AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

IN THE MATTER OF

FRANK DAVID OMARY AND OTHERS **APPLICANTS**

v.

UNITED REPUBLIC OF TANZANIA **RESPONDENT**

Application 001/2012 (Review)

JUDGMENT

The Court composed of: Elsie N. THOMPSON, Vice-President; Gérard NIYUNGEKO, Fatsah OUGUERGOUZ, Duncan TAMBALA, Sylvain ORÉ, El Hadji GUISSÉ, Ben KIOKO, Rafâa BEN ACHOUR, Solomy B. BOSSA, and Angelo V. MATUSSE - Judges; and Robert ENO, Registrar,

Pursuant to Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ("the Protocol") and Rule 8(2) of the Rules of Court ("the Rules"), Judge Augustino S. L. RAMADHANI, member of the Court and a Tanzanian national, did not hear the case.

In the Matter of:

Frank David OMARY and Others

represented by:

Pius L. CHABRUMA & Co. Advocates

v.

United Republic of Tanzania

represented by:

1. Permanent Secretary
Ministry of Foreign Affairs and East African, Regional
and International Cooperation
United Republic of Tanzania

2. Deputy Attorney General
Attorney General's Chambers
United Republic of Tanzania

3. Mrs. Sara D. MWAIPOPO
Director, Division of Constitutional Affairs and Human Rights
Attorney General's Chambers
United Republic of Tanzania

4. Mr. Elisha E. SUKU
First Secretary and Legal Officer
Ministry of Foreign Affairs and East African, Regional
and International Cooperation
United Republic of Tanzania

After deliberation,

renders the following Judgment:

I. SUBJECT OF THE APPLICATION

1. Messers Frank David OMARY and Others (hereinafter referred to as the "Applicants") filed before the Court, through their Counsel, CHABRUMA and Co. Chambers, an Application for Review of the Judgment of the Court (hereinafter referred as "the initial Judgment") rendered on 28 March 2014 in the Matter between them and the United Republic of Tanzania (hereinafter referred as "the Respondent"), pursuant to Article 28(3) of the Protocol and Rule 61 (4) of its Rules.

2. For ease of reference, the Applicants, former employees of the East African Community (hereinafter referred as "EAC"), had seized the Court by an Application dated 17 January 2012, brought against the Respondent. They alleged, among other things, that the non-payment of the entirety of their pension and terminal allowance owed by the Tanzanian Government by virtue of the Mediation Agreement of 1984, constitutes a violation of the Universal Declaration of Human Rights, especially

Article 7 on the right to non-discrimination, Article 8 on the right to effective remedy, Article 23 on the right to work and to a fair remuneration, Article 25 on the right to adequate standard of living and Article 30 on the obligation of States to refrain from engaging in any activity or perform any act aimed at the destruction of the rights and liberties set forth in the Declaration. They further alleged that the brutality and humiliation they suffered at the hands of the police also constitute a violation of the Declaration.

3. In its decision of 28 March, 2014, the Court held that the Application is inadmissible. The relevant portions of that decision are as follows:

> "3) On the admissibility of the Application, unanimously…:
>
> iv. Sustains the Respondent's objection to the admissibility of the Application due to Applicants' failure to exhaust local remedies with respect to alleged violations relating to claims for compensation;
>
> *v.* Sustains the Respondent's objection to the admissibility of the Application due to failure to exhaust local remedies with respect to the alleged police brutality;
>
> 4) Declares this Application inadmissible."

II. PROCEDURE

4. On 30 June 2014, the Court received an Application filed by Frank David Omary and Others against the Respondent.

5. By letter dated 18 September 2014, the Registry, pursuant to Rule 35(3) of the Rules of Court, transmitted the Application for review to the Respondent and, by another letter dated 12 November 2014, requested the latter to submit its response within 30 days of receipt of the letter.

6. By e-mail dated 12 December 2014, the Respondent transmitted to the Registry its Response. On 13 December 2014, the Registry, having found that the brief was not attached to the e-mail, accordingly notified the Respondent by e-mail dated 15 December 2014. The Respondent transmitted its Response by e-mail dated 17 December 2014.

7. By *Note Verbale* dated 29 December 2014, the Respondent again transmitted to the Registry its Response dated 12 December 2014.

