THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

(FIRST INSTANCE DIVISION)

APPLICATION NO. 9 OF 2012

[Arising From Reference No. 1 OF 201O]

(CORAM: Busingye PJ; M.S.Arach-Amoko DPJ, J. Mkwawa J; J. B Butasi J; and I. Lenaola, J.)

THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY…………………………………………………..APPLICANT

VERSUS

HON. SITENDA SEBALU………………………………………..RESPONDENT

DATE: 14TH February, 2013.

RULING OF THE COURT

By a Notice of Motion dated 10th July, 2010,the Applicant moved this Court under Rules 4, 84 and 85 of the East African Court of Justice Rules of Procedure, 2010 (the "Rules ") for Orders that:

1. This application be certified as urgent and heard on priority basis; and

2.The time for the Applicant for filing an appeal from the judgment of the East African Court of Justice (First Instance Division) … delivered at Arusha on the 30th June 2011 in the EACJ Reference No.1 of 2010, be extended.

The grounds of the application are that:

a) ***The delay in filing the Appeal was occasioned by hardship;***
b) ***Consultations between the Applicant, the Attorney General of the Republic of Uganda, the 2nd Respondent in the EACJ Ref. No. 1 of 2010 and the East African Community Council of Ministers, the Community's policy organ, took long and this delayed the filing of the appeal in the time prescribed by the Rules of Procedure; and***
c) ***The appeal has chances of success.***

The background to the application is as follows: Sometime in 2006, Hon. Sebalu filed an election petition against Hon. Sam Njuba and the Electoral Commission of Uganda in the High Court at Kampala. He was unsuccessful, so he appealed to the Court of Appeal but the appeal was dismissed with costs to the respondents. He finally appealed to the Supreme Court and that appeal too suffered the same fate. Being dissatisfied with the decision of the Supreme Court, which is the highest court in Uganda, Hon. Sebalu contemplated filing an appeal to this Court, but then he realized that it was futile do so since the Court lacked appellate jurisdiction.

Consequently, on the 14th of June 2010, Hon. Sebalu was constrained to file in this Court, **Reference No. 1 of 2010,** the origin of the instant application, against the Applicant, the Attorney General of the Republic of Uganda, Hon. Sam Njuba and The Electoral Commission of Uganda

(as 1st, 2nd, 3rd and 4th respondents, respectively). In general, his contention was that the delay to vest the East African Court of Justice (EACJ) with appellate jurisdiction is a contravention of the Treaty. In particular, his complaint against the Applicant was that he had failed or delayed, in his capacity as the Chief Executive Officer of the East African Community (EAC), to convene the Council of Ministers to conclude a Protocol to extend the appellate jurisdiction of the EACJ as per Article 27, and this inaction and or delay infringed Articles 6; 7(2); 8(1)(c) 27; and 29 of the East African Community Treaty.

For that reason, his main prayer was that, quick action should be taken by the EAC to conclude the said Protocol in order to operationalise the extended appellate jurisdiction of the EACJ to enable him and other interested litigants to preserve their right of appeal and subsequently file their appeals in the EACJ.

In his response to the Reference, the Appellant denied the claim and contended inter alia, that he had fully discharged his mandate under the Treaty by convening the relevant meetings. He prayed for its dismissal with costs.

We heard the Reference and on the 30th June, 2010, we delivered the judgment where we made orders:

1. ***That the failure or delay by the 1st respondent to refer the matter or delay by the 2nd respondent to submit comments on the draft Protocol to operationalise the extended jurisdiction of the EACJ to the Council of Ministers is an infringement of Articles 29, 7(2), 8(1) (c) and particularly, 6(d) of the Treaty.***
2. ***That the inaction by the 2nd Respondent is an infringement of Articles 6(d), 7(2) and 8(1) (c) of the Treaty.***

3. ***That quick action should be taken by the EAC in order to conclude the Protocol to operationalise the extended jurisdiction of the EACJ under Article 27 of the Treaty.***
4. ***We awarded costs against the 1st and 2nd respondents.***
5. ***We struck off the 3rd and 4th respondents from the Reference.***

(The underlining was added for emphasis).

Apparently, the Applicant now intends to appeal against the judgment, but the time prescribed by the Rules of this Court for lodging the appeal has long since lapsed, hence this application.

