IN THE EAST AFRICAN COURT OF JUSTICE

AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Yohane B. Masara, PJ; Dr Charles O. Nyawello, Charles Nyachae, Richard Muhumuza & Richard W. Wejuli, JJ)

REFERENCE NO. 14 OF 2018

RUGO FARM COMPANY.....APPLICANT

VERSUS

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

7th April 2022

JUDGMENT OF THE COURT

A. INTRODUCTION

1. This Reference was filed on 24th August 2018 under Articles 3(3)(b), 6(d), 7(2), 8(4),12, 27(1) and 30(1) & (2) of the Treaty for the Establishment of the East African Community (hereinafter "the Treaty"). It challenges the decision taken by the Special Court of Land and other Assets of the Republic of Burundi ("the Special Court") on the grounds that the decision was an infringement of the laws of the Republic of Burundi as well as the provisions of the Treaty, particularly Articles 6(d) and 7(2).

2. The Applicant is a legal person duly registered in the Republic of Burundi, a Partner State of the East African Community. The Respondent is the Attorney General of the Republic of Burundi, sued on behalf of the Government of Burundi in the capacity of the Principal Legal Advisor and representative of the Government.

B. REPRESENTATION

3. At the hearing, the Applicant was represented by learned Advocates Horace Ncutiyumuheto and Janvier Nsabimana; while the Respondent was represented by Diomede Vyizigiro, Senior State Attorney.

C. BACKGROUND

4. In 1993, Rugo Farm, a company duly registered in the Republic of Burundi bought a piece of land from another Burundian company by the name of RUZIZI. The land is said to be 1507 hectares and 60 acres in Nyakagunda locality. The acquisition of land was done through a sale contract concluded between the two companies on 24th August 1993, under which Rugo Farm paid one hundred and

thirty-one million two hundred and fifty thousand Burundi Francs (BIF 131,250,000) as well as transactional tax to the State of Burundi.

5. After acquiring the land, the Applicant exploited the land, cultivating both Palm oil trees and Patchouli for agricultural and industrial purposes and, in that regard, erected several factory buildings in the said land.

6. On 18th July 2012, the Government of Burundi, through its newly formed company called COGERCO, repossessed the land and put it into public domain. COGERCO sued the Applicant before the National Commission for Lands and other Assets ("the Commission") for grabbing land in the cotton reserves of COGERCO. The Applicant, not satisfied with the decision of the Commission unsuccessfully challenged it before both divisions of the Special Court; meanwhile, it also submitted the matter to the Constitutional Court of Burundi on the grounds of unconstitutionality. After submitting the matter before the Constitutional Court, the Applicant made an application to the Special Court to suspend the proceedings in order to await the verdict from the Constitutional Court in accordance with Article 230(3) of the Constitution of Burundi.

7. The Special Court declined the request to suspend determination of the appeal. It went ahead and decided the appeal, upholding the decision that the land remains in the public domain.

8. Aggrieved by the decision of the Special Court, the Applicant lodged the present Reference seeking orders obliging the Respondent to comply with its obligation under Articles 6(d) and 7(2) of the Treaty.

D. THE APPLICANT'S CASE

9. The Applicant's case is set out in the Statement of Reference, in the affidavit in support of the Reference, in the written submissions as well as in the submission's highlights made during the hearing.

10. It is the Applicant's case that by failing to protect its land and property rights, the Government of Burundi violated the fundamental and operational principles of the Treaty under Articles 6(d) and 7(2) respectively. The Applicant contends that the decision of the Commission of Lands and other Assets as well as that of the Special Court to uphold the Government repossession of the land owned by Rugo Farm was a failure by the Respondent to observe the principles of good governance and the rule of law.

