IN THE EAST AFRICAN COURT OF JUSTICE
APPELLATE DIVISION AT ARUSHA, TANZANIA

(***Coram***: Emmanuel Ugirashebuja, P.; Liboire Nkurunziza, V.P; Edward Rutakangwa, Aaron Ringera and Geoffrey Kiryabwire, J.J.A)

APPEAL NO. 2 OF 2016

BETWEEN

GODFREY MAGEZI..... APPELLANT

AND

NATIONAL MEDICAL STORES..... RESPONDENT

[Appeal from the Ruling of the First Instance Division at Arusha (Isaac Lenaola, DPJ; Faustin Ntezilyayo and Fakihi A. Jundu JJ) dated the 30th day of June 2016 in Application No. 9 of 2015 arising from Taxation Reference No. 1 of 2015]

JUDGMENT

A. INTRODUCTION

1. This is an Appeal by Godfrey Magezi ("the Appellant") against the Ruling of the First Instance Division of the Court ("the Trial Court") whereby the Trial Court dismissed with costs the Appellant's **Application No. 9 of 2015** for extension of time for lodging **Taxation Reference No. 1 of 2015** and validation of the late filing of the same.

2. The Respondent, National Medical Stores, is a Corporation established in 1993 by an Act of Parliament of the Republic of Uganda.

3. The Appellant was both in this Court and in the Trial Court represented by Mr. Mohmed Mbabazi, Advocate, of Nyanzi, Kiboneka & Mbabazi Advocates of Kampala, Uganda and the Respondent was represented by Mr. Peter Kawuma, Advocate, of Kiwanuka & Karugire Advocates of Kampala, Uganda.

B. BACKGROUND

4. The factual background to the Appeal is fully set out in the Scheduling Memorandum presented to this Court by both Parties on 15th November 2016 pursuant to the provisions of Rule 99 of the East African Court of Justice Rules of Procedure 2013 ("the Rules") and is as below.

5. The Appellant on 25th July, 2013 filed **Reference No. 5 of 2013** at the East African Court of Justice against the Attorney General of the Republic of Uganda. The Appellant in the said Reference impleaded the Inspector General of Government, the Auditor

General, the Public Procurement and Disposal of Public Assets Authority, National Medical Stores and Quality Chemical Industries Limited as "Interested Parties".

6. After the interested Parties had been served with the Reference and filed their Responses, the Appellant amended his Reference and served the Interested Parties with Notices of Withdrawal. The Respondent along with Quality Chemical Industries Limited then separately filed two applications before the First Instance Division that were consolidated as **Consolidated Applications No. 8 and 9 of 2014** arguing that the withdrawal/discontinuance of the matter against them was without an agreement in writing as to the terms of such withdrawal and in particular with regard to terms as to costs incurred.

7. The Trial Court in its Ruling in **Consolidated Applications No. 8 and 9 of 2014** delivered on 19th June 2014 held that National Medical Stores and Quality Chemical Industries Limited were entitled to costs as prayed and also condemned the Respondent to pay costs of the application.

8. The Respondent then filed its bill of costs and a Taxation hearing was held by the Deputy Registrar on 13th May 2015 wherein the bill of costs was taxed under **Consolidated Taxation Cause No. 2 and No. 4 of 2014.**

9. The Deputy Registrar, as the Taxing Officer, delivered a Taxation Ruling in the matter on 7th September 2015.

10. Being dissatisfied with the Taxation Award of the Registrar, the Appellant on 22nd September 2015 filed **Taxation Reference No.**

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1 of 2015 by way of Notice of Motion supported by affidavits sworn by counsel Mohmed Mbabazi and the appellant himself before the Trial Court seeking to set aside the said award. The said application was filed on 22nd September 2015, one day in excess of the 14-day period prescribed by the Rules.

11. The Appellant subsequently on 2nd October 2015 filed Miscellaneous **Application No. 9 of 2015** in the Trial Court seeking for orders that (a) Enlargement of time for lodging **Taxation Reference No. 1 of 2015**: **Godfrey Magezi v National Medical Stores** against the decision of the learned Deputy Registrar in **Consolidated Taxation Causes Nos.2 and 4 of 2014: National Medical Stores & Quality Chemical Industries Ltd v Godfrey Magezi** be granted; (b) The late filing of **Taxation Reference No.1 of 2015: Godfrey Magezi v National Medical Stores** be validated; and (c) Costs of the application be in the cause. This Application, like the previous one, was also by way of Notice of Motion supported by the affidavits of Counsel Mbabazi and Godfrey Magezi, the Appellant herein.

12. When the Application for enlargement of time came up for hearing on 14th March, 2016, the Trial Court directed that the Parties file written submissions in both Application No. 9 of 2015 and Taxation Reference No. 1 of 2015.

13. The Parties accordingly filed Written Submissions in both **Application No. 9 of 2015** and **Taxation Reference No.1 of 2015.**

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C. THE APPELLANT'S APPLICATION BEFORE THE TRIAL COURT

14. The Appellant's Application for extension of time for lodging the Taxation Reference was predicated on the grounds that (i) the failure and/or omission to file the Reference within the prescribed time was not the applicant's doing but that of his Counsel, (ii) the Reference was filed just one day late, (iii) immediate steps were taken to cure the default, and (iv) justice required that the application be granted.