The application is supported by the affidavit of Mr. Wilbert Kahwa, the Counsel to the EAC, sworn on the 10th July 2012 in which he gave an explanation for the delay in filing the appeal within the time prescribed by the Rules. The thrust of his application is contained in paragraphs 5 to 10 of the supporting affidavit where he deponed as follows:

> " *5.THAT by the provisions of the Treaty for the Establishment of the East African Community, it is the Council of Ministers rather that the Applicant that is charged with, among other functions, making binding policy decisions for the harmonious functioning and development of the Community, its organs and institutions.*
>
> *6. THAT the subject matter of the Reference and the judgment of the First Instance Division were policy matters that at all material times necessitated broad consultations with the East African Community's relevant policy organs and principally the Council of Ministers.*

7.THAT since the delivery of the judgment the Applicant has been involved in consultations with both the Attorney General of the Republic of Uganda and the East African Community Council of Ministers on the outcome of the Reference and the best way forward in the interests of the integration process.

8. THAT owing to the above reasons the applicant was not able to file an appeal within the time prescribed by the Rules of Procedure.

9. THAT the Appeal relates to matters of great public importance as far as the development of the East African Community is concerned and the delay in pursuing the appeal does not infringe on public administration.

10. THAT this honourable Court has unfettered discretion in granting extension of time in this application."

The Respondent opposes the application for the reasons he has set out in his 23-paragraph affidavit in reply dated 15th August, 2012. We find the affidavit, with due respect to the Respondent, unnecessarily lengthy, argumentative and convoluted, but what we have deduced from it, as its main thrust is simply, that the Applicant has not adduced sufficient evidence to justify the grant of the order sought and that it should be denied.

Mr.Kaahwa submitted that this Court has unfettered discretion under Rule 4, to extend time for sufficient reasons. That the applicant has shown sufficient reason to warrant an extension of time to file an appeal and that the delay was occasioned by hardship, which arose

from the necessary consultations with the various policy-making organs of the EAC in a matter of great public importance. He also contended that the appeal has high chances of success and enumerated the following proposed grounds of the intended appeal:

5 (i) That the Court erred in law and in fact in holding the Applicant responsible for failure to discharge his obligations in regard to the conclusion of the Protocol for the extended jurisdiction of the Court;

(ii) That the Court erred in law and in fact in interpreting the
10 provisions of the Treaty in terms of extending the jurisdiction of the Court.

(iii) That the Court erred in law when it held that the meeting to oversee the conclusion of the Zero Draft Protocol were counterproductive; and

15 (iv) That the Court erred in law in awarding costs against the Applicant.

Mr. Kaahwa further argued that this is a court of justice, which is enjoined to administer substantial justice without undue regard to technicalities. Additionally, the Court has inherent powers under Rule 1
20 to make the necessary orders for the ends of justice and therefore, the application should be granted as prayed. In support of his submissions, Mr. Kaahwa relied on several authorities including ***EACJ Application No. 2 of 2010. Prof. Anyang' Nyongo & 10 Others vs The Attorney General of Kenya and EACJ Application No. 2 of 2010, The Attorney General of***
25 ***Kenya vs Prof. Anyang' Nyongo & 10(consolidated);Wasike v Swala [1984] KLR 591; Bonny Katatumba v Wahid Karim;*** **Barclays Bank Ltd v Master Karirwa Civil Application No. 52 of 2010 and Fakil Mohammed v Joseph Mugambi and Others Application No. 332 of 2004.**

Mr. Chris Bakiiza and Mr. Justin Semuyaba who represented the respondent did not agree. They submitted, on their part, that the Court's unfettered jurisdiction under Rule 4 arises only after sufficient reason for extension has been established by the Applicant. They argued that no sufficient reason had been disclosed by the Applicant in the instant application to justify the exercise of this Court's discretion in his favour. In their view, the affidavit of Mr. Kaahwa did not furnish the Court with any reason at all, why he had not taken the essential steps provided by the Rules to file his appeal. They singled out Rules 77, 78 and 79 and they argued that the delay of 11 months and 20 days was long and inordinate. They argued further that there was no evidence at all of the alleged hardship, or when, how and where the alleged consultations took place or what effect they had on the decision by the Applicant to appeal and how they impaired his ability to file an appeal in time.

It was also their contention that the Applicant has not complied with the decision of the Court in **Reference No. 1 of 2010** or the one by the Registrar in **Taxation Cause No. 1 of 2011** where the Applicant was ordered to pay USD 52.534.10 as the taxed costs of the Reference and yet there is no stay of proceedings or any application to set the Registrar's Order aside which the Applicant was obliged to file within 14 days of the taxation order as per Rule 114. That the Respondent has also applied to the High Court of Uganda in Kampala, for an order of mandamus force the Attorney General of Uganda to pay his share of the costs. In their view, therefore, granting this application would render the taxation order nugatory and an academic exercise, to the detriment of the Respondent.

