THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

(CORAM:MARY STELLA ARACH-AMOKO,DPJ)

APPLICATION NO 1 OF 2010

IN THE MATTER OF A CIVIL APPEAL NO 1 OF 2009

BETWEEN

1.THE ATTORNEYGENERAL OF KENYA ……. APPELLANT/APPLICANT

AND

1.PROF.PETER ANYANG' NYONGO
2.ABRAHAM KIBET CHEPTONGA
3.FIDELIS MUEKE NGULI
4.HON. JOSEPH KAMOTHO
5.MUMBI NGARO
6.GEORGE NYAMWEYA
7.HON. JOHN MUNYES
8.DR. PAUL SAOKE
9.HON. GILBER OCHIENG MBEO
10.YVONNE KHAMATI
11.HON.ROSE WAHU ……..... RESPONDENTS

DATE:5TH MARCH 2010

RULING OF THE COURT

This is an application by the Attorney General of Kenya (hereinafter referred to as the Applicant) brought by Notice of Motion under Rule 4 of the Rules of this Court for orders that:

1)This matter be certified urgent and be heard on priority basis.

2)The time for serving the Memorandum of Appeal and the Record of Appeal be extended to enable the applicants serve the Memorandum of Appeal and Record of Appeal out of time.

3)In the alternative, the Memorandum of Appeal and the Record of Appeal filed and served on the Respondents on the 13th of January 2010 be deemed as dully served.

The grounds of the application are that:

a)The delay in serving the Memorandum of Appeal and Record of Appeal was occasioned by hardship due to Christmas Vacation.

b)The delay in serving the Memorandum of Appeal and the Record of Appeal was due to the fact that the counsel conducting the matter for the Applicant did not receive information that the documents had been executed by the Registrar until the 6th of January 2010, two days after the expiry of the period for service.

The application is supported by two affidavits sworn by Mr. Anthony Oteng'o Ombwayo , Senior Principal Litigation Counsel , on the 12th January and the 19TH February 2010 respectively.

Ms Judith Sijeny, one of the Respondents' counsels swore an affidavit in reply on behalf of the Respondents on the 4th February 2010 opposing the application. On the same date, Counsel for the Respondents also filed and served a notice of objection notifying the Applicant of his intention to raise the following objections during the hearing of the application:

> **"1.That the appellant ought to have filed his application before the Court of Appellate Division and not before the Court of First Instance Division.**
> **2.The appellant's motion lacks merit and must fail with costs to the Respondent**."

On record is another affidavit sworn by one Boniface Namulu Ogoti, a Clerk of this court, on the 2nd February, 2010, on the instruction of the Registrar.

The background to the application is rarther long and checkered. It began with Reference No. 1 of 2006 , Proffessor Peter Anyang Nyongo And Others vs The Attorney General of Kenya And Others. This Court decided that Reference in favour of Professor Anyang Nyongo And Others and ordered the Attorney General to pay them inter alia, the taxed costs of the Reference. Consequently, Professor Anyang Nyongo And Others filed their bill of costs before the Registar vide Taxation Cause No. 6 of 2008. The Registrar

taxed it and allowed $ 2, 033,164.99 in his Ruling delivered on the 19th December 2008.

The Attorney General was dissatisfied with the learned Registrar's decision and wished to challenge it under Rule 114 which provides that:

> "***Any person who is dissatisfied with a decision of the taxing officer may within 14 days apply for any matter to be referred to a single judge of the Court whose decision shall be final".***

By the time the Attorney General took the decision to refer the matter before a single judge of the Court under the provisions of Rule 114 above, however, the 14 days period had long elapsed.

Consequently, on the 3rd April 2009, the Attorney General filed Application No. 4 of 2009, between the same parties, under Rule 4 of the Rules of Court for extension of time to file the said reference

That application was heard by Hon. Justice Busingye the Principal Judge of the Court and a judge of the First Instance Division who delivered his Ruling on the 16th October 2009, dismissing the application, again with costs to Professor Anyang' Nyongo And Others.

The Attorney General was once again dissatisfied with that Ruling and on the 29th October 2009, a Notice of Appeal was lodged on his behalf under Rule 78(2) in the Court's Registry indicating his intention to appeal against

the said decision. The Notice of Appeal was lodged within the 14 days prescribed by Rule 78(2) for lodging a Notice of Appeal.

