IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

(Coram: Hon. Mr. Justice Johnston Busingye, PJ)

APPLICATION NO. 04 OF 2009

THE ATTORNEY-GENERAL OF THE REPUBLIC OF KENYA……APPLICANT

VERSUS

HON. PETER ANYANG'-NYONG'O AND TEN OTHERS ……RESPONDENTS

DATE: 16TH OCTOBER 2009

RULING OF THE COURT

The Applicant is the Attorney General of the Republic of Kenya. He is represented by Mr. Antony Oteng'o Ombwayo Senior Principal Litigation Counsel, Attorney General's Chambers, Kenya.

The Respondents are Hon. Peter Anyang – Nyong'o and ten others. They are represented by Mr. T. J. Kajwang and Ms Judith Sijeny of Kilonzo & Co. Advocates.

This is an application to enlarge time brought under Rule 4 of the Rules of this Court.

Background

The facts which gave rise to this application are that this Court, in its judgment of 30th March 2007 in Reference No.1 of 2006, ordered that the claimants (who are the respondents in the present application) "**shall have costs of the Reference to be borne by the 1st Respondent and to be taxed by the Registrar taking into account that a single applicant could have presented the reference**."

Subsequently the Bill of Costs was lodged and taxed. The Ruling on Taxation was delivered on the 19th December 2008 by the Registrar of this Court, as Taxing Officer by virtue of Rule 113 of the Rules of this Court.

On the 6th January 2009 the Attorney General of the Republic of Kenya, the applicant in this application, communicated the contents of the Taxation Ruling to the Clerk of the National Assembly of Kenya, advised the Clerk on the available options at law and sought instructions on the way forward.

On the dates of 12th and 22nd January 2009 the claimants, through Kilonzo and co. Advocates, sent written demands to the Attorney General and the Clerk to the National Assembly, respectively, seeking amicable settlement of the decretal sum or else recovery proceedings would issue.

On the 3rd April 2009 the applicant filed the present application to enlarge time so he could file, out of time, a Reference on Taxation under Rule 114 of the Rules of this Court. Rule 114 provides that a Reference on Taxation may be made within 14 days. This Reference is sought to be filed about 90 days after the Ruling on Taxation was delivered hence the application to extend time.

The application is supported by the affidavit of Senior Principal Litigation Counsel, Attorney General's Chambers Antony Oteng'o Ombwayo sworn on 13th March 2009.

The grounds on which the application is based, as appear in the Notice of Motion, as well as in Mr. Ombwayo's affidavit, may be summarized as follows:-

1) That the application could not be filed in time due to Christmas vacation that was being observed by the Staff of the East African Court of Justice and the Registry was not manned,
2) That the delay in filing the application was occasioned by hardship,
3) That consultations between the office of the Attorney General, the Clerk to the National Assembly of Kenya and the Treasury delayed the filing of the application,
4) That time be extended due to the public interest in the case,
5) That the Respondents are not persons of mean resources and therefore no prejudice will be occasioned to them if the extension is granted.
6) That the Reference is merited as the amount awarded by the Court is excessive and not founded on any legal basis hence the same ought to be reviewed.

Hearing in Court

At the hearing Mr. Ombwayo, for the Applicant, relying on two affidavits and oral arguments submitted that the two main grounds of this application are inability to file due to Christmas vacation and inability to file the application due to tragedies that befell his family necessitating his personal intervention at home. He also told the Court that there were consultations between the office of the Attorney General and that of the Clerk to the National Assembly and the Treasury over this matter which also delayed the filing of the Reference.

Canvassing the first of the grounds, learned Counsel submitted that it was within his knowledge that between 15th December and 5th January the entire staff of the East African Community go on Christmas vacation. Therefore, he submitted, part of the 14 days expired when the court was on vacation.

On the second ground Counsel submitted that "after the vacation" on 10th January 2009 his younger brother was attacked by thugs and he had to travel to his rural home to attend to his treatment as a facilitator. He told Court that "**in the same month of**

January" another brother of his was also attacked and again he had to personally intervene back at home. He told the Court that during that time he could not engage in the preparation of this application to be brought before the Court.

After his main grounds he raised a few more. On the consultations ground Counsel submitted that there were some consultations between the offices of the Attorney General and that of the Clerk to National Assembly over possible settlement of and who should pay the costs and this led to some delay in the filing of the Reference.

