IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Isaac Lenaola, DPJ; Faustin Ntezilyayo J, Fakihi A. Jundu J & Audace Ngiye J)

APPLICATION NO.12 OF 2015

(Arising from Reference No. 17 of 2014)

THE SECRETARY GENERAL,
EAST AFRICAN COMMUNITY..... APPLICANT

VERSUS

RT. HON. MARGARET ZZIWA ..... RESPONDENT

29TH JANUARY, 2016

RULING OF THE COURT

Introduction

1. The Applicant herein is self-defining and instituted the present proceedings in a representative capacity as provided in Article 4 of the Treaty for the Establishment of the East African Community (hereinafter referred to as 'the Treaty'). On the other hand, the Respondent is the former Speaker of the East African Legislative Assembly (EALA), a Member of Parliament (MP) in the said Assembly, and the Applicant in **Margaret N. Zziwa vs. Secretary General of the East African Community Reference No. 17 of 2014**.

2. By way of background, **Reference No. 17 of 2014** was instituted by Ms. Zziwa in 2014 challenging the legality of her then intended removal from the office of Speaker of EALA. Following Ms. Zziwa's subsequent removal from the said office in December 2014, the Reference has since been amended to question the validity of her removal from that office. It had been scheduled for hearing of oral evidence by the Applicant therein on 8th and 9th September 2015. However, on 8th September 2015, the Respondent therein raised a preliminary point of law premised on Section 20 of the East Africa Legislative Assembly (Powers and Privileges) Act, 2003; the gist of which was that the Applicant and her witnesses were members and/ or officers of EALA but had not secured special leave from the Assembly to adduce evidence before this Court, as prescribed by section 20 of the EALA (Powers and Privileges) Act. Given that this Preliminary Objection was raised orally without due notice to opposite party as prescribed by Rule 41(2) of the East African Court of Justice

Rules of Procedure (hereinafter referred to as 'the Rules'), this Court did order the Applicant herein to file a formal Notice of Preliminary Objection in this matter. The said Objection was duly heard on 9th September 2015 and a Ruling in respect thereof was delivered on 6th November 2015. The gist of the Ruling was that whereas section 20 of the EALA (Powers and Privileges) Act did prohibit sitting members of the House such as the present Respondent from adducing evidence on the Assembly's Minutes and Proceedings, given that she intended to adduce oral evidence this Court was unable to pre-determine the nature of evidence she intended to present, and could not therefore prohibit her from testifying before it on the premise of the provisions of section 20 of the said Act.

3. The Applicant sought to appeal the said decision and lodged the present Application seeking the stay of proceedings in **Reference No. 17 of 2014** pending the determination thereof. The Application was brought under Rules 1(2) and 21(1) of the Court's Rules and was premised on the following grounds:

    a. If the hearing of the Reference proceeds, the Appeal would be rendered nugatory.
    b. The Appeal was very pertinent as it touches on a question of law, the outcome of which would set a clear precedent.
    c. The Appeal had high chances of success.
    d. The stay (of proceedings) would not be prejudicial to the Respondent.

4. It was supported by an Affidavit deponed by Dr. Anthony Kafumbe dated 10th November 2015, the gist of which was that:

a. The Appeal filed dealt substantively with a matter of law which required clarification with finality by the Appellate Division before the determination of the Reference.

b. The Respondent did not stand to suffer any prejudice should the Application be allowed, rather both parties stood to lose should an issue of law be left unresolved by the Appellate Division.

c. The Appeal stood high chances of success considering the merits of the matter.

5. The Respondent herein, Ms. Zziwa, did depone an Affidavit in Reply dated 16th November 2015 in which we understood her to *inter alia* state that:

a. The Application and supporting Affidavit did not raise any justifiable cause for the grant of an order for stay of proceedings.

b. No substantive Appeal had been filed by the Applicant, who had also failed to demonstrate that any intended Appeal dealt with a matter of law that required clarification with finality by the EACJ Appellate Division, before **Ref. No. 17 of 2014** could be entertained by the Court's First Instance Division.

c. The Applicant had not demonstrated that the intended Appeal had high chances of success.

d. Hardship was one of the considerations in an application for stay of proceedings, the Respondent was suffering the expenses of travel and accommodation for advocates and

witnesses, and the grant of the Application would cause greater hardship to her than to the Applicant that is resident in Arusha.

e. This Court has discretion to grant or refuse a stay of proceedings.

f. **Ref. No. 17 of 2014** should be determined in a timely manner as it was a matter of urgency, the resolution of which was essential to the efficient management of EALA and EAC affairs.

