfy that constitutional provision that Rule 117 of the Parliamentary Rules of Procedure requires that every private member's bill should be accompanied by a certificate of financial implications issued by the Ministry of Finance. In accordance with the harmonious approach to constitutional application advocated in the **Ssemogerere** case, the Respondent did also propose the interpretation of Article 93 alongside Article 94 of the Constitution, which empowers Parliament to formulate rules of procedure to govern the conduct of its legislative function.

253. The Applicant took issue with the following Justices of the Supreme Court on their handling of the matter. His lordship the Chief Justice was faulted for making reference to a certificate of financial implications that is allegedly alien to the Constitution of Uganda.

Katureebe, CJ

Sections 1, 3, 4 and 7 of the Bill did not contain a provision that created a charge, and had no effect of imposing a charge on the consolidated fund beyond that already budgeted for by the institutions responsible to enforce them. They were therefore not provisions that were a target for article 93 of the Constitution. The import of certificate of financial implications was that the Minister was satisfied that those provisions could be accommodated within the medium term framework without

imposing any extra expenditure beyond that budgeted for within that period.

254. Lady Justice Arach Amoko was criticized for allegedly allocating a function that is legally assigned to the office of the Speaker to the Minister of Finance.

Arach Amoko, JSC

How does Parliament determine that a Bill complies with Article 93? Although Rule 123 of the Rules of Parliament provide that it is the Speaker who should give an opinion regarding financial matters in respect of private members' Bills, in practice, this is the responsibility of the Minister of Finance who is expected to be the expert in this area.

255. In turn, Justice Tumwesigye was derided for dismissing the relevance of the Applicant's contestations yet (as we understood him to suggest) the legislative prohibition in Article 93 of the Constitution is rooted in a forecast on the impact of the amended law.

Tumwesigye, Ag. JSC

Concerning allowances likely to be spent as a result of the 15 extra days given to the Supreme Court to determine a presidential election petition, my view is that this a matter that is purely speculative and trivial which should not have been raised by the appellants.

256. It would appear from the material on record that the original Bill as presented by Honourable Raphael Magyezi was indeed accompanied by a certificate of financial implications dated 28th September 2017, as required by Rule 117 of the Parliamentary Rules of Procedure. It is not debatable that the Constitution, being the grund norm of the Respondent State, is implemented through Acts of Parliament and

corresponding subsidiary legislation that cascade from it. The requirement for a certificate of financial implications is one such rule that is intended to address the prohibitions in Article 93 of the Constitution.

257. The additional amendments that accrued from the parliamentary debate on the Magyezi Bill apparently were not accompanied by a certificate of financial implications, yet they would have necessitated a charge on the Consolidated Fund. Reading the provisions of Articles 93 and 263(2)(a) of the Constitution together, it becomes evident that the additional amendments did not pass the compliance test so as to warrant inclusion in the Certificate of Compliance that was issued by the Speaker. Consequently, we cannot fault the observations of Justices Katureebe and Arach Amoko in that regard.

258. It seems to us that Article 93 is couched in such terms as would suggest that Parliament should not take further action on a private member's bill or motion that, simply stated, has financial implications to State coffers. Article 94 then seeks to provide for circumstances under which private members may exercise their legislative mandate without flouting the constitutional prohibition in Article 93. In the instant case, debate on the Magyezi Bill commenced after production of the certificate of financial implications. As aptly observed by Justice Tumwesigye, ***'it therefore follows that at the time of proceeding with the Bill as tabled by Hon. Magyezi, no provisions existed that had the effect of imposing a charge on the consolidated fund.'*** We are inclined to agree.

259. In the instant case, where two additional motions were moved by private members to introduce additional amendments without the

cushion availed in Rule 117, Parliament should not have commenced debate on the said motions. However, that having transpired, there was another constitutional safeguard in the form of Article 263(2)(a) under which the Speaker finally endorses a bill's compliance with the Constitution. The Speaker thus correctly invoked her prerogative under that constitutional provision to only endorse the constitutional amendments that had been validly debated and passed.