On the public interest ground, Counsel submitted that since the award made is to be paid from the consolidated fund, itself public money, the public in Kenya stands to lose colossal sums of money due to the inordinately high award and invited the Court to take into account the greater public interest as opposed to private interest.
He submitted further that the Kenyan public will suffer irreparably if the money is paid without the Government being able to challenge the taxing officer's award.

On prejudice, Counsel specifically argued that the respondents had not commenced Execution Proceedings as provided by Rule 74 of the Rules of the Court, order 28 rule 3 of the Civil Procedure Act, Chapter 21 Laws of Kenya and section 21 of the Government Proceedings Act Chapter 40 of the Laws of Kenya, and therefore, he argued, it would do them no harm if this extension is granted because it would not be interrupting any execution process.
On resources of the parties issue Counsel specifically referred to the 1st Claimant in Reference No. 1 of 2006, Prof. Anyang Nyong'o and, matching him with the "single Claimant" mentioned in the judgment, submitted that he is a Cabinet Minister who will not suffer any prejudice "as a *Cabinet Minister is not a man of mean resources*."

On the merit of the Reference Counsel submitted that the amount awarded of 1.3m$ was inordinately high, was not founded on any legal basis and did not reflect costs for one claimant especially on the instruction fees.

Counsel cited authorities like **City Council of *Nairobi vs Intercity Utility Services Ltd (Civil application No.35 of 2007), Samuel Ondieki vs Samuel Mageto Civil Application No.266 of 200, Wasike vs Khisa and Another Civil Appeal No. NAI 248 of 2003 and Wasike vs Swala Civil Application No. NAI, 150 of 1983*** to support his submissions that this Court has unfettered discretion to extend time, that he had put enough material before Court to enable it exercise this discretion judicially and not capriciously, that there is sufficient public interest in this case to warrant extension of time and enable review of the award and that the reference was merited.

Mr. T.J. Kajwang, for the Respondents, relying on the affidavit of Ms Sijeny and on oral arguments, opposed the application. He concurred, though, with Counsel for the Applicant on the matters the Court will consider in determining extension of time as including length of delay, explanation of the delay, arguability of the reference, merits of the reference, prejudice to the other party, public importance of the matter, general interest of justice, application made in good faith and sufficiency of the reasons advanced. He did not dispute the length of the delay. He invited the Court to examine whether the applicant had sufficiently, and in good faith, explained the delay in filing the application.

First he contended that Counsel was confusing Christmas day, official holidays, Court vacation and computation of time. He argued that Christmas day is an official holiday within the meaning of Article 2 of the Rules, that Court vacation is a vacation determined by the President and published in the Gazette as provided by Rule 19 and that under Rule 3 periods shall (b) include official holidays, Sundays and Saturdays and (c) shall not be suspended during Court vacations. He urged the Court to find that Counsel for the Applicant had not based his arguments on all or any of the above rules and therefore had not sufficiently explained his grounds of delay due to “Christmas vacation.”

On the family tragedies issue Counsel argued that Mr. Ombwayo had not put anything on record to help him prove the truth of what he was saying. He enumerated the many unanswered questions around this ground such as which is the vacation after which the

tragedies happened, on which dates did the attacks happen, when did Mr. Ombwayo travel to his rural home, when did he return to office, what was the seriousness of the attacks, and what was the evidence was on record to support what he was saying. Counsel contended that these are very legitimate questions without whose answers the Court was unable to determine whether there was sufficient or any explanation on this ground. Relying on ***Wasike V. Khisa & Another Civil Appeal No. NA1 248 of 2003*** Counsel told Court that it was the applicants duty to provide evidence to support the grounds of his application to enable the Court to believe the truth of what he was saying.

On the ground of consultations between the offices of the Attorney General, the Clerk to the National Assembly and the Treasury learned Counsel challenged the nature of the said consultations. He invited the Court to take notice that the Respondents were not party to these consultations and therefore could not be affected thereby. He also argued that since the Attorney General already knew the options and merely waited for the Clerk's instructions he could not see why it took up to April to file the application after the Clerk had allegedly responded in February 2009. He urged Court to find that there is no explanation at all on this ground as well.

