IN THE EAST AFRICAN COURT OF JUSTICE

HOLDEN AT NAIROBI, KENYA

APPELLATE DIVISION

APPEAL NO. 1 OF 2009

(Coram: H. R.Nsekela P.; P.K. Tunoi VP; E. R.Kayitesi JA; L. Nzosaba JA; and J M Ogoola JA)

BETWEEN

ATTORNEY GENERAL OF KENYA ……. APPELLANT

AND

PROF. ANYANG' NYONG'O & 10 OTHERS ……. RESPONDENTS

For the Appellant: *Anthony Otengo Ombwayo*
Senior Principal Litigation Counsel
Attorney General's Chambers
Republic of Kenya

For the Respondents: *T J Kajwang & Judith Sijeny*
of Kilonzo & Co., Advocates
Nairobi, Republic of Kenya

JUDGMENT OF THE COURT

Hon. Justice James Ogoola, JA, read the Judgment of the Court:

This was a slow and convoluted case. It wound its tortuous way through the maze of the corridors of this Court at less than the proverbial snail's pace. The original Reference, lodged in November 2006, sought an interpretation and application of

the East African Community Treaty ("the Treaty"), regarding the validity of the nomination and election of Kenya's representatives to the East African Legislative Assembly ("EALA"). The Court heard the Reference, and concluded that Kenya's National Assembly did not undertake an election within the meaning of Article 50 of the Treaty; and that the Election Rules in issue infringed the provisions of that Article 50. The Court ordered the Government of Kenya, through its Attorney General, to pay the costs of the Reference. Thereupon, Mutula Kilonzo & Co., Advocates for the claimant then lodged a bill of costs for the sum of US $ 5,622,528.69. On 19/12/08, the Registrar of this Court acting as Tax Master, taxed the bill to US$ 2,033,164.99. The Attorney General was aggrieved by the decision of the Registrar. Under the Rules of Procedure of the EACJ ("Court Rules"), any party aggrieved by the decision of the Registrar as Tax Master may appeal by way of a reference to a single Judge of the Court whose decision is final. However, the Attorney General did not appeal until the prescribed period within which to appeal lapsed.

It was against this background that the Attorney General, on 3/04/09, applied to the First Instance Division of this Court, to extend the time within which to file a taxation reference. A single Judge of that Division (BUSINGYE, PJ), acting pursuant to Rule 114 of this Court's Rules of Procedure, dismissed the application. The Attorney General then sought to appeal to this Appellate Division, against the Ruling of the single Judge. His Application, No. 4 of 2009 for that Appeal, was filed out of time; whereupon he filed yet another application for extension of time. On 16/10/2009, the First Instance Division dismissed the application for extension of time. Undaunted, the Applicant sought to appeal against the refusal to extend time. However, that Application too was itself filed out of time. The memorandum and record of appeal could not be duly served on the Respondents, on account of expiry of time. Accordingly, (in Civil Application No. 2 of 2010 filed on 19/03/10), the Applicant once again moved the Court, under Rule 4 of the Court's Rules, for an extension of time to enable service out of time, beyond the 7 days prescribed by Rule 89(1) of the Court's Rules.

For their part, the Respondents had in the meantime filed Application No. 1 of 2010 of 5/03/10, praying the Court to strike out the Applicant's purported appeal. In the midst of all this confused state of affairs, the Applicant once more applied to the First Instance Division (before ARACH, DPJ) for yet another kind of redress. Very sensibly the learned Judge, noting that the same matters were at that time already before the Appellate Division, declined jurisdiction and dismissed that particular application.

Eventually, this appeal to the Appellate Division (for extension of time to serve the memorandum and record of appeal), was duly heard and granted on 2/06/2010, with an order to backdate the date of service to 13/01/2010. With that the first phase of the long, slow saga of the case ended – yielding place to the next phase: namely, the hearing of the Applicant's appeal against the Ruling of BUSINGYE, PJ. In that appeal, the Appellant (the Attorney General of Kenya) sought a review of the exercise of discretion by BUSINGYE, PJ. In this regard, the Applicant's Skeleton/ Written Arguments state that:

> *"The Gravamen of the appellant argument is that the honourable judge failed to exercise his discretion in accordance with the law. It is trite law that the Court of Appeal can interfere with the discretion are(sic) decision of a judge where to (sic) the following matters can be discerned.*
>
> 1. *That the Judge misdirected himself in law.*
> 2. *That he misapprehended the facts.*
> 3. *That he took in account of (sic) considerations of which he should not have taken account.*
> 4. *That he did not take account of consideration of which he should not (sic) have taken account.*
> 5. *That his decision albeit it (sic) discretionary is plainly wrong."*

From the outset, this Court wishes to dispose of one critical concern in this appeal, and one that both parties seemed to have swept under the rag – namely:

Whether the Appellate Division should be seized of this appeal at all, given the existence of Rule 59 of this Court's Rules of Procedure. It is crystal clear that a single Judge of the First Instance Division has authority to entertain certain specified interlocutory matters. Among such matters are application(s) for "extension of time prescribed under the Rules" – pursuant to paragraph (2) of Rule 59. Accordingly, BUSINGYE, PJ was totally within the scope and ambit of this Court's Rules when, as a single Judge, he entertained the Attorney General's application for extension of time.

