



**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. 20 OF 2019**

**MARTHA WANGARI KARUA ..... APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL OF  
THE REPUBLIC OF KENYA ..... RESPONDENT**

**AND**

**1. HON. ANNE MUMBI WAIGURU  
2. HON. PETER NDAMBIRI ..... INTERVENERS**

**30<sup>TH</sup> NOVEMBER 2020**



## JUDGMENT OF THE COURT

### A. Introduction

1. Ms. Martha Wangari Karua ('the Applicant'), a Kenyan citizen, lawyer and politician that is ordinarily resident in the Republic of Kenya ('the Respondent State'), lodged this Reference under Articles 6(d), 7(2), 27(1) and 30 of the Treaty for the Establishment of the East African Community ('the Treaty'). The Reference is premised on the failure by the Respondent State, through the acts and omissions of its judicial organ (the Kenya Judiciary), to abide the fundamental and operational principles encapsulated in Articles 6(d) and 7(2) of the Treaty.
2. The Applicant faults the decision of the Supreme Court of Kenya in *Petition No. 3 of 2019* for its failure to uphold the rule of law and knowingly dispensing injustice to her as a litigant before it. This action by the Respondent State's judicial branch is deemed to violate the principles of good governance, democracy, rule of law, and human and peoples' rights; including the Applicant's right to access to justice and a fair hearing. The Reference is supported by two affidavits deposed by the Applicant and one Gitobu Imanyara respectively, both of which are dated 15<sup>th</sup> April 2020.
3. It is opposed by the Attorney General of the Republic of Kenya ('the Respondent'), a self-defining office that was sued in its representative capacity as Principal Legal Advisor to the Respondent State. In its Response to the Reference, the said office denies any breach of the Treaty in the terms proposed by the Applicant. The Respondent maintains that the Applicant's case was determined in due



compliance with the rule of law, and she did have access to and a fair hearing in the Respondent State's judicial organ.

4. The Respondent does also contest the justiciability of some of the matters raised in the Reference, urging that only the Supreme Court judgment of 7<sup>th</sup> August 2019 is validly challenged, all the other decisions being time-barred. Furthermore, it is proposed that the present Reference is tantamount to an appeal from the decision of the Respondent State's apex court, a jurisdiction that this Court is not vested with; and, in any event, the Applicant is not entitled to damages, that being a preserve of States parties. No affidavit was filed in support of the Response to the Reference.
5. At trial, the Applicant was represented by Mr. Donald Deya and Ms. Esther Muigai Mnaro. The Respondent State was represented by Mr. Emmanuel Bitta and Ms. Michelle Omuom. The Interveners, on the other hand, were jointly represented by Messrs Paul Nyamodi, Patrick Barasa and Kamotho Waiganjo.

## **B. Factual Background**

6. On 8<sup>th</sup> August 2017, the Applicant participated in the General Election in the Respondent State as a gubernatorial candidate for Kirinyaga County, and lost to the First Intervener. Dissatisfied with the election result, the Applicant lodged *Election Petition No. 2 of 2017* at the High Court of Kenya at Kerugoya, challenging the Interveners' election as Governor and Deputy Governor respectively.
7. Before the Petition could be heard, the First Intervener successfully challenged its compliance with Kenyan electoral laws. The Petition was struck down by the High Court of Kenya on 15<sup>th</sup> November 2017.

The Applicant successfully appealed that decision in the Court of Appeal at Nyeri vide *Election Petition Appeal No. 1 of 2017*. In its judgment of 2<sup>nd</sup> March 2018, the said appellate court remitted the matter back to the High Court for determination on its merits.

8. The High Court did on 14<sup>th</sup> June 2018 render its judgment on the merits. It dismissed the petition and upheld the Interveners' election. Aggrieved by the High Court decision, the Applicant sought redress from the Court of Appeal but lost on both a point of law and the substantive grounds of appeal. The Court of Appeal, in its judgment of 20<sup>th</sup> December 2018, *inter alia* held that the High Court lacked the jurisdiction to entertain the Election Petition after the lapse of the six-month period for hearing petitions as by law prescribed.
9. The Court of Appeal decision was upheld by the Supreme Court of Kenya vide its judgment in *Petition No. 3 of 2019*, whereupon the Applicant lodged the present Reference in this Court.

