IN THE EAST AFRICAN COURT OF JUSTICE
APPELLATE DIVISION AT BUJUMBURA

(Coram: Geoffrey Kiryabwire, VP; Sauda Mjasiri and Anita Mugeni, JJA)

APPEAL NO. 02 OF 2020

BETWEEN

1. LE FORUM POUR LE RENFORCEMENT DE LA SOCIETE CIVILE (FORSC) ;
2. ACTION DES CHRETIENS POU L'ABOLITION DE LA TORTURE (ACAT) ;
3. ASSOCIATION BURUNDAISE POUR LA PROTECTION DESDROITS HUMAINS ET DES PERSONNES DETENUES (APRODH) ;
4. FORUM POUR LA CONSCIEHCE RT LE DEVELOPPEMENT (FOCODE) ;
5. RESEAU DE CITOYENS PROBES (RCP) ;

APPELLANTS

AND

1. THE ATTORNEY GENERAL OF THE REPUBLIC OF BURUNDI .....1ST RESPONDENT

2. THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY.....2ND RESPONDENT

[Appeal from the Judgment of the First Instance Division of the East African Court of Justice at Arusha by Hon. Lady Justice Monica K. Mugenyi (Principal Judge), Hon. Justice Dr. Faustin Ntezilyayo (Deputy Principal Judge), Hon. Justice Fakihi A. R. Jundu (Judge), Hon. Justice Dr. Charles Nyawello (Judge) and Hon. Justice Charles Nyachae (Judge) dated 04/12/ 2019 in Reference Number 12 of 2016].

JUDGMENT OF THE COURT

A. INTRODUCTION

1. This Appeal arises from the decision of the First Instance Division in Reference No. 12 of 2016 which was filed under Articles 6(d), 7(2) and 127(3) and (4) of the Treaty for the Establishment of the East African Community ('the Treaty'), challenging the banning the Applicants' operational activities by the Government of Burundi, an act that allegedly constitutes a violation of Burundian law, the Treaty, as well as pertinent international legal instruments.

2. The Appeal was filed by five (5) non-governmental organizations (NGOs) incorporated under Presidential Decree No. 1/11 of the 18th April 1992 that regulates the activities of non-profit associations in Burundi as follows; *Le Forum Pour Le Renforcement La société Civile* (FORSC) [First Appellant], *Action Des Chretiens Pour l'Abolition de la Torture* (ACAT) [Second Appellant], *Association Burundaise Pour La Protection Des Droits, Humains et des Personnes Detenues* (APRODH) [Third Appellant], *Forum Pour La Conscience et le Développement* (FOCODE) [Fourth Appellant], *and Reseau De Citoyens, Probes* (RCP) [Fifth Appellant].

The Appellants are all resident in Burundi although some of their officers reside outside that Partner State.

3. The Respondent is the Attorney General of the Republic of Burundi [First Respondent] was sued in the Reference as a representative for and on behalf of the Republic of Burundi

4. The Secretary General of the East African Community [Second Respondent] was sued in the Reference as a representative for and on behalf of East African Community.

5. The Reference was dismissed by the First Instance Division (herein after 'Trial Court') and each party was ordered to bear its own cost. Being dissatisfied by the said decision the Appellants have now appealed to this Court. The appeal was filed on 2nd December 2020.

6. The appellants were both in the Trial Court and in this court represented by Donald Deya and Nelson Ndeki, Advocates and the First Respondent was represented by Diomede Vyizigiro, a state Attorneys while Dr. Anthony Kafumbe, Counsel to the Community, appeared on behalf of the Second Respondent.

B. BACKGROUND

7. The background to this Appeal as gleaned from the Memorandum and Record of Appeal filed in this Court is as outlined below.

8. That following the events in Burundi during the period from 2015 to 2016, the Burundi Prosecutor General froze the bank accounts of the Appellants as a result of prosecutions that arose out of the insurrections and abortive coup d'état in that period.

9. That subsequently, the Minister in Charge of Interior of the Respondent state issued the Ministerial Order No 530/1597 of 23rd November 2015, suspending the Applicants' activities. On this matter the Applicants were not given the opportunity to make presentations, neither before the suspension nor after the suspension.

10. Around eleven months later, the Minister issued the Ministerial Order No 530/1922 of 19th October 2016, banning their activities. Again, they were not availed the opportunity to make their case before the banning order.

11. In the event, the Appellants made oral and written communication with Second Respondent for his intervention in the matter but in vain;

C. THE REFERENCE

12. Aggrieved by the steps that culminated in the ban of their activities, as well as the Second Respondent's failure to intervene, the Appellants instituted the Reference which is the subject matter of this Appeal on 19th December, 2016 in the Trial Court under Articles 6(d), 7(2) and 127(3) and (4) of the Treaty for the Establishment of the East African Community ('the Treaty') challenging the banning of the Applicants' operational activities by the Government of Burundi, an act that allegedly constitutes a violation of

Burundian law, the Treaty, as well as pertinent international legal instruments.

13. In the Reference, the Appellants' averred that:

a. The system of administration and governance in Burundi is not conducive to enabling environment for civil society.

b. That as a result of the decision taken by the Minister in Charge of Interior and Prosecutor General, that Civil Society in Burundi is threatened and its activities sabotaged, its future undermined and this amounted to a breach of the relevant provisions in Articles 3(3)(b), 6(d), 7(2) and Article 127(3)(4) of the Treaty and the Arusha Accord.

c. That the procedure adopted and employed by the Minister in Charge of Interior was in breach of international instruments on the principle of separation of powers and the right to fair trial.