However, as to whether the Attorney General, being dissatisfied with the decision of the single Judge, could or could not then appeal to this Division, is quite another matter – requiring careful analysis of the law. On the face of it, this Court's Rules of Procedure appear to bar any such direct appeal from a single Judge of the First Instance Division to this Appellate Division. In this regard, Rule 59 (3) states quite categorically that:

> *"A party dissatisfied with a decision of a single judge may apply orally to the judge at the time when the decision is given, or by writing to the Registrar within seven (7) days after a decision of the judge to have the order, direction or decision of a single judge varied, discharged or reversed by full Court."*

Learned Counsel for the Respondents (Mr. T.J.Kajwang), sought to bolster the meaning of that Rule with yet another – namely, Rule 83, which provides as follows:

> *"Whenever application may be made either to the First Instance Division or to the Appellate Division, it shall in the first instance be made to the First Instance Division, unless specific rules provide otherwise."*

It is true that a reading of Rule 59 together with Rule 83, appears to be unequivocal in suggesting that an appeal from the judgment of a single Judge of the First Instance Division of this Court should lie, not directly to this Appellate

Division, but rather to a full bench of the First Instance Division. That, on its surface, is an eminently attractive and logical interpretation. On the other hand, the Court is persuaded by a counter argument – namely, that a more apposite position is to read Rule 59, not with Rule 83, but with Rule 77 – and then to interpose the provisions of Article 35A of the Treaty, into the resultant equation (of reading together Rules 59 and 77). Rule 77 reads as follows:

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

As is evident from the above quotation, Rule 77 is the more **specific** rule governing "appeals", than is Rule 83 (which speaks to applications, **in general,** that may be made to the two Divisions of the Court). Rule 77 is couched in terms of appeals from "*the judgment or any order of the First Instance Division*". That language encompasses, directly, "orders" of the Court – such as the order that was handed down by BUSINGYE, PJ. Similarly, the Rule encompasses, not only the judgments or orders of the full bench of the First Instance Division, but also those of a single Judge (such as BUSINGYE PJ). This is so because of the express definition, in Article 2 of the Treaty, of the term "judgment"– namely:

> "*judgment' shall where appropriate include a ruling, an opinion, an order;".*

Secondly, the matter at hand, in this instant appeal, falls squarely within the four walls of Rule 77 – namely, that the appeal is an appeal against "*points of law*", as well as against *"procedural irregularities"*. As will be seen at once, the provisions of Rule 77 are but a mirror reflection: paragraph for paragraph, phrase for phrase, word for word, and comma for comma, of Article 35A of the Treaty.

That Article is a "new" Article, introduced at the time and in the course of the Second Amendment of the Treaty (in August 2007) when the Court was, among other features, drastically restructured into a First Instance Division and an

Appellate Division. The Article eloquently bespeaks the effect and consequence of that historic restructuring, and the devolution of jurisdiction between the two Divisions: the one, the Trial Chamber; the other, the Appellate Chamber – with litigants of the Court afforded an unfettered right of liberty to appeal the judgments of the First Instance Division, to the Appellate Division.

That Article puts the matter beyond any possible debate whatsoever. It is trite law, and a fundamental doctrine and tenet of statutory interpretation, that where subsidiary legislation (such as the Court Rules, in this instant case) conflict with or are in any way inconsistent with the provisions of a parent legislation (such as the EAC Treaty, in this case), the provisions of the subsidiary legislation must yield to those of the parent one – to the extent of the conflict or inconsistency. In the instant case, there is a clear inconsistency – if not outright conflict – between Rule 59(3) of this Court's Rules, and Article 35A of the Treaty. The Court Rules are made pursuant to Article 42(1) of the Treaty. Accordingly, the Court Rules, which derive their life and existence from the Treaty, are of a legal hierarchy that is inferior to that of the Treaty. Indeed Article 42(1) itself specifically provides that:

> *"The Court shall make rules of the Court which shall* ***subject to the provisions of this Treaty****, regulate the detailed conduct of the business of the Court."* [emphasis added]

Indeed, Rule 77 was made after the Second Treaty Amendment, precisely to comply with the amended Treaty.