### C. Applicant's Case

10. It is the Applicant's case that video evidence that she had filed with the High Court of Kenya at Kerunyoga was lost or stolen while in that court's custody, but it went ahead to determine the remitted election petition without investigating the issue. In its judgment of 14<sup>th</sup> June 2018 the court *inter alia* held that the said video evidence had never been filed.
11. Her appeal to the Court of Appeal was dismissed on the ground that the High Court had no jurisdiction to entertain the matter given that six months had lapsed since the petition was first filed; never mind that it was the Court of Appeal itself that had remitted the matter

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back to that court. Be that as it may, the Court of Appeal did find for a fact that the Applicant had indeed filed the lost video evidence in the High Court.

12. On appeal to the Supreme Court, it was the Applicant's contention that the Court of Appeal had misconstrued the Kenyan Constitution, particularly the right to access to justice and a fair hearing. The Supreme Court dismissed the Appeal on grounds that it too lacked jurisdiction to entertain it given that the hearing of the petition had commenced after the six-month period prescribed by Kenya's Elections Act, 2011.

13. The Applicant contends that whereas the Elections Act does indeed restrict the hearing and determination of election petitions to six months from the date of filing, and another six months for determination of appeals; that law is silent on time lines for the hearing of remitted petitions upon a successful appeal. It is the contention that in so far as Article 259 of the Kenyan Constitution obligates municipal courts to apply the doctrine that the law is always speaking in order to ensure justice is dispensed, the Supreme Court failed to uphold the rule of law in its determination of *Petition No. 3 of 2019*. It thus breached Articles 6(d) and 7(2) of the Treaty.

#### D. Respondent's Case

14. On its part, the Respondent contends that the Interveners appealed to the Supreme Court against the Court of Appeal decision to remit the Applicant's election petition back to the High Court, but the apex court declined to entertain the appeal on grounds that, the High Court having been seized of the matter, it was prematurely before Supreme Court.



15. It was further contended that upon hearing the matter on its merits, the High Court held that an appeal lodged in the Court of Appeal operates as a stay of proceedings at the High Court thus freezing the six-month time frame for the hearing of election petitions; an issue that was successfully cross-appealed by the Interveners and overturned by the Court of Appeal. The Supreme Court concurred with the Court of Appeal, deciding that the High Court proceedings were a nullity on account of lapse of time and it had no jurisdiction to entertain the remaining issues.
16. 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.
17. The Respondent urges that the Applicant's case was decided in accordance with publically promulgated laws that are equally enforced; it was adjudicated by independent and impartial courts; and the proceedings and decisions of the domestic courts depict the principles of supremacy, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, and procedural and legal transparency.

#### **E. Issues for Determination**

18. At a Scheduling Conference held on 16<sup>th</sup> March 2020, the Parties framed the following issues for determination:

- I. *Whether the Reference by the Applicant is time-barred.*



- II. *Whether the Reference raises a cause of action against the Respondent.*
- III. *Whether the Respondent State through the acts and/ or omissions of its judicial organs violated its commitments to the fundamental and operational principles of the EAC Treaty, especially the right to access to justice and a fair trial.*
- IV. *Whether the Applicant is entitled to the remedies sought.*

## F. Interveners

19. At the same Scheduling Conference, and following their admission to the case by consent of the Parties, the Interveners were directed to file a Statement of Intervention in this matter. In their Statement of Intervention dated 15<sup>th</sup> September 2020, they address points of law, as well as the merits of the Reference.
20. In terms of the points of law raised, the Interveners urge the Court to find that it lacks jurisdiction to entertain the Reference in so far as it seeks to have the Court sit in appellate jurisdiction over a decision of the apex municipal court in Kenya, a jurisdiction the Court purportedly does not have. The Interveners do also contest the Applicant's challenge to the decisions of the High Court and Court of Appeal of Kenya, urging that it is time-barred, the said decisions having been rendered well outside the two-month period prescribed in Article 30(2) of the Treaty.
21. With regard to the substantive issue herein, it is the Interveners' contention that the decisions of the municipal courts that have been questioned were arrived at after hearing all parties in their respective cases, as required under Article 50 of the Kenyan Constitution. It is argued that in the absence of proof (either by a record of the Supreme Court proceedings or otherwise) that the municipal courts were biased; the allegation of breach of the Applicant's right to a fair

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hearing or violation of the rule of law remains baseless and unsubstantiated.

