



**IN THE EAST AFRICAN COURT OF JUSTICE AT
ARUSHA FIRST INSTANCE DIVISION**



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

REFERENCE NO. 19 OF 2018

GARANG MICHAEL MAHOK APPLICANT

VERSUS

**THE ATTORNEY GENERAL OF
THE REPUBLIC OF SOUTH SUDAN RESPONDENT**

24th JUNE 2022

JUDGEMENT OF THE COURT

A. INTRODUCTION

1. **Mr Garang Michael Mahok** (“the Applicant”) filed this Reference against the Attorney General of the Republic of South Sudan (“the Respondent”) on 12th October 2018. It was preferred under Articles 6(c) and (d), 7(2) and 27 of the Treaty for the Establishment of the East African Community (“the Treaty”) and Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure, 2013 (“the 2013 Rules”).
2. The Reference was brought on behalf of one Mr Kerbino Agok Wol (“Mr Wol”) who is the subject of this Reference. The Applicant identified himself as a national of the Republic of South Sudan, who at the time of filing the Reference, was residing in Nairobi in the Republic of Kenya. He is also said to be a personal friend of Mr Wol, the latter being a citizen and resident of the Republic of South Sudan.
3. The Applicant prays for the following orders (reproduced as presented):
 - a) **A declaration that the Government of South Sudan has violated principles of good governance, rule of law, and human and people’s rights by: -**
 - i. **arresting and detaining Mr Wol for a prolonged period of time without according him a hearing, due process of law or any legal or administrative process;**

- ii. the acts/omissions by the Respondent are unlawful and unjustifiable and constitutes a violation of Articles 6(d) and 7(2) of the Treaty;
- iii. refusing and/or failing to give any information or reasons for the mistreatment and continued unlawful detention of the Subject. Such a failure to provide reasons concerning the continued detention further constitutes a violation of Mr Wol's fundamental right of access to information guaranteed by Article 9(1) of the African Charter on Human and People's Rights;

b) A declaration that the Government of South Sudan has violated the Constitution of South Sudan by: -

- i. violating Article 12, on the Applicant's right to liberty;
- ii. violating Article 19, on the Applicant's right to fair trial; and
- iii. violating Article 20, on the Applicant's right to litigation;

c) A declaration that the Government of South Sudan has violated the Penal Code Act of South Sudan by:

- i. violating Article 154, by influencing the course of justice for the Applicant;
- ii. violating Article 284, by wrongfully confining the Applicant;

d) A declaration that the Government of South Sudan has violated the Code of Criminal Procedure of South Sudan by: -

- i. violating Article 44, on the trial of offences against the Government, which the Applicant is allegedly being detained for;**
- ii. violating Article 64, on the remand in custody of the Applicant;**

e) A declaration that the Government of South Sudan has violated the South Sudan Police Service Act by: –

- i. violating Article 9, subsection 3 where the obligations of the Police Service have not been carried out in respect to the Applicant;**

f) A declaration that the Government of South Sudan has violated the National Security Service Act of South Sudan by:-

- i. violating Article 54, subsection 2, where the Applicant was not brought before a Magistrate or a court of law within twenty-four (24) hours;**

g) A declaration that the Government of South Sudan has violated the Revitalised Agreement on the Resolution of Conflict in the Republic of South Sudan by: -

- i. violating Chapter 2: 2.1.6, where Prisoners of War and detainees shall be released immediately**

under the supervision of the International Committee of the red Cross;

ii. violation 2.1.10.7 where the parties shall adhere to the obligations outlined in the Agreement on Cessation of Hostilities (CoHA) of 21st December 2017 which, inter alia include, but are not limited to:

a. Respect and ensure full compliance with international humanitarian law;

b. Cessation of all hostile military actions as defined in the CoHA of 21st December 2017;

c. Protection of human rights of civilians at all times to ensure safety and dignity of individuals and communities;

h) A declaration that by ordering the closure of his bank accounts with no reason or criminal charge, the Respondent is denying the subject, Mr Wol, of his rights to own and enjoy property;

i) An ORDER for the immediate release of the subject, Mr Wol;

j) An ORDER for the prompt production of the subject, Mr Wol, before this Honourable Court;

k) An ORDER for the immediate restitution of Mr Wol's property;

l) A declaration that the Applicant is entitled to a remedy of reparation in general, exemplary and/or punitive damages from the Respondent consequent upon the violation of his fundamental rights and freedoms, and subsequent and consequent ORDER on reparations and damages aforementioned;

m) The Respondent be ordered to pay costs; and

n) Any such other Orders, remedies or directions as the Court may deem fit to grant.