6. At the hearing of the Application, the Applicant was represented by Mr. Stephen Agaba, while the Respondent was represented by Messrs. Justin Semuyaba and Jet Tumwebaze.

Applicant's Submissions:

7. Mr. Agaba cited the cases of **Attorney General of Uganda vs. East African Law Society EACJ Application No. 7 of 2012**, **Owar Awadh Omar & others vs. Attorney General of Kenya & Others EACJ Application No. 4 of 2011** and **Mobile Producing Nigeria Unlimited vs. His Royal Highness Oba Yinusa A. Ayeni & Others CA/L/255/5** in preposition of the principles to be considered in an application for stay of proceedings.

8. Advancing what he termed as 'the principle of balance of convenience' and in support of his argument that it was in the interest of justice that the outcome of the Appeal was awaited, learned Counsel referred us to the case of **Attorney General of Uganda vs. East African Law Society** (supra), where the following dictum in **Mobile Producing Nigeria Unlimited vs. His Royal Highness Oba Yinusa A. Ayeni & Others** (supra) was cited with approval by this Court:

".... It will be futile to allow the proceedings at the lower Court to continue while an appeal is before this court challenging its jurisdiction to hear and determine the suit against them at the lower court. At the end of the day, if their Appeal hereat succeeds, the whole proceedings of the lower court will be declared a nullity and be struck out however well conducted it might have been. It is therefore necessary to avoid this undesirable result by ordering a stay of proceedings in the present case pending the determination of the appeal against the trial court jurisdiction."

9. Further, Mr. Agaba advanced 'the principle of injury' as another consideration in the grant or refusal of stay of proceedings, arguing that there was no injury to be suffered by the Respondent that could not be compensated. In that regard, he relied upon the following decision by this Court in **Attorney General of Uganda vs. East African Law Society** (supra):

> "**The final consideration is one of injury. We do not see any injury to the Respondent which cannot be adequately compensated if this Application is granted. If there is one, like the delay to dispose of the Reference as argued by the Respondent, it would be compensated later by the final disposal of the Reference after the outcome of the Appeal is known and taken into consideration.**"

10. Learned Counsel did also argue that while considering an application for stay of proceedings, the Court was not required to delve into the merits of the pending appeal as that was in the sole domain of the

Appellate Division. *See* ***Owar Awadh Omar & others vs. Attorney General of Kenya & Others*** *(supra).*

11. Finally, it was argued for the Applicant that in applications for stay of proceedings, it was important to establish from the onset that there existed a valid, pending Appeal before the application could be entertained. *See* ***Mobile Producing Nigeria Unlimited*** *(supra).*

12. Aside from the foregoing principles for the grant or rejection of an application for stay of proceedings, Mr. Agaba did take issue with some aspects of the Affidavit in Reply. He opined that the said Affidavit was false and misleading; did not respond to the issues raised in the Affidavit in support of the Application; offended the rules of affidavits, and thus offended Rule 23 of the Court's Rules. In what appeared to be evidence from the Bar in the absence of an Affidavit in Rebuttal, Mr. Agaba sought to rebut some of the contents thereof; initially prayed that the offending paragraphs of the Affidavit in Reply be struck out but later sought to have the entire Affidavit struck out.

Respondent's Submissions:

13. It was argued for the Respondent that there was no proper appeal before the Court but rather, the Notice of Appeal on record denoted a frivolous appeal intended to delay the hearing of the main Reference. Mr. Semuyaba contended that the Application had been wrongly instituted under Rule 21 of this Court's Rules rather than Rule 110, and outlined what in his view were frivolous grounds of Appeal given that the evidence purportedly governed by section 20 of the EALA (Powers and Privileges) Act had not yet been adduced. He invited this Court to adopt the principles governing applications for stay of

proceedings as stipulated in the **Mobile Producing Nigeria Unlimited** case.

14. Learned Counsel did also refer this Court to the cases of **Attorney General of the Republic of Tanzania vs. Africa Network for Animal Welfare (ANAW) EACJ Appeal No. 3 of 2011** and **Attorney General of Kenya vs. Independent Medical Legal Unit EACJ Appeal No. 1 of 2011**, both of which addressed the question of what would amount to preliminary points of law.

15. In **Attorney General of the Republic of Tanzania vs. Africa Network for Animal Welfare (ANAW)** (supra) it was held that matters that entailed the clash of facts, production of evidence and assessment of testimony were not preliminary points of law. With regard to **Attorney General of Kenya vs. Independent Medical Legal Unit** (supra), the following dictum from the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 696** was cited with approval as the test of what would amount to a preliminary objection:

> "**A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if a fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. The Court considers that this improper practice should stop.**"

16. We understood Mr. Semuyaba to have cited the two foregoing decisions in support of his preposition that were this Court to stay the present proceedings in order to await the determination of an Appeal that in his view had no merit given that the issues raised therein were not preliminary points of law in the first place, it would render meaningless the recognized maxim that justice delayed was justice denied.

