



IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

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(FIRST INSTANCE DIVISION)

REFERENCE NO 7 OF 2012

(Coram: J. Busingye PJ; M.S. Arach-Amoko DPJ; and JB Butasi J.)

ANTHONY CALIST KOMU.....APPLICANT

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VERSUS

**THE ATTORNEY GENERAL OF THE REPUBLIC OF
TANZANIA.....RESPONDENT**

Date: 14th February, 2013

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RULING OF THE COURT

This ruling is in respect of an oral application made by Counsel for the Respondent for extension of time to file a response to the Reference out of time.

The background of the application is not in dispute. The applicant, Anthony Calist Komu, is member of the CHADEMA political party in the United Republic of Tanzania. He was an unsuccessful candidate in the election of the representatives of the United Republic of Tanzania to the East African Legislative Assembly (hereinafter referred to as the “EALA”), conducted in April last year by the Tanzania Parliament. He filed the instant Reference in this Court on 15th June, 2012 to challenge the process of the said election on the ground that it violated the provisions of Article 50 of the Treaty for the Establishment of the East African Community (hereinafter referred to as the “Treaty”. He prayed for a declaration to that effect and for an order prohibiting the Parliament of the United Republic of Tanzania from further violation of Article 50 of the Treaty in future elections to the EALA. He prayed for the costs of the Reference as well.

The Reference was served on the Attorney General of the United Republic of Tanzania on the 19th of June, 2012. The Attorney General did not file a response within the 45 days prescribed under Rule 30(1) of the Rules of this Court.

Nonetheless, the Reference was cause listed for a Scheduling Conference in accordance with Rule 53 on the 30th of January 2013. The Notice of the Scheduling Conference was duly served on the Attorney General as evidenced by the affidavit of service of one Mennas Donald Mafwere, a clerk of the East African Court of Justice (EACJ) at the Dar es Salaam sub-Registry.

On 30th January 2013, when the file was called before us, learned Counsel for the Applicant, Mr. Edson Mbogoro informed Court that he was ready to proceed with the Scheduling Conference. On the other

hand, Mr. Mark Mulwambo and Mr. Obadia Kameya, the learned Senior and Principal State Attorneys, respectively, who represented the Respondent, applied for leave to make an oral application under Rule 21(7) for extension of time within which to file a response to the Reference. We granted their request.

One of the reasons advanced by the learned Counsels for the Respondent for the delay in filing their response to the Reference was that on perusal of the Reference, they discovered that the matters in the Reference were similar to those in another matter that was pending before the High Court at Dodoma, where they had raised preliminary objections. Therefore, they were waiting for that ruling and were contemplating challenging the Reference as sub-judice.

Secondly, they told Court that they had spent time in carrying out research and consultations. This took some time since they had to make physical follow up in the National Assembly from where the matter arose. By the time they were ready, the 45 days in which they had to file a response had lapsed.

They also told Court that they did not sit idly by, but made frantic attempts to lodge the documents they had prepared in the sub-Registry at Dar es Salaam, but were informed that the 15 US Dollars they had paid was insufficient and that the correct fee was 400 US Dollars. They further stated that they made every effort to contact the Registrar for clarification, including calling him on his cellular phone, but their efforts were futile as the Registrar informed them that he was on leave.

Lastly, but most importantly, in their view, they made very spirited submissions that the Reference requires the interpretation of Article 50 of the Treaty. It is thus a very important matter, since it touches the

heart and structure of the institutions of a Partner State of the East African Community (EAC). For that reason, the Court should consider the interest of justice and that of the Partner State and should give the Partner State an opportunity to present its side of the case, so that the Court can assess both sides in order to ascertain whether the alleged conduct actually amounts to a violation of the Treaty.

Mr. Mbogoro opposed the application. His stance was that the reasons advanced by the Respondent for the delay were insufficient.

Firstly, he contended that any serious lawyer should have been able to do research, to consult and file a response within the 45 days allowed under the Rules.

Secondly, it was Mr. Mbogoro's contention that the sub-judice issue could not operate as an obstacle to delay the filing of the response as it could have been raised as a preliminary objection to the Reference.