260. Chief Justice Katureebe and Lady Justice Arach Amoko further drew the wrath of the Applicant for endorsing the non-closure of Parliament's doors during the debate despite the express provisions of Rule 98 of the parliamentary rules of procedure. Rule 98(4) of the Rules of Procedure of Parliament provides for how a roll call vote for MPs is conducted. The pertinent provision on the closure of the doors states:

> **(1)** .....
> **(2)** .....
> **(3)** .....
> **(4) The Speaker shall then direct the doors to be locked and the bar drawn and no Member shall thereafter enter or leave the House until after the roll call vote has been taken.**

261. At page 5234 of the Hansard of 20th December 2017, before closing the roll call vote, the Speaker had this to say:

> *Honourable Members, ideally I was supposed to have closed the doors under Rule 98(4). However, that exists in a situation where all Members have got seats, but in this Parliament, 150 Members do not have seats. Therefore, it was not possible to lock them out that is why I did not lock the doors.*

262. In that regard, Justice Katureebe opined:

> ***I agree that rules must be obeyed. I however also emphasize that the substance and purpose of the rules is equally or even more important. In absence of evidence to the contrary, I do not see how that procedural breach by the Speaker vitiates the entire process. In my view, the said breach could not render the entire amendment process unconstitutional. The Parliamentary Chamber as currently in existence might be too small for the numbers of members of Parliament which was not envisaged before. Under article 95(2) of the Constitution, it is conceivable that the Speaker can constitute Parliament at any place of sitting upon a proclamation to that effect. If that is possible, what if such a place is a building without doors? Or it has doors but people are not fitting? In my opinion, it is the substance of the matter that is important in the prevailing circumstances. As long as no body is proved to have taken advantage of the non-closure of the doors, the omission to do so only remains a matter of form.***

263. On the other hand, Lady Justice Arach Amoko held:

> ***Theoretically Parliament could sit in an open place with no door as long as it is gazetted for that purpose. The Speaker explained the reason why she could not close the door due to the large number of Members of Parliament. This did not violate the Constitution since there was a requisite quorum to pass the Act.***

264. Given the Speaker's explanation as to why she adopted the course of action she did, we are inclined to agree with Justice Katureebe and Lady Justice Arach Amoko that all other conditions for the roll call vote having been satisfied, the practical inability to lock out Members of the House would not be reason to vitiate the vote that was taken.

265. On the question of the violence that descended upon the House in the course of the enactment of the amendment law, having held as we did on *Issue No. 4*, the Court is mindful not to interrogate the merits of events that transpired in Parliament (the violence inclusive) owing to considerations of limitation of time. This matter would only

be considered in the context of the Supreme Court's handling of the issue. Consequently, we are not at liberty to engage in an intrinsic interrogation as to who of the actors in the violence abused the exigencies of constitutionalism and human rights.

266. We determine the propriety of the Supreme Court decision from the perspective of the principles of good governance and rule of law as raised before us by the Applicant. Before we progress further, however, we deem it necessary to remind ourselves of the observation in *Teraya, Koji,* ***Emerging hierarchy in International Human Rights and Beyond: From the perspective of Non-derogable Rights'***,[96] that '**law is not merely a means of dealing with issues, but concerns the purposive self-ordering of society, each articulation of law carries social and value-related implications**.' This observation was cited with approval by this Court in **Human Rights Awareness and Promotion Forum (HRAPF) vs. The Attorney General of the Republic of Uganda & Another** (supra), while considering the normative aspect of matters of public interest. We construe it to underscore the vital role played by the law (and, by extension, courts) in shaping societal values and norms.