11. The Applicant submitted that the Government of Burundi through the Commission violated both Constitutional and Procedural rules of the country when it made the decision to take Rugo Farm's land. The Applicant argues that since it had submitted the issue to the Constitutional Court of Burundi, the proceedings of the Commission as well as that of the Special Court at First Instance Division and thereafter at its Appeal Division, proceedings should have been suspended pending the decision of the Constitutional Court.

12. It is also the Applicant's contention that the Respondent's actions violated Article 36 of the Constitution of Burundi as well as Article 14 of the African Charter on Human and Peoples Rights. Both provisions, the Applicant states, guarantee the right to property. The Applicant contends that the deprivation of the property bought and possessed legitimately constitutes a violation of his rights. For those

reasons, the Applicant seeks from this Court the following declarations and orders:

a) **A declaration that the decision made by the Special Court of Lands and other Assets against Rugo Farm is a violation of Articles 6(d) and 7(2) of the Treaty;**

b) **A declaration that the sale between Rugo Farm and Ruzizi under the auspices of the Government of Burundi is legal;**

c) **An order directing the Respondent to pay 18,837,500,000 Burundi Francs representing the field of 1507 hectares, and 126,678,027,100 Burundi Francs representing various plantations on the field; and**

d) **An order directing the Respondent to pay the costs arising from this Reference.**

E. RESPONDENT'S CASE

13. Similarly, the Respondent's case is set out in the Response to the Reference, the Respondent's Response to the Applicant's written submissions, affidavits in support of the Respondent's case, as well as the highlights of the same at the hearing.

14. The Respondent's case is premised on the validity of the sale contract through which the Applicant obtained the land. The Respondent contends that Ruzizi Company, which sold the land to the Applicant had no right to dispose of that property. According to the Respondent, the first sale contract of the land in dispute between the Republic of Burundi and Ruzizi Company was subject to certain conditions in accordance with the laws on concession and that the

rights of Ruzizi Company over the land were limited to exploitation according to the said contract. Thus, the sale of the land to the Applicant was inevitably illegal.

15. Secondly, it is the Respondent's contention that this Court is not vested with appellate jurisdiction to determine matters decided by domestic courts in Partner States, its jurisdiction being limited to the interpretation and application of the Treaty, pursuant to Articles 23, 27 and 30 of the Treaty.

16. The Respondent also submitted that this Reference is time barred and should therefore be dismissed.

F. ISSUES FOR DETERMINATION

17. At a Scheduling Conference held on the 7th September 2020, the following were framed as issues for determination:

    a) **Whether the Court has Jurisdiction to entertain the Reference;**

    b) **Whether the Reference is time-barred;**

    c) **Whether the contract for the sale of land by Ruzizi to the Applicant was legal;**

    d) **Whether the decision of the Special Court on Lands and Other Assets violates Articles 6(d) and 7(2) of the Treaty; and**

    e) **What remedies are available to the Parties**

G. DETERMINATION OF ISSUES

ISSUE No. 1: Whether this Honourable Court has jurisdiction to determine the Reference

18. In the Response to the Reference, Counsel for the Respondent raised the issue of jurisdiction of this Court. He reiterated the same in his written and oral submissions

19. He submitted that the dispute before this Court is about land that was given to Ruzizi Company by the Colonial Government in 1928 for exploitation but with conditions not to dispose of the land and, that, in 1993 RUZIZI entered into a sale contract of the said land with the Applicant in violation of the conditions set out in the 1928 agreement. He further submits that in 2012, COGERCO, a government company in charge of exploiting cotton in Burundi sued the Applicant before the Commission alleging that the Applicant trespassed on its land. That COGERCO won the case. The appeal against this decision in the Special Court yielded no different result as the lower judgement was upheld. He maintains that it was after losing the case before the competent judicial organs that the Applicant (Rugo Farm) referred the matter to this Court whose jurisdiction the Respondent contests on the ground that the Court has no powers to deal with the Reference as it is not an appellate court over cases tried by Partner States' judicial organs. He premised his argument on Article 27(1) and (2) of the Treaty.

