IN THE EAST AFRICAN COURT OF JUSTICE

APPELLATE DIVISION AT KAMPALA

(Coram: Sauda Mjasiri, VP; Kathurima M'Inoti and Cheborion Barishaki, JJA.)

APPEAL NO. 04 OF 2022

BETWEEN

ISAT SURL..... .....APPELLANT

AND

THE ATTORNEY GENERAL OF

THE REPUBLIC BURUNDI.....RESPONDENT

(Appeal from the Judgment of the First Instance Division of the East African Court of Justice at Arusha by Yohane Masara, PJ, Dr. Charles Nyawello, DPJ, Charles Nyachae, Richard Muhumza and Richard W. Wejuli, JJ dated 24th March 2022 in Reference No. 10 of 2018)

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JUDGMENT OF THE COURT

A. INTRODUCTION

1. This is an Appeal from the decision of the First Instance Division of this Court (hereinafter referred to as the "Trial Court") arising out of Reference No. 10 of 2018 dated 24th March, 2022. The Trial Court dismissed the Reference and held that each party bears its own costs.

2. The Appellant is a company incorporated in the Republic of Burundi, a State Party to the Treaty for the Establishment of the East African Community (hereinafter referred to as "the Treaty"). The Respondent is the Attorney General of the Republic of Burundi.

3. The Appellant filed Reference No. 10 of 2018 in the Trial Court on 28th May, 2018. The Reference was dismissed by the Trial Court on 24th March, 2022. The Appellant then filed Appeal No. 4 of 2016, **ISAT SURL vs the Attorney General of Burundi** to the Appellate Division (this Court).

4. The Appellant was represented by Mr. Justin Semuyaba, learned Advocate while the Respondent was represented by Mr. Diomede Vyzigiro, Director of Civil Litigation in the Attorney General's Office of

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the Republic of Burundi. The Director of the Appellant company, Mr. Salim Allibhai was also present in court.

B. BACKGROUND

5. On 15th January, 2004, the Appellant who was represented by its Director, Salim Allibhai entered into a contract with Attorney Maitre Augustin Mabushi representing Antoine Ntisigana, for the sale of land situated in the Asian cadastral quarter under Land Title No. 06510 Division A, (the suit property) at a purchase price of Burundi Francs, BIF 350,000,000 which was paid to Antoine Ntisigana the owner of the land in question, by various instalments in January, July and December 2004.

6. The Certificate of Title for the Land was then transferred to the Appellant company, ISAT Surl by the Registrar of Titles.

7. The sale was the subject of dispute between the Appellant and the owner of the land who claimed that his Attorney, Mr. Augustine Mabushi did not have the mandate to conclude the contract of sale on his behalf and that the contract purported to have been entered on his behalf was null and void.

8. This resulted in a suit being filed against the Director of Titles and Mr. Augustin Mabushi for cancellation of the sale agreement and registration of the Appellant as the proprietor of the suit property. The Appellant was joined in the suit as an interested party.

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9. The suit proceeded through the Republic of Burundi's court system from the Court of First Instance in the Administrative Court of Bujumbura in 2007 up to the Supreme Court of Burundi (Cassation Chamber) and finally an application was made to the Minister of Justice in March 2018 for a Review.

10. The sequence of events in the Burundi Courts was as follows:-

(a) A suit **RAEP 93** was filed before the **Administrative Court of Bujumbura** against the State of Burundi by **Antoine Ntisigana** seeking for annulment of the transfer of the suit property to the benefit of of the Appellant.

(b) Another case **RPS 70** was filed before the Supreme Court (Judicial Chamber) against the Director of Titles and **Mr. Augustin Mabushi** for forgery of authentic documents and cancellation of the agreement of sale between the Appellant and **Mr. Augustin Mabushi** and the cancellation of the registration of the Appellant as the registered proprietor of the suit property. The Appellant was joined in this suit as an interested party.

(c) On 28th January 2008, the Administrative Court of Burundi issued its decision in **RAEP 93** cancelling the lease transfer made on April 1, 2005 in favour of the Appellant, the contract of sale of 1st April, 2005 between the Director of Land Titles and the Appellant, as well as the Certificate of Registration of the property covered by the contract of sale.

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(d) On 28th January 2011, in an appeal by the Appellant, the Administrative Chamber of the Supreme Court issued its decision in **RAA 781** overturning the decision of the Administrative Court in **RAEP 93** and reinstating the contract of transfer of lease and registration of the Appellant as the Registered proprietor of the suit property.

(e) On 24th June 2011, in a Criminal Case instituted by **Antoine Ntisigana** alleging offences of forgery in authentic writing and complicity in the forgery in writing against **Celestin Karuhariwe** (the Registrar of the Land Titles), **Augustin Mabushi and Salim Allibhai** (owner of the Appellant), the Judicial Chamber of the Supreme Court issued its decision in **RPS 70** acquitting the three accused persons of the charges against them and cancelling the Certificate of Registration of the Appellant over the suit property.