15. In his affidavit in support of the application, Counsel Mbabazi deposed, *inter alia*, that (i) he had personal conduct of the Taxation Cause which was decided on the 7th day of September, 2015 against the Appellant, (ii) the Appellant decided to seek legal redress against the decision by filing a taxation reference, (iii) he begun building his client's case for the intended taxation reference and had prepared to file the same by the 21st of September 2015, (iv) on Sunday 20th September 2015, one of his workers drowned in a pool on his farm in Hoima District, in Uganda, an incident which required his involvement and cooperation with the police, who only managed to recover the body on Monday 21st September, 2015, (v) he was only able to return to his chambers in the evening of 21st September 2015 whereupon he prepared and signed the Notice of Motion for the intended taxation Reference, (vi) his client only managed to sign his affidavit in support of the Motion on the 22nd September 2015, (vii) the Motion was filed in Court that very day and his Clerk was informed it was one day late, (viii) he immediately informed the Appellant of the lapse in the filing of the Taxation Reference and advised him to file the application for extension of time with immediate effect,(ix) the omission to file

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the Taxation Reference within the prescribed fourteen days was unavoidable and beyond his control and was in no way owing to the appellant, and (x) the Motion for extension of time was filed as soon as the default in filing the taxation reference in time was discovered.

16. In his supporting affidavit, Godfrey Magezi, deposed that (i) he instructed Mr.Mbabazi to challenge the Taxation award, (ii) Mr.Mbabazi informed him that a taxation reference is done in fourteen days and that he would file a taxation reference on Monday, the 21st September, 2015 and that he implored him to file it by Friday 18th but Counsel told him that he would be going up country to his farm on Friday but would be back on Monday (21st September 2015) to file the reference, (iii) he called Mr. Mbabazi on Monday, 21st September 2015 and the latter told him that he had suffered personal problems whereby one of his farm workers had drowned in a pool on his farm, which required his presence and cooperation with the Uganda police, (iv) he could not attend his Counsel's chambers late in the evening of Monday 21st September and so he signed the affidavit in support of the Reference in the morning of 22nd September 2015, (v) the Reference was filed in Court that very day; (vi) in the circumstances, the delay in filing the Reference was owing to the inadvertent omission of his Counsel and no fault, dilatory conduct or omission could be ascribed to him for the delay in filing the Reference, and (vii) it was in the interest of the administration of justice to grant the Application.

17. The Appellant filed Written Submissions in support of his application on 21st March 2016.

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D. THE RESPONDENT'S OPPOSITION TO THE APPLICATION

18. In opposition to the Application, Mr. Apollo Newton Mwesigye, the Respondent's Corporation Secretary, deposed in a Replying Affidavit as follows: (i) that the Appellant in his Application and in the supporting Affidavits had not bothered to give the specific details of the incident that was alleged to have caused the delay in filing, (ii) that in the absence of any evidence in proof of the allegation in the application, there could not be said to be sufficient reason to grant the orders sought and the application, accordingly, was without basis and must fail, (iii) that he was aware that the law firm of Nyanzi, Kiboneka and Mbabazi Advocates which was handling the case was equipped with more than ten lawyers but no explanation had been given why none of them completed the filing of the application within time in the alleged absence of Mr. Mohmed Mbabazi, (iv) that the Appellant had also not given any explanation as to why he did not follow up on the matter with the other lawyers in the law firm in the alleged absence of Mr. Mohmed Mbabazi, and (v) that the Taxation Reference No. 1 of 2015 in itself did not have chances of success as the bill of costs being disputed was taxed in accordance with the law and the principles of taxation.

19. The Respondent filed Written Submissions in support of its opposition to the Application on 1st April 2016.

E. THE TRIAL COURT'S FINDINGS

20. After considering the Affidavits filed by the Parties and the opposing arguments articulated in the Written Submissions, the Trial Court made the Findings set out herein below.

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21. It was settled law that the Court had discretion according to Rule 4 to extend time if sufficient reason was shown by the Applicant. The Court distilled from the cases of **Attorney-General of Kenya v Prof. Peter Anyang' Nyongo' [Appeal No.1 of 2009]** and **The Secretary General of the East African Community v Hon. Sitenda Sebalu [Application No. 9 of 2012]** the following propositions of law:-

(a) Rule 4 requires a qualitatively higher standard to extend time (namely, sufficient reason), than the case with the standard of "any reason" which is prescribed under the corresponding rules in some member States; and

(b) The Court's discretion to extend time under Rule 4 only comes into existence after sufficient reason for extending time has been established and that it is only then that the other considerations such as the absence of any prejudice and prospects or otherwise of the success in a reference or appeal can be considered.

22. The Appellant's Counsel had not provided any evidence in support of his statement in the Affidavit that his worker had drowned and that he had to collaborate with the police who recovered the worker's body on 21st September 2015. In that regard, the Trial Court said, one would have expected to have been annexed to his Affidavit some evidential proof of the said drowning incident and also further information on the incident and the extent of his involvement in the matter. The Court concluded that by making a statement in an affidavit without any evidence to

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substantiate it, such a statement did not meet the rigorous standard of proof set by Rule 4.

23. The Appellant's conduct was not irreproachable. He ought to have acted diligently upon learning that his Counsel would not meet the statutory deadline and requested that his case be attended by another lawyer from his Counsel's law firm. It was not shown anywhere that the Appellant had made such a request and that it was either rejected or deemed to be impossible.

24. In the result, the Court was not satisfied that sufficient reason had been given for the late filing of **Taxation Reference No. 1 of 2015**.

25. In the above premises, the prayers for extension of time for filing the Taxation Reference and for validation of the late filing of the same were dismissed with costs to the Respondent.