On the ground of public interest around the application Mr. Kajwang contended that evidence of public interest should be brought before the Court and should not be an opinion of counsel. He told court that public interest cannot be on an amount of money awarded to a litigant but on a policy issue. He argued further that the Ruling on Taxation is a very private matter unless the Applicant can show the court any law which has shown that public policy in the community court is such that Partner States should not be made to pay certain amounts of money upon which the applicants would base to argue that a decision to award such money is against public policy.

On the ground of prejudice Counsel argued that there is a judgment by which the claimants acquired vested rights and it will be prejudicial if it is disturbed or re opened. He contended that these rights can only be disturbed by applying the rule of law and the

rule of law in the present case is sufficient reason which, in his opinion, the Applicant had failed to show.

On the ground that the Reference is merited as the award is excessive and not founded on any legal basis, Counsel argued that the Taxing Officer gave a decision on the matter well aware of the position taken by the Court that one claimant could have brought the Reference and that, therefore, the Applicant's argument lacked basis. Secondly he questioned the basis of the Applicant's assertion that the sums awarded were excessive and wondered what they were excessive against or what the yardstick of what is not excessive was since excessive was a relative term.

Consideration of the Grounds

Rule 4 of the Rules of this Court empowers this Court, for sufficient reason, to extend the time prescribed by these rules. **In Boney M. Katutumba – vs Waheed Karim, Civil Application No.27 of 2007** Justice Mulenga, JSC, (as he then was) held: **"…** ***under rule 5 of the Supreme Court Rules (the equivalent of rule 4 of the rules of this Court), 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 an 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."***

I respectfully agree with that holding and will apply it in handling the present application. I, however, also agree with the respondent that it must be discernible that the application is made in good faith and the reasons plausible and candid to pass the test

of sufficiency. ***See Mohamed & Muigai Advocates vs Kang'ethe & Company Advocates H.C.C.C. No.234 of 1999 (O.S).***

Counsel for the Applicant stated the two main grounds of his application and added a few others, as aforeshown, which I will proceed to examine.

1st Ground

In the first ground he said that inability to file in time was due to Christmas vacation. He stated, and I quote, "… ***it was within my knowledge that between the 15th December and 5th January 2009, the entire staff of the East African Community go on Christmas vacation… so part of the 14 days expired when Court was on vacation*.**"

Mr. T.J. Kajwang, for the Respondents, attacked this reason for insufficiency. He contended that the Applicant was confusing Christmas day, official holidays, Court vacation and computation of time. He invited the Court to find that this particular ground of delay was not sufficiently explained by the Applicant.

Having listened to arguments to Counsel, I concur with learned Counsel T.J. Kajwang. Christmas day is an official holiday within the provisions of Article 2 of the Rules of this Court. Court vacation is a vacation of the Court determined by the President of the Court and published in the Gazette vide Rule 19, and, under Rule 3, periods in (b) shall include official holidays, Sundays and Saturdays and in (c) shall not be suspended during Court vacations. No such thing as "Christmas vacation" exists under the Rules of this Court.

In my view the applicant had a duty to sufficiently explain what he meant. A blanket statement that it was within his knowledge that the entire EAC Staff go on Christmas vacation between 15th December and 5th January, aware that it means different things to different institutions, without any reference to the above said rules or to how he could

have acquired, and decided to rely on, this knowledge or, at least, to which officer of the court could have "misled" him, amounts, in my view, to a fairy tale.

If the Hon. Attorney General, or Mr. Ombwayo in particular had, indeed, desired to file this reference in time surely they had, at their disposal, all professional and material resources to find out what the rules provide. Instead they chose to rely on generalized knowledge. On deeper inquiry the Court finds that the first and only communication in this respect, availed to Court, to the Clerk of the National Assembly was written by Mr. Ombwayo and was written on the 6th January 2009, a day late. In its "options available" the letter suggests that the Registrar's ruling should be referred to a single Judge in accordance with Rule 78 (current Rule 114). The Court does not seem to see any urgency in the words used or in the tone of the letter if indeed the Attorney General thought that time was of the essence.

