

AFRICAN UNION

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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

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THE MATTER OF

ANUDO OCHIENG ANUDO

v.

UNITED REPUBLIC OF TANZANIA

APPLICATION No. 012/2015

JUDGMENT

22 MARCH, 2018



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**The Court composed of:** Sylvain ORÉ, President, Ben KIOKO, Vice-President; Gérard NIYUNGEKO, El Hadji GUISSÉ, Rafâa BEN ACHOUR, , Ntyam S. O. MENGUE, Marie-Thérèse MUKAMULISA, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Judges; and Robert ENO, Registrar.

In the Matter of:

Anudo Ochieng ANUDO

*represented by:*

- i) Advocate Jane Mary RUHUNDWA, Country Director, Asylum Access, Tanzania
- ii) Advocate Mwajabu KHALID, Lawyer

v.

UNITED REPUBLIC OF TANZANIA

*represented by:*

- i) Ms Sarah D. MWAIPOPO: Director, Division of Constitutional Affairs and Human Rights;
- ii) Ms Nkasori SARAKIKYA: Assistant Director, Human Rights – Principal State Attorney;
- iii) Mr. Baraka LUVANDA: Ambassador, Head of Legal Unit – Ministry of Foreign Affairs, International and East African Regional Cooperation;
- iv) Ms Aida KISUMO: Senior State Attorney – Attorney General's Chambers;
- v) Ms Blandina KASAGAMA: Legal Officer, Ministry of Foreign Affairs, International and East African Regional Cooperation;
- vi) Advocate Abubakar MRISHA, Senior State Attorney – Attorney General's Chambers;
- vii) Advocate Msillo MGAZA, Inspector at the Ministry of Home Affairs and Immigration, Immigration Department;



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## **I. THE PARTIES**

1. The Applicant is Anudo Ochieng Anudo, who states that he was born in 1979 in Masinono, Butiama, United Republic of Tanzania.
2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State") which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 December 1986 and to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 10 February, 2006. It deposited the declaration prescribed under Article 34 (6) of the Protocol recognizing the jurisdiction of the Court to receive cases from individuals and Non-Governmental organizations on 29 March, 2010. The Respondent State also became a Party to the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR") on 11 July, 1976, and to the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as "the ICESCR") on 11 June, 1976.

## **II. SUBJECT OF THE APPLICATION**

3. The Application relates to the withdrawal of nationality and expulsion from the United Republic of Tanzania of the Applicant by the Respondent State.

### **A. Facts as stated by the Applicant**

4. The Applicant states that in 2012, he approached the Tanzanian authorities of the Babati District Police Station to process formalities for his marriage. The Police decided to retain his passport on the grounds that there were suspicions regarding his Tanzanian citizenship. His Tanzanian nationality was withdrawn and he was then deported to the Republic of Kenya which, in turn, expelled him back to the United Republic of Tanzania; but because he could not enter the country, he remained in the "no man's land" between the *Tanzania-Kenya border* in Sirari.

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5. On 2 September, 2013, the Applicant sent a letter to the Minister of Home Affairs and Immigration requesting to know why his travel document was confiscated by the Police.
6. Between April and May 2014, the immigration service opened an investigation and questioned certain residents of the village of Masinono, notably those the Applicant indicated to be his biological parents. Many of them attested that the Applicant was the biological son of Anudo Achok and Dorcas Rombo Jacop, with the exception of his uncle Alal Achock (his father's brother) who stated that the Applicant was born in Kenya to one Damaris Jacobo, and subsequently migrated to Tanzania.
7. The Applicant indicated having written to the Prevention and Combatting of Corruption Bureau informing this Bureau that immigration officers had asked him to give them a bribe, which he refused to do.
8. By a letter dated 21 August, 2014, the Minister of Home Affairs and Immigration informed the Applicant that, after careful verification of all the relevant documents, officials of the Immigration Department had come to the conclusion that he was not a citizen of Tanzania, and that his Tanzanian passport No. AB125581 had been issued on the basis of fake documents. The Minister's letter further stated that the Applicant's passport had been cancelled and an order issued for him to report to the Immigration Office for information as to what steps to take to obtain Tanzanian nationality.
9. In response to that invitation, the Applicant, on 26 August, 2014, unaware of the Minister's letter dated 21 August, 2014 went to the Immigration Office at Manyara with a view to having his passport returned. He alleges that, upon arrival, he was arrested, detained and beaten. Seven days later, that is, on 1 September, 2014, he was expelled, with immigration officers escorting him to the Kenyan border after he was compelled to sign a notice of deportation and a document attesting that he is a Kenyan citizen.



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10. On 5 October, 2014, the Applicant's father brought the matter to the attention of the Prime Minister of the Respondent State, seeking annulment of the decision to strip his son of his citizenship and for his deportation. The Applicant's father's letter was transmitted to the Minister of Home Affairs and Immigration for consideration and appropriate action. On 3 December, 2014, the Minister of Home Affairs and Immigration confirmed the Applicant's expulsion.
11. In Kenya, the Applicant was on 3 November, 2014, found in a comatose condition with bruises and injuries, and was taken to hospital. On 6 November, 2014, he was arraigned before the Homa Bay Resident Magistrate's Court in Kenya which declared him as being in an "*irregular status*" in the territory and sentenced him to pay a fine for illegal stay. The Applicant was again expelled to Tanzania following that decision.
12. The Applicant alleges that he has since been living in secret in the "*no man's land*" between the territory of the Respondent State and the Republic of Kenya, in very difficult conditions, without basic social or health services.

