



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

(Coram: Isaac Lenaola, DPJ; Faustin Ntezilyayo, J; Fakihi A. Jundu, J)

REFERENCE No.2 OF 2013

BENOIT NDORIMANA.....APPLICANT

VERSUS

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

28TH NOVEMBER 2014

REFERENCE No. 2 OF 2013

JUDGMENT OF THE COURT

INTRODUCTION

1. This is a Reference by one **BENOIT NDORIMANA**, 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 NCUTYUMUHETO, Boulevard Patrice Lumumba, P.O. Box 1374 Bujumbura, Burundi.
2. The Reference was filed on 8th April 2013 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**”). The Respondent is the Attorney General of the Republic of Burundi, who is the Principal Legal Adviser of the Republic of Burundi, and is being sued on behalf of the Government of Burundi.
3. When this Reference was filed, the Secretary General of the East African Community had been sued as the 2nd Respondent, but in an Amended Reference filed on 18th November 2013, the Applicant withdrew the 2nd Respondent from the Reference.

REPRESENTATION

4. The Applicant was represented by Mr. Isidore Rufyikiri, but the latter was replaced by Mr. Horace NCUTYUMUHETO following a notice of change of advocate. Mr. Nestor KAYOBERA appeared for the Respondent.

BACKGROUND

The background of the case can be summarized as follows:

5. The Applicant, a Burundi citizen and a businessman was arrested on 15th March 1989 and detained until 6th August 2002 when he was released. After his release, he filed a case registered under Reference **RAC 2048** against the Government of Burundi in the Administrative Court of Burundi claiming damages for losses his pharmaceutical enterprises suffered following his alleged arbitrary imprisonment and closure of his business.
6. On 14th June 2004, the case was determined in favour of the Applicant and the Government of Burundi was condemned to pay him a total amount of BIF 1,000,300,000.00, the latter amount to be increased by the payment of interest of 6% per annum from the date of the judgment until full payment.
7. The Attorney General of the Republic of Burundi, aggrieved by the judgment, filed an appeal to the Supreme Court of Burundi, Administrative Chamber and the case was registered under Reference **RAA 669**.
8. The Applicant thereafter filed a preliminary objection opposing the admissibility of the case by the Supreme Court, arguing that it was filed out of the one month period to lodge an appeal as prescribed by Article 197 of the Civil Procedure Code of Burundi.
9. On 26th March 2012, the Supreme Court delivered a preliminary ruling on the matter, rejected the objection raised by the Applicant, and invited the parties to file their substantial pleadings.

10. On 28th March 2012, the Supreme Court delivered a judgment in Reference **RAA 669** and overturned the judgment of the Administrative Court of Bujumbura of 14th June 2004.
11. On 25th May 2012, the Applicant, dissatisfied with the judgment, applied for review to the Supreme Court of Burundi and the case was registered under Reference **RCC 21625**.
12. While the matter was still pending before the Supreme Court, the Applicant filed the instant Reference, on 8th April 2013.

The Applicant's case

13. The Applicant's case is contained in the Reference dated 8th April 2013, as amended on 18th November 2013, his Affidavit in support sworn on the same day together with its annexures, the Written Submissions filed on 11th March 2014 and List of Authorities filed on 18th July 2014. In a nutshell, his case is as follows.
14. The Applicant alleged that he was arrested on 15th March 1989 by the Intelligence Service of the Republic of Burundi which immediately and arbitrarily closed all his pharmaceutical enterprises. He contended that upon his release, on 6th August 2002, he sued the Government of Burundi before the Administrative Court of Bujumbura for indemnification and a judgment was delivered in his favour against the Republic of Burundi for the sum of BIF 1,000,300,000.00 with interest of 6% per annum accruing on the unpaid amount until full payment.
15. It is his contention that despite several demands for payment, the last one being by a letter to the Minister of Justice dated 4th

November 2012 and the legal deadline for the latter to respond being three months after receipt of the letter, that is, by 10th February 2013, the Government of Burundi has failed and/or refused to pay him the damages he was awarded together with accrued interest and that the said failure or refusal is unlawful and constitutes an infringement of Articles 6(d) and 7(2) of the Treaty.