Accordingly, in the event of a conflict or inconsistency between the Rules, or a particular Rule, and a provision of the Treaty, the Rule must yield place of priority to the Treaty. This means that, in the instant case, Article 35A of the Treaty, overrides Rule 59(3) of the Court's Rules. Therefore, the Appellate Division of this Court may entertain an appeal (such as the instant one), that is lodged with it directly from a single Judge of the First Instance Division – notwithstanding the apparent constraints of Rule 59(3) of this Court's Rules. Needless to say, the legal situation here ought to be regularized at the earliest appropriate opportunity – including re-writing the Court Rules, and re-visiting the Treaty provisions.

That, is the state of the law. But in any event, in this particular appeal, the facts and history of the litigation, as set forth at the outset of this judgment, are quite disturbing. Their chronicle, adds up to a long litany of one application after another *ad infinitum*; and a catalogue of one misstep after another *ad nauseum* – all to the sad and costly detriment of the litigants. Justice demands that the successful litigants should enjoy the fruits of their litigation; and that both litigants should rest from the trauma of un-ending litigation. There must be an end to litigation. This Court cannot and must not at this outstretched stage, in subservience to Rule 59(3) of the Court Rules (which Rule has, in any event, now been impugned), remit the resultant decision of this appeal back to the full bench of the First Instance Division. To do so would, in all probability, be tantamount to launching yet another ponderous odyssey of a succession of applications and appeals – which would, once more, end at the gates of this Appellate Division. This Court must, in the interests of justice, preempt any such drawn-out scenario: which would be but a recipe for patent injustice to the Parties, coupled with judicial irresponsibility, if not judicial tyranny, by the Court in perpetuating the injustice of this never-ending litigation.

In this regard, it behoves stating that to remit this matter back to the full bench of the First Instance Division of this Court would, to all intents and purposes, be to subject the matter to an "appeal" – in as much as (i) the single Judge sitting pursuant to Rule 114 of the Court's Rules, is in truth exercising the powers vested in him/her alone, on behalf of the whole First Instance Division. Accordingly, in the event that the full bench is called upon to entertain the judgment of the single Judge, it would do so as an "appellate" forum. To that extent, the full bench of the First Instance Division (just like this Appellate Division of the Court) would interfere with the exercise of the discretionary powers of the single Judge only for very specific reasons – identical to the ones now canvassed in this Appellate Division. Why then duplicate and elongate the review process? This position was

very ably considered and settled by the Court of Appeal of Kenya in the case of ***Mwangi Vs Kenya Airways Ltd [2003] KLR 486 at p.487*** to the effect that:

> *" 1. A single appellate judge sitting alone and acting under rule 4 of the Court of Appeal Rules (Cap 9 sub leg) is exercising the powers vested in him alone on behalf of the whole Court. A full court can only interfere with the exercise of those entirely discretionary powers for very specific reasons.*
>
> *2. The circumstances under which the full court would be entitled to interfere with the exercise of the discretionary power by a single judge* ***are similar to those under which an appellate court would be entitled to interfere*** *with the exercise of a discretion by a trial judge*".[emphasis added]

We are of the view that it would be patently meaningless to remit this matter to the First Instance Division to do exactly that which this Appellate Court is now called upon to do. We must eschew playing a game of roulette with the fate of litigants who come to this Court for expeditious, effective, efficient, effectual, and cost effective remedies.

We now turn to the substantive issues raised by the Attorney General (and the Respondents) in this appeal. Learned Counsel, Mr. Ombwayo, for the Attorney General, raised, in all, a hefty total of twelve grounds of appeal. However, at page 24, of his own " Skeleton/ Written Arguments", the Learned Counsel was content to collapse the twelve grounds into four issues only, which he then proceeded to argue before us. In effect, Counsel Kajwang for the Respondents also agreed with the proposition that the four issues effectively embrace all the substantive factual issues arising from this appeal.

Specifically, Mr. Kajwang stated that:

"Facts leading to this appeal have been accurately described by Learned Senior Principal State Counsel appearing on behalf of the Attorney General of the Republic of Kenya, we see no reason to reproduce them in our submissions".

Accordingly, the Court hereby adopts those broad issues as the real grounds of this appeal, namely: that the learned single Judge erred in exercising his discretion, in as much as he failed to consider, or considered only inadequately or inappropriately, that the Attorney General's delay to effect service was caused by:

(i) the fact that at the material time, all the Court's staff were on Christmas Vacation;

(ii) the Applicant's Counsel was attending to a family tragedy - well beyond his own control;

(iii) the internal consultations between the Attorney General, the National Assembly and other Government Ministries.