22. The Interveners further contend that it does not amount to breach of the right to access to justice or fair trial for a court to decline to entertain a matter on account of lack of jurisdiction. On the contrary, the absence of jurisdiction automatically halts a court's intervention.

23. Citing this Court's definition of good governance in the case of **Raphael Baranzira & Another vs. The Attorney General of the Republic of Burundi**,<sup>1</sup> it was opined that the Reference does not demonstrate that the Respondent State lacks effective mechanisms, processes and institutions to address its citizens' legal rights. Accordingly, the alleged infringement of the good governance principle was unfounded.

24. The right to intervene in a matter before the Court is granted in Article 40 of the Treaty. That Article restricts an intervener's role in a Reference to submissions in respect of '**evidence supporting or opposing the arguments of a party to the case.**' The Statement of Intervention is in the form of submissions on the evidence on record; highlighting the intervener's support or opposition to the arguments of its party of preference, without delving into issues of law.<sup>2</sup> That is not to say that the Interveners may not address the Court on the law applicable to the facts that they seek to substantiate. However, they would not be at liberty to address the Court on issues of law as



<sup>1</sup> EACJ Reference No. 15 of 2014.

<sup>2</sup> **Union Trade Centre (UTC) vs. The Attorney General of the Republic of Rwanda, EACJ Reference No. 10 of 2013, para. 27.**



between the Parties.<sup>33</sup> We would therefore respectfully disregard the Interveners' submissions on points of law.

### G. Court's Determination

25. 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 effective 1<sup>st</sup> February 2020 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.'**

26. Secondly, although it was not framed as an issue, the question of jurisdiction being a *sine qua non* for judicial legitimacy, we deem it necessary to clarify this Court's jurisdiction in the present case as a matter of course. It is trite 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 Articles on the Responsibility of States for Internationally Wrongful Acts* (ILC Articles on State Responsibility). The Court is also clothed with jurisdiction to entertain a challenge to the judicial decision of municipal courts, including apex courts. This was conclusively settled in The East African Civil Society

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<sup>33</sup> See Hon. Fred Mukasa Mbidde vs. The Attorney General of the Republic of Burundi & Another, EACJ Reference No. 6 of 2018, as cited in Union Trade Centre (UTC) vs. The Attorney General of the Republic of Rwanda (supra) at para. 29.

**Organisations' Forum (EACSOFF) vs. The Attorney General of the Republic of Burundi & Others**,<sup>4</sup> in the following terms:

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

27. Accordingly, this Court is well within the purview of its mandate to interrogate the decision of the Supreme Court of Kenya, with a view to determining its compliance with the Treaty.

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

AND

**Issue No. 2: Whether the Reference raises a cause of action against the Respondent**

28. We elected to address Issues 1 and 2 together given the Parties' treatment of them. It is the Respondent's contention that the Reference is time-barred, having been filed on 4<sup>th</sup> October 2019 – more than two months after the date the cause of action therein allegedly accrued. However, learned State Counsel appeared to

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<sup>4</sup> EACJ Appeal No. 4 of 2016.



restrict his time-limitation objection to the decisions of the High Court and Court of Appeal; conceding that the challenge to the Supreme Court decision of 7<sup>th</sup> August 2019 is within time. It was also conceded that the same decision of the apex court constitutes a valid cause of action in this matter.

29. On her part, the Applicant addressed the Court only on the issue of cause of action, making no closing submissions on the question of time-limitation. It is her contention that the Supreme Court's failure to hear her petition on its merits constitutes a fundamental violation of human rights, in particular the right to access to justice. It thus breaches a fundamental obligation that binds the EAC Partner States under Article 6 of the Treaty, as well as Articles 2 and 7 of the African Charter on Human and Peoples' Rights.

30. We carefully considered the rival arguments of both Parties. As quite correctly observed, 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.**

31. To the extent that the Respondent concedes that the impugned Supreme Court decision is the sole matter in contention between the Parties, *Issue No. 1* would stand conceded. However, in oral submission highlights, learned State Counsel appeared to back-track on this issue, suggesting that in so far as the matter in the Supreme

Court was initiated in the High Court of Kenya, the date of the High Court's decision would be the date of reckoning for purposes of computation of time. Given learned Counsel's ambivalence on the issue, we deem it necessary to interrogate it on its merits.