## B. Alleged violations

13. The Applicant alleges that the confiscation of his passport, the "*illegal immigrant*" status issued against him and his expulsion from the United Republic of Tanzania deprived him of his right to Tanzanian nationality, guaranteed and protected under Articles 15 (1) and 17 of the Tanzanian Constitution and Article 15 (2) of the Universal Declaration of Human Rights.
14. In his Reply to the Respondent State's Response, the Applicant, through his Counsel, further states that by depriving him of his Tanzanian nationality and expelling him to Kenya, which in turn declared him as being in "*an irregular situation*", the Respondent State violated a number of his fundamental rights:

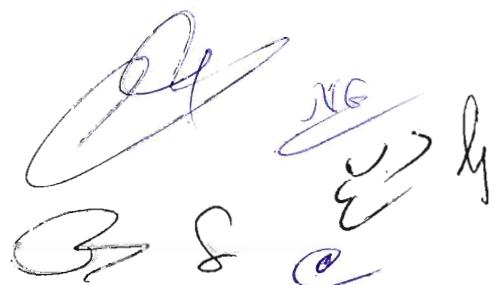
"(i) the right to freedom of movement and residence in his own country as guaranteed by Article 12 of the Charter, including;

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- (ii) the right to liberty and security of his person and freedom from arbitrary arrest and detention as provided in Article 9 (1) of the ICESCR and Article 6 of the Charter;
- (iii) the right to equality before the law; the right to be presumed innocent until proven guilty; the right to a fair and public hearing guaranteed under Article 15 of the ICCPR and Article 7 (b) of the Charter; the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force, under Article 7 (a) of the Charter;
- (iv) the right to participate freely in the government of his country, either directly or through freely chosen representatives, as provided under Article 13 (1) of the Charter and Article 25 (1) of the ICCPR;
- (v) the right of access to public office and the use of public services in his country, as provided under Article 13 (2) of the Charter and Article 25 (2) of the ICCPR;
- (vi) the right to work as provided under Article 15 of the Charter and Article 6 of the ICESCR;
- (vii) the right to enjoy the best attainable state of physical and mental health as guaranteed by Article 16 of the Charter;
- (viii) the right to protection of his family by the Respondent State as provided under Article 18 of the Charter, and the right to an adequate standard of living for himself and his family as provided under Article 11 of the ICESCR;
- (ix) the right to marry and found a family guaranteed by Article 23 of the ICCPR;
- (x) the right to take part in the cultural life of his community as provided under Article 17 (2) of the Charter".

### **III. SUMMARY OF THE PROCEDURE BEFORE THE COURT**

15. The Application dated 24 May, 2015, was lodged at the Registry of the Court by an email sent on 25 May 2015.

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16. The issue of the validity of the email and its registration was considered by the Court at its 38th Ordinary Session which decided that the Application be registered.
17. On 15 September, 2015, the Application was served on the Respondent State. On the same date, it was transmitted to all the States Parties to the Protocol; and on 28 October, 2015, was notified to the other entities listed under Rule 35 (3) of the Rules of Court (hereinafter referred to as "the Rules").
18. On 30 December, 2015, the Respondent State filed its Response. On 5 January, 2016, the Registry transmitted the Response to the Applicant.
19. At its 39th Ordinary Session, the Court decided to provide the Applicant with legal assistance and instructed the Registry to contact the Non-Governmental Organization (NGO) Asylum Access Tanzania in this regard. On 4 February, 2016, Asylum Access Tanzania accepted to represent the Applicant.
20. On 25 March, 2016, the Court, pursuant to the provisions of Rule 45 (2) of its Rules, sought the opinion of the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission") on issues of nationality as regards the matter of Anudo Ochieng Anudo v. United Republic of Tanzania, in view of its expertise in this area. The Commission did not respond to the request.
21. By an Application dated 18 November, 2016, received at the Registry on 28 November, 2016, the Applicant prayed the Court to issue an order for Provisional Measures to: (i) dissuade the Respondent State from barring him from entering Tanzania; and (ii) allow him to return to his family in Tanzania pending the final decision of the Court. This prayer was transmitted to the Parties on 2 December, 2016.
22. On 6 December, 2016, the Registry notified the Parties that the matter was set down for public hearing for 17 March, 2017. Following a request from the Applicant, the said hearing was held on 21 March, 2017. During the hearing, the Parties presented their pleadings, made oral submissions and responded to questions put to them by Members of the Court.

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23. At the request of the Respondent State during the public hearing, the Parties were granted leave to file additional evidence.

24. Pursuant to Rule 45 (2) of the Rules, the Court, on 4 January, 2017, requested the NGO, Open Society Justice Initiative, as an organization with recognized expertise on the regime of nationality and statelessness in international law, for an opinion on the issue.

25. On 7 March, 2017, the Open Society Justice Initiative transmitted its comments, and these were forwarded to the Parties for their observations.

#### **IV. PRAYERS OF THE PARTIES**

##### **A. The Applicant's Prayers**

26. The Applicant prays the Court to order that the immigration authorities' decision to expel him from his own country, be declared null and void.

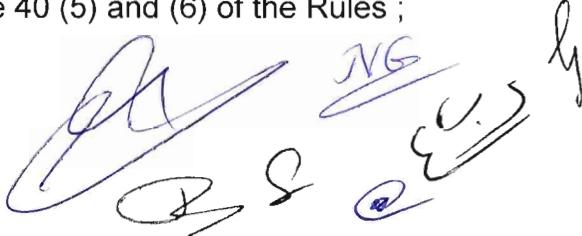
27. Further, in his Reply to the Respondent State's Response, the Applicant prays the Court to order the following measures:

- (i) cancel the *prohibited immigrant notice* issued against him and reinstate his nationality by declaring him a citizen of the United Republic of Tanzania;
- (ii) allow him to enter and stay in the Respondent State like all its other citizens;
- (iii) ensure his protection by the Respondent State as it does for other citizens and protect him from victimization on account of this case; and
- (iv) reform its immigration law to guarantee the right to a fair trial before taking any decision that may deprive a person of his fundamental right, like the right to nationality..

##### **B. The Respondent State's Prayers**

28. In its Response to the Application, the Respondent State prays the Court to:

- (i) declare that it has no jurisdiction to adjudicate the Application;
- (ii) declare the Application inadmissible on the grounds that it has not met the admissibility conditions stipulated under Rule 40 (5) and (6) of the Rules ;

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- (iii) declare that the Respondent has not violated the Applicant's right to personal freedom and the right to life;
- (iv) declare that the allegations of corruption are false;
- (v) dismiss the Application for lack of merit, and
- (vi) grant it leave to file additional evidence pursuant to Rule 50 of the Rules of Court.

