



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

*(Coram: Isaac Lenaola, DPJ, Faustin Ntezilyayo, J, Monica K. Mugenyi, J)*



**REFERENCE No.9 OF 2012**

**VENANT MASENGE.....APPLICANT**

**VERSUS**

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

**18<sup>TH</sup> JUNE 2014**

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## **JUDGMENT OF THE COURT**

### **INTRODUCTION**

1. This is a Reference by one **VENANT MASENGE**, a resident of the Republic of Burundi (hereinafter referred to as the “Applicant”). His address for the purpose of this Reference is indicated as C/O Mr. Horace NCUTIYUMUHETO, Boulevard Patrice Lumumba, P.O. Box 1374 Bujumbura, Burundi.
2. The Reference was filed on 10<sup>th</sup> August 2012 under Articles 3(3)(b), 6(d), 7(2), 8(4), 27(1) and 30(1) &(2) of the Treaty Establishing the East African Community (hereinafter referred to as the “**Treaty**”) and Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure (hereinafter referred to as the “**Rules**”).
3. The Respondent is the Attorney General of the Republic of Burundi sued in his capacity as the Principal Legal Adviser of the Republic of Burundi.

### **REPRESENTATION**

4. The Applicant was represented by Mr. Horace NCUTIYUMUHETO while Mr. Elisha MWANSASU appeared for the Respondent.

### **THE APPLICANT’S CASE**

5. The Applicant’s case is contained in the Reference, an affidavit in support and a counter-affidavit sworn on 10 August 2012

and 24 October 2013, respectively, by the Applicant himself, a reply to the amended Respondent's Response to the Reference filed on 26<sup>th</sup> March 2013, as well as his submissions.

6. The Applicant averred that he is the proprietor of a land property measuring 24 hectares in the Commune of GIHANGA in BUBANZA Province, Burundi and that he holds a legal and official title to the said property as demonstrated by the Registration Certificate of land property VOL.ECCXXV Portfolio 134 issued by the Registrar of land titles, on 9<sup>th</sup> October 2009.
7. He alleged that following encroachment onto his land by Mr. Anthere NZOHABONAYO, a local troublemaker and Mr. Bonaventure NTIRANDEKURA, the Mayor of Gihanga Commune, together with their supporters, he referred the matter to the Minister of Home Affairs on 12<sup>th</sup> March 2012 seeking for his authority to take all the necessary actions to restore completely and peacefully his possession of the land. He further stated that he never received any response from the Minister of Home Affairs, which made him presume an implicit refusal, after the three-month legal deadline to respond had elapsed. He then referred the matter to this Court holding the Government of Burundi vicariously responsible for the actions of the Mayor of Gihanga Commune and the inaction of the Minister of Home Affairs which, in his view, violated the fundamental principles referred to in Article 6(d) of the Treaty.

8. The Applicant therefore pleads for the following prayers and orders, against the Respondent:

- (a) A declaration that the occupation and exploitation of the Applicant's land property is unlawful and is an infringement of Article 6(d) and 7(2) of the Treaty for the Establishment of the East African Community;**
- (b) A declaration that the whole land of Kizina as claimed by the Applicant and demarcated on the Registration Certificate belongs to MASENGE Venant and all illegal constructions and occupations have to be immediately demolished by the Respondent and turned out[sic];**
- (c) An order that the Respondent restitutes the full property to the Applicant;**
- (d) Declare that the Applicant has a full right to enjoy the property right on Kizina land according to his Registration Title;**
- (e) An order that costs and incidental to this Reference be met by the Respondent;**
- (f) That this Honorable Court be pleased to make such further or other orders as may be necessary in the circumstances."**

## **RESPONDENT'S CASE**

9. The Respondent's case is set out in an amended Response to the Reference filed on 22<sup>nd</sup> February 2013, an Affidavit in support of the Respondent's Response to the Reference sworn on 8<sup>th</sup> October 2013 by Mr. Claude NIMUBONA and written submissions filed on 8<sup>th</sup> January 2014.
10. Briefly, his response is as follows:
- a) The matter is about land property and as such, this Court is incompetent to hear and determine it, since such a matter is reserved for the national courts of the Republic of Burundi in accordance with Article 27 of the Treaty.
  - b) He contends that the Applicant has already instituted a similar case in the Administrative Court in Burundi, to wit, **RAC 6190** and the case is still pending determination.
  - c) The costs and incidental to the Reference should be met by the Applicant.

