

COUR DE JUSTICE



محكمة العدل

COMESA



COURT OF JUSTICE

IN THE COURT OF JUSTICE OF THE COMMON MARKET FOR EASTERN AND
SOUTHERN AFRICA – FIRST INSTANCE DIVISION

REFERENCE NO. 1 OF 2025

TEWODROS GETACHEW TULU----- APPLICANT

VERSUS

THE SECRETARIAT AND
SECRETARY-GENERAL OF COMESA-----RESPONDENT

THE COUNCIL OF MINISTERS-----RESPONDENT NO. 1

A. F CHUI CHEONG----- RESPONDENT NO. 2

AND

EAST AFRICA LAW SOCIETY----- INTERVENER

RULING OF THE COURT

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CORAM:

Hon. Lady Justice Qinisile Mabuza (Presiding Judge)
Hon. Mr. Justice Ali Sulaiman Mohammed
Hon. Lady Justice Mary N. Kasango
Hon. Mr. Justice Bernard Georges
Hon. Dr. Justice Léonard Gacuko
Hon. Lady Justice Clotilde Mukamurera
Hon. Mr. Justice Chinembiri Bhunu

REGISTRY:




Hon. Philippe Ruboneza.....Deputy Registrar
Hon. Asimwe Anthony..... Assistant Registrar
Mrs. Mutinta Chinganya – Mulenga.....Legal Officer

COUNSEL:

Mr. Kiya Tsegaye Lemessa.....For the Applicant
Mr. Solomon Ayano Hirpo.....For the Applicant
Dr. Suzgo Lungu.....For the Respondent
Mr. Lubinda Linyama.....For the Respondent
Ms. Mailesi Undi.....For the Respondent
Ms. Emily Osiemo.....For the Intervener

COURT REPORTERS:

Mr. Mutale Mpempa
Mr. Chileleko Simbayi

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A. THE PARTIES

1. The Applicant, Tewodros Getachew Tulu, is a resident of the Federal Democratic Republic of Ethiopia, a member of the Common Market for Eastern and Southern Africa (hereafter “COMESA”) as specified under Article 1(2) of the COMESA Treaty (hereafter the “Treaty”).
2. The Respondent is the Secretariat and Secretary General of COMESA.
3. The 1st Respondent is the Council of Ministers of COMESA.
4. The 2nd Respondent (sometimes referred to as the 3rd Respondent in pleadings) is Justice Ah Foon Chui Yeu Cheong of the Republic of Mauritius, a member of COMESA.
5. The Intervener is the East Africa Law Society.
6. In this Ruling, we will refer to the parties as set out hereinabove.

B. BACKGROUND FACTS

7. The COMESA Court of Justice (CCJ) is an organ of COMESA, established under Article 7 of the Treaty. It is divided into two Divisions, the First Instance Division (FID) and the Appellate Division (AD). The FID is composed of 7 elected Judges whereas the AD is composed of 5 elected Judges. COMESA Judges are elected to serve for 5 years, renewable for a further 5-year term.
8. The election of Judges to both Divisions follows an elaborate election process strictly governed by the Rules of Procedure for the Election of the Judges of the COMESA Court of Justice (2005) (the Rules).
9. Elections are conducted by an Electoral College established in terms of the Rules. Under Rule 8, the COMESA Secretary General is the returning officer responsible for the administration of the elections. The elections are conducted prior to the expiry of the terms of the sitting Judges.
10. In anticipation of the impending expiry of the current Bench’s term, the Secretary General on 5 April 2024 called upon all Member States of COMESA to submit nominations of qualified candidates for election to replace the outgoing Judges.

Under Article 20 (2) of the Treaty, prospective candidates are qualified for nomination if they are:

- i. Persons of impartiality and independence;
- ii. Who fulfil the conditions required for the holding of high judicial office in their respective countries of domicile; or
- iii. Who are jurists of recognised competence.

11. Both the Federal Democratic Republic of Ethiopia (Ethiopia) and the Republic of Mauritius (Mauritius) are members of COMESA. Together with other Member States, they both submitted nominations for the impending elections. Ethiopia nominated the Applicant, whereas Mauritius nominated the 2nd Respondent. There was a total of 14 nominees, including Ethiopia and Mauritius, for the election. The election procedure is that all candidates first participate in the election for the AD. The unsuccessful nominees then participate in the election for Judges in the FID.

12. On 21st November 2024, the Ministers of Justice and Attorneys General of Member States convened an Electoral College for the election of Judges of the COMESA Court of Justice. The nominees were:

(a) Dr Onesphore Baroreraho	Burundi
(b) Dr Ahmed Tharwat Ibrahim Mohamed	Egypt
(c) Justice Sium Tekle Belete	Eritrea
(d) Justice Mazwendoda Mavuso	Eswatini
(e) Mr Tewodros Getachew Tulu	Ethiopia
(f) Justice Aggrey Otsyula Muchelule	Kenya
(g) Justice Salohy Norotiana Randrianarisoa	Madagascar
(h) Justice Masauko Timothy Msungama	Malawi
(i) Justice Ah Foon Chui Yeu Cheong	Mauritius
(j) Justice Samia Cecile Bella Andre	Seychelles

(k) Justice Ibrahim Osman Briema Hamid	Sudan
(l) Justice Monica Kalyegira Mugenyi	Uganda
(m) Justice Mervin Sitwala Mwanamwambwa	Zambia
(n) Justice Lavender Makoni	Zimbabwe

13. The outcome of the elections is captured in the minutes of the Twenty-Seventh Meeting of the COMESA Ministers of Justice and Attorneys General. The outcome was as follows:

Appellate Division

(a) Zambia	10 votes
(b) Burundi	8 votes
(c) Uganda	8 votes
(d) Malawi	7 votes
(e) Madagascar	7 votes
(f) Egypt	7 votes
(g) Seychelles	4 votes
(h) Zimbabwe	4 votes
(i) Eritrea	1 vote
(j) Eswatini	1 vote
(k) Mauritius	1 vote
(l) Ethiopia	1 vote

14. Both candidates for Ethiopia and Mauritius, among others, were unsuccessful in the election for Judges of the AD. Their names then went forward for election to the FID.

