EAST AFRICAN COMMUNITY

IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

APPELLATE DIVISION

(Coram: H. R. Nsekela P, P. K. Tunoi VP, E.R. Kayitesi J.A, L. Nzosaba J.A, J.M. Ogoola J.A)

APPLICATION NO. 1 OF 2010

Prof. Anyang' Nyong'o & 10 Others ..... Applicants

Versus

Attorney General of Kenya ..... Respondent

AND

APPLICATION NO. 2 OF 2010

Attorney General of Kenya ..... Applicant

Versus

Prof. Peter Anyang' Nyong'o & 10 Others ..... Respondents

A.O. Ombwayo, Esq. ..... appearing for the Attorney
Senior Principal Litigation Counsel General of Kenya

T. J. Kajwang' Esq & Judy Sijeny ..... appearing for Prof. Anyang' Nyong'o and 10 Others

JUDGMENT

The judgment of the Court was delivered by Harold R. Nsekela, P.

On the 19.3.2010 the Attorney General of Kenya (the Applicant) in Application No. 2 of 2010, moved this Court under rule 4 of the East African Court of Justice Rules of Procedure, 2008 (the Court Rules) for an extension of time to serve a memorandum and record of appeal on Professor Anyang' Nyong'o and 10 Others (the Respondents). The application was supported by an affidavit of Antony Oteng'o Ombwayo, learned counsel. The Respondents had on the 5.3.2010 filed Application No. 1 of 2010 between the same parties under Rules 81, 84 and 90 of the Court Rules seeking, among other Orders –

> "*1. That the appeal in EACJ number 1 of 2009 be and is hereby struck out;"*

The background to these two applications, goes back to Taxation Cause No. 6 of 2008, in which the Respondents' bill of costs was taxed by the Registrar at US $2,033,164.99. The Applicant was dissatisfied with the outcome and so on the 3.4.2009 filed Reference No. 4 of 2009 under rule 114 of the Court Rules before a single Judge seeking extension of time. Apparently, it dawned upon the Applicant that the Reference had been filed out of time and so filed an application for extension of time to file Reference No. 4 of 2009. The First Instance Division (Busingye, P.J) dismissed the application with costs on the 16.10.2009.

The Applicant was dissatisfied with this decision. On the 29.10.2009, he filed a Notice of Appeal. On the 28.12.2009, he filed a memorandum and record of appeal in terms of rule 86 of the Court Rules. However,he did not comply with rule 90 (1)of the Court Rules. He purported to serve the documents upon the Respondents on the 13.1.2010, after the expiry of the prescribed seven (7) days, in terms of rule 90 (1). It is against this background that we had the

two applications before us. Since the two applications are closely interrelated, the parties agreed during a scheduling conference to orally submit on Application No. 2 of 2010, followed by Application No. 1 of 2010. The Court also admitted Mr. Ombwayo's corrected affidavit in Application No. 1 of 2010.

The thrust of Mr. Ombwayo's application is captured in paragraphs 10 – 20 of his supporting affidavit which provide as follows –

> *"10. That I personally travelled to Arusha the 28th day of December, 2009 and presented the Memorandum of Appeal and Record of Appeal to the Registry Clerk Mr. Boniface Ogoti who received the documents and stamped the same ...*
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> *11. That upon receiving the documents Mr. Boniface Ogoti informed me that he would communicate to me immediately the Registrar signed the documents as the Registrar was not available at the time of presentation of the documents to the Registry.*
>
> *12. That on the 6th of January, 2009 I received a call from Mr. Boniface Ogoti informing me that the documents were ready for collection. However, he informed me that I was already out of time for service.*
>
> *13. That on the 7th of January, 2009, I sent Senior Clerk of the Civil Litigation Department Mr. Peter Mbuvi to collect the documents from the East African Court of Justice Registry at Arusha.*
>
> *14. That on the 11th of January, 2010 Mr. Peter Mbuvi, came to my office at 8.00 a.m with the documents and informed me that he had collected the same on the 8th January, 2010 which information I verily believed to be true.*