They further contested the possibility of success of the appeal in the absence of a Memorandum of Appeal, which would have put the Respondent on notice of the grounds of the intended appeal and given him an opportunity to respond appropriately. They also wondered about the purpose of the appeal considering the evidence adduced by the Respondent, which in their view indicates that the relevant policy organs of the EAC are actually in the process of implementing the Court's decision.

In their view, the application was not only brought in bad faith, but it is frivolous, vexatious and an abuse of the Court process. They prayed for its dismissal with costs to the Respondent. They relied on the same authorities relied on by Mr. Kaahwa. They only added few others including the case of **Ondieki v Samuel Mageto Civil Appeal No. Nai. 248 of 2003** where the Court held that the rights to enjoy the fruits of a judgment is as hallowed as the right of appeal and the breach of either for no good reason would be prejudicial.

We have given anxious consideration to opposing arguments before us and we note that the applicable Rule to this application is Rule 4, which provides that:

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

Rule 4 has been the subject of interpretation in several applications in our jurisdiction and in this Court and the position is settled: This Court has discretion according to Rule 4 to extend time within which to file an appeal if sufficient reason is shown by the applicant. The Appellate Division made this crystal clear in **Appeal No. 1 of 2009, The Attorney General Of Kenya v Professor Anyang' Nyongo & 10 Others,** when the Court was dealing with an appeal from the Ruling of a single judge of this Division in **Application No. 4 of 2009,** between the same parties. The Court made the following solid observation at page 9 of the judgment**:**

" …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 the case with the standard of "any reason", which is prescribed under the corresponding rules in some member states (notably Kenya). Accordingly, the trial judge in exercising his discretion to extend time in this case, had to and did indeed; raised the bar appropriately to meet the rigorous standards of the Community Rule."

Any doubt concerning the above approach was buried by H.R.Nsekela, President of the EACJ, in ***EACJ Application No. 2 of 2010. Prof. Anyang'Nyongo & 10 Others vs The Attorney General of Kenya and EACJ Application No. 2 of 2010, The Attorney General of Kenya v Prof. Anyang' Nyongo & 10(consolidated)***, when he stated as follows:

"The Court appreciates the reference to the Court's "unfettered discretion" indicated in the Katatumba case

above. 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, the Court's discretion in an application to extend time is not unlimited…

We would like to state once again that this court's discretion to extend time under rule 4 only comes into existence after "sufficient reason" for extending time has been established and it is only then that the other considerations such as the absence of any prejudice and prospects or otherwise of success in the appeal can be considered." (We added the underlining for emphasis).

His Lordship was discussing the case of **Bonny Katatumba v Wahid Karim (supra),** where Mulenga JSC, of the Supreme Court of Uganda, as he then was, had issued the following guideline in dealing with applications under a similar Rule:

"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 from taking the essential step in time or other reasons why the intended appeal should be allowed to proceed though out of time. For example, an application that is brought promptly will be considered more sympathetically than one that is brought after unexplained inordinate delay. But even where the application is unduly delayed, the Court may grant the

extension if shutting out the appeal may appear to cause injustice."

The courts have also emphasized that the discretion under Rule 4, just like any other discretion, must be exercised judicially and not arbitrarily or capriciously, nor should it be exercised based on sentiment or sympathy. That the burden lies squarely on the party seeking the Court's discretion, to place before the Court the material upon which the discretion is to be exercised. Sufficient reason depends on the circumstances of each case. See also: ***Wasike v Swara [1984] KLR 591.***

Some of the factors that the courts take into consideration in deciding whether to grant an extension or not were enumerated by counsel for both parties, they include:

a) the length of delay;
b) the reason for delay;
c) the chances of the appeal succeeding if the application is granted;
d) the degree of prejudice to the respondent if the application is granted;
e)The effect of the delay on public administration.

As pointed out rightly by Mr. Kaahwa, the crucial issue in the instant application is whether the applicant has shown sufficient reason to justify the exercise of this Court's discretion in his favour or not. We shall examine the grounds of application one by one. In so doing, we shall apply the principles set out above as well.

1. Length of delay:

We delivered the judgment on the 30th June 2010. Under Rule 78, a person who desires to appeal against a judgment of this Division to the Appellate Division must lodge a written Notice of Appeal in this Division within 30 days from the date of the decision against which it is desired 5 to appeal. In the case before us, it is important to note that the Applicant has not lodged the requisite Notice of Appeal to date. It should have been lodged by the 30th July 2010.