17. Learned Counsel argued the point that his client was suffering a lot of hardship in prosecuting **Ref. No. 17 of 2014** owing to the manner in which the case was dragging on, yet a lot of time could be salvaged if the matters raised in the Appeal in issue presently were raised by way of an Appeal from the final decision of this Court in the matter. He did also contend that his client had attested to the impending expiration of the 3rd EALA's tenure of office which eventuality, he opined, could pose a difficulty to her with regard to securing witnesses to testify in the Reference. In this regard, Mr. Semuyaba referred this Court to the following principle in the **Mobile Producing Nigeria Unlimited** case:

> **"One important factor in an application for stay of proceedings is hardship. A court of law will be most reluctant to grant an application for stay of proceedings if it will cause greater hardship than if the application is refused. The question of hardship is a matter of fact which can be deduced from the competing affidavit evidence. The moment the court comes to the conclusion that the grant of the application would do more harm than good, it will be refused."**

18. In turn, Mr. Tumwebaze supplemented Mr. Semuyaba's submissions and disputed the existence of falsehoods in paragraphs 20 and 21 of the Respondent's Affidavit in Reply as had been opined by learned Counsel for the Applicant. Alluding to the length of time the hearing of **Ref. No. 17 of 2014** had taken, Mr. Tumwebaze invited this Court to find that not only would some of the prayers sought by the Applicant therein be overtaken by events if the matter was delayed longer, the balance of convenience in this matter was such that whereas the Applicant was incurring individual expenses associated with the delayed hearing thereof, the Respondent (Applicant herein), being sued in official capacity, was cushioned from the costs thereof.

19. It was Mr. Tumwebaze's contention that, despite previous Rulings of this Court to the contrary, the correct position of the Court's Rules was that the existence of a substantive Appeal, as opposed to an intention to Appeal, was a precondition to the grant of a stay of proceedings pending Appeal. He submitted that a court considering such an application must, without delving into the merits of the appeal, satisfy itself that there were valid grounds of appeal. Learned Counsel pointed out that ideally the Memorandum of Appeal detailing the grounds thereof should have been availed to opposite Counsel but, given that this had not been done in the instant case, he invited this Court to carefully peruse the said Memorandum of Appeal and find that the grounds therein did not warrant the grant of the orders sought herein.

20. Finally, Mr. Tumwebaze argued that it was not true, as had been posited by learned Counsel for the Applicant, that the Respondent had not complied with the procedure for application for special leave from the Assembly to testify in Court. He maintained that whereas

the procedure in Rule 26 of the Assembly's Rules of Procedure outlined the procedure where such Application was brought to the House in session, section 20(2) of the EALA (Powers and Privileges) Act made provision for situations where the House was on recess, expressly providing for such leave to be sought from the Rt. Hon. Speaker. It was Mr. Tumwebaze's contention that in the instant case, Ms. Zziwa had sought for special leave from the Speaker while the House was in recess and there was no specific procedure designated therefor, hence her letters to the Rt. Hon. Speaker. He intimated that had the leave so sought from the Rt. Hon. Speaker been granted, the Respondent would have been in a position to proceed with her evidence as had been scheduled. Learned Counsel gleaned bad faith from the foregoing course of events and invited this Court to consider the entirety of the present circumstances, allow the matter to proceed and have justice be seen to be done as much in the process as in the end result; in an open, fair and transparent manner.

Submissions in Reply:

21. In reply, Mr. Agaba reiterated his earlier position that the Notice of Appeal did demonstrate the existence of a valid Appeal before the Court when the present Application was filed. In what then appeared to be an alternative argument, he did also contend that the existence of a valid Appeal should be deduced as at the date when the Application was heard and not when it was filed. We understood it to be implicit within this argument that since the Memorandum of Appeal had been lodged on 17th November 2015, it followed that as at the hearing of the Application there was a valid, pending appeal in place. With regard to the veracity of the Affidavit in support of the Application that had erroneously attested to the existence of an Appeal at the

time of filing the present Application, learned Counsel referred us to Rule 55(3)(d) of the Court's Rules which prescribes the need to administer substantive justice without undue reliance on technicalities. In any event, it was Mr. Agaba's submission that disallowing the Application and proceeding with the hearing of the Reference before the Appellate Division had pronounced itself on the interlocutory Appeal would have an adverse effect on the Court's proceedings.