15. *That I have instructed Mr. Peter Mbuvi to promptly serve the documents upon the firm of M/S Kilonzo & Co. Advocates which he did on the 13th of January, 2010.*
16. *That after service, I promptly filed an application in the East African Court of Justice First Instance Division for extension of time. The application was dismissed on the 5th of March, 2010.*
17. *That the reason for the delay in serving the record of appeal within time was hardship occassioned by the absence of the Registrar at the time of lodging the appeal and the undertaking by Mr. Boniface Ogoti that he would notify me immediately the Registrar signed the documents.*
18. *That this hardship is demonstrated by the fact that I was not immediately issued with a receipt but a handwritten acknowldgement and promised to be issued a receipt later ...*
19. *That on the 11th of January 2010 I received a receipt in respect of filing fees from the Registry issued on 28th December, 2009.*
20. *That the delay in serving the documents was caused by hardship in collecting the documents due to the fact that I was not informed promptly as agreed to collect the documents upon signing of the documents by the Registrar."*

In elaboration, Mr. Ombwayo submitted that the delay in serving the documents was occassioned by the delay of the Registar to sign the documents and that the Registry Clerk did not promptly inform him that the documents were ready for collection as promised. Mr. Kajwang, learned counsel for the Respondents, strongly disputed the allegation that the Registrar was absent from office on the 28.12.2009 since he signed the memorandum of appeal on that same day. As regards the purported undertaking made by the Registry Clerk to notify Mr. Ombwayo, learned

counsel contended that the Registry Clerk had no legal obligation to do so. The learned counsel added that the Court was enjoined to exercise its judicial discretion in terms of rule 4 of the EACJ Court Rules and not rule 4 of the amended Kenya Court of Appeal Rules. He was of the firm view that the Applicant did not advance sufficient reasons to warrant the Court to exercise its judicial discretion to extend time.

To bolster his case, Mr. Ombwayo referred the Court to about twenty-six decisions from both the High Court and the Court of Appeal of Kenya. It is not out of disrespect that we shall refer to one case only, namely **Wasike Vs Khisa & Another [2004] IKLR 197**. In this case, the Applicant moved the Court of Appeal, inter alia, under rule 4 of the Court of Appeal Rules for an extension of time for lodging a memorandum and record of appeal. In the course of his ruling, a single Judge of the Court (Githinji, J.A) had this to say at page 199 –

> "*By rule 4 of the Court of Appeal Rules, the Court has discretion, inter alia, to extend time limited by any decision of the Court for doing any act authorised or required by the rules whether before or after the doing of the act on such terms as the Court thinks just. This discretion is unfettered, but must be exercised judicially. In exercising its discretion the Court is guided by such factors as the merits or otherwise of the intended appeal, whether the extension will cause undue prejudice to the respondent and the length of delay ...*

And he continued at page 201 –

> *The delay that the applicant in this case is accused of must be considered broadly and realistically taking all the circumstances of this case into account. A minute examination of every single act of delay in taking any appropriate step and a strict requirement that every such act of delay be satisfactorily explained before the applicant can be given the orders sought,*

the approach that the learned counsel for the respondent has in fact adopted in the application, would fetter the wide discretion of the Court to extend time under rule 4. Such a rigid approach to the application of the rule would herald the return to the bygone era before the amendment of rule 4 when a "sufficient reason" had to be shown before the Court could extend time".

Now, rule 4 of the EACJ Court Rules provides as follows –

> *"4. A Division of the Court may for sufficient reason extend the time limited by these Rules or by any decision of the Court 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*."

We have considered the application for extension of time to serve the memorandum and record of appeal; the affidavit sworn in support of it by Mr. Anthony Oteng Ombwayo; the memorandum of appeal filed on the 28.12.2009; the Respondents' grounds of objection filed on the 8.4.2010; and the replying affidavit sworn by Judith Sijeny together with the eloquent submissions made by the two learned counsel.