267. In the instant case, the Applicant correctly opined that the **Katabazi** case had aptly defined the rule of law as a principle that is '**intended to be a safeguard against arbitrary governance, whether by a totalitarian leader or by mob rule. Thus the rule of law is hostile to both dictatorship and anarchy.**' He however drew the wrong conclusions from it, seemingly proposing that the Supreme Court wrongly called out the indiscipline of some Members of the House, without considering the constitutional and human rights

[96] European Journal of International Law (EJIL), (2001), Vol. 12, No. 5, 917 at 921.

violations occasioned by the violence in the House. Indeed, it was argued before the Supreme Court that the violence in the House vitiated the parliamentary proceedings and the resultant amendment law. With respect, we take a contrary view.

268. To be clear, the Court does not condone the violence that ensued in Parliament, from both strangers to the House and some Members themselves. A defining feature of the rule of law is that all persons, natural and juridical, are equal before the law; equally submit to and are held equally accountable to it. The governors and the governed are, in equal measure, held accountable to laws that are publically promulgated, equally enforced and independently adjudicated. Thus, without getting unduly embroiled in the question of causation, we observe in general terms that the material on record reveals that the behavior of otherwise Honourable Members, which clearly breached parliamentary rules of conduct and decorum; was as much an affront to the rule of law as the violence that ensued following the Speaker's attempts to redress it. The rule of law is as averse to dictatorship – absolute or autocratic authority; as it is to anarchy – a state of disorder due to non-recognition of authority.

269. Indeed, in **Hon. Dr. Margaret Zziwa vs. The Secretary General of the East African Community**[97], a question arose as to whether the East African Legislative Assembly (EALA) had followed due process in the suspension of a sitting Speaker and appointment of a temporary one. It was opined for the respondent that the Temporary Speaker had been appointed to steer impeachment proceedings given the substantive Speaker's own disregard for a parliamentary rule that enjoined her not to preside over her impeachment

[97] EACJ Reference No. 17 of 2014, para. 67.

proceedings. In a decision that was not contested on appeal, this Court held:

> **With utmost respect, we do not share learned Counsel's apparent deference to extra-legal means to resolve a legal or procedural impasse. The proverbial 'end' cannot and should not justify the means in a civilised dispensation such as the EAC. We are unable to find any legal justification for recourse to a wrong procedure to rationalise an alleged procedural abuse by the Applicant. Quite clearly, the Members of the House that resorted to the course of action pursued on 26th November 2014 were alive to the procedural and practical hitches before them, but sought to address a supposed 'crisis'. In our considered view, the dictates of respect for the rule of law and due process would have required that the House accord due respect to the Office, if not the person, of the Speaker and explore available legal rules in pursuit of its desired result.** *(Our emphasis)*

270. In the instant case, the Supreme Court similarly deduced the events that transpired in Parliament to amount more to indiscipline by Members of the House than the exercise of totalitarian authority by the Speaker in an attempt to restore order. They do thus fall within the category of extra-legal interventions that cannot by any shade of imagination abide due process and the rule of law. The Applicant, on his part, fell short on proof that while the conduct of the Members was constitutionally unassailable, the Speaker exercised her authority over the House with autocracy.

271. More importantly, we are disinclined to agree with the Applicant that the violence in the House would vitiate the parliamentary proceedings. Cognizant of the role of courts in shaping societal values and norms, we are of the decided view that a judicial decision that translates violence in Parliament into a nullification of parliamentary proceedings would automatically ride the course of such members of the House that consider extra-legal, un-parliamentary conduct as an alternative means to parliamentary debate and due process. Such a decision would in effect entrench violence and misbehavior in Parliament; impede Parliament's legislative function and curtail the principle of good governance espoused in the Treaty. This would be a blatant antithesis to constitutionalism and the rule of law in the Respondent State. We therefore decline to vitiate the parliamentary proceedings.

272. With regard to the infirmity suffered by the learned Chief Justice, we do not find Article 144(3) of the Constitution as invoked by the Applicant useful. That constitutional provision only recommends the removal of a judge from office where such bodily infirmity is such as to inhibit a judge's ability to perform his/ her functions. Given that the Chief Justice was able to write his judgment, we find no proof of judicial incompetence; neither would the infirmity he suffered be a reason to impeach his judgment.