We will now proceed to consider the veracity of each one of these grounds *seriatim*. Nonetheless, we need to emphasize that it is not the role of an appellate bench in a case of this kind, to review the substantive merits underlying the grounds of appeal. Rather, the role of this Court is to review the propriety of the exercise of discretion by the trial Judge on each of these grounds. The question to ask, in respect of each ground, is: Whether the trial Judge in reaching the decision(s) he reached, did so on the basis of a proper, judicious exercise of his discretion? Did he arrive at the decision after a judicious process rooted in dispassionate and empirical analysis of the facts and the law; or merely on a flight of fancy, unanchored in any sound basis? If the Judge applied the empirical process, it matters not that he arrived at the "wrong" decision, unless such

decision is plainly wrong. If, on the other hand, he engaged only in the fanciful or the whimsical, then it matters little that he arrived at the "right" conclusion, to the extent that the process and procedure is plainly and patently misconceived, irregular, unjust, and wrong. At the heart of the Appellate Court's review is the question: Did the Judge exercise his discretion properly (i.e. judicially)? On this point, both Counsel (for the Attorney General and the Respondents) were in total agreement as to the applicable Principles of law – namely, that an appellate court may interfere with the exercise of the trial Judge's discretion only where the Judge:

(i) misdirected himself/herself in law;

(ii) misapprehended the facts;

(iii) took into account matters/issues he/she should not have taken into Account;

(iv) did not take into account matters/issues he/she should have taken into Account;

(v) reached a decision which is plainly wrong.

In this connection, this Court is in consonance with the principles laid down by ***Mwangi's*** case (*supra*). In our view, that case recasts into brighter light the fundamental principles specifically enunciated by, most probably, the oldest case on this point in the East African jurisdiction – namely: ***Mbogo Vs Shah [1968] EA at 93.*** The Principles of this line of case law are that before an appellate court (or, as the case may be, a full bench of the same court) can interfere with the exercise of discretion by a trial Judge/single Judge, it must be satisfied that in coming to his/her decision, the Judge in question:

(i) took into account some irrelevant factor(s);

(ii) failed to take into account some relevant factor(s);

(iii) did not apply a correct principle to the issue (such as, for instance, misdirection on a point of law, or misapprehension of the facts);

(iv) taking into account all the circumstances of the case, the Judge's decision is plainly wrong.

Taking into account all the clear Principles and considerations embedded in our law, we will now embark upon a careful, clinical, and forensic examination of the processes by which the learned BUSINGYE PJ dealt with each one of the four broad issues raised in complaint by the aggrieved Appellant/Attorney General. In doing so, we would wish to emphasize that the trial Judge in this particular case, was dealing with Rule 4 of the EACJ Rules, which requires a qualitatively higher standard to extend time (namely, **"sufficient reason"**), than is the case with the standard of **"any reason"**, which is prescribed under the corresponding Rules in some of the EAC Member States (notably Kenya). Accordingly, the trial Judge in exercising his discretion to extend time in this case, had to and did indeed, raise the bar appropriately to meet the more rigorous standard of the Community Rule.

1. Christmas Vacation

The Attorney General's submission on this issue was to the effect that:

> *"the learned Judge erred in law and, therefore, misapplied the law in holding that the ground of hardship due to Christmas Vacation was being cooked up, when it was very clear from the record that the entire staff of the East African Community including the Court, went on vacation during Christmas Vacation".*

The question for this Court to ask is not whether the trial Judge erred in reaching the conclusions he reached on this issue. Rather, the question is whether and to what extent, and in which manner the Judge considered the issue that was before him regarding the "Christmas Vacation". We find that, indeed, the Judge dealt with this issue in depth and at quite some length. At page 3 of his Ruling, the Judge listed, by way of summary, Mr. Ombwayo's grounds of application as including:

> *"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."*

Having so flagged the issue, the Judge then proceeded to diagnose and analyse the issue – starting thus:

> *"canvassing the first of the grounds, learned Counsel submitted that it was within his knowledge that between the 15th December and 5th January, the entire staff of the East African Community go on Christmas vacation."*

Next, the learned Judge (at page 5 of his Ruling) considered the counter arguments of opposing Counsel, Mr. Kajwang, to the effect that care should be taken not to confine Christmas day, official holidays, Court Vacation, and the computation of time under Rules 2, 3, and 19 of this Court's Rules of Procedure. Then (at page 7 of the Ruling), the Judge proceeded to cast his mind to the applicable jurisprudence: Case law, such as ***Boney Katatumba Vs Waheed Karim, Civil Application No. 27 of 2007(unreported), Supreme Court of Uganda; and Mohamed & Muigai Advocates Vs Kang'ethe & Co. Advocates, Kenya HCCS No.***

234 of 1999 (OS). The Judge concurred with the Respondent's Counsel that, indeed, there was here confusion between Christmas day as an official holiday (within the provisions of Rule 2 of the Court's Rules; Court Vacation (determined by the President of the Court and gazetted under Rule 19); official holidays, including Saturdays and Sundays; and Court Vacations. The Judge took the Senior State Counsel to task to show specifically which rules provide for "Christmas Vacation" (Counsel conceded he knew of none); whether there was any "Christmas Vacation" declared by the Court's President; whether it was fact or only Counsel's belief that indeed the Court staff were on leave during their "Christmas Vacation"; and whether, in fact, Counsel had not filed documents during the 2007/2008 "Christmas Vacation" – (he had).