(f) On 14th February 2013, in an appeal by the Public Prosecutor's office against the decision of the Court in **RPS 70,** the Judicial Chamber of the Supreme Court issued its decision in **RPSA 283** bis dismissing the appeal and confirming the judgment of the Court in **RPS 70.**

(g) On 11th February 2014, in an appeal by Antoine Ntisigana against the ruling of the Court in **RAA 781**, the Supreme Court's Chamber of Cassation rendered its decision in **RCC 19782** overturning the decision of the Court and referring the case to the same Chamber (Administrative Chamber of the Supreme Court) for a new ruling, the bench being composed differently.

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(h) On 27th August 2015 the Appellant appealed. The National Court rendered Judgment **RAA 1172** bis granting the motion for an appeal initiated by Antoine Ntisigana, declaring it entirely well founded and accordingly, annulling the decision to transfer the lease of **1/ 04/2005** in favour of the **Appellant,** the contract of sale of **1/ 04/2005** between the Director of Land Titles and the Appellant, as well as Certificate of Registration of the property in question in favour of the Appellant.

(i) On 2nd December 2015 the Appellant appealed against the judgment **RAA 1172 bis,** but the Supreme Court on 1st January, 2015 rendered judgmen **RTC 1141** declaring inadmissible the second appeal against judgment **RAA 1172 bis** on the grounds that it did not raise any points of law as required. As a result, judgment **RAA 1172 bis** became final.

(j) The Attorney General of Burundi who was representing the Director of Titles did not proceed with **RTC 1141**.

11. The Appellant subsequently appealed to the Minister of Justice under Article 160 of Burundi Law No. 01/07 of 25th February 2005, the law governing the powers of the Supreme Court, for the Revision of judgment **RAA 1172 bis** on the ground that the decision **RAA 1172 bis** hereinafter ("RAA 1172") was contradictory to the criminal court's decision **RPS 70** (hereinafter "RPS 70").

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12. On March 28, 2018 the Minister of Justice rejected the Appellant's request for Review for having no legal basis and found that there were no contradictions between **RPS 70** and **RAA 1172.**

C. THE REFERENCE TO THE TRIAL COURT

13. At the Trial Court the Appellant sought the following Declarations and Orders:-

1. An order for reinstatement of the Appellant as the Registered Proprietor of the suit property.
2. An order for compensation for the loss of income and property suffered by the Appellant amounting to 350,000,000 Burundi Francs.
3. Loss of income of USD 252,000, being monthly rent of USD 7,000 for three (3) years accruing from the lease of the suit property to the Government of the Republic of South Africa for purposes of hosting The Chancery of the Embassy in Burundi.
4. Loss of income per paragraph (3) above for a period of over eleven (11) years from 2010 to the end of 2020 equalling to USD 924,000 which was placed in an escrow account while the case was still in the Burundi Courts of Law.
5. Costs of the Reference.

D. DECISION OF THE TRIAL COURT

13. Initially six (6) issues were to be determined by the Trial Court which are reproduced as follows:-

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1. *Whether the East African Court of Justice had jurisdiction to determine the Reference.*

2. *Whether the Reference is time barred.*

3. *Whether the National Courts of the Republic of Burundi failed to uphold the principles of the rule of law, good governance and human rights in violation of Articles 3(3)(b), 6(d), 7(2), 8(4) 27(1), 30(1) & (2), 81(2) and 127(2) (a) of the Treaty; Article 15(1) of the Protocol for on the Establishment of the East African Community Common Market (the Protocol) and Article 14 of the African Charter on Human and People's Rights.*

4. *Whether the acts and omissions of the Director of Title Deeds while deregistering the Certificate of Title and transferring the suit property is a violation of Articles 6(d) and 7(2) of the Treaty, Article 15(1) of the Protocol and Article 14 of the African Charter on Human and Peoples' Rights.*

5. *Whether the decision of the Minister of Justice of 28th March 2018 violate Articles 3(3) (b), 6(d), 7(2), 8(4) 27(1), 30(1) & (2), 81(2) and 127(2) (a) of the Treaty; Article 15(1) of the Protocol and Article 14 of the African Charter on Human and People's Rights; and*

6. *Whether the Applicant is entitled to the reliefs sought.*

14. Issues No. 1 and 2 were on a point of law which were determined first. The Trial Court answered issue No. 1 in the affirmative in favour of the Appellant. Issue No. 2 was answered in the negative. The Trial Court held that in view of its findings on the

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two issues, issues Nos. 3 and 4 were disposed on account of being hinged on the decisions of the national courts of Burundi and the alleged actions and omissions of the Director of Title. Therefore what remained to be considered were issues No. 5 and 6.

15. Issue No. 5 was answered in the negative that the decision of the Minister did not violate the provisions of the Treaty.

16. In relation to issue No. 6 on remedies, the Court dismissed the Reference and held that each party should bear its own costs.