15. The election results for the 7 posts for Judges of the FID were as follows:







First Instance Division

- | | |
|----------------|----------|
| (a) Kenya | 13 votes |
| (b) Zimbabwe | 12 votes |
| (c) Eswatini | 9 votes |
| (d) Egypt | 9 votes |
| (e) Seychelles | 9 votes |
| (f) Sudan | 8 votes |
| (g) Mauritius | 8 votes |
| (h) Ethiopia | 4 votes |
| (i) Eritrea | 3 votes |

16. In its decision, the Electoral College pronounced the following candidates to have been duly elected:

Appellate Division

- (a) Justice Marvin Sitwala Mwanamwambwa (Zambia) - President
- (b) Dr Onesphore Baroreraho (Burundi)
- (c) Justice Monica Kalyegira Mugenyi (Uganda)
- (d) Justice Masauko Timothy Msungama (Malawi)
- (e) Ms Salohy Norotiana Randrianarisoa (Madagascar)

First instance Division

- (a) Justice Aggrey Otsyula Muchelule (Kenya) - Principal Judge
- (b) Justice Lavender Makoni (Zimbabwe)
- (c) Justice Mazwendoda Mavuso (Eswatini)
- (d) Dr Ahmed Tharwat Ibrahim Mohamed (Egypt)
- (e) Justice Samia Cecile Bella Andre (Seychelles)
- (f) Justice Ibrahim Osman Briema Hamid (Sudan)
- (g) Justice Ah Foon Chui Yew Cheong (Mauritius)



17. Aggrieved by the outcome of the election results, the Applicant wrote a letter addressed to the Respondent on 17th February 2025, complaining of procedural irregularities in the manner the elections were conducted, and of communications with the Judge-elect from Mauritius.
18. On 19th February 2025 the Respondent replied, refuting the Applicant's allegations in their entirety. This prompted the Applicant to file this matter before the Court.

C. THE REFERENCE

19. The Applicant on 15th April 2025 filed a Reference before this Court. The Applicant is represented by Mr Kiya Tsegaye Lemessa and Mr Solomon Ayano Hirpo, advocates of Ethiopia.
20. The Respondents to the Reference are the Secretariat and the Secretary General, the Council of Ministers and the Judge-elect from Mauritius. The Respondent and 1st Respondent are represented by Dr Suzgo Lungu, Legal and Corporate Affairs, COMESA Secretariat, and Mr Lubinda Linyama and Ms Mailesi Undi of Messrs Eric Silwamba, Jalasi and Linyama Legal Practitioners. The 2nd Respondent did not appear and was not represented.
21. The relief that the Applicant seeks is in the following terms:

“(1) The Applicant seeks a declaration that the decision of the Secretary General on 18th of February 2025 is made without its mandate and invalid.

(2) The Applicant also seeks to annul the decision of the Electoral College made on the 21st of November 2024 to the extent that it ruled on nominations of nominees as Judges whose nominations were not received formally by the Secretariat and those who were non eligible due to age requirement.

(3) As the nominee who received the 8th highest vote, immediately after the 3rd Respondent, who is not qualified to be a candidate in the first place, the Applicant seeks a ruling by this Honorable Court:

a) that the 3rd Respondent was ineligible to be seated as a Judge of the Court; or

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b) The position of the 3rd Respondent be declared vacant starting from the date of communication to the Secretariat that the 3rd Respondent is unable to assume the role for personal reasons; and

c) That the Applicant be appointed to fill the position unlawfully held by the 3rd Respondent; and/or

(4) That the 1st Respondent has acted ultra-virus by calling again the 3rd Respondent to allow filling the position after a formal communication from her own country coordinating ministry; and/or

(5) That the 1st, 2nd and 3rd Respondents jointly or severally make good injuries and damages (both monetary and moral) sustained by the Applicant.

b. The costs, including legal fees, of and incidental to this reference.

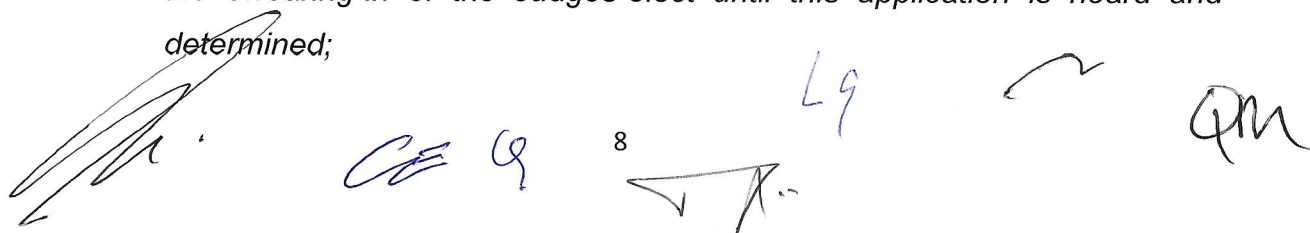
c. Any other ancillary orders as the Court may deem fit and expedient under the circumstances.”

22. Additionally to his Reference, the Applicant filed an application supported by affidavit wherein he moved the Court for an Order granting a preliminary injunction, pending a full trial on the merits, to restrain the appointment of Judges of the CCJ who were elected on 21st November 2024 by the Council of Ministers of COMESA Member States and swearing in the elected Judges until this matter had been heard and determined.

23. On 16th April 2025 the Honourable Principal Judge granted the preliminary injunction *ex-parte* and ordered as follows:

“1. THAT a preliminary injunction is hereby issued, restraining the Respondent from proceeding with the appointment of Judges to the COMESA Court of Justice following the election done by the COMESA Ministers of Justice and Attorney’s General on 21st of November 2024, and adopted on 28th of November 2024 by the Council of Ministers, until this application is heard and determined;

2. THAT the Respondent is prohibited from proceeding with preparations for the swearing-in of the Judges-elect until this application is heard and determined;

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3. *THAT the Applicant shall serve this Order on the Respondents on or before 30 April 2025;*

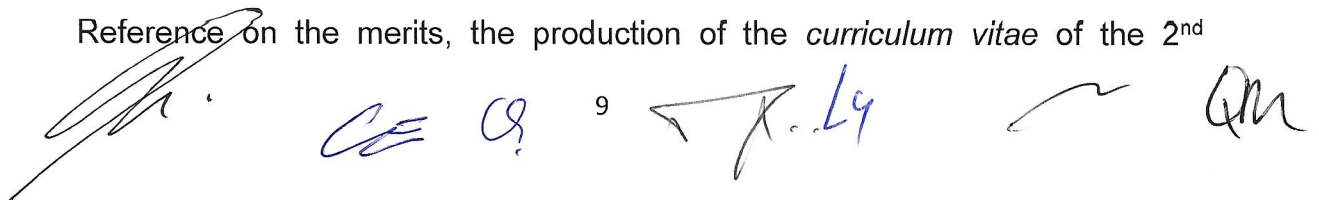
4. *THAT the Respondents shall file their responses on or before 14 May 2025;*

5. *THAT the Applicant shall file its reply on or before 21 May 2025;*

6. *THAT all parties shall file their written submissions on or before 26 May 2025; and*