8. By letter dated 6 January 2015, the Registry acknowledged receipt of the brief to the Respondent, notified the latter that the Annexes mentioned in the covering letter were not attached, and gave it seven (7) days within which to transmit the said Annexes. By *Note Verbale* of 9 January 2015, the Respondent transmitted the missing Annexes.

9. By letter dated 6 January, 2015, the Registry forwarded to the Applicants, a copy of the Response of the Respondent and requested them to submit their observations within thirty (30) days of receipt of the letter.

10. By letter dated 30 January 2015, received at the Registry on 2 February 2015, Counsel for the Applicants transmitted Reply, to which the Respondent also reacted in a rejoinder dated 9 March 2015, received at the Registry on 18 March 2015.

11. On 29 May 2015, the Court declared the written procedure closed and the Parties were notified accordingly on 8 June, 2015.

III. POSITION OF THE PARTIES

A. The Applicants' submissions

12. In their Application for Review, the Applicants alleged that: "the Court's finding that the Applicants have not complied with Article 56 (5) of the African Charter by failing to produce evidence of exhaustion of local remedies needs to be reviewed because the evidence produced was not given the weight it deserves".

13. According to the Applicants, to determine whether local remedies have been exhausted, the Court should take into account the events that gave rise to the Applications addressed to it in respect of payment of terminal entitlements and damages arising from police brutality, which events allegedly took place, respectively, after the 2005 Deed of Settlement and at the time of implementation of the Deed on 23 May 2011.

14. They further explained all the efforts they allegedly deployed to exhaust the local remedies before Tanzanian Courts and to bring their concerns to the attention of the judicial and political authorities.

15. The Applicants also affirmed that they are not concerned by the matters pending before the local courts.

16. Furthermore, reverting to the request for damages sequel to police brutality, the Applicants claimed that this Court was the ideal forum for the matter to be heard; for fear that they would not otherwise have a fair trial.

17. The Applicants submit finally that they have discovered new evidence to request for a review of the initial judgment, in conformity with the Rules of Court. They provide as annexures to their Application a number of documents as part of the new evidence, in particular:

    i. Letter from the former employees of the EAC to the Chief Justice in the Court of Appeal of Tanzania.

    According to the Applicants, the said letter was addressed to the Chief Justice of the United Republic of Tanzania to see whether their request will be granted.

    ii. Response from the Office of the Chief Justice.

    According to the Applicants, that letter was allegedly a reply of the Chief Justice of the United Republic of Tanzania to their email dated 5 October 2011, a response which they found unsatisfactory.

    iii. Newspaper Article (HABARI LEO) of 16 March 2011.

    The Applicants produced this Newspaper Article which, according to them, highlights the personal involvement of the President to the Republic, who instructed the Government to proceed with settling their terminal entitlements. The Applicants regard the non-implementation of the said instructions as undue prolongation of the procedure.

iv. Tanzania Daima Newspaper (Toleo No. 983), Monday 13 August 2007 edition.

The Applicants similarly produced this Newspaper to evoke the payments which were allegedly made fraudulently to unentitled persons, thus endangering the funds meant for them.

v. EAC Mediation Agreement 1984.

The Applicants maintained that the copy of this Agreement is a complete document contrary to the copy filed during the initial procedure.

vi. Tanzania Legal and Human Rights Centre Reports 2010, 2011 and 2012.

To corroborate the fact that the procedure in the suit between them and the Respondent has been unduly prolonged, the Applicants submitted to the Court the Reports of the Tanzania Legal and Human Rights Centre for 2010, 2011 and 2012, which allegedly mentioned and commented that the procedure in the local Courts as being prolonged.

vii. Letter dated 11 May 2012, as evidence of the exhaustion of local remedies.

As regards new evidence, the Applicants produced a letter dated 11 May 2012, which, according to them, constitutes proof that the local remedies have been exhausted.

viii. Report on undue prolongation as prophesied by Dr. V. Umbritch.

As the title indicates, this report produced by the Applicants is, in their view, a prediction allegedly made by Dr. V. Umbritch on the undue prolongation of the procedure in respect of the settlement of the terminal entitlements of the former employees of the EAC.

ix. Letter from Crown Agent dated 25 February 1987 addressed to the former Minister of Finance, Economic Affairs and Planning, Mr. Cleopa D. Msuya signed by the Fund Manager, Mr. Collyer.