## **SCHEDULING CONFERENCE**

11. Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on 25<sup>th</sup> January 2013 at which the following were framed as issues for determination.

### **Issues for determination by the Court**

- a) Whether the Court has jurisdiction to entertain the Reference;

b) If so, whether the failure by the Minister of Home Affairs to order the demolition and/or stop all construction on the Applicant's land is an infringement of Articles 3(3)(b), 6(d) and 7(2) of the Treaty.

c) Whether the Applicant is entitled to the order sought.

## **DETERMINATION OF THE ISSUES**

### **PRELIMINARY OBJECTION**

In his written submissions filed on 8<sup>th</sup> January 2014, Counsel for the Respondent raised for the first time the question of limitation of time. He contended in that regard that this Reference is time-barred since the Applicant filed it on 10<sup>th</sup> August 2012, almost a year after the decision of the Minister of Home Affairs, whereas Article 30(2) of the Treaty provides that proceedings shall be instituted within two months of the decision complained of. In support of his contention, the learned Counsel cited **EACJ Appeal No.2 of 2012, Attorney General of the Republic of Uganda & another Vs. Omar Awadh & 6 others**, where the Appellate Division of this Court ruled that for purposes of proceedings filed in this Court, time starts running under Article 30(2) of the Treaty not on the day the act complained of ends, but on the day when it is first effected.

During the hearing to highlight parties' written submissions, Counsel for the Applicant strongly opposed the submission of a preliminary objection at that stage of the proceedings and contended that this breached Rule 41 of the Court's Rules which

requires that any preliminary objection should be raised by pleading and before the Scheduling Conference under Rule 53 of the Court's Rules. He then argued that by so doing, the Respondent took him by surprise since he did not get time to prepare an appropriate response.

### **COURT'S FINDINGS**

It is noteworthy that the question whether or not the Reference is time-barred was neither raised in the Respondent's Response to the Reference, nor was it raised during the Scheduling Conference which set up issues for determination by the Court. In that regard, we consider that it was not proper to raise it as an issue for determination after and not before the Scheduling Conference. It should also have been raised in the pleadings so that the Applicant could have gotten an opportunity to address it in his submissions and later on in the rejoinder.

Given the foregoing and taking into consideration the issue at hand, it is our view that such submissions made at the tail end of the proceedings without allowing the other party to prepare an appropriate response was in breach of Rule 41 of the Court's Rules and cannot be entertained.

For ease of reference, Rule 41 of the Court's Rules reads as follows:

**“(1) A party may by pleading raise an preliminary objection.**

**(2) Where a respondent intends to raise a preliminary objection he shall, before the scheduling conference under Rule 53 of the Rules, give not less than seven (7) days written notice of preliminary objection to the Court and to the other parties of the grounds of that objection.”**

We are aware that in some legal regimes, a preliminary objection on a point of law, including on limitation of time can be raised at any time even when the pleadings have been closed, but the above quoted Rule of the Court does not offer that possibility. It is worded in mandatory terms and should be complied with. Rules are the handmaidens of justice and are not enacted for cosmetic reasons. Whatever the merits of the issue raised by the Respondent, once it is raised unprocedurally, the Court cannot legitimise an unprocedural matter by determining it on its merits. Therefore, the Respondent’s preliminary objection as framed above is rejected.

**Issue No.1: Whether the Court has jurisdiction to entertain the Reference**

The question as to whether the Court has jurisdiction to entertain this Reference was an issue raised by the Respondent. Counsel for the Respondent argued that according to Article 27 of the Treaty, this Court lacks jurisdiction to hear and determine the dispute which is related to land and as such, falls under the jurisdiction of national courts. He hastened to add that the



Applicant is fully aware of that fact since he filed a similar case referenced **RAC6190** at the Administrative Court of Bujumbura.

Furthermore, learned Counsel contended that this Court does not have jurisdiction to declare that the Applicant has a full right to enjoy land property since only the abovementioned Burundian Court is competent to deal with the matter. On this basis, he prayed that the Court should dismiss the Reference for the reason that it is only competent on matters requiring interpretation and application of the Treaty, not those ordering demolition of properties and constructions as that jurisdiction belongs to national courts of Partner States.