On the 28th December 2009, Counsel for the Attorney General lodged in this Court's Registry in the Appellate Division a Memorandum of Appeal and a Record of Appeal. These documents were also lodged within the 60 days prescribed by Rule 86.The appeal was registered in the Appellate Division as Civil Appeal No. 1 of 2009.

The problem arose in service of the said documents on the Respondents. Rule 90 (1) provides that:

> ***"(1) The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies of them on each respondent who has complied with the requirements of Rule 80."***

Rule 80 requires every person on whom a notice of appeal has been served, to lodge in the appropriate registry and serve on the intended appellant, a full address for purposes of service within fourteen days after service of the notice of appeal. This is not in issue.

It is also not disputed that the Applicant's Counsel did not serve the memorandum and record of appeal on the Respondents within the seven days prescribed under Rule 90(1). According to learned counsel for the Applicant, Mr. Ombwayo, the documents were not served on the

Respondents until 13th January 2010. By then, the seven days prescribed by Rule 90(1) had long elapsed.

Mr Ombwayo apparently realized this irregularity, and has filed the instant application in a bid to rectify it by the orders sought herein.At the hearing of the application before me on the 17th February 2010, Mr. T. J. Kajwang, learned Counsel for the Respondents raised two issues for determination by court, namely:

1) ***Whether the First Instance Division has the jurisdiction to determine this application.***
2) ***Whether the applicant has met the conditions for extension of time.***

Submissions followed the same order.

Issue No. 1:Whether the First Instance Division has the jurisdiction to determine this application.

Mr. Kajwang contended that:
The Applicant should have filed the instant application in the Appellate Division and not in the First Instance Division. The confusion seems to have arisen from Rule 83 which is entitled "Application to First Division first", but Rule 83 borrows from Rule 82 because Rule 82 talks about "Applications for leave to appeal", and Rule 84 gives the form of application to the Court.

Rule 83 does not apply to applications for extension of time under Rule 4.The Rules are compartmentalized into different sections dealing with each

of the two Divisions of the Court. Rule 83 is in Part C which deals with Proceedings before the Appellate Division. It exists because there are instances in which there are applications which can be made to the First Instance Division because an appeal has not been instituted or filed. Once that is done, then there is a proper appeal before the Appellate Division which is the Court which has the jurisdiction and direct control over the appeal in both procedural and substantive law.

Rule 83 is titled "Applications to First Instance Division First. Whenever application may be made either to the Appellate Division or to the First Instance Division, it shall in the first instance be made to the First Instance Division".Rule 82, the rule immediately before this Rule is titled " ***Application for leave to appeal***". Rule 82(2) says ***"Where an appeal lies with the leave of the Appellate Division, application for leave shall be made in the manner prescribed in rules 83 and 84 within fourteen days of the decision against which it is desired to appeal or, where an application for leave has been made to the First Instance Division and refused, within fourteen days of that refusal."*** (Underlining is for emphasis)

Rule 84 gives the form of application to the Court, which is by Notice of Motion.

It is appears to be clear that Rule Rule 83 borrows from Rule 82 because Rule 82 talks of "Applications for leave to appeal", and it says that where there is that application, then Rules 83 an 84 come into play, and it makes sense because where an applicant wishes to appeal with the leave of court,

that application may be made to both the divisions. Rule 83 explains clearly that because it can be made to both divisions, it should be made first to the court of First Instance Division. That is the only sense in which Rule 83 exists in this procedure. It does not apply to applications under Rule 4 or to any other applications other than applications under Rule 82.

If an applicant served or filed a Notice of appeal out of time, and were to come to court for extension of time, it is probable that he could approach the Court of First Instance Division as a result of Rule 83 because an appeal has not yet been filed or instituted. But when you consider Rule 86 which is "***Institution of appeals"***, sub-section 1 says:

> ***(1) Subject to the provisions of Rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged—***
> ***"(a)a memorandum of appeal, in quintuplicate;***
> ***(b)the record of appeal, in quintuplicate;***
> ***(c) the prescribed fee; and***
> ***(d) security for the cost of appeal."***

Once this is done, then there is a proper appeal before the Appellate Court which is under the direct jurisdiction and control both in matters of substantive law and procedural law before the Appellate Court. An Applicant would not therefore confuse both courts there. Where an appeal has been properly filed, then he cannot come to the court of First Instance to determine procedural issues regarding an appeal which is substantively and properly filed.