The Applicants also produced this document to justify, as they said, "giving details of the distribution of EAC funds on 20 January 1987".

18. For the foregoing reasons, the Applicants pray the Court to review the Judgement of 28 March 2014.

B. The Respondent's submissions

19. For its part, in its Response to the Application, the Respondent maintained that the decisions of the African Court are final and not subject to appeal, except where key new evidence has been discovered which was not within the knowledge of the Applicants at the time the judgement was delivered.

20. According to the Respondent, the letters dated 5 October 2011 and 1 November 2011, the Newspaper edition of 16 March 2011, the letter of 11 May 2012, the Newspaper edition of 13 August 2007, the EAC Mediation Agreement and the 2010-2012 Reports of the Legal and Human Rights Centre produced by the Applicants do not constitute new evidence in support of exhaustion of local remedies, given the fact that an appeal procedure involving these documents was still pending under Case No. 73/2004.

21. The Respondent further maintained that the allegations that the Applicants had not been afforded the right to a fair trial were erroneous given the fact that the Tanzanian judicial system is independent and the Applicants had reached an amicable settlement in all freedom and in the presence of a lawyer.

22. For the foregoing reasons, the Respondent prays the Court to:

    i. Dismiss the Applicant's Application on the basis of Rule 36 of the Rules of Court;
    ii. Uphold its initial decision as rendered in the Matter referenced 001/2012;
    iii. Award costs to the Respondent or grant any other relief(s) that the Court may deem fit to grant.

IV. OBJECTION RAISED BY THE APPLICANTS TO THE RESPONDENT'S RESPONSE

23. In their Reply, the Applicants raised *the* issue of inadmissibility of the Respondent's Response on the grounds that it was submitted out of time, that is, over three months after the expiry of the time limit, without explanation.

24. To buttress their Application, the Applicants invoked Rule 70 (1) of the Rules of Court and the letter dated 12 November 2014, addressed by the Registry to the Counsel for the Respondent.

V. THE RESPONDENT'S RESPONSE TO THE OBJECTIONS RAISED BY THE APPLICANTS

25. In response, the Respondent maintained that the Applicants' allegation according to which the brief had been filed out of time, was groundless for the following reasons:

i. The letter from the African Court dated 18 September 2014, did not stipulate a time limit for the Respondent to file its Response;

ii. The Respondent grounded its argument on Rule 37 of the Rules of Court which allows it sixty (60) days within which to file its Response. The Respondent affirmed having received on 17 November 2014, a letter from the Registrar of the Court dated 12 November 2014, notifying it that it had thirty (30) days from the date of receipt of the letter, to react;

iii. The Respondent transmitted its Response to the Court by email dated 12 December 2014, that is, prior to the expiry of the time limit set by the Registrar, but omitted to attach the Response;

iv. By email dated 13 December 2014, the Registry acknowledged receipt thereof and, by another email dated 15 December 2014, notified the Respondent that its Response had not been attached. The Respondent took notice of the aforesaid email on 17 December 2014 and, on the same day, forwarded the Response, together with its Annexures.

26. The Respondent maintained, for the above reasons, that it had complied with all the guidelines issued by the Registry and, therefore, prayed the Court to dismiss the preliminary objection and, in that case, grant it leave to file its Response all the same.

VI. CONSIDERATIONS OF THE COURT ON THE PRELIMINARY OBJECTION

27. As regards the Respondent's Response which the Applicants request to be expunged from the current procedure, the Court first notes that the said Response was forwarded to it by email on 17 December 2014, following the two emails which the Registrar addressed to the Respondent on 18 September and 20 November 2014, respectively.

28. The Court notes that the letter dated 18 September 2014, did not provide for any time limit for the submission of the response, whereas the letter dated 12 November 2014, filled that gap by setting 30 days' time limit for the Respondent to submit its Response. It should be noted that a copy of the same letter was forwarded to the Applicants for information.