F. THE APPEAL TO THE APPELLATE DIVISION

26. The Appellant being dissatisfied with the above decision of the Trial Court appealed to this Court by lodging a Memorandum of Appeal containing eleven (11) grounds, namely:

i) The Hon. Learned Judges of the First Instance Division erred in law when they decided that the Appellant had no sufficient reason for not filing Taxation Reference No. 1 of 2015 within the prescribed time;

ii) The Hon. Learned Judges of the First Instance Division erred in law when they decided that the Appellant's counsel had not provided evidence to support his failure to meet the deadline for filing the taxation reference;

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iii) The Hon. Learned Justices of the First Instance Division erred in law when in reaching their decision they visited the inadvertence and omissions of counsel on the litigant;

iv) The Hon. Learned Justices of the First Instance Division erred in law when they arrived at their decision that the Appellant failed to act diligently upon learning that his counsel would not meet the statutory deadline and request that his case be attended by another lawyer from his Counsel's law firm;

v) The Hon. Learned Justices of the First Instance Division erred in law when they failed to administer substantial justice;

vi) The Hon. Learned Justices of the First Instance Division erred in law when in reaching their decision they gave undue regard to technicalities;

vii) The Hon. Learned Justices of the First Instance Division erred in law when in reaching their decision they failed to apply and/or ignored the doctrine of precedent and *stare desis* (sic) in **The Attorney General v. The East African Law Society &The Secretary General of the East African Community**: [EACJ AD Appeal No. 1 of 2013] and **Attorney General of Kenya v. Prof. Anyang' Nyongo'& 10 others**:[EACJ AD Application No. 2 of 2010];

viii) The Hon. Learned Justices of the First Instance Division erred in law when they applied the strict standard of interpretation when interpreting sufficient reason;

ix) The Hon. Learned Justices of the First Instance Division erred in law when they wrongly interpreted the procedural rules and

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arrived at the conclusion that the Appellant had no sufficient reason for not filing Taxation Reference No.1 of 2015 within the prescribed period;

x) The Hon. Learned Justices of the First Instance Division erred in law when in reaching their decision they failed to use the Court's inherent powers to make orders necessary for the ends of justice;

xi) The Hon. Learned Justices of the First Instance Division erred in law when in reaching their decision they failed to do the balancing act of weighing between competing interests of procedural fairness versus substantive justice.

27. The Appellant prayed this Court to:-

(a) Set aside the order of the Trial Court dated 30th June 2016 in Application No. 9 of 2015;

(b) Enter Judgment for the Appellant as prayed in Application No. 9 of 2015; and

(c) Allow the Appeal with costs to the Appellant here and in the First Instance Division of this Court.

28. At the Scheduling Conference of this Appeal on 15th November, 2016, all the Grounds of Appeal were, by consent of the Parties, consolidated into one issue for determination, namely, whether the Trial Court erred in law when it declined to grant the Appellant's Application for extension of time and validation of the late filing of **Reference No. 1 of 2015.**

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29. After the Scheduling Conference, the Parties, in compliance with this Court's Directions filed their Written Submissions. The Appellant's Written Submissions were filed on 14th December 2016 and the Respondent's Submissions were filed on 20th January 2017. The Appellant filed his Replying Submissions on 27th January 2017.

G. THE PARTIES' RESPECTIVE CASES

30. Counsel for the Appellant pointed out that **Taxation Reference No.1 of 2015** was filed one day late and the application for extension of time was filed eleven days after the filing of the Taxation Reference. He submitted that such delay could not be inordinate.

31. With respect to the reasons for the delay, Counsel faulted the Trial Court for doubting the occurrence of the drowning incident and his personal involvement in it as deposed in his affidavit and also in requiring evidential proof of the same by the Appellant. Counsel trenchantly argued that if one wanted to doubt, even with a police report one could doubt its authenticity and require further proof of any photos and video coverage supplied.

32. Counsel further argued that failure to file the Reference in time was clearly his omission or inadvertence and the same should not have been visited on his client, the litigant in the matter. He relied on the Ugandan case of **Julius Rwabinumi v Hope Bahimbisomwe** [Civil Application No. 14 of 2009] where G.M. Okello JSC held that:

> *"It would be a grave injustice to deny any applicant to pursue his right of appeal simply because of a blunder of his lawyer when it is well settled that an error of Counsel should not necessarily be visited upon his client."*

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33. In this case, Counsel pointed out, the Appellant had deposed that he instructed his Counsel to appeal against the Taxation Award and even reminded him to file it on the Friday preceding Monday, 21st September 2015 which was the last day for filing the Reference as per the Rules. Counsel faulted the Trial Court for taking the position that the Appellant ought to have been more diligent and as a precaution should have thought about a possible alternative measure to be taken. In his view, that amounted to imposing a higher degree of caution and diligence on a litigant to vigorously pursue his case in the event of inadvertence by Counsel and it was to open a new chapter in making justice accessible to the public. Counsel pointed out that, in the circumstances of this case, the events giving rise to the default happened within a period of 8 hours from 9:00 a.m.to 5:00 p.m. on 21st September 2015 and as such, the litigant could not be expected to get another lawyer even from the same firm to prepare and file the Taxation Reference without making such assumptions as to the ready availability of an Advocate to work on the Appellant's file and that such Advocate was capable of representing the Appellant as required under the East African Court of Justice Rules.

34. Counsel for the Appellant also faulted the Trial Court for failing to decide the Application for extension of time in consonance with substantive as opposed to procedural justice as propounded by this Court in **The Attorney-General of Uganda v the East African Law Society & the Secretary General of the East African Community** [EACJ Appeal No. 1 of 2013]. Counsel submitted that to determine whether there was sufficient reason to extend time within which the Appellant can file a Taxation Reference was not substantive justice but procedural. In similar vein, he further submitted that to determine

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whether the Taxation Award rendered by the Registrar was legal and assessed in accordance with law and principles was substantive justice. He asked rhetorically why this Court would shut out the Appellant and refuse to hear him on the issue of the quantum and lawfulness of the Taxation Award.

35. Counsel for the Appellant also contended that the Trial Court erred in law in failing to follow the doctrine of precedent by failing to follow the authority of **The Attorney-General of the Republic of Uganda v. The East African Community Law Society & Another** (supra) and **Attorney-General of Kenya v Prof. Anyang' Nyongo' & 10 others** (supra). Counsel submitted that the *ratio decidendi* in those cases was to administer substantial justice without undue regard to technicalities. In his view, if the Trial Court had applied those decisions in the determination of the Application for extension of time, they would have reached a decision allowing the extension of time to the Appellant to file the Taxation Reference. In His Submission, the Trial Court failed to balance the requirement of procedural fairness to establish sufficient reason against the ultimate search for justice by the Parties before the Court and, in so doing, allowed technicalities to prevail over substantive justice and thereby abdicated from performing its cardinal role and greatest commandment, namely, administering substantive justice.