17. The Trial Court held that the two judgments were consistent as between the parties and as between the court levels. This decision resulted in Appeal No. 4 of 2022, **ISAT Surl v The Attorney General of the Republic of Burundi.**

E. THE APPEAL

18. Being dissatisfied with the judgment of the Trial Court, the Appellant filed an appeal in this Division on the following grounds contained in its Memorandum of Appeal:-

"*1. The learned Justices of the East African Court of Justice (First Instance Division) erred in law in holding that the decision of the Minister of Justice made on March 28, 2018 did not violate Articles 3(3) (b),) 6(d), 7(2), 8(4), 27(1), 30(1) & (2), 81(2) and 127 (2) (a) of the Treaty for the Establishment of the East African Community as amended and Article 15(1) of the Protocol on the Establishment of the East African*

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Community Common Market and Article 14 of the African Charter on Human and Peoples' Rights.

2. *The learned Justices of the East African Court of Justice (First Instance Division holden in Arusha) erred in law in holding that the judgments RPS 70 and RAA 1172 bis did not reveal contradictions in that the decision RPS 70 was a criminal matter whereas RAA 1172 bis related to a civil matter and the decision on the criminal matter need not be consistent with the decision on a civil matter involving the same matters.*

3. *The learned Justices of the East African Court of Justice (First Instance Division holden in Arusha) erred in law in holding that under the* ***Law No. 1/07 of 25th February, 2005, Law No. 1/08 of 13th March 2019 Revising Law No, 1/26 of 15th September 2014 of the Creation, Organization and Jurisdiction of the Special Court of Land and Other Assets*** *the judgments* ***RPS 70 and 1172 bis RAA*** *did not reveal contradictions which became res judicata.*

4. *The learned Justices of the East African Court of Justice (First Instance Division holden in Arusha) erred in law in failing to hold that the decision in RPS 70, a criminal matter, made conclusive determination of the ownership of the suit property and the Civil Court in RAA 1172 bis was bound by that decision and could not reopen those issues as that was contrary to the principle of Res Judicata in respect of the previous criminal judgment and Res Judicata force applies to everybody notwithstanding that they were not parties to the criminal case.*

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5. *The learned Justices of the East African Court of Justice (First Instance Division Holden in Arusha) erred in law in holding that* ***The Letter No. 550/500/Cab/2018 of 28th March 2018 from the Minister of Justice*** *properly made reference to both the* ***Annulment of the Certificate Vol. ECL XX1 Folio 17*** *via* ***RPS 70 and RAA 1172 bis*** *which served as a legal ground for declining the request for Review.*

6. *That the learned Justices of the East African Court of Justice (First Instance Division Holden in Arusha) committed a* ***Procedural Irregularity*** *when they failed to interpret* ***The Law No. 1/08 of 13th March 2019 Revising Law No. 1 /26 of 15th September 2014 of the Creation, Organization and Jurisdiction of the Special Court of Land and Other Assets. The Judgments*** *on the powers of the Minister of Justice who failed to give reasons for his decision whereas it was blatantly clear that RPS 70 declared valid the contract of sale entered by* ***SALIM ALLIBHAI and Maitre AUGUSTIN MABUSHI*** *and the Civil Court sitting under* ***RAA 1172 bis*** *which subsequently seized of the same question of the validity of this contract had to respect the decision rendered by the Criminal Court sitting under* ***RPS 70*** *under Civil Law.*

7. *That the learned Justices of the East African Court of Justice (First Instance Division Holden in Arusha) committed* ***a Procedural Irregularity*** *in failing to interpret the two judgments* ***RPS 70 and RAA 1172 bis*** *and thereby arrived at a wrong decision which occasioned a miscarriage of justice.*

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8. *The learned Justices of the East African Court of Justice (First Instance Division Holden in Arusha)* erred in law *in failing to grant the Declarations sought by the Applicant/Appellant.*

9. *The learned Justices of the East African Court of Justice (First Instance Division Holden in Arusha) erred in law and fact when they dismissed* ***REFERENCE NO. 10 OF 2018*** *with no order as to costs".*

18. The Appellant asked the Court to grant the following orders:-

a) The Appeal be allowed.

b) The Judgment of the East African Court of Justice (First Instance Division) be varied / quashed.

c) The Appellant be granted costs of **REFERENCE NO. 10 OF 2018** as well as costs in this Appeal.

d) This Honourable Court makes such consequential or further Order (s) as it may deem just and equitable.

F. THE CROSS APPEAL

19. The Attorney General of the Republic of Burundi being dissatisfied with the judgment of the First Instance Division filed a cross appeal on a point of law and procedural irregularity for failure by the Trial Court to award costs to the State of Burundi, the winning party in Reference No. 10 of 2018.

20. The Respondent asked for an order that costs of the Reference and the Appeal be awarded to the State of Burundi.

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ISSUES FOR DETERMINATION

20. The following issues were agreed upon by the parties and approved by the Court during the scheduling conference which was held on 10th August, 2022:-

1. ***Whether the First Instance Division of the East African Court of Justice erred in law when it found that the judgments RPS 70 and RAA 1172 bis did not reveal contradictions leading to the conclusion that the principle of res judicata did not apply to them.***
2. ***Whether the First Instance Division of the East African Court of Justice erred in law when it found / held that the decision of the Minister of Justice made on the 28th of March 2018 did not violate Articles 3(3) (b),) 6(d), 7(2), 8(4), 27(1), 30(1) & (2), 81(2) and 127 (2) (a) of the Treaty for the Establishment of the East African Community as amended and Article 15(1) of the Protocol on the Establishment of the East African Community Common Market and Article 14 of the African Charter on Human and People's Rights.***
3. ***What remedies are the parties entitled to?***

PARTIES' SUBMISSIONS AND ARGUMENTS: ISSUE NO. 1

21. Whether the First Instance Division of the East African Court of Justice erred in law when they found that the judgments **RPS 70** and **RAA 1172** bis did not reveal contradictions leading to the conclusion that the principle of *res judicata* did not apply to them.