The Court itself asked Mr. Ombwayo to clarify these vacation issues for the record. First he said he did not know what the Rules provide. Immediately thereafter he said he was not aware if the President had declared a vacation. Then he said he believed the Court went on vacation just like the other staff of the EAC. When the Court pressed him about this belief he said it was a practice even in the past. In contradiction he said that he had been able to file documents during the 2007/2008 Christmas vacation. When it was suggested to him that it was possible, therefore, to receive documents at that time he said that, then, an officer was called from Kisii but that since this time it was a vacation he could not come back to file the reference.

I found his answers so incoherent that to believe them would be to assume the very high risk of piecing them together and guessing which fits where. I preferred not to. I formed the opinion that this ground was being cooked up.

2nd Ground

Counsel for the Applicant's second ground was hardship. He told Court that his brothers at home were attacked one after another whereupon he intervened thereby losing valuable time.

Mr. T.J. Kajwang for the Respondents challenged the sufficiency of the explanation for this ground because of the many unanswered questions surrounding it as shown above.

I am of the view that the applicant failed to sufficiently explain this ground.

Mr. Ombwayo was challenged to clarify the "vacation", referred to in his submissions, after which his family tragedies happened. He did not. He was challenged to mention the respective dates on which his brothers were attacked. He managed one, the 10th January 2009, which he could not prove. He was challenged to indicate when he travelled to his rural home and when he returned. He did not. He was challenged to produce medical, police or any evidence of these attacks. He only said that all available documents had been sent to the Teachers Service Commission as his brothers were teachers and the Commission needed the documents to process compensation. He did not tell the Court whether he attempted to obtain these documents and failed or whether he thought they were not required in evidence. He was asked why he thought the Court could believe his story without evidence and replied that as an officer of the Court he could not be lying. He was told that this is a Court of Law and the issue was one of proof and not one of who was lying and who was not. He answered that he had had no opportunity to obtain proof. When he was asked whether the Attorney General's Chambers got incapacitated because he was away he said he had gone upcountry and mistakenly did not hand over the file otherwise the office was operational.

The Attorney General was served with Ms Sijengy's replying affidavit, in which the sufficiency of Mr. Ombwayo's explanation of his family tragedies was questioned, on or around 20th May 2009. He filed nothing in evidence. He personally sought and was granted leave to file a further affidavit. He did file one on 11th June 2009. He did not explain any of these issues.

Upon careful examination of the of arguments on this ground I could not tell, with certainty, whether the unfortunate tragedies actually happened, whether, if they happened, Mr. Ombwayo went home to assist or whether nothing at all happened to Stanley and Wyclif Ombwayo and the ground was a mere gamble. With due respect, I found Mr. Ombwayo's honesty, candour and effort in explaining his family tragedy far

less than I would require to admit his story in Court. Clearly this was not the conduct of counsel who wanted to move the court to appreciate the personal tragedy that befell him, the resultant honest mistake he committed and the delay occasioned.
(***see Mohamed & Muigai Advocates (supra*)**.

Even the mistake he claimed to admit of going upcountry without handing over the file, needed to be proved, in the first place, before it could be admitted as mistake of Counsel. I am alive to established case law that mistake of Counsel should not be visited on his client. **(*see Zam Nakumansi vs Suleman Lule Civil Application No. 02 of 1999 (SCU*).** Mr. Ombwayo did not prove to the Court that he went to Mumias or to Kakamega on any date between 19th December 2008 and 3rd April 2009. The veracity of his story was challenged way back in May 2009 in Ms Sijeny's affidavit. He had all the time until 21st August 2009 to prove it. He knew it was his burden as Mr Ombwayo as well as Counsel for the applicant. There is clear authority that discretion is exercisable on the basis of evidence and sound legal principle; and that the duty of placing the necessary evidence before the Court to enable it exercise its discretion is squarely on the applicant; *See Bogetutu Farmers vs Mohamed Hassan Yonis H.C.C.C No. 154 of 1992*.**) In my view the applicant did not discharge his duty**.

3rd Ground:

The Applicant's third ground was that there were consultations between the Attorney General's Office, that of the Clerk to the National Assembly and the Treasury which delayed the filing of the application. Counsel for the Respondents challenged this ground as shown above.