32. It is indeed true that time would be computed from the starting date of an act complained of and not the day the act ends. This position was underscored in the case of **The Attorney General of the Republic of Uganda & Another vs. Omar Awadh & 6 Others**.<sup>5</sup> That case re-stated the position taken in the earlier Appeal of **The Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit**,<sup>6</sup> where 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.**'

33. However, that computation would be made against the act complained of in the Reference, and not such act as is deduced to be in issue by a respondent. In the instant case, whereas the Applicant does make extensive reference to the decisions of the lower courts' handling of her election petition, in paragraphs 23, 24 and 25 of the Reference she clearly demarcates the Supreme Court decision as the decision complained of before this Court. Therefore, time would be computed as from the date of that decision.

34. That being so, the Reference having been lodged in this Court on 4<sup>th</sup> October 2019 in respect of a judgment delivered on 7<sup>th</sup> August 2019, it was filed two days short of the expiration of the two-month time line set out in Article 30(2) of the Treaty. We would therefore resolve *Issue No. 1* in the negative.

<sup>5</sup> EACJ Appeal No. 2 of 2012, para. 60.

<sup>6</sup> EACJ Appeal No. 1 of 2011.



35. Having held that the impugned Supreme Court decision is the issue in contention in this Reference, it follows that it is the action that gave rise to the present proceedings. Again, the Respondent did concede that fact, therefore that should have been the end of the matter. However, for the avoidance of doubt, we clarify the position.

36. A cause of action has been severally held to exist where a Reference raises a legitimate question under the Court's legal regime as spelt out in Article 30(1); more specifically, where the matter complained of is alleged to violate the national law of a Partner State or infringe any provision of the Treaty. Causes of action before this Court are grounded in a party's recourse to the Court's interpretative and enforcement function as encapsulated in Article 23(1) of the Treaty, rather than the enforcement of typical common law rights. See *Sitenda Sebalu vs. The Secretary General of the East African Community & Others*<sup>7</sup> and *Simon Peter Ochieng & Another vs. The Attorney General of the Republic of Uganda*.<sup>8</sup> Indeed in the case of *British American Tobacco (BAT) Limited vs. The Attorney General of the Republic of Uganda*,<sup>9</sup> the violation of municipal law was held to give rise to a cause of action either under Article 30(1) to the extent that it amounts to an 'unlawful' act *per se*, or under **Article 6(d) of the Treaty in so far as it would constitute a violation of the principle of rule of law enshrined therein.**'

37. In the instant case, the Reference does question the compliance of the Supreme Court decision with the right to access to justice and fair trial contemplated in the rule of law principle under Article 6(d) of the Treaty. This undoubtedly is a legitimate legal question under

<sup>7</sup> EACJ Reference No. 1 of 2010

<sup>8</sup> EACJ Reference No. 11 of 2013

<sup>9</sup>EACJ Reference No. 7 of 2017, para. 35



Article 30(1) of the Treaty, which *inter alia* mandates an intending litigant to refer for the Court's determination a decision that is considered an infringement of any Treaty provision. We are therefore satisfied that the Reference discloses a cause of action against the Respondent State, and do answer *Issue No. 2* in the affirmative.

**Issue No. 3: Whether the Respondent State through the acts and/ or omissions of its judicial organs violated its commitments to the fundamental and operational principles of the EAC Treaty, especially the right to access to justice and a fair trial.**

38. We approach our determination of the present issue from the conceded premise that it is only the Supreme Court decision of 7<sup>th</sup> August 2019 that is in contention as between the Parties.

39. It is the Applicant's contention that the Respondent State's judicial branch was expected to interpret the law within the precincts of Articles 48, 50, 105, 159 and, particularly, 259 of the Kenya Constitution so as to uphold the rule of law, democracy and human and peoples' rights. The said judicial branch was purportedly obliged to interpret the Constitution and laws of the Respondent State in a manner that promotes the purpose and principles of the Constitution, and advances the principle that justice must not only be done but be seen to be done. It is proposed that the expeditious disposal of cases alluded to in Article 219(2)(b) could not have been intended to lock out litigants that succeeded on appeal and (through no fault of theirs) had their cases remitted to the trial court, such as the Applicant.

40. It is the Applicant's view that the impugned Supreme Court decision offended Articles 6(d) and 7(2) of the Treaty, as well as

Articles 7 and 8 of the Universal Declaration of Human Rights and Articles 3 and 7 of the African Charter on Human and Peoples' Rights. In her estimation, the Supreme Court ought to have considered a six-month period for cases remitted on appeal, so as to avert the absurdity of rendering nugatory her right of appeal, itself an essential component of due process.