APPELLANT'S SUBMISSIONS

22. Mr. Justin Semuyaba, learned Advocate, for the Appellant prayed to adopt the written submissions and the Rejoinder to the

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Respondent's submissions, both filed in Court. He also submitted that the Trial Court rightly decided that the Court had jurisdiction to hear the matter and that the Reference was filed on time.

23. In relation to issue No. 1, Counsel submitted that the Trial Court wrongly concluded that there were no contradictions between Judgment **RPS 70 and RAA 1172 bis.** The Trial Court failed to compare the two judgments, that is the Criminal Case (having been delivered earlier) and the Civil Case judgment and failed to find that there were contradictions between the two decisions. The Trial Court was wrong to conclude that because one of the judgments was criminal and the other civil, it cannot compare the two as they are from different court systems. Counsel added that the Appellant has clearly pointed out the contradictions between the two judgments from page 13 to 21 of its written submissions. According to Counsel, in **RPS 70** the Court ruled that the sale was legal.

24. Counsel also submitted that the Trial Court made a wrong decision by concluding that the principle of *res judicata* cannot apply where there is a judgment in a criminal case followed by a judgment in a civil case. According to Counsel, a criminal judgment can be used to apply the principle of *res judicata* when the issue appears again in a civil case. This is because both courts would have looked at the evidence, evaluated the same and made their own conclusions. The criminal court had come to the conclusion that the transaction was validly done and that the agreements were not

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forged. Therefore, according to counsel, a person who has paid money for a property should not be deprived of the same.

25. Counsel made reference to the case of **Media Council of Tanzania and 2 Others v. The Attorney General of the United Republic of Tanzania, Reference No. 2 of 2017** where it was held that for a matter to be *res judicata*, it must be between the same parties in respect of the same subject matter and determined on merits by another court of competent jurisdiction. The Trial Court made reference to **James Katabazi and 21 Others v. Secretary General of the East African Community, and the Attorney General of Uganda, Reference No. 1 of 2007,** where the Court stated that three situations are essential for the doctrine to apply:-

26. Counsel also relied on **James Katabazi and 21 Others v Secretary General East African Community & Another, Reference No. 1 of 2007** where it was held that three situations are essential for the doctrine to apply:-

i) The matter must be directly and substantially in issue in the two suits;

ii) The parties must be the same or litigating under the same title.

iii) The matter was finally decided by a court of competent jurisdiction in the previous suit.

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27. Counsel relied on **Niyongabo Theodore and Two Others v Attorney General of the Republic of Burundi,** Reference No. 4 of 2017, where the Court made reference to the case of **Steven Dennis v AG Burundi & 5 Others,** Reference No.3 of 2015 in support of the view that the doctrine is meant to ensure that parties and the court are not burdened with multiple resolutions of the same disputes between the same parties on the same subject matter before the same court on an issue which has been conclusively determined.

28. Counsel also made reference to the decision in the **Application of the Convention on the Prevention and Punishment on the Crime of Genocide (Bosnia & Herzegovina v Serbia & Montenegro) ICJ Reports** 2007 that in International Law, the underlying principles in the concept of res judicata had been identified, **firstly the stability of legal relations that requires that litigation comes to an end, and secondly,** that an issue that had been conclusively adjudicated need not be re-litigated.

29. The Appellant also made reference to the case of **Manariyo Desire v The Attorney General of the Republic of Burundi,** Appeal No. 1 of 2017, where the Court defined the principle of the rule of law as follows:-

> *"The principle of governance [according to which] all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are*

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consistent with international human rights norms and standards. It requires, as well measures to ensure adherence to the principles of supremacy of the law, accountability to the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency".

RESPONDENT'S SUBMISSIONS

30. Counsel for the Respondent prayed for the Court to adopt the Respondent's written submissions filed in Court.

31. In relation to issue No. 1, Counsel submitted that there are no contradictions between the decisions in the criminal case and the civil case, that is Judgment **RPS 70** and **Judgment RAA 1172 bis**. Therefore according to counsel for the Respondent, the principle of *res judicata* does not apply. The two judgments are consistent as they led to the annulment of the Certificate of Title Vol ECL XXI Folio 17 on the basis of its form. The judgment in RPS 70 related to a criminal matter and the judgment in RAA 1172 bis related to a civil matter.

32. According to Counsel, the principle of law is that a decision in a criminal matter, need not be consistent with a decision on a civil matter involving the same parties because the allegations and standards of proof are different. Judgment **RPS 70** annulled the certificate Vol ECL XXI Folio 17 to restore the ownership of the

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property to the original owner. Along the same line, judgment RAA 1172 bis cancelled all the documentation to restore the property to the original owner.