14. In the premises, the Appellants prayed to the Trial Court for the following Orders:

a. A declaration that the system of administration and governance in Burundi is not conducive to enabling environment for civil society.

b. A declaration that by virtue of the damaging decision taken by the Minister in Charge of Interior and Prosecutor General, the civil society in Burundi is tremendously threatened, its activities sabotaged, and its future undermined and hence a breach of the relevant provisions in Articles 3(3)(b), 6(d), 7(2) and Article 127(3)(4) of the Treaty and the Arusha Accord.

c. A declaration that the procedure adapted and employed by the

Minister of Home Affairs was in breach of international instruments on the principles of separation of powers and the right to a fair trial.

d. A declaration that the Ministerial Ordinance infringes upon and is in contravention of Article 3(3)(b), 6(d) and 7 (2) (j) and 127(3)(4) of the Treaty.

e. An Order immediately and forthwith quashing, setting aside and or lifting the Ministerial Ordinance and related decisions including the freezing of the NGO's bank accounts.

f. An Order directing the Government of Burundi to put in place mechanisms aimed at ensuring enabling environment for civil society in Burundi.

g. An Order directing the Secretary General of the of the EAC to constitute and commission an evaluation team to establish whether or not the government and administration system in the Republic of Burundi are in line with the relevant provisions of the Treaty and whether the Republic of Burundi should continue being a member of the EAC.

h. An Order directing the Government of the Republic of Burundi to Appear and file a progress report on mechanisms and steps taken towards the implementation of the principles of good governance to this Honorable Court every quarter or such other lesser period as the Trial Court shall deem expedient.

i. An Order that the costs of and incidental to this Reference be met by the Respondents.

j. That the Trial Court be pleased to make further or other orders.

D. THE RESPONSE TO THE REFERENCE

a. First Respondent's response.

15. In brief, the First Respondent averred that the action complained of by the Appellants in the Reference violated neither Burundian Law nor the Treaty. He argued that the procedure that culminated in the banning of the Applicant Civil Society organizations ensued in strict compliance with the Article 30(2) of the Presidential Decree No. 11 of 18th April, 1992 which empowers the Minister in Charge of Interior to take measures of safeguard where there is involvement of a civil society organization in the country's political affairs or a breach of public order arises.

16. That accordingly the said law does not oblige the Minister to resort to the national court on the matter of banning a civil society organization. That therefore, the measures taken under Article 30(2) of that impugned law did not violate the principles of good governance under Article 6(d) and 7(2) of the Treaty. A distinction was made between the regimes established by the first two sub-articles of Article 30 of the impugned law namely:

a) 30(1) that captures the resolution or liquidation of an association that is no longer able to meet its obligation vis-a-vis a third party, and

b) 30(2), which deals with the banning of an association on ground of meddling in political affairs or of committing breach of public order and security.

17. The First Respondent further argued that when leaders of the Applicant Civil Society Organizations called upon their members to participate in an

insurrectional movement they were endangering the nation, and failure to take measures to ban them would amount to violation of the principle of good governance under Article 6(d) and 7(2) of the Treaty.

18. It was counsel for the first Respondent's argument that there has been an enabling environment for private sector and civil society in the Respondent State because many of the civil society organizations that did not call their members to participate in the insurrectional movement and had been carrying on their activities.

19. That since they had not involved themselves in political affairs, they were functioning peacefully and enjoying the state of good governance and rule of law in the Respondent State. Counsel therefore submitted that, in his view, the Ministerial Ordinance No 530/1922 of 19/10/2016 did not in any way violate Article 127(3) and (4) of the Treaty.

20. In conclusion, learned Counsel for the First Respondent opined that the Ministerial Ordinance banning the Applicants was taken in accordance with the Burundian law in order to safeguard public order and security, and in conformity with the East African Treaty. On that basis the Learned Counsel submits that prayers 4 and 5 in the Reference be dismissed on ground of non-violation and prayers 5, 6, 7 and 8 on ground that the Court has no jurisdiction to order them. Thus, he prays that the Reference against his client be dismissed.

b. Second Respondent's response.

21. On his part, Learned Counsel for the Second Respondent did not contest

the jurisdiction of the Court, but challenged the case against his client on account of its failure to disclose a cause of action against it given that the office of the Secretary General had not played any role in the matter presently before the Court.

22. Learned Counsel argued that the circumstances giving rise to the current Reference only came to the attention of the Second Respondent upon the filing of the Reference and it would not be tenable on the part of his client to commence an investigation into a matter that was now *sub judice.*

23. He further submitted that since 2006, there had been an ongoing Inter-Burundi Dialogue that had served as a window where civil society organizations could influence what happened in Burundi and seek remedies to what they thought was unsatisfactory. In this regard he cited the case of **East African Civil Society Organization Forum v. The Attorney-General of Burundi & 2 Others** Ref No 02 of 2015 in support of his case.

E. PROCEEDINGS BEFORE THE TRIAL COURT.

24. Pursuant to the Scheduling Conference held on 8th November 2018, the Parties framed the following issues for determination:

a) Whether the East African Court of Justice has jurisdiction to hear and determine the Reference.

b) Whether there is a cause of action against the Secretary General of the East African Community.

c) Whether the banning of the Applicants violates Articles 3(3)(b), 6(d) and 7(1)(2) and 127(3)(4) of the Treaty.

d) Whether the Applicants are entitled to the remedies sought.