273. The Applicant questioned the failure by the Supreme Court to adhere to the sixty-day rule for delivery of judgments as encapsulated in clause 6.2 of the Uganda Judicial Code of Conduct, and sought the nullification of the impugned judgment on that premise. It reads:

> **A Judicial Officer shall promptly dispose of the business of the court, but in so doing, must ensure that justice prevails. Protracted trial of a**

case must be avoided wherever possible. Where a judgment is reserved, it should be delivered within 60 days, unless for good reason, it is not possible to do so.

274. Undoubtedly, that provision does recognize that there are instances when a delay in the delivery of a judgment would be inevitable. In this case, a plausible reason is raised by the Applicant himself in terms of the infirmity suffered by the learned Chief Justice. That in itself would explain the delay in delivering the reserved judgment within sixty days.

275. Be that as it may, the constitutional duty upon the Constitutional Court and, by design the Supreme Court sitting in first appellate capacity over constitutional appeals, is prescribed in Article 137(7) of the Constitution. The prescribed standard therein is for both courts to determine such matters 'as soon as possible.' That standard is obviously dependant on a myriad of extraneous circumstances but is, nonetheless, the over-riding constitutional standard for the Constitutional and Supreme Courts of Uganda when presiding over constitutional petitions or appeals.

276. We find no evidence of breach of that constitutional duty given the sheer volume of materials that the two courts had to sift through. Certainly, as correctly opined by the Respondent, the complexity and gravity of *Constitutional Petition No. 49 of 2017* and *Constitutional Appeal No. 2 of 2018* placed them within that category of cases that would require an additional amount of time to determine.

277. Further, we do note that the cases relied upon by the Applicant to seek a nullification of the judgment all originate from courts with appellate jurisdiction over the defaulting courts, rather than the international review of a domestic court's decision, as is the case

presently. At the risk of repeating ourselves intermittently, this Court is not clothed with appellate jurisdiction over the impugned Supreme Court decision. It will suffice to state here that the professional standards encapsulated in the Bangalore Principles simply represent best practice that judges should aspire to and should not be equated to conduct justifying disciplinary action unless a breach is of such magnitude as to justify such sanction.[98] Thus the enforcement of the Bangalore Principles is largely peer-driven.[99]

278. We therefore are not persuaded by the Applicant's assertion that the Supreme Court (or the Constitutional Court for that matter) were duty bound to conclude the matters before them within sixty days, failure of which, they were obliged to furnish the parties with reasons for the delay. We do not read any such requirement in the provisions of clause 6.2 of the Uganda Judicial Code of Conduct. Accordingly, we decline to nullify the judgment on that premise.

279. In the result, we find that the judicial process and decision in *Constitutional Appeal No. 2/ 2018: Male H. Mabirizi K. Kiwanuka vs. The Attorney General of the Republic of Uganda* were neither in contravention of Ugandan laws nor inconsistent with the rule of law principle enshrined in Articles 6(d) and 7(2) of the Treaty.

Issue No. 6: What reliefs are available to the Parties?

280. The Applicants sought a litany of reliefs, as reproduced verbatim below:

I. **Declarations that:**

[98] Jayawickrama, Nihal, From Independence to Accountability – The Bangalore Principles of Judicial Conduct, Presentation made at conference of Chief Justices and Presidents of Supreme Courts and Constitutional Courts of Africa, 2018.