20. Conversely, it was argued for the Applicant that its reference of the matter to this Court is not in light of the Court being an Appellate court over decisions finally decided upon by the courts of Partner States, but rather in accordance with Articles 23(1), 27(1) and 30(1)

of the Treaty. Counsel for the Applicant submitted that the issue of this Court not being an appellate division of domestic courts in Partner States was discussed on several occasions. He made reference to cases of **Manariyo Desire vs the Attorney General of the Republic of Burundi, EACJ Reference No. 8 of 2015, Niyongabo Theodore & 2 Others vs the Attorney General of the Republic of Burundi, EACJ Reference No. 4 of 2017)** and **East African Civil Society Organization Forum vs the Attorney General of the Republic of Burundi & Others, EACJ Reference No. 2 of 2015.** He affirmed that this Court has jurisdiction to entertain and determine this Reference.

21. We have carefully considered the rival arguments of the parties. The facts and arguments of both parties point to the jurisdiction of the Court in relation to a matter tried both at first instance and appeal level by a Court in Burundi. Thus, the contentions of the Parties hinge on whether this Court has or has no jurisdiction over cases decided by Courts of Partner States. Consequently, resolution of this matter requires an interpretation and application of Article 30(1) of the Treaty. We will address the issue in light of decided cases by this Court.

22. In **Manariyo Desire vs the Attorney General of the Republic of Burundi** (supra) it was held that:

> **"There is a clear distinction between what constitutes an appellate review of a subordinate court's decision and the dialectical approach which is synonymous of international review of domestic judgements."**

23. In the same vein, in **Niyongabo Theodore & 2 Others vs the Attorney General of the Republic of Burundi** (supra) the same issue was discussed and the Court held that:

> **"Similarly, recourse to this court with regard to a decision of the Tribunal de Grande Instance of Bujumbura would not amount to the invocation of unavailable appellate jurisdiction but, rather, the application of jurisdiction conferred upon this Court under Article 27(1) of the Treaty."**

24. Further, in **East African Civil Society Organization Forum vs. the Attorney General of the Republic of Burundi & Others, EACJ Appeal No. 4 0f 2016,** this Court held that a reference before the trial Court was not a further appeal of the decision of the Constitutional Court of Burundi. The Court stated:

> **"...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 the duty to determine this international responsibility and in so doing, it had a further duty to consider internal laws of the Partner State and apply its own appreciation thereof to the provision of the Treaty."**

25. For ease of reference, Article 30(1) of the Treaty is reproduced here under. It reads:

> **"Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner Sate or an institution**

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

26. Manifestly, the provision of this Article confers to residents of Partner States the right to bring a matter to this Court where it is alleged that an "***act, regulation, directive, decision or action of a Partner State is unlawful or an infringement of the Treaty***". In this Reference, the Applicant's case challenges 'a decision' by the **Courts of the Republic of Burundi,** a Partner State. Based on the jurisprudence developed by this Court, the Applicant has a right to bring the matter to this Court to challenge the legality of the decision referred to in the Reference. We therefore find nothing to suggest that the conditions spelt out in Article 30 of the Treaty are not met by the Applicant. As long as the Reference alleges abrogation of the Treaty provisions, this Court has jurisdiction to deal with the matter, notwithstanding that such matter arises from a decision of a domestic Court of a Partner State.

27. Accordingly, we answer issue No.1 in the affirmative.

ISSUE No. 2: <u>Whether the Reference is time-barred</u>

28. In submissions, it was argued for the Respondent that this Reference should not be entertained, the same having been filed in Court beyond the two months sanctioned by the Treaty.

29. On the other hand, Counsel for the Applicant submitted that the Reference is not time barred. He argued that the Reference was filed in Court within the time specified by the law. He reiterated that the decision of the Appellate division of the Special Court was rendered on 18th April 2018 and the Applicant was notified of the same on 27th

June 2018. That, as the Applicant filed the Reference before this Court on 24th August 2018, the same was within the two months' period required by Article 30(2) of the Treaty.