## V. JURISDICTION

29. In terms of Rule 39 (1) of its Rules, "the Court shall conduct preliminary examination of its jurisdiction ..."
30. In this respect, the Respondent State raises objection to the material jurisdiction of the Court on which the Court shall make a ruling before considering other aspects of jurisdiction.

### A. Objection to the Court's material jurisdiction

31. The Respondent State raises objection to the material jurisdiction of the Court by invoking Article 3 (1) of the Protocol and Rule 26 (1) and (2) of the Rules which provide that "the Court shall have jurisdiction to deal with all the cases and all disputes submitted to it concerning interpretation and application of the Charter, the Protocol and any other relevant instrument on human rights ratified by the States concerned".
32. The Respondent State argues that, contrary to the above provisions, the Applicant does not request the Court to interpret or apply an Article of the Charter or the Rules, nor invoke any human rights instrument ratified by the United Republic of Tanzania.
33. The Applicant refutes the Respondent State's objection to the Court's material jurisdiction, contending that even in the absence of any express reference to the Charter or the Protocol, the alleged violations fall within the ambit of the international instruments in respect of which the Court has jurisdiction.

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34. The Court notes that, in actual fact, the Application does not indicate the articles or human rights instruments guaranteeing the rights alleged to be violated.

35. However, in his Reply to the Respondent State's Response, the Applicant specifies the rights allegedly violated as well as the international instruments which guarantee the said rights. It follows that the Application raises allegations of violations of human rights guaranteed by international legal instruments applicable before this Court and ratified by the Respondent State, particularly the Charter, the ICCPR and the ICESCR.

36. The Court notes its established case law on this issue and reiterates that the rights allegedly breached need not be specified in the Application; it is sufficient that the subject of the Application relates to the rights guaranteed by the Charter or by any other relevant human rights instrument ratified by the State concerned<sup>1</sup>.

37. Accordingly, the Court dismisses the Respondent State's objection and rules that it has material jurisdiction to hear the case.

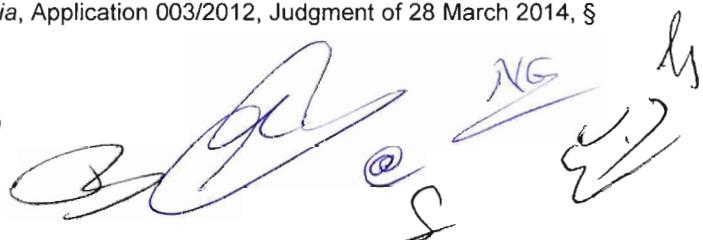
## B. Other aspects of jurisdiction

38. The Court notes that its personal, temporal and territorial jurisdiction is not contested by the Respondent State. Besides, nothing on record indicates that the Court does not have personal, temporal and territorial jurisdiction. The Court accordingly holds that:

(i) it has personal jurisdiction given that the Respondent State is a Party to the Protocol and has made the declaration prescribed under Article 34 (6) of the Protocol, which enabled the Applicant to bring this Application directly before this Court, pursuant to Article 5 (3) of the Protocol;

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<sup>1</sup> See Application 005/2013: *Alex Thomas v. United Republic of Tanzania*, Judgment of 20 November 2015 § 45; *Frank David Omari and Others v. United Republic of Tanzania*, Application 001/2012 Judgment of 28 March 2014, § 115; *Peter Chacha v. United Republic of Tanzania*, Application 003/2012, Judgment of 28 March 2014, § 115.



- (ii) it has temporal jurisdiction since the alleged violations occurred subsequent to the Respondent State's ratification of the Protocol establishing the Court;
- (iii) it has territorial jurisdiction given that the facts of the case occurred in the Respondent State's territory.

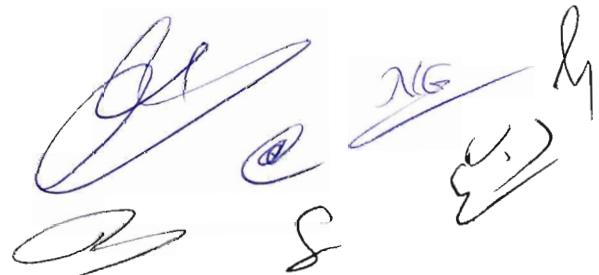
39. In light of the foregoing, the Court holds that it has jurisdiction to hear the instant case.

## VI. ADMISSIBILITY

40. Pursuant to Rule 39 (1) of its Rules, "the Court shall conduct preliminary examination of ... the admissibility of the application in accordance with articles 50 and 56 of the Charter and Rule 40 of these Rules". The Respondent State raises objection to the admissibility of the Application on the basis of Article 6 of the Protocol and Rule 40 (5) of the Rules of Court. It contends not only that the Applicant has not exhausted the available local remedies, but also that the Application has not been filed within a reasonable timeframe.

41. In terms of Rule 40 of the Rules, which in substance restates the content of Article 56 of the Charter, Applications shall be admissible if they fulfil the following conditions:

- "1. Indicate their authors even if the latter request anonymity,
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter,
3. Are not written in disparaging or insulting language,
4. Are not based exclusively on news discriminated through the mass media,
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,



6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and
7. Do not deal with cases which have been settled by these States involved in accordance with the principle of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provision of the present Charter."

#### **A. Objection based on the non-exhaustion of local remedies**

42. The Respondent State avers that the Applicant could have challenged the decision of the Minister of Home Affairs and Immigration by filing before him a petition for waiver or cancellation of the "prohibited immigrant" notice and also introduce an application for authorization to return to the United Republic of Tanzania, stating the reasons for the return. It contends that under The Immigration Act, 1995, the Minister of Home Affairs and Immigration has the discretionary power to grant exemptions in cases of illegal residence; but that the Applicant never attempted to exercise this remedy.
43. According to the Respondent State, the Applicant had the opportunity to challenge the Minister's decision to publish the "prohibited immigrant" notice as provided under the Law Reform Act, (Cap. 310 of the Laws) which offers the right to remedies to people who feel aggrieved by a measure taken through an organ of Government or an administrative authority.
44. The Respondent State further states that the Applicant could have introduced before the High Court of Tanzania, an Application for review as a way to remedy the alleged violation of his rights.
45. The Respondent State argues that the afore-mentioned remedies exist because they are provided under Tanzanian laws; are available and can be exercised without impediment.