[99] See also Mugenyi, Monica K, *Bangalore Principles of Judicial Conduct: A Framework for Arbitrator Conduct?*, (supra) at p.52.

i. The several actions, directives and/ or decisions of all the three organs of Government and State of the Republic of Uganda; the Parliament, the Executive and the Judiciary of the Republic of Uganda in conceptualizing, processing, pursuing and upholding of the Uganda Constitutional (Amendment) Act 2018 are unlawful and/ or are an infringement of the provisions of the Treaty for the Establishment of the East African Community, particularly the actions of;

   a. Curtailing and undermining Uganda citizens' participation in their constitutional amendment process through;

      i. Preventing the applicant, with proper identification documents, access the parliament's gallery during the seeking of leave and presentation of the Bill,
      ii. Failing to take steps in the circumstances to ensure public participation of all Ugandans in the Constitutional amendment process, and
      iii. Using the police and the military to disperse meetings organized by members of parliament and other political players to enhance public participation of citizens.

   b. Securing an amendment of the Constitution through violence and/ or threatened violence by;

      i. Undermining the integrity of Parliament,

      ii. Allowing defence forces to participate in partisan politics,

      iii. Deploying military in and outside parliament and throughout the entire country,

      iv. Derogating the Members of Parliaments' fundamental rights against torture, inhuman and degrading treatment through,

      v. Invasion of Parliament by Uganda People's Defence Forces on 27/09/2017, the day of seeking leave to introduce a private members bill,

vi. **Assaulting, torturing and inhumanly treating members of Parliament by the Uganda Police** (and/ or) **Uganda Peoples' Defence Forces,**

vii. **Arresting members of parliament from the House and detaining them without any charge whatsoever and**

viii. **Reconvening Parliament on the same day and in the same place where Uganda Peoples Defence Forces had beaten up, tortured and arrested members of parliament.**

c. **Curtailing and undermining Uganda citizens' participation in their constitutional amendment process through,**

i. **Preventing the applicant, with proper identification documents, access the parliament's gallery during the seeking of leave and presentation of the Bill, and**

ii. **Failing to take all reasonable steps in the circumstances to ensure public participation.**

d. **Not complying with strict procedures contained in the Uganda Constitution, Acts of Parliament and Rules of Procedure of Parliament by;**

i. **Proceeding in a multi-party parliament in absence of the leader of Opposition, Opposition Chief Whip and other opposition members,**

ii. **Allowing ruling party members to cross the floor and sit at the opposition side,**

iii. **Entertaining presentation and grant of leave to table a Private Members Bill which had the effect of charging money from the consolidated fund of Uganda,**

iv. **Allowing signing of the report by new members on the Legal and Parliamentary Affairs Committee after it had finished hearings from the public,**

v. Allowing presentation of a Parliamentary committee report outside the 45 days period,

vi. Proceeding on a motion to suspend a rule of Procedure of Parliament without secondment,

vii. Closing the debate on the Bill before each and every member of parliament who wanted to debate and present the views of their constituents,

viii. Refusing to close the doors to the Chambers of parliament before voting on the 2nd reading and 3rd reading, and

ix. Failing to separate the 2nd reading and 3rd reading by at least fourteen sitting days of parliament.

e. Flouting the strict pre-assent mandatory conditions and procedures through;

i. The Speaker's preparing and forwarding to the president of a Certificate of Compliance different from what was agreed to by the entire parliament,

ii. Failing to refer the Bill to the referendum of the people, and

iii. Assenting to the Bill by the President on strength of an invalid certificate of compliance and in absence of proof that 14 sitting days were separated between the 2nd and 3rd readings and/ or that the matter had been referred to a referendum,

contravene and undermine the fundamental and operational principles of the Community which include good governance including adherence to the principles of democracy, the rule of law, accountability, transparency and the maintenance of universally accepted standards of human rights.

ii. **The action/ decision and the process of reaching the decision of the Uganda Constitutional and Supreme Courts upholding part of the Constitutional (Amendment) Act, 2018 which resulted from the above stated actions in the majority part their respective decisions dated 26th July 2018 and 18th April 2019, respectively, contravene and undermine the fundamental and operational principles of the Community which include good governance including adherence to the principles of democracy, the rule of law, accountability, transparency and the maintenance of universally accepted standards of human rights.**

iii. The actions/ decisions of Uganda's Constitutional and Supreme Courts in;

a. **evicting the applicant from court seats occupied by representatives of other parties, only on ground of his being self-represented,**