33. On *res judicata,* Counsel submitted that the principle of *res judicata* seeks to end judicial proceedings on the same facts and between the same parties. It also promotes the fair administration of justice and honesty and prevents abuse of the legal process. The principle of *res judicata* cannot in any way help the Appellant who is attempting to show contradictions between RPS 70 and RAA 1172 bis, the judgment ordering the annulment of the Certificate Vol. ECL XXI Folio 17. Counsel submitted further that the issue of *res judicata* was not raised by the Appellant and cannot therefore be considered at the stage of the appeal. This issue should therefore be expunged from the record.

34. Counsel also stated that if *res judicata* is established, it means there are no contradictions and therefore the Appellant cannot disclose any cause of action, hence the appeal is an abuse of the process of the Court.

PARTIES' SUBMISSIONS AND ARGUMENTS: ISSUE NO. 2

1. Whether the First Instance Division of the East African Court of Justice erred in law when it found / held that the decision of the Minister of Justice made on the 28th of March 2018 did not violate Articles 3(3) (b),) 6(d), 7(2), 8(4), 27(1), 30(1) & (2), 81(2) and 127 (2)

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(a) of the Treaty for the Establishment of the East African Community as amended and Article 15(1) of the Protocol and Article 14 of the African Charter on Human and People's Rights.

APPELLANT'S SUBMISSIONS

35. Counsel for the Appellant submitted that the Trial Court committed a procedural irregularity by holding that the Appellant did not provide sufficient proof of violations of Articles 6(d) and 7(2) of the Treaty, Article 15(1) of the Protocol and Article 14 of the African Charter on Human and People's Rights.

36. Counsel submitted that in compliance with Articles 3(3) (b),) 6(d), 7(2), 8(4), 27(1), 30(1) & (2), 81(2) and 127 (2) (a) of the Treaty as amended, Article 15(1) of the Protocol and Article 14 of the African Charter on Human and People's Rights, the Minister of Justice ought to have given a detailed opinion and decision in order to comply with the requirement of good governance, adherence to the principles of democracy, rule of law as well as promotion of human and people's rights in accordance with the African Charter on Human and People's Rights.

37. Counsel relied on **Niyongabo Theodore & 2 Others v AG of the Republic of Burundi** (supra) where it was held that:-

"the procedure for cancellation or nullification of the land titles under Burundi law can only be made through a special action. We further

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find that the Court ought to have sought for information as to whether there was an action for fraud as a mandatory procedure under Burundi laws and whether the National Courts complied with this procedure".

38. Counsel further submitted that the Appellant's rights were violated as a result of the impugned decision of the Trial Court contravening Article 6(d) and 7(2) of the Treaty. He relied on **B.E. Chattin (USA) v United Mexican States, Annual Digest of Public International Law Cases Vol 4** (1932) where it was held that for an international claim to be sustainable, the Court or tribunal is required to determine "whether there exists an injury and whether the act which causes it violates any rule of International Law".

39. It was Counsel's further submission that the Trial Court committed a procedural irregularity when it failed to interpret Law No. 1/07 of 25th February 2005 and Law No. 1/08 of 25th March 2019 revising Law No.1/26 of 15th September, 2014 on the **Creation, Organization and Jurisdiction of the Special Court of Land and other Assets.**

40. He submitted further that the Minister failed to give reasons for his decision, even though it was very clear that RPS 70 declared valid the contract of sale entered into by Salim Allibhai and Maitre Augustin Mabushi and that the Civil Court sitting in respect of **RAA 1172** bis and seized of the same question on the validity of the contract, had to respect the decision of the criminal court in **RPS 70.**

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41. Counsel argued that the Trial Court erred in law in failing to recognize that the Appellant was a *bona fide* purchaser for value without notice. The Trial Court misinterpreted and failed to apply properly the bonafide purchaser principle. Counsel made reference to the case of **Katende v Haridas Company Limited** [2008] 2 E.A. 173 where the Court of Appeal of Uganda described a bonafide purchaser as *"a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly".*

42. The Appellant's counsel concluded his submissions by stating that the Trial Court committed a procedural irregularity in failing to interpret the two judgments **RPS 70** and **RAA 1172** bis and thereby arriving at a wrong decision which, occasioned a miscarriage of justice.

RESPONDENT'S SUBMISSIONS

43. In relation to issue No. 2, Counsel for the Respondent submitted that the decision of the Minister of Justice dated 28th March 2018 did not violate Articles 3(3) (b),) 6(d), 7(2), 8(4), 27(1), 30(1) & (2), 81(2) and 127 (2) (a) of the Treaty as amended, Article 15(1) of the Protocol and Article 14 of the African Charter on Human and Peoples' Rights. The matter was not *res judicata.*

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44. According to Counsel, the Trial Court did not fail to interpret Law No, 1/07 of 25th February 2005 and Law No. 1/08 of 13th March, 2019 on the powers of the Minister for Justice. The law provides six (6) grounds upon which a review to the decision of the Minister can be sought. The Appellant's request for review was rejected by the Minister because the Appellant failed to show contradictions between **RPS 70** and **RAA 1172** bis, hence no basis for review was established.