4. The Reference having been filed pursuant to the 2013 Rules, the Applicant did not depone an Affidavit in support of the Reference. He also did not testify in Court in the course of hearing.

5. The Respondent filed a Response to the Statement of Reference on 3rd January 2019. Likewise, no oral or affidavit evidence was tendered on behalf of the Respondent.

B. REPRESENTATION

6. Mr Donald Deya and Ms Praise-God Joseph, learned Advocates, appeared on behalf of the Applicant. The Respondent was represented by Mr Biong Pieng Kuol, Counsel General.

C. THE APPLICANT'S CASE

7. The Applicant's case is contained in the Statement of Reference filed on 12th October, 2018, the Applicant's Rejoinder to the Respondent's Response and the affidavit in support of Statement of Reference by Dr Robert A. Portada III dated 5th October 2021.

8. As it can be gathered from the Statement of Reference and the other documents from the Applicant, the Applicant preferred the Reference on behalf of Mr Wol (the Subject). However, in the reliefs sought, he appears to be craving the reliefs for the “Applicant” and not on behalf of the Subject. We believe that this was inadvertent. We therefore consider any reference to the “Applicant” in the Reliefs section of the Reference to be in reference of the Subject, Mr Wol.
9. It is the Applicant’s case that he was a personal friend of the Subject of the Reference. He introduced himself as the Coordinator of Nile Foundation, a non-governmental organisation in South Sudan. The Subject of the Reference is introduced as the founder and Chief Executive Officer of the Kerbino Agak Security Services (KASS) and the KASS Group of companies headquartered in Juba, Republic of South Sudan.
10. That, Mr Wol was arrested and detained from 27/04/2018 after being summoned by the Director General of the National Security Service, Mr Akol Koor Kuc. That at the detention, Mr Wol was tortured, was not given medical attention and was not informed of the reasons for his arrest. That he continued to be held despite the Revitalised Agreement on the Resolution of Conflict in the Republic of South Sudan of 12/09/2018 and the Republican Order Number 17 by the President of the Republic of South Sudan of 27/09/2018 which had express provisions to provide relief for those in Mr Wol’s position, and others in situations similar to his.
11. That, Mr Wol and other prisoners organised a peaceful protest demanding their right to due process on 7/11/2018. That it is on the same day that the Respondent, through its Internal Security Bureau,

acknowledged that it was holding Mr Wol pending Internal Security Bureau court martial.

12. That on 11/10/2018, the Bank of South Sudan, acting under the orders of the National Security Service, ordered closure of all of Mr Wol's Bank Accounts without giving reasons for the order.

D. THE RESPONDENT'S CASE

13. In reply, the Respondent contested the Reference and contended that it was filed out of time contrary to Article 30(2) of the Treaty.

14. That the Subject of the Reference is an active officer in the rank and file of the National Security Bureau (Internal Security Bureau) with the rank of Captain. That he was involved in the purchase of sophisticated equipment without prior knowledge of the National Security Service using his private security company known as KASS.

15. That Mr Wol was involved in huge business activities in contravention of the National Security Service Act, 2014 for which the National Security Service has the right to discipline him if he goes contrary to the law (sic). The Respondent further contends that Mr Wol's case is different from that of the other political detainees as his case is purely that of indiscipline of an Officer of National Security Service, and that it is not covered by the Revitalised Agreement of 12/09/2018 or the **Presidential decree No. 17 of 2018**.

16. That Mr Wol managed to smuggle a pistol in his possession into the detention facility, used the same to detain the detention guard, broke into arms store, took 17 rifles and spearheaded the mutiny in

the said detention facility which was taken over for some considerable period of time after which the National Security Services managed to restore the situation. That this act of mutiny engineered by Mr Wol could have plunged the country into a bloody path if it was not properly handled by the National Security.