7. *THAT the application shall be heard inter partes on 29 to 30 May 2025."*

24. The Respondent and 1st Respondent filed a Defence in which they opposed the Reference and therein raised several preliminary objections which included a challenge to the Court's jurisdiction. However, at the hearing these preliminary objections were abandoned.
25. By an application dated 26th May 2025, the East Africa Law Society applied to intervene in the matter in support of the Applicant. The Intervener was represented by Ms Emily Osiemo of Lumumba and Ayieko Advocates Nairobi, Kenya.
26. The application to intervene not being opposed, the Intervener filed a Statement of Intervention.
27. In view of the late filing of the application for intervention and numerous motions filed, the hearing of the Reference on the merits could not take place as proposed. The Court dealt instead with the motions and proceeded to hear the substance of the application for an injunction *inter partes*. The Court reserved its ruling on the injunction application and, pending this, maintained the injunction in place.
28. There remain several interlocutory matters which are pending before the Court from the arguments addressed by the parties during the hearings held on the 29th and 30th May and 3rd June 2025.
29. These matters relate to the preliminary injunction granted *ex-parte*, the application of the Respondent for a three-day adjournment for the hearing of the Reference on the merits, the production of the *curriculum vitae* of the 2nd

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Respondent, directions on the scope of involvement of the Intervener, and directions on the involvement of the 2nd Respondent in the matter.

30. The Court's Ruling of 3rd June 2025 ordered the Applicant to re-serve the 2nd Respondent with the Reference and pleadings filed thereafter. The Court stated there that the application of the Respondent for a three-day adjournment did not therefore arise for consideration. Likewise, the involvement of the 2nd Respondent in the matter will follow from the ruling that she be served and that the matter will then proceed in accordance with the Rules of Procedure.
31. This omnibus ruling deals with the outstanding matters serially.

D. THE INJUNCTION

32. As earlier stated, the Applicant filed an *ex-parte* application for an interlocutory injunction simultaneously with his Reference. By that application he seeks to prevent further processes in the appointment of Judges of the Court who were voted into office as Judges of the Court.
33. As stated in paragraph 23 above, the Principal Judge granted an *ex-parte* order prohibiting the Respondent from proceeding with the swearing-in of the Judges-elect until the injunction application has been heard and determined. The application was fixed for *inter partes* hearing on the 29th and 30th May 2025.
34. Ultimately, on 30th May 2025, the Applicant, the Intervener, the Respondent and 1st Respondent, in the absence of the 2nd Respondent, made full submissions before the Court on the injunction application. The Court reserved its ruling on that application.
35. When the matter returned to the Court on 3rd June 2025 for the hearing on the merits of the Reference, the Respondent and 1st Respondent had filed a notice of motion dated 2nd June 2025 seeking the following orders:

"(a) that the present proceedings be adjourned to a date to be fixed to allow the Applicant (the Respondent) herein to obtain instructions on the Statement of Intervention; and



(b) that the Court determines on the further conduct of the present proceedings in light of (the) fact that Respondent Number 2 may not be aware of the present proceedings.”

36. The pertinent prayer in the Respondents’ application which has a bearing on the issue of the injunction application is prayer (b).
37. The affidavit in support of the notice of motion was sworn by Counsel Dr. Suzgo Lungu. He deponed that he had contacted the Solicitor General of the Republic of Mauritius who informed him that he had spoken to the 2nd Respondent and the 2nd Respondent had informed him that she was unaware of these proceedings. His deposition in part is as follows:

“THAT, Counsel Yvan Jean-Louis informed us that he contacted her ladyship who informed him that she was unaware of the present proceedings and had not been served process of the same. Produced and attached hereto is a copy of the email exchange with Counsel Yvan Jean-Louis.”

38. After hearing the parties on the notice of motion the Court delivered the following Ruling:

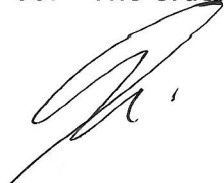
“1. We have considered the submissions made by the parties before court.

2. We are of the view that the communication attached to the affidavit of Dr. Suzgo Lungu dated 2nd June 2025 casts doubt in the mind of the court that 2nd Respondent has been served.

3. Accordingly, we order the Applicant to re-serve the 2nd Respondent by DHL courier with the Reference and all the pleadings filed up to date. The matter will then proceed in accordance with Rule 27 and other Rules of Procedure. To that extent the issue of adjournment sought by the Respondent does not arise.

4. The Court shall give a Ruling on the scope of involvement of the intervener and until then the preliminary injunction is extended.”

39. The order is self-explanatory and needs no further elucidation.

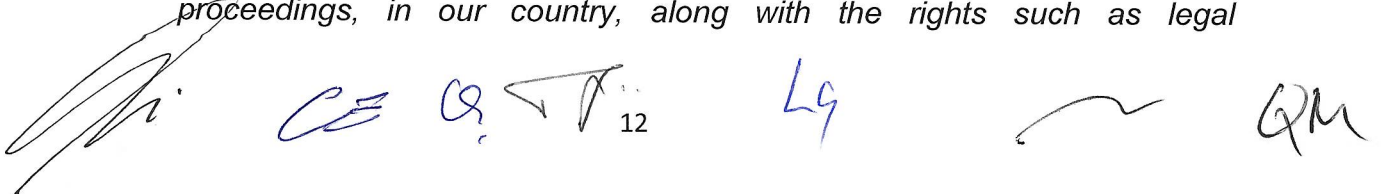


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40. We are alive to the principle that the law always favours the protection of the enjoyment of rights over their abrogation. In respect of the Judges who have been elected and whose election is not challenged, the continued injunction may be seen to be an interference with their acquired rights as the injunction restrains all the Judges from taking up their posts. Additionally, apart from the 2nd Respondent, the other Judges have not been joined as parties to the Reference.
41. That said, it is a fundamental principle in law that no person should be Judged without a fair hearing in which every party is given the opportunity to respond to the evidence against the party. The 2nd Respondent is a primary party in this matter. The injunction application was heard in the absence of the 2nd Respondent. It is that Respondent who informed the deponent of the affidavit, Dr Lungu, that she had not been served in this case. The fact that the 2nd Respondent stated that she had not been served and that the injunction application, which directly affects her, was heard in her absence, is clear indication that her right to be heard was negated.
42. The right to be heard ensures that a party is given a chance to present its views and be heard before a decision is taken that affects the party. The principle that no person should be Judged without a fair hearing in which every party is given the opportunity to respond to the evidence against them is one of the principles of natural justice, known as the *audi alteram partem* rule, meaning “hear the other side or let the other side be heard”. This principle was laid down in the case of **Progress Welfare Association of Malindi Kenya National Chamber of Commerce and Industry & another v County Government of Kilifi, County Executive Committee, Member, Lands, Housing, Physical Planning & Urban Development & 4 others [2021] eKLR** where the Court, on the principle of the right to fair hearing, stated:

“In Rex vs Deferral 1937 AD 370 and 373, the court observed that the audi alteram partem principle literary means, “hear the other side’. This means that no ruling of any importance, either on the merits or on procedural points, should be made without giving both parties the opportunity of expressing their views. The audi alteram partem principle is followed in judicial proceedings, in our country, along with the rights such as legal



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representation, the right to adduce and challenge evidence in cross examination and the right to present one's evidence to the dispute or claim".