The Court examined the arguments.
Counsel for the Applicant was asked to clarity the nature of these consultations, if they ever took place, and why they should have occasioned a delay. *His response was that* ***"… some of the consultations were, in terms of meetings and, of course, there was also a possibility of settling the matter. Such consultations are the ones that delayed the filing of the reference. If there is that possibility of settling the matter***

and also analyzing the opinion that I had presented to them, we could not file the reference, until maybe a decision is made by the Office of the Attorney General and the Clerk to the National Assembly on the way forward. There is no correspondence annexed but some of the consultations were in terms of meetings…" When he was pressed further about the nature of consultations he responded that there was also some confusion between the Attorney General and the Clerk to the National Assembly, over who should pay. When he was asked whether the Clerk to the National Assembly responded to the Attorney General's letter of 6th January 2009, and whether that response was in writing, he told the Court that the Clerk replied in writing, sometime in February 2009, that he, in fact, instructed the Attorney General to proceed and file a reference pursuant to Rule 114 and that, although he had not found that letter to annex it to his affidavit, it was within his knowledge that it existed and it preferred the option of filing a reference.

Upon consideration of the arguments of Counsel I found the evidence of consultations placed before the Court by Counsel, very insufficient. Counsel merely stated that there were consultations and that he was willing to be cross-examined on his statement. With due respect this was not the burden placed on him. The burden was to place evidence before the Court and not to assure the Court that the evidence existed somewhere else. In the unlikely event that the consultations took place, the Court was not told why they impaired the capacity of the Attorney General's Office to file the Reference. Even a possible settlement, to which the Respondents were not party, would not have impaired the Attorney General from filing the Reference, just in case.

The only correspondence on record is of 6th January 2009. This was after the 14 days. It was late already. The alleged consultations took place, if at all, after that date. In my view no matter how fast agreement would be reached on the way forward, it seems not to have been the intention of both of these offices that this application is filed in time.

The Court was told by Mr. Ombwayo that the Attorney General waited for the Clerk's reply before filing the application. But apart from stating, from the bar, that the Clerk replied, no evidence was placed before Court. In other words it was not proved whether the Clerk, up to know, ever responded. Whether it is true, as Counsel told Court, that the Clerk replied and instructed the Attorney General to proceed and file a reference under Rule 114, no evidence was placed before Court. Whether it is true that the letter could not be located in the Attorney General's Chambers, no evidence was brought. Assuming it is true the Attorney General received the missing letter, "sometime in February 2009", as Mr. Ombwayo told Court, still the Court was not told what happened all the way to 3rd April 2009. Counsel for the respondents sought an answer as to why they were not part of these consultations or why they should be affected thereby in the end. Mr. Ombwayo had no answer for this as well.

In Paul Njoroge vs The Attorney General and others, HC Misc case no.90 of 2004 *Justice W.S. Deverell,* faced with inability due to negotiations, such as the inability due to consultations in the present case had this to say; ***"… I consider that it was a risky strategy for the applicants to delay filing the record of appeal on the strength of verbal negotiations, which do not appear to have been reduced to writing at any material stage. It would have been prudent to have complied with the requirements laid down in the rules while the alleged negotiations were ongoing and to have confirmed their existence in writing at some stage. As it is I am not in position in which I can make any meaningful decision as to who is telling the truth as to the existence of the alleged negotiations. The burden of proving their existence is upon the applicants who now wish to rely upon them and I am of the view that this burden has not been discharged."***

This authority summarizes my opinion on this ground. I am not in position in which I can ascertain whether, in truth, these consultations took place and, if they took place, why the Respondents were not involved, and whether the objective was to find a way forward over this matter or to frustrate it. The burden of proving that they took place, what the objective was, and with what the result was upon the Applicant who now wish to rely on them. **In my opinion this burden was not discharged. The Respondents**

cannot be affected adversely by unevidenced consultations which they knew nothing about.

Opinion of the Court on explanation for the delay

I am aware of, and respectfully agree with, the holdings of Githinji JA in *Wasike vs Khisa & Another (Civil Application NAI 241 of 2003) that* ***"… it would be a fetter on the wide discretion of the Court to 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…"*** Let me cast a comparative glance at the *Wasike* explanation for delay and the instant one. In ***Wasike*** the applicant said he was sick for sometime and annexed documents, complete with individual dates, of consultation and names of the Doctor he consulted. This persuaded the Court that he was actually sick and unable. He also told Court that he was engaged in a High Court Election Petition at Nyeri and annexed the Court proceedings showing which petition it was and the various days it was heard. Understandably the Court was satisfied with the truth of the applicant's story. Requiring a minute examination of each act beyond this would be to ask too much.