17. That the closure of Mr Wol's bank accounts was dictated by an investigation carried out in accordance with sections 5 and 13(2) of the National Security Services Act, 2014.

18. That the Reference ought to be dismissed as Mr Wol was detained and confined in the National Security Service Facility in connection with offences in violation of Article 4(2) of the Transitional Constitution of the Republic of South Sudan, 2011 and Section 56 of the National Security Service Act, 2014.

E. ISSUES FOR DETERMINATION

19. The following issues for determination were agreed upon:

- a) Whether this Honourable Court has jurisdiction to entertain the Reference;**
- b) Whether the Reference is time barred;**
- c) Whether the Respondent's actions constituted a violation of the Respondent's domestic law and, therefore, violating Articles 6(d) and 7(2) of the Treaty; and**
- d) Whether the Parties are entitled to the Remedies sought.**

F. COURT'S DETERMINATION OF THE ISSUES

20. Before dealing with the issues outlined above, we find it pertinent to comment, albeit briefly, on the conduct of the Parties and their advocates in prosecuting this Reference. After filing this Reference in October 2018, the Applicant filed Application No. 20 of 2018 seeking interim orders, amongst them, that the Respondent either releases Mr Wol or arraigns him before a competent, impartial and effective Court or tribunal, and pending determination of the Reference, the Respondent, with immediate effect, reverses the closure of Mr Wol's businesses and personal and corporate bank accounts.
21. The Court, after an *inter parte* hearing, declined to grant the interim orders sought. It directed that the Reference be fixed for hearing.
22. As earlier stated, the Scheduling Conference was held on 25th November, 2020 whereby the Court directed Counsel for the Parties to finalise the Scheduling Notes and consequently proceed with filing of Affidavits and Written Submissions. The Applicant was to file his affidavits by 11th January 2021 and the Respondent to file its affidavits by 10th February 2021 and in case of an Affidavit in reply by the Applicant the same was to be filed by 25th February 2021. The Court further directed that the Applicant puts in its written submissions by 25th March 2021, then the Respondent puts in theirs by 26th April 2021 and, in case of a rejoinder, by 10th May 2021.
23. The timelines set by the Court were not complied with. No reasons were given and none of the parties made any application for the Court's consideration. The Scheduling Notes were not finalised until 23rd September 2021, six days before the Reference came up for

hearing. On 29th September 2021, during the hearing, Counsel for the Applicant made an oral application to adjourn the hearing. He stated that he had encountered challenges in getting witnesses but that he had gotten some witnesses who were willing to testify. He requested for seven days to be able to file witness statements, affidavits and documents. Counsel for the Respondent requested for a month's time to respond. The Court expressed its disappointment, but allowed the prayers. A schedule of written submissions was also made whereby the Applicant was to file submissions by 19th November 2021, the Respondent by 20th December 2021 and a rejoinder, if any, by 3rd January 2022.

24. Counsel for the Applicant filed one affidavit by one Dr Robert A. Portada III, an Associate Professor at Kutztown University in the USA on 6th October 2021. The Respondent did not file any affidavit or witness statement. Written submissions were filed very late; that is, the Applicant filed on 10th February 2022 (instead of 19th November 2021) while the Respondent filed theirs on 29th March 2022.

25. On 4th April 2022, this Reference was scheduled for submissions highlights. Again, Counsel for the parties came up with a number of excuses beseeching the Court to condone the delays in the interest of justice.

26. The Court reluctantly acceded, but as it can be gathered from the events preceding the highlights, there is insufficient, if any, evidence to enable the Court to determine the issues framed for determination. We will now address the issues as framed. For obvious reasons, we combine issues 1 and 2.

ISSUE 1: Does the Court have Jurisdiction to determine the Reference? And

ISSUE 2 Is the Reference Time Barred?

27. Although the issue of jurisdiction was distinctively listed as one of the issues for determination, no evidence or submission was led to suggest that this Court does not have jurisdiction to determine the Reference, other than a contention that the Reference was filed outside the prescribed time. It is on that premise that we have decided to deal with the issue of jurisdiction and time limitation jointly.