16. The Applicant therefore seeks the following orders against the Respondent:

(a) A declaration that the refusal by the Respondent to pay damages awarded by the Court to him is an infringement of Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community;

(b) A declaration that the Applicant has a full right to enjoy his vested interests without any prior conditions;

(c) An order that the Applicant be immediately paid by the Respondent the amount of BIF 1,660,498.00¹;

(d) An order that costs of the Reference be paid by the Respondent

The Respondent's case

17. The Respondent filed a response to the Reference on 7th June 2013, an Affidavit in support sworn by Mr. Sylvestre Nyandwi on 3rd December 2013, Written Submissions on 14th April 2014 and a List of Authorities on 17th September 2014.

¹ In his written submissions, the Applicant brought the amount of the damages claimed to BIF 1,720,516,000.00.

18. The Respondent contended that he filed an appeal to the Supreme Court of Burundi, Reference **RAA 669** against the judgment of the Administrative Court of Bujumbura and that the Supreme Court overturned the said decision on 28th March 2012.
19. The Respondent further contended that the Applicant herein applied for review of the Supreme Court judgment under Reference **RCC 21625** and that the case was still pending before that Court.
20. The Respondent also contended that, in accordance with Articles 27(2) and 30(3) of the Treaty, this Court does not have jurisdiction to entertain matters that are before national courts of a Partner State – in this case, the Supreme Court of Burundi - and that this Court does not have jurisdiction to order payment of damages for a case pending before the Highest Court of a Partner State.
21. The Respondent therefore prayed this Court to declare that it cannot grant the orders and reliefs sought by the Applicant and consequently, to dismiss the Reference with costs.

SCHEDULING CONFERENCE

22. Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on 13th February 2014 at which the following were framed as issues for determination:
- a) Whether the Court has jurisdiction to entertain the Reference;
 - b) Whether the Reference is time-barred;
 - c) Whether the Applicant is entitled to the orders sought.

DETERMINATION OF THE ISSUES

Issue No.1 – Whether the Court has jurisdiction to entertain the

Reference

Submissions

23. The question as to whether the Court has jurisdiction to entertain this Reference was raised by Counsel for the Respondent. He submitted that, in view of the provisions of Article 27(1) and (2) of the Treaty, some of the prayers and orders sought by the Applicant fall outside the jurisdiction of this Court. In this regard, Counsel asserted that prayer (a) seeking a declaration that the refusal of the Respondent to pay damages to the Applicant is an infringement of Articles 6(d) and 7(2) of the Treaty and prayer (d) about costs can be entertained by the Court and granted, if proved by the Applicant. In support of his submission, learned Counsel referred the Court to the following decided cases: **EACJ Appeal No.1 of 2012: The Attorney General of the Republic of Rwanda Vs Plaxeda Rugumba (Plaxeda Rugumba case)** and **EACJ REF. No.1 of 2007: James Katabazi & 21 Others Vs The Secretary General of the East African Community & The Attorney General of the Republic of Uganda (James Katabazi case)**. He, however, submitted that prayer (b) seeking “**a declaration that the Applicant has full right to enjoy his vested interests without any prior conditions**” and prayer (c) seeking an “**order that the Applicant be immediately paid the amount of BIF 1,660,498,000.00 by the Respondent**” fall outside the jurisdiction of the Court as provided by Articles 27(2) and 30(3) of the Treaty, since the matter is pending before the

highest court of competent jurisdiction (i.e. the Supreme Court of Burundi) in a Partner State. To fortify his argument, he relied on the decision of this Court in **EACJ REF. No. 8 of 2011: Prof. Nyamoya Francois Vs The Attorney General of the Republic of Burundi & The Secretary General of the East African Community (para 43 of the Judgment).**

24. 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.