22. He maintained his position that letters to the Rt. Hon. Speaker did not constitute an application for special leave from the Assembly within the precincts of Rule 26 of the House's Rules of Procedure, and countered the Respondent's argument on the expenses she was incurring, with the argument that any serious litigant should be prepared to incur attendant expenses associated with the litigation. He questioned learned Respondent Counsel's attempt to link the issue of hardship with the life span of the 3rd Assembly, arguing first, that this was not pleaded and, secondly, that the life span of the Assembly could not affect the securing of witnesses in court proceedings and, in any event, the Assembly as an institution would always be in existence. It was his argument that the life span of the 3rd Assembly should not be a reason to flout rules of procedure as the Reference detailed 6 or 7 additional prayers that could be considered by this Court in the event that that Assembly's tenure of office expired.

Court's Determination:

23. We have carefully considered the arguments of both Parties. We propose to address the procedural aspects of the Application prior to

a determination of the merits thereof. First and foremost, for avoidance of doubt, we must state that we do find Rule 110 of this Court's Rules of Procedure absolutely pertinent to the Application in so far as it expressly negates the incidence of an interlocutory appeal as an automatic basis for the stay of proceedings before this Court. It provides a legal avenue for the stay of proceedings only where the Court has so ordered. Rule 110(1) reads:

> "**An appeal shall not operate as a stay of proceedings under decree or order appealed from except so far as the Court may order** ..."

24. In the instant case, the Application is brought under Rules 1(2) and 21(1). While clarifying the Applicant's deference to this course of action, Mr. Agaba argued that Rule 110 left the stay of proceedings pending appeal to the discretion of the Court hence the Applicant's recourse to Rule 1(2) that invokes the inherent powers thereof. With respect to learned Counsel, we are unable to appreciate this application of the Rules. We do recognize that Rule 110(1) does not prescribe the procedure by which a court order thereunder may be secured. Nonetheless, we take the view that standard judicial practice would dictate that such an order may be made by the Court either on its own motion or upon being so moved by any of the Parties.

25. In the instant case where the Applicant opted to move the Court, Rule 21(1) and (4) clearly provides the procedure that would have been available to that Party and thus gives procedural effect to the provisions of Rule 110(1). For ease of reference, Rule 21(1) and (4) reads:

"(1) Subject to sub-rule (4) of this Rule, all applications to the First Instance Division shall be by motion, which shall state the grounds of the application.

(4) A notice of motion shall be substantially in (the form prescribed in) the Fourth Schedule."

26. We do, therefore, find that the present Application was wrongly brought under Rule 1(2). It is a well recognized principle of legal interpretation that recourse may only be made to such a general provision of the law where no specific provision addresses a given scenario. That was not the case in the matter before us. In this case, as we have belaboured to demonstrate hereinabove, the applicable law would have been Rules 21(1) and (4), and 110 of the Court's Rules. However, we would not go so far as to strike out the Application on that account because we do not consider the omission by a party to cite the correct provision under which an Application is brought to be fatal thereto provided the gist of the Application and the remedies sought can be deduced from the pleadings. In the instant case, it is apparent on the face of the record that the Applicant sought to stay the proceedings in **Ref. No. 17 of 2014** pending the determination of an appeal against the interlocutory orders of this Court. Both the Notice of Motion and the supporting Affidavit allude to this. We are satisfied, therefore, that we have sufficient material before us to determine that issue, the citation of the wrong procedural rule notwithstanding.

27. We now turn to the second procedural issue. The right of appeal in any matter is conferred by statute or equivalent legislative authority.

Within the EACJ's legal regime, Parties' right of appeal is expressly conferred by Article 35A of the Treaty in the following terms:

> **"An appeal from the judgment or any order of the First Instance Division of the Court shall lie to the Appellate Division on –**
>
> **(a) Points of law;**
> **(b) Grounds of lack of jurisdiction; or**
> **(c) Procedural irregularity."**

28. An 'order' in this context is a decision of the court other than a judgment, which is the final decision of a court in relation to a claim before it. *See* ***Oxford Dictionary of Law, 7th Edition, Oxford University Press, p. 386***. For present purposes, therefore, the Applicant does have an automatic right of appeal against the decision of this Court in respect of Preliminary Objections raised before it on 9th September 2015. The question then is whether or not the present Application does merit the grant of a stay of proceedings in **Ref. No. 17 of 2014** pending the determination of the Appeal.