28. In the Response filed by the Respondent on 3rd January 2019, the issue of the Reference being time barred was made. It was the Respondent's view that as the Subject of the Reference was arrested and detained on 27th April 2018 and as the Reference was filed on 12th October 2018, about six months later, then the Reference cannot be adjudicated by this Court as doing so would contravene Article 30(2) of the Treaty. The Applicant, on the other hand, opposed the assertion, contending that the Reference was filed within the two months prescribed by the Treaty. In his rejoinder to the Respondent's Response, he firmly stated that the Applicant's claim against the Respondent was premised on the following:

a) Failure of the Respondent to release the Subject, as required by the Revitalised Agreement on the Resolution of Conflict in the Republic of South Sudan which was signed on 12 September 2018;

b) Failure of the Respondent to release the Subject, as directed by the President of the Republic of South Sudan,

H.E. Mr Salva Kiir Mayardit, through his Republican Order (decree) Number 17 of 27 September 2018; and

c) The Respondent's failure to protect rights of the Subject, which were violated by the unlawful closure of his personal and corporate bank accounts, and also all of his businesses, on 11 October 2018.

29. Before delving into the submissions made by Advocates for the parties in this respect, we find it imperative to reiterate the jurisprudence of this Court relating to the issue of jurisdiction.

30. The jurisdiction of this Court is stated in Article 27(1) of the Treaty as follows: **"The Court shall initially have jurisdiction over the interpretation and application of this Treaty."**

31. Further, Article 30(1) of the Treaty provides for References to the Court by legal and natural persons as follows:

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

32. From the two provisions of the Treaty cited above, this Court has jurisdiction to interpret and apply the Treaty in the case of a Reference by a legal or natural person that is resident in any of the Partner States, where the impugned act is an act, regulation, directive, decision, or action of a Partner State or an institution of

the Community, on the grounds that such impugned act is unlawful or is an infringement of the provisions of the Treaty.

33. This Court, in the case of The Attorney General of the United Republic of Tanzania vs Anthony Calist Komu, EACJ Appeal No. 2 of 2015 delineated three types of jurisdictions: *ratione personae*, *ratione materiae* and *ratione temporis*. It explained them as follows:

“Lack of *ratione personae* would arise where one of the parties is devoid of the requisite capacity or *locus standi* to appear before a court. On the other hand, court’s *ratione materiae* may be questioned on the basis of the invoked subject matter, an international court having no *ratione materiae* to try a matter where the treaty or convention under which it derives its mandate does not grant it jurisdiction over designated actions. In the case of the Treaty for the Establishment of the East African Community, such *ratione materiae* is outlined in Articles 30, 31 and 32 thereof. *Ratione temporis*, on its part, refers to time-frame prescribed for the institution of cases in a court.”

34. Further, in the case of Attorney General of the United Republic of Tanzania vs African Network of Animal Welfare, EACJ Reference No.9 of 2010, the Court stated:

“Jurisdiction is a most, if not the most, fundamental issue that a Court faces in any trial. It is the very foundation upon which the judicial edifice is constructed; from which springs the flow of the judicial process. Without jurisdiction, a Court

cannot take even the proverbial first Chinese step in its judicial journey to hear and dispose of the case.”

35. There are a number of decisions by this Court where the Court has categorically stated that it considers determination of the issue of jurisdiction paramount. It is the first and fundamental question that we determine before going into the merit or otherwise of the matter before us. In this Reference, we note from the pleadings and submissions made by the Respondent, that the jurisdiction contested is *ratione temporis*. The Respondent’s Counsel concedes to the other limbs of Jurisdiction of this Court in his written submissions and the oral highlights made in Court.

36. Article 30(2) of the Treaty provides:

“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.”