30. Article 30(2) of the Treaty on which the Applicant leans in support of his argument states that:

> "...**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. At the oral hearing, Counsel for the Respondent was in agreement with the Applicant on the computation of time for the purposes of limitation. According to the Respondent, since the Applicant filed this case to the Court within the specified two months after notification of the decision by the appellate division of the Special Court then the Reference before Court was made within the specified time.

32. From the foregoing, we hasten to observe that the issue of time limitation raised by the Respondent and inserted during the Scheduling Conference is no longer an issue. Consequently, we find it unnecessary to interrogate it further.

33. Thus issue No. 2 is answered in the negative.

ISSUE No. 3: <u>Whether the contract for the sale of land by RUZIZI Company to the Applicant is legal</u>

34. At the beginning of the oral hearing, Mr Vyizigiro informed the Court of the existence of two other References instituted in this Court by Ruzizi company. These References are **No. 4 of 2019** and **No. 23 of**

2019. He submitted that it is quite difficult for him to determine whether the contract for sale of land by Ruzizi to the Applicant in the instant Reference is legal as long as the two references mentioned above are not determined. He claims, the subject matters in those References are similar to the one in the instant Reference as they relate to the sale of land by Ruzizi Company to Rugo Farm and another. Thus, he asked Court, pursuant to Rule 52(7) of the East African Court of Justice Rules of the Court, 2019 ("the Rules"), to allow him to make an informal application for consolidation of the three references.

35. The Court did not allow the oral application on the following grounds: first, the prayer was made after Counsel for the Applicant had finished highlighting its submissions in chief. It was therefore considered to be unfair to the Applicant. Secondly, the two References sought to be consolidated with this Reference were not readily available and some were still not ready for hearing. Thirdly, it was not made apparent whether parties in the two other References were consulted and were agreeable to the consolidation, as they were not before the Court.

36. On the substance, Mr Vyizigiro submitted that the contract between Ruzizi Company and Rugo Farm for the sale of land was illegal as it was declared so by the Special Court on the ground that Ruzizi Company did not have the right to dispose of the land through the sale to the Applicant. He argued further that the contract between Ruzizi Company and the Government of Burundi dated in 1928, gave Ruzizi the right to exploit the land only; that Ruzizi had no right to dispose of the land. Thus, the sale of the said land by Ruzizi to the

Applicant contravened the conditions attached to the land and, therefore, illegal.

37. On the contrary, it was the Applicant's submission that the contract of sale of land between Ruzizi Company and Rugo Farm was legal. The Applicant's Counsel faulted the Respondent for failure to provide a law or procedure in support of his assertion that the sale was unlawful. It is the Applicant's case that the contract of sale of the land to the Applicant was made under the auspices of the Government of Burundi as the latter received money in form of transaction tax. He also referred to the letter from the Minister of Land Management, Tourism and Environment authorizing Ruzizi Company to sell two plots of land as had been requested. According to the Applicant, the authorization to sell by the said Minister is acknowledgement by the Government of the legality of the contract. The Applicant also questioned why the Respondent only reacted to its use of the land after more than 20 years of peaceful enjoyment of the right over the property.

38. We have carefully considered the rival arguments of Counsel for the parties. The facts and arguments of both parties are based on the legality of the contract of sale of land between Ruzizi Company and the Applicant. The Applicant submits that it acquired the land through a sale agreement from Ruzizi Company. The Applicant relied on a document attached to the Reference titled **"IMMOVABLE PROPERTY SALES CONTRACT"** dated 24th August 1993. The document's object is sale of land located in Nyakagunda in Rugombo Commune, with an acreage of 1,507 hectares and 60 acres, at a price of one hundred thirty-one million two hundred and fifty thousand Burundian Francs (BIF 131,250,000). This document

names the seller, on behalf of RUZIZI Company, as Mr Pierre KASUBUTARE, the CEO of RUZIZI and the buyer, on behalf of RUGO FARM, is Mr Donatien BIHUTE, the Chairperson of the Board of Directors, and Mr Stanislas HABONIMANA, Delegate Director.