29. Rule 110 of the Court's Rules does not prescribe grounds upon which a court considering such an application may premise its decision. In such circumstances, a court would look to binding judicial precedent from within its jurisdiction; *stare decisis* (decisions made by itself), or persuasive precedent from other jurisdictions. In that regard, as stated earlier hereinabove, we were referred to this Court's decisions in **Omar Awadh Omar & 6 Others vs. Attorney General of Kenya & 2 others** (supra) and **Attorney General of Uganda vs. East African Law Society & 2 Interested Parties** (supra) on the principles governing the grant of an application for stay

of proceedings pending appeal. We were also referred to the decision in the Nigerian Court of Appeal case of **Mobile Producing Nigeria Unlimited** (supra), which was extensively cited by both sets of Counsel.

30. We have carefully considered the foregoing legal authorities. We must categorically state that the **Attorney General of Uganda vs. East African Law Society** case is not applicable to the present Application because the matter that was under consideration therein was not an application for stay of proceedings pending an interlocutory appeal in the same matter, as is the case herein, but rather an application for stay of proceedings pending the determination of the appeal in another matter, **Appeal No. 2 of 2012**. The said Appeal had arisen from the Court's decision in **Omar Awadh Omar & 6 Others** (supra) to which we shall revert shortly. In a nutshell, it was argued by the Applicant in the **Attorney General of Uganda vs. East African Law Society & 2 Interested Parties** (supra) that since both cases arose from the same series of events, a decision by the Appellate Division that the **Omar Awadh Omar** case was time barred would, similarly, render the Reference from which **Attorney General of Uganda vs. East African Law Society** case arose, time barred. That scenario is not encompassed by Rule 110(1); clearly, Rule 110(1) applies only to applications for stay of proceedings in respect of which an Appeal has been lodged, and not stay of proceedings pending the determination of an appeal in respect of a different matter. Therefore, the Court in the **Attorney General of Uganda vs. East African Law Society** case quite rightly upheld recourse to Rule 1(2) in the absence of a more applicable legal provision to the circumstances thereof.

31. With regard to the **Omar Awadh Omar** case, on the other hand, it would appear that the Court invoked its inherent powers under Rule 1(2) to permit an oral application for stay of proceedings pending appeal. We cannot fault a decision made in exercise of a court's judicial discretion, particularly so when we are not seized of the circumstances that pertained before it. We do note that the circumstances in the case before us are different. In the instant case, the Applicant rightfully made a formal application for stay of proceedings under Rule 21(1) and was under a legal duty to apply the Court's Rules of Procedure correctly. Therefore, this Court's earlier decision in the **Omar Awadh Omar** case notwithstanding, as we have stated hereinabove, after the most careful and respectful consideration of this Court's Rules of Procedure we are satisfied that the applicable law in an application for stay of proceedings that pertain to a decree or order appealed from is Rules 21, 86 and 110 thereof. We so hold.

32. Be that as it may, in the **Omar Awadh Omar** case, the Court did state as follows with regard to the merits of an application for stay of proceedings pending appeal:

> "**We are of the candid view that in order for the Applicant to succeed in an application for stay of proceedings in a pending appeal, it is not required by this Court to go into the merits of the pending appeal as that is the sole domain of the Appellate Division.**"

33. In our considered view, the import of that position is that provided there is a pending *appeal*, a trial court need not delve into the merits thereof for an application for stay of proceedings pending such appeal

to succeed. Indeed in that case, the court did observe that the filing of an *intended appeal* in itself was not sufficient. We do respectfully abide by this position of the law.

34. The above decision in the **Omar Awadh Omar** case resonates with the legal position advanced in **Mobile Producing Nigeria Unlimited** (supra) where it was held:

> "**It is however, important to establish from the onset that there exists a valid pending appeal before an application for stay may be entertained**."

35. The foregoing legal position does portend that the existence of a 'valid, pending appeal' would be a condition precedent to the entertainment of any application for stay of proceedings pending appeal. We stand respectfully persuaded by this reasoning because quite clearly, if there is no appeal then there would be no reason whatsoever to purport to stay proceedings pending a non-existent appeal. The very foundation of the entire application would collapse.

36. The question of the non-existence of a valid appeal when the present Application was filed was raised by the Respondent herein in paragraph 9 of her Affidavit in Reply, and canvassed by both her lawyers in submissions. Counsel for the Applicant did also address us on this issue in his submissions in reply, initially maintaining that a notice of appeal would suffice for an application of this nature and subsequently stating that, in any event, when the Application came up for hearing, a memorandum of appeal had been filed.