45. Counsel stated further that RAA 1172 bis originated from the judgment RAEP 93 rendered by the Administrative Court of Bujumbura that annulled Certificate Vol I ECL Folio 17. The Appellant appealed against the decision to the Administrative Chamber of the Supreme Court that rendered the judgment RAA 781 and reversed the judgment of the first level.

46. In relation to **Manariyo Desire** (supra) Counsel submitted that the Appellant is wrongly relying on the said decision of the Trial Court which was reversed by the Appellate Division in Appeal No. 1 of 2017.

47. In relation to the principle of *bonafide purchaser for value,* counsel stated that this issue was not dealt with by the Trial Court and was also not raised and agreed upon as an issue in the Scheduling Conference. Therefore it cannot be raised at this level.

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PARTIES' SUBMISSIONS AND ARGUMENTS: ISSUE NO. 3

What remedies are the parties entitled to?

RESPONDENT'S SUBMISSIONS

48. On issue No. 3 relating to the cross appeal on costs by the Respondent, the Respondent's counsel relied on Rule 127 of the East African Court of Justice Rules of the Court, 2019 ("Court Rules 2019"). According to Counsel under this Rule costs follow the event unless for good reasons the Court otherwise orders. However, in this matter no good reasons have been established by the Appellant. Even though the rule gives discretion to the Court to deny costs to the winning party in a proper case, in this case costs should have been awarded to the Respondent who was the winning party. The Respondent was denied costs unjustifiably. The Respondent is also entitled to costs in this appeal as well. The issue of *res judicata* does not apply in this appeal. The Appellant had no cause of action and its appeal has no merit and is an abuse of the process of the Court. It should therefore be dismissed with costs.

49. Counsel submitted that, the Appellant is not entitled to any remedies prayed for in the Reference as all the remedies sought are unfounded and cannot be granted. That the Appellant has also demonstrated many times that there are sufficient reasons to regard the appeal as an abuse of the process of the Court.

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50. The Respondent submitted further that the Appellant has brought vexatious proceedings against the State of Burundi. Costs should follow the event as there is no justification to depart from the norm.

51. The Respondent therefore, prayed to be awarded costs in the Trial Court and in the Appellate Division.

APPELLANT'S SUBMISSIONS

52. On the cross appeal on costs, counsel for the Appellant argued that the Trial Court did not err in declining to award costs of the Reference to the Respondent. Counsel made reference to **Singh v Qurbanlite Limited** [1985] KLR 920 and submitted that the discretion of the Court is to be exercised on the basis of the conduct of the parties and what led to the filing of the case in court unjustifiably.

53. Counsel submitted further that the Appellant is entitled to all the remedies claimed.

54. The Appellant therefore prayed that the Appeal should be allowed with costs.

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THE COURT'S ANALYSIS AND DETERMINATION

55. We have carefully considered the rival arguments of the parties on the issues raised.

56. On issue No. 1 the Trial Court in paragraph 48 of its judgment held as follows:-

> *"It is an established principle of law that the decision on a criminal matter need not be consistent with the decision on a civil matter involving the same parties because the allegations and standard of proof are different".*

57. The findings of the Trial Court was that the judgment **RPS 70** annulled certificate Volume ECL XXI Folio 17 to restore the ownership of the suit property to the original owner and along the same line, judgment **RAA 1172** bis cancelled all the documentation to restore the same property to the original owner. Therefore both decisions resulted in cancellation. So in this respect, there is no contradiction as both judgments result in cancellation.

58. According to Mr. Semuyaba, learned Advocate for the Appellant, under the Burundian Laws, land belongs to the Government. What the Appellant purchased from Mr. Nsigana was what is called the concessionaire (lease).

59. However, according to Mr. Vyizigiro, counsel for the Respondent, the consequences of the cancellation of the title is that the ownership of the land reverts back to the original owner. The title does not pass to another party.

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60. We entirely agree with the findings of the Trial Court that there are no contradictions and or any inconsistencies between Judgment **RPS 70** and **RAA 1172 bis.** The two decisions resulted in the cancellation of the Certificate of Title hence making the transfer to the Appellant invalid and ineffective, the result of which was to revert the property in question to the original owner.

61. We are also of the considered view that it is an established principle that a decision rendered in a criminal matter need not necessarily conform to the decision rendered in a civil matter between the (same) parties because the claims, the mode and standards of proof are different.

62. According to **Black's Law Dictionary 10th Edition,** Balance of Probability is the *preponderance of evidence that has the most convincing force, superior evidentiary weight, that though, not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.*

63. This is a burden of proof in most civil trials in which the court finds for a party that in the whole, has the stronger evidence, however slight the edge may be. On the other hand, for the Court to find for the prosecution, it must prove its case, not on a preponderance of evidence, but beyond reasonable doubt.

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64. This is reflected in the findings of the two judgements, the one from a civil decision resulting in the cancellation of all documents and the other from a criminal decision resulting in the cancellation of the Certificate of Title.