39. We note from both the Reference and the Applicant's submissions, documents indicating that before this land was sold to the Applicant, it was first registered in the Land Registry Book at **Volume E. LXXIV, Folio Number 00108**. A certificate of Registration to that effect is labelled as Annex 6 in the Reference. Similarly, after the sale of the land, the Applicant acquired a Certificate of Registration from the Land Registry, **Volume E. XC Folio 12**. This document is labelled Annex 14 in the Reference.

40. We also note from the same documents an authorization letter from the Minister of Land Management, Tourism and Environment, in which he informs Ruzizi Company that he is agreeable to the sale of the two plots of land in accordance with the decision of the Government and cautions that *"...the new purchaser of these plots of land, this means the new owner, is still bound, despite everything, by the obligation of using these plots of land under the sole projects in which the Government is interested..."*

41. The letter referred to above is dated 19th March 1991 and was also copied to the Minister of Justice of Burundi. It precedes the conclusion of the contract of sale of 24th August 1993.

42. It is our considered view that the said letter confirms the assertion by the Applicant that the Government was not opposed to the disposal of the land by Ruzizi Company, thus making the contract of sale of land to the Applicant lawful.

43. Further, in support to their pleadings on this issue of the legality of the contract, learned Counsel for the Applicant referred Court to a number of provisions of Burundi law. These include:

    a) **Articles 329-340 of Burundi Land Code** (Law No. 1/008 of 1 September 1986) that commonly share the notion that land rights are only legally established by a certificate of registration issued by Registrar of Land Titles;

    b) **Article 33 of the Civil Code Book III** which reads: **"Legally formed agreements take the place of law for those who made them. They can only be revoked with their mutual consent or for causes authorized by law. They must be performed in good faith";**

    c) **Article 38(1) of the Burundi Company Act of 2011,** which stipulates that the Legal Personality of Companies is acquired from their registration in the Register of Trade and Companies; and

    d) **Article 39 of the of the Burundi Company Act of 2011** which provides that the acquisition of legal personality confers to the company the power to hold rights and obligations, as is the case for the natural person.

44. Although Counsel for the Respondent submitted that the illegality of the contract between Ruzizi Company and the Applicant is based on lack of the right to dispose of the land through the said sale, allegedly because the contract through which it got the land was subject to concession, we find this assertion not supported by any evidence from the Respondent.

45. During the hearing, Mr Vyizigiro faulted the Applicant for invoking Article 38 of the Burundi Company Act of 2011. He argued that since Ruzizi company had a life span of thirty years (from 1964-1994 as per its statutes) this law cannot apply to the operation of the contract of sale because it had ceased to exist. We do not find this reasoning convincing because the contract in dispute was concluded on 24th August 1993, before the expiry time mentioned in those statutes.

46. Additionally, Article 617 of Burundi Company law cited above, provide that the law comes into force twelve (12) months after the date of its promulgation for the existing businesses and from its promulgation for new companies to be created. We construe the time lapse of 12 months before coming into force of the new law for existing businesses to mean the allowance of ample time for these businesses to align themselves to its provisions, thus, its retroactive applicability.

47. What we infer from the above provisions of the domestic laws of the Respondent State is that, in the absence of evidence to the contrary, the acquisition of legal personality by registration gives rise to ownership rights, which may include the right of property disposal.

48. Having reviewed the documents from the Reference pertaining to the contract of sale and the laws of the Respondent State, we find no evidence to infer that Ruzizi Company was not authorised to sell the disputed land as there was mutual consent for the two mentioned companies to contract and transfer the land to the Applicant.