(Emphasis added)

37. To satisfy the Court that the Reference was made within time prescribed under Article 30(2) of the Treaty, the Applicant has to state succinctly when the decision or action complained of took place or when it came to his knowledge. The Appellate Division of this Court, while dealing with the issue of computation of time in **The Attorney General of the Republic of Kenya vs Independent Medical Legal Unit, EACJ Appeal No.1 of 2011**, held that time would start to run ‘**two months after the action or decision was first taken or made.**’ This position was affirmed in the case of **The**

Attorney General of the Republic of Uganda & Another vs Omar Awadh & 6 Others, EACJ Appeal No. 2 of 2012 where it was held that ‘the starting date of an act complained of under Article 30(2) .. is not the day the act ends, but the day it is first effected’.

38. In the latter case, the Court went further to state as follows:

“The principle of legal certainty requires strict application of the time-limit in Article 30(2) of the Treaty. Furthermore, nowhere does the Treaty provide any power to the Court to extend, to condone, to waive, or to modify the prescribed time limit for any reason (including for ‘continuing violations’).”

39. As stated in Paragraph 29 above, the Applicant maintains that the Reference was filed within the prescribed time. This is contested by Counsel for the Respondent. At paragraphs 5 and 6 of the written submissions, the Respondent avers that since the Subject was arrested and detained on 27/4/2018 after he voluntarily presented himself, and since the Applicant was aware of the arrest and detention of the Subject, the Application should have been filed latest on 27/6/2018.

40. In the course of hearing, it became apparent that the issue whether the Reference was filed within time was canvassed in Application No. 20 of 2018 between the same parties. At Paragraph 37 of the typed Ruling, this Court stated as follows:

“As indicated in paragraph 36 herein above, the impugned acts (ie. Failure to release Mr Wol and failure to protect his property) did happen following the signing of the

Revitalised Agreement on 12th September 2018 and the signing of the Republican Order (Decree) of 27th September 2018, as well as the closing of Mr. Wol's personal and corporate bank accounts which took place on 11th October 2018. The Reference having been lodged on 12th October 2018, we find that it was filed within the two months prescribed by Article 30(2) of the Treaty."

41. We do not understand why the Respondent's Counsel, who had represented the Respondent at the hearing of Application No. 20 of 2018, raised the same issue again. If he was not satisfied with the Court's decision on the issue, he was at liberty to challenge it by way of appeal. Much as it may not be palatable to the Respondent, this Court is unable to vacate its own decision at this stage.

42. We thus maintain our previous position and hold that the Court has Jurisdiction *ratione temporis* to deal with this Reference.

43. Our decision is premised on the fact that the actions complained of do not relate to the initial arrest and detention of the Subject. We are aware that some of the reliefs craved have a bearing on the events of 27/4/2018. We will deal with the same as and when necessary.

ISSUE NO. 3 Did the Respondent's actions constitute a violation of the Respondent's domestic law and, therefore, violated Articles 6(d) and 7(2) of the Treaty?

44. The Applicant's submission on this issue is that the Respondent violated its own laws; namely, the Constitution, the Penal Code

Act, the Code of Criminal Procedure, the Police Service Act and the National Security Service Act. Further, that the Respondent violated the Revitalised Agreement on the Resolution of Conflict in South Sudan, the Treaty and International legal instruments that it is party to.

45. To substantiate the above claims, Counsel for the Applicant contended that the Subject was arrested and held incommunicado without any access to his family, doctors or his lawyers until October 2018 when the Respondent disclosed his whereabouts. He referred this Court to decisions in **Weismann Lanza & Alcides Lanza Perdomo vs Uruguay, No. R. 2/8, U.N. Doc. Supp. No. 40; L. Magana ex-Philibert vs Zaire, Communication No. 90/1981** and **Plaxeda Rugumba vs the Secretary General of the East African Community, Reference No. 8 of 2010.**

46. Although Counsel for the Applicant had intimated that the Applicant's claims were limited to failure by the Respondent to release the Subject pursuant to the Revitalised Agreement on the Resolution of Conflict in South Sudan, the Republican Order by the President and the confiscation and freezing of the Subject's properties and accounts, his written submissions, and the highlights thereof, covered previous acts regarding the arrest, detention and failure to arraign the Subject in Court. These earlier acts, in our view, fall outside the ambit of what was agreed as the cause of action as they would bring up the question whether the Reference, regarding those acts, was filed in time pursuant to Article 30(2) of the Treaty.