It is evident, then, that the trial Judge not only dealt with the issue of Christmas Vacation; but, indeed, he did so: carefully, meticulously adequately, firmly, extensively, and fairly (i.e. took into account both sides of the argument). He quoted the applicable rules and the case law, and reflected deeply on the facts of the case (including the fact that Counsel had indeed filed documents during the period in contention). In all this, the Judge did not decide anything on the spur of the moment, nor did he treat the issue superficially, conjecturally or capriciously. He did so advisedly and judicially. There is, thus, no reason for this Appellate Court to fault the trial Judge on this ground. Accordingly, that ground fails.

2. **Family Tragedy**

Learned Senior State Counsel, averred that the delay in filing the documents was aggravated, in part, by a family tragedy that befell him personally – namely, to

attend to his two brothers in the rural family home; and that the brothers were attacked, one after the other, by bandits who left them gravely injured and helpless. In this regard, the Appellant's complaints were that the Judge failed to consider certain unchallenged averments; considered instead irrelevant matters (such as that the Attorney General's Office, being operational, was not incapacitate due to Mr. Ombwayo's family misfortune); and that the Judge misapprehended the fact that re-allocation of the file on this case to another Counsel in the Attorney General's Chambers, would have required prior preparation of a brief to enable the new Counsel understand the dispute.

Here again, the task of the Appellate Court is not to try the matter on its merits. Rather, it is to ask: Whether the trial Judge exercised his discretion judicially in reaching his decision? In his Ruling (at page 10), the learned trial Judge dealt extensively with this issue. In summary, the Judge challenged Counsel to prove the fact of the multiple bandit attacks on his brothers. Counsel could not mention the dates of the attacks (except one). He could not indicate when he travelled to and returned from his rural home. He could not produce any medical, police or similar documentary evidence relating to the attacks. The Judge noted Ms Sijeny's affidavit which challenged Mr Ombwayo's own affidavit concerning these attacks. He even granted Mr Ombwayo the opportunity to depone a further affidavit. To all this, the Judge recorded the following:

> "*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*".

Then, on p.11, the learned Judge concluded, thus:

"Upon careful examination of this ground, I could not tell with certainty, whether the unfortunate tragedies actually happened, whether if they happened [Counsel] went home to assist or whether nothing at all happened.

With due respect, I find [Counsel's] honesty, candour and effort in explaining his family tragedy far less than I would require to admit his story in court {see ***Mohamed & Muigai Advocates*** *(supra). I am alive to established case law that mistakes of counsel should not be visited on his client (see* ***Zam Nakumansi v Suleman Lule, civil Application No.02 of 1999 (SCU****).*

….

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 2008 to prove it. He knew it was his [own personal] burden 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 HCCC No. 154 of 1992.
In my view the applicant did not discharge this duty."

From the above, it is clear that the trial Judge was seized of the issue, explained it, asked all the questions relevant and necessary to establish the existence of the double tragedy, granted counsel every opportunity to prove the matter (including by further affidavit to counter Ms Sijeny's challenges promptly and effectively). He did not. Instead, he took all the months of January, February and March – a total of approximately 90 days in all – to file this appeal. We cannot find anything at all untoward in all this, with which to fault the trial Judge concerning this particular ground of appeal. On the contrary, we are alive, rather, to the all - too

- revealing dialogue (recorded at page 145 of the Record of Appeal) between the Court and Counsel on this aspect of the matter – namely:

> *"**Justice Busingye**: Okay, when Mr. Ombwayo's family gets problems, does the Attorney General's Office get incapacitated?*
>
> ***Mr. Ombwayo**: I (sic) cannot get incapacitated but …of course with those personal problems, I did not even have time to brief the Attorney General on the issue of time limits. But as I said in my affidavit, those were my personal problems. It could have been an oversight on me not to have briefed the Attorney General and may be handed over the file for reallocation to the Attorney General to allocate it to another Counsel … I did not hand over the file for reallocation to the Attorney General . That is a mistake I admit to have made."*

In addition to the above, this Court takes judicial notice of the fact that the Attorney General's Chambers is a fully – fledged State Office with many counsel (of whom Mr Ombwayo is only one; and indeed, a Senior Principal Officer). Any one of his juniors, let alone colleagues, could have stepped into his shoes to rescue the situation.