In response to the Respondent's arguments on this issue, Counsel for the Applicant submitted that this Court derives its mandate from Articles 23(1), 27(1) and 30(1) of the Treaty.

In Article 23(1), it is stated that **“The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with the Treaty.”**

According to Article 27(1) of the Treaty, **“1. 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.*”**

As for Article 30(1) of the Treaty, it provides that **“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.”**

The Applicant’s allegations in the instant matter are that, despite holding a valid land title, he has seen his land being expropriated by administrative organs of the Government of Burundi which argued at first, that there was a public need for the use of the property and later on that the property has never belonged to him. Counsel for the Applicant further stated that the Applicant complained to different administrative authorities, including the Minister of Home Affairs, but that he has never been restored in his rights.

Counsel then asserted that the Applicant’s main claim is that the occupation and exploitation of his property is unlawful and is an infringement of Article 6(d) of the Treaty. He submitted in that regard, that this Court has jurisdiction to entertain the case since the act of denying Mr. Venant MASENGE his property rights over a land legally possessed constitutes a violation of the principles of good governance and rule of law as provided by Articles 6(d) and 7(2) of the Treaty. In support of this argument, Counsel referred us to a number of cases viz. **EACJ Ref. No.3 of**

**2010: Independent Medical Unit Vs The Attorney General of Kenya & 4 others; EACJ Ref. 9 of 2012: The East African Center for Trade Policy and Law Vs The Secretary General of the EAC; EACJ Appeal No.1 of 2012: The Attorney General of Rwanda Vs Plaxeda Rugumba; EACJ Ref. No.1 of 2007:James Katabazi & 21 others Vs The Secretary General of EAC & The Attorney General of Uganda; EACJ Ref. No.1 of 2006: Peter Anyang' Nyong'o & others Vs The Attorney General of Kenya & others; EACJ Ref. No. 5 of 2011: Samuel Mukira Muhochi Vs The Attorney General of Uganda.**

On the question of non exhaustion of local remedies raised by the Respondent's Counsel, learned Counsel pointed out that the Applicant, being a natural person who has direct access to the Court under Article 30(1) of the Treaty, is not required to first exhaust local remedies before seeking this Court's intervention.

### **DETERMINATION OF THE ISSUE**

We have carefully considered the rival submissions by learned Counsel and we opine as hereunder:

It is common ground that under Article 27(1) of the Treaty, this Court has jurisdiction over the interpretation and application of the Treaty, where such jurisdiction is not conferred by the Treaty on organs of Partner States. And, as decided in the ***Samuel Mukira Muhochi*** case (supra), **“this Court does have jurisdiction to interpret and apply any and all provisions of the Treaty save those excepted by the proviso to Article 27.”**

It is our view that, in the instant matter, what the Applicant seeks, among others, is for this Court to determine whether the actions and decisions of the Respondent were an infringement of specific provisions of the Treaty, namely Articles 6(d) and 7(2).

According to Article 6(d) of the Treaty, one of the fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States is ***“good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunity, gender equality, as well as the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter of Human and Peoples’ Rights.”***

Similarly, Article 7(2) of the Treaty provides that ***“The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.”***

It is our considered opinion that the interpretation and application of these provisions in order to determine whether the impugned actions and decisions (i.e. the occupation and exploitation of the Applicant’s land property, and the denial to restore the Applicant in his rights, in spite of the possession of a valid land title) are infringements of the Treaty, are matters

within the jurisdiction of this Court under Article 27(1) of the Treaty. (see **Samuel Mukira Muhochi** case, supra).

In light of the foregoing and guided by the Court's previous decisions on similar matters [see for examples: **Plaxeda Rugumba case** (supra), **Peter Anyang' Nyong'o case** (supra), **James Katabazi case** (supra); **Samuel Mukira Muhochi case** (supra)], we are of the decided opinion that the Court has jurisdiction to entertain this Reference, but subject to what we shall say about prayers (b), (c) and (d) of the orders sought by the Applicant.