65. In **Charles Kajimanga and Marmetus Chilemya,** Appeal No. 50 of 2014, the Supreme Court of Zambia stated thus:-

> *"The procedural Rules relating to documentary evidence in civil matters are different from those applicable to criminal matters. This is essentially because the standard of proof in criminal matters is proof beyond reasonable doubt while proof in civil matters is on the balance of probabilities. For this reason, the rules relating to documentary evidence in criminal matters require that each document must be specifically identified and produced by the relevant witness during trial before its contents can be publicized and relied upon to support a party's case."*

66. In **Kishan Singh (D) Through L.Rs v Gurpal Singh & Others,** August 2010 the Supreme Court of India revisited the principle in **Igbal Singh Marwah & Another v Meenakshi Marwah & Another** (2005) 4 SCC 370, when considering whether criminal proceedings can be quashed by the High Court relying upon a finding of a Civil Court on an issue involved in criminal proceedings in respect of the same subject matter where the Court held as under:-

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" Coming to the last contention that an effort should be made to avoid conflict of findings between the civil and criminal courts, it is necessary to point out that the standard of proof required in the two proceedings are entirely different. Civil cases are decided upon a preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given. There is neither any statutory ***provision nor legal principle that the findings recorded in one proceeding may be treated as final or binding in the other, as both cases have to be decided on the basis of the evidence adduced therein".*** [Emphasis added].

67. Generally, a burden of proof describes the standard that a party seeking to prove a fact in court must satisfy to have that fact legally established. Standard of proof is different in civil and criminal cases. In civil cases it is preponderance of probabilities while in criminal cases it is proof beyond reasonable doubt.

68. With regards *to res judicata* we entirely agree with counsel for the Respondnet that the Appellant cannot claim inconsistencies and contradictions between the two judgments and simultaneously raise *res judicata,* which is defined as follows in **Black's Law Dictionary** (10th Edition):-

1. An issue that has been definitively settled by judicial decision.
2. An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or a series of transactions and that could have

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been but was not raised in the first suit. The three essential elements are:-

1. An earlier decision on the issue,
2. A final judgment on the merits, and
3. The involvement of the same parties or parties in privity with the original parties.

69. Accordingly, we are satisfied that r*es judicata* has not been established under the circumstances of this case. Accordingly we answer issue No. 1 in the negative.

70. In relation to issue No. 2 as to whether the decision of the Minister of Justice violated the Treaty, the Protocol and the African Charter on Human and People's Rights, we are of the considered view that there was no violation of the Treaty. The two judgments are consistent. Accordingly, the Minister's decision did not violate the Treaty.

71. As submitted by Counsel for the Respondent, the Minister rightly concluded that there was no basis for review. No contradictions have been established between judgment **RPS 70** and judgment **RAA 1172 bis**.

72. The Trial Court found that the Minister's letter sufficiently informed the Appellant/ Applicant that according to the Minister, the

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two decisions did not contain any apparent contradictions requiring review by the Supreme Court of Burundi.

73. The Trial Court in paragraph 48 of its judgment made the following findings:-

> *"Our reading of **Judgments RPS 70 and RAA 1172** bis does not reveal any contradictions on the matter in issue. In the first place **RPS 70** was a criminal matter, whereas **RAA 1172** bis related to a civil matter. Second, it is an established principle of law that the decision in a criminal matter need not be consistent with a decision in a civil matter involving the same parties because the allegations and standard of proof are different. Lastly judgment RPS 70 annulled the certificate Vol. ECL XXI FOLIO 17 to restore the property to the original owner, along the same line, Judgment RAA 1172 bis cancelled all the documentation to restore the same property to the original owner. Therefore we find that the two judgments are consistent as between the parties and the Court level."*

74. Law No. 1/07 of 25th February, 2005 and No. 1/08 of 13th March 2019 revising Law No.1/26 of Burundi provides six (6) grounds for Review, the sixth ground being ***if there is a conflict between two decisions which have been final***. The said law does not provide any procedure for handling a review. The Minister is required to request a review by the Supreme Court if there are contradictions. If no contradictions are established a review is rejected by the Minister.

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Whether or not the contradictions exist would be determined in accordance with the Judgments submitted as a subject for review.

75. The Minister for Justice in his letter dated March 28, 2018 (supra), stated that the basis for rejecting the review by making reference to the Annulment of Certificate Vol ECL XXI Folio 17 and the cancellation of all documentation via RAA 1172 bis. Therefore the legal ground by the Minister for declining the request for review was the consistency of the two judgments.

76. Under the laws of the Republic of Burundi, the Minister of Justice will order a review only where there are contradictions between two judgments and where the principle of *res judicata* can properly be invoked.

77. As rightly held by the Trial Court, the Minister was acting within the precincts of the law which gives him powers to exercise his discretion to refer the matter for review or otherwise. The complaint by the Appellant that the Minister's decision rejecting the review was not detailed enough has no justification as the relevant law does not require that a detailed decision be given for rejecting the request or an application for review. The Minister's letter clearly informed the Appellant that the two impugned decisions contained no contradictions necessitating a review to be made by the Supreme Court. Those were sufficient reasons to explain the basis of the Minister's decision and they are valid reasons under the law of the Respondent.