41. It is opined that in departing from renown rules of constitutional interpretation, which are underpinned by Article 159 of the Constitution and have been otherwise relied upon by the same court; the Supreme Court undermined the rule of law contrary to Articles 6 and 7 of the Treaty. Furthermore, the apex court is considered to have condoned the subversion of justice by its failure to adjudicate the appeal on its merits, particularly the thorny issue of the lost or stolen electronic evidence.

42. Conversely, it is the Respondent's contention that the Applicant did have formal and actual access to the Respondent State's judicial organs but opted to lodge the Reference as a disguised appeal. The Court was urged not to delve into matters to do with the Respondent State's election petition time lines or Elections Act as they allegedly fall outside its purview. Citing the definition of good governance and the rule of law as adopted by this Court in the case of **Raphael Baranzira & Another vs. The Attorney General of the Republic of Burundi** (supra), it was opined that the Applicant had not demonstrated arbitrariness, unfairness or lack of accountability in the Supreme Court's application of the law.

43. We would dispel forthwith the position peddled by Learned State Counsel that this Court cannot delve into the Respondent State's

electoral laws in its determination of a matter before it. In the case of **Henry Kyarimpa vs. The Attorney General of the Republic of Uganda**<sup>10</sup> the Court was most categorical in deciding that it may, in the course of determining Treaty compliance, inquire into Partner States' adherence with their domestic laws. It held:

**Where the complaint is that the action was inconsistent with internal law and, on that basis, a breach of a Partner State's obligation under the Treaty to observe the principle of the rule of law, it is this Court's inescapable duty to consider the internal laws of such Partner State in determining whether the conduct complained of amounts to a violation or contravention of the Treaty.**

44. The facts of the present case fall squarely within the scenario contemplated by that decision. The Applicant faults the Supreme Court of Kenya for misconstruing the Respondent State's constitutional and statutory laws in its determination of her election appeal. She further faults it for disregarding its previous decisions on established rules of constitutional interpretation. She considers the said actions or omissions to violate the right to access to justice and the right to a fair trial as enshrined in the rule of law principle. It is thus her contention that, to that extent, the Respondent State (taking international responsibility for the acts of the said judicial organ) is in breach of Articles 6 and 7 of the Treaty.

45. We reproduce below the pertinent provisions of the Kenyan Constitution as invoked by the Applicant.

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<sup>10</sup> EACJ Appeal No. 6 of 2014, p. 30.





Article 48

The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

Article 50(1)

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Article 159(2)

In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

- (a) .....
- (b) justice shall not be delayed;
- (c) .....
- (d) justice shall be administered without undue regard to procedural technicalities; and
- (e) the purpose and principles of this Constitution shall be protected and promoted.

Article 259(1) and (8)

- (1) This Constitution shall be interpreted in a manner that—
  - a. promotes its purposes, values and principles.
  - b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights.
  - c. permits the development of the law.
  - d. contributes to good governance.
- (2) .....
- (3) .....
- (4) .....
- (5) .....
- (6) .....
- (7) .....

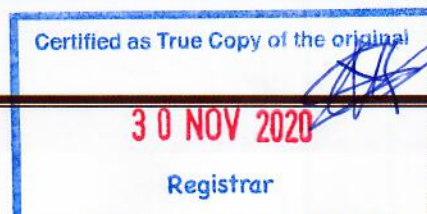


(8) If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay.

46. We carefully considered the material on record in this Reference. As quite rightly emphasized by learned Counsel for the Applicant, this is neither a disguised appeal nor an electoral offence trial. The gist of the Applicant's case is that the Supreme Court of Kenya so misapplied that Partner State's municipal law as to forment a scenario whereby, a party's right of appeal against electoral malpractice notwithstanding, such party may have his/ her right to access substantive justice curtailed on account of a *lacuna* in constitutional time lines. Whereas the said court took the view that its hands were tied by the Constitution, it is the Applicant's contention that it abdicated its judicial role and denied her petition its day in court.

47. It is common ground that Section 75(1) of the Elections Act grants parties the right to contest alleged electoral malpractices in the High Court of Kenya. It is not in dispute either that Section 85A of the same law confers a right of appeal to the Court of Appeal. On the other hand, Article 163(4)(a) though not conferring a typical second appeal from the Court of Appeal in respect of electoral matters, does provide for an appeal to the Supreme Court on matters of constitutional interpretation.