37. We are acutely aware that there is judicial disparity as to whether or not an appeal in that context would be construed to include an intended appeal as typified by a notice of appeal. However, for

reasons we shall elucidate forthwith, we take the view that within this Court's legal regime, a statutory distinction has been drawn between an appeal and an intended appeal, and an appeal is only deemed to have been duly instituted when a memorandum of appeal, as opposed to a notice of appeal, has been lodged. In that regard, Rule 110 is couched in very clear and unambiguous terms. It makes reference to an 'appeal', rather than an 'intended appeal', not operating as an automatic stay of proceedings. Although the term 'appeal' is not defined either in the Treaty or in the Court's Rules of Procedure, the meaning attributed to it within this Court's legal regime can be deduced from the Court's Rules. We do find appropriate instruction on what constitutes an appeal from Rules 78(1), 81, 82 and 86(1) thereof. We reproduce the said Rules for ease of reference:

> **"Rule 78(1)**
>
> **Any person who desires to appeal to the Appellate Division shall lodge a written notice in duplicate in the registry of the Appellate Division.**
>
> **Rule 81**
>
> **A person on whom a notice of appeal has been served may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.**

Rule 82

If a party who has lodged a notice of appeal fails to institute an appeal within the prescribed time .....

Rule 86(1)

..... an appeal shall be instituted by lodging in the appropriate registry, within thirty (30) days of the date when the notice of appeal was lodged –

***(a)*A memorandum of appeal, in quintuplicate"** *(our emphasis)*

38. It is quite apparent that the framers of the foregoing Rules deliberately drew a distinction between a 'notice of appeal' and an 'appeal'. In fact, Rule 78(1) explicitly denotes a notice of appeal as being indicative of a 'desire to appeal'. On the other hand, Rule 86(1) expressly designates the manner in which an appeal is instituted; it is lodged by a memorandum of appeal and not a notice of appeal. Consequently, it seems abundantly clear to us that the lodging of a notice of appeal cannot be said to be tantamount to the institution of an appeal within the EACJ's legal regime. It simply represents a party's desire or intention to appeal as stated in Rule 78(1).

39. In the present Application, paragraph (a) of the Notice of Motion represents a prayer for this Court to stay the proceedings in **Ref. No. 17 of 2014** pending the determination of an Appeal against part of the Ruling of the Court dated 6th November 2015. All the grounds of that Application are premised on the existence of a valid, pending appeal. Indeed, paragraph 5 of the supporting Affidavit attests to an appeal having been filed. Both the Application, as well as the supporting Affidavit are dated 10th November 2015. The Notice of Appeal in this

matter was lodged on 10th November 2015, while the Memorandum of Appeal, by which an appeal is instituted, was lodged on 17th November 2015. It is undoubtedly apparent from the foregoing facts that when the present application for leave to stay the proceedings in **Ref. No. 17 of 2014** was filed, there was no valid, pending appeal before the Appellate Division. We do, therefore, find that the Application before us is defective in that regard and improperly before this Court.

40. Two sub-issues emerge from this finding. First, as was held in the **Mobile Producing Nigeria Unlimited** case, having found that there was no valid, pending appeal before this Court when the present Application was filed, the Application cannot be entertained on its merits but rather should be struck out on that account. Tied to that is the fact that the Affidavit in support of the defective Application is false in so far as it untruthfully attests to an existent appeal.

41. With utmost respect, we find to be flawed and misleading the argument by learned Counsel for the Applicant that if there was no appeal at the time of filing the Application, the Court should consider the fact that at the time of the hearing thereof an appeal had been filed. It is a cardinal rule of judicial practice that all parties appearing before a court or tribunal must be accorded a fair trial. Parties' right to a fair trial by necessity includes their right to know in good time the nature of the case against them to enable them adequately prepare therefor. This principle was aptly addressed in the case of **Captain Harry Gandy vs. Caspair Air Charter Ltd (1956) 23 EACA 139** and cited with approval by this Court in the case of **Simon Peter Ochieng & Another vs. Attorney General of Uganda EACJ Ref. No. 11 of 2013**. In that case (**Captain Harry Gandy**) it was observed:

"The object of pleadings is of course to ensure that both parties shall know what are the points in issue between them so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent."

42. Secondly, one of the principles governing stay of proceedings pending an appeal, without delving into the merits thereof, is that the appeal has reasonable chances of success. Stated differently, the applicant must demonstrate a *prima facie* claim on appeal. *See* ***Mobile Producing Nigeria Unlimited*** *(supra).* Such an appeal should be arguable and not frivolous. *See* ***Silverstein vs. Chesoni (2002) 1 EA 296*** *(Court of Appeal, Kenya).* We are unable to appreciate how such demonstration can be established by an applicant in the absence of a memorandum of appeal, or indeed, how a respondent that has not been served with a memorandum of appeal can adequately prepare his/ her response to the *bona fides* of the appeal for purposes of the application.