He argued further that the inability of the Respondents to find the Registrar was not a plausible reason as the Registry itself was open and could be accessed. The Registrar may have been on leave but his office was not.

Finally, he prayed for costs in the event that the Court grants the application.

Applications for extension of time are provided for under Rule 4 of the Rules of this Court. It provides that:

“ A Division of the Court may for sufficient reason extend the time limited by these Rules to or by any decision of itself for the doing of an act authorized or require 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 this Rules to such time shall be construed as a reference to such time as so extended.”

5 The principles are well settled. Under Rule 4, the Court has power to extend time even after the time has expired like in the instant case but the applicant must present sufficient reason(s) before Court can exercise its discretion. Some of the factors the Court considers include the length and reason for delay, the likely prejudice to the respondent if the application is granted as well as the importance of the matter in
10 issue to public administration in general and its effect on the integration process in particular. See: **Appeal No. 1 of 2009: The Attorney General of Kenya v. Prof. Anyang’ Nyongo & 10 Others.**

15 We have carefully considered the submissions on both sides and the Rule and principles that guide the Court in determining applications of this nature.

We must state from the outset that we are not persuaded at all by the flimsy reasons for the delay advanced by the Respondent’s counsels. The 45 days should have been adequate for consultations between the Attorney General’s Chambers and Parliament. Even so, the response
20 could have been lodged out of time under Rule 10, which permits documents to be lodged in the Registry out of time, pending regularization.

25 While it may be true that the Registrar was on leave, the argument that the Respondent could not file a response because of that lacks both logic and merit. First, they should have known that the Registrar’s office, just like the Attorney General’s Chambers, does not go on leave. The Court has a Registry that is open and operational during official

hours. There is a Deputy Registrar as well, who takes care of the Registrar's duties during his absence. We find that their problem was that instead of looking for the Registry, they seem to have spent time, for some unexplained reason known to them, trying to look for and access the Registrar personally. We think they should have known and they do know the difference between the Registrar and the Registry.

We also are not convinced as to why the existence of a similar case in the Tanzania High Court should have stopped Counsel from responding to this Reference. They did not even show us the evidence of the case in order for us to ascertain that it was in respect of a violation of the Treaty or a similar issue. Even if it was, Counsel should have known better whether there is a law that bars him from responding to the Reference. The fact that there is a similar case in a Tanzania High Court does not act as a bar. Any preliminary objections could have been raised before this Court within the response. We also take judicial notice of the fact that it is not the first time that the Attorney General of Tanzania is appearing before this Court and that being the case; they ought to know the very basics of the Rules of the Court. In the circumstances, we find the Respondent's reasons flimsy and lacking merit. To that extent, we agree with Counsel for the Applicant.

Nevertheless, one of the factors considered by courts as sufficient reason in applications of this nature is the importance of the matter to public administration. We think that the subject matter of the Reference before us is important and pertinent to the development of the EAC in that the subject of election impinges on the very rubric of the EALA, which is the legislative arm of the EAC. The manner of electing its members is thus of paramount importance. Consequently, while we would not otherwise have hesitated to dismiss this application

with costs, we find that due to the public importance of the matter at hand as above shown, the justice of the case would demand that the United Republic of Tanzania is afforded an opportunity to present its side of the story so that the Court is assisted in making an informed decision. Fortunately, Mr. Mbogoro also conceded that it would be better, in the circumstances, to have the matter heard inter partes so that both sides are given an opportunity to present their side of the case.

We are also alive to the inherent powers of this Court under Rule 1(2), which is to the effect, that:

(2) Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice....”

We accordingly allow the application and order that:

1. The Respondent shall file his response to the Reference within 15 days from the date of this Order.
2. The Respondent shall meet the costs of the application in any event.

It is so ordered.

Dated and Delivered at Arusha this 14th day of February 2013.

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JOHNSTON BUSINGYE

PRINCIPAL JUDGE

M.S. ARACH-AMOKO

DEPUTY PRINCIPAL JUDGE

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JEAN BOSCO BUTASI

JUDGE

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