F. THE DECISION BY THE TRIAL COURT.

25. In relation to Issue No.1 on whether the East African Court of Justice has jurisdiction to hear and determine the Reference, the Trial Court held that the Court has jurisdiction to hear and determine any Reference in which violation of the Treaty is alleged.

26. In relation to Issue No. 2 on whether there is a cause of action against the Secretary General of the East African Community, the Trial Court held that no cause of action had been established against the said Respondent in that Reference.

27. In relation to Issue No.3 on whether the banning of the Applicants violates Articles 3(3)(b), 6(d) and 7(1)(2) and 127(3)(4) of the Treaty, The Trial Court found that the said Minister in Charge of Interior had competent authority within the limits of Article 30 of the Decree. Consequently, the Trial Court concluded that the Ministerial Order No 530/1922 of 19th October 2016 was issued in compliance with the Burundian law and, accordingly, does not infringe Articles 6(d), 7(2) and 127(3) and (4) of the Treaty.

G. APPEAL TO THE APPELLATE DIVISION.

28. The appellants raised seven grounds of appeal in the Memorandum of Appeal which are reproduced hereunder:

    1) That the Trial Court erred in law by holding that Applicant/Appellant did not provide sufficient evidence of violation of articles 6(d) and 7(2)

of the Treaty for the Establishment of the East African Community; Article 15(1) of the Common Market Protocol; Article 14 of the African Charter on Human and People's Rights in their Reference.

2) That the Trial Court erred in law by holding that the appellants were not entitled to remedies sought.
3) The Trial Court erred in law by holding that there was no cause of action against the Second Respondent.
4) That the Trial Court erred in law by interpreting the deregistration of the Appellants as an isolated incident without acknowledging that the actions of the First Respondent constituted a systematic cycle of reprisals against Civil Society Organizations, targeting a select group of individuals who had opposed the illegal third term of the current President of the Republic of Burundi, which resulted to deprivation of the protected rights and freedoms of the Appellants and therefore constituted the violation of the above mentioned provisions.
5) That the Trial Court erred in law by misapprehending the pleadings and submissions of the Appellants, by assuming that the crux of the Appellants' case was challenging its compliance with an interpretation of the laws of the Republic of Burundi.
6) That Court erred in law by failing to scrutinize the actions of the First Respondent in line with its obligations under the EAC Treaty but also other international treaties it is a party to.
7) That the Trial Court erred in Law by declaring that the Appellants tendered insufficient evidence to rebut the allegations of their "insurgence". This violated natural law principle "*sempa necessitatis probandi incumbit ei qui agit*" ('he who alleged must prove that which he alleges').

29. The Appellants, Counsel prayed for the following orders:

a. That the judgement and Orders of the Trial Court dated 4th December 2019 be set aside.

b. That the orders as prayed for in the reference be granted or a retrial of the above Reference be ordered.

c. That this appeal be allowed with costs in favor of the Appellants in the Appellate Division and in the First Instance Division.

d. That the Honorable Appellate Division makes such further or other Orders as it deems just in the Circumstances.

H. ISSUES FOR DETERMINTION.

30.The following issues were agreed upon by the parties during the Scheduling Conference which was held on the 7th October, 2020:

a. Whether the First Instance Division of this Court erred in law and committed procedural irregularity by finding that there was no cause of action against the Secretary General of the EAC.

b. Whether the First Instance Division erred in law and committed procedural irregularities by finding that the Ministerial Order No.530/1922 of 19th October 2016 was issued in compliance with the Burundian Law and accordingly does not infringe Articles 6(d), 7(2) and 127(3) & (4) of the EAC Treaty.

c. Whether the Appellants are entitled to the remedies sought.

30. The Learned Counsels for the Parties considered those issues in that order in their written submissions which submissions they wholly adopted at

the hearing of the Appeal. Their respective arguments are summarized hereunder:

ISSUE N°.1: Whether the First Instance Division of this Court erred in law and committed procedural irregularity by finding that there was no cause of action against the Secretary General of the EAC

A. Appellants' case:

31. In relation to this issue, the Appellants after a comprehensive analysis of the Trial Court Judgement with regard to this issue, now concur with the findings of the Trial Court that there is no cause of action against the Secretary General of the EAC. They agreed with how the Court interpreted Article 14(3)(1) and Article 16 and 127 of the Treaty.

32. The Appellants accordingly filed a notice under Rule 105(1) and Rule 4 of the Rules of procedure withdrawing the Appeal against the Second Respondent.

B. First Respondent's case

33. In relation to this issue the Respondent submitted that even if he had not been served with the notice of withdrawal of the appeal against the Second Respondent, he did not object to the withdrawal.

C. Determination of the Court

34. After carefully considering both parties' submissions, indeed we find that

the Appellants had appealed against the Trial Court's finding on the issue that there was no cause of action against the Second Respondent.

35. We also note that the Learned Counsel on behalf of appellants, in his main submissions to the appeal, he confessed to have concurred with the Trial Court's finding that there was no cause of action. The Learned Counsel mentioned that the Appellants agreed on how the Court interpreted Article 14(3)(1), article 16 and 127 of the treaty. What this Court is left to assess, is the legality of the withdrawal of the Appeal, whether it complies with the Rules of Procedure which have always guided this Court.