49. In light of the foregoing, we hold that the contract for the sale of land by Ruzizi to the Applicant was legal. Thus, the issue on whether the

contract for the sale of land by Ruzizi Company to the Applicant is legal is answered in the affirmative.

ISSUE No. 4: **Whether the decision of the Court on Lands and Other Assets violates Articles 6(d) and 7(2) of the Treaty**

50. At the outset, on this issue, learned Counsel for the Applicant complained to this Court that the impugned Court's decision violated the Constitution of the Republic of Burundi. It is the Applicant case that the Respondent, through the Special Court in **Case No. RSTBA 0195** violated its own law by refusing to stay the proceedings and await the determination of the Constitutional Court on a matter filed in that court for violating the Constitution.

51. The Applicant argued that it acquired the disputed land after a sale agreement made with the facilitation of the Respondent's Government and subsequently secured a certificate of registration of the property as the rightful owner of the purchased piece of land. The Applicant contended that the decision in the above case deprived it of its right to property by taking away the disputed land and cancelling the certificate of registration.

52. The Applicant further argued that for more than 20 years it enjoyed the right of ownership of its property and the Respondent never initiated any proceedings towards the nullification of the title deed until the appellate division of the Special Court, acting in bad faith and without following due process, cancelled the title deed.

53. Learned Counsel for the Applicant supported his case by citing Articles 14 of the African Charter of Human and Peoples' Rights which provides that:

"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

54. The Applicant faults the Respondent for violating Articles 14 of the said Charter as well as Articles 6(d) and 7(2) of the Treaty and submitted that this Court, by virtue of Article 23(1) of the Treaty, has to ensure adherence to these provisions in the interpretation and application of the Treaty.

55. The Applicant referred to the decisions of this Court in **The Attorney General of Rwanda vs Plaxeda Rugumba, EACJ Reference Appeal No.1 of 2012** and **James Katabazi and 21 Others vs Secretary General of the East African Community and Attorney General of Uganda, EACJ Reference No. 1 of 2007** where this Court held that by violating its own law, a Partner State violates the provisions of the Treaty. The Applicant is therefore of the view that the infringement of Burundi law as highlighted in its submissions is an infringement of the Treaty.

56. Learned Counsel for the Respondent submitted that the Special Court did not violate the provisions of the Treaty. It is the Respondent's position that there is no evidence that the Special Court violated the Treaty. He contended that the reason that led the Special Court not to consider the prayer of the Applicant to stay proceeding and await the decision of the Constitutional Court, was because the request has no legal basis. He averred that what is provided for under Burundi Law is the stay of proceedings in a civil case while awaiting the outcome of an ongoing related criminal one.

That, he asserts, there is no requirement for the proceedings to be suspended pending a decision from the Constitutional Court.

57. It was also the submission of Mr Vyizigiro that non reliance on Article 33 of the Civil Book III of Burundi Law by the Special Court cannot be regarded as noncompliance with the law as alleged by the Applicant, as Article 33 of the said law, which refers to legal contracts made between parties, cannot apply in the present case. This, to him, is because the illegality of the sale between Ruzizi and Rugo farm is obvious.

58. Concluding on this matter, Mr Vyizigiro contended that the National Courts did not violate the provisions of both the laws of Burundi and the Treaty.

59. We have carefully considered the pleadings and rival arguments of Parties in respect of this issue. The facts raised by the Applicant indicate that the failure by the appropriate authorities of the Republic of Burundi to ensure protection of its rights fundamentally consists of the violation of the obligation under Articles 6(d) and 7(2) of the Treaty bestowed on the Respondent.

60. We have perused through the impugned decision **RSTBA 0195** rendered by the Special Court on 18th April 2018, and found conclusions by the Court that are inconsistent with the provisions of the law.