48. Conversely, whereas Section 75(2) of the Elections Act limits the hearing and determination of election petitions in the High Court to six months from the date of filing, it is silent on whether that time frame includes the time within which cases on remission by an appellate court may be determined. Ordinarily, an election petition brought under Section 75(1) should be heard and determined within the six-



month period stipulated in Section 75(2) and, should it go on appeal, it would be determined within the six months delineated in Section 85A(1)(b). However, the question is what would happen where the appellate court determines an appeal by remitting a matter back to the trial court as happened in this case? More importantly, the Applicant having been caught up in that scenario, was there a violation of the rule of law and/ or good governance in the Supreme Court's handling of the matter?

49. The Supreme Court rendered itself as follows on that issue:

**We still hold the position that the period provided for the settlement of electoral disputes cannot be extended by any court and we see no reason to depart from that position in this or any other case. It is indeed unfortunate that in remitting the matter back to the High Court after the determination of the prior appeal, the Court of Appeal appeared to have disregarded this Court decision in *Lemanken Aramat v. Harun Maitamei Lempaka & 2 Others*. Had the Appellate Court applied the precedent in that case, it would not have made an open-ended order or remission as it did. The Court should have made a limited order with the requirement that the High Court determines the petition strictly within the timeline of six months. In the alternative, the Appellate Court should have decided to terminate the matter at that stage, well aware that any substantive determination of the petition by the High Court would be an exercise in futility, in view of the precedent in *Lemanken*. (Our emphasis)**



50. In the case of Rashid Salim Adiy & Others vs. The Attorney General of the United Republic of Tanzania & 2 Others,<sup>11</sup> a fair trial was defined as 'a trial by an impartial and disinterested tribunal in accordance with regular procedures.' Article 14(1) of the International Convention on Civil and Political Rights (ICCPR) was also cited with approval as follows:

**In the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by the law.**

51. After a careful consideration of the material on record, we find it far-fetched to suggest that the Supreme Court decision was arrived at in an unfair hearing, and by an incompetent, non-independent or partial court. No such fact has been established before us. A legal challenge to the court's interpretation of Section 75(2) of the Elections Act would not necessarily impute any unfairness to the trial or hearing that underpinned it. It is so held.

52. In the Rashid Salim Adiy case, the Court also adopted the following definition of the concept of 'access to justice':

**Access to justice means that citizens are able to use justice institutions to obtain solutions to their common justice problems. For access to justice to exist, justice institutions must function effectively to provide fair solutions to citizens' justice problems.**

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<sup>11</sup> EACJ Application No. 7 of 2018, para. 40.



53. Meanwhile, Black's Law Dictionary equates access to justice to 'a **fair trial on the merits**.'<sup>12</sup>

54. Accordingly, purely from the access to justice perspective, the impugned Supreme Court decision is deeply troubling. The chronology of events in this case was that the trial court upheld a point of law that the Applicant's failure to include in her petition the results of the elections and the date of declaration results was fatal. The Applicant undoubtedly had a right of appeal in that matter, which she opted to exercise. The Court of Appeal was also well within its remit to overturn the trial court's decision and refer the matter back to it for determination on its merits; particularly since its appellate jurisdiction in election petitions is limited to questions of law not fact. Unfortunately, the trial court was unable to determine the matter within the time fixed by statute. The Applicant's quest for justice saw her return to the appellate court to challenge a decision on the merits, albeit one that was delivered beyond the prescribed time-line. On this occasion she was unsuccessful *inter alia* on the premise of time-limitation, a decision that was upheld by the apex court.

55. Against that background, we respectfully observe that the Applicant did not seek an *extension* of time from the Supreme Court. No time is designated in the Constitution for remitted cases therefore the issue of extension alluded to by the municipal court would not arise. Secondly, a decision from the Supreme Court that the Court of Appeal '**should have decided to terminate the matter at that stage, well aware that any substantive determination of the petition by the High Court would be an exercise in futility**' is extremely troublesome. It suggests that the Applicant's right to

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<sup>12</sup> 8th Edition, p.881



access to justice, including exhausting her right of appeal, were unimportant. It does also denote a recommendation for courts to disregard their duty to administer justice purely because in their estimation, to do so would be '**an exercise in futility.**'

56. It will suffice to point out here that the matter before the Supreme Court was no longer an electoral matter but a search for a constitutional solution to a legal problem. Sitting as such, the Supreme Court would be the judicial organ mandated to provide a just and equitable solution to the identified procedural debacle, where no time is allotted for the hearing of matters on remission. The Kenyan Constitution does, in our considered view, provide an appropriate legal framework for the solution to the unjust circumstances that the Applicant found herself in.