29. The Court notes that the Respondent received the Registry's letter on 17 November 2014, and as such had up to 17 December 2014 to submit its Response. The Court finds in this regard that the Respondent has submitted its Response within the prescribed time limit.

30. Moreover, the Court holds that, in the instant case, the fact that it forwarded to the Applicants a letter dated 6 January 2015, transmitting the Respondent's Response does not mean that the Respondent submitted its Response out of time.

31. For these reason, the Court holds that the Respondent's Response was validly submitted and consequently dismisses the preliminary objection grounded on non-compliance with the time limit.

VII. CONSIDERATIONS OF THE COURT ON ADMISSIBILITY OF THE APPLICATION FOR REVIEW

32. Pursuant to Article 28 of the Protocol, the Court may review its decision. According to this Article,

> "2. The judgement of the Court decided by majority shall be final and not subject to appeal.
> 3. Without prejudice to sub-article 2 above, the Court may review its decision in the light of new evidence under conditions to be set out in the Rules of Procedure"

33. Rule 67 (1) of the Rules of Court states that "...pursuant to Article 28 (3) of the Protocol, a party may apply to the Court to review its judgement in the event of the discovery of evidence which was not within the knowledge of the party at the time the judgement was delivered. Such application shall be filed within six (6) months after that party acquired knowledge of the evidence so discovered".

34. Rule 67 (3) of the same Rules of Court provides that "...the Court shall rule on the admissibility of such application and its decision shall take the form of a judgement".

35. The Court will now examine the requirements concerning time limit and the discovery of new evidence.

36. With respect to the discovery of new evidence, the Applicants affirmed on page 3, paragraph h of their Application that: "We have come across such evidence ..." and produced the following documents as listed in paragraph 18 of this Judgment, including:

    i. Letter dated 5 October 2011, from the former employees of the EAC to the Chief Justice of Tanzania;

    ii. Reply letter from the Office of the Chief Justice dated 1 November 2011;

iii. Newspaper (HABARI LEO) report of the 13 August 2007 Speech of the President of the United Republic of Tanzania, His Excellency Jakaya Mrisho Kikwete;

iv. Tanzania Daima Newspaper (Toleo No. 983) Monday 13 August 2007 edition;

v. EAC Mediation Agreement 1984;

vi. Tanzania Legal and Human Rights Centre Reports 2010, 2011 and 2012;

vii. Letter dated 11 May 2012 as evidence of the exhaustion of local remedies;

viii. A report concerning undue prolongation as prophesied by V. UMBRITCH;

ix. Letter from the Crown Agent dated 25 February 1987 addressed to the former Minister of Finance, Economic Affairs and Planning, Mr. Cleopa D. Msuya signed by the Fund Manager, Mr. Collyer.

37. The Court recalls that in its initial Judgment, review of which is being sought, the Application had been declared inadmissible on the grounds that local remedies had not been exhausted. In that judgement, the Court also held that ".... the matter has not been unduly prolonged by the Respondent..." (paragraph 135 of the initial Judgment).

38. In the circumstances, the Court will limit itself to the pieces of evidence that the Applicants produced as new evidence of exhaustion of local remedies and of undue prolongation of the time limit to decide whether the said evidence effectively impact on the findings which it made on 28 March 2014.

39. The Court notes, on this score, that the Newspaper article of 16 March 2011, the letter of 11 May 2012, the Tanzania Legal and Human Rights Centre 2010, 2011 and 2012 Reports and, lastly the statement of Dr. V. Umbritch, as pieces of evidence deserve attention.

40. As regards the letter of 11 May 2012, the Court notes that, that letter was produced by the Applicants in the initial procedure in response to the Registry's letter dated 30 April 2012, requesting them "to produce evidence that the Application has met the conditions set forth in Rule 34 of the Rules of Court". The Court notes that in the said letter of 30 April 2012, the Applicants wanted to show, in their own words, "how our Application meets the requirements under Rule 34 of the Rules of Court". They also explained "the evidence of exhaustion of local remedies including judgments and all possible annexures to assist efficiency of handling the case".

41. The Court deduces from the aforesaid that the evidence in question does not constitute new evidence, given the fact that the same had been amply analysed by the Court in its Ruling of 28 March 2014, especially in paragraphs 27 and 28 thereof.

42. As regards the Newspaper article of 16 March 2011, the Reports of the Tanzania Legal and Human Rights Centre of 2010, 2011 and 2012, and the statement of Dr. V. Umbritch, the Court notes that the Applicants have produced these pieces of evidence as new proof of undue prolongation of local remedies.

43. The Court finds that the evidence relating to the Tanzania Legal and Human Rights Centre Reports of 2010, 2011 and 2012 dwelt on the question of payment of the pensions of a group of ex-employees of the EAC. The Reports also dwelt on the slow pace of the procedure, the politicisation of the matter and the human rights violations observed, especially the rights of older women.

44. As regards the evidence on undue prolongation of local remedies as predicted by Dr. V. Umbricht, the Court notes that that entailed an account of a discussion between Dr. V. Umbricht, who was at the time the liquidator of the EAC and President Nyerere, on 7 May 1984 at Msasani.

45. It therefore follows from the foregoing analysis, that the aforesaid evidence contains a number of depositions filed by the Applicants and attached to the Brief dated 27 January 2012, as Annexures 12 and 4.1, respectively, received at the Registry on 30 January 2012, and were subsequently submitted for consideration by the Court during the previous procedure, leading to the Judgment of 28 March 2014.

46. The Court deduces from the aforesaid that the documents in question do not constitute new evidence and must therefore be dismissed.

47. As regards the Newspaper article of 16 March 2011, the Court notes that, that evidence is being brought before it by the Applicant for the first time.

48. The Court notes that the author of that Article reported the directives issued by the then President of the United Republic of Tanzania, H.E. J. KIKWETE, to the Minister of Finance for payment of the former employees of the East African Community and for adoption of appropriate measures to ensure prompt settlement of the case.

49. The Court notes that, although produced for the first time before it, nothing in that Article is of the nature to exert influence on its initial decision. In fact, the undue prolongation of the remedies will be determined on the basis of the remedies actually exercised or attempted before the local courts, rather than in light of statements and reports.

50. Moreover, the Court finds it quite surprising that the Applicants claim to have acquired knowledge of a Newspaper article so vital to their cause only after the Court had rendered its decision of 28 March, 2014, whereas the said article has been in the public domain since 11 March 2011, date of its publication.

51. Be that as it may, the Court holds the view that the Newspaper article of 16 March 2011, does not constitute new evidence within the meaning of Rule 67(1) of its Rules in the sense that it could not have led to a change in the decision taken by the Court in its Judgement of 28 March 2014.

52. The Court recalls that the requirements for admissibility for an Application for Review are cumulative; the absence of any one of them is sufficient to engender the inadmissibility of the Application. In the Matter of *El Salvador/Honduras v. Nicaragua*[1], the International Court of Justice observed in this regard, that "an Application for revision is admissible only if each of the conditions laid down is satisfied. If any one of them is not met, the Application must be dismissed."

53. The Court therefore does not deem it necessary to consider the requirement in respect to time limit.

54. Consequently, the Application must be declared inadmissible.

55. **FOR THESE REASONS**,

The Court,

Unanimously,

i) Rules that the Application for Review dated 28 June 2014, does not meet the requirement regarding new evidence.

ii) Declares the Application inadmissible, pursuant to Rule 67 (1) of its Rules.

[1] International Court of Justice, Matter of the Land, Island and Maritime Frontier Dispute *(El Salvador/Honduras v. Nicaragua (intervening)*, Judgement of 18 December 2003, par 20

Signed:

Elsie N. THOMPSON, Vice-President

Gérard NIYUNGEKO, Judge

Fatsah OUGUERGOUZ, Judge

Duncan TAMBALA, Judge

Sylvain ORÉ, Judge

El Hadji GUISSÉ, Judge

Ben KIOKO, Judge

Rafâa BEN ACHOUR, Judge

Solomy B. BOSSA, Judge

Angelo V. MATUSSE, Judge; and

Robert ENO, Registrar

Done at Arusha, this 3rd day of the month of June, Two Thousand and Sixteen, in English and French, the English text being authoritative.

Pursuant to Article 28 (7) of the Protocol and Rule 60(5) of the Rules, the individual opinion of Judge Fatsah OUGUERGOUZ is attached hereto.