In the instant case Counsel for the Applicant claimed inability due to Christmas vacation, due to family tragedy and due to consultations in the concerned institutions of Government. The Court did not require him to prove every minute detail of these stories. All that the Court required of him was to place before it the bare minimum to enable it form an opinion that what he was saying was probably true. He failed on each. **I find the delay, therefore, inordinate, unreasonable and wanton. And I find, further, the explanations insufficient, less than candid and, in places, highly improbable.**

My considered view is that the Attorney General's Chambers adopted a casual and "not urgent" approach in the way they handled the Ruling on Taxation and should blame nobody but themselves for the delay that resulted.

Upon the above findings alone, this application should fail. But in keeping with the last holding in **Boney M. Katutumba V. waheed Karim (Supra)**, I will consider the other grounds to assure myself that shutting out the Reference **will not appear to cause injustice**.

4th Ground:

Counsel for the Applicant's argued that there is sufficient public interest in this application to warrant enlargement of time. He told court that the Kenyan public stands to lose if such a high award is paid out of the Government Consolidated Fund without Government having an opportunity to have it reviewed. It was challenged.

Upon consideration of the arguments I think this is a case of misplacement of public interest. I think that the Kenyan public, including the respondents, should be interested in scrutinizing issues leading to the award and not on the quantum of award itself. Counsel's argument suggests that if the award is reduced then the Kenyan public interest is diminished. Would the respondents, also members of the Kenyan public, support this view? I think not. Counsel could have done well perhaps to define the public interest he was talking about. He did not. The Kenyan public would for example be interested, in my view, on issues like why and how they ended up in this litigation, whether it was justifiable and unavoidable, why, then, was the Reference on Taxation not filed in time and the like. And it is obvious that the Court has nothing to do with such issues. The award, whatever the amount, is a mere consequence and the Court's hands in deciding awards cannot be tied to or pegged on an unknown quantity of public interest unless some law says so and defines the Court's minimum and maximum limits. I was not shown any. In the ***Nairobi City Council case (supra)*** Court held that the public had a right to scrutinize the processing and awarding of tenders by the City Council. That was a public interest issue, not the money that was paid to the winners of

tenders, which would be a mere consequence. **I find, therefore, the issue of public interest, in the sense it was argued before me, quite misplaced.**

5th Ground:

On the resources of the parties Counsel singled out the 1st claimant in the Reference Prof. Peter Anyang Nyong'o to correspond with the "*single claimant*" who "*could have brought the reference*" (***see Ref. No.1 of 2006***), and told Court that he is a member of Cabinet who would suffer no prejudice if extension is granted because, ***"…a Cabinet Minister is not a man of mean resources."*** Nothing in the way of evidence was placed before me in support of this assertion. It was made from the bar. In my view this is a personal view Mr. Ombwayo holds. I was not told how and why he singled out the 1st Claimant from the other respondents and made him the "single claimant" in Reference No.1 of 2006. Secondly, unless Mr. Ombwayo's argument was that to be a Cabinet Minister in the Republic of Kenya is synonymous with being a person of no mean resources, he did not show me, and I doubt, whether he is so privy to Honorable Anyang Nyong'o's resource situation and that he can even make an informed opinion on how short or long the he can wait without any prejudice. I am not in a position to form any opinion either way.

Counsel further told Court that the respondents would suffer no prejudice if extension is granted because they have not commenced the process of execution against the Government as envisaged under Rule 74 of the Rules of this Court, Rule 3 of order 28 of the Civil Procedure Act (Chapter 21 Laws of Kenya) and Section 21 of the Government Proceedings Act (Chapter 40 Laws of Kenya), that as there is still a lengthy procedure for the Government to pay and, therefore, that the Reference would be heard and determined quickly without occasioning prejudice from such delay. First of all my reading of Section 21 of the Government Proceedings Act does not suggest a lengthy delay in executing against Government. I was not told why it should be lengthy. Secondly, while it is true that the respondents have not commenced execution proceedings to date, I would not hold that they would suffer no prejudice if extension is granted. The time the Court should seek accountability for is between the 22nd January

and 3rd April 2009. The respondents cannot, in my view, be held accountable for all the time between those dates. The 22nd of January 2009 is the date of the Respondents' last formal correspondence to the Hon. Speaker of the National Assembly, copied to the Hon. Attorney General, offering amicable settlement "devoid of any acrimony". They must have waited for some response for some time. Ms Judith Sijeny's affidavit, at paragraph 19, avers that there was no response to explain any handicap or predicament or any action taken. The 3rd of April 2009 is the date this application was filed in this Court and copied to the Respondents. Commencement of execution proceedings then would be legally pointless.