Learned Counsel argued very ingeniously both before the trial Judge and before this Court, that his mistakes as counsel (of which this Court finds quite a bundle), should not be visited on his client. This is all too true. Just like the trial court, we too are of course alive to and sympathetic with the position canvassed by Counsel. But then it has to be remembered that it is Counsel himself who initiated this ground; who injected , so to speak, the personal dimensions of his family into the official affairs of his client; and who having brought it to the fore, strenuously argued it before this Court and the single Judge in the court below. In these circumstances, he has himself to blame. In a sense, his argument is that if he succeeds on this second ground, then his client stands to gain. But if he fails, then his client should not suffer. The principal answer to all this, is that he cannot have his cake and eat it at the same time. He must bear his cross. In this regard,

we would recall, with approval, the stand once taken by WAKI, JA when faced with a similar predicament in the case of **Phoebe Ndunda & Others v. Mwakini Ranch Co. Ltd & Kitui Town Council, Civil Application No. NAI.448 of 2001 (CA Kenya).** His Lordship stated that:

> "*The opportunity given to applicants was squandered and if it is their case that the advocate was to blame, they are at liberty to seek recompense from the advocate.*
>
> *As it is, the applicants appeal to* ***sympathy*** *rather than sound factual and legal basis in seeking the orders above. I would be surrendering my discretion to whim and caprice if I acceded to the application on that basis. I decline to do so."[*emphasis added]

In the circumstances of this appeal, therefore, the second ground fails – irrespective of where the chips fall.

3. Internal Consultations

The Attorney General's third ground of appeal was that the delay to file in time was a consequence, in part, of the necessity for the Attorney General to consult with both the National Assembly, and the Treasury of Kenya on whether or not to pay the suit costs. Learned Counsel's complaint on this issue was that:

> *"The Honourable Judge misapplied the law on discretion in discussing the [sic] the explanation on consultation. The magnitude of the amount of money taxed required consultation between the three Ministries of the Attorney –General, National Assembly, and the Ministry of EA Cooperation. The Hon Judge misapplied the law and therefore fettered his discretion by requiring the appellant the [sic] explain every minute delay. The court should have considered all reasons of the delay…."*

A cursory reading of the above ground, leaves one with some amount of confusion. First, the first sentence appears to merely make the assertion (without more) that the trial Judge misapplied the law of discretion. Secondly, the

sentence on fettered discretion does not seem to connect with the first at all. And even if it did, it seems to be a complaint about the Judge seeking an explanation in too minute a detail. Yet at the same time, the same Counsel in the final sentence faults the Judge for not having considered "*all reasons of the delay*". Unfortunately, all this leaves one wondering what exactly the complaint of this ground is? At best, the complaint is unclear. At worst, it is simply incoherent. Be that as it may, it was plainly evident that the trial Judge did adequately deal with the issue of "consultation."

Once more, the question is not whether the Judge's decision on this issue was "right" or "wrong". Rather, it is whether the Judge's decision was arrived at appropriately, after due consideration (i.e. judicially). Pages 12 and 13 of the Judge's Ruling, deal with this issue of internal consultations. Briefly, the Judge queried the existence and nature of these consultations; whether they were oral or verbal or written; and whether there was sufficient evidence to bear out these consultations. The Judge stated that:

> *"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."*

And then the learned trial Judge added, with approval, a quotation from DEVERELL, J, thus:

> *"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".

And then, in virtually identical summation as DEVERELL's, the trial Judge concluded as follows:

"*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****."*

It is quite evident from all the above, that the learned trial Judge brought his mind to the issue of consultations; discussed and dissected it at length and in depth; asked of Counsel all the relevant questions; considered the counter-arguments of the opposing counsel; brought to light the applicable jurisprudence; and then (and only then), reached his own conclusions on the matter. Was he wrong on those conclusions? If wrong, was he "plainly wrong"? The first one of these two questions (to which our answer is No), is not really for this Appellate Court to ask, let alone to answer, in an appeal , (such as the instant one) concerning the exercise of a trial Judge's discretion. The second one of those two questions, is appropriate and necessary. The answer, in this case, is plainly No.

In the result, the Appellant's third ground of appeal also fails.