b. **failing to hear and determine the petition filed by the applicant expeditiously,**

c. **favouring the respondent in all their processes and proceedings as against the applicant,**

d. **failing to deliver their judgments within 60 days stated by their Judicial Code of Conduct,**

e. **delivering and upholding judgments which were stale/ expired by virtue of delivering them outside the mandatory 60 days,**

f. **awarding professional fees to all petitioners except the applicant only on account of his being self-represented,**

g. **failing to take steps to ensure that objections to participation of some justices of the two courts in the proceedings are adequately addressed,**

h. **allowing judicial officers who have conflict of interest in the matter to sit as justices in the case and to purport to determine the dispute,**

i. **allowing a judicial officer suffering from infirmity of body to purport to write and deliver judgment,**

j. **refusing or neglecting to set aside the purported judgments entered by such conflicted justices despite applying for the same**

contravene and undermine the fundamental and operational principles of the Community which include good governance including adherence to the principles of democracy, the rule of law, accountability, transparency and the maintenance of universally accepted standards of human rights.

II. ***Order annulling the Republic of Uganda's Constitutional (Amendment) Act 2018*** **on account of being conceptualized, initiated, processed, enacted and assented to in contravention of the fundamental and operational principles of the East African Community.**

III. **A *Permanent Injunction* against the Government and State of the Republic of Uganda from implementing the Constitutional (Amendment) Act 2018 on account of being conceptualized, initiated, processed, enacted and assented to in contravention of the fundamental and operational principles of the East African Community.**

IV. ***General Damages to the Applicant*** **due to disturbance and anguish caused to him arising out of the actions complained against in this Reference.**

V. **Costs of the Reference to the Applicant.**

VI. ***Interest*** **of 25% per annum on the general damages and costs from the date of filing the Reference till payment in full.**

281. We observe with no minute measure of displeasure that the foregoing averments (as indeed the rest of the Applicant's pleadings) offend every procedural rule on the conciseness of pleadings, particularly Rule 35(1) of this Court's Rules of Procedure. This mode of pleadings is an unacceptable abuse of court process.

282. Be that as it may, having held as we have on the issues as framed, we find all the substantive reliefs sought by the Applicants to be clearly untenable.

283. Specifically, given our finding under *Issue No. 4* that the parliamentary enactment process is time-barred, we are unable to grant the declarations sought under paragraph 6(1)(I) of the Reference. The Supreme Court decision was, under *Issue No. 5*, interrogated on its findings in respect of the reliefs sought under paragraphs 6(1)(I)(b) and (e) of the Reference, and adjudged to have been in compliance with the rule of law. We therefore decline to grant the declarations sought in that regard.

284. In like vein, as the Court held in *Issue No. 4*, the Constitutional Court's trial process and resultant decision are time-barred. Accordingly, the declaration sought in respect thereof under paragraph 6(1)(II) is untenable.

285. With regard to the judicial process and decision of the Supreme Court, having held as we did on *Issue No. 5*, we would decline to grant the declaration sought under paragraph 6(1)(II) of the Reference. On the same premise, we would similarly decline to grant the declarations sought in paragraph 6(1)(III) of the Reference.

286. Given the Court's conclusion that the impugned Supreme Court decision did not violate the rule of law principle either in terms of the judicial conduct that underpin it or in substance, we decline to grant the reliefs sought in paragraph 6(2) and (3) of the Reference. Consequently, an award of general damages and interest thereon as sought under paragraph 6(4) of the Reference are rendered untenable.

287. On the question of costs, Rule 127(1) of the Court's Rules of Procedure provides that costs shall follow the event unless the Court for good reason decides otherwise. This rule was emphatically reinforced in the case of **The Attorney General of the Republic of Burundi vs. The Secretary General of the East African Community & Another**.[100] In the instant case where the Reference fails, the Respondent (not the Applicant) would be the party entitled to costs.