Once the Attorney General did what he did under Rule 86, there was an appeal properly filed within time, and having done that, he evoked the jurisdiction of the Appellate Court Division and the Appellate Division therefore exercises a competent jurisdiction both on substantive law and on procedural law.

Rule 83 is not one of those Rules which deal with the First Instance Court, unless the applicant is coming to court for leave to appeal, or leave for extension of Notice of appeal before filing or instituting an appeal. Once an appeal has been instituted, the Court of First Instance is functus officio in respect of those issues and the Appellate Court takes over the jurisdiction to determine both the procedural issues and substantive issues. If Rule 83 were to be construed otherwise, it would conflict with Article 23 of the Treaty because after the amendments, Article 23 has created the two Divisions and in paragraph 3 it says that the First Instance Division shall have jurisdiction to hear and determine at the first instance, subject to a right of appeal to the Appellate Division under Article 35 (A), any matter before the Court in accordance with the Treaty. So there is a right of appeal and that right of appeal is exercised when an applicant has evoked Rule 86, and once there is an appeal properly instituted, it would conflict with the jurisdiction allocated by Article 23of the Appellate Division. It says "***An appeal from the judgment or any order of the First Instance Division of the Court shall lie to the appellate division on points of law , grounds of jurisdiction, or procedural irregularity".***

The decision that the applicant seeks to appeal from is from the Principal Judge and is on grounds of procedural irregularity. This application also touches on procedural irregularity. If one construed Rule 83 in a way that would allow the First Instant Division to exercise jurisdiction, it would conflict with Articles 23 and 35 (A) of the Treaty.

The only jurisdiction left for the Court of First Instance is found in Rule 59 (3), since the applicant is dissatisfied with the decision of a single judge of the First Instance Division in an application for extension of time. The matter would now have to be placed before a full bench of three judges of the First Instance Division, and not by an appeal to the Appellate Division.

The application is misconceived in that Mr. Ombwayo filed it in the First Instance Division. He should have filed it in the Appellate Division under Rule 4 and the Appellate Division would exercise a competent jurisdiction to extend time. The rules of court need to be properly adhered to and need to be properly exhausted for the applicant to get the remedy he seeks from the Court. The application ought to fail even for this reason alone.

Mr Ombwayo's response is that:

He filed the application in the proper Division of the Court. What is before court is an application within the appeal that was filed on 28th December 2009. The appeal was filed in the Appellate Division. Rule 4 provides that the court may for sufficient reason extend the time limited by the rules or by any decision of the court for doing any act authorized or required by these

rules, so any Division of the Court has the jurisdiction to extend time. One might file an appeal in the Appellate Division, but request the First Instance Division to extend time within which to file the appeal.

Rule 4 provides that you can file the application either in the First Instance Division or the Appellate Division, but under Rule 83, if you can file the application in both Divisions, then you should file the application in the First Instance Division first. This Court still has jurisdiction to entertain the application. Rules 4 and 83 ought to be read with the interpretation section Rule 2, where "Court" is defined as "***the East African Court of Justice established under the Treaty and includes any division of that Court and a single judge exercising any power vested in that Judge sitting alone***".

There is only one Court with two divisions under the Treaty, not two. So, whatever decision comes from the First Instance Division or the Appellate Division, those are decisions of the Court. Rule 83 provide that you first make your application to the First Instance Division. Therefore, Rule 83 should be read with Rule 4. Since Rule 4 provides that you can file the application in either Division of the Court, it means that you can file the application in either Division of the Court, but you commence your application in the First Instance Division.

Rule 59 is discretionary, one can choose to go by Rule 59 by filing a reference to full bench, but that does not take away the right of appeal under Rule 77. Under Rule 77, the applicant has two options, to refer the matter to a full bench or to appeal. The applicant has opted to appeal because under

Rule 77, one can appeal on points of law against the decision of a single Judge. Both rights are concurrent. You can refer the matter to a single Judge, a full bench or institute an appeal.