47. On the other hand, Counsel for the Respondent submitted that the Respondent did not breach any domestic law, the Treaty or international legal instruments. In his view, the Respondent was merely implementing the law as the Subject had been accused and charged of contravening the National Security Act and the Penal Laws. He submitted that the Subject was in fact tried, defended by a lawyer and was convicted and sentenced to 10 years imprisonment, a sentence that was later pardoned by the President.
48. Counsel for the Respondent further contended that the Subject was an active officer in the national security service and was therefore prevented from indulging into private business not sanctioned by the National Security. That the Subject is not in the category of persons referred to in the Revitalised Agreement on the Resolution of Conflict in South Sudan and the Republican Order by the President. That those instruments related to political detainees and not persons such as the Subject.
49. In a rejoinder submission, Counsel for the Applicant reiterated the Applicant's case and faulted Mr Biong for adducing evidence from the bar, having filed no affidavit in support of the contentions made in Court.
50. Having outlined the submissions regarding this issue, the Court is bound to decide whether it was supplied with sufficient evidence to determine the allegations made by the Applicant. As earlier stated, the conduct by both Counsel left a lot to be desired. The only evidence tendered is the affidavit of Dr Robert Portada III attested on 5th October 2021 in the United States of America.

51. The Applicant did not attest any affidavit or provide a written witness statement. When the Court asked the learned Counsel for the Applicant why such evidence was not procured, he replied that the Applicant had filed an affidavit in the interlocutory application but later assigned Dr Robert Portada III who is also a director of the Nile Foundation to put in comprehensive affidavit.

52. The affidavit sought to be relied upon, in this Court's view, falls short of the standards required of an affidavit to be relied upon for serious allegations of abrogation of rights. The affidavit contains hearsay statements which cannot by themselves be relied upon to make a determination of the issue in question. At paragraph 13 of the Affidavit, the deponent states:

“THAT, I am aware that on 27/04/2018. Mr Wol was arbitrarily arrested and unlawfully detained by the National Security Service of South Sudan (hereinafter NSS) under the orders of the Director General of NSS, General Akol Koor Kuc (hereinafter general Koor). I was given this information by various contacts in South Sudan and confirmed in news reports in the days following the arrest, and Mr Wol confirmed this to me via telephone in the months and years following the arrest and detention and after his ultimate pardon and release from prison.”

53. By the above paragraph, the deponent confirms that he was not in South Sudan during and after the arrest of the Subject and that he actually spoke to the Subject in the **months and years** after he was pardoned. The affidavit also states that the Subject died

after he was pardoned. It does not state when he died. In paragraph 24 thereof, the deponent confirms that he used to speak to the subject even before he was released from prison.

54. With respect to this issue, the affidavit only refers to the seizing of Mr Wol's premises and bank accounts in paragraph 18 thereof. It does not state whether Mr Wol was a political prisoner who was entitled to be released following the Revitalised Agreement on the Resolution of Conflict in South Sudan and the Republican Order by the President. This Court has had opportunity to discuss what an affidavit should contain in **Media Legal Defence Initiative (MDLI) & 19 Others vs Ronald Ssemuusi (Deceased) and The Attorney General of the Republic of Uganda, Application No. 4 of 2015.**

55. Where an affidavit contains information that is not within the deponent's personal knowledge, the Court will be entitled to disregard such evidence unless there is cogent evidence to corroborate such evidence. In this Reference, it is alleged that the Subject of the Reference was a political detainee, thus entitled to be released upon the signing of the Revitalised Agreement on the Resolution of Conflict in South Sudan and upon the proclamation of the Republican Order by the President of South Sudan. It is the Applicant's contention in the Statement of Reference that failure to release the Subject contravened both the laws of South Sudan and consequently the Treaty. That evidence is not contained in the affidavit supporting the Reference. One would have expected the Applicant to procure evidence to prove that the Subject was a political detainee and not otherwise.

56. We note from the Affidavit presented on behalf of the Applicant that the Subject was able to speak to the deponent and other persons while in detention and even after he was released upon being pardoned by the President. We are not made aware of the reasons which prevented the Applicant or his counsel from obtaining an affidavit from the Subject before he died. We are also not made aware of the reasons why the Applicant did not seek to amend the Reference after the Subject was pardoned in order to remove parts of the Reference that ask the Court to order the release of the Subject.