25. 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."**

26. 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.*"**

27. 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.”

28. Counsel further submitted that, with regard to the question of non-exhaustion of local remedies raised by the Respondent’s Counsel, 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 bringing a case to this Court.
29. As for the case Reference **RCC 21 625** still pending before the Supreme Court of Burundi, he contended that the process which brought the matter before the Supreme Court was unlawful on the ground that the Applicant was forced by the Government of Burundi to follow an **“illegal procedure.”** He maintained that, in any case, he had written to the Supreme Court requesting the suspension of all proceedings in the matter since the case had been brought to this Court.
30. After referring the Court to some decided cases, to wit, **EACJ REF. No.1 of 2006: Prof. Peter Anyang Nyong’o & 10 others Vs The Attorney General of Kenya & 2 others; Plaxeda Rugumba case(supra); James Katabazi case(supra)**, where this Court had to address issues pertaining to its jurisdiction, Counsel wrapped up his submissions by contending that this Court has jurisdiction to entertain the case and to decide on the orders sought, since there are no similar prayers in the Reference before the Supreme Court of Burundi as wrongly submitted by the Respondent.

Analysis of the issue

31. We have carefully considered the opposing arguments in respect of the instant issue. We first of all note 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. As persistently stated by the Applicant, his Reference seeks, among other orders, that this Court determine whether the refusal by the Government of Burundi to abide by the Laws of Burundi in paying the amount awarded to him by the Administrative Court of Bujumbura is an infringement of Articles 6(d) and 7(2) of the Treaty.
32. In his written submissions and during the hearing held on 19th September 2014, Counsel for the Respondent conceded that this Court has jurisdiction to entertain some prayers of the Reference, namely, a prayer seeking a declaration that the refusal by the Government of the Republic of Burundi to pay damages as per the decision of the Administrative Court of Bujumbura is an infringement of Articles 6 (d) and 7(2) of the Treaty [**prayer (a)**] and another one regarding costs of this Reference [**prayer (d)**]. Learned Counsel, however, maintained that the Court lacks jurisdiction to determine other prayers [**i.e. prayers (b) and (c)**] sought by the Applicant.
33. Guided by the Court's previous decisions on similar matters [see **Plaxeda Rugumba** case (supra), **Peter Anyang Nyong'o** case (supra), **James Katabazi** case (supra) and **EACJ REF. No.9 of 2012, Venant Masenge Vs The Attorney General of the Republic of Burundi**], we are of the decided opinion that the

Court has jurisdiction to entertain prayers (a) and (d) of the Reference. However, in light of the aforementioned case law, we agree with the Respondent that this Court lacks jurisdiction to grant prayers (b) and (c) since they fall outside the Court's jurisdiction as provided for by Articles 23, 27 as read together with Article 30 of the Treaty.

34. We therefore answer issue No. 1 partly in the affirmative.

35. Having so decided, we now turn to the substantive matter pertaining to whether or not there has been violation of Articles 6(d) and 7(2) of the Treaty and the question of the admissibility of this Reference while there is another related case pending before the Supreme Court of Burundi. This imperatively calls for a determination on whether the Reference discloses a cause of action under Article 30(1) of the Treaty.

36. As recalled above, the substratum of the Reference is the Applicant's contention that, by refusing to execute "**a definitive and enforceable**" judgment rendered by the Administrative Court of Bujumbura, awarding damages to him for loss allegedly caused by the Government of Burundi, the latter violated Articles 6(d) and 7(2) of the Treaty. The Respondent's main opposing argument is that there is no infringement to any provision of the Treaty since there is no enforceable judgment that the Government has failed to execute as the very judgment referred to by the Applicant has been overturned by another judgment of the Supreme Court of Burundi and that an application to review the latter is still pending before the Supreme Court.

