



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



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

APPLICATION NO. 41 OF 2022
(Arising out of Reference No. 49 of 2022)

HON. RWASA AGATHON 1ST APPLICANT
HON. SIMON BIZIMUNGU 2ND APPLICANT

VERSUS

**THE ATTORNEY GENERAL OF THE
REPUBLIC OF BURUNDI RESPONDENT**

30TH NOVEMBER, 2023

RULING OF THE COURT

A. INTRODUCTION

1. This Application is brought under Articles 5, 6(d), 7(2), 8(1)(c) & (4), 13, 14, 15, 16, 20, 21, 22, 23, 27(1), 29, 30, 33, 38, 39, 44, 53(3) and 71 of the Treaty for the Establishment of the East African Community (“the Treaty”) and Rules 4, 52(1), (2), (3) & (4), 53(1), 84(1),(2),(3) & (5), 132 and 133 of the East African Court of Justice Rules of Procedure, 2019 (“the Rules”).
2. The Application arises from **Reference No. 49 of 2022** which was filed challenging the election of Members of the East African Legislative Assembly (EALA) by the National Assembly of the Republic of Burundi, in terms of Articles 50 of the Treaty.
3. The first Applicant herein is a natural person resident in the Republic of Burundi, a Partner State of the East African Community. He is described as a male adult of sound mind and President of the Congress National Pour La Liberte (CNL), a political party in the Respondent State.
4. The second Applicant is a natural person also resident in the Republic of Burundi. He is described as a male adult of sound mind and the Secretary General of the said political party, Congress National Pour La Liberte (CNL).
5. The address for service of the Applicants is: c/o Pan African Law Chambers, LLP, Advocates and Attorneys at Law and the address for electronic mail is: wanisantinojada@gmail.com and/or wanisantino@panafricanlawchambers.com.

6. The Respondent is the Attorney General of the Republic of Burundi, herein sued in the representative capacity as the Legal Advisor of the Republic of Burundi. His address for service is c/o The Office of the Attorney General of the Republic of Burundi, Minister of Justice and Holder of the Public Seal, P.O. Box 1880, Bujumbura, Republic of Burundi. (Email: sylvesternyadwi@gmail.com; pacibako@gmail.com; pacibako@yahoo.fr, Bujumbura, Burundi).

B. REPRESENTATION

7. At the hearing, the Applicant was represented by Mr Wani Santino Jada, Learned Advocate. The Respondent was represented by Mr Diomede Vyizigiro, Director of Civil Litigation and Mr Pacifique Barankitse, Senior State Attorney.

C. THE APPLICANT'S GROUNDS FOR THE APPLICATION AND SUBMISSIONS

8. The Applicant's grounds for the Application are to be found in the Notice of Motion filed in this Court on 23rd November, 2022, and in the Affidavit in support thereof deponed by the first Applicant, also filed on 23rd November 2022. Counsel for the Applicants also made oral submissions at the hearing.

9. In the Notice of Motion as well as in the supporting Affidavit, the Applicants contend that in respect of the term of the East African Legislative Assembly, for the period 18th December 2022 to 18th December 2027, the Respondent State failed to comply with the electoral requisites set out in the Treaty, and in particular, violated

Article 50 thereof, as well as the East African Legislative Assembly Act of 2012.

10. That there was no publication or invitation of notice for aspirants within the Respondent State to apply for the position of EALA membership and contest in elections for the same.
11. That there was no election nor debate in respect thereof, allowed in the Parliament of Burundi.
12. That the Speaker of the National Assembly of the Respondent State purported to unilaterally and fraudulently make appointments to EALA on behalf of the CNL party.
13. That in any event, the Respondent State violated the timelines set out in the East African Legislative Assembly Act, 2012 regarding when elections for EALA could be held.
14. That no election for EALA membership was conducted by the Burundi Parliament in terms of Article 50 of the Treaty and the names submitted as elected members were a sham, as being handpicked.
15. The Applicants also contended that the Respondent State Parliament further violated the Treaty by failing to respect the balance and numerical strength of the parties represented in the National Assembly.
16. Accordingly, in the Notice of Motion, the Applicants sought the following orders:

i. This Honourable Court be pleased to dispense with the East African Court of Justice Rules of Procedure 2019 for

proceeding in the ordinary way that would or might entail irreparable injustice;

ii. An *ex parte* interim order/temporary injunction do issue restraining the Respondent from presenting its appointees to the 5th East African Legislative Assembly and from being sworn in pending the hearing and determination of this Application *inter partes*;

iii. Pending determination of the main Reference filed in this Court, an interim order and/or a temporary injunction doth issue restraining the Respondent, their appointees to the 5th East African Legislative Assembly (EALA) from being sworn in until the main Reference is determined by this Court; and

iv. Costs of this Application be borne by the Respondent.

D. THE RESPONDENT'S GROUNDS OF OPPOSITION AND SUBMISSIONS

17. The Respondent State's grounds of opposition are to be found in the Affidavit in Reply sworn by Harerimana Jeanne Chantal the Secretary General of the National Assembly of the Republic of Burundi. Counsel for the Respondent also made oral submissions at the hearing.

18. In the said Affidavit in reply, Harerimana sets out in detail, the events that she is personally conversant with, that took place in the National Assembly of the Respondent State on 14th September 2022 that

constituted the Burundi Parliament's election of EALA members, in accordance with the Treaty.

19. That the meeting of the Burundi National Assembly on 14th September 2022, presided over by the Speaker, was quorate in terms of Article 180 of the Constitution of Burundi and Rule 123 of the Rules of Procedure of the Burundian National Assembly.

20. That in accordance with the said Rules, the members of the National Assembly unanimously voted to use the secret ballot voting procedure.

21. That following the said election, the following nine (9) candidates were elected as members of EALA:

- i. **Ntakirutimana Joseph;**
- ii. **Ntisezerana Gabriel;**
- iii. **Burikukiye Victor;**
- iv. **Muhirwa Jean Marie;**
- v. **Saidi Kibeya;**
- vi. **Karerwa Momamo;**
- vii. **Nkurinziza Olivier;**
- viii. **Bigirimana Goreth; and**
- ix. **Kezimana Cathy.**

22. That subsequent to the said election of 14th September 2022, one of the elected members, Muhirwa Jean Marie, resigned on 14th October 2022 and, thus, the National Assembly met again on 26th October 2022 and held another election to replace that one person. That Manirambona Anastase was elected.

23. That the final list of EALA members elected by the Burundi National Assembly in compliance with Article 50 of the Treaty was:

- i. **Ntakirutimana Joseph;**
- ii. **Ntisezerana Gabriel;**
- iii. **Burikukiye Victor;**
- iv. **Manirambona Anastase;**
- v. **Saidi Kibeya;**
- vi. **Karerwa Momamo;**
- vii. **Bigirimana Goreth;**
- viii. **Nkurunziza Olivier; and**
- ix. **Kezimana Cathy.**

24. Both in the said Affidavit in Reply as well as in the submissions, the Respondent contended that in any event, this Court does not have jurisdiction to hear and determine this matter, neither **Reference No. 49 of 2022** nor the instant Application, upon a correct interpretation of the provisions of the Treaty and, in particular Articles 27, 30, 50 and 52 thereof read together, as well as the judicial precedent in this Court.

25. Accordingly, the Respondent prayed that the instant Application be struck out for want of jurisdiction and that the costs of the Application be borne by the Applicant.

E. THE COURT'S DETERMINATION

26. By dint of well-established judicial practice, where an issue of jurisdiction is raised or arises, the Court must make a determination

on that issue before it can make any consideration of the substantive matter before it.

27. In **Alcon International Limited vs The Standard Chartered Bank of Uganda and Others, EACJ Appeal No. 3 of 2013**, this Court cited with approval the statement of Nyarangi, JA, in the Court of Appeal of Kenya case of **Owners of the Motor Vessel “Lilian” vs Caltex Oil (Kenya) Limited (1989) KLR 1** as follows:

“Jurisdiction is everything. Without it, a Court has no power to make one step. Where a Court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction”.

28. Indeed, the jurisprudence of this Court is replete with pronouncements by the Court on the primacy of determining jurisdiction where the issue is raised.

29. We shall accordingly first consider and determine the jurisdictional issue.

30. Like all international Courts, this Court derives its Jurisdiction from the constituting instrument, in this case, the Treaty. Specifically, the Jurisdiction is derived from Articles 23(1), 27(1) and 30.

Article 23 (1) provides:

“The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty.”

Article 27 (1) provides:

“The Court shall initially have jurisdiction over the interpretation and application of this Treaty:

Provided that the Court’s jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.”

Article 30 provides:

- 1) “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;**
- 2) 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; and**

3) The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State.”

31. In any situation where the Court is considering if it has jurisdiction to hear and determine a matter, all the above Articles must be considered together. That way, the Court will be able to ascertain that in the particular case, all three types of jurisdiction are covered. Jurisdiction *ratione personae/locus standi*, jurisdiction *ratione materiae*, and *jurisdiction ratione temporis*.

32. In **Eric Kabalisa Makala vs Attorney General of The Republic of Rwanda, EACJ Reference No. 1 of 2017**, this Court stated:

“...to succeed on a claim of lack of Jurisdiction in this Court, a party must demonstrate the absence of any of the three (3) types of jurisdiction: *ratione personae/locus standi*, *ratione materiae* and *ratione temporis*. Simply stated, these 3 jurisdictional elements respectively translate into jurisdiction on account of the person concerned, matter involved and time element.”

33. The Respondent in the instant Application submitted that this Court lacks jurisdiction to entertain the main Reference from which the Application arose. This, the Respondent argued, was because of the provision in Article 27 which states that: **“provided that the Courts Jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States”**.

34. The Respondent based his submission in the preceding paragraph, on the provision of Article 52(1) of the Treaty which provides:

“Any question that may arise whether any person is an elected member of the Assembly or whether any seat in the Assembly is vacant shall be determined by the institution of the Partner State that determines questions of the election of members of the National Assembly responsible for the election in question.”

35. It was the Respondent’s submission that upon a proper reading of Article 27, the Court has jurisdiction to interpret the Treaty, but the jurisdiction to apply such interpretation does not extend to where the Treaty confers jurisdiction on Partner State organs.

36. That Article 52 confers on Partner State organs, the jurisdiction to determine **“any question whether any person is an elected member of the Assembly or whether any seat in the Assembly is vacant ...”**

37. As regards Article 30 of the Treaty, the Respondent contended that the clear effect of Article 30(3) is that whereas in Article 52, an Act regulation, directive, decision or action has been reserved to an institution of a Partner State, no legal or natural person can refer the legality of any such matter to the Court for determination. In plain language in such instance, the legal or natural person lacks *locus standi* and the Court does not have Jurisdiction *ratione personae*.

38. The Appellate Division of this Court had opportunity to consider in detail, this issue of the Court’s jurisdiction when both the provisions

in Article 27(1) and in Article 30(3) apply. That was in **Attorney General of The United Republic of Tanzania vs Anthony Callist Komu, EACJ Appeal No. 2 of 2015.**

39. On careful consideration, this Court is fully persuaded that, on the jurisdictional issues, the instant Application and the Reference from which it arises, is “on all fours” with the **Anthony Callist Komu** case.

40. We find it useful to quote in extenso what the Appellate Division stated in the latter case as regards Article 27:

“It is axiomatic to note that when the Court such as ours finds the terms of the Treaty provision unambiguous then our role becomes that of application of the Treaty rather than its interpretation. This is anchored in the wording of Article 27 of the Treaty which provides that the Jurisdiction of the Court is twofold; “interpretation and application. According to Ehrilich, interpretation constitutes the process of ‘determining the meaning of a rule’ whereas application is the process of determining the consequences which the rule attaches to the occurrence of a given fact” (Case Concerning the Factory at Chorzow (claim for indemnity-jurisdiction) (Dissenting opinion of Judge Ehrilich), PCIJ Report Series A No. 9 (1927), 39). On his part, Arnold McNair states that:

(t)he words “interpret”, interpretation, are often used loosely as if they include “apply, application”. Strictly speaking, when the meaning of the treaty is clear, it is “applied not “interpreted”. Interpretation

is a secondary process which only comes into play when it is impossible to make sense of the plain terms of the treaty, or when they are susceptible of different meanings. '(see, A McNair, The Law of Treaties (Clarendon Press Oxford, 1961), 365). In other words, Treaty interpretation is a process of discovering the proper meaning of treaty terms through various interpreting methods; whereas treaty application is the process of identifying a source of law and applying it.

Admittedly, in most cases, we are likely to first determine what a treaty provision means and then proceed to apply it. Interpretation in a majority of the cases becomes part of the process of the application of a provision in contention. Judge Higgins succinctly opines that the phrase "application or interpretation" in a treaty 'contains two distinct elements which may form the subject-matter of a reference to the Court. All too frequently, they are treated compendiously' (Oil Platforms (Islamic Republic of Iran vs. United States of America) (Preliminary Objection) (Dissenting opinion of Judge Higgins), 1996, ICJ Rep. para.3)

However, in a case such as this, all that one has to question is whether there is a prohibition from accessing the Court, and who is prohibited to access the Court, and for what (the subject matter). This is a pretty straight forward exercise, which is subsequently followed by

applying the requisite provision allowing the person (legal and/or natural) to either proceed with the merits of the matter or disqualify the person on the basis that their access to the Court is forbidden on a given subject matter. This exercise does not involve interpretation of the law, but rather, its application, and as a result judicial inquiry is complete. Judge Rosalyn Higgins eloquently remarked that a dispute over the “application” of a treaty, for purposes of jurisdiction, refers to grounds of jurisdictional objections based on among other things, *ratione temporis* inapplicability. We would also add *ratione personae* inapplicability to the list of jurisdictional objections. Judge Higgins further opines that where a treaty involves “non-applicability” of *ratione materiae* then the Treaty will inevitably fall “interpretation” in a jurisdictional context...” (Oil Platforms (Islamic Republic of Iran vs United States of America) [Preliminary Objection] (Dissenting opinion of Judge Higgins), 1996, ICJ Rep. paras 4-6.”

41. While, therefore, the provisions of Article 50 of the Treaty are unambiguous, and do not call for interpretation by reason of the proviso to Article 27(1) of the Treaty, this Court is denied the application jurisdiction therein referred to.
42. We find, therefore, that in the instant Application as well as **Reference No. 49 of 2022** from which it arises, the Court lacks jurisdiction *ratione materiae*.

43. As regards Article 30, we apply as we are bound to, the reasoning of the Appellate Division in the Anthony Callist Komu case.
44. As the Court stated, “A careful examination of Article 30 (3) makes it clear that legal and natural persons access to this Court (*locus standi*/jurisdiction *ratione personae*) is prohibited **“where an Act regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State”**.”
45. The first question, therefore, is, are the Applicants legal or natural persons? This issue need not detain us, as the answer is clearly in the affirmative and the Applicants are so described in the pleadings.
46. The second question on Article 30 is: does the Reference refer to this Court for determination, the legality of any Act, regulation, directive, decision or action of a Partner State... on grounds that such Act regulation, directive, decision or action is unlawful or is an infringement of the provisions of the Treaty?
47. The answer to the second question is certainly in the affirmative. From the pleadings and the submissions, the gravamen of the Applicants’ complaint is that the Partner State, through its National Assembly, violated Article 50 of the Treaty.
48. Thirdly, have the Act, regulation, directive, decision or action of the Partner State, been reserved under the Treaty to an institution of a Partner State? Again, the answer is undoubtedly in the affirmative from the clear wording of Article 50. That Article clearly provides that the action of electing members of EALA and the enactment of enabling regulations for the elections have been reserved for the

National Assembly of each Partner State. In this case, the National Assembly of the Republic of Burundi.

49. In its consideration of the effect of Article 30 (3) read together with Article 50 (1) in the **Anthony Callist Komu** case, the Appellate Division concluded:

” In light of the above, the Court comes to the conclusion that the Claimant (now Respondent) did not qualify to institute the proceedings in this Case. The Claimant (as he was then) was consequently devoid of *locus standi* before this Court. Hence, this Court had no jurisdiction *ratione personae* to entertain this matter as per Article 50(1) read together with Article 30(3). The Court can exercise its judicial function only in respect of those parties who have lawful access to it in given matters.”

50. We respectfully reach the same conclusion as regards the instant Application and the Reference from which it arises.

51. At the hearing of this Application, it was the Applicants Counsel's submission, in response to the Respondent's objections on jurisdiction that the Court had jurisdiction by virtue of the **“clear wording”** of Article 23 (1) that, **“The Court will be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with the Treaty”**, and in Article 27(1): **“The Court shall initially have Jurisdiction over the interpretation and application of the Treaty.”**

52. The Applicant also sought to rely on the Court's decision in the **Anyang' Nyongo case** which according to Counsel for the Applicants, confirmed the Court's jurisdiction with regard to compliance with the Treaty.

53. Despite invitation by the Court at the hearing, the Applicants' Counsel stated that he saw no necessity to distinguish between the **Prof. Anyang' Nyong'o & 10 Others vs Attorney General of Kenya, EACJ Reference No. 1 of 2006** case and the **Anthony Callist Komu** case. In Counsel's view, the jurisdiction of the Court is self-evident from a plain reading of the Treaty provisions. A view that we respectfully disagree with.

54. In **Anthony Callist Komu**, the Court stated:

“The reliance on the Anyang' Nyong'o case by the Respondent does not resuscitate his case. Before the Anyang Nyongo case, persons had unlimited *locus standi* in matters such as this. It is the post Anyang' Nyong'o case, that amendments introduced limit to the standing of persons in this Court in matters such as the present one.”

55. As stated earlier in this ruling, we find no appreciable distinction between the legal considerations applied by the Court in the **Anthony Callist Komu** case, and those to be applied in the instant matter.

56. In the result, we find that this Court lacks jurisdiction to entertain either the instant Application or **Reference No. 49 of 2022** from which it arises. The Court lacks jurisdiction *ratione materiae* by virtue of the

proviso to Article 27 and also lacks jurisdiction *ratione personae* by virtue of Article 30(3) of the Treaty.

57. Having found as we have on the jurisdictional issues, we must down our tools, and cannot proceed to consider the merits of the Application. Nor indeed can the Court entertain the Reference from which the Application arises.

F. CONCLUSION

58. Accordingly, we dismiss the instant Application for lack of jurisdiction. We also dismiss **Reference No. 49 of 2022** from which the Application arises.

G. COSTS

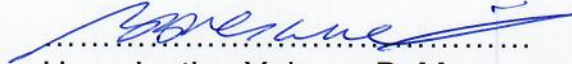
59. Rule 127(1) of the Rules provides as follows:

“Costs in any proceedings shall follow the event unless the Court shall for good reasons otherwise order.”

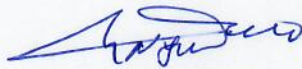
60. In exercise of our discretion, we see no reason to depart from the principle set out in the said Rule 127(1) and we order that the costs of the Application and the Reference shall be borne by the Applicants.

61. It is so ordered.

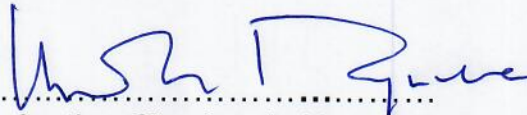
Dated, signed and delivered at Arusha this 30th day of November
2023.



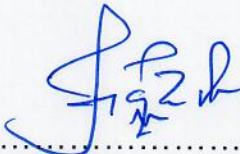
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Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE



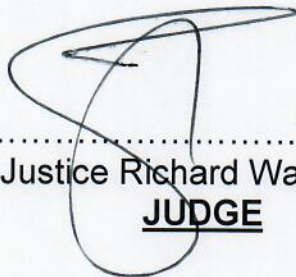
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Hon. Justice Dr Charles O. Nyawello
DEPUTY PRINCIPAL JUDGE



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Hon. Justice Charles A. Nyachae
JUDGE



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Hon. Justice Richard Muhumuza
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Hon. Justice Richard Wabwire Wejuli
JUDGE