43. It is because this Court exercised doubt on whether the 2nd Respondent had been served that we deferred delivery of a ruling on the injunction application until the 2nd Respondent had been served as ordered by this Court on 3rd June 2025.
44. We cannot anticipate the position, if any, that the 2nd Respondent will take on the matter of the injunction. Nor can we anticipate, without having heard the case on the merits, what form our eventual judgment will take.
45. In the circumstances, we feel that the interest of justice requires that the *ex parte* preliminary injunction issued on 16th April 2025 be extended until further order of this Court. Thereafter, upon proof of service on the 2nd Respondent being filed, the Court shall proceed to rule on the injunction application after all parties have been heard.

E. CURRICULUM VITAE (CV)

46. By a petition dated 30th May 2025, the Applicant sought an order for the Respondent to release the CV of the 2nd Respondent. This is the CV forwarded to the Respondent by the Republic of Mauritius when that Member State nominated the 2nd Respondent for election as a Judge of the CCJ.
47. When the matter was canvassed by the parties before the Court on 29th May 2025, Learned Counsel for the Respondent responded to an informal application for the production of the CV as follows, *verbatim*:

"Every document has its own rule of production. Are they asking for privileged documents? We need to get instructions on that. Our proposal will be that in line with their spirited desire to argue this matter next week, they can file a formal application. If we do harbor an objection, we can react. If what they ask for is something that instructions come our way to concede and consent to, we shall gladly proceed as such."

48. The Applicant filed a formal application dated 2nd June 2025 for production of the CV.



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49. The Respondent opposed the application and informed the Court that the Respondent had not been served with any documents in the case and that the CV might be a privileged document.
50. A prayer which is not responded to can lead to a default order being issued.
51. In any event, the 2nd Respondent's CV is an important document for the just determination of this matter. The CV was forwarded as a necessary document in the election process and distributed to all members of the Electoral College. A privileged document is one which is confidential or protected from mandatory disclosure. Once the CV was circulated, it lost any privilege which attached to it. Since the eligibility of the 2nd Respondent for election is being challenged, it is only fair and just that the Applicant should have access to the 2nd Respondent's CV.
52. An order is therefore hereby issued for the Respondent to release the 2nd Respondent's CV to the Applicant within 14 days from the date of this Ruling.

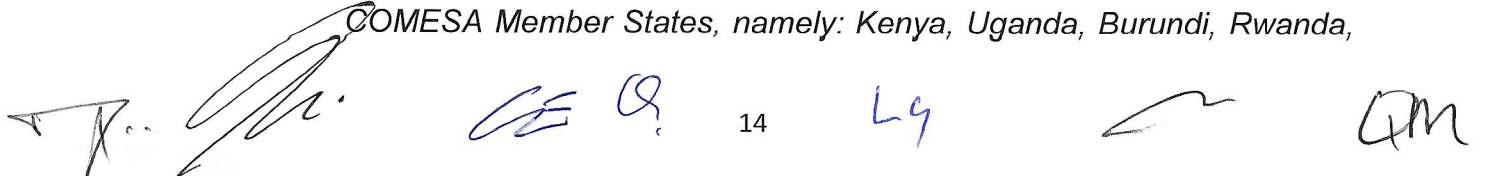
F. SCOPE OF INVOLVEMENT OF INTERVENER

53. As stated above, when this matter came to be heard, the East Africa Law Society applied under Rule 50 of the Rules of Procedure for leave of the Court to intervene in the Reference filed by the Applicant. It gave as grounds for its intervention that:

"i. It is an apex regional bar in East Africa whose membership comprises of over 42,000 lawyers from Kenya, Uganda, Tanzania, Burundi, Rwanda, Democratic Republic of Congo, Rwanda, the Federal Republic of Somalia and Federal Democratic Republic of Ethiopia.

ii. It draws membership from more than 8 national bars namely: the Law Society of Kenya, Tanganyika Law Society, Uganda Law Society, Zanzibar Law Society, Rwanda Bar Association, Burundi Bar Association, South Sudan Bar Association and the Ethiopian Federal Advocates Association.

iii. It represents both individual lawyers and national bars from 6 COMESA Member States, namely: Kenya, Uganda, Burundi, Rwanda,

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Democratic Republic of Congo and the Federal Democratic Republic of Ethiopia.

iv. Its mandate is to intervene in public interest matters involving issues of rule of law, good governance, democracy and promotion of regional integration which affects its members.

v. Its members, including the Applicant, are among the persons who submitted their application for election to the COMESA Court of Justice and, as such, the Reference directly affects the welfare of its members, giving it an interest in the outcome of the case.

vi. The matter of election of Judges to the COMESA Court is a matter of immense public interest

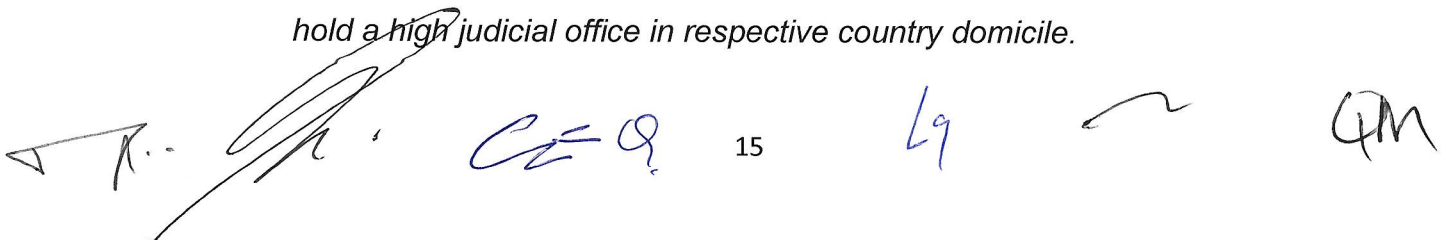
vii. The Reference questions the integrity, transparency and impartiality of the process of election of Judges of the COMESA Court and its compliance with the COMESA Treaty and the Rules of Procedure for the Election of Judges and, as such, is a matter in which it has direct and immediate interest in the case.”

