IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

APPELLATE DIVISION

(Coram: Liboire Nkurunziza VP; Aaron Ringera and Geoffrey Kiryabwire JJA)

CONSOLIDATED APPLICATIONS Nos 4 AND 6 OF 2018

(Arising from Appeal No. 1 of 2018; Application No. 4 of 2015 and Reference No. 16 of 2014)

BETWEEN

THE ATTORNEY GENERAL OF

UGANDA.....APPLICANT

AND

MEDIA LEGAL DEFENCE INITIATIVE (MDLI)

AND 19 OTHERS..... RESPONDENTS

(Application arising from the Ruling of the First Instance Division at Arusha – Monica K. Mugenyi, PJ; Isaac Lenaola, DPJ; Faustin Ntezilyayo; Fakihi A. Jundu; and Audace Ngiye, JJ Dated 20th September, 2017).

RULING OF THE COURT

INTRODUCTION

1. This is an Application by The Attorney General of Uganda (hereinafter referred to as "The Applicant") brought by way of Notice of Motion under Rules 4 ,82A and 84(2) of the East African Court of Justice Rules of Procedure 2013 (hereinafter referred to as "the Rules of this Court") seeking that this Court grants the Applicant extension of time to appeal the Ruling (hereinafter referred to as the "impugned Ruling") of the First Instance Division of this Court (hereinafter referred to as "the Trial Court") dated 20th September, 2017) in which the Trial Court allowed the Respondents to join Reference No 16 of 2014 as amici curiae.
2. The Applicant being dissatisfied with the Ruling of the Trial Court filed a Notice of Appeal on the 6th October, 2017 but filed the said Notice in the Registry of the Trial Court instead of this Court.
3. The Applicants have since filed a fresh Notice of Appeal in the Registry of this Court and are interested in pursuing the Appeal to its logical conclusion.
4. The Applicant was represented by Mr Geoffrey Atwine, Senior State Attorney and Mr Johnson Natuhwera, State Attorney and the Respondents were represented by Mr Nelson Sydney Ndeki.

BACKGROUND

5. The factual background to this application is quite lengthy, however as agreed by the parties at the Scheduling Conference held on the 13th November, 2018 it can be summarized as hereinafter.

   a. On 10th June 2015, the Media Legal Defence Initiative (MLDI), Africa Freedom of Information Centre (AFIC), ARTICLE 10 Eastern African, Centre for Human Rights of the University of Pretoria, Center for Media Studies and Peacebuilding (CEMESP), Centre for Public Interest Law (CEPIL), Committee to Protect Journalists (CPJ), Foundation for Human Rights Initiative (FHRI), Freedom of Expression Institute (FXI), Ghanaian PEN Centre, Human Rights Network Uganda (HURINET-U), Media Council of Tanzania (MCT), Media Rights Agenda, Media Institute of Southern Africa (MISA), Pan African Lawyers Union (PALU), PEN International, PEN Sierra Leone, PEN South Africa, PEN Uganda, and World Association of Newspapers and News Publishers (WAN-IFRA), (collectively hereinafter referred to as "the Respondents") filed Application No. 4 of 2015 in the Trial Court seeking leave to be joined as *amici curiae* to Reference No. 16 of 2014, ***Ronald Ssembuusi (deceased) v. The Attorney General of the Republic of Uganda.***

   b. The application was heard and on the 28th June 2016, the Trial Court delivered its ruling granting the Applicants leave to be

joined to Reference No. 16 of 2014, as *amici curiae*, with no order as to costs.

c. Dissatisfied with the Trial Court's decision, the Respondent then filed Appeal No. 3 of 2016 against the ruling of the Trial Court dated 28th June 2016. On 26th May 2017, this Court rendered its judgment, quashing and setting aside the ruling of the Trial Court. This Court held that the Trial Court erred in law and procedurally in not addressing itself fully to the preliminary objection and directed the Trial Court to compose a fresh ruling containing a clear determination of the preliminary objection made by the Applicants.

d. In a fresh ruling dated 20th September 2017 the Trial Court determined the preliminary objection in detail and still granted the Respondents leave to be joined to Reference No. 16 of 2014, as *amici curiae*, and to submit a joint amicus brief restricted to issues within the *amici curiae's* mandate and of specific relevance to the Reference, with no order as to costs.

e. On 6th October 2017, the Applicants filed a Notice of Appeal against the Ruling of the Trial Court of 20th September 2017. The Notice of Appeal was served on the Respondent's advocates on 18th December 2017, outside the 14-day period prescribed by Rule 79(1) (a) of the Rules of Procedure. On the 20th December 2017, the Respondents then lodged a Notice of Address for Service and a Notice of Motion to have the Notice of Appeal struck out [Application No. 4 of 2017 (Appellate

Division) (initially recorded as No. 19 of 2017)]. The Applicants did not file an Affidavit in Reply to this Application.

f. The Applicant filed its Record of Appeal [Appeal No. 01 of 2018 (Appellate Division] on 4th January 2018, outside the 30-day period prescribed by Rule 86(1). On 17th January 2018, the Respondents filed a Notice of Motion to strike out Appeal No. 1 of 2018 on grounds that the Appeal was instituted out of time and that the Notice of Appeal was improperly lodged in the Trial Court [Application No. 1 of 2018 (Appellate Division)]. The Applicants further withdrew Application No. 4 of 2017 (Appellate Division), in order to avoid numerous applications and delay of the determination of the main Reference No. 16 of 2014. On 2nd February 2018, the Applicants filed an application to validate the filing and service of Appeal No. 1 of 2018 [Application No. 2 of 2018 (Appellate Division)] in the Appellate Division. The respondents filed an Affidavit in Reply on the 7th February 2018.

g. On the 8th May 2018, a Scheduling Conference took place where it was agreed to consolidate Application No. 1 of 2018 and Application No. 2 of 2018 (since Application No. 4 of 2017 had been withdrawn). Hearings were then fixed for 8th and 10th August 2018. However both applications were then subsequently withdrawn rendering the hearings unnecessary. In the meanwhile the Applicant on 16th July 2018 simultaneously filed a fresh Notice of Appeal and a Notice of Motion, Application No. 4 of 2018 for extension of time to

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appeal. The Respondents (as Applicants) then also Filed a Notice of Motion, Application No. 6 of 2018 to strike out the new Notice of Appeal. Both Applications No. 4 of 2018 and No. 6 of 2018 were fixed for a scheduling Conference on the 13th November 2018.

SCHEDULING CONFERENCE ON 13TH NOVEMBER 2018

6. At the Scheduling Conference the Court then directed that Applications Nos 4 of 2018 and 6 of 2018 be consolidated.
7. The Court and the parties agreed to the following three issues for determination:-
   a) Whether the late filing of the 16th July, 2018 Notice of Appeal should be validated? ;
   b) Whether the 16th July, 2018 Notice of Appeal was instituted out of time and should be struck out? ;
   c) What reliefs are the parties entitled to?

Issue No. 1: Whether the late filing of the 16th July 2018 Notice of Appeal should be validated?

<u>The Applicant's submissions.</u>

8. The Applicant in their submissions relied on the Affidavit in support of the Motion of Ms. Josephine Kiyingi, a Principal State Attorney in the Applicant's Chambers. It is the case for the Applicant that after the impugned Ruling was delivered in the Trial Court in Application No. 4 of 2015 on 20th September 2017, the Applicant filed a Notice

of Appeal on the 6th October 2017 and requested for the record of proceedings so as to file a record of Appeal.

9. Ms. Kiyingi in Paragraph 5 of the said Affidavit avers that the said Notice of Appeal was inadvertently lodged in the Trial Court Registry instead of this Court. It was further averred that this error was occasioned by one Ms Esther Nyangoma the State Attorney handling the file who at the time was going for maternity leave. After the Applicant realized this mistake, a fresh Notice of Appeal was filed in this Court's Registry (Appellate Division).

10. Counsel further submitted that the stated error notwithstanding, the Notice of Appeal was actually filed within the time stipulated under Rule 78(1) (2) of the Rules of this Court. He argued that the fact that there was an error in the filing the Notice of Appeal in the Trial Court does not negate the fact that the Applicant's intention was to Appeal and the Respondents was duly served with the Notice of Appeal and therefore the Respondents have suffered no prejudice.

11. Counsel for the Applicant submitted that the mistake and negligence of Counsel should not be visited on its client. He further submitted that the Respondents will not be prejudiced since they knew of the Applicant's intention to Appeal since they had been served with the Notice of Appeal and which validation was being sought.

The Respondent's Submissions.

12. Counsel for the Respondent opposed the application for extension of time and argued that Rule 78(2) of the Rules of this Court prescribes that:

> *"[e]very notice shall, subject to the provisions of Rule 82 be so lodged within thirty (30) days of the date of the decision against which it is desired to appeal".*

However in this matter the time line was not followed. He submitted that the Trial Court did render a fresh ruling on the matter of the preliminary objection and amicus curiae (after the Applicant's first appeal on the matter), on 20th September 2017. However the Applicant filed its Notice of Appeal on 16th July 2018, approximately 10 months after the ruling by the Trial Court. In so doing, the Applicant failed to take an essential step in the proceedings as required by the Rules of this Court.

13. Counsel further submitted that under Rule 81 of the Rules of this Court, the failure to take an essential step in the proceedings within the prescribed time is ground for an application to have the Notice of Appeal struck out. He argued that the filing of a Notice of Appeal within time is an essential step in the proceedings, without which it is impossible to institute an appeal. He concluded that the failure by the Applicant to file the Notice of Appeal within the timeframe as prescribed by Rule 78(2) of the Rules of this Court should therefore result in the striking out of the Appeal.

14. Counsel further argued that the Applicants had failed to provide Court with sufficient reason why time should be extended as required by Rule 4 of the Rules of this Court. He submitted that while this Court has the judicial discretion to extend the time limited by the Rules of Procedure, in accordance with Rule 4 of the Rules of this Court, there is need to meet the test of "sufficient reason" in order to do so. He argued that the need to meet this test was confirmed by this Court in the case of ***Prof. Anyang' Nyong'o & 10 Others v. the Attorney General of Kenya (Applications No. 1 of 2010 and No. 2 of 2010)***, which dealt with similar applications as the present case. In that case, this Court held that:

> *"...the Court's discretion in an application to extend time is not unlimited."*

The Court emphasised that:

> *"...the crucial issue upon which the determination of this Application depends, is whether or not the Applicant has shown sufficient reason".*

It follows therefore that the exercise of the Court's discretion is subject to proof of "sufficient reason".

15. Counsel further submitted that this Court went on to cite from various cases as to what amounted to "sufficient reason", each of which provided guidance as to which factors the Court should take

into account. In the Kenyan Court of Appeal case of ***Wasike Vs Khisa & Another [2004] IKLR 197*** a number of relevant factors were highlighted:

> *"By rule 4 of the Court of Appeal Rules, the Court has discretion, inter alia, to extend time limited by any decision of the Court for doing any act authorised or required by the rules whether before or after the doing of the act on such terms as the Court thinks just. This discretion is unfettered, but must be exercised judicially. In exercising its discretion the Court is guided by such factors as the merits or otherwise of the intended appeal, whether the extension will cause undue prejudice to the respondent and the length of delay...*
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> *...The delay that the applicant in this case is accused of must be considered broadly and realistically taking all the circumstances of this case into account. A minute examination of every single act of delay in taking any appropriate step and a strict requirement that every such act of delay be satisfactorily explained before the applicant can be given the orders sought, the approach that the learned counsel for the respondent has in fact adopted in the application, would fetter the wide discretion of the Court to extend time under rule 4. Such a rigid approach to the application of the rule would herald the return to the bygone era before the amendment of rule 4 when a "sufficient reason" had to be shown before the Court could extend time".* [Emphasis added]

These factors now can be summarised as including the merits of the intended appeal, whether the extension will cause undue prejudice, the length of delay and whether or not there is a satisfactory explanation for each act of delay.

16. Counsel further submitted that this Court had also referred to the Ugandan Supreme Court decision of ***Boney M Katatumba vs Waheed Karim, Civil Application No. 27 of 2007 (unreported)***. The Ugandan Supreme Court took into consideration reasons that prevented an applicant from taking an essential step in time or other reasons why the intended appeal should be allowed to proceed despite the fact that it was filed out of time and **Justice Mulenga JSC** (as he then was) held:

> *"Under r 5 of the Supreme Court Rules, the Court may, for sufficient reason, extend the time prescribed by the Rules. What constitutes "sufficient reason" is left to the Court's unfettered discretion. In this context, the Court will accept either a reason that prevented an applicant taking the essential step in time or other reasons why the intended appeal should be allowed to proceed though out of time. For example, an application that is brought promptly will be considered more sympathetically than one that is brought after unexplained inordinate delay. But even where the application is unduly delayed, the Court may grant the extension if shutting out the appeal may appear to cause injustice."* [Emphasis added]

These additional factors can be summarised as including the promptness or inordinate delay with which the application was brought, and the injustice caused by striking out the appeal.

17. Counsel further submitted that this Court in the case of **Prof. Anyang' Nyong'o** (Supra) showed the order in which the different factors for granting an extension of time should be taken into account as follows:

> *"The Court at page 77 stated thus – "We would like to state once again that this Court's discretion to extend time under rule 4 only comes into existence after "sufficient reason" for extending time has been established and it is only then that the other considerations such as the absence of any prejudice and prospects or otherwise of success in the appeal can be considered."* [Emphasis added]

18. Counsel also submitted that in the case of **Prof. Anyang' Nyong'o** (Supra) this Court noted that court personnel had contributed to the Applicant's delay in serving the documents. Further, the delay in service of the relevant document could not be characterized as inordinate given that the delay was only a matter of days, two of which were weekend days. The Applicant in that matter was not considered to have been "in any way tardy".

19. Counsel for the Respondents submitted that in their understanding according to this Court's jurisprudence, the following

factors are most relevant to the consideration of whether or not there is "sufficient reason":

i) *the length of the delay; and*

ii) *Whether or not there is a satisfactory explanation for each act of delay, including whether the Court was in any way responsible for (some of) the delay.*

It is further the case of the Respondents that once "sufficient reason" has been established (with the help of the above factors) then the following tests should be considered as to whether the Court should exercise its discretion namely:

iii) *the merits and the prospects of success of the intended appeal;*

iv) *whether the extension will cause undue prejudice; and*

v) *the injustice caused by striking out the appeal.*

20. Counsel for the Respondents then submitted that when one applied the Court's case law to the Applicant's failure to serve the Notice of Appeal on the Respondents on time, it is clear that "sufficient reason" has not been established for the following reasons:

i) *Length of the delay*

The Notice of Appeal was filed almost 10 months after the Ruling by the Trial Court, instead of within the prescribed 30-day period. This, he submitted, is a lengthy delay.

ii) *Explanation for each act of delay*

The Applicant has explained that the delay in filing the Notice of Appeal dated 16th July 2018 is due to negligence of one of the State Attorneys, which the Applicant argues on the basis of Ugandan case law should not be visited on the Applicant's client. In the affidavit in support of Application No. 4 of 2018, the deponent Kiyingi Josephine explains that a State Attorney erroneously filed an earlier notice of appeal dated 6th October 2017 in the First Instance Division instead of the Appellate Division; because she was about to go on maternity leave. This is the sole explanation that the Applicant provided for filing the Notice of Appeal in the wrong division.

21. Counsel for the Respondents submitted that this explanation is not an accurate reflection of the procedural history in this matter which shows a litany of errors and omissions on the part of the Applicant which, is more indicative of a casual attitude on the part of the Applicant towards this Court's procedural deadlines well before this incident.

22. Counsel recalled that the Applicant had also failed to observe the Rules of this Court by only serving the Notice of Appeal dated 6th October 2017 on the Respondents on 18th December 2017,

clearly outside the 14-day period prescribed by Rule 79(1) (a) of the Rules of Procedure. In accordance with the Rules of Procedure, the Notice of Appeal was deemed to have been withdrawn. Furthermore, the Record and Memorandum of Appeal [Appeal No. 1 of 2018 (Appellate Division)] were lodged on 4th January 2018, outside the 30-day period prescribed by Rule 86(1) of the Rules of this Court, so even if the Notice of Appeal (wrongly filed) had correctly been before the Appellate Division at that stage, the Applicant still in any event would have failed to properly institute the relevant appeal.

23. Counsel further pointed out the above notwithstanding, that there was still a significant delay between the mistake on 6th October 2017 and filing a fresh Notice of Appeal on 16th July 2018. He argued therefore that the explanation provided by the Applicant does not clarify why, if the filing of the Notice of Appeal in the wrong division was a genuine mistake, it took another 10 months for that error to come to light, which undermines the legitimacy of the explanation provided. He further pointed out that, the procedural history of the case demonstrates that the Applicant had notice of the said erroneous filing long before July, 2018. This is because on the 20th December 2017, the Respondents had filed a Notice of Address for Service and a Notice of Motion to have the Notice of Appeal struck out [Application No. 4 of 2017 (Appellate Division) (initially recorded as No. 19 of 2017)] in which it specifically notified the Applicant that it had filed the Notice of Appeal in the wrong division. The Applicant even in these circumstances has still

provided no explanation for the subsequent delay of 6 months to file a fresh Notice of Appeal on 16th July 2018.

24. It is the case for the Respondents that the Applicant actions therefore have been deliberate to perpetuate delay. This is because after having been notified of filing the Notice of Appeal in the wrong division, the Applicant nonetheless tried on multiple occasions to progress the defective appeal, without due regard to the Rules of this Court, resulting in further delays as follows:

a. On 4th January 2018, the Applicant filed its Record and Memorandum of Appeal [Appeal No. 1 of 2018 (Appellate Division)], outside the 30-day period prescribed by Rule 86(1) of the Rules of Procedure. The Applicant later insinuated that this was due to delay on the part of the Registry in sending the copy of the proceedings. However, the copy of the proceedings was promptly made available to the Applicant by the Registry one day after its request.
b. On 15th January, 2018, the Applicant erroneously filed Application No. 2 of 2018 to validate the service of the Notice of Appeal in the Trial Court. The Applicant failed to withdraw this application, so it was fixed for hearing in the Trial Court on the 4th June 2018.
c. On the 2nd February, 2018, the Applicant filed another application for extension of time within which to file and serve the Record and Memorandum of Appeal out of time, and for the filing and service of the Record and Memorandum of Appeal

already effect but out of time to be validated [Application No. 2 of 2018 (Appellate Division)].

d. The Applicant then subsequently failed to file submissions within the timeframe set by this Court [the Applicant had been directed to file a further affidavit on or before 15th May, 2018 explaining why it had failed to observe Rule 78(1) of the Rules of Procedure, as well as submissions by 5, June 2018]. The Applicant failed to meet this deadline and instead again filed its submissions out of time on 16th July 2018. The Applicants further affidavit had been filed on 15th May 2018 but was only served upon the Respondents on 20th July 2018, after the Respondents had filed its submissions.

e. Furthermore when the hearings were scheduled by this Court for the 8th and 10th August 2018, (shortly before the application to strike out and to validate the appeal would be heard) the parties consented to withdraw both applications as well as the appeal.

f. Lastly to date, no fresh Memorandum and Record of Appeal have been served on the Respondents by the Applicants.

25. It is the case for the Respondent that the delay in filing the fresh (third Notice of Appeal) is not related to a single mistake by one State Attorney as alleged, but rather highlights an institutional disregard for the Rules of this Court within the Applicant's Chambers. Given these circumstances, there cannot be established "sufficient reason" and or justification by the Applicant to file the Notice of Appeal almost 10 months after the relevant ruling.

26. In the alternative, Counsel for the Respondent submitted that even if this Court found that the Applicant has demonstrated "sufficient reason":

i) the intended appeal is entirely without merit and the prospects of success are non-existent;

ii) any further extension, having regard to the factual background and the failure of the Applicant to comply with the Rules of this Court, will cause undue prejudice to the Respondents as their Reference continues to stall while the Applicant's numerous applications and appeals are heard, and

iii) there can be no injustice in striking out the notice of appeal where the Applicant has disregarded the Rules of this Court, has failed to act with reasonable expedition, and bases its purported appeal on meritless grounds with the effect of further delays to the main Reference. In fact, not striking out the appeal would cause injustice, especially to Mr Ssembuusi, whose case would be even further delayed.

The Rejoinder by the Applicant

27. It is the case of the Applicant that the Respondents have through their submissions recognized that various steps were taken in this matter examples of which are as follows:

i) On 6th October 2017, the Applicant filed a Notice of Appeal against the ruling of the Trial Court dated 20th September 2017. The Notice of Appeal was served on the Respondent's advocates on 18th December 2017.

ii) On 4th January 2018, the Applicant filed its Memorandum and Record of Appeal [Appeal No.1 of 2018 (Appellate Division)].

iii) On the 2nd February 2018, the Applicant filed Application No.2 of 2018 to enlarge time within which to file and serve the Memorandum and Record of Appeal on the Respondents. On 7th February 2018, the Respondent filed an affidavit in reply.

iv) On 17th January 2018, the Respondent (Applicant in Application No.1 of 2018) lodged Application No.1 of 2018 to strike out Appeal No.1 of 2018 on grounds that the Memorandum and Record of Appeal was instituted out of time. On 13th February 2018, The Attorney General of Uganda as Respondent in that matter filed an affidavit in reply.

Furthermore among the steps that were taken by the Applicant between the time of judgment and filing the Notice of Appeal dated 16th July 2018 was the filing of a Record of Appeal at this Court on 4th January 2018 and served on Arcadia Advocates counsel for the Respondents on 9th January 2018.

28. The Applicant's contention for the delay in filing the Notice of Appeal dated 16th July 2018 is because of an error in filing the

Notice of Appeal dated 6th October 2017 in the wrong Court. Counsel for the Applicant in support of the contention that this mistake should not be visited on their client referred us to the Ugandan Supreme Court decision of ***James Bwogi & Sons Ltd – versus- Kampala City Council & Kampala District Land Board, Supreme Court Civil Applications No.09 of 2017,*** wherein ***Justice Nshimye JSC*** held that;

> *"Although the mistake of counsel was not pleaded as submitted by the Counsel for the 2nd Respondent, when court is considering all the circumstances of the matter, it is not precluded from inferring matters which otherwise appear obscured.*
>
> *Court, before exercising its discretion ought to lift the veil to see the party who is likely to suffer most if justice is denied on the ground of fault or error of Counsel.*
>
> *In this case, it is the applicant who would be denied the right to present and prosecute his appeal in the highest court of the land. He would in addition be condemned to pay exorbitant costs on account of deficiency of Counsel.*
>
> *I am alive to the fact that the people in whose name I exercise justice expect me to dispense substantive justice. In consideration of the precursor circumstances and submissions of all counsel. I find that sufficient reason has been established to warrant the grant of the application."*

In the case of **James Bwogi & Sons Ltd** (Supra), the facts are that the Appellant sought an order of Supreme Court extending the time in

which to serve a Notice of Appeal. However counsel for the Applicant failed to demonstrate that the Court's staff had caused the delay and furthermore could not explain why it took nearly four months to file the application for extension before the Supreme Court. All that notwithstanding, the Supreme Court found that refusing the application for extension would amount to denying the applicant's right to present and prosecute his appeal and would have disproportionately negative consequences on the applicant. The Court therefore, used its discretionary powers to grant the extension sought, thereby validating the Notice of Appeal and the Appeal itself. Counsel for the Applicant submitted that the same considerations are relevant in the matter current before this Court.

29. It is the case for the Applicant therefore that they were not just sitting and doing nothing from the time the Ruling was delivered. Steps were taken notwithstanding that some errors were committed by counsel for the Applicant and Court should not disregard the zeal with which the Applicant has pursued their right to Appeal and prosecute the Appeal.

30. Counsel for the Applicant further prayed that this Court finds that there is a Record of Appeal already filed by the Applicant on court record and therefore the Respondent's argument that the Applicants are abusing Court process cannot hold.

31. Counsel for the Applicant also denied that the Applicant were abusing court process through the practice of repeated appeals

against interlocutory rulings and in particular the appeal dated 16th July 2018. Counsel submitted that there had been no abuse of court process but the Applicant is only interested in pursuing the Appeal. He referred us to the decision in the case of ***Attorney General & Uganda Land Commission –versus- James Mark Kamoga & James Kamala, Supreme Court Civil Appeal No.8 of 2004,*** where ***Justice Mulenga JSC,*** held at page 7 of the Judgement that;

> *"Lastly, I note that learned counsel's proposition is basically grounded on the argument that the appeal amounts to abuse of court process because the appellants raise an issue on a second appeal, which could have been raised and disposed of in the first appeal. In my view, failure to adhere to a rule of procedure in instituting a court case does not necessarily amount to an abuse of court process. Abuse of court process involves the use of the process for an improper purpose or a purpose for which the process was not established. Black's Law Dictionary [6th Ed.] states*
>
> *"A malicious abuse of legal process occurs when the party employs it for some unlawful object, not the purpose which it is intended by the law to effect; in other words, a perversion of it."*
>
> *In the instant case it has not been established that, either the failure to apply for a rehearing in the Court of Appeal or the institution of this appeal was for some unlawful object or to pervert the purpose for which the appeal processes were established. I would therefore also dismiss this objection"*

Counsel submitted that the **Kamoga Decision (Supra)** is applicable in this application and therefore the failure to adhere to a rule of this Court should not be construed by this Court as an abuse of court process. He further argued that this Court should consider what prejudice the Respondent will suffer if this Application is allowed and in any event the Respondents have not submitted that they would suffer any.

32. Counsel further submitted that in allowing this application the Appeal will be heard inter parties which is a fundamental right and the Respondents will also have an opportunity to advance their arguments against the Appeal. In this regard Counsel for the Applicant referred Court to the case of ***Caroline Turyatemba & 4 Ors –versus- The Attorney General and the Uganda Land Commission, Constitutional Court of Uganda, Petition No.15 of 2006,*** where the Justices held that;

> *"The right to be heard is a fundamental basic right. It is one of the cornerstones of the whole concept of a fair and impartial trial. The principle of* ***"Hear the other side"*** *or in Latin:* ***"Audi Alteram Partem"*** *is fundamental and far reaching. It encompasses every aspect of fair procedure and the whole area of the due process of the law. It is as old as creation itself, for even in the Garden of Eden, the Lord first afforded a hearing to Adam and Eve, as to why they had eaten the forbidden fruit, before he announced them guilty:* ***See R V University of Cambridge [1723] 1 Str.557 (Fortescue J.)*** *This principle is*

now of universal application. Article 10 of the Universal Declaration of Human Rights, 1948, Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms, 1950, and Section 2(2) of the Canadian Bill of Rights, as well as Article 7(1) (c) of the African Charter on Human and People's Rights, all provide for this right..."

It is therefore the Applicant's submission that the applicant's should be given an opportunity to be heard.

33. The Applicants finally prayed that this Court orders that;

a) That the Applicant's (Attorney General of Uganda) Notice of Appeal be allowed on court record out of time.
b) That the Applicant's (Attorney General of Uganda) late service of Notice of Appeal be validated.
c) That in the alternative, the Applicant's late filing and service of the Memorandum and Record of Appeal in Appeal No.1 of 2018 be validated.
d) That Application No. 6 of 2018 to strike out Appeal No. 4 of 2018 be dismissed.
e) That the Applicant did not abuse court process.
f) That each party bear its costs.

The Court's Analysis and determination.

34. This application at its core is an application for extension of time so that the Notice of Appeal dated 16th July, 2018 filed by the Applicant out of time be validated. This would be an essential first step in validating Appeal No. 4 of 2018 in this Court.

35. Rule 4 of Rules of this Court provides for extension of time and states:

"…. A Division of the Court may, for ***sufficient reason*** *extend time limited* ***by these Rules or by any decision of*** *itself for the doing of any act authorised or required by these Rules,* ***whether before or after the expiration of such time and whether before or after the doing of the act,*** *and any reference in these Rules to any such time shall be construed as a reference to such time as extended." (Emphasis ours).*

Clearly this Court is accorded by the Rules a wide discretion to extend time provided that it finds sufficient reason to do so.

36. This Court has recently had occasion to extensively discuss the application of Rule 4 of the Rules of this Court in the case of **Godfrey Magezi V National Medical Stores** Appeal No. 2 of 2016. We shall for consistency restate our position on Rule 4 where we held:

> *"… we hold that in determing whether "sufficient reason" for extension of time under Rule 4 exists, the court seized with the matter should take into account not only the considerations relevant to the applicant's inability or failure to take the*

essential procedural step in time, but also any other considerations that might impel a court of justice to excuse a procedural lapse and incline to a hearing on the merits. In our considered opinion, such other considerations will depend on the circumstances of individual cases and include, but not limited to , such matters as the promptitude with which the remedial application is brought, whether the jurisdiction of the Court or legality of the decision sought to be challenged on the merits is in issue, whether there was manifest breach of the rules of natural justice in the decision sought to be challenged on the merits, the public importance of the said matter, and of course, the prejudice that may be occasioned to either party by the grant or refusal of the application for extension of time. We prefer this broad purposive approach for the reason that judicial discretion is only a tool, a stratagem or a device in the hands of a court for doing justice or, in the converse, avoiding injustice. That tool should not be blunted by an approach which constricts the court's margin of appreciation. In dealing with procedural lapses, the only relevant sign is the beacon of justice. The Court's eyes must remain firmly fixed on that beacon…".

37. This Court in the **Godfrey Magezi case** (Supra) while following its earlier decision in the case of **Attorney General of Kenya V Prof Anyang' Nyongo'** Appeal No. 1 of 2009 noted that "sufficient reason" under Rule 4 does not mean "any reason" therefore calling for a "qualitatively higher standard". Indeed in the **Godfrey Magezi case** (Supra) the Appellant was able to show that his depositions did not

disclose sloth or dilatoriness on his part but rather they showed appropriate diligence for which we allowed the application for extension of time.

38. In this matter before us, the Applicant makes no direct reference or argument showing compliance with the test of "sufficient reason" as provided for under the Rule 4 of the Rules of this Court. That notwithstanding, the submissions of counsel for the Applicant provide a reason that the Notice of Appeal of the 16th July 2018 was filed out of time because it was filed in the wrong Registry by a State Attorney about to go on maternity leave and it took the Applicant some time to realise this error. Counsel admitted that some errors were made in filing the Notice of Appeal but in mitigation referred us to the Ugandan Supreme Court decisions of **James Bwogi** and **David Kamoga** (both Supra) which are to the effect that mistake of counsel should not be visited against his/her client and court should do its best to administer substantive justice.

39. Counsel for the Respondent on the other hand submitted that the errors of the Applicant stretch far beyond the single incident of failing to file the Notice of Appeal in the wrong Registry but overall taking all the interlocutory applications in this case show a pattern of deliberate disregard for following the rules of this Court and an abuse of court process as it happened again in another appeal before this Court involving the same parties namely **Attorney General of Uganda V Media Legal Defence Initiative (MLDI) & 19 others** Appeal No. 3 of 2016 (herein after referred to as "MLDI 1"). We shall not reproduce that said pattern as argued by the Respondents as it is already outlined earlier in this Ruling.

40. Counsel for the Applicant denies that there was an abuse of court process as the Applicant in filing the said applications was simply interested in pursuing its appeal as, is their fundamental right to be heard. In this regard we were referred to another Ugandan Supreme Court decision of **Caroline Turyatemba** (Supra).

41. The underlining contest at the Trial Court from which this application arises is whether or not the Respondents should be allowed as amici curiae (friend of court) in the Reference No. 16 of 2014 **Ronald Ssembuusi V Attorney General of Uganda**. The Applicant takes the view that the Respondents are biased and should not be allowed to provide briefs in the Reference and raised a preliminary objection in the Respondent's application at the Trial Court to be amici curiae which was over ruled by the Trial Court without addressing all aspects of the said objection especially the competence of the application. The Applicants appealed that decision to this Court in **MLDI 1** (Supra) and were successful. The Trial Court was directed by this Court to make a determination of the competence of the application and the Trial Court still over ruled the objection and hence this present Application. It is important however to note that the actual merits of Reference No. 16 of 2014 have not been finalised and the Applicant Mr Ssembuusi has since passed on before the hearing of his Reference.

42. In our decision in **MLDI 1** (Supra) this Court held:

"...We, all the same have found ourselves constrained to make this pertinent observation as we conclude our canvassing of this issue. We are not oblivious of the fact that the unfettered right of appeal against any "judgment or order" of the First

Instance Division carries with it the potential of causing delays in the disposal of cases in both Divisions of the Court, thereby rendering the Court's vision a poetic dream. This is particularly true where the appealed from decision or order, like this one, does not have the effect of finally disposing of the Reference, Application or Claim. We therefore hope and pray that well intentioned parties will sparingly resort to this right of appeal against interlocutory rulings of orders which are likely in the long run to lead to a miscarriage of justice if no immediate redress is sought and obtained."

As it is, this application for leave to extend time in substance seeks the same result as the appeal in **MLDI 1** (Supra), which is to object to the Respondents being admitted as amici curiae at the Trial Court.

43. So applying the above stated tests to this Application, can it be said that the Applicant has met the test of "sufficient reason" for time to be extended? We say no, and the following are the reasons for our finding.

44. Whereas an application for leave to appear as amicus curiae under Rule 36 of the Rules of this Court shall be by Notice of Motion, the outcome is quite unique from all other such types of applications. This is because the applicant seeks to be a friend of court and it is the court to decide whether or not it wishes to benefit from the assistance of the said amicus. In **Black's Law Dictionary** 10th Edition the term "amicus curiae" is defined as

"...Friend of court. Someone who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief

in the action because that person has a strong interest in the subject matter."

Indeed Rule 36 (2) of the Rules of this Court reads

"…An Application under sub-rule (1) shall contain-

(a) A description of the parties

(b) The name and address of the intervener

(c) The order in respect of which the …amicus curiae is applying for leave to intervene;

(d) ….a statement of the amicus curiae's interest in the result of the case…"

In other words the amicus strictly speaking is for the benefit of the court not the parties as such. The court in such circumstances may find the amicus brief useful and rely on them or on the other hand of little value added and dispense with them.

45. Indeed the Trial Court in its decision in the Reference of **Dr Ally Possi & anor V Human Rights Awareness & Promotion Forum (HRAPF) & anor** Application No 1 of 2005 had the opportunity to discuss the admission of Amici Curiae. It held after an extensive review of case law, that the admission of Amicus Curiae brief is a matter of judicial discretion which like all discretion, should be exercised judiciously. We agree. However when the court has properly exercised it discretion to benefit from an amicus brief then the court has made its decision, it cannot rightly be for one of the parties to the case to say *"such and such an expert should not be the court's friend"* and then appeal the matter. That would amount to usurping the court's discretion. This should be distinguished from

what happened in **MLDI 1** (Supra) where there was a procedural irregularity in the said application.

46. It is our considered view that the experience in this matter is clear evidence of the need to review Rule 36 of the Rules of this Court with regard to the admission of amicus brief and avoid "trials with a trial" at the expense of disposing of the main Reference. Indeed it is apparent to us that it was erroneous to have lumped together the applications for an Intervener (under Article 40 of the Treaty) and *Amicus Curiae* under the same Rule 36 of the Rules of this Court. Whereas an Intervener becomes a party to the Reference, an *Amicus Curiae* does not and therefore admission of *Amicus* is firmly within the discretion of the Court.

47. Secondly, the reason that a *"State Attorney was going on maternity leave"* and hence filed the