***Therefore, Issue No. 1 is partly answered in the affirmative.***

***Issue No.2. Whether the failure by the Minister of Home Affairs to order the demolition and/or stop all constructions on the Applicant's land is an infringement of Articles 3(3)(b), 6(d) and 7(2) of the Treaty***

From the outset, Counsel for the Applicant asserted that when the Republic of Burundi acceded to the EAC Treaty, it accepted to be bound by its provisions, the most relevant for this case being Articles 3(3) (b), 6(d) and 7(2). These provisions require all Partner States to uphold the fundamental and operational principles of the Community such as good governance, rule of law and the observance of human rights and social justice.

Learned Counsel pointed out that Article 6(d) of the Treaty obliges the Government of Burundi to ensure good governance which includes, *inter alia*, the recognition and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights which has been ratified by the Republic of Burundi.

In support of his case, he cited Articles 1, 2 and 14 of the said Charter.

Article 1 thereof provides that **“The Member States of the Organization of the African Union, parties to the present Charter shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measure to give effect to them.”**

Regarding Article 2, it states that **“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, political or any other opinion, national and social origin, fortune, birth or any status.”**

Article 14 reads: **“The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”**

It was contended by learned Counsel in the above regard that since the right to the disputed property is attested by an official

and legal title held by the Applicant, and that the Respondent has not contested that the said property is occupied and exploited forcefully by governmental agencies of the Republic of Burundi, and considering that complaints to different administrative authorities in order to have his rights restored have fallen on deaf ears, the Government has violated Articles 1, 2 and 14 of the African Charter of Human and Peoples' Rights as well as Articles 3(3)(b), 6(d) and 7(2) of the Treaty. He thus submitted that this Court, by virtue of Article 23(1) of the Treaty, has to ensure adherence to these provisions in the interpretation and application of the Treaty.

Counsel went on to point out that the Government of Burundi, through its Minister of Home Affairs or otherwise, had the obligation to protect the property rights of the Applicant which constitutes an issue of good governance. He therefore submitted that the arbitrary and illegal occupation of a land property of a citizen by any organ of a Partner State of the Community constitutes a violation and an infringement of the principles of good governance, the rule of law and social justice.

Counsel finally referred us to the **Samuel Mukira Muhochi** case where the Court decided that: **“The denial of entry into Uganda of the Applicant, a citizen of a Partner State, without according him the due process of law was illegal, unlawful and a breach of Uganda’s obligations under Articles 6(d) and 7(2) of the Treaty”**. He submitted therefore that similarly, the denial of Applicant’s enjoyment and use of his land, and the lack

of protection of his property rights by the Government of Burundi is illegal, unlawful and a breach of Burundi's obligations under Articles 3(3)(b), 6(d) and 7(2) of the Treaty.

The Respondent's Counsel made a brief response on this point and he contended essentially that the Applicant did not have any evidence concerning the way he acquired the disputed land. Relying on Rule 63(1) of the Court's Rules which states that: **“at the hearing the party having the right to begin shall state its case and produce evidence in support of the issues which it is bound to prove”**, he challenged the Applicant to produce documents showing the way he acquired the land. It also is his case that although the procedure to be followed in Burundi for the registration of land ownership does not show whether the land was acquired legally or illegally, he maintained nevertheless that the land title issued to the Applicant is illegal.

## **DETERMINATION OF ISSUE NO.2**

After carefully considering the submissions made by both sides and perusing the pleadings on record, the following are our findings and conclusions:

As the case stands, the crux of the Applicant's plea, as can be gleaned from the Reference, is that the Respondent breached Articles 6(d) and 7(2) of the Treaty by not protecting his property



rights over a land for which he possesses a legal title duly issued by a competent authority in the Republic of Burundi.

In support of his argument, the Applicant's Counsel referred us to Article 317 of the 2011 Burundi Land Act and Articles 1, 2 and 14 of the African Charter for Human and Peoples' Rights.

Article 317 of the Burundi Land Act provides that, **“The right to land can be established: either by the land title established by the Registrar of land titles or by a land certificate established by the municipal land service recognizing a regular appropriation of land resulting in personal or collective, permanent and sustainable possession, according to the custom of the time, the place and the use of the land.”**

Articles 1, 2 and 14 of the African Charter of Human and Peoples' Rights have been cited above.

Counsel for the Respondent's main counter-arguments are that the Applicant acquired and occupied the disputed land illegally, that the Burundian laws do not recognize automatically a land title as proof of ownership and that the National Commission for Land and other Properties has issued a report which shows that the Applicant has no rights over the said land. The learned Counsel did not however allude to any law in support of his contentions.