54. Importantly, the application stated that the Intervener would not enlarge the issues in the case if granted leave to intervene.

55. In its application for leave to intervene, the Intervener stated clearly that it was seeking to intervene in support of the Applicant. The application rehearsed the relief sought by the Applicant:

“7. The Applicant seeks a declaration that the decision of the Secretary General on 18th February 2025 is made without its mandate and invalid.

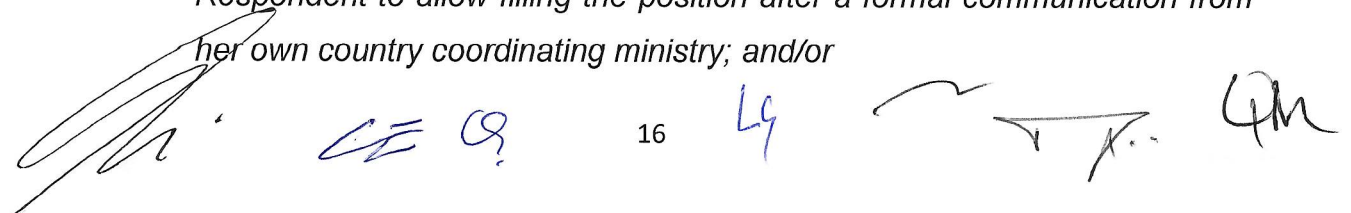
8. The Applicant also seeks to annul the decision of the Electoral College made on 21st November 2024 to the extent that it ruled on nominations of nominees as Judges whose nominations were not received formally by the Secretariat and whose CV's were not disseminated before the election as per the Rules of Procedure for the election of Judges and those who were non eligible due to age requirement also does not fulfill the conditions to hold a high judicial office in respective country domicile.

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9. As the nominee who received the 8th highest vote immediately after the 2nd Respondent, who is not qualified to be a candidate in the first place, the Applicant seeks a ruling by this Honorable Court:

- A. That the 2nd Respondent was ineligible to be seated as a Judge of the Court; or
- B. The position of the 2nd Respondent be declared (vacant) starting from the date of communication to the Secretariat that the 2nd Respondent is unable to assume the role for personal reasons;
- C. That the Applicant be appointed to fill the position unlawfully held by the 2nd Respondent; and/or
- D. That the act of the Secretariat and Secretary General to resend a letter of the 2nd Respondent after a month of her formal withdrawal through the coordinating Ministry of Foreign Affairs and Regional Integration of Mauritius is not procedural and in no way acceptable.
- E. That the letter alleged to be confidential by the Respondent reveals a clandestine operation of transgressing the clear laws and encroaching on the powers of the Council, which is illegal and cannot be protected under the veil of confidentiality. An official information or communication by a Member State concerning a publicly held, expectedly, transparent election and made public through media outlets cannot be stated as confidential.
- F. That, as per the cumulative reading of the Treaty and the Rules of Procedure for the Election of Judges, 2005, the Secretariat and the Secretary General has the responsibility 1) to receive the nomination from Member States with a nomination letter and CV 2) Properly shortlist those candidates who are eligible 3) Reject the non-eligible candidates or advise and provide full information to the Member States and the Electoral College.

10. That the 1st Respondent has acted ultra vires by calling again the 3rd Respondent to allow filling the position after a formal communication from her own country coordinating ministry; and/or

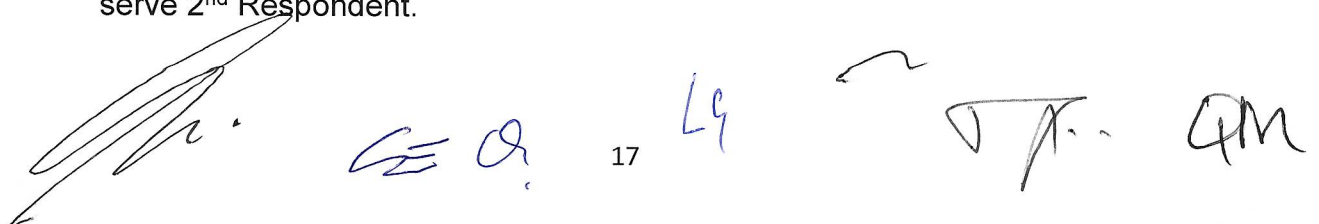
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11. *That the 1st, 2nd and 3rd Respondents jointly or severally make good injuries and damages (both monetary and moral) sustained by the Applicant.*

12. *The costs, including legal fees, of and incidental to the Reference.*

13. *Any other ancillary orders as the court may deem fit and expedient under the circumstances.”*

56. The application for leave to intervene was supported in all material respects by an affidavit sworn by Mr David Sigano, the Chief Executive Officer of the East Africa Law Society. He stated that the Intervener would “*wholly rely on the issues as raised by the Applicant and it will not enlarge the issues.*”
57. As stated before, the Respondent and 1st Respondent did not oppose the application. Consequently, at its sitting on 29th May 2025, the Court granted leave to the Intervener to intervene in the matter. The Court ordered the Intervener to file its Statement of Intervention by close of business on Saturday 31st May 2025 and the Respondent to file its reply by Monday 2nd June 2025.
58. In the event, the Intervener filed its Statement of Intervention a day late (on Sunday 1st June 2025) and the Respondent stated that it had received the statement on 2nd June 2025 when the same was posted on Case Lines.
59. By undated notice of motion, supported by affidavit dated 2nd June 2025, the Respondent sought an extension of three days to allow it, *inter alia*, to file its reply to the Statement of Intervention. The motion sought two other relief:
- i. That the Court issue directions as to the involvement of the 2nd Respondent in the matter;
 - ii. That the Court issue directions ‘*on the scope of involvement of the intervener*’ in the matter.
60. In a ruling issued on 3rd June 2025, the Court ordered the 2nd Respondent to be served with the Reference and all pleadings filed since then, and reserved its ruling on the scope of involvement of the Intervener. The request of the Respondent for a three-day extension was subsumed into the direction to reserve 2nd Respondent.

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61. The issue brought up by the Respondent and 1st Respondent for our consideration and decision relates to the difference between the contents of the application for intervention and those of the Statement of Intervention.

62. In the Statement of Intervention, the Intervener set out the relief it sought as follows:

"1. A declaration be and is hereby issued that there were illegalities and irregularities during the election of Judges of COMESA Court of Justice held on 21st of November 2024 which contravened the COMESA Treaty and the Rules of Procedure for Election of Judges of COMESA Court of Justice 2005.

2. An order be and is hereby issued annulling the election of Judges of COMESA Court held on 21st November 2024.

3. An order do issue directing the Respondent to conduct fresh elections in strict compliance with the COMESA Treaty and the Rules of Procedure for Election of Judges of COMESA Court of Justice 2005.