36. With regard to the procedure, we find that the appellants correctly filed a notice under rule 105(1) and Rule 4 of the rules of procedure withdrawing the Appeal against the Second Respondent.

37. **Rule 105(1)** provides that:

"An appellant may at any time after instituting his appeal and before the appeal is called on for hearing lodge in the appropriate registry a written notice that he does not intend further to prosecute the appeal".

38. Considering the above provision, we find that the above provision was complied with, however, this Court has to establish whether the applicant went further to comply with Rule 105(2) as well.

39. **Rule 105(2)** provides that:

"The appellant shall, within seven (7) days after lodging the notice of withdrawal, serve copies of it on each respondent....."

40. According to the Counsel for the Second Respondent, he argued and

demonstrated that he was not served with the copy of the notice of withdrawal of appeal. However, despite not being informed about the Appellants' withdrawal of Appeal against him, the Counsel of the Respondent submitted that he was satisfied with the Appellants' withdrawal of appeal against him on this issue.

41. Rule 4 provides that:

"...Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders or give such directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court...".

42. It is therefore this Court's finding that both parties agreed about the withdrawal.

43. This Court guided by Rule 4 of the Rules of this Court, holds that the Withdrawal of the Appeal challenging the Trial Court's Holding that there was no cause of action against Second Respondent was accepted and upheld. Hence the Court shall not have to determine on the same.

ISSUE NO 2: Whether the First Instance Division erred in law and committed procedural irregularities by finding that the Ministerial Order No.530/1922 of 19th October 2016 was issued in compliance with the Burundian Law and accordingly does not infringe Articles 6(d), 7(2) and 127(3) & (4) of the EAC Treaty

A. Appellants' case.

44. The Appellants submitted that the Trial Court erred in law and committed procedural irregularities by finding that the Ministerial Order No.530/1922 of 19th December, 2016 was issued in compliance with the Burundian Law and accordingly does not infringe Articles 6(d), 7(2) and 127(3) & (4) of the EAC Treaty.

45. The Appellants based their appeal on Article 35 (A) of the Treaty which lays down the grounds on which an Appeal should be based and Rule 86 of the Rules of Procedure which both highlight that the three grounds are as per:

(a) Point of law

(b) Lack of jurisdiction; or

(c) Procedural irregularity.

46. In support of the above, the Appellants referred this Court to the Case of **Simon Peter Ochieng' vs the Attorney General of the Republic of Uganda** Appeal No 04 of 2015 where this Court categorically held that the right of appeal is limited to the grounds provided under Article 35 (A) of the Treaty. From the above case, the Appellants admitted that the onus of proof (*onus probandi)* falls on the party alleging the error. That in the same case, it was held that, the party (Appellant) must advance arguments in support of the contention and explain how the error invalidates the impugned decision.

47. From the above, the Appellants based their appeal on two grounds namely a point of law and procedural irregularities. In relation to the foresaid, the Appellants referred this Court to the case of **Angela Amudo vs.**

Secretary General of the East African Community Application No. 04 of 2015, where the Appellate Court provided factors to be considered when determining the highlighted grounds of Appeal, the Court held as follows:
"We are fully aware that a court commits an error of law or a procedural error when it:

a. *misapprehends the nature, quality, and substance of the evidence;*
b. *draws wrong inferences from the proven facts: see, Trevor Price & Another vs. Raymond Kelsal [1957] E.A. 752, Wynn Jones Mbwambo v. Waadoa Petro Aaron (1966) E.A. 241; or*
c. *acts irregularly in the conduct of a proceeding or hearing leading to a denial or failure of due process (i.e. fairness) e.g. irregularly admits or denies admission of evidence, denies a party a hearing, ignores a party's pleadings..."*

a. The Trial Court misapprehended the nature, quality, and substance of the evidence.

48. Based on the case mentioned above, on the first ground of appeal, the Appellants submitted that the Trial Court misapprehended the nature, quality and substance of the evidence in stating that the First Respondents' affidavit attested to the Applicants having breached public order. That attestation was not rebutted beyond the assertion in the submissions that the First Respondent bore the burden of that allegation. The Appellants referred this Court to paragraph 67, Page 279 of the Record of Appeal. The Appellants submitted that the Trial Court erred in that finding; that it

misapprehended the timeline of the pleadings and the affidavits.

49. On the same issue, the Appellants further argued that with regard to the timelines of pleadings, the Appellants' statement of Reference was filed on the 19th December, 2016 and that they were the first to raise the issue of insurrection and the report of the Commission of Inquiry that was the sole reason for the Ministerial ordinance No. 530/ 1922 of 19th December, 2016 being issued; that the Appellants attached the said order as an annexure to the Reference. That under paragraph 18 and 19 of the statement of Reference that the Appellants stated that the report was based on the information from interrogation of some detainees arrested due to the insurrection.

50. The Appellants further referred this Court to the First Respondent's response to the Reference filed on the 30th January, 2017 that was supported by the Affidavit of Elisa Mwansasu, in the Respondent's reply, the First Respondent alleged that the Appellants were warned by the authority regarding their violations of the law and statutes but that the Appellants had continued to cause hatred and divisions among the Burundi populations and tarnishing the image of the Country. In the same reply, the First Respondent further submitted that the non-profit associations destabilized democratically elected institutions, organized insurrectional movements to overthrow democratically elected institutions in the name of good governance or people centered principles.