46. The Respondent State concludes that since the Applicant did not exercise the aforesaid remedies available locally, the Application does not meet the conditions set forth under Rule 40 (5) of the Rules, and must therefore be dismissed.
47. The Applicant submits that he has exhausted the local remedies available in the Respondent State in conformity with section 10 (f) of the Tanzanian Immigration Act which provides that "...every declaration of the Director...shall be subject to confirmation by the Minister, whose decision shall be final."
48. The Applicant also submits that he appealed the "prohibited immigrant" decision before the Minister through his father, but that the Minister confirmed the decision.
49. The Applicant further submits that after his expulsion from the Respondent State, he wrote to the Prime Minister (through his father), appealing his expulsion, but that the Minister, requested by the Prime Minister to examine his request responded, confirming the said expulsion. He avers that, consequently, the Respondent State was aware of his desire to return to its territory, and that the available domestic remedies have been exhausted.
50. The Applicant also points out that the Tanzanian Immigration Act does not provide judicial remedy for the decisions of the immigration authorities. According to him, the only other remedy was therefore that of review which is inefficient, unavailable and illogical.

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51. The Court notes that the Applicant did in actual fact exercise the remedies provided by the Tanzanian Immigration Act by first seizing the Minister of Home Affairs and Immigration<sup>2</sup> of the matter. He also sent a letter to the Prime Minister<sup>3</sup>. The Court also notes that beyond these remedies

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<sup>2</sup> See above § 5 of the Judgment

<sup>3</sup> See above § 10 of the Judgment

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exercised by the Applicant, the Tanzanian Immigration Act is silent on whether or how the Minister's decision can be challenged in a court of law.

52. With regard to the Respondent State's contention that the Applicant could have challenged the Minister's decision in the High Court by way of judicial review, this Court notes that at the time the Applicant was in a position to exercise the said remedy, he had already been expelled from Tanzania and was no longer in the territory of the Respondent State. In the circumstances, it would have been very difficult for him to exercise the review remedy.

53. Consequently, the Court dismisses the Respondent State's objection to the admissibility of the Application on grounds of failure to exhaust local remedies.

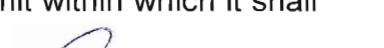
**B. Objection on the ground that the Application was not filed within a reasonable time**

54. The Respondent State alleges that the Application was not filed within a reasonable time in conformity with Rule 40 (6) of the Rules of Court, arguing that the Applicant seized the Court nine (9) months after the publication of the "prohibited immigrant" notice, a period it considers unreasonable.

55. In his Reply, the Applicant notes that the Minister's letter in response to his appeal was signed in December, 2014, and that he filed his Application before this Court in May, 2015; meaning that only five (5) months had elapsed between the Minister's final decision and the filing of the matter in this Court.

56. The Court notes that Rule 40 (6) of the Rules which in substance reproduces Article 56 (6) of the Charter speaks simply of "a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter."

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57. The Court has established in its previous Judgments that the reasonableness of the period for seizure of the Court depends on the particular circumstances of each case and must be determined on a case-by-case basis.<sup>4</sup>

58. In the instant case, the Court notes that the Applicant did, as a matter of fact, file the instant Application on 24 May, 2015, whereas the Minister's letter in response to his appeal was dated 3 December, 2014, thus representing a period of five (5) months and twenty-one (21) days between the two dates. For the Court, this period is reasonable, considering in particular the fact that the Applicant was outside the country.

59. The Court therefore dismisses the objection to the admissibility of the Application for non-submission of the same within a reasonable time.

#### **C. Admissibility conditions not in contention between the Parties**

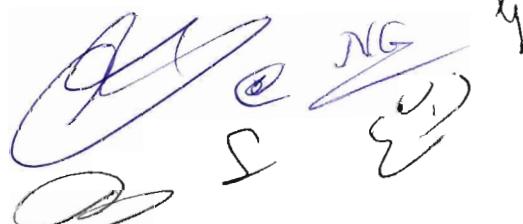
60. The Court notes that compliance with sub-rules 1, 2, 3, 4 and 7 of Rule 40 of the Rules (see paragraph 39 above) is not in contention and that nothing on record indicates that the requirements of the said sub-rules have not been complied with. In view of the aforesaid, the Court finds that the admissibility conditions have been met; and thus, that the instant Application is admissible.

#### **VII. THE MERITS**

61. The Court notes that the instant Application invokes the violation of three fundamental rights: (i) the Applicant's right to nationality and the right not to be arbitrarily deprived of his nationality, (ii) the right not to be arbitrarily expelled and (iii) the right to have his cause heard by a court.

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<sup>4</sup> Application 005/2013, Judgment of 20 November 2015, *Alex Thomas v. United Republic of Tanzania*, paragraph 73; *Abubakari v. United Republic of Tanzania*, Application 007/2013), Judgment of 3 June 2016, paragraph 91; and in *Christopher Jonas v. United Republic of Tanzania*, Application 011/2015, Judgment 28 September 2017, § 52



62. The Court notes that the rights of which the Application alleges violation concern not only the rights above cited, but also other incidental rights.

**A. On violations arising from the withdrawal of nationality and related rights**

**i. The Applicant's right to nationality and the right not to be arbitrarily deprived of his nationality**

63. The Applicant submits that he is a Tanzanian by birth, just like his two parents, namely, his father Achok Anudo and his mother Dorka Owundo. He further states that he holds a valid Tanzanian birth certificate and a Tanzanian voter's card which were confiscated by the Respondent State's authorities.

64. The Applicant further submits that the Manyara Immigration Office invited him to collect his passport on 26 August, 2014 and that when he went to that Office, he was detained for six days, beaten and forced to admit that he is a Kenyan. He states that two documents were handed to him on the sixth day of his detention, that is, on 1 September, 2014, one of which was a letter indicating that:

- a) He is not a citizen of the United Republic of Tanzania;
- b) His passport AB125581 was invalidated because he obtained it with fake documents;
- c) He will have to go to the Manyara Immigration Office to obtain information as to how to legalize his stay or arrange to leave the country.

65. On the seventh day of his detention, the Applicant was deported under police escort to Kenya.

66. The Applicant also alleges that the decision declaring him "prohibited immigrant" was ill-motivated given that his arrest and detention were based on unfounded and fabricated evidence; that he was arrested, detained and

then deported to Kenya without any possibility for him to challenge, in Court, the "prohibited immigrant" notice issued by the Minister of Home Affairs.

67. The Applicant alleges that the proceedings leading to the decision to invalidate his passport did not follow the legal procedure as required by Article 15 (2) (a) of the Constitution of the United Republic of Tanzania.
68. The Applicant contended that his father, who is Tanzanian by birth and with whom the Respondent State's authorities claimed to have spoken, had requested a DNA test to ascertain their parental connection but the Respondent State's authorities did not accede to the request.
69. The Respondent State contends that the Applicant's passport was obtained on the basis of false documents, adding that the information on the copy of his father's birth certificate attached to the Applicant's passport application in 2006 turned out to be contradictory to the statements concerning his parents, obtained during the investigation conducted on 29 November, 2012.
70. The Respondent State further contends that the birth certificate issued on 6 September, 2015 mentioned by the Applicant and attached to the Application submitted to this Court was obtained on the basis of the false documents that were presented.
71. The Respondent State also submits that the Applicant was declared a non-Tanzanian after the investigation in Masinono village where the Applicant claimed he was born; that in light of the discrepancies between the questionnaire completed by the Applicant at the Immigration Office and the statements obtained during the investigation conducted on 28 November, 2015, the immigration authorities concluded that the Applicant is not a citizen of the United Republic of Tanzania.
72. According to the Respondent State, the Applicant had the opportunity to change his status to one that is legal given that he was asked, in a letter

dated 21 August, 2014, to provide further clarification and to legalize his stay, failing which he would be expelled, but he failed to subject himself to the said formalities.

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73. The Court notes that before the Applicant's nationality was withdrawn by the Respondent State, he was considered a Tanzanian national, with all the rights and duties associated with his nationality (See infra 80-81).

74. It is important to state here that the conferring of nationality to any person is the sovereign act of States.

75. The question here is for the Court to determine whether the withdrawal of the Applicant's nationality was arbitrary or whether it conformed with international human rights standards.

76. The Court notes that neither the Charter nor the ICCPR contains an Article that deals specifically with the right to nationality. However, the Universal Declaration of Human Rights which is recognized as forming part of Customary International Law<sup>5</sup> provides under Article 15 thereof that: "1. Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality..."

77. In international law, it is recognized that the granting of nationality falls within the ambit of the sovereignty of States<sup>6</sup> and, consequently, each State determines the conditions for attribution of nationality.

78. However, the power to deprive a person of his or her nationality has to be exercised in accordance with international standards, to avoid the risk of statelessness.

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<sup>5</sup> See Case Concerning United States Diplomatic and Consular Staff in Tehran (*United States v Iran*) [1980] ICJ page 3, Collection 1980. See also Matter of South-West Africa (Ethiopia v. South Africa; Liberia v. South Africa) (Preliminary Objections) (Bustamante, Judge, separate opinion), ICJ, Collection 1962 page 319, as well as Section 9(f) of the Constitution of the United Republic of Tanzania, 1977.

<sup>6</sup> ICJ, Nottebohm Case, (Liechtenstein v. Guatemala) Judgment 6 avril 1955, page 20



79. International Law does not allow, save under very exceptional situations, the loss of nationality. The said conditions are: i) they must be founded on clear legal basis; ii) must serve a legitimate purpose that conforms with International Law; iii) must be proportionate to the interest protected; iv) must install procedural guarantees which must be respected, allowing the concerned to defend himself before an independent body<sup>7</sup>.

**80. In the instant case, the Applicant maintains that he is of Tanzanian nationality, which is being contested by the Respondent State. In the circumstance, it is necessary to establish on whom lies the burden of proof. It is the opinion of the Court that, since the Respondent State is contesting the Applicant's nationality held since his birth on the basis of legal documents established by the Respondent State itself, the burden is on the Respondent State to prove the contrary.**

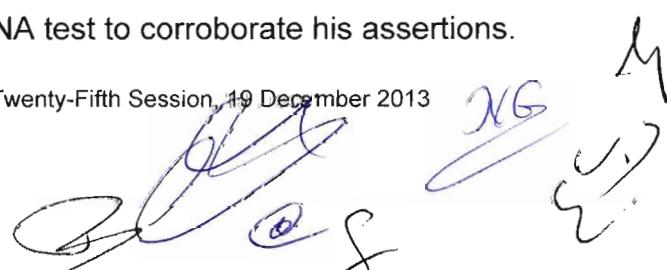
81. The Court notes that, in this case, the Applicant has always held Tanzanian nationality with all the related rights and duties, up to the time of his arrest, he had a birth certificate and passport like every other Tanzanian citizen.

82. The Court further notes that, in the instant case:

- (1) the passport in question, AB125581 delivered by Tanzanian authorities,
- (2) The Applicant's birth certificate attached to his Application before this Court indicates that his name is Anudo Ochieng Anudo and that his father is Achok Anudo,
- (3) the Respondent State claims that the Applicant's father's birth affidavit attached to the Applicant's passport application in 2016 bears the name of Anudo Ochieng, but that according to a testimony, his father was rather called Andrew Anudo,
- (4) Mr. Achok Anudo testified, on oath, that he was indeed the Applicant's father and, in addition, requested a DNA test to corroborate his assertions.

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<sup>7</sup> Report of the Secretary General, Human Rights Council, Twenty-Fifth Session, 19 December 2013



(5) Mrs Dorcas Rombo Jacop also testified, on oath, that she was the Applicant's mother.

(6) Other residents of the village, including old people and community leaders, affirmed in writing that the Applicant is Tanzanian, born in Tanzania. Among the residents was one Patricia O. Sondo who asserted having been present and assisted the Applicant's mother at the time of his birth, and clearly describing the place of birth.

83. The Court notes that the Respondent State's argument reposes on the statement of the Applicant's uncle who asserted that the Applicant's mother is a citizen of Kenya, and on the contradiction observed between the information provided by the Applicant and the statements of his supposed relations.

84. The Court notes, also, that the Applicant's citizenship was being challenged 33 years after his birth; that he has used the same citizenship for all those years leading an ordinary life, pursuing his studies in the schools of the Respondent State and in other countries; and that he has always lived and worked, like every other citizen, in the Respondent State's territory where he had been exercising a known profession.

85. The Court further notes that the Respondent State does not contest the Applicant's parents' Tanzanian nationality just as it did not prosecute the Applicant for forgery and making use of forged documents with the intent to defraud.

86. The Court also holds that in view of the contradictions in the witnesses' statements about the Applicant's paternity, the proof would have been a DNA test. A scientific DNA test was what was required and was requested by Achok Anudo, who, until then, claimed to be the Applicant's father.

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87. By refusing to carry out the DNA test requested by Achok Anudo, the Respondent State missed an opportunity to obtain proof of its claims. It follows that the decision to deprive the Applicant of his Tanzanian nationality is unjustified.

88. The Court is of the opinion that the evidence provided by the Respondent State concerning the justification for the withdrawal of the Applicant's nationality is not convincing, and therefore holds in conclusion that the deprivation of the Applicant's nationality was arbitrary, contrary to Article 15(2) of the Universal Declaration of Human Rights.

## **ii. The Applicant's right not to be expelled arbitrarily**

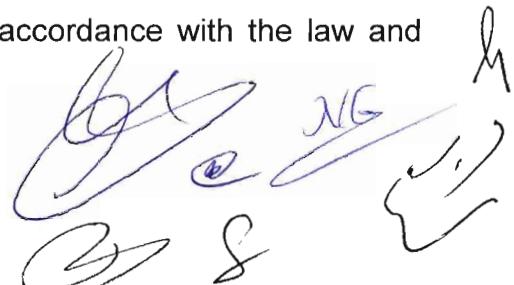
89. The Applicant submits that his arrest and expulsion is the result of his refusal to give a bribe to the immigration officers. Subsequently, he wrote to the Prevention and Combating of Corruption Bureau to complain.

90. The Applicant maintains that officials of the Respondent State unlawfully seized his passport which was still valid, cancelled it, deleted it from the Register, and then deported him to Kenya.

91. He submits that it is unlawful to declare him a "prohibited immigrant" and expel him from his country. He denounces the Tanzanian authorities' application of Section 11 (1) of the Tanzanian Immigration Act, which states that "the entry and presence in Tanzania of any prohibited immigrant shall be unlawful".

92. The Respondent State, for its part, contends that the Applicant's passport was cancelled following an investigation conducted by the Immigration Department which provided proof that the information used in obtaining the said passport was false. The decision to expel the Applicant was taken by the Minister of Home Affairs, the only one competent to do so.

93. It submits that the Applicant's stay in its territory was unlawful; that the "prohibited immigrant" notice was issued in accordance with the law and that the Applicant's expulsion was legal.

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94. The Respondent State further submits that after the cancellation of his passport, the Applicant had the opportunity to regularize his situation in Tanzania but refused to do so.

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95. The Court notes that the Applicant alleged the violation of Article 12 of the Charter which stipulates that: (1) "Every individual shall have the right to freedom of movement and residence ... (2) "Every individual shall have the right to leave any country, including his own, and to return to his country ..."

96. In the opinion of the Court, the relevant portion of this provision which relates to the instant matter is Article 12(2), in particular, the right "to return to his country". In the instant case, the Court will consider this aspect, notwithstanding the fact that the Applicant left the Respondent State's territory involuntarily.

97. Having found that the deprivation of the Applicant's nationality was arbitrary, the question that arises at this juncture is whether a citizen can be expelled from his own country or prevented from returning to his country.

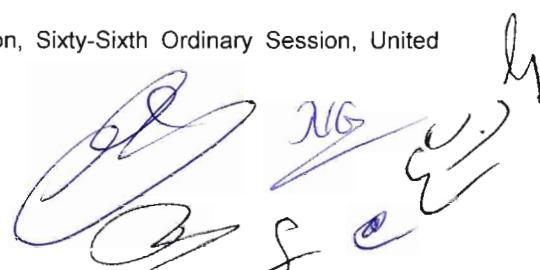
98. In this regard, the United Nations Human Rights Committee has found "... that there are few circumstances in which a ban on entry into one's own country may be reasonable. A State Party may not ... by deporting a person to a third country, prevent that person from returning to his own country."<sup>8</sup>

99. The Court notes that the Applicant's expulsion resulted from the arbitrary withdrawal of his nationality by the Respondent State. This procedure is contrary to the requirements of international law which stipulates that "a State cannot turn its citizen into a foreigner, after depriving him of his nationality for the sole purpose of expelling him".<sup>9</sup>

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<sup>8</sup> United Nations Human Rights Committee, General Observations, No. 27 on Freedom of Movement.

<sup>9</sup> Draft Articles on Expulsion of Aliens, International Law Commission, Sixty-Sixth Ordinary Session, United Nations General Assembly, A/CN.4/L.797, 24 May 2012.



100. However, the Court notes that even if the Respondent State regarded the Applicant as an alien, it is clear that the conditions of his expulsion did not comply with the rule prescribed in Article 13 of the ICCPR which stipulates that: "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."<sup>10</sup>

101. The Court notes that the objective of the afore-cited ICCPR Article is to protect a foreigner from any form of arbitrary expulsion by providing him with legal guaranties. He should be able to present his cause before a competent authority and cannot in any case be expelled arbitrarily.

102. The Court also notes that, in this case, the Applicant was deported to Kenya, which, in turn, declared him as being in an irregular situation. This proves that, prior to his expulsion, the Respondent State failed to take the necessary measures to prevent the Applicant from being in a situation of statelessness. As a matter of fact, prior to his expulsion to Kenya, the Respondent State could have satisfied itself that, if the Applicant is not Tanzanian, he is Kenyan.

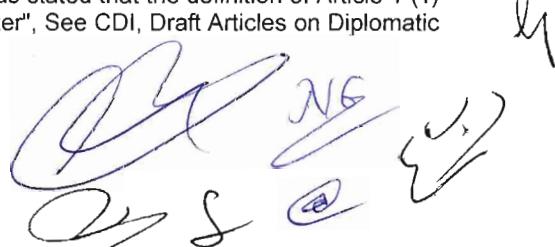
103. The Court also notes that the Applicant's present situation whereby he is rejected by both Tanzania and Kenya as a national, makes him a stateless person as defined by Article 1 of the Convention relating to the Status of Stateless Persons<sup>11</sup>.

104. Consequently, the Court holds that given the fact that he had been considered by the Respondent State as a national prior to the withdrawal of his nationality, he could not be arbitrarily expelled.

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<sup>10</sup> See Article 12.4 of ICCPR

<sup>11</sup> United Nations Convention relating to the Status of Stateless Persons, Article 1 (1). Although Tanzania has not ratified the 1954 Convention, the International Law Commission (ILC) has stated that the definition of Article 1 (1) "can without doubt be considered to have acquired a customary character", See CDI, Draft Articles on Diplomatic Protection with Commentaries, ILC Yearbook Vol. 2 (2) (2006) pp 48-49



105. In any event, even if it were to be assumed that he was an alien, the Respondent State could still not expel him in the arbitrary manner it did, as this would constitute a violation of Article 13 of the ICCPR.

106. The Court therefore holds in conclusion that the manner in which the Applicant was expelled by the Respondent State constitutes a violation of Article 13 of ICCPR.

### iii. The Applicant's right to be heard by a Judge

107. According to the Applicant, by depriving him of his nationality and deporting him from his country, the Respondent State violated several of his rights guaranteed by the ICCPR and the Charter, including the right to seize the competent national courts. He further maintained that after his passport was annulled, he was not arraigned before a court in accordance with section 30 of the Immigration Act.

108. The Applicants indicated that, by so doing, the Respondent State's agents condemned him without giving him the opportunity to be heard and defend himself. He concludes that the Respondent State thus failed in its protection duty, condoning arbitrary arrest and expulsion.

109. The Respondent State maintains that the Minister of Home Affairs is the competent authority in this respect, and that the Applicant could have brought the matter to his attention and requested a lifting of the ban and the authorization to return to the country. It further submits that the Applicant had the possibility of challenging the Minister's decision before the High Court, but chose not to do so. The Respondent State also submits that even while outside the country, the Applicant had the opportunity to be heard by the national courts by having himself represented by the one he claims to be his father, as he did by writing to the Prime Minister.

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110. Article 7 of the Charter stipulates that: "1. Every individual shall have the right to have his cause heard. This comprises:

- "
- a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
  - b) The right to be presumed innocent until proved guilty by a competent court or tribunal;
  - c) The right to defence, including the right to be defended by counsel of his choice....

111. Article 14 of ICCPR provides that: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, every one shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law..."

112. The Court notes that the African Commission on Human and Peoples' Rights has held that in matters of deprivation of nationality, the State has "the obligation to offer the individual the opportunity to challenge the decision" and is of the opinion that the State should conduct a judicial enquiry in the proper form in accordance with national legislation.<sup>12</sup>.

113. In the instant case, the Court notes that in matters of immigration, the Tanzanian Immigration Law of 1995 defining "illegal immigrant" provides that the decision of the Minister of Home Affairs declaring a person an "illegal immigrant" shall be final [Article 10 (f)]. It follows that, in this case, the Applicant was *à priori* unable to appeal against the Minister's administrative decision before a national court.

114. The Court, in any case, holds that even if, in the silence of the aforementioned immigration law, the Applicant had, under a general

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<sup>12</sup> Matter of Amnesty International v. Zambia, Communication No. 21298(1999) para. 36-38. Also see the Study by the African Commission on Human and Peoples' Rights on the Right to Nationality in Africa, 36 (2004).

principle of law, the right to seize a national court, but the fact that he had been arrested and then expelled immediately to Kenya, did not afford him the possibility of exercising such a remedy. Besides, when he later found refuge in the no-man's land, it was very difficult for him to exercise this remedy.

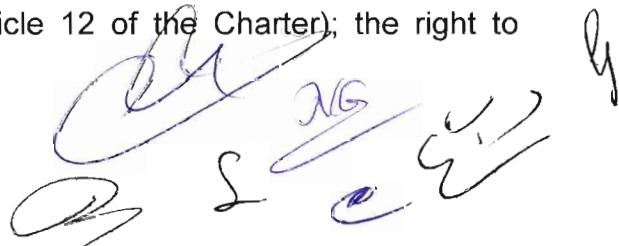
115. The Court finds in conclusion that, by declaring the Applicant an "illegal immigrant" thereby denying him Tanzanian nationality, which he has, until then enjoyed, without the possibility of an appeal before a national court, the Respondent State violated his right to have his cause heard by a judge within the meaning of Article 7(1) (a), (b) and (c) of the ICCPR.

116. The Court notes further that the Tanzanian Citizenship Act contains gaps in as much as it does not allow citizens by birth to exercise judicial remedy where their nationality is challenged as required by international law. It is the opinion of the Court that the Respondent State has the obligation to fill the said gaps.

## B. Other alleged violations

117. The Applicant submits that the Respondent State since 1 September, 2014, abandoned him in the "lawless no man's land" in inhuman, humiliating and degrading conditions, characterized by lack of drinking water, food and security, thus subjecting him to numerous physical and psychological ordeals.

118. He also alleges that the Respondent State violated a number of his rights guaranteed under various human rights instruments among which are the African Charter on Human and Peoples' Rights, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. He refers specifically to: the right to wellbeing, the right to the enjoyment of the highest attainable standard of physical and mental health (Article 16 of the Charter); the right to free movement and to choose one's residence in one's country (Article 12 of the Charter); the right to



liberty and security of one's person and protection against arbitrary arrest or detention (Article 9 (1) of the ICESCR and Article 6 of the Charter); the right to participate freely in the conduct of public affairs of one's country, either directly or through freely chosen representatives (Article 13 (1) of the Charter and Article 25 (1) of the ICCPR); the right to access public offices and to use the public services in one's country (Article 13 (2) of the Charter and 25 (2) of the ICESCR); the right to work (Article 15 of the Charter and Article 6 of the ICESCR); and the right to marry and to found a family (Article 23 of the ICCPR).

119. The Applicant further submits that the said violations resulted from the unlawful deprivation of his nationality and his expulsion from Tanzanian territory, especially the fact that he found himself in a situation of statelessness in a "no man's land" between the Republic of Kenya and the United Republic of Tanzania.

120. The Court notes that some of the alleged violations relate to the Applicant's living conditions in the said "no man's land" while others concern the rights which the Applicant would enjoy had he not lost his nationality and had he not been expelled from the United Republic of Tanzania.

121. In the opinion of the Court, therefore, the violation of the aforesaid related rights is a consequence of the major violations. The Court, having established the violation of the right not to be arbitrarily deprived of his nationality, the right not to be arbitrarily expelled from a State and violation of the right to judicial remedy, defers consideration of the related violations to the stage of consideration of the request for reparation.

### VIII. REMEDIES SOUGHT

122. In his Application, the Applicant prayed the Court to: (i) order the annulment of the decision of the immigration authorities to expel him from his own country, including the notice of "prohibited immigrant", and restoration of his nationality by declaring him a citizen of the United

Republic of Tanzania; (ii) allow him to return to and remain in the Respondent State like all its other citizens; (iii) order the Respondent State to protect him against victimization as a consequence of the present application; and (iv) order the Respondent State to amend its immigration legislation in order to guarantee a fair trial for persons likely to be deprived of their right to nationality.

123. During the oral pleadings, the Applicant reiterated his requests for reparation as well as "payment of compensation for prejudices suffered".

124. The Respondent State argues that the decision to annul his passport, declare him an illegal immigrant and expel him, was taken following investigations by the immigration authorities and implemented in accordance with the law. Therefore, for the Respondent State, the Application must be dismissed.

125. Article 27 (1) of the Protocol stipulates that "If the Court finds that there has been a violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation".

126. Rule 63 of the Rules stipulates that: "The Court shall rule on the request for the reparation, submitted in accordance with Rule 34 (5) of these Rules, by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision".

127. The Court holds that it does not have the power to rule on the requests made by the Applicant in paragraph 122 to annul the decision of the Respondent State to expel him.

128. The Court notes that the Parties did not make submissions on other forms of reparation. It will therefore determine this issue at a later stage of the proceedings.



## IX. COSTS

129. The Court notes that in their pleadings, neither of the parties made submissions concerning costs.

130. According to Rule 30 of the Rules "Unless otherwise decided by the Court, each party shall bear its own costs".

131. The Court shall decide on the issue of costs when making a ruling on other forms of reparations.

## X. OPERATIVE PART

132. For these reasons,

THE COURT,

*unanimously*

*on jurisdiction:*

(i) *dismisses the objection on lack of jurisdiction;*

(ii) *declares that it has jurisdiction;*

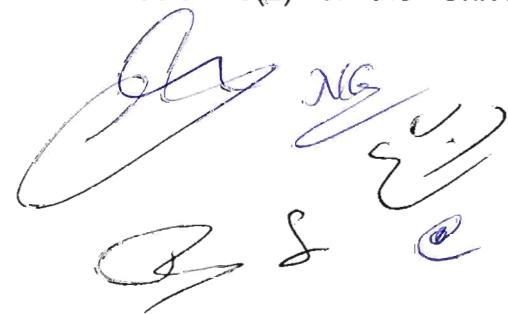
*on admissibility:*

(iii) *dismisses the objection on inadmissibility;*

(iv) *declares the Application admissible;*

*on the merits*

(v) *declares that the Respondent State arbitrarily deprived the Applicant of his Tanzanian nationality in violation of Article 15(2) of the Universal Declaration of Human Rights;*

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- (vi) *declares* that the Respondent State has violated the Applicant's right not to be expelled arbitrarily;
- (vii) *declares* that the Respondent State has violated Articles 7 of the Charter and 14 of the ICCPR relating to the Applicant's right to be heard;
- (viii) *orders* the Respondent State to amend its legislation to provide individuals with judicial remedies in the event of dispute over their citizenship;
- (ix) *orders* the Respondent State to take all the necessary steps to restore the Applicant's rights, by allowing him to return to the national territory, ensure his protection and submit a report to the Court within forty-five (45) days.
- (x) *Reserves its Ruling on the prayers for other forms of reparation and on costs.*
- (xi) Allows the Applicant to file his written submissions on other forms of reparation within thirty (30) days from the date of notification of this Judgment; and the Respondent State to file its submissions within thirty (30) days from the date of receipt of the Applicant's submissions.

A handwritten signature in blue ink, appearing to read "J. M. S." or "J. M. S. J."

Signed:

Sylvain ORÉ, President

Ben KIOKO, Vice-President

Gérard NIYUNGEKO, Judge

El Hadji GUISSÉ, Judge

Rafâa BEN ACHOUR, Judge

Ntyam S. O. MENGUE, Judge

Marie-Thérèse MUKAMULISA, Judge

Tujilane R. CHIZUMILA, Judge

Chafika BENSAOULA, Judge; and

Robert ENO, Registrar.

Done at Arusha, this Twenty-Second Day of the month of March in the Year Two Thousand and Eighteen in English and French, the English text being authoritative.