This is because the learned trial Judge considered all the salient issues raised by the Appellant. He did so by, among others, casting his mind to the case of **Wasike Vs Khisa & Another, Civil Application No.248 of 2003 (KCA), [2004], 1KLR 197** – in which GITHINJI, JA, stated 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."*

In light of the above, the trial Judge did cast a comparative assessment between the explanation for the delay in **Wasike's** Case and the comparable explanation for the delay in the instant case. The Applicant, in **Wasike's** case, produced a full dossier of evidence to support his claim of having been sick. The dossier was full – complete with dates of consultation, names of doctors, the relevant court proceedings, the date thereof, etc. In contrast, the Applicant, in the instant case, did not produce any documentary evidence. To this, the Judge stated, quite rightly in our view, that:

> *"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 minimum to enable it form an opinion that what he was saying was probably true."*

4. Prejudice – Failure to hear subsidiary grounds

In his oral submission before this Court, learned Counsel for the Attorney General took issue with the fact that the trial Judge, as single Judge, seemed to judge the application before him only on the above grounds 1,2 and 3; thus failing to consider all the other grounds before him – and, therefore, rendering himself to be prejudiced in the rest of the matter. We will make short shrift of this challenge. Counsel's point, in belabouring this line of argument, was premised on the trial Judge's statement (on page 37 of his Ruling) to the effect that:

"*upon the above [three] findings alone, this application should fail."*

Now, even if that were all that the trial Judge stated and did on that matter, we would find no particular fault with it. First, this is common judicial practice for our courts of law to determine a matter before them on the basis of only some (not all) of the issues and grounds canvassed by Counsel – if the particular issues are critical and dispositive of the dispute. In the instant case, the three grounds were sufficiently determinative of the application before the Judge. Interestingly, the same Counsel said as much. Indeed, the fact of three principal issues, coupled with other lesser issues, was common knowledge among all the participants in the court proceedings before the single Judge. Counsel Ombwayo himself said so; and even opposing Counsel, Mr Kajwang, acknowledged as much when, at p.150 of the Record of Appeal, he said:

> *"My learned friend has put emphasis on the merits and I accept that it is one of the things that the Court will look at, but I will also be showing you in the authorities cited by myself and my learned friend, they have been coded as possibly, those issues which are on a secondary level and not the primary issues which the Court wants to look at.*
>
> *…..*
>
> *I have seen the affidavit of my learned friend, Mr Ombwayo. It is about 17 paragraphs. I want to say that a lot of paper has been used because I think that only three paragraphs are important in my view, namely, Paragraph 14, 15 and 16….. .i.e. paragraph 14 Christmas vacation…paragraph 15 the tragedy that befell the family …. and paragraph 16 that there were some consultations.* ***Those are the only three reasons. We just want to consider these reasons alone and see if they can fit within the principles of law that the case law has developed.*"**[emphasis added]

It is patently evident that the Court had before it three critical grounds on which the fate of the application depended. But be that as it may, it is not at all true, as

contended by the Appellant, that the learned Judge discussed only the above three grounds. The record shows plainly that, indeed, after the three primary grounds, the Judge proceeded to consider and to make findings even on the secondary grounds as well – all of them. We now deal with those secondary grounds herebelow.

5. Public Interest

The Appellant pressed the point that the "exhorbitant" award of costs by the Taxing Officer should be impugned on the grounds of public interest – in as much as payment by the Attorney General of such a hefty sum of money, would impinge drastically on the welfare of the Public Treasury, eat into the Public Finances and adversely affect the tax payers of Kenya. Accordingly, the Appellant argued, the trial Judge should have been alive to this issue as a matter of "public interest" or "public policy". The argument is immensely ingenious and attractive. Indeed for the Attorney General to pay the suit costs, would involve a significant loss from the Public Purse of Kenya and would, to that extent, affect the interest of the Public who are the source of the tax revenues that feed into that public purse. However, we must be extremely careful with what constitutes "**public interest**", and what does not. A blanket view, to the effect that use of the taxpayers' money to pay legal costs constitutes public interest, needs weighty reflection and deep introspection – for if such argument were stretched to its logical extreme, then the Attorney General would never, ever, be condemned by the Courts of law into paying lawful damages, costs and similar expenses of litigation. In this regard, it bears repeating what LORD GRIFFITHS so ably proclaimed – namely:

> "*There is a world of difference between what is in the public interest and what is of interest to the public"* – **(see Lim Laboratories Ltd v Evans [1984] 2 All ER 417, at 435, CA .**

It is eminently true that paying legal costs (and especially in hefty sums) out of the Consolidated Fund of the National Treasury is, of course, a matter of great interest to the public. Nonetheless, that in itself, need not be a matter of public

interest or public policy. **Blacks Law Dictionary (Seventh Edition, 1999, p.1245)** defines "public policy" in the following two senses:

1. *"Broadly, principles and standards regarded by the Legislature or by the courts as being of fundamental concern to the state and the whole society."*
2. *More narrowly, the principle that a person should not be allowed to do anything that would tend to injure the public at large."*

Generally speaking, courts have held public policy to be:

> *"that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or the public good."* -see **Egerton v Brownlow (Earl) (1853) 4 HL Cas at 14 p.196**, per LORD TRURO.