H. <u>THE RESPONDENT'S SUBMISSIONS</u>

36. Counsel for the Respondent, on his part, submitted that the Trial Court did not err in arriving at the conclusion that sufficient reason for extension of time had not been established and that sufficient reason is required to be shown before an order for extension of time is

granted. Counsel argued that it was trite law that he who asserts must prove, and that in the instant case, the assertion or statement made by the Appellant Counsel in his affidavit was not backed by any evidence in proof thereof to substantiate it, and, accordingly, the Trial Court did not err in holding that sufficient reason had not been shown for the extension of time. In short, Counsel contended, the Appellant failed in his duty to present evidence of the alleged drowning incident and the Trial Court could not be faulted for finding that sufficient reason for extension of time had not been made.

37. With respect to inadvertence and omission of Counsel and the diligence of the Appellant himself, Counsel for the Appellant submitted that the statement by the Appellant that he was not to blame was to be assessed in the context of the Trial Court's finding that there was no sufficient reason given to enable extension of time. Counsel supported the Trial Court's reliance on the Irish Supreme Court's case of **Salim v Minister for Justice, Equality and Law Reform** [2002] 12 SC17 holding that –

> "...the fact that the Applicant was not to blame for the delay was not in itself sufficient reason to extend time limits. ...in general delay by legal advisors will not prima facie be a good and sufficient reason to extend time. Circumstances must exist to excuse such delay and to enable the matter to be considered further".

38. In Counsel's Submission, the reason for delay in this case, was wanting in proof. Furthermore, Counsel submitted, the Appellant was not as irreproachable as he contended. Counsel supported the Trial Court's reasoning and finding that the Appellant was wanting in

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diligence as he did not instruct his lawyer to have the filing of the reference taken up by one of the other lawyers in his firm or personally request that his case be attended to by another lawyer in the firm. That the Appellant was fully aware that the statutory deadline for filing his application would not be adhered to and yet failed to act to avert that, was, Counsel argued, a pointer to the Appellant's want of diligence.

39. Counsel for the Respondent also submitted at length that the Appellant's Counsel's contention that he had personal conduct of the Appellant's case and, accordingly, no other lawyer from his firm would have handled the Appellant's Application without straying from the rules was not correct. In his submission rules 17 and 18 relate to "appearances and representation" as opposed to filing of documents and as such did not preclude any other Advocate from the law firm apart from Mr.Mohmed Mbabazi from signing and filling Appellant's Application.

40. With respect to the length of the delay, Counsel for the Respondent submitted that such other considerations for grant of an order for extension of time could only be considered after sufficient reason had been established.

41. As regards the argument that the Trial Court sacrificed substantive justice to procedural justice, Counsel for the Respondent submitted that the Trial Court's ruling met the ends of justice and was to prevent abuse of the Court's own process. In his submission, substantive law requires that where no sufficient reason is given by an applicant, the Court cannot grant an order to extend time. To grant an order for extension of time in the absence of sufficient reason would be arbitrary

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or capricious: such an order would not amount to substantive justice, but would in fact be an abuse of the Court process, Counsel argued. He distinguished the case of **Attorney General of Uganda v The East African Law Society and Another** (supra) from the matter at hand on the ground that the case concerned the issue of the Court's authority to depart from or vary the Parties agreement at a Scheduling Conference in the interests of justice and sufficient grounds had been given to enable the Court to exercise its discretion to grant the orders sought.

42. With regard to the alleged failure by the Trial Court to adhere to the doctrine of precedent, Counsel for the Respondent submitted that the Trial Court did not depart from established precedents and jurisprudence. He reiterated his submission with respect to the case of **Attorney General of the Republic of Uganda v The East African Law Society & Another** (supra). He also distinguished the case of **Professor Anyang' Nyongo' & 10 Others v Attorney General of Kenya** (supra) on the grounds that the Court in that case had sufficient reason to grant the order for extension of time even though it went on to state that it was doing so to administer substantive justice without undue regard to technicalities. Counsel concluded his submissions with a prayer that we dismiss the Appeal with costs.

I. THE APPELLANT'S REPLYING SUBMISSIONS

43. The Appellant's Written Submissions in reply to the Respondent's Submissions were filed on 27th January 2017 in the Sub Registry at Kampala. In that Reply, the Appellant made the following points.

44. The Trial Court erred in law when it failed to consider the deposition of the Appellant's Counsel under oath in an Affidavit and instead

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referred to it as a mere statement without evidence. As that deposition was not rebutted or found to be false, Counsel for the Appellant submitted, the Trial Court should have considered the said deposition as cogent evidence to prove that he was prevented by the reason deposed from attending to the filing of the Taxation reference on Monday, 21st September 2015, and, accordingly, should have found that the Appellant had placed before it some material that was cogent and probable in explanation of the delay, which was not in any event inordinate, wanton or unreasonable. Counsel further submitted that to demand more evidence from the Appellant beyond what was produced was to increase the burden of proof beyond the required standard of balance of probability. In his view, if the deposition of the drowning incident was credible and cogent enough to explain the absence from his office, then the Appellant had met the "qualifying higher standard" which Rule 4 requires and proved sufficient reason that hindered him from filing the Taxation Reference in time. Counsel added that the "qualifying higher standard" does not increase the burden of proof but merely emphasises the credibility, cogency, or plausibility of the reason given for not acting within the prescribed period.