Unlike the position now obtaining in Kenya, rule 4 of the EACJ can trace its origin to rule 9 of the then East African Court of Appeal Rules; rule 5 of the Judicature (Court of Appeal) Rules, and Judicature (Supreme Court) Rules, Cap 13, Laws of Uganda; and the then rule 8 of the Tanzanian Court of Appeal Rules, 1979. The EACJ rule clearly states that any Division of the Court has discretionary powers to extend time for the doing of any act in terms of that rule if sufficient reason is shown. As correctly submitted by Mr. Kajwang, the Court's discretion is not unlimited. The crucial issue upon which the

determination of this application depends, is whether or not the Applicant has shown sufficient reason. In the case of **Abdul Aziz Ngoma Vs Mungai Mathayo & Another [1976-80] IKLR 75**, the appellant applied to the then Court of Appeal for East Africa for an extension of time in which to serve the memorandum and record of appeal. The respondents applied to have the appeal struck off. The Court at page 77 stated thus –

> *"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."*

The above case was decided before the amendment of rule 4 of Kenya. It reflects, however, the position of Kenya's old rule 4 which is identical with rule 4 of EACJ Rules now under consideration. The position in Uganda is not different. In **Boney M Katatumba vs Waheed Karim, Civil Application No. 27 of 2007 (unreported),** Mulenga JSC (as he then was) while construing rule 5 of the Uganda Supreme Court Rules stated –

> "*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. 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."

This 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.

Apparently, the memorandum and record of appeal in the instant application were presented to the Registry Clerk, on the 28.12.2009. The Applicant was given an unofficial receipt by the Clerk acknowledging receipt and payment of Court fees. We certainly do not approve of this informality. Official receipts for all Court documents must be issued at the time of receipt in order to avoid, inter alia, audit queries and the difficulty of apportioning blame. In the instant case, the Applicant has used this very fact partly to explain what he termed "hardship" at the Court at that time. There was an allegation that the Clerk undertook to inform Mr. Ombwayo once the Registrar had signed the documents. The Clerk denied that he had made any such undertaking. There was also an allegation that the documents were not signed on the 28.12.2009 because the Registrar was not present. On our part, on these circumstances we are inclined to the view that Court personnel contributed to the Applicant's delay in serving the documents at least from the 28.12.2009 to the 6.1.2010 by which time the period prescribed under rule 90 (1) had already expired. The Clerk cannot wholly extricate himself from this delay and so the Applicant should not be made to suffer for this delay. Accordingly, the Applicant should not be made to suffer for a delay which emanated, in part, from the Court.

Mr. Mbuvi from Mr. Ombwayo's Chambers, collected the documents from Arusha on the 8.1.2010, a Friday. Mr. Kajwang submitted that the

documents could have been served on Monday, the 11.1.2010. Ideally, this should have been the case, but we have to be realistic taking into account all surrounding circumstances. The delay to serve them on the 13.1.2010 cannot be characterized as inordinate. Two days were non-working days. In any event Mr. Ombwayo's Chambers required time to prepare the documents for effective service on the Respondents. Therefore, the Applicant was not in any way tardy.

In this connection, our Court (which is pre-eminently a Court of Justice), stands prepared to administer substantive justice without undue regard to technicalities – especially technicalities of practice, process or procedure. It is, no doubt, for the pursuit of justice that rule 10 of this Court's Rules readily permits even the acceptance and filing of documents lodged out of time. And it is for this principle, that rule 1 (2) of the Court's Rules mandates the Court to use its inherent power to make any orders necessary for the ends of justice.

Lastly, we are aware that the appeal from the decision of Busingye, P.J. is still awaiting determination by this Court. The First Instance Division (Arach-Amoko, DP.J) dismissed the application for extension of time on the ground that that Division had no jurisdiction to entertain the application. There are procedural issues that need to be addressed at some point in time in the appeal. There is, therefore, need for the Applicant to pursue this application.

In the result, Application No. 1 of 2010 stands dismissed. Application No. 2 of 2010, to extend time, is hereby granted; and time for service under that Application is deemed to have been extended to the 13.1.2010. Costs to be in the cause.

It is ordered accordingly.

Dated and delivered at Arusha, this 22nd day of June, 2010

HAROLD R. NSEKELA
PRESIDENT

PHILIP K. TUNOI
VICE PRESIDENT

EMILY R. KAYITESI
JUSTICE OF APPEAL

LAURENT NZOSABA
JUSTICE OF APPEAL

JAMES OGOOLA
JUSTICE OF APPEAL