Secondly, Counsel for the Applicant filed the instant application on the 10th July 2012.This means the delay is actually 11 months and 20 days 10 as calculated by Mr. Bakiiza. This is certainly a long delay and in the absence of any plausible explanation, can be unreasonable. Has the Applicant given a satisfactory explanation for the delay? Has he made out a case to justify the grant of the order sought? To answer these questions, we shall proceed to examine the reasons advanced by the 15 applicant as a basis for the delay and for the application as a whole.

2. Reasons for delay:

a) The first reason is hardship. Apart from pleading hardship as a one of the grounds of the application, Mr. Kaahwa did not explain the kind of hardship that the Applicant suffered. The supporting affidavit was silent 20 on the issue of hardship. We are, as Mr. Bakiiza put it, left to conjecture as to what actually happened. In the premises, we are unable to accept that explanation.

b) The second reason is consultation. This is undoubtedly the main reason advanced by Mr. Kaahwa for the delay in lodging an appeal in 25 time. We have once again subjected the supporting affidavit to further scrutiny and we do not find any proof of the alleged consultations, the form, the nature, the organs involved, the period it took and above all,

how it impaired the Applicant from lodging the Notice of Appeal in time, if he indeed intended to appeal.

The delay in the instant case is 11 months and 20 days and as seen above, the Applicant has not given any satisfactory explanation for the same. It is therefore inordinate. This cannot be compared to the situation for instance in the case of **Wasike v Khisa (supra)** referred to by Mr. Kaahwa**.** In that case, in a similar application, the applicant averred that the Clerk at the Registry had rejected the Record of Appeal. He annexed the notes from the registry clerk specifying the irregularities. He also stated that his lawyer was sick for some time, so he could not file the appeal in time and he annexed documents, which showed that the lawyer had consulted a Doctor on specific dates. He further stated that the lawyer was engaged in an election petition in Nyeri, and he annexed a copy of the record of proceedings. In that case, the Court found, rightly in our view, that the applicant had given a satisfactory explanation for the delay of 113 days.

Additionally, we wish to emphasise that under Rule 78, the appeal process begins by lodging of a Notice of Appeal in the Registry of the First Instance Division within 30 days from of the date of judgment. The clear objective is to put a Respondent on notice of an intended appeal. No such notice has been filed by the Applicant to date and indeed, as Mr. Semuyaba pointed out rightly, the Applicant should have actually prayed for extension of time to file a Notice of Appeal first, before an appeal. Moreover, the format for a Notice of Appeal is given in Form B in the Sixth Schedule to the Rules and the content is spelled out in Rule 78(3). This document which is just one page long, would not take any vigilant counsel or party to litigation 11 months of

consultation to lodge in Court. This application would for that reason alone fail.

3. The chances of the appeal succeeding

The third ground of the application is that the appeal stands a high
5 chance of success. Again, apart from the bare statement in paragraph 10 of the supporting affidavit, Counsel did not place before us any material which this Court could make use of to determine this assertion. In keeping with the practice in applications of this nature, the Applicant ought to firstly, have filed a Notice of Appeal, indicating
10 whether the appeal is against the whole or part of the judgment. This was not done as stated before.

In addition to that, the details of the grounds of the intended appeal would have been found in the Memorandum of Appeal. No such draft was annexed to the supporting affidavit. The first time we learnt of the
15 grounds of appeal was from Mr. Kaahwa's oral submissions in Court during the hearing of the application. The courts have held and it is indeed the practice, that in an application for extension of time to appeal, it is necessary for a draft Memorandum of appeal to be availed so that the Court is assisted in making an informed assessment of the
20 success of the appeal. It also gives the respondent adequate opportunity to prepare a response to the application instead of being ambushed with the grounds in court as the case was, in the instant application. See: **Mrs. Phoebe Ndunda and Others v Mwakini Ranch Company Ltd & another, Civil Application No. Nai 448 of 2001 CAK**
25 **(per Waki JA).**

Nevertheless, we had occasion to peruse the grounds of the intended appeal enumerated by Mr. Kaahwa in court and to consider the rival

submissions by Mr. Bakiiza and Mr Semuyaba. We wish to state that we are fully aware of the thin line we tread over this issue in order to steer clear from determining the grounds of the Appeal beforehand. All we can safely say at this stage is that, against the Applicant's grounds, the Respondent raised equally powerful submissions and we find that short of examination of the rival arguments on merit, the Applicant's assertion is presumptuous.

