



**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

NGOKENG

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for Applicant:**

Self-Represented

**Counsel for Respondent:**

Steven Dietrich, ALS/OHRM, UN Secretariat

Elizabeth Gall, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant is a staff member of the International Criminal Tribunal for Rwanda (“ICTR”) based in Arusha, Tanzania, and serves as a Reviser on a P-4 post on a fixed-term appointment.

2. On 5 December 2012, he filed the present Application contesting two administrative decisions outlined as follows:

a) The decision to suspend the selection process for the position of Chief of the Language Services Section at the ICTR as advertised in job opening No. 12-ADM-ICTR-21952-R-ARUSHA (O) and to reject the Applicant’s application for the same so as to retain the incumbent beyond the retirement age.

b) The improper evaluation of his performance for the 2011/2012 performance cycle.

3. On 7 January 2013, the Respondent filed his substantive Reply which in addition refuted the receivability of this Application on primarily three grounds, namely:

a) The Application has been prematurely conceived as a final decision is still pending in respect of the contested selection process. The contested selection process is currently pending since a final administrative decision in respect of the said process has yet to be made that is capable of a challenge under the Statute of the Dispute Tribunal.

b) The comments on the Applicant’s performance document do not constitute an administrative decision within the meaning of article 2.1(a) of the Statute of the Dispute Tribunal.

c) The rejection of the Applicant’s application for the post and the suspension of the selection process do not carry any direct legal effects on the Applicant’s contract of employment.

## **Factual Background**

4. On 16 February 2012, Job Opening No. 12-ADM-ICTR-21952-R-ARUSHA (O) (“Job Opening”) was published for the post of Chief of the Language Services Section (“LSS”) at the ICTR. It is not in contention that at the material time of the publication of the job opening, the incumbent of the advertised position, Ms. Justine Ndong-Keller, was the Applicant’s direct supervisor.

5. According to the Applicant, in addition to the stipulations on the eligibility criteria for candidates applying for the post, the said job opening limited eligibility to interpreters by including a heretofore unprecedented requirement that candidates for the job opening were required to ‘have a demonstrated ability to interpret’.

6. The Applicant applied for the vacancy on 16 March 2012 and in his cover letter to the application noted his disquiet over the incorporation of the requirement for interpretation skills in the job opening.

7. On 24 April 2012, the Administration notified the Applicant that recruitment in respect of the position of the Chief of LSS had been suspended and could ‘possibly reopen at a later date.’ No reasons were adduced in the notification for the suspension of the recruitment process.

8. According to the Respondent, the Applicant was among five applicants who were found eligible for the job opening but whose applications were eventually rejected for failing to manifest an ability to interpret pursuant to the vacancy announcement.

9. Following the suspension of the selection process for the position of Chief of the LSS, Ms. Ndong-Keller, continued encumbering the post.

10. On 18 April 2012, Ms. Ndong-Keller, acting in her capacity as the Applicant’s First Reporting Officer (“FRO”), emailed him his statistics for the two performance cycles of 2010-2011 and 2011-2012 by way of attachments and

requested him to call on her on 19 April 2012 for discussions on his 2011-2012 performance cycle.

11. On 27 April 2012, Ms. Ndongo-Keller finalized her evaluation of the Applicant for the 2011/2012 performance cycle and rated him as having successfully met performance expectations. However, in her overall comments on the Applicant's e-PAS, she indicated that the Applicant had a 'serious problem of output' and noted that the matter had been raised with him during the end of performance cycle discussions.

12. On 8 May 2012, Mr. Pascal Besnier, the Applicant's Second Reporting Officer (SRO) signed off on the Applicant's ePAS and made comments thereto thanking the Applicant for his contribution and commending him.

13. On 9 May 2012, the Applicant signed off on his ePAS and included therein observations disputing the First Reporting Officer's assessment of his performance in relation to output.

14. According to the Applicant, he further sent a memorandum to his FRO on 10 May 2012 in which he opined that her evaluation of his performance had been influenced by bad faith, discrimination and self-interest. This memorandum was copied both to the Applicant's SRO and to senior members of management at the ICTR.