43. In fact, in the instant case, the Respondent was served with the Memorandum of Appeal at the hearing of the Application. Under those circumstances, such a Party could hardly be expected to have known the issues raised therein in time, let alone have had the ability to meaningfully prepare its case in response thereto. With respect, we do not appreciate Mr. Tumwebaze's submission that this Court should look at the Memorandum of Appeal that was filed and determine whether it warranted the orders sought by the Applicant. We take the view that due process would dictate that the parties are given sufficient time to prepare their respective cases on a matter for adjudication, and thereafter a court would be addressed by them on

the merits of their respective cases. That is the essence of pleadings and submissions. It is not the function of courts to second-guess parties' cases and determine matters before them on that basis. In the result, we find that there was no valid, pending Appeal before this Court at the time of the filing of the present Application, and do reiterate our earlier finding that the said Application is incurably defective.

44. With regard to the falsehood in the supporting Affidavit, Mr. Agaba did also argue that the Court should not give undue recourse to technicalities as prescribed by Rule 55(3)(d). We take the considered view that, having impugned the present Application, the supporting Affidavit thereof is rendered redundant. Nonetheless, for completion, we propose to address that issue forthwith. It seems to us that the falsehood in that Affidavit derived from the mistaken equating by the Applicant of an appeal with a notice of appeal. As we have endeavored to illustrate earlier in this Ruling, that is not the position under our Rules. The question would be, having so found, would this Court be at liberty to ignore the falsehood therein under the pretext of Rule 55(3)(d), as submitted by learned Counsel?

45. Rule 47(1) of our Rules provides:

> "**The Court may, on application of any party, strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document –**
>
> **(a) .....**
>
> **(b) Is scandalous, frivolous or vexatious; or**
>
> **(c) Is an abuse of the process of the Court.**"

46. In our considered view, the core value of an affidavit as a document made on oath presupposes the veracity and truthfulness that should underscore the statements contained therein. Indeed, while rejecting an Affidavit, the Supreme Court of Uganda upheld the decision of the Court of Appeal that had held the importance of affidavit evidence to be rooted in the fact that it is made on oath. *See* ***Kakooza vs. Electoral Commission & Another Election Petition Appeal No. 11 of 2007*** *(Supreme Court, Uganda).* We are respectfully persuaded by the reasoning in that case. Applying the same analogy to the present facts, we find that it would undermine the importance of affidavit evidence to leave intact on the record a document purportedly made on oath that contains apparent falsehoods, even if such falsehoods were made on an innocent but mistaken application of the law. We take the view that a false affidavit or false affidavit evidence is scandalous and vexatious, an apparent manifestation of abuse of court process. We are aware that the options available to this Court under Rule 47(1) are hinged on an application therefor having been made by any of the parties to a case. There does not seem to be any room in that Rule for the Court to consider any of those courses of action on its own motion. However, that lacuna is addressed by the inherent powers of the Court under Rule 1(2) of its Rules.

47. Suffice to note that Rule 47(1) applies equally to any offending pleading as it would to an affidavit. Whereas in the present context it has been applied in respect of the falsehood in the supporting Affidavit, it would similarly be applicable to the present Application. In the legal context, the meaning attributed to the term 'frivolous' includes a claim that is '**lacking of legal basis or legal merit; not**

serious; not reasonably purposeful.' *See* ***Black's Law Dictionary, 8th Edition, p.692***. It is our considered view that an application that does not comply with the legal regime governing its subject matter is most certainly lacking in legal basis, unserious and accordingly not purposeful.

48. Having found that the present Application is improperly before us in so far as it misdirected itself to the legal regime in respect thereof, it does follow that the said Application is frivolous within the foregoing definition. Furthermore, we have found the Affidavit in support of the defective Application to have been scandalous and vexatious on account of its falsehoods. The question would be what remedies are available to a court that is faced with such defective pleadings. Rule 47(1)(b) of this Court's Rules prescribes 'striking out of pleadings' as one of the options available in respect of frivolous pleadings. In the same vein, Part 3 of the United Kingdom's revised Civil Procedure Rules, 1999 does recognize 'failure to comply with a rule, Practice Direction or court order' as a ground for striking out pleadings. *See* ***Oxford Dictionary of Law (supra), p.531***.

49. Be that as it may, before we take leave of this matter we are constrained to address the applicability of Rule 55(3)(d) of the Court's Rules as raised by learned Counsel for the Applicant. It reads:

> **"The Court shall, when fixing the date for the opening of the oral proceedings or postponing the opening or continuance of such proceedings, have regard to –**
>
> **(a) ....**
>
> **(b) .....**
>
> **(c) ......**

(d) The need to administer substantive justice without undue regard to technicalities."