51. The Appellants quoted the Affidavit of Elisha Mwansasu that supported the First Respondent's reference and stated that:

"...The Applicants, launched, participated and supervised actively and the appellants have been behaving and acting like political organizations especially since the 26th April 2015 when they tried in vain to overthrow the democratically elected institutions through their organized insurrectional movements...".

52. With regard to the issue of timeline, the Appellants argued that by the time the Respondent had filed their statement of Reference, the First respondents' reply to the Reference, and the First Respondent's affidavit between 19th December, 2016 and 30th January, 2017 the Appellants had not yet filed any affidavit in support of the same Reference.

53. That on the 8th November, 2018 during the scheduling conference, the Appellants through their counsel requested the Court to allow them to file additional affidavits which were their first affidavits in support of the Reference, which prayer was granted. That pursuant to the aforesaid, on the 22nd November 2018, the Appellants filed six (6) affidavits to support their Reference. That all the Appellants' affidavits rebutted both allegations of the First Respondent that the Appellants were involved in insurrectional movement and the allegation that the government warned the Appellants regarding their violations of the law and statutes. In support of the foregoing the Appellants referred this court to their affidavits as follows;

a) 1st Appellant's Affidavit : paragraphs Nos 12, 13, 21, and 22 ;
b) 2nd Appellant's Affidavit : paragraphs Nos 10, 11, and 23 ;
c) 3rd Appellant's Affidavit : paragraphs Nos 11, 12 and 23 ;
d) 4th Appellant's Affidavit : paragraphs Nos 12, 13 and 22 ;
e) 5th Appellant's Affidavit : paragraphs Nos 12, 13 and 22 ;

f) 6th Appellant's Affidavit : paragraphs Nos 11, 12 and 20.

54. The appellants submitted that though the Trial Court in its judgment at paragraph 67 held that:

> *"The First Respondents 'affidavit evidence did attest to the Appellants having breached public order. The attestation was not rebutted beyond the assertion in submission that the First Respondent bore the burden of proof of that allegation."*

The Appellants condemned the Trial Court's finding because the said allegations were rebutted both in the appellants' affidavit and written submissions. The Trial Court's failure consider their affidavits therefore consequently affected the Trial Court's appreciation of the quality and substance of the evidence of the Appellants.

55. The appellants argued that all their affidavits which were submitted in support of their reference rebutted the allegations of the First Respondent.

b. The Trial Court drew wrong inferences from proven facts.

56. On the second ground, the appellants submitted that the Trial Court drew wrong inferences from proven facts. The Appellants submitted that it was a proven fact that Article 30 of the impugned Decree was applicable to the instant case, but the Trial Court in its judgment inferred wrong inferences as to what constitutes competent Jurisdiction

57. The Appellants disputed the finding of the Trial Court under paragraph 67 of the impugned Judgment, in which, the Trial Court found that:

"Minister in charge of interior" as the Competent officer to order safeguard

measures in the event of an infringement by any organization of, among other

things, *public order"*

58. The Appellants referred this Court to Article 30 of the Presidential Decree No. 1/11 of 18th April, 1992 which provides that:

"At the request of any interested person or the public prosecutor, the competent jurisdiction may dissolve any organization which is no longer able

to honor its commitment vis-a vis third parties (...)"

59. The Appellants, disagreed with the analysis of the Trial Court under paragraph 67,

where the Trial Court disregarded the word "Competent" and only focused on the word "Jurisdiction". The appellants referred to the **Black's law Dictionary, Ninth Edition**, and argued that the definition of the word "Jurisdiction"; as per **Black's law Dictionary** is *"A court's power to decide the case or issue a Decree-Also termed in sense 2) "Competent Jurisdiction"* and further referred this Court to case of **A.G. of Rwanda vs Trade Union Centre Ltd (U.T.C.) & 3 Others** Ref No.10 of 2013.

60. For Appellants, according to the **Black's Law Dictionary**, the definition of a "Competent jurisdiction" means a Court's power, for that matter, the appellants submitted that the Trial Court drew wrong inference in its analysis

by disregarding the word "Competent".

61. The Appellants directed this Court to the meaning of the word "Jurisdiction" as cited in Black's Law Dictionary as follows;

> Meaning 1: A government's power to exercise authority over all persons and within its territory.
>
> Meaning 2: A court's power to decide a case or issue a decree-also termed competent jurisdiction.

62. Referring to the above definitions, the Appellants submitted that the interpretation applied by the first instance Division which reflects the definition in meaning No.1 above, was wrong inference on proven fact as to the intention of Article 30 Presidential Decree No.1/11 of 18th April, 1992 and what constitutes competent Jurisdiction.

63. The Appellants argued that hence the Trial Court's scrutiny of article 30 of the Presidential Decree No. 1/11 of 18th April, 1992 led to an unbalanced conclusion in favor of the Respondent.

c. The Trial Court acted irregularly in the conduct of a proceeding or hearing leading to a denial or failure of due process.

64. On the third ground of appeal, the appellants submitted that the Trial Court acted irregularly in the conduct of a proceeding or hearing leading to a denial or failure of due process. That the Trial Court ignored all of the Appellants' affidavits. That they were not referred to anywhere in the Trial Court's judgement visa-à-vis in determination of issue No.3 and termed this as an

error on the part of the Trial Court. The Appellants relied on the case of **Attorney General of Burundi vs. Secretary General East African Community & others Reference No. 02 of 2018.**

B. First Respondent's case

65. The Counsel for the Respondent submitted that he does not find any strong argument submitted by the Appellants which show how the Trial Court erred in law by finding that the Ministerial Ordinance N° 530/1922 of 19th December, 2016 was issued in compliance with the Burundian Law and where the Trial Court found that it does not infringe Articles 6(d), 7(2) and 123(3) & (4) of the East African Community Treaty.