45. Counsel for the Appellant fortified his submission by reference to the case of **The Attorney-General of Kenya v Peter Anyang' Nyongo' & Others** [EACJ Application No. 4 of 2009] where Busingye, P.J. in considering an application for extension of time under Rule 4 had the following to say:

> "I am aware of, and respectfully agree with, the holding of Githinji JA in Wasike v Khisa & Another (Civil Application NAI 241 of 2003) that ...it would be a fetter on the wide discretion of the Court to

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require a minute examination of every single act of delay and to require every such act to be satisfactorily explained..."and that..."It is not every delay in taking any appropriate step required that would disentitle a party to any relief. It is only the unreasonable delay which is culpable and whether or not delay is unreasonable will depend on the circumstances of the case..."

[Underlining supplied.]

46. With respect to the Respondent Counsel's support of the finding by the Trial Court that the Appellant himself had not been diligent enough, Counsel for the Appellant submitted that if it was accepted that the drowning incident was a probable reason to keep him (the Appellant's Counsel) away from the office and make him unable to file the Reference in time, it followed that the lapse in filing the Reference in time was due to inadvertence by Counsel. In light of that, to interrogate, as the Trial Court did at the urging of the Respondent's Counsel, why another advocate in the firm of Nyanzi, Kiboneka and Mbabazi did not file the Appellant's taxation Reference in the absence of Mr.Mbabazi would have begged so many other questions such as whether the Appellant would have been able and was in contact with his Counsel at the material time, whether his Counsel had completed the necessary application and readied it for signature and filing, and if not, whether the new Counsel would have been able to start drafting and complete the work. In his submission, asking all those questions would have been to go into a minute examination of the cause for the delay. In his view, it was sufficient for the Appellant to show that his Advocate was away in Hoima on Monday 20th September, 2015 and came back to his office in Kampala on Tuesday, 21st September 2015

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and filed the Taxation Reference one day outside the prescribed period.

47. With respect to the administration of substantive justice, Counsel for the Appellant submitted that the duty of the Court was clearly stated in the case of **Attorney-General of the Republic of Uganda v East African Law Society and another** [EACJ Appeal No. 1 of 2013] as to "answer authoritatively and conclusively all the issues and questions in dispute." He argued that the Trial Court, in the matter at hand, allowed procedure to outweigh substantive justice and instead of deciding **Taxation Reference No.1 of 2015**, it determined **Civil Application No. 9 of 2015** which it dismissed. Counsel contended that the proper balance between procedure and substantive law was done in the case of **Prof. Anyang' Nyongo' & 10 Others v. Attorney-General of Kenya** [EACJ Application No. 2 of 2010] where the focus of the Court was "the ends of justice" and substantive justice but not to penalize a party or prioritize procedure over substantive justice.

48. Lastly, Counsel for the Appellant wondered what injustice the Respondent had suffered as a result of the Appellant's late filing of Application No. 1 of 2015 considering that the filing was delayed by one day and that thereafter the said Application had been scheduled and the Parties had filed their Written Submissions

J. THE COURT'S ANALYSIS AND DETERMINATION

49. The jurisdiction of the Appellate Division to entertain appeals proffered from the Trial Court is granted by Article 35A of the Treaty for the Establishment of the East African Community which provides as follows:-

"35A. An appeal from the Judgment or any order of the First Instance Division of the Court shall be to the Appellate Division on:-

(a) points of law;

(b) grounds of lack of jurisdiction; or

(c) procedural irregularity."

50. The instant Appeal concerns a challenge to the Trial Court's refusal to grant extension of time to file the Taxation Reference out of time and to validate the late filing of that Reference. In declining the Appellant's request, the Trial Court acted in exercise of its power under Rule 4. The power under Rule 4 is obviously discretionary, and thus, the Appeal here is challenging the Trial Court's exercise of its discretion. The agreed issue for determination does not raise lack of jurisdiction or procedural irregularity. It pointedly raises the question whether the Trial Court erred in law when it declined to grant the Appellant's Application for extension of time and the validation of the late filing of **Taxation Reference No. 1 of 2015.**

51. This Court states at the outset that whether or not a Trial Court has exercised its discretion properly is a matter of law. In **Mary Ariviza & Another v Attorney-General of Kenya & Another** [EACJ Appeal No. 3 of 2012], this Court expressed the point thus:

"Whether the First Instance Division's determination of the facts was right or wrong, is not appealable to this Division. What is relevant and justiciable in this Division, is the issue of law – namely, did the First Instance reach its findings and conclusions judiciously, after due consideration of the evidence; after taking

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into account only relevant (not irrelevant) factors; and after exercising due analysis (not mere caprice)?"

52. The second matter for stating at the outset is that the principle on which an appellate court will interfere with a trial court's exercise of its judicial discretion is well known. It is simply that an appellate court will not interfere with a trial judge's exercise of his judicial discretion unless it is satisfied that the discretion was not exercised judicially. And the court will only reach such a conclusion if one or more of the following matters is established: (a) that there was a misdirection on law; or (b) that there was a misapprehension of fact(s); or (c) the trial court took into account some irrelevant factor(s), or failed to take into account some relevant factor(s); or (d) taking into account all the circumstances of the case, the decision arrived at was so manifestly wrong that an improper exercise of discretion must be inferred. See **Attorney-General of Kenya v Prof. Anyang' Nyongo' & Others** [Appeal No. 1 OF 2009], **The Attorney-General of the Republic of Uganda v The East African Law Society & Another** [EACJ Appeal No. 1 of 2013] where the Ugandan case of **American Express International Banking v ATUL** [1990-1994] EA 10 (SCU) was cited with approval, and **Mbogo v Shah** [1968] E. A. 93.

53. In the instant Appeal, Counsel appearing before the Court did not directly anchor their submission on those principles. They framed their submission as if the matter at hand was an ordinary Appeal on the merits of the Trial Court's adjudication of the matter before it. Be that as it may, we shall proceed to dispose the Appeal on the basis of those well-known principles. Before we do so, it is important to consider the tenor and import of Rule 4 on which the Court's discretion to extend time is rooted.