15. The Applicant's FRO responded vide an email dated 10 May 2012 in which she reiterated the Applicant's acknowledgment of her prerogative to evaluate her subordinates' performance and further stated that the other matters raised in the Applicant's memo were to be left to the appropriate quarters. She further invited the Applicant to see her for purposes of executing an improvement plan.

16. On 20 June 2012, the Applicant submitted a request for management evaluation of two decisions:

- a) The first related to the decision by the Administration to suspend the recruitment process for the position of the Chief of LSS in respect of

Job Opening No. 12-ADM-ICTR-21952-R-ARUSHA (O), to reject the Applicant's application for the same position and to extend the incumbent's contract beyond the stipulated retirement as well as the vacancy announcement used for the selections decision.

b) The second was the decision by the Applicant's FRO, Ms. Ndongo-Keller to improperly evaluate the Applicant's performance for the 2011-2012 performance cycle and to make dishonest comments in reprisal for the Applicant's application to her post.

17. On 24 August 2012, a job opening for the position of Chief, LSS was posted as No. 12-ADM-ICTR-23993-R- ARUSHA (R). As relates to this matter, the demonstrated ability to interpret was listed as a desirable asset.

18. On 6 September 2012, the Management Evaluation Unit ("MEU") responded to the request for evaluation and advised the Applicant that because the ICTR had informed them that the selection process for the position of Chief, LSS, was to be resumed and that the impugned VA was to be revised to reflect the ability to interpret as merely a desirable trait as opposed to a requirement, the request for evaluation was not receivable and/or moot.

19. The MEU nevertheless noted that there appeared to be internal inconsistencies between the Applicant's overall ratings and the overall comments made by the Applicant's FRO regarding the existence of a work output problem.

20. On 11 October 2012, the Applicant's FRO requested a roll-back of the Applicant's 2011-2012 e-PAS report for purposes of ensuring consistency between the competency and core value ratings, comments and the overall performance rating following the letter by MEU dated 6 September 2012.

21. In her amended evaluation effected through a Note for the File dated 11 October 2012, the Applicant's FRO revised her earlier assessment of the Applicant's rating for the Teamwork and Communication competencies from a rating of 'fully meets performance expectations' to one of 'requiring development'. She further noted in her overall comments that the Applicant had

serious output problems and further indicated that on several occasions, the Applicant had failed to exhibit the expected Teamwork and Communication spirit as well as failed to effect a timely delivery of his work assignments, the latter being a shortcoming that she brought to the attention of the Applicant.

22. The Applicant's FRO and SRO both signed off on the first amendment to the 2011-2012 e-PAS report on 11 October 2012. The Applicant's SRO noted in his comments that he concurred with the FRO's evaluation.

23. Ms. Ndongo-Keller further amended her assessment of the Applicant's performance a second time in a Note for the File dated 11 October 2012. In that instance, her overall comments were that the Applicant has 'serious output problems' and she indicated that the Applicant had failed to deliver work assignments within prescribed time frames and included the need for the Applicant to improve on the same. The Applicant's performance rating in the second amended evaluation remained that of 'successfully meets performance expectations.'

24. The Applicant's FRO and SRO both signed off on the second amendment to the Applicant's 2011-2012 e-PAS report on 8 November 2012.

25. On 8 November 2012, Ms. Charity Kagwi-Ndungu, a legal officer in the Office of the Chief of the Division of Administrative Support Services Section wrote to the HR Help desk through an email in which she stated as follows:

- a) The original Note for the File as drafted by the Applicant's FRO following the Roll back of the 2011-2012 e-PAS had no comments on core competencies.
- b) The comments on core competencies were included on account of good faith efforts by Ms. Kagwi-Ndungu after seeking advice from the Chief of SDTU, Nairobi, who had recently concluded a training event at the ICTR on performance evaluation.
- c) MEU had rendered advice on 12 October 2012 indicating that the purpose of redoing[sic] the e-PAS vide a Note for the File was limited in scope to ensuring internal inconsistencies by rectifying the discrepancy among overall comments, overall ratings and individual rating, which advise had been noted [presumably by the Applicant's FRO].

d) Ms. Kagwi-Ndungu instructed HR to expunge the Note for the File as filed on 11 October 2012 and to submit instead the original note for the file which did not contain any comments on core competencies [and which was attached to the email to HR dated 8 November 2012].