I disallow this ground on three accounts; first that the respondents did not sit on their rights and waste valuable time. Second, that since, as Counsel for the Applicant told Court, execution against the government "*is a very lengthy process*", the respondents should be afforded an opportunity to embark on it sooner rather than later *and third, I associate myself with P N Waki (JA) in Samuel Ondieki V Samwel Mageto (2006) KLR "… The right to enjoy the fruits of judgment is as hallowed as the right of appeal and a breach of either for no good reason would be prejudicial".*

6th Ground:

Counsel for the Applicant told court that the application is merited for three reasons. First that the Taxing Officer did not take into consideration the order of court that in taxing the bill he had to consider that the one claimant could have brought the Reference, second, that it was not founded on any legal basis and, third, that the award of 1.3m$, as instruction fees, was inordinately high and excessive and not commensurate with the amount of work done and the complexity of the dispute. It was challenged.

I am aware, as I examine this ground, of the very thin line I tread in order avoid examining the Reference on Taxation itself. Therefore my opinion must be based on

outwardly visible signs of merit and not the deep and invisible signs for which a microscope might be required.

Several authorities (for example (***Mwangi v. Kenya Airways [2003] KL P.56, Leo Sila Mutiso v. Rose Hellen Wangari Mwangi Civil Application No. NAI 225 of 1997)*** concur that in these applications merit, or chance of success if the application is granted, is merely stated as something for a "possible" consideration, not that it must be considered. The ***Wa'njuguna case* (*Misc Civil Application 621 of 2000*)** the applicant relied on is very instructive in dealing with a Ruling on Taxation itself not application to extend time to have a ruling on Taxation challenged as in the present case. I would therefore resist the temptation to rely on it for to do so would be to cross the thin line.

On the first reason, a quick glance at the Ruling on Taxation shows that the taxing officer referred himself to the particular order which Counsel for the applicant says he did not consider. On the second, Counsel did not show me that the Taxing Officer relied on a wrong or non-existent law or fact, or that he was plainly wrong, in arriving at the award of 1.3m$. On the third, Counsel did not show me, for example, that the taxing officer taxed a non-taxable item or that he included an item that had not been included in the bill or that he relied on a wrong calculation formula to arrive at the award.
He himself agreed that the matter was complex but his argument was that it was not complex enough to warrant an award of 1.3m$. He did not show me any fixed rule as to minimum or maximum levels of awards contrary to which the Taxing Officer made the instant award. **With due respect, I do not think that the Reference can be merited on such unevidenced opinions of the Applicant.**

I associate myself with the observation of the Privy Council in *Ratman vs Cumara Samy (1965) I WLR 10 at Page 12,* **also cited with approval in Ambunda vs Tanzania Harbours Authority (*Civ. App. No. 164 of 2005), TZCA 48 (4 April 2006*),** that **"The rules of Court must be obeyed, and in order to justify a Court in extending the time during which some step in procedure requires to be taken, there must be some material upon which the Court can exercise its discretion. If the law were**

otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules, which is to provide a time table for the conduct of litigation".

I would only add that if that "party in breach" is a Partner State within the East African Community, it would not only obey the rules but it would have to be seen, by all, to spare no effort to obey the rules if the Rule of Law in the Community is to achieve full and uniform respect.

In the instant case, I find no material upon which I can exercise my discretion in favour of the Applicant. He has failed to satisfactorily and candidly explain the delay and other grounds to warrant extension of time. The application is lacking in merit and the scales of justice tilt towards dismissing it. I accordingly dismiss the same with costs to the Respondent.

Dated at Arusha this ---------- day of ----------2009

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JOHNSTON BUSINGYE

PRINCIPAL JUDGE