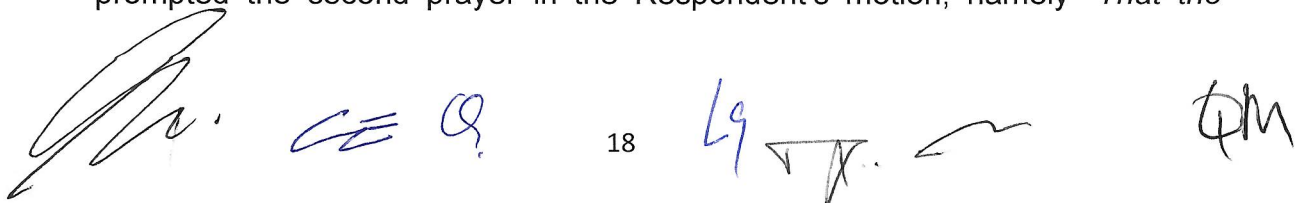
4. A declaration be and is hereby issued that the Republic of Mauritius' withdrawal of Respondent 2, A.F Chui Cheong, did create a vacancy for position of Judge of First Instance Division.

5. In the alternative to reliefs 2 and 3 above, the Honorable Court be please (sic) to order for a replacement of the name of withdrawn Judge elect, Respondent No. 2, A.F Chui Cheong with the name of the Applicant.

6. A declaration be and is hereby issued that a retired Judge in a Member State is ineligible to be nominated, elected and appointed as a Judge of the COMESA Court of Justice under Article 21 (2) of the COMESA Treaty.

7. Any other reliefs that the Honorable Court may order to meet the ends of justice."

63. On behalf of the Respondent and 1st Respondent, Learned Counsel Mr Linyama objected to the scope of the relief sought by the Intervener. This is what no doubt prompted the second prayer in the Respondent's motion, namely *"That the*

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honourable Court issues directions on the scope of involvement of the intervener in this matter.”

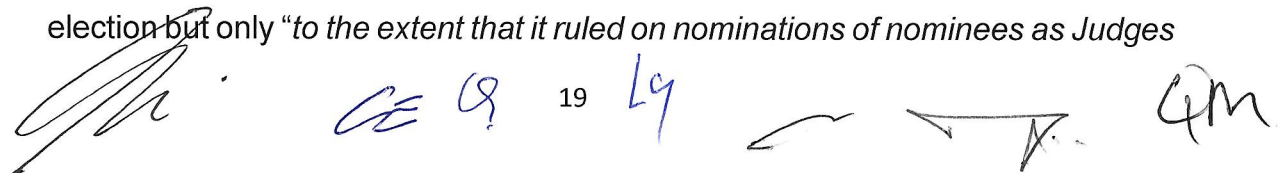
64. Speaking to his motion, Mr Linyama stated, *verbatim*:

“My Ladies and My Lords, the documents filed yesterday by the Intervener clearly recast the case. The Applicant last week was on record saying he wants to annul the election of the Judge elect of Mauritius, that is on the record of the Court as of Friday. They have paraphrased the case to say they want to annul the whole election, including the Apex Court's election, that is their prayer. Now, can an Intervener come and recast a claim to extend it more than what the principal party was claiming? That's not permissible.”

65. On this issue, Ms Osiemo, Learned Counsel for the Intervener, submitted, *verbatim*:

“The only thing, My Lords, My Ladies, we did is just to rephrase the orders our reliefs so that they are clear. My Lords, My Ladies, if you look at the Applicant's reference, the reliefs sought at page 12 were not very clear, and for that reason, even when you look at Rule 50 of the Rules of the Court. They require that when we make an application at 3(e), we state the reliefs sought by one of the parties, which we did in our application. We copied word for word what the Applicant was seeking. Then when you look at Rule 50(10)(a), it says that we are now supposed to state the reliefs sought by the Intervener in support of one side. My Lords, My Ladies. What we have sought here is exactly the same. For instance, let me show you. One of the reliefs we are seeking is that, an order be issued annulling the election. That is one of the orders by the Applicant Under Part 2. It's not different. My Lords, My Ladies, there's nothing new. If you ask the Respondent, what new issue have we raised, they will not be able to respond because there is no issue that is new that is catching them by surprise under the motion raised by the Intervener.”

66. The statement of Ms Osiemo is not entirely correct. The second relief sought by the Applicant (Part 2 in Ms Osiemo's words) was not the annulment of the whole election but only “to the extent that it ruled on nominations of nominees as Judges

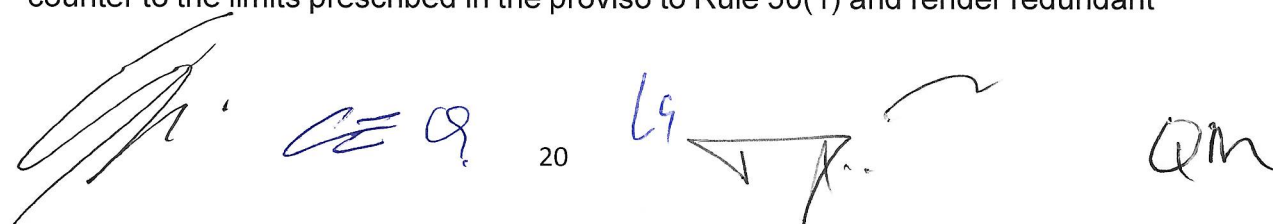
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whose nominations were not received formally by the Secretariat and whose CV's were not disseminated before the election as per the Rules of Procedure for the election of Judges and those who were non eligible due to age requirement also does not fulfill the conditions to hold a high judicial office in respective country domicile."

67. Rule 50 sets out the parameters of an intervention by a third party in a case which has commenced between other parties:

- i. The proviso to Rule 50(1) limits the scope of an intervention to "*evidence supporting or opposing the arguments of a party to the case.*"
- ii. Subrule 3(e) requires the application to contain the relief sought by a party in support of or in opposition to which the Intervener is applying to intervene.
- iii. Subrule 8 limits the intervention to the case as it is at the time of the intervention.
- iv. Subrule 10(a) requires the Statement of Intervention to contain the relief sought by the Intervener in support of or in opposition to the relief sought by a party.