### **Procedural Background**

26. The Applicant filed a Motion for Extension of Time to file an Application dated 5 November 2012 on 6 November 2012 requesting an extension of 30 days within which to complete his application on the merits. The Tribunal granted the Applicant's Motion on 7 December 2012 and he accordingly filed his substantive Application on 5 December 2012, to which the Respondent filed a substantive Reply on 7 January 2013.

27. On 9 January 2013, the Tribunal directed the Applicant to file any comments on the Respondent's challenge to receivability no later than 1 February 2013.

28. On 10 January 2013, the Applicant moved the Tribunal for leave to file a comprehensive response to the Respondent's Reply. The motion was granted by the Tribunal on the same date and the Applicant was directed to file submissions specifically responding to matters of receivability as raised by the Respondent and a separate submission responding to the merits no later than 1 February 2013.

29. On 31 January 2013, the Applicant filed two separate comprehensive submissions on receivability and on the merits respectively.

30. On 1 February 2013, the Applicant filed a Motion for Production of Evidence for the Respondent to disclose evidence which he needs to establish his case.

### **Applicant's Case**

31. The following contentions form the pillars of the Applicant's case:

a) The entire selection procedure revolving around the advertising of the post of Chief, LSS vide Job Opening No. 12-ADM-ICTR-21952-R-

ARUSHA (O) published on 16 February 2012 was a sham and was not in actual fact aimed at identifying a competent successor to the incumbent of the post.

b) The Job Opening was part of a procedural sham that was published ostensibly to conform to the Organizational rules governing selection whereas the ultimate, improper and unlawful goal was to justify the extension of Ms. Ndongo-Keller's contract. This blocked the Applicant's considerable chances of promotion to the post of Chief, LSS.

c) The unprecedented eligibility criteria in the Job Opening limiting eligibility to interpreters by requiring eligible candidates to have a 'demonstrated ability to interpret' was improperly motivated by the incumbent's desire to secure the extension of her contract beyond her retirement age, contrary to the rules of the Organization on the retention in service of staff members beyond the mandatory age of separation.

d) Further, the eligibility criterion of a 'demonstrated ability to interpret' must be understood within the context of the UN ICTR draw down process where senior managers had projected the complete halt of ICTR trial activities in 2012 and which in fact did halt in July 2012. The Applicant contends in this regard that the functionality of interpreters was only to service court hearings and that after July 2012, the bulk of the work of the LSS would consist of translation and not interpretation. Under these circumstances, limiting the eligibility of the post to interpreters was highly suspect.

e) The review and subsequent amendment of the eligibility criterion of a demonstrated ability to interpret in Job Opening No. 12-ADM-ICTR-21952-R-ARUSHA (O) of 16 February 2012 to merely a desirable asset in Job Opening No. 12-ADM-ICTR-23993-R- ARUSHA (R) published on 24 August 2012 corroborates the Applicant's claim that his FRO was driven by improper motives in drafting the first job opening.



- f) The publication of the amended job opening on 24 August 2012 did not rescind the impugned Job Opening No.12-ADM-ICTR-21952-R-ARUSHA (O) as it related to a completely new job opening and did not cure the prejudice and injury caused to and suffered by the Applicant in respect of the first job opening.
- g) The decision of the Hiring Manager to reject the Applicant's application in respect of Job Opening No. 12-ADM-ICTR-21952-R-ARUSHA (O) and to suspend the selection process was improper and violated his right to a full and fair consideration of his application.
- h) It is also the Applicant's case that the decision to reject his application and all other candidates' applications and to retain the incumbent, contrary to organizational rules on retention in service beyond the mandatory age of separation was improper and unlawful.
- i) With respect to his performance evaluation by the FRO, the Applicant maintains that it was unfair and included false claims of a serious output problem and false allegations of teamwork and communication problems.
- j) The Applicant submits that the dishonest, unfair and improper evaluation of his performance by the FRO was tantamount to abuse of authority which seriously damaged his professional reputation and violated his right to equal treatment and to a consistent and fair performance evaluation.
- k) The Applicant contends that in light of his previous performance ratings, the last of which was the 2011-2012 cycle for which his overall rating was 'exceeds performance expectations', he could not in all likelihood have had an output problem as alleged by his supervisor.
- l) The Applicant further maintains that his FRO's initial evaluation of the 2011-2012 cycle is invalidated by both its inconsistency with the

opinions of the SRO and the discrepancy between his overall performance rating and overall comments.

m) The Applicant further claims that the use of statistics by his FRO to evaluate his performance was unreasonable on the following grounds:

- i) His FRO had discontinued her predecessor's method of using statistics to measure output.
- ii) In the course of the 2011-2012 performance cycle, Ms-Ndongo-Keller failed to raise any output problem or other performance shortcoming for that matter, which she bore an obligation during mid-point review or at any other point.
- iii) Ms. Ndongo-Keller's use of statistics was discriminatory in respect of the Applicant.

n) The Applicant submits that it was dishonest and unfair of his FRO to accuse him of teamwork and communication problems in light of his time spent in coaching and mentoring other staff in the section and his work undertaken to translate all Vacancy Announcements published by the ICTR in *Inspira*.

o) The belated referral to the Applicant's output related problems indicates that the FRO failed to discharge her obligation to continually review his performance during the cycle and to assist him to find a solution to any performance shortcoming.

p) With reference to the first amended evaluation, the Applicant contends that it was unlawful for officials who were neither familiar with his work nor designated as his additional supervisors under the provisions of ST/AI/2010/5 to assist his FRO to evaluate his performance and to give her more ammunition in "good faith" and more so for his FRO to either seek or accept their assistance.

q) The Applicant claims that it was unlawful for his FRO to downgrade his performance rating in respect of the teamwork and communication competencies in the course of his appeal.

r) The Applicant argues that the second amended evaluation is flawed to the extent that the alleged output problem was retained even in light of the fact that a Retention Panel at the ICTR awarded him a perfect score on output for the period 1 April 2011 to 30 September 2012.

s) Ultimately, the Applicant contends that his FRO's successive evaluations of his performance for 2011-2012 were inherently improper and vitiated by her improper intentions to ruin his career prospects to succeed her as the Chief, LSS at the ICTR.

### **The Respondent's Case**

32. The substance of the Respondent's case is outlined below as follows:

a) The Application is not receivable because no final administrative decision has been made concerning the selection process contested against.

b) The Respondent submits that the comments by the FRO in the Applicant's ePAS report do not constitute an administrative decision that is actionable under the Statute of the Dispute Tribunal.

c) The Respondent argues that because the Hiring Manager is currently considering all applications for the position, including that of the Applicant, the Applicant has no cause of action because he has not been denied an opportunity to compete for the post in question. The Respondent considers that should the Applicant's candidacy for the post be unsuccessful following the completion of the selection process, he will then come under the purview of article 2.1(a) of the Statute of the Dispute Tribunal to challenge the decision not to select him.

d) The rejection of the Applicant's application for the post and the suspension of the selection process do not carry any direct legal effects on

the Applicant's contract of employment because following the suspension of the selection process, the requirements for the job opening were revised to the Applicant's advantage.

e) The Respondent further submits that staff members do not have a right to a selection process being completed within any particular timeframe.

In the alternative, the Respondent contends that:

f) The rejection of the Applicant's application and the suspension of the selection process were justified and were not actuated by improper motives.

g) The comments by the Applicant's FRO constitute a fair and balanced evaluation of the Applicant's performance and that the contested decisions were lawful and reasonable.

h) After the posting of Job Opening No12-ADM-ICTR-21952-R-ARUSHA (O) on 16 February 2012, the Applicant was found eligible with four other applicants and that following further screening, the Deputy Registrar rejected the applications of all five applicants as none of them met the requirements and that the Applicant's application was rejected because he did not have a demonstrated ability to interpret.

i) Whereas it is the duty of the Applicant to prove the ulterior and improper motives he complains of, the Applicant has failed to do so.

j) The initial job opening No.12-ADM-ICTR-21952-R-ARUSHA (O) was drafted to reflect the operational needs of the ICTR and the Language Services Section. Interpretation services were required until the closure of the ICTR and it is a requirement for the Chief of LSS to supervise and evaluate interpreters. In that sense, the recruitment process for the position of Chief, LSS was initiated to identify a successor in anticipation of the retirement of the Chief of LSS.

## **Considerations**

### ***Receivability as a Preliminary Issue before the Tribunal***

33. As a point of departure, the Tribunal must definitively determine the Respondent's challenge to the admissibility of the present Application which is premised on three grounds, and which the Tribunal shall dispose of in turn:

- a) The Application has been prematurely conceived as a final decision is pending in respect of the contested selection process.
- b) The comments on the Applicant's performance document do not constitute a decision within the meaning of Article 2.1(a) of the Statute of the Dispute Tribunal.
- c) The rejection of the Applicant's application for the post and the suspension of the selection process do not carry any direct legal effects on the Applicant's contract of employment.

34. The applicable legal instrument in the current case is ST/AI/2010/3 (Staff selection system). This administrative instruction establishes the staff selection system, which integrates the recruitment, placement, promotion and mobility of staff. It serves the Tribunal's purpose to reproduce the pertinent provisions of ST/AI/2010/3:

7.1 Applicants applying to job openings will be pre-screened on the basis of the information provided in their application to determine whether they meet the minimum requirements of the job opening.

7.2 OHRM, the local human resources office or the Field Personnel Division of the Department of Field Support will release electronically to the hiring manager (for position-specific job openings) and the occupational group manager (for generic job openings), within and/or shortly after the deadline of the job opening, the applications of candidates who have successfully passed the pre-screening process, together with the names of pre-approved eligible candidates, for consideration for selection.

7.3 OHRM, the local human resources office or the Field Personnel Division of the Department of Field Support has the authority to pre-screen individuals identified through an outreach strategy aiming for target groups in terms of gender, geography and/or specialized expertise within the deadline of the job opening. The applications of successful candidates will be released to the hiring or occupational group manager.

7.4 The hiring or occupational group manager shall further evaluate all applicants released to him/her and shall prepare a shortlist of those who appear most qualified for the job opening based on a review of their documentation

35. The Applicant has submitted that there are manifestly two selection processes in this matter and that the impugned selection process in respect of Job opening no. No.12-ADM-ICTR-21952-R-ARUSHA (O) posted on 16 February 2012 was completed and a final decision was made thereupon to reject his Application. This decision is the same one that the Applicant contends was a final decision in respect of which he has filed the present Application.

36. With reference to section 7.2 ST/AI/2010/3 above, the Tribunal considers that a decision was made within the plain and ordinary meaning of the term in respect of the suspension of the initial selection process and rejection of the applications of the candidates for job opening No. 12-ADM-ICTR-21952-R-ARUSHA(O). The notification to the Applicant on 24 April 2012 simply stated that the recruitment for the post had been suspended and 'may reopen at a later date'. Job Opening No. 12-ADM-ICTR-23993-R- ARUSHA (R) that was posted on *Inspira* on 24 August 2012 did not make any references to it being a recirculation of the opening posted on 16 February 2012 for the post of Chief, LSS. The Respondent has not submitted that the candidates for the initial job opening were not required to submit fresh applications for the second job opening since the two job openings were posted in respect of one selection process. Indeed, in the second job opening No. 12-ADM-ICTR-23993-R- ARUSHA (R), the glaring absence of any reference to the initial job opening posted on 16 February 2012 is quite telling.

37. While the two job openings as posted both refer to the same position of Chief, LSS save for the slight amendment in the requirement for candidates to

demonstrate an ability to interpret, there is nothing on the face of it to support the Respondent's contention that the second job opening was a continuation of a singular selection process which had been truncated.

38. In *Appleton*, Order No. 288(NY/2010), the Tribunal was confronted by a scenario where two Vacancy Announcements (VAs) had been published in respect of one post. The first VA was cancelled and a second VA was issued and described as a recirculation of the first VA rather than a completely new exercise. In addition, the second VA expressly advised candidates who had applied to the first VA that their right to be considered for the Post had not been subsumed by the cancellation of the first VA. On the plenitude of the evidence available in that case, the Tribunal concluded that the selection process was a singular ongoing one.

39. No such evidence exists in this case. Instead, the Respondent has made the helpful submission in its substantive Reply which enables the Court to take a short walk on what is essentially a short legal pier thus:

“The Applicant applied and was found eligible together with four other candidates. One of the requirements of the initial job opening was for the candidates to have a demonstrated ability to interpret. Following further screening, the acting Deputy Registrar as the hiring manager rejected the applications of all five applicants as none of them met the requirements of the post. *The Applicant's application was rejected because he did not have a demonstrated ability to interpret.*”

40. The Tribunal accordingly finds that an administrative decision capable of challenge under article 2.1 of the Statute of the Dispute Tribunal was made when the Administration rejected the Applicant's application in respect of the first job opening and purported to suspend it. The Tribunal concludes that there exist two separate selection processes in this matter, the latest of which is still on-going.

41. The Tribunal shall now turn to consider the Respondent's contention that the comments in the Applicant's performance document cannot form the basis of an administrative decision that is actionable under Article 2.1(a) of the Statute of the Dispute Tribunal.

42. To address the Respondent's proposition, it is necessary to precisely characterize the decision the Applicant contests in regard to his performance evaluation. In both his request for Management evaluation and in his substantive Application, the Applicant has identified the second contested decision as the 'improper evaluation' of his performance for the 2011/2012 performance cycle. The Tribunal is of the view that the Applicant herein challenges the totality of the evaluation process of his performance which he alleges was dishonest and unfair, *inter alia*.

43. The governing issuance in respect of performance evaluations is ST/AI/2010/5 (Performance Management and Development System). Under section 15.1 thereof, staff members having received the rating of 'successfully meets performance expectations' cannot initiate a rebuttal under the procedures outlined in ST/AI/2010/5.

44. It is note-worthy that in *Andati-Amwayi*, 2010-UNAT-058, the Appeals Tribunal established that what an administrative decision is or is not depends on the nature of the decision, the legal framework under which the decision has been made and the consequences of the decision, thereby dispelling any notion that administrative decisions can be placed in any kind of legal strait jacket.

45. For the present purposes, the Tribunal is of the view that no interpretation of section 15.1 of ST/AI/2010/5 precludes it from having jurisdiction in this matter. While it is patently clear that an Application before the Tribunal may not be used to circumvent the specific rules on the rebuttal of a performance rating as contained in ST/AI/2010/5, the Statute of the Dispute Tribunal is equally clear that a staff member's terms and contract of appointment include all pertinent regulations and rules and all relevant administrative issuances in force at the material time.

46. The Applicant has raised varied allegations against his FRO touching on the breach of provisions in ST/AI/2010/5. At the present stage, the Tribunal's concern is not so much the veracity or otherwise of those allegations, which are in any event untested at present, as the fact that a contested decision which is alleged to be in violation of the provisions of legal issuances of the Organization must *per*



*force* be actionable before the Tribunal in so far as they relate to the Applicant's contract of employment.

47. The third limb of the Respondent's challenge to receivability is that the rejection of the Applicant's application and the purported suspension of the selection process do not legally impact on the Applicant's terms and contract of employment. The Applicant has submitted that by permitting the suspension of the selection process on the basis of a flawed job opening advertisement, the Respondent has infringed his right to be shortlisted as granted by ST/AI/2010/3 in addition to his right to a full and fair consideration of his application.

48. Section 7.4 of ST/AI/2010/3 provides that the hiring or occupational group manager evaluates all applicants released to him/her and shall prepare a shortlist of those who appear *most qualified* for the job opening based on a review of their documentation. The Hiring Manager instead rejected all applications for the post. This decision directly impacted on the Applicant's right to full and fair consideration of his application for the advertised post of Chief, LSS. The Tribunal concludes that on the strength of article 2.1(a) of the Dispute Tribunal Statute, the decision of the Respondent to reject the Applicant's application to the first job opening in question and to purportedly suspend the selection process had ramifications on his contract of employment.

### **Conclusion**

42. The Tribunal finds that the contested decisions are administrative decisions within the meaning of article 2.1 (a) of its Statute and that this Application is receivable.

43. The parties are hereby directed to appear before the Tribunal on **Wednesday, 24 April 2013 at 1600 hours** (Nairobi Time UTC+3) in Conference Room 12 for purposes of a case management conference.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 28 day of March 2013

Entered in the Register on this 28 day of March 2013

*(Signed)*

Jean-Pelé Fomété, Registrar, Nairobi Registry.