288. In the **Eric Kabalisa Makala** case, this Court did depart from the general rule on costs on account of the exceptional circumstances persuasively highlighted in the case of **Schuller vs. Roback**.[101] The factors informing trial courts' discretion on costs were espoused in that case as follows:

> **When the court should order otherwise is a matter of discretion, to be exercised judicially by the trial judge, as directed by the Rules of the Court. ... Factors such as hardship, earning capacity, the purpose of the particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award itself are all matters which a trial judge, quite properly, may be asked to take into account. Assessing the importance of such factors within the context of a particular case, however, is a matter best left for determination by the trial judge.**

289. Accordingly, in the **Eric Kabalisa Makala** case, the Court considered the hardship encountered by the applicant therein that led

[100] EACJ Appeal No. 2 of 2019
[101] (2012) BCSC (British Columbia Supreme Court) 8

to his self-prosecuting his case without the benefit of legal advice. It was held:

> **In terms of hardship, it is not lost upon us that the Applicant propagated his case personally without the benefit of advocacy services that, given his circumstances, he was seemingly unable to afford. Perhaps had he had the benefit of legal advice he might have forgone the present legal proceedings and spared himself and opposite party the costs incurred. It seems to us, therefore, that the circumstances of this case do warrant a departure from the general rule as espoused in Rule 127(1) of this Court's Rules.**

290. However, similar circumstances do not prevail in the instant case. The Applicant, being a lawyer by profession, was well able to assess the merits of his case. Further, we find nothing on record to suggest that he had any difficulty in the prosecution of this Reference. We therefore find no reason to depart from the general rule on costs in this case. Accordingly, the interest on costs is rendered redundant.

G. CONCLUSION

291. This judgment accentuates the constitutional provision that a bill in the Republic of Uganda would ordinarily become law once passed by Parliament and assented to by the President. Therefore, the *Constitutional Amendment Bill No. 2 of 2017* stood duly enacted into the *Constitutional (Amendment) Act of 2018* upon securing presidential assent.

292. The process leading to the enactment of that law, as well as the Constitutional Court's judgment in respect thereof are adjudged to

have been time-barred, having fallen prey to the two-month time limit prescribed in Article 30(2) of the Treaty. However, the Supreme Court's judgment was properly placed before the Court, the Reference having been lodged well within that time frame.

293. In so far as this Court is clothed with exclusive jurisdiction over the interpretation of the Treaty, the notion that the Applicant could have (but did not) raise the matters in contention in the Reference before the domestic courts in Uganda is untenable. Given that the said issues had never been conclusively adjudicated by the Court, the defence of *res judicata* is unsustainable and the challenge to the Supreme Court's decision was adjudged to represent a live dispute.

294. Thus, it being trite law that nation states can be held internationally responsible for the wrongful actions of their judicial organs, the interrogation of the impugned Supreme Court decision to determine its consistency with the Treaty is well within this Court's jurisdiction.

295. The Applicant bore the legal burden to establish his case as against the Respondent to the required standard. The standard of proof applicable to challenges to apex courts' judicial decisions is *'fully conclusive evidence'* that demonstrates a clear and notorious injustice that is blatantly evident 'at a mere glance'.

296. The Court neither impeached the conduct of the Uganda Supreme Court from a judicial ethics viewpoint; nor adjudged the judicial process and result in *Constitutional Appeal No. 2 of 2018* to have been inconsistent with the rule of law principle enshrined in the Treaty or the Applicant's right to a fair hearing.

297. The upshot of the Court's determination of this case is that the Reference is hereby dismissed with costs to the Respondent.

It is so ordered.

Delivered by Video Conference this 30th Day of September, 2020.

Hon. Lady Justice Monica K. Mugenyi

PRINCIPAL JUDGE

Hon. Justice Dr. Charles O. Nyawello

JUDGE

Hon. Justice Charles A. Nyachae

JUDGE

Certified as True Copy of the original

30 SEP 2020

Registrar

EAST AFRICAN COURT OF JUSTICE