4. The effect of the delay on public administration

Another ground of the application was set out in paragraph 9 of the supporting affidavit where Mr.Kaahwa averred that the appeal relates to a matter of great public importance and the delay does not infringe on public administration. We find this statement bare as well. As Mr. Bakiiza rightly argued, the Applicant has not explained what constitutes great public importance or how the decision in Reference No. 1 of 2009 is likely affect the development of the EAC in particular or public administration generally. As a result, we agree with Mr. Bakiiza that the applicant has not discharged the burden of proving that there are matters of great public importance that merited the delay of nearly one full year in the filing of the appeal.

5. The unfettered discretion of the Court

Counsel for the Applicant averred in paragraph 10 of his affidavit that the court has unfettered discretion in granting extension of time. With due respect, this averment is incorrect. As stated earlier on in this Ruling, the Court's unfettered discretion arises only after sufficient reason has been established and not before. This is not the case in the instant application, in view of our findings above.

6. The inherent power of the Court

In his submissions before us, Mr. Kaahwa also referred to the inherent power of the Court under Rule 1 and the Court's duty to administer substantive justice without undue regard to technicalities.

5 We are very much alive to that position of the law, but we are equally fully aware and strongly believe that it is a tenet of public policy and a central pillar of our justice system that there should be finality in litigation. Justice demands that successful litigants should enjoy the fruits of their litigation; and that both parties should rest from the 10 trauma of unending litigation. In the **Attorney General of Kenya v Anyang' Nyongo & 10 Others Appeal No. 1 of 2009 page 25 and 26 ,** which was very similar to the instant application, the justices of the Appellate Division summed up the position in their concluding statement in the following words :

15 ***" Undoubtedly, the Appellant had a right to access the ultimate justice by way of appeal. But then, that right was not open-ended. It was circumscribed by the Rules of this Court in terms of the requirement of Rule 4 to file the notice within 7 days. The Appellant did not comply. The delay dragged on from one month, to two months and ultimately 20 to almost three months: in all, a delay of some 90 days. Such a delay was, by any measure, inordinate. It was inimical to the rights of the Respondents, to enjoy the fruits of the judgment of their long-standing litigation…***

Equity enschews indolence. Finally it was against the inimical principle 25 of finality to litigation…"

We respectfully adapt to the reasoning in the said case and apply it fully in the application before us.

We also wish to point out that the delay in that case was only 90 days and the Court held that it was inordinate and dismissed the application
5 with costs to the Respondents.

7. The degree of prejudice to the Respondent

Counsel for the Respondent submitted and the Respondent has also adduced evidence to show that subsequent to the delivery of the judgment, he filed an application before the Registrar of this Court for
10 taxation of the bill of costs. He annexed a copy of the Ruling by the Registrar in **Taxation Cause No. 1 of 2011** dated 20th January 2012 to the Respondent's affidavit in reply which shows that the bill was taxed and allowed at USD 105,068.20 to be shared equally between the Applicant and the Attorney General of Uganda. Apart from that,
15 Counsel for the Respondent annexed a copy of an application for mandamus to show that he has gone ahead and taken steps to enforce the judgment against the Attorney General of Uganda through an application for mandamus (**Misc. Appl. No. 93 of 2012- Hon Sitenda Sebalu v Attorney General and The Treasury Officer of Accounts)**
20 which is pending before the High Court in Kampala. There is indeed no order of stay of execution to prevent the Respondent from enforcing the judgment. No application to set aside the taxation order has been filed, so the order is intact. In the circumstances, we find merit in Mr. Bakiiza's submission that the said order will be rendered nugatory and
25 academic exercise, if this application is granted and so will the application pending before the High Court in Uganda.

As result, the Respondent will, in our view, be prejudiced

undoubtedly been put to substantial expenses in the process of enforcing the judgment which he would definitely have avoided if the Applicant had filed his appeal on time.

In conclusion and for the reasons we have given, we find that the Applicant has not made out a case to justify the exercise of the court's discretion in his favour. We accordingly, dismiss the application with costs to the Respondent.

Dated and delivered at Arusha, this …. day of ……, 2013.

JOHNSTON BUSINGYE

PRINCIPAL JUDGE

MARY STELLA ARACH AMOKO

DEPUTY PRINCIPAL JUDGE

JOHN MKWAWA

JUDGE

JEAN BOSCO BUTASI

JUDGE

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ISAAC LENAOLA

JUDGE

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