37. It transpired from the parties' pleadings and submissions, especially from oral submissions made during the hearing held on 19th September 2014, that **Case RCC 21625** in which the Applicant requested the Supreme Court of Burundi to review its judgment delivered in **RAA 669**, is still pending before that Court.

38. During the hearing, when pressed to answer the question whether the Respondent could be faulted for not executing a decision that has been overturned by a subsequent decision of the Supreme Court, the latter decision being itself subject to an application for review pending before the same Court, Counsel for the Applicant evasively stated that the case before the Supreme Court has been instituted following an **"illegal procedure."** We find, with respect, that this argument is untenable, the reason being that, if some procedural irregularities were committed in instituting the case, it was up to the Applicant to raise the matter before a court of competent jurisdiction in Burundi.

39. In view of the above Applicant and Respondent's averments, the only conclusion to be drawn is that there is no final and enforceable decision in the matter in issue. It then follows from this finding and in line with Article 30(1) of the Treaty that, although the Applicant does have *locus standi* as he need not exhaust local remedies before coming to this Court, his Reference did not disclose a cause of action as commonly defined to be **"a set of facts or circumstances that in law give rise to a right to sue or to take out an action in court for redress or remedy"** [see Peter Anyang' Nyong'o case (supra)].

40. Regarding therefore the question at issue, we are of the opinion that, since the Applicant has not disclosed any cause of action against the Respondent, there is no legal ground for the instant Reference and for this reason, violation of Articles 6(d) and 7(2) of the Treaty cannot arise.

Issue No.2: Whether the Reference is time-barred

Having found above that the Reference does not disclose any cause of action, and the latter matter being a point of law that can dispose of the entire Reference, it would be a futile exercise to entertain the issue of time-bar since it cannot arise while the Reference is no longer alive on substance.

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

41. The Applicant seeks the following declarations and orders:

- (a) A declaration that the refusal by the Respondent to pay damages to the Applicant is an infringement of Articles 6(d) and 7(2) of the Treaty;**
- (b) A declaration that the Applicant has a full right to enjoy his vested interests without any prior conditions;**
- (c) An order that the Applicant be paid the amount of BIF 1,720,516,000.00 by the Respondent;**
- (d) Costs of this Reference to be paid by the Respondent.**

42. Counsel for the Applicant submitted that the “**Respondent, by a pure abuse of authority, refused to abide by its own national laws of Civil Procedure, and decided to engage by force the Applicant in an unlawful procedure of appeal instead of**

executing a judgment that has become definitive and enforceable”[sic]. He argued that, in so doing, the Respondent violated the principles of rule of law and good governance enshrined in Articles 6(d) and 7(2) of the Treaty. He then urged the Court to grant all the prayers sought in the Reference.

43. The Respondent’s Counsel countered the Applicant’s allegations by arguing that the matter forming the basis of this Reference is going due process in the Supreme Court of Burundi and in accordance with the Laws of Burundi. He contended therefore that no violation of the Treaty was committed and that the Applicant is not entitled to the orders sought.

44. As found above, the Applicant did not adduce evidence that there has been a Treaty violation imputable to the Respondent. Therefore, prayer (a) cannot be granted. As regards prayers (b) and (c), we are of the view, in agreement with the Respondent, that this Court does not have jurisdiction to grant them since they undoubtedly fall outside the Court’s jurisdiction as provided for by Articles 23, 27 as read together with Article 30 of the Treaty

CONCLUSION

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

Prayers (a), (b) and (c) are disallowed.

The Reference is therefore dismissed with costs to the Respondent.

It is so ordered.

Dated, Delivered and Signed at Arusha this 28th day of November, 2014.

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ISAAC LENAOLA

DEPUTY PRINCIPAL JUDGE

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FAUSTIN NTEZILYAYO

JUDGE

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FAKIHI A. JUNDU

JUDGE