The fact that Part C deals with appeals does not pre-empt the application of Rule 4 because if you look at Part C section 18 which deals with the proceedings in the Appellate Division, there is no distinct provision for extension of time in the Appellate Division. The provisions for extension of time is in section 1 Part A which is under the General section and that part is applicable to all parts. Rule 4 is within this general section. Therefore, under Rule 4, each division can extend time.

Mr. Ombwayo compared the Rule to the provisions in the rules of Kenya, where the Court of Appeal can grant leave to appeal and also the High Court can grant you the same leave. He argued that he is not asking for any action to be done in the Appellate Division, he is only asking to serve a record of appeal, which is a step provided for by law. The objection should be therefore be overulled.

After careful consideration of the submissions by both learned counsel, and perusal of the Rules, this is my finding and decision:

This issue basically revolves around the interpretation of Rules 4 and 83 of the rules of this Court. The Vienna Convention On The Law Of Treaties sets out international rules of interpretation of treaties. Article 31(1) reads-

> ***"1.A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their full context and in light of its object and purpose."***

Article 32 provides that where, in interpreting a treaty, the application of Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable, recourse would be had to supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion.

This rule of interpretation has been adopted by this Court over the years in a number of references including for instance, ***Ref. No. 3 of 2007, The East African Law Society And Others versus The Attorney General of Kenya And Others*** at pages 23 to 24.These rules are applicable to the East African Court Of Justice Rules of Procedure,2008, by virtue of the fact that the said Rules are made by the Court in exercise of the powers conferred on the Court by Article 4 of the Treaty for the Establishment of the East African Community. It is therefore part and parcel of the Treaty.

It is common knowledge that initialy, the Court was one, but the Treaty was amended and two Divisions were created under Article 23, namely, the First Instance Division and the Appellate Division. Consequently, the Rules were revised by the Court in 2008 to conform to the Treaty amendments restructuring the Court. The rules are indeed divided or compartmentalized into four Parts namely, A, B, C and D, entitled ***"General Provisions***",

"***Institution of Proceedings In First Instance Division," "Proceedings* In The Appellate Division," and "Miscellaneous Provisions,"** respectively.

Part A has sections I to V entitled ***"General," "Registrar and Registry", "Documents", "Appearance", "Court Vacation and Holidays",*** respectively. Rule 4 is found section I of Part A entitled ***" General".*** Rule 4 provides that:

> ***"A Division of the Court may for sufficient reason extend the time limited by these Rules or by a decision of the Court 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, and any reference in these Rules to any such time shall be construed as a reference to such time so extended".***

From the definition of ***"Court***" under Rule 2 that is ***"…..the East African Court of Justice established under the Treaty and includes any division of that Court and a single Judge exercising any power vested in that Judge sitting alone",*** it would appear on the face of it that under Rule 4, extension can be granted by either division of the Court and applications can therefore be made in either division as submitted by Mr. Ombwayo.

Taking into account the general principles of interpretation enunciated in Article 31 of the Vienna Convention, however, it is my view that Rule 4 must be interpreted not only in accordance with its ordinary meaning, but also in its context and in light of its objective and purpose. Primarily, one

has to take into account the objective of the Treaty and of the Rules as a whole.

It is gainsaid that the primary objective and purpose of the Rules like any other Rules of procedure, is to regulate and to ensure the orderly conduct of proceedings before the Court as established by the Treaty. The object and purpose of the Amended Rules is to "***revise the rules of procedure to conform to the Treaty amendments restructuring the Court".***

Article 23 (2) and (3) of the Treaty reads:

> ***"2.The Court shall consist of a First Instance Division and an Appellate Division.***
>
> ***3. The First Instance Division shall have jurisdiction to hear and determine, at first instance, subject to a right of appeal to the Appellate Division under Article 35A, any matter before the Court in accordance with this Treaty."***

Article 35 A provides that:

> ***"An appeal from the judgment or order of the First Instance Division of the Court shall lie to the Appellate Division on-***
>
> ***(a)points of law***
>
> ***(b)grounds of lack of jurisdiction; or***
>
> ***(c)procedural irregularity".***

The interpretation by Mr. Ombwayo is that since Rule 4 provides that you can file the application for extension of time either in the First Instance

Division or the Appellate Division, then Rule 83 comes into play because it provides that you begin with the First Instance First.