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54. Rule 4 provides as follows:-

> *"4. A Division of the Court may, for sufficient reason, extend the time limited by these Rules and by any decision of itself for the doing of any act authorised or required by these Rules, whether before or after the expiration of such time and whether before or after the doing of the act, and any reference in these Rules to any such time shall be construed as a reference to such time as so extended."*

55. Now, the term "sufficient reason" is not defined in the Rules. Neither, to our knowledge, has this Court ever interpreted the term. The Court has however had occasion to consider the term's significance in procedural justice. In **Attorney-General of Kenya v Prof. Anyang' Nyongo'** [Appeal No. 1 of 2009] this Court made the following observations while considering an appeal from a single Judge of the Trial Court in connection with the Judge's exercise of discretion to extend time under Rule 4:

> *"We wish to emphasize that the trial Judge in this particular case was dealing with Rule 4 of the EACJ Rules, which requires a qualitatively higher standard to extend time (namely, "sufficient reason"), than is the case with the standard of "any reason" which is prescribed under the corresponding Rules in some of the EAC Member States (notably Kenya). Accordingly, the trial Judge in exercising his discretion to extend time in this case, had to and did indeed raise the bar appropriately to meet the more rigorous standard of the Community Rule."*

56. We apprehend the Court to be saying no more than that under Rule 4 "sufficient reason" (and not just "any reason") must exist in order for

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the Court to exercise its discretion. The phrases "sufficient reason", "qualitatively higher standard" and "rigorous standard" are used synonymously by the Court. The Court does not however define sufficient reason or indicate what the term encapsulates or excludes. And in **Prof. Anyang' Nyongo' and 10 Others v Attorney General of Kenya** [Application No. 1 of 2010] consolidated with **Attorney General of Kenya v Prof. Anyang Nyongo & 10 Others** [Application No. 2 of 2010] this Court noted Mulenga J.S.C's construction of Rule 5 of the Supreme Court of Uganda Rules (which was *in pari materia* with rule 4 of this Court) in **Boney M. Katatumba v Waheed Karim [Civil Application No. 27 of 2007]** (unreported) where that learned Judge stated as follows:-

> "Under r. 5 of the Supreme Court Rules, the Court may, for *sufficient reason, extend the time prescribed by the Rules. What constitutes "sufficient reason" is left to the Court's unfettered discretion. In this context, the Court will accept either a reason that prevented an applicant taking the essential step in time or other reasons why the intended appeal should be allowed to proceed though out of time."*

57. Immediately after noting the opinion of the learned Supreme Court Judge, this Court delivered itself as follows:-

> "The Court appreciates the reference to the Court's "unfettered" discretion indicated in the Katatumba case. Nonetheless, as a matter of practical application and good jurisprudence, the Court's "unfettered discretion" arises only after "sufficient reason" for extension of time, has been established. Therefore, to that extent,

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the Court's discretion in an application to extend time is not unlimited."

58. Three points emerge from the above postulation of law by the court: First, we must, with respect, point out that the Court misapprehended the reference to the Court's "unfettered" discretion in the **Katatumba case** as referring to the discretion to extend time, whereas it was plain from the **Katatumba case** itself that the reference was to the discernment as to what would constitute "sufficient reason"; Secondly, the Court's discretion to extend time is circumscribed by the necessity to have "sufficient reason"; Thirdly, the Court did not define the term "sufficient reason" or indicate what it includes or excludes.

59. In the East African Court of Appeal case of **Mugo & Others v Wanjiru & Another** [1970] E.A. 481, Spry, V.-P. expressed himself as follows:

> *"Normally, I think, the sufficient reason must relate to the inability or failure to take the particular step in time, but I am not prepared to say that no other consideration may be invoked."*

And Duffus, P. expressed himself thus:-

> "Each application must be decided in the particular circumstances of each case but as a general rule the applicant must satisfactorily explain the reason for the delay and should also satisfy the court as to whether or not there will be a denial of justice by the refusal or granting of the application."

The reasoning of Spry, V.-P. was followed in **Njagi v Munyiri** [1975] E.A.179 by Musoke, J.A. of the same Court.

60. In the above premises, the Court is faced on the one hand, with a situation where the East African Court of Justice has not defined or interpreted the term "sufficient reason" or in any way indicated what it includes or excludes, and, on the other hand, judicial authority from the Supreme Court of Uganda where the Supreme Court is clear that the sufficient reason is either a reason that prevented an applicant taking the essential step in time or other reason(s) why the intended appeal should be allowed to proceed though out of time and the authority of the East African Court of Appeal where it is made clear that sufficient reason is not always or necessarily confined to the explanation of the inability or failure to take the necessary step in time.

61. The Court once again states that decisions of Municipal Courts do not have precedential authority here. However, as the Court has stated often before, such decisions may provide inspiration to this Court, particularly where they have been rendered by the highest tribunals in those countries and they are relevant to the matter under consideration by the Court.

62. Taking that view of the matter, we take inspiration from the Ugandan case of **Katatumba** and the East African Court of Appeal case of **Mugo v Wanjiru** wherein the courts in interpreting Rules which were *in pari materia* with our Rule 4, construed the term "sufficient reason" to comprehend not only reasons relevant to the applicant's inability or failure to take the essential procedural step in time but also any other considerations that might impel a Court of Justice to excuse a procedural lapse and incline to a hearing on the merits. Being thus inspired, we hold that in determining whether "sufficient reason" for extension of time under Rule 4 exists, the court seized of the matter should take into account not only the considerations relevant to the

applicant's inability or failure to take the essential procedural step in time, but also any other considerations that might impel a Court of Justice to excuse a procedural lapse and incline to a hearing on the merits. In our considered opinion, such other considerations will depend on the circumstances of individual cases and include, but are not limited to, such matters as the promptitude with which the remedial application is brought, whether the jurisdiction of the Court or the legality of the decision sought to be challenged on the merits is in issue, whether there was manifest breach of the rules of natural justice in the decision sought to be challenged on the merits, the public importance of the said matter, and of course, the prejudice that may be occasioned to either party by the grant or refusal of the application for extension of time. We prefer this broad purposive approach for the reason that judicial discretion is only but a tool, a stratagem or a device in the hands of a Court for doing justice or, in the converse, avoiding injustice. That tool should not be blunted by an approach which constricts the Court's margin of appreciation. In dealing with procedural lapses, the only relevant sign post is the beacon of justice. The Court's eyes must remain firmly fixed on that beacon.