66. The Respondent reminded this Court of Article 30 of the Decree-Law n° 1/11 of 18th April, 1992 relating to the organic framework of non-profit organizations which was the basis of the pleadings before the Trial Court.

67. That the Appellants (then Applicants in the Trial Court) had based their Reference on the first part of the Article. However, the second part provides that (In the latter case) the Minister in charge of Interior may, in advance, order safeguard measures in particular those provided for in Articles 36 and 38 below. That those measures include the prohibition from carrying out activities by the order of the Minister of interior for foreign organizations and the dissolution of the organization to be dealt with the Minister in Charge of Interior.

68. That according to the Affidavit sworn on behalf of the Respondent by the late Elisha Mwansasu who was the Public Prosecutor in the General

Prosecutor's office of the Republic of Burundi, it was clearly set out that on 26th, April 2015, a number of civil society organizations including the Appellants, launched, participated and supervised actively a deadly insurrectional movement that brought chaos, damages and crisis in the country before their leaders fled to neighboring countries and to Europe.

69. That the Prosecutor General of the Republic of Burundi put into place a commission to shed light on what transpired during the insurrection and the damages and responsibilities of each and every one and it was discovered that a number of civil society organizations including the Appellants were responsible for the chaos and the damages of the insurrectional movement. That taking into account of the aforesaid, the Court's decision was correct.

C. Determination of the Court.

70. Having carefully read the Appellants' and First Respondent's case, with regard to this issue, this Court will begin its resolution of the issues with the first claim raised by the Appellants, that:

a. The Trial Court misapprehended the nature, quality and substance of the evidence.

71. It was argued for the Appellants in their submission on page 65 of the Trial Court's Judgement, by holding that the first Respondent's Affidavit evidence did attest to the applicants having breached public order. This

attestation was not rebutted beyond the assertion in submissions of the Appellants that the Respondent bore the burden of proof of that allegation. That by doing this, the appellants are of the view that the Trial Court erred in that finding, that it misapprehended both the timeline of the pleadings and affidavits.

72. Having considered both the Appellants and Respondent's submissions, the court with regard to this ground of appeal now pose the following question. Is the timeline of the Appellant pleadings and affidavits with regard to the Appellant's being the first to raise the issue insurrection and the report of the Commission of Inquiry, which led to the eventual issuance of the Ministerial Order No. 530/1992 of 19th December, 2016, exonerate the Appellants from bearing the burden of proof to rebut the First Respondent's submissions?

73. Paragraph 67 of the Trial Judgment reads as follows:

> *"The first Respondent's Affidavit evidence did attest to the applicants having breached public order. This attestation was not rebutted beyond the assertion in submission that the Respondent bore the burden of proof of that allegation".*

From this ruling, it is clear that the basis of the court's finding was based on the fact that the Appellant's (the Applicants in Trial Court) submissions did not rebut beyond assertion the attestation of the first Respondent that the Appellants breached public order.

74. On the Contrary, this Court finds that the Trial Court did not misapprehend the timeline of the pleadings and affidavits, because "timeline of pleadings

and affidavits of appellants" was not mentioned anywhere in the Trial Court judgment as a basis for its determination with regard to paragraph 67 of the Trial Court judgment neither was it contested.

75. This Court finds that, the Trial Court in its determination, in paragraph 67 as earlier highlighted, never pronounced itself as to who submitted the pleadings and or affidavits first or who submitted them later, whether on the part of the Respondents or the then Applicants but rather the Trial Court found that it is the Appellants who failed to rebut to the contrary the claims of breach of public order by the Respondent; which led to their eventual banning by the Minister in Charge of Interior. The Appellants did not rebut this allegation in their affidavits and pleadings that were submitted to the Trial Court. This we find was the basis of the finding of fact by the Trial Court with regard to this issue.

76. The basis of the Court's determination is that among all the evidence including the cited affidavits of the Appellants did not contain evidence to rebut that the Appellants breached public order. We believe that the Trial Court after having considered the evidence, came to a conclusion, that the Appellants apart from mere assertions, provided no proof. The Appellants did not present any evidence to rebut the allegation that they breached public order which led to their eventual ban.

77. This Court finds that based on the Affidavit of Elisa Mwansasu and the Respondent's reply submissions, to statement of Reference of Appellants, that the Respondent was able to prove that indeed there was an insurrection, that a Commission was put in place to investigate the cause

of the insurrection and those behind it. The said Commission found that the Appellants were found to be among those behind the insurrection. Therefore, the evidential burden now shifts to the Appellants to prove to the Trial Court that they did not participate or incite in the insurrection by providing tangible evidence.

78. This Court finds that in the Appellants affidavits, it was stated that in 2015, there was a *coup d'état*, in the Respondent state. In their affidavits, the Appellants, concur that there were insurrections arising thereof during that time. In their Affidavits all Appellants agree that a Commission was put in place by the Prosecutor General of the Respondent State, to investigate the cause of the insurrections, which after the investigation, the Appellants were found to be among organizations that incited those insurrections which led to the eventual banning of the Appellants. Although the Appellants deny the allegations of participation, these are general denials.