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78. In the case of **East African Civil Society Organisations' Forum** (supra), this Court considered at length its role as an International Court when considering the violation of the provisions of the Treaty. The Court held thus:-

> *"Pursuant to the EAC Treaty, Partner States have undertaken to abide by and carry out the obligations as provided therein. This at international law creates state responsibility to each and every Partner State that is attributable to them. It is the duty of this Court under Article 23(1) of the EAC Treaty to "ensure the adherence to law in the interpretation and application and compliance with this Treaty."*

79. The Rule of Law principle is enshrined in Articles 6(d) and 7(2) of the Treaty. The definition of the Rule of Law principle is encapsulated in a **Report of the (UN) Secretary General on the Rule of Law and Transitional Justice in conflict and post conflict societies** [UN Docs/2004/616 92004] and was rendered in the following words:-

> *"It refers to the principle of governance to which all persons, institutions and entities, public and 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 principles of the supremacy of the law, equality before*

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the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency".

80. We entirely agree with the above formulation of the concept and principles of the rule of law. However we are of the considered view that there was no violation of the Treaty and none has been established in this Appeal.

81. With regard to the Appellant's submissions relying on the case of **Niyongabo Theodore and Others v Attorney General of Burundi** (supra) that it is a bonafide purchaser for value, we agree with the Mr. Vyizigiro that the Appellant is introducing a completely new issue which was neither presented nor decided by the Trial Court. Nor was it agreed upon during the Scheduling Conference.

82. We are of the settled view that a court is duty bound to decide a case on the issues on record and that if there are other questions to be determined they must be placed on record.

83. In the case of **Farrel v Secretary of State** [1980] 1 ALL ER 166 HL at p. 173 Lord Edmund Davies made the following observations :-

"For the primary purpose of pleadings remain, and it can still prove of vital importance. That purpose is to define issues and thereby inform the parties in advance of the case they have to meet and so to enable them to take steps to deal with it."

84. In view of what has been stated hereinabove we answer issue No. 2 in the negative, that decision of the Minister for Justice of the Republic of Burundi did not violate Articles 3(3) (b),) 6(d), 7(2), 8(4),

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27(1), 30(1) & (2), 81(2) and 127(2) (a) of the Treaty for the Establishment of the East African Community as amended and Article 15(1) of the Protocol on the Establishment of the East African Community Common Market and Article 14 of the African Charter on Human and Peoples' Rights.

85. In relation to issue No. 3 on Remedies, the Appellant asked the Court to allow the Appeal and to grant it all the declarations sought. However, given our findings on issues No. 1 and 2, the Appellant is not entitled to any of those remedies.

Costs

86. The Respondent filed a cross appeal complaining that it was denied costs. According to Rule 127(1) of the Court Rules, costs follow the event unless the Court for good reasons decides otherwise. See **Kiska Ltd v. De Angelis** [1969] EA. 6.

87. The Trial Court directed that each party to bear its own costs. The Trial Court relied on the case of **The Attorney General of the United Republic of Tanzania v Calist Komu,** Appeal No. 2 of 2015, where the Court held as follows:-

> *"This Court has on numerohus occasions followed the general rule that costs follow the event. However, where a case has been instituted by a public spirited person and it is arguable and raises significant issues as to the interpretation and future application of the Treaty provisions, this Court has exercised its*

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discretion not to award costs against this kind of litigant when he or she loses the reference".

88. The Trial Court ruled that the circumstances in this case militated against awarding costs against the Appellant as it believed that the Appellant filed the Reference in good faith. The Court found that this was a clear case to depart from the general rule.

89. We have carefully considered the rival submissions of the parties on the issue of costs. Having done so we think that the pertinent question to ask in this appeal is whether this Court will be exercising its discretion judiciously in declining to award costs to the successful party. See **Alcon International v Standard Chartered Bank of Uganda and Others** [EACJ 2012-2015] p.430 at p.449.

90. In **Devram Manji Daltani v Danda** [1949] EACA 35. It was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted And in in **Hussein Jan Mohamed & Sons v Twentsche Overseas Trading Co. Ltd** [1967] EA p. 287 the Court held inter-alia :-

"The general rule is that costs should follow the event and the successful party should not be deprived of them except for good cause."

See also **Supermarine Handling Services Limited v Kenya Revenue Authority**, Civil Appeal No. 85 of 2006, Court of Appeal of Kenya.

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Having carefully considered the issue, we are not satisfied that there is any compelling reason why we should depart from the general rule on award of costs. Accordingly, we award costs to the Respondent.

DISPOSITION

91. In view of our findings hereinabove, this Appeal is hereby dismissed in its entirety. We allow the Cross Appeal on costs and award costs to the Respondent in respect of the Appeal as well as the Reference in the Trial Court. Orders accordingly.

DATED, DELIVERED AND SIGNED at **ARUSHA** this 23rd day of February, 2023.

.....
Sauda Mjasiri
VICE PRESIDENT

.....
Kathurima M'Inoti
JUSTICE OF APPEAL

.....
Cheborion Barishaki
JUSTICE OF APPEAL

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