63. With the above appreciation of the principles applicable when an appellate court is called upon to reverse a trial court's exercise of judicial discretion and the amplitude of the term "sufficient reason" in rule 4, we now turn to a consideration of the Appeal before us.

64. We remind ourselves that the gravamen of the Appellant's complaint is that the Trial Court erred in law when it found that sufficient reason had not been established to move it to extend the time as prayed. Did the Trial Court misdirect itself in law in finding that sufficient reason had not been established?

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65. We have seen in paragraph 15 above that Counsel for the Appellant had deposed in the Affidavit in support of the application for extension of time the reasons why he was unable to file the Taxation Reference in time, namely, that he had intended to do it on Monday 21st September, 2015 (the last possible day) but on Sunday, 20th September, one of his workers drowned in a pool in his farm and that incident required his involvement and cooperation with the police, who managed to recover the body on Monday, 21st September, 2015 and, as a result, he was only able to return to his Chambers that evening whereupon he prepared and signed the Notice of Motion for the intended Taxation Reference. Counsel for the Appellant had further deposed that his Client, the Appellant himself, only managed to sign the Affidavit in support of the Motion on the 22nd September and the Motion was filed that very day – a day late. The Appellant himself had deposed in his supporting Affidavit that he instructed his Counsel to challenge the Taxation Award as soon as it was made, whereupon this Counsel informed him that such Reference is done within 14 days of the decision and he would do so on Monday 21st September, 2015. He had further deposed that he reminded his Counsel on Thursday 17th September 2015, and implored him to file it by Friday the 18th September 2015, but his Counsel told him that he would be going up country to his farm on Friday, 18th September, and would be back on Monday 21st September to file the Reference. He had further deposed that when he called his counsel on Monday, the 21st September 2015, the latter informed him that he had suffered a personal problem in that one of his workers had drowned in his farm, an incident which required his presence and cooperation with the police. He had further deposed

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that he signed the supporting Affidavit in the morning of 22nd September 2015.

66. Our review of the Trial Court's Findings show that the Court took the view that the above Deposition by the Appellant's Counsel was an allegation or statement which required to be proved or substantiated by evidence such as a police report of the incident or factual particulars of the incident. That Finding by the Trial Court was very much inspired by the Respondent's Counsel's submissions to the same effect. In other words, the Trial Court found that the deposition by Counsel had no evidential value and, accordingly, concluded that the reason why the necessary step had not been taken in time was not proved and, therefore, sufficient reason had not been established. We say at once that that was misdirection on law. A statement or statements made on oath in an affidavit are evidence and it was improper to treat them as mere statements or allegations which required evidential proof (as would undoubtedly have been the case if they had been made in a pleading). To cast doubts on the veracity of such statements, as the Trial Court did at the urging of Counsel for the Respondent, without there being any rebutting evidence from the Respondent was also misdirection on law.

67. With respect to the Appellant's own deposition, the Trial Court took the view that the Appellant had not demonstrated due diligence and his conduct was not irreproachable. The Court did so on the basis that the Appellant had not instructed his Counsel to arrange for his alternative representation by another Advocate in his firm (which indisputably had about ten (10) lawyers) and that he himself had not bothered to ask any of those other lawyers to take up his matter. We agree with the submission by the Counsel for the Appellant that the

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condemnation of the Appellant's inaction was based on the conjecture or hypothesis by the Trial Court that another advocate in the firm was available, ready, and willing to take up the Appellant's brief and work on it on Monday, 21st September, 2015 and file the pertinent Application in Court. In contradistinction to such conjecture or hypothesis, there was on record the Appellant's own uncontroverted deposition of the steps he took to ensure that his Counsel filed the Application in time. In our view, those depositions did not disclose sloth or dilatoriness on his part, they showed appropriate diligence. In that connection, we fully agree with what the East African Court of Appeal said in **Shanti v Hindocha & Others** [1973] E.A. 207, at p.209 when reviewing the exercise of discretion by a single judge of the Court to extend time under the Court's rules. The Court said –

> *"The position of an applicant for extension of time is entirely different from that of an applicant for leave to appeal. He is concerned with showing "sufficient reason" why he should be given more time and the most persuasive reason that he can show…is that the delay has not been caused or contributed to by dilatory conduct on his part."* [Emphasis ours].

68. Last, but not least, it was patent on the face of the intended Reference on Taxation that the Taxation Award was to be challenged on *inter alia*, the following grounds: (i) the Award amounted to an illegality as there was breach of the Public Procurement Rules of the Republic of Uganda by the Respondent in instructing M/S Kiwanuka & Karugire Advocates, and (ii) there was inequity and discrimination by the Learned Deputy Registrar in awarding a total of USD 28,669.49 to the Respondent for disbursements in Taxation Cause No. 2 of 2014: **National Medical Stores v Godfrey Magezi** vis-à-vis USD 3,852 to

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Quality Chemical Industries in Taxation Cause No. 4 of 2014 for disbursements when both taxations flowed from the same Reference. In this connection, we take inspiration from the Court of Appeal of Tanzania in **Transport Equipment Ltd v D.P. Valambhia [1993]** T.L.R 11, where the Court expressed itself as follows:

> *"As stated much earlier, Dr. Ford gave us a bit of authority from outside this jurisdiction on the fact that this Court would enlarge time prescribed by our Rules if there is a point of law involved in the Appeal. We agree with that and we have in fact already done so a number of times.* ***In Principal Secretary, Ministry of Defence v D.P. Valambhia*** *we said 'in our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty even if it means extending the time for the purpose to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right'."*

69. Quite clearly in this matter, the intended appeal from the Taxation Award which was lodged in the Trial Court raised issues of illegality and discriminatory treatment of the Respondent. That was a consideration that could properly have been taken into account, but was omitted, in the disposition of the application for extension of time in the Trial court. We say so for the reason that the wording of rule 4, namely, that **"the Court may, for sufficient reason, enlarge time"** is permissive enough to allow the Court to take into account, *suo motu,* any reason or ground which is pertinent to the exercise of its discretion. In other words, in our view, Rule 4 is a standing invitation to the Court to consider an application for extension of time with its eyes wide open, taking a helicopter view of the matter placed before it.

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70. As regards the Appellant's complaint that the Trial Court erred in law by not determining the rights of the Parties and instead elevated procedural technicalities over substantive justice, we have come to the conclusion that the same is unmeritorious. His contention that the Court's duty is to answer authoritatively and conclusively all the issues and questions in dispute between the parties and, accordingly, where, as here, the Court was faced with an application for extension of time to lodge a taxation reference out of time, it should have ignored the procedural arguments against such a prayer and proceeded to the determination of such Reference, must be rejected. In our view, to accept the Appellant's counsel's argument, would be to take away the discretion of the Court and open litigation to indeterminate timelines contrary to the objective of expeditious justice. The inexorable logic of his proposition would be to impel the Court to ignore procedural defaults and proceed willy-nilly to the merits of the cases which are the subject of such procedural defaults. On our part, we see no legal error in the Trial Court's assumption of the duty to interrogate the Appellant's application for extension of time with a view to satisfying itself that sufficient reason for extension of time existed. We do not accept the Appellant's characterisation and condemnation of that approach as elevating procedural technicality over substantive justice. To our mind, the Trial Court merely did its judicial duty. Furthermore, the cases cited by counsel for the Appellant do not support his wide propositions. We accept the submission by Counsel for the Respondent that the case of **Attorney-General of the Republic of Uganda v East African Law Society and Another** (supra) was distinguishable from the case before the court in that in the former, sufficient grounds had been given to enable the Court to exercise its

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discretion to grant the orders sought by varying or departing from the parties agreement at the Scheduling Conference. We also accept Counsel for the Respondent's further submission that equally the case of **Prof. Anyang' Nyongo' & 10 Others v Attorney-General of Kenya** (supra) was distinguishable from the case before the Trial Court in that sufficient reason to grant the order for extension of time had been shown in that case, and the other observations by the Court therein were mere *obiter*.

71. With respect to the submission by Counsel for the Appellant that the Trial Court erred in law in not following the Court's previous precedents, we again agree with Counsel for the Respondent's submissions that the Trial Court did not depart from previous precedents. We have in the preceding paragraph stated that the cases of **Attorney-General of Uganda v East Africa Law Society & Another** (supra) and **Anyang' Nyongo' & 10 Others v Attorney General of Kenya** (supra) relied upon the Appellant were properly distinguished by Counsel for the Respondent. In the premises, we find the Appellant's submission devoid of merit.

72. It must by now be evident from our above findings that our conclusion in this Appeal is that: (i) the Trial Court misdirected itself on law in its treatment of the affidavit evidence of the Appellant himself and his Counsel; (ii) the Trial Court failed to take into account some other relevant factors which it ought to have taken into account, namely, that the Taxation Reference raised the issue of the legality and equity of the impugned taxation, that the period of delay in filing the said Reference was in no measure inordinate, that the Application for extension of time was filed promptly, and that no prejudice to the Respondent had been shown; and (iii) consequently, the Trial Court

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did not exercise its discretion under Rule 4 judicially. In the result, this Appeal succeeds.

73. With regard to costs, we are mindful of the Provisions of Rule 111(1) that costs shall follow the event unless the Court shall for good reason otherwise order. In this case, the proceedings under Rule 4 in the Trial Court were necessitated by the Appellant's procedural lapse. It is only meet and just in those circumstances that the Appellant bears those costs. As regards costs here, we are of the view that although the Appellant has succeeded overall, each party should bear his own costs of the Appeal in view of the fact that the Respondent has succeeded in resisting some of the grounds of Appeal.

74. The upshot of our consideration of this Appeal is that –

(1)The Appeal be, and is hereby, allowed;

(2)The Order of the Trial Court dated 30th June 2016 in **Application No.9 of 2015** be, and is hereby, set aside and is substituted with an Order that-

(i) Enlargement of time for lodging **Taxation Reference No. 1 of 2015**: **Godfrey Magezi v National Medical Stores** against the decision of the learned Deputy Registrar in **Consolidated Taxation Causes Nos.2 and 4 of 2014**: **National Medical Stores & Quality Chemical Industries Ltd v Godfrey Magezi** be, and is hereby, granted; and

(ii) The late filing of **Taxation Reference No.1 of 2015: Godfrey Magezi v National Medical Stores** be, and is hereby, validated;

(3)**Taxation Reference no.1 of 2015: Godfrey Magezi v National Medical Stores** be heard on the merits in the Trial Court;

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(4)The Appellant be, and is hereby, condemned to the costs in the Trial Court;

(5)Each Party shall bear his own costs of the Appeal.

It is so ordered.

Dated and delivered at Arusha this 25 day of MAY 2017.

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Emmanuel Ugirashebuja

PRESIDENT

.....

Liboire Nkurunziza

VICE PRESIDENT

.....

Edward Rutakangwa

JUSTICE OF APPEAL

.....

Aaron Ringera

JUSTICE OF APPEAL

.....

Geoffrey Kiryabwire

JUSTICE OF APPEAL