79. Therefore, we conclude on this issue, by holding that the Trial Court did not err in Law by stating that the Appellants did not rebut the Respondent's allegations of breach of public order by the Appellants.

b. The Trial Court drew wrong inferences from the proven facts.

80. On this issue the Appellants argue that it a proven fact that Article 30 was applicable to the instant case, that however the Trial Court in its judgment inferred wrong inferences as to what constitutes competent jurisdiction. That the Trial Court disregarded the word "competent" and focused on the word "jurisdiction" despite the provision of Article 30 using both words "competent jurisdiction".

81. What should not be forgotten is that the issue which was before the Trial Court was the legality of the acts of the Minister in Charge of Interior, in banning of the Appellants from carrying out their activities from the Respondent state.

82. What this court has to find out is whether competent jurisdiction, means a court or any authority? Whether, the Minister in Charge of Interior was competent to order the banning of Appellants; And whether the Trial Court focused on the word 'jurisdiction' instead of the words 'competent jurisdictions' in its Judgement.

83. A proper translation of Article 30 of the Presidential Decree provides:

> *"At the request of any interested person or the public Prosecutor, the Competent Court may dissolve any organization which is no longer able to honor its commitments vis-à-vis third parties, which allocates its assets or income for purposes other than the purpose for which it was established or which infringes its statutes, mandatory provisions of this decree law or public order.*
>
> *In the latter case the Minister in charge of the interior may, in advance, order safeguards, measures, in particular those provided for under Article 36 and 38 below".*

84. The second part to that provision clearly designates the Minister in charge of Interior as the competent office to order safeguard measures in the event of an infringement by any organization of, among other things, public order. In the instant case, the First Respondent's affidavit evidence did attest to the Appellants having breached public order. This attestation

was not rebutted beyond the assertion in submissions that the First Respondent bore the burden of proof of that allegation.

85. The Trial Court in paragraph 67 found as follows:

> "*We now revert our consideration to Article 30 of the same decree. Counsel for the Applicants equated the reference to that article to 'Competent Jurisdiction' to 'Court', we find ourselves bound to determine what is meant by the term in the decree by taking the ordinary meaning thereof within the context of that legal provision. In our considered view, 'jurisdiction' in that context denotes "authority" that is inclusive of, but not restricted, to a Court".*

86. From the above it is for this Court to determine whether the Trial Court in its judgment inferred wrong inferences as to what constitutes competent jurisdiction. That the Trial Court disregarded the word Competent and focused on the word Jurisdiction despite the provision of Article 30 indicating Competent Jurisdiction. It is very important for this Court and for clarity to revisit the Original framing of Article 30 of the Presidential Decree N°1/11 of 18th April 1992 of the Respondent state especially its first part thereof to dig out its real meaning in French. This Court finds that the Trial Court relied on the Translated version of the Decree which was in English that changed the meaning of some provisions especially the one in issue regarding the interpretation of Article 30 especially on whether, it provides for Competent jurisdiction or competent Court to ban the Appellants, whether it was within the Jurisdiction of the Court or the Minister of interior of the Respondent state to ban the Appellants from carrying out their activities.

87. Having considered the French Version in which the Decree law was drafted, it is this Court's finding that the Trial Court indeed erred in its judgment and it was misled in law by the English Translation of Article 30(1) of the of the Presidential Decree N° 1/11 of 18th April 1992, this made it to draw wrong inferences. This Court finds that Article 30 of the said law, refers to competent Court or tribunal which in French was referred to as "***Juridiction compétente***" and in French which does not mean Competent Jurisdiction but rather a competent Court of competent jurisdiction.

88. However, despite that fact that this Court finds that the Trial Court erred in determining that Article 30(1) refers to Competent Jurisdiction, not Competent Court, nonetheless the Minister in Charge of Interior of the Respondent State still had the competence to ban the Appellants. This Court finds that as it was argued for the Respondent in their appeal submissions, that the Competence of the Minister in Charge of Interior of the Respondent State, is provided for under the second part of Article 30 of the Presidential Decree N°1/11 of 18th April,1992 read together with Article 36 of the same Decree, with regard to safeguard measures.

89. Therefore, this Court finds that contrary to the positions of the Trial Court and the Appellants, the banning of the Appellants by the Minister in Charge of Interior is provided for under the second limb of Article 30 which provides that:

> *"...In the latter case (in case of infringement of public order), the Minister in charge of the interior may, in advance, order safe*

guards, measures, in particular those provided for under article 36 and 38 below…"

90. In the same vein as earlier demonstrated, Article 36 provides:

"The organization of foreigners, which is the subject of application for judicial dissolution brought by the Public Prosecutor pursuant ***to Article 30 may jointly be prohibited from carrying out its activities by Order of the Minister in Charge of Interior"****.*

91. It is on this note that this Court does not agree with the finding of the Trial Court, in paragraph 66, where it indicated that Articles 36, 37 and 38 of the Presidential Decree No 1/11 of 18th April 1992 fall under the theme "SPECIAL PROVISIONS FOR ORGANISATIONS OF FOREIGNERS AND FOREIGN ORGANISATIONS", here this Court finds that the Trial Court merely relied on the theme and did not assess or interpret the linkage between Article 30 of the Decree especially the second limb with provisions of Article 36, where by it is under Article 30 that it is contemplated and predicted the said provisions that such procedures that are laid down under Article 36, of the same law, shall be followed and whose competence of course lies with the Minister in Charge of Interior.