We are also aware that Article 36 of the Constitution of the Republic of Burundi provides that: **“Every person has the right to property. No one shall be deprived of his possessions**

**except in public interest, in circumstances and manner determined by law and subject to fair and prior compensation or pursuant to a court decision having the authority of *res judicata*.”**

In light of the foregoing, we are satisfied that the Applicant’s land ownership is, in conformity with Article 317 of the 2011 Burundian Land Act, evidenced by the Registration Certificate of a land property Vol.ECCXXV Portfolio 134 issued on 9<sup>th</sup> August 2009 by the Registrar of Land Titles. And as such, the Applicant’s land ownership should be protected under the above quoted Article 36 of the Constitution of the Republic of Burundi and relevant provisions contained in conventions and treaties to which the Republic of Burundi is signatory. Of importance for this Reference are the abovementioned quoted Article 14 of the African Charter for Human and Peoples’ Rights and Articles 6(d) and 7(2) of the Treaty.

All the aforementioned legal instruments recognize the right to property and state that any encroachment upon it should follow due process of law in order to avoid any arbitrary exercise of government power.

No evidence was adduced by the Respondent that any legal proceedings seeking the nullification of the Applicant’s land title has been undertaken either by the Government of Burundi or by the Commission for Land and other Properties.

It is our view that a land title is a conclusive evidence of the Applicant's land ownership that ought to be protected as required by the abovementioned provisions. Similar cases have been decided where courts have held that a certificate of title issued by the Registrar of land titles is conclusive evidence of the registered proprietor's ownership thereof (see **Ddungu Vs Marc Widmer & Anor, Civil Appeal No. 38 of 2009, [2012] UGHC121; Festus Mwanzi Lonzi Vs Roseline Muthoni Muburu, Environmental & Land Case 606 of 2011, [2012], eKLR**).

For all those reasons given above, we hold that the failure by the appropriate authorities of the Republic of Burundi to ensure the protection of the Applicant's land property rights was fundamentally inconsistent with Burundi's express obligations under Articles 6(d) and 7(2) of the Treaty to observe the principles of good governance including in particular, the principles of adherence to the rule of law, and the promotion and protection of human rights. This failure constitutes an infringement of the said provisions of the Treaty.

**Therefore, Issue No.2 is answered in the affirmative.**

**Issue No.3: Whether the Applicant is entitled to the order sought**

Both Counsel made no submissions on this issue.

We note, however, that the Applicant seeks the followings declarations and orders:

**“(a) A declaration that the occupation and exploitation of the Applicant’s property is unlawful and is an infringement of Article 6(d) of the Treaty for the Establishment of the East African Community.**

**(b)A declaration that the whole land of KIZINA as claimed by the Applicant and demarcated on the Registration certificate belongs to Venant MASENGE and all illegal constructions and occupations have to be immediately demolished by the Respondent and turned out.**

**(c)An order that the Respondent restitutes the full property of the land to the Applicant.**

**(d) Declare that the Applicant has a full right to enjoy the property right on KIZINA land according to his Registration title.**

**(e)An order that the costs and incidental to this Reference be met by the Respondent.**

**(f) That this Honorable Court be pleased to make such further or other orders as may be necessary in the circumstances.”**

We have addressed prayer (a) while determining Issue No. 2 of the Reference. As for prayers (b), (c) and (d), we are of the view, in agreement with the Respondent, that this Court is not clothed with the jurisdiction to grant them since they clearly fall outside the Court’s jurisdiction as provided for by Articles 23, 27 as read together with Article 30 of the Treaty.

### **CONCLUSION**

In light of our findings and conclusions on issues herein, we make the following orders:

1. A declaration that the occupation and exploitation of the Applicant’s property is unlawful and is an infringement of Article 6(d) of the Treaty for the Establishment of the East African Community.
2. Prayers (b), (c) and (d) are disallowed.
3. On costs, the Applicant has partially succeeded and shall be awarded half of the taxed costs to be borne by the Respondent.

It is so ordered.

Dated, Delivered and Signed at Arusha this 18<sup>th</sup> day of June, 2014.

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ISAAC LENAOLA

DEPUTY PRINCIPAL JUDGE

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FAUSTIN NTEZILYAYO

JUDGE

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MONICA K. MUGENYI

JUDGE