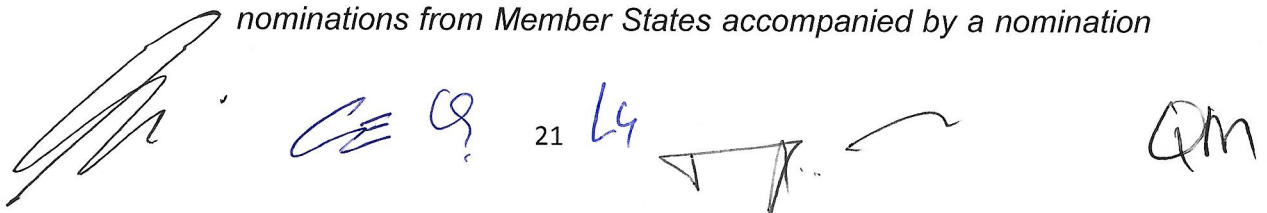
68. It is clear from the foregoing that an intervention is limited to the matter as filed by a party to the case, being the party the intervener seeks to support or oppose. Insofar as Subrule 10(a) requires the relief sought by the Intervener to be set out in the Statement of Intervention, this cannot be interpreted as giving *carte blanche* to the Intervener to formulate new relief not hitherto sought by the party the Intervener proposes to support. Rather, it allows the Intervener to choose among the relief sought by the principal party that which it seeks to support or oppose. A situation may well arise where an Intervener does not wish to support or oppose all the relief sought by the principal party but wishes to limit itself to only part of the relief. That is why the provision in Subrule 10(a) has been provided. To hold otherwise would be to allow an Intervener to recast the case for one of the parties and reformulate the relief that party seeks. That would run counter to the limits prescribed in the proviso to Rule 50(1) and render redundant

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the words “in support of or in opposition to the relief sought by one of the parties whether in whole or in part” in Subrule 10(a).

69. A synopsis of the relief sought by the Applicant reveals that it seeks:

- i. A declaration that the decision of the Secretary General regarding the election of Judges was made without mandate and was invalid.
- ii. Annulment of the decision of the Electoral College of 21 November 2024 to the extent that it ruled on nominations of nominees as Judges whose nominations were not received formally by the Secretariat and whose CVs were not disseminated before the election and those who were not eligible due to age requirement and who did not fulfill the conditions to hold a high judicial office in their respective countries of domicile.
(underlining supplied)
- iii. A ruling that the 2nd Respondent was ineligible to be seated as a Judge of the Court or that the position of the 2nd Respondent be declared vacant; that the Applicant be appointed to fill the position unlawfully held by the 2nd Respondent; and/or that the act of the Secretariat and Secretary General to resend a letter of the 2nd Respondent after a month of her formal withdrawal through the coordinating Ministry of Foreign Affairs and Regional Integration of Mauritius was not procedural and unacceptable.
- iv. Declarations that:
 - a. there was a clandestine operation to transgress clear laws and encroach upon the powers of the Council;
 - b. official information or communication by a Member State concerning a publicly held and transparent election and made public through media outlets could not be confidential;
 - c. a cumulative reading of the Treaty and the Rules of Procedure for the Election of Judges, 2005 reveals that the Secretariat and the Secretary General have the responsibility (i) to receive nominations from Member States accompanied by a nomination

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letter and CV (ii) to properly shortlist those candidates who are eligible and (iii) to reject the non-eligible candidates or advise and provide full information to the Member States and the Electoral College;

d. the 1st Respondent acted ultra vires by calling upon the 2nd Respondent to allow her to fill the position after formal communication from her own country coordinating ministry.

v. Monetary and moral damages against the Respondents jointly or severally.

vi. Costs, including legal fees, of and incidental to the Reference.

vii. Any other ancillary orders as the Court deems fit and expedient under the circumstances.

70. It is clear from the foregoing synopsis that the Applicant seeks relief principally arising from two actions of the Secretariat, namely:

i. that relating to improper nominations and circulation of CVs, and allowing the election of Judges who were either unqualified or ineligible, and

ii. allowing the 2nd Respondent to resume her position as an elected Judge after she had withdrawn her candidacy post-election.

71. While the Applicant criticises the electoral procedure, he stops short of seeking the annulment of the whole electoral process. His prayer for the annulment of the election is limited to formal communication of CVs and to the election of unqualified Judges. Indeed, Counsel for the Applicant stated as much before us, as the following exchange between the Court and Mr Lemessa reveals, *verbatim*:

“COURT: May I follow up on that question. As I read the reference, you do not seek or the Applicant does not seek to annul the whole election. In fact, I am reading the relief claimed and it does not seek to annul the whole election. So, what happens to the Judges who have been elected and who are not challenged? What will be the effect of your request? Are you asking that the whole election be done de novo? Or that only part of the election is

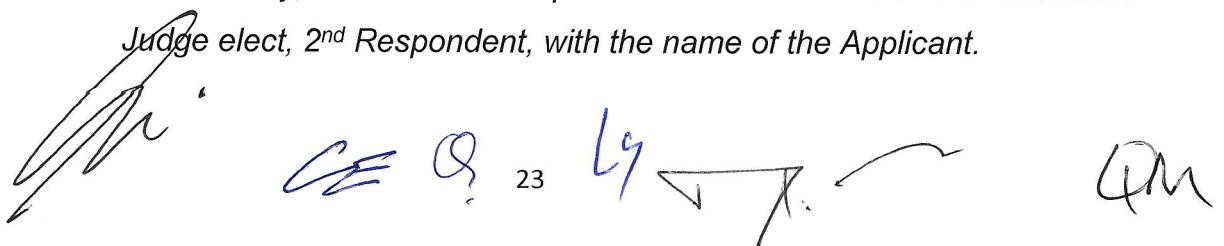
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done de novo? Or are you simply asking that the 8th candidate moves up one place to the 7th candidate's place?

MR. LEMESSA: Thank you Judge. So, as you have rightly said in the last sentence, what we are requesting is for you know, the Applicant got the 8th highest votes and when the 7th person who got the 7th highest votes, which is a 3rd Respondent who his candidacy has been withdrawn by the country of origin of these 7th candidate, then immediately, the Applicant who got the 8th highest votes will become the 7th and will join to be part of the Judges of this Honourable Court for the coming 5 years term. So, our claim is not for total annulment of the election of the whole Judges but only those whose the election process whose the action of the Secretariat and the Secretary General affected the process. So, we are seeking for the coming of the Applicant to be the 7th Judge and join the other remaining Judges." (underlining supplied)

72. In its Statement of Intervention, the Intervener went further. It claimed the following relief:

- i. A declaration that there were illegalities and irregularities during the election of Judges of COMESA Court of Justice held on 21st of November 2024 which contravened the COMESA Treaty and the Rules of Procedure for Election of Judges of COMESA Court of Justice 2005.
- ii. An order annulling the election of Judges of COMESA Court held on 21st November 2024.
- iii. An order directing the Respondent to conduct fresh elections in strict compliance with the COMESA Treaty and the Rules of Procedure for Election of Judges of COMESA Court of Justice 2005.
- iv. A declaration that the Republic of Mauritius' withdrawal of the 2nd Respondent created a vacancy for position of Judge of First Instance Division.
- v. Alternatively, an order for a replacement of the name of the withdrawn Judge elect, 2nd Respondent, with the name of the Applicant.