92. Therefore, Ministerial Order N° 530/1922 of 19th of October 2016 was issued by the Minister in Charge of Interior under Article 30(2) and 36 of Presidential Decree No 1/11 of 18 April 1992 on the basis of the Report of a Commission that had been set up to inquire into the causes of the "insurrection" which infringed the public order in Burundi.

93. Consequently, this Court holds that whereas the Trial Court erred by interpreting the Article 30 with regard to first limb for mistaking "Competent court" for "Competent Jurisdiction", on the other hand regarding the legality of the banning of the Appellants from performing their activities in the Respondent State, it is the finding of this Court that act of the Minister of Interior was a safeguard measure within the meaning of Article 36, and Article 30(2) of the impugned Decree law but not competence under Article 30(1) as determined by the Trial Court. It follows that Ministerial Order No 530/1922 of 19th October 2016 was issued in compliance with the Burundian law and, accordingly, does not infringe Articles 6(d), 7(2) and 127(3) and (4) of the Treaty.

c. The Trial Court acted irregularly in the conduct of a proceeding or hearing leading to a denial or failure of due process.

94. Regarding this issue, the Appellants relied on the case of ***Attorney General of Burundi vs. Secretary General of the East African Community and others***, in which this Court cited the ***Angela Amudo case***, where it decided:

> *"we compressed all that by stating that a Court commits a procedural irregularity when it; "acts irregularly in the conduct of a proceeding or hearing leading to a denial or failure of due process (i.e. fairness) e.g. irregularly admits or denies admission of evidence, denies a party a hearing, ignores a party's pleadings etc."*

95. It is on that same position that the Appellants submitted that the Trial Court ignored ALL of the Appellants' affidavits as they were not referred to anywhere in the Trial Court's judgment vis-à-vis in determination of issue No. 3. It was further argued that this was an error on the part of the Trial Court as none of the Appellants' affidavits were expunged from the record to justify this approach. The Appellants cited ***the Attorney General of Burundi vs. Secretary General East African Community and others Reference No. 02 of 2018,*** where it was held that "an irregularity is a procedural shortcoming; not substantive error of interpretation of the law. It is committed whenever a Court in a proceeding or trial omits to apply or enforce the applicable normative procedure". Hence, the Appellants submitted that disregarding the Affidavits in the Trial Court's judgment in essence ignored a normative procedure; and this was a procedural irregularity.

96. With regard to this issue, counsel for the Respondent submitted that the allegations by the Appellants that the Trial Court ignored their affidavits is not true, because the Trial Court repeatedly referred to their Affidavits especially at paragraph 10 of the Judgment while dealing with the Appellants case. The Counsel for the Respondent referred this Court to page 243 of the Record of Appeal. He further submitted that the Appellants' Affidavits content was reflected on page 51 of the impugned Judgment where the Trial Court held:

> *"They do also attest the freezing and seizing their bank accounts vide the Prosecutor General's decision dated 19th November, 2015"*

Counsel argued that this amounted to a reference to the affidavit unless

the Appellants wanted a verbatim quotation of the Affidavit.

97. The Appellants further argued that in determining whether the Appellants activities were legal or not, the Trial Court based its findings on the national laws of the Respondent State and the Treaty of East African Community that in interpreting such laws would not require looking at the Affidavit.

98. From the above, and after considering the contents of the Affidavits of the five Appellants as demonstrated above by both parties, this Court finds that whatever is contained in the affidavits was reflected in the impugned Judgment. The Trial Court even in determining issue No.3 at page 51 of the Trial Record, observed that based on the Appellant's submissions, which referred to the said Affidavits, it could not find any evidence to rebut the assertion of the breach of public order.

99. This being the case, this Court finds that there was no denial of due process or failure of due process by the Trial Court, since from the lodging of the claim up to the day of the Trial Court Judgment; all the procedures were well respected by the Court including a hearing. Therefore, this Court further finds the claim by the Appellants that the Trial Court acted irregularly in the conduct of the proceedings or hearing leading to a denial or failure of due process is unsubstantiated and therefore this issue is answered in the negative.

ISSUE NO. 3: Whether the Appellants are entitled to the remedies sought.

100. Finally, this Court finds that all grounds of appeal are not successful and

so the appeal stands dismissed.

101. As to costs, the general principle is that costs follow the event; this means that the costs of an action are usually awarded to the successful party. However, it should be noted that any award of costs is at the discretion of the Court.

102. Rule 127(1) of the Court Rules provides that costs in any proceedings shall follow the event unless the court for good reasons shall otherwise order. Therefore, we have carefully considered the rival submissions of the parties on the issue of costs, and find that it is just and equitable given that there were inter alia translation challenges at the Trial Court that each party bears its own costs.

Final disposition of the Court.

103. We order that this appeal stands dismissed with each party bearing their own costs.

IT IS SO ORDERD.

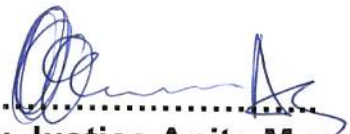
Dated, delivered and signed at Bujumbura, this 19th day of November 2021

.....

Justice Geoffrey Kiryabwire
VICE PRESIDENT

.....

Lady Justice Sauda Mjasiri
JUSTICE OF APPEAL



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Lady Justice Anita Mugeni
JUSTICE OF APPEAL