Always at the back of the common law concept of what offends the public interest or policy, are issues of unlawfulness, morality, and similar reprehensible behaviour. In **Janson v Dreifontein Consolidated Mines Ltd [1902] AC at 491, 492 HL**, LORD HALSBURY LC first enumerated the more usual acts, contracts and transactions normally held to be against public policy (including; contracts for marriage brokerage, restraint of trade, gaming and waging, and assisting the King's enemies). His Lordship then stated that all these:

> *"are undoubtedly **unlawfu**l things; and you may say that it is because they are contrary to public policy they are **unlawful**; but it is because these things have either been enacted or assumed to be by the common law **unlawful**."* [emphasis added]

In the case before us, the essential element for consideration of the public interest is missing – namely, there would be absolutely nothing **"unlawful",** or **"immoral"** , or **reprehensible** about the Attorney General of Kenya paying litigation costs from the Public Treasury of the Republic. If anything, such payment would indeed redound to the rule of law, in general, and to the enforcement of Court judgements, in particular – both of which are the very essence on which any law-abiding ship of State is anchored. We should, as a court

be circumspect of what LORD HALSBURY (in the **Janson case** above (and others e.g. **Egerton v Brownlow; Bowman v Secular Society Ltd [1917] AC at 427**), termed as "*inventing a new head of public policy*". This is so because judges are interpreters of the law, not expounders of public policy; and it is important that the doctrine should only be invoked in clear cases, in which the harm to the public is substantially incontestable – see **Halsbury's Laws of England (Fourth Edition Reissue, 1998 Vol. 9 (1), Para 842.** Similarly, the Court should give heed to the following graphic advice opined by BURROUGH, J in **Richardson v Mellish (1824) 2 Bing 229 at 252:**

> "*I, for one, protest … against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail*".

Having regard to all the above, it will suffice to say that in the instant case, the trial Judge did, indeed, raise and consider the issue of "public interest" as canvassed by learned Counsel for the Attorney General. The Judge engaged Counsel on this at some considerable length. In particular, his Lordship discussed, especially, the irrelevance of the quantum of the costs. He opined that the Kenyan public, including the Respondents, would be interested more in scrutinizing issues leading to the award of the costs, than merely the quantum of those costs. They would be interested in issues such as why and how they ended up in this litigation, whether it was justifiable and unavoidable, why the Reference on Taxation was not filed on time, and the like. Then, he reached his decision (dismissing the argument). The decision reached was, therefore, a function of a well-reasoned and fair process. Whether the decision emanating from that process was "right" or "wrong", is quite a different matter – not for this Appellate Court to second-guess. We are satisfied that the trial Judge exercised his discretion on this issue judiciously (not whimsically, nor capriciously). He cannot be faulted in any material particular.

6. Prejudice to the Respondents/Ministers

The Appellant's contention here was to the effect that if the trial Court had granted the application to file out of time, there would have been no prejudice occasioned to the Respondents – who were, in any case, high-ranking Government Ministers, etc, receiving regular monthly government salaries. The Court finds grievous fault with this line of argument, and on very many levels. First, not all the Respondents (eleven in number) were Ministers receiving Government salaries. On the contrary, at the onset of this litigation, virtually all eleven were other than Ministers; with many being in the opposition Political Parties. Second, and even if they were all or substantially all Government Ministers (as they now are), that would not avail much in the way of relieving the Respondents' legal rights or mitigating their loss. While receiving a regular salary might relieve or, at any rate, ameliorate the Respondents' **"economic prejudice"** (i.e. financial hardships, etc), it would do absolutely nothing to address, let alone redress, their **"judicial prejudice"**.

Conclusion

Undoubtedly, the Appellant had a right to access 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, and ultimately 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. It was inimical to the exercise of the trial Judge's judicial discretion – which was grounded in equity and which, like the Appellant's own application to extend time, was itself anchored in equity. In short, the Appellant came to equity tardy and untidy – with soiled hands and inept footwork. Equity eschews indolence. Finally, it was inimical to the principle of finality to litigation – the principle in respect of which we catalogued, at the outset of this judgment, all the convoluted twists and turns that have characterized this hapless litigation right from the start,

all the way to the present. This ubiquitous twisting and turning must stop, at some point. That point is now. To this end, we derive comfort in Rule 1 (2) of this Court's Rules of Procedure, which mandates this Court to use its *"inherent power to make such orders as may be necessary for the ends of justice…".*

In the result, this Appeal is dismissed. The costs of the Appeal and of the related proceedings, whether in this Appellate Division, or in the First Instance Division of this Court, are awarded to the Respondents.

It is ordered accordingly.

Dated and delivered at Nairobi, Kenya, this …… day of August, 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