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vi. *A declaration that a retired Judge in a Member State is ineligible to be nominated, elected and appointed as a Judge of the COMESA Court of Justice under Article 21 (2) of the COMESA Treaty.*

vii. *Any other reliefs to meet the ends of justice.*

73. Despite the two statements of the Intervener referred to previously that it would not enlarge the issues of the case, the relief sought by the Intervener does go beyond that sought by the Applicant. In particular, the relief seeking the annulment of the whole election of Judges (which would include Judges of the AD) and the holding of fresh elections, as well as that seeking a declaration that retired Judges of a Member State are ineligible to be appointed, have not been sought by the Applicant.

74. We hold therefore that the relief sought by the Intervener set out at subparagraphs ii., iii. and vi. of paragraph 72 above are inconsistent with the relief sought by the Applicant and should be struck out. We accordingly order the Intervener to recast the Statement of Intervention in light of our finding herein and file an amended Statement of Intervention within 10 days hereof.

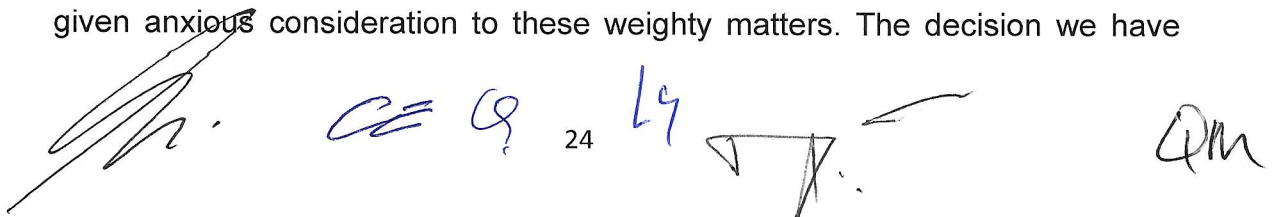
75. The matter will proceed on the basis of the relief sought by the Applicant as supported by the Intervener, subject to the Court's order in paragraph 74 above.

G. FURTHER CONDUCT OF THE CASE

76. The Court has been seized of this matter since 16th April 2025 and has heard and ruled on numerous preliminary matters relating to it. As is evident from this Ruling, some of these matters remain unresolved.

77. Among these are the injunction and the hearing on the merits. These have to await service of the pleadings on the 2nd Respondent and a consideration of the stand, if any, she will take in the matter.

78. We are conscious that our term in office as Judges has come to an end by effluxion of time. We are also alive to the fact that the Reference needs to be decided on its merits and disposed of speedily. We are further aware that a Court needs to be appointed to succeed that which expired on 5 June 2025. We have given anxious consideration to these weighty matters. The decision we have

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reached is born out of a desire not to handicap the Common Market and at the same time not to leave the parties remediless.

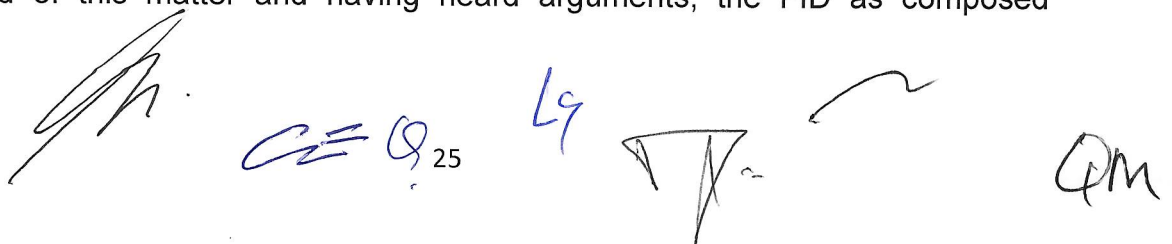
79. Article 21 of the Treaty reads:

"Tenure of Office and Resignation

- 1. The President and Judges shall hold office for a period of five years and shall be eligible for re-appointment for a further period of five years.*
- 2. The President and the Judges shall hold office throughout the term of their respective appointments unless they resign or die or are removed from office in accordance with the provisions of this Treaty.*
- 3. Where the term of office of a Judge comes to an end by effluxion of time or on resignation before a decision or opinion of the Court with respect to a matter which has been argued before the Court of which he was a member is delivered, such Judge shall, only for the purpose of completing that particular matter, continue to sit as a Judge.*
- 4. The President may, at any time, resign his office by giving one year's written notice to the Chairman of the Authority, but his resignation shall not take effect until his successor has been appointed by the Authority and has taken office.*
- 5. A Judge may, at any time, resign his office by letter delivered to the President for transmission to the Chairman of the Authority, and his resignation shall take effect on the date it has been accepted by the Authority."*

80. Article 21(3) is a saving clause providing for the completion of partly heard matters by outgoing Judges beyond their tenure of office. This is not unusual, and a similar provision is found in municipal courts.

81. We have therefore decided that, in terms of Article 21(3) of the Treaty, being seized of this matter and having heard arguments, the FID as composed

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immediately prior to 5 June 2025 will continue to hear this matter until final completion.

82. As stated at the start of this Ruling, the Court as established in the Treaty consists of twelve Judges in two Divisions both of which are presided over by a Judge President. The Judge President is vested with special and personal powers which other Judges of the CCJ do not possess. Under Rule 7(1) of the Rules of Procedure of the Court, the Judge President “*shall direct the overall functions of the Court*”.
83. So long, therefore, as Judges of the FID continue to hear a matter which has been argued before them, the Judge President must likewise continue to administer and direct the functions of the Court, occasion arising.
84. In view of the need for this dispute to be resolved and a new Court empanelled, and bearing in mind the injunction in place, we urge the Registry to list the Reference to be heard as soon as is reasonably practicable.

IT IS SO ORDERED.

DATED this 9TH day of JUNE 2025.




.....

HON. LADY JUSTICE QINISILE M. MABUZA

- Principal Judge


.....

HON. MR JUSTICE ALI SULAIMAN MOHAMMED

- Judge


.....

HON. LADY JUSTICE MARY N. KASANGO

- Judge


.....

HON. MR JUSTICE BERNARD GEORGES

- Judge



.....
HON. DR JUSTICE LEONARD GACUKO

-

Judge



.....
HON. LADY JUSTICE CLOTILDE MUKAMURERA

-

Judge



.....
HON. MR JUSTICE E. CHINEMBIRI BHUNU

-

Judge