With much due respect to Mr. Ombwayo, if this interpretation were to be accepted, it would lead to a result that is manifestly absurd and unreasonable and which is likely to lead to total confusion and uncertainty in the conduct of proceedings before the Court in that even after an appeal has been lodged and is lying before the Appellate Division as in the instant case, a single judge of the First Instance Division can extend time in the Appellate Division. This could not have been the object and purpose of Rule 4 let alone 83.

Further, and of equal importance is the fact that the decision the Applicant seeks to appeal from is of a single judge of the First Instance Division. As stated before, the appeal is lying before the Appellate Division. If Rules 4 and 83 were construed according to Mr. Ombwayo's interpretation, it will also conflict with the clear provisions of Articles 23 and 35A of the Treaty which created the two distinct and separate divisions of the Court and spelled out their jurisdictions. According to the two Articles the First Instance Division shall have the jurisdiction to hear and determine at first instance, subject to a right of appeal to the Appellate Division, any matter before the Court in accordance with the Treaty. Therefore, there is a right of appeal, and that right of appeal is exercised when an applicant evokes the provisions of Rule 86 by lodging a memorandum and record of appeal in the Appellate Division and the appeal is registered and given a number, as in the instant case. The First Instance Division does not have the jurisdiction after

this stage in the proceedings to entertain any application for extension of time because the matter is then squarely within the jurisdiction of the Appellate Division.

In any case, applications for extension of time in the First Instance Division are specifically catered for in Rule 59(2) (a) which provides that a single judge of the division can extend time as stated therein at the trial stage. The confusion by Counsel Ombwayo should not have therefore arisen in the first place in light of this provision.

Regarding Rule 83, that Rule is entitled ***"Applications to First Instance Division First"***. It is found in Part C of the Rules entitled "***Proceedings In The Appellate Division".*** This part contains Rules dealing with the Appellate Division. Rule 83 provides that:

> ***"Whenever an application can be made either to the Appeallate Division or to the First Instance Division it shall first be made to the First Instance Division".***

Rule 83 is allied to Rule 82, especially Rule 82(2). They concern applications for leave to appeal to the Appellate Division. This is obvious from the provisions of Rule 84 (2) which prescribes the form of application which reads:

> "***(2)A Notice of Motion shall be substantially in the Form A in the Sixth Schedule to these Rules and shall be signed by or on behalf of the applicant."***

Form A in the Sixth schedule shows that the application is to be made in the Appellate Division.

It therefore very clear that this Rule applies to proceedings in the Appellate Division only. It must, however, be read together with the preceding Rules in Part C including Rule 82 which makes provision for applications for leave to appeal.

It is also clear that all the applications provided for under Rule 83 are in part C and are supposed to be made before the institution of the appeal. Applications that can be entertained by the First Instance Divisions there under are mainly applications for leave to file an appeal, extension of time to file or to serve a notice of appeal, not applications for extension of time to serve a memorandum and record of appeal. Once the appeal has been lodged in the Appellate Division under Rule 86, the matter ceases to be within the jurisdiction of the First Instance Division. Any applications thereafter emanating from the instituted appeal becomes a matter for the jurisdiction of the Appellate Division. The First Instance Division ceases to have jurisdiction over them.

According to the Notice of motion, the Applicant lodged his appeal in the Appellate Division on the 28th December 2009.Mr. Ombwayo has also alluded to the said appeal in his submissions. All the Applicant now seeks is an extension of time to serve the appeal on the Respondents.

Although Rule 4 makes provision for such applications, it is my opinion that the time can only be extended by the Appellate Division where the appeal is lying, and not the First Instance Division.

For these reasons, I find merit in Mr. Kajwang's objection and I hold that neither a single judge of the First Instance Division nor the First Instance Division has the jurisdiction to entertain an application of this nature. The answer to this issue also determines the outcome of the entire application since a decision made without jurisdiction is in law a nullity. I therefore need not go into the second issue, which I believe is the preserve of the Appellate Division to which the Applicant should direct his application.

The application is accordingly struck out with costs to the Respondents.

Dated and delivered at Arusha this …… day of …….2010

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MARY STELLA ARACH-AMOKO

DEUTY PRINCIPAL JUDGE/JUSTICE OF THE COURT OF FIRST INSTANCE