61. We gather from the reading of the Special Court's decision (on page 78 of the Reference) that on February 19th 2018 the said Court carried out a field visit on the disputed land, all parties to the suit and their witnesses in attendance. During the hearing on that day the Applicant, citing Article 230(3) of the Constitution, applied for the

suspension of proceedings to wait for determination by the Constitutional Court on the question of the violation of Constitutional provisions. The ruling of the Special Court on the application was as follows:

> **"Judging on the bench, the Court found it untimely to await this decision by the Constitutional Court. Seeing this, the appellant did not see fit to be heard on the merits, but Court decided it will rule on evidence and the case was taken under advisement."**

62. We deduce from this ruling that the Applicant's plea was not given a favourable consideration, hence the Applicant's assertion of a violation of Constitution by the Special Court.

63. We also note, from the documents in the Reference, a letter by the Applicant dated 21st February 2018 addressed to the President of the Special Court requesting for a re-opening of the proceedings so as to ensure respect and compliance to the Constitution, but no re-opening was ordered.

64. The determination of whether the ruling of the Special Court offends the provisions of Burundi's Constitution requires us to cast a glance at the 2005 Constitution of Burundi that was in place at the time of the proceedings that led to the impugned Court's decision.

65. Article 230 (2) and (3) of the Constitution states as follows:

> **(2) "Every natural or legal person interested, including the Public Ministry, may refer the Constitutional Court to a matter of the constitutionality of the laws, either directly by way of an action or indirectly by the procedure of exception of**

unconstitutionality invoked in a matter submitted to another jurisdiction.

(3)This one postpones its decision until the decision of the Constitutional Court which must intervene within a period of thirty days."

66. In our view, this provision is not ambiguous. It delineates the powers of the Constitutional Court, which, as per Article 225 thereof, is described as the jurisdiction of the State for Constitutional matters.

67. It is a fact of common knowledge in every legal setting that the Constitution enjoys the legal superiority over conflicting laws and decisions. In fact, Article 48 of the Constitution of the Republic of Burundi lays out the supremacy of the Constitution in a more succinct manner. It reads:

"The judicial, administrative, and institutional orders must respect citizen's fundamental rights. The Constitution is the supreme law. The legislature, executive and the judiciary must respect it. All laws that do not conform to the Constitution are stricken as null and void."

68. It is failure to comply with Article 230(3) of the Burundi Constitution that, *inter alia*, prompted the Applicant to have recourse to this Court seeking a declaration of the violation of the Treaty.

69. This Court has in the past pronounced itself on the violation of Partner States' domestic laws amounting to a violation of the Treaty. In **Plaxeda Rugumba vs Attorney General of Rwanda, EACJ Reference No. 8 of 2010** and **Muhochi vs Attorney General of Uganda, EACJ Reference No. 5 of 2011** the Court held that by violating its own law, a Partner State violates the provisions of the

Treaty. In **Baranzira Raphael & Another vs Attorney General of the Republic of Burundi, EACJ Reference No. 15 of 2014,** this Court examined the concept of the rule of law. Quoting from a UN Report, the Court stated:

> **"The concept of the rule of law refers to the principle of governance to which all persons, institutions and entities, public or private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principle of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of power, participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."** (emphasis added)

70. From the above definition, it can be stated that for any democratic society to thrive, rule of law is a prerequisite and **adherence to the principle of supremacy of the law, is one of its necessary elements that makes it fully functional.**

71. It is our considered opinion that the Special Court, by not suspending the proceedings in **RSTBA 0195** and await the determination by the Constitutional Court, violated Article 230(3) of the Constitution of the Republic of Burundi, which inevitably is an affront to the principles of the rule of law and, thus, constitutes an infringement to Articles 6(d) and 7(2) of the Treaty.