57. Article 48 represents an unequivocal commitment by the Respondent State to ensure access to justice for all persons. Article 159, on the other hand, encapsulates the principles that should guide courts in the exercise of their judicial authority. Article 259 then provides a more focused outlook on how the Constitution should be construed against, we propose, the backdrop of the values and principles outlined in Article 10 thereof. Therefore, the solution to the Applicant's dilemma was to be found in the application of the interpretation rules espoused in Article 259, against the yardstick of the values and principles set out in Articles 10 and 159 of the Kenyan Constitution. It is on that premise that we interrogate the issue before the Court.

58. Article 259(1(a) calls for the interpretation of the Constitution in a manner that promotes its purposes, values and principles. For



present purposes, these are to be found in Articles 10(2)(b) and 48 of the Constitution. The obligation upon the Respondent State in Article 48 to ensure access to justice for all persons is thus anchored in the national ethos of **'human dignity, equity, social justice'** as highlighted in Article 10(2)(b). Indeed, Article 10(1)(a) succinctly binds any State organ (including a judicial organ) that seeks to interpret the Constitution, to the national values and principles in Article 10(2), such as have been highlighted above. This is re-echoed in Article 159(2)(e), where courts are enjoined to exercise their judicial authority with due regard to the protection and promotion of the purposes and principles of the Constitution.

59. We take the considered view that it is against the totality of the foregoing legal backdrop that Article 259(8) is couched in the terms it is. A holistic interpretation of that provision would thus suggest that in the promotion of access to justice, equity and social justice; where a court sitting in interpretation of the Constitution finds that a particular time frame is not prescribed therein, it is urged to construe and remedy the *lacuna* in such a manner as would ensure that **'the act shall be done without unreasonable delay.'** In the instant case, therefore, there was a duty upon the Supreme Court to redress the identified *lacuna* in the law so as to engender equity and social justice in the adjudication process. This would not be tantamount to usurping the legislative role of the legislature, but rather a breath of judicial life into the provisions of Article 259(8) of the Constitution to underscore **'access to justice for all persons'** as guaranteed in Article 48, and ensure that Kenyan law is never silent, *always speaking*.<sup>13</sup>

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<sup>13</sup> See Article 259(3) of the Kenyan Constitution.



60. Consequently, with utmost respect, we find that the impugned Supreme Court decision did fall short on the said judicial organ's constitutional duty and curtailed the Applicant's right to access to justice. It thus contravened the rule of law principle enshrined in Articles 6(d) and 7(2) of the Treaty. Article 4(1) of the ILC Articles on State Responsibility provides as follows on the responsibility of States for the actions of their judicial organs:

**The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions ....**

61. Accordingly, we find the Respondent State responsible for the impugned decision of the Supreme Court. We do therefore answer *Issue No. 3* in the affirmative.

**Issue No. 4: Whether the Applicant is entitled to the remedies sought.**

62. The Applicant sought the following reliefs as reproduced verbatim below:

- a. A DECLARATION that the Respondent State, through the acts and/ or omissions of its judicial organ, violated its commitments to the fundamental and operational principles of the EAC, specifically the principles of good governance, democracy, rule of law, and human and peoples' rights, guaranteed under Articles 6(d) and 7(2) of the EAC Treaty.
- b. A DECLARATION that the Respondent State infringed on the Applicant's right to access to justice and fair trial.
- c. That this Honourable Court be pleased to award damages to the Applicant.





- d. THAT this Honourable Court pleased to make such further or other orders as may be just, necessary or expedient in the circumstances.
- e. AN ORDER that the costs of and incidental to this Reference be met by the Respondent.

63. Having held as we have on *Issue No. 3*, we would grant the declaration sought under paragraph 62(a) above, albeit only in terms of the rule of law principle. We would similarly grant the declaration sought in paragraph 62(b) with regard to the right to access to justice.

64. With regard to the prayer for general damages, it is not in dispute that the Court is clothed with jurisdiction to grant such reliefs to parties. This was quite conclusively settled in the case of **Hon. Dr. Margaret Zziwa vs. The Secretary General of the East African Community**.<sup>14</sup> In that case, the duty upon the Court with regard to granting appropriate remedies to parties was spelt out as follows:

**The full effectiveness of East African Community Laws including the Treaty and the protection of the rights granted by such laws requires the Court to grant effective relief by way of appropriate remedies in the event of breach of such laws. Otherwise such laws would be no more than pious platitudes. ... Articles 23(1) and 27(1) of the Treaty do not confine the Court's mandate to mere Treaty interpretation and the making of declaratory orders but confer on the Court, being an international judicial body, as an aspect of its jurisdiction, the authority to grant appropriate remedies**

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<sup>14</sup> EACJ Appeal No. 2 of 2017.



**to ensure adherence to law and compliance with the Treaty.<sup>15</sup>**

65. In addition, the legal consequences of breach of Treaty obligations were held in that case to include reparation, compensation (otherwise known as damages) being an entrenched remedy in international law.<sup>16</sup> That position resonates with Articles 35 and 36 of the ILC Articles on State Responsibility, as reproduced below:

Article 35 Restitution

**A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:**

**(a) is not materially impossible;**

**(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.**

Article 36 Compensation

**1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.**

**2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.**

66. Under Articles 35 and 36, a State found to be responsible for an internationally wrongful act would be obliged to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed and/ or to compensate for the damage caused as a result of the wrongful act. In the instant case, no prayer for restitution

<sup>15</sup> Ibid. at p. 19, para. 35

<sup>16</sup> Ibid. at p. 36, para. 75



was made. However, in the absence of restitution, the State responsible for a wrongful international act is obligated to pay compensation.<sup>17</sup> We would therefore grant the claim for compensation as provided under Article 36(1) of the ILC Articles on State Responsibility.

67. According to the case of Grand Lacs Supplier S.A.R.L vs. The Attorney General of the Republic of Burundi,<sup>18</sup> the compensation awardable in that regard would be **'those ... for what is termed moral, non-material or non-pecuniary loss or damage (also referred to as 'general damages').'** In that case, the Court awarded USD \$ 20,000 as general damages for unlawful seizure of a consignment of goods worth USD \$ 130,524; Treaty and Protocols violations; wrongful deprivation of property, and hampering EAC citizens' business, trade and economic activity. In the instant case, given the lost opportunity to be heard in an election petition that could have resulted in national gubernatorial service, we would think that an award of USD \$ 25,000 would suffice for the Applicant.

68. Meanwhile, Article 38(1) of the ILC Articles provides that **'interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation.'** Given the totality of the circumstances of this case, we do deem it necessary to grant simple interest on the compensation awarded at 6% per annum from the date of this judgment until payment in full.

69. On the other hand, 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

<sup>17</sup> See Article 36(1) of the ILC Articles on State Responsibility.

<sup>18</sup> EACJ Reference No. 6 of 2016, p. 26, para. 60.



the case of **The Attorney General of the Republic of Burundi vs. The Secretary General of the East African Community & Another**.<sup>19</sup> Finding no reason to decide otherwise, we would award costs to the Applicant.

#### H. **Conclusion**

70. In the result, the Reference is allowed in the following terms:

- i. A DECLARATION is hereby issued that the Respondent State, through the acts and/ or omissions of its judicial organ, violated its commitments to the fundamental and operational principles of the EAC, specifically the principle of rule of law guaranteed under Articles 6(d) and 7(2) of the Treaty.
- ii. A DECLARATION is hereby issued that the Respondent State infringed on the Applicant's right to access to justice.
- iii. Compensation in general damages in the sum of USD \$ 25,000 (twenty five thousand) is hereby awarded to the Applicant.
- iv. Simple interest at 6% per annum is awarded against the compensation designated in paragraph 70(iii) hereof from the date of this judgment until payment in full.
- v. Costs are awarded to the Applicant.

It is so ordered.

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<sup>19</sup> EACJ Appeal No. 2 of 2019



Dated and delivered by Video Conference this 30<sup>th</sup> Day of November, 2020.



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**Hon. Lady Justice Monica K. Mugenyi**  
**PRINCIPAL JUDGE**



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**Hon. Justice Dr. Charles O. Nyawello**  
**JUDGE**



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