57. Other than the affidavit of Dr Robert Portada III, there is no other evidence to prove the death of the Subject. The Court is not informed of when the Subject died and whether any member of his family was appointed to oversee his affairs, including the reliefs sought in this Reference. The evidence of the death of the Subject was, in our view, indispensable considering the ramification that some of the reliefs have on the life and liberty of the Subject.

58. We also note, with great concern, the absence of evidence to the contrary by the Respondent. It is curious that the Respondent could not get a witness to attest the averments that Counsel for the Respondent put in the Response, Written submissions in Reply and the oral highlights. Failure to bring such evidence depicts, in our view, lack of seriousness of the Respondent on matters of grave ramification and concerns brought before this Court against it.

59. Nevertheless, the onus of proof lies on the Applicant. It is our view that the Applicant has not managed to prove the assertions made in the Statement of Reference. He was duty bound to prove the allegations contained in the Statement of Reference. On the aspect of proof, this Court in British American Tobacco (U) Ltd vs The Attorney General of Uganda, Reference No. 7 of 2017, stated as follows:

“We are constrained, from the onset, to underscore a pertinent evidential rule. The burden of proof in international claims was articulated in the case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina vs Serbia & Montenegro), Judgment, ICJ Reports 2007, p. 43 as follows:

‘On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it; as the Court observed in the case of Military and para-military activities in and against Nicaragua (Nicaragua vs United States of America) “it is the litigant seeking to establish a fact who bears a burden of proving it.” ... Various International tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that a party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of

evidence in civil law, common law and in fact, most jurisdictions, that the burden of proof rests with the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.” (Emphasis added)

60. In the instant Reference the Applicant has not adduced evidence sufficient to enable the Court to shift the burden of proof to the Respondent. Inevitably, his claims about failure of the Respondent to abide with its domestic law and thus violating Articles 6(d) and 7(2) of the Treaty must fail for lack of proof on the balance of probabilities.

61. Consequently, the third issue is answered in the negative.

ISSUE NO. 4 Whether the Parties are entitled to the Remedies sought

62. A number of declaratory orders and other remedies were sought by the Applicant as shown in Paragraph 3 hereof. As stated in the preceding paragraphs, the Applicant failed to substantiate his entitlement to the reliefs sought. On the other hand, the Respondent prayed that all claims made against it by the Applicant be dismissed with costs. In our determination of the issues, we held that the Applicant was unable to prove his claims and thereby be entitled to the reliefs. Consequently, we are unable to grant any of the reliefs sought.

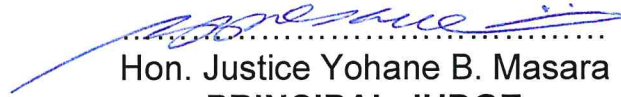
63. Ordinarily, we would be inclined to grant costs to the successful party, in this case, the Respondent in accordance with Rule 127 of the Rules. However, taking into consideration the manner in which the Respondent prosecuted this case, granting them costs will not serve the interest of justice.

G. CONCLUSION


64. In the event, we decline to grant the orders sought by the Applicant. The Reference is hereby dismissed in its entirety.

65. Considering the circumstances of the matter herein and in exercise of our judicial discretion, we direct that each Party bears their own costs.

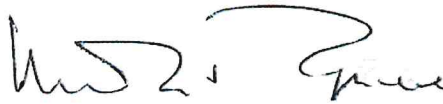
Dated, signed and delivered in Arusha this 24th day of June, 2022



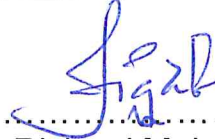
Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE



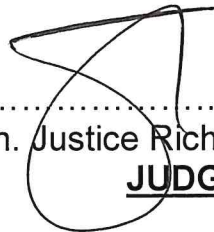
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JUDGE



Hon. Justice Charles A. Nyachae
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Hon. Justice Richard Muhumuza
JUDGE



Hon. Justice Richard W. Wejuli
JUDGE