72. Accordingly Issue No.4 is answered in the affirmative.

ISSUE No. 5: <u>What remedies are available to the Parties</u>

73. We note that during the hearing, the issue of remedies was not revisited by either Counsel. In the Applicant's written submissions, however, Counsel for the Applicant requested Court for an order directing the Respondent to pay BIF 18,837,500,000 (Eighteen Billion Eight Hundred and Thirty-Seven Thousand and Five Hundred Francs) as compensation for the land measuring 1507 hectares as well as an amount of BIF 126,678,027,100 (One Hundred Twenty-Six Billion Six Hundred and Seventy-Eight Million Twenty-Seven Thousand One Hundred) representing various plantations on the field.

74. In response to the Applicant's written submissions, Counsel for the Respondent submitted that the Applicant should not be awarded any remedies because they have no legal basis. He argued that the remedies sought arise from an illegal Contract, hence, unfounded.

75. We have carefully considered the rival submissions of the Parties on this issue. Having held that the sale contract between the Applicant and Ruzizi Company was legal and that the actions of the Respondent infringe the Treaty, it would logically follow that the Applicant's prayer for remedies are in order. We note the fact that this prayer for remedies contains two limbs. First, the Applicant requires a declaratory order for payment of BIF 18,837,500,000 (Eighteen Billion Eight Hundred and Thirty-Seven Thousand and Five Hundred Francs) by the Respondent as compensation for the land measuring 1507 hectares and 60 acres. The second limb is a request of an order for payment of BIF 126,678,027,100 (One Hundred Twenty-Six Billion Six Hundred and Seventy-Eight Million Twenty-Seven Thousand One Hundred) *representing various*

plantations on the field. We would understand the amount in the first prayer to relate to the piece of land in Nyakagunda locality which has been hitherto the subject of litigation in the present Reference.

76. Apart from the statement of request for the same amounting to billions of Burundi Francs, there is no other justification as to how the amount was arrived at. With all due respect, given the vague nature of the Applicant's submission on this issue, we find it difficult to grant the Applicant's prayer due to lack of evidence and clarification on the value of the disputed land. It is incumbent upon the Applicant therefore, to bear the risk of failure of proof.

77. Regarding the prayer in the second limb, it is our view that it should be nipped in the bud. Much as it suffers the same fate as the first, it should not even have been brought forward because *'various plantations on the field'* did not feature anywhere in the pleadings of this Reference and the Court cannot make orders on non-litigated issues. In the result, we are unable to grant this order.

78. Notwithstanding our decision hitherto above regarding payment of compensation of the land and developments therein, for reasons delineated in this judgement, we nevertheless urge the Respondent State, in the interest of justice, to reconsider the matter, either at the Special Court or any other Government level. If the Government needs the land, it should compensate the Applicant in accordance with its laws and international best practice on property rights.

79. As to the costs of this Reference, the Applicant has succeeded in all the issues framed for determination, save for one. Rule 127(1) of the Rules provides that costs shall follow the event unless the Court

shall, for good reasons otherwise order. We find no good reason to depart from this principle.

H. **CONCLUSION**

80. From the foregoing and taking into consideration the findings and conclusions on issues herein, the Court declares and orders as follows:

    a) **This Reference is not time barred.**

    b) **that the contract of sale of land by RUZIZI to the Applicant was legal;**

    c) **that failure of the Special Court of Lands and Other Assets to adhere to the provisions of the Constitution of the Republic of Burundi in the impugned decision is a violation of Articles 6(d) and 7(2) of the Treaty;**

    d) **Claims for compensation by the Respondent to the Applicant fail; and**

    e) **the Respondent to pay the Applicant costs of the Reference.**

81. It is so ordered

Dated and signed at Arusha this 7th day of April 2022.

.....

Hon. Justice Yohane B. Masara

PRINCIPAL JUDGE

.....

Hon. Justice Dr Charles O. Nyawello

DEPUTY PRINCIPAL JUDGE

.....

Hon. Justice Charles Nyachae

JUDGE

.....

Hon. Justice Richard Muhumuza

JUDGE

.....

Hon. Justice Richard W. Wejuli

JUDGE