50. This legal provision is akin to Article 126(2)(e) of the Constitution of the Republic of Uganda (as amended) and Article 159(2)(d) of the Constitution of Kenya, 2010. The former reads:

> **"In adjudicating cases both of a criminal and civil nature, the courts shall subject to the law, apply the following principles:**
>
> **(a) .....**
>
> **(b) .....**
>
> **(c) .....**
>
> **(d) .....**
>
> **(e) Substantive justice shall be administered without undue regard to technicalities."**

51. The Supreme Court of Uganda did have occasion to address the issue of substantive justice viz rules of procedure in the cases of **Utex Industries Ltd vs. Attorney General Civil Application No. 52 of 1995** and **M/s Kasirye Byaruhanga & Co. Advocates vs. Uganda Development Bank Civil Application No. 2 of 1997**.

52. In **Utex Industries Ltd** (supra) the court was faced with a prayer for enlargement of time for failure by a party to take the right step at the right time under the provisions of the said court's rules of procedure. The party sought to rely on Article 126(2)(e) in support of its case. In rejecting the party's plea, the Court held:

> "**Regarding Article 126(2) .... we are not persuaded that the Constituent Assembly Delegates** (framers of the Constitution) **intended to wipe out the rules of procedure of our courts by**

enacting Article 126(2)(e). Paragraph (e) contains a causation against undue regard to technicalities. We think that the Article appears to be a reflection of the saying that rules of procedure are handmaids of justice, meaning that they should be applied with due regard to the circumstances of each case." (*Our emphasis*)

53. Similarly, in **M/s Kasirye Byaruhanga & Co. Advocates** (supra), an applicant for the enlargement of time sought to rely upon Article 126(2)(e). In rejecting the application, the court held:

> "**A litigant who relies on the provisions of Article 126(2)(e) must satisfy the court that in the circumstances of the particular case before the court it was not desirable to pay undue regard to a relevant technicality. Article 126(2)(e) is not a magic wand in the hand of defaulting litigants.**"

54. Turning to the matter before us, we are not persuaded that the Applicant herein has demonstrated satisfactory reasons as would compel us to waive the application of Rules 86(1)(a) and 110 of this Court's Rules of Procedure, or disregard the provisions of Rule 47(1) as read together with Rule 1(2) thereof. We respectfully agree with the principle advanced in **M/s Kasirye Byaruhanga & Co. Advocates** (supra); Rule 55(3)(d) of our Rules is not a magic wand in the hand of a defaulting litigant that when invoked would in itself compel this Court to waive its Rules of Procedure. Rules of Procedure must be meticulously adhered to so as to entrench their intended purpose – the seamless administration of justice by fostering the integrity, rationality and objectivity of the judicial process.

55. Thus, for present purposes, whereas we are alive to and do respectfully appreciate the decision in the case of **Attorney General of Uganda vs. East African Law Society** (supra) that it would be futile to allow the proceedings before a trial court to continue in the event that an Appeal arising therefrom was allowed and the proceedings were rendered a nullity; we are also cognizant of the role of courts as stewards of the judicial processes that deliver justice. These processes operate most justly and judiciously when rules of procedure are applied with the seriousness, conscientiousness and dignity that is due to them.

56. As we have dutifully elucidated hereinabove, the Court in the **Attorney General of Uganda vs. East African Law Society** case was considering an Application that was properly before it on the question of staying the hearing of one case pending the determination of an Appeal in another case. That is not the case in the matter before us presently, which is dogged by such serious procedural defects as would essentially invalidate it. We take the considered view, therefore, that it would be disingenuous and incongruous of this Court, having pronounced itself on the procedural deficiencies it has found herein, to nonetheless seemingly condone them and proceed to entertain the present Application.

57. In the final result, therefore, we find that the Application is misconceived, incompetent and improperly before this Court, and do hereby strike it out under Rules 1(2) and 47(1) of the Court's Rules.

58. It is trite law that costs in any action follow the event unless the court, for good reason, decides otherwise. In the instant case, given that the present application is interim in nature, we are of the

considered view that it is just that the costs abide the determination of **Reference No. 17 of 2014**. We so order.

59. Dated, delivered and signed at Arusha on this 29th day of January 2016.

Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE

Hon. Justice Isaac Lenaola
DEPUTY PRINCIPAL JUDGE

Hon. Justice Faustin Ntezilyayo
JUDGE

Hon. Justice Fakihi A. Jundu
JUDGE

Hon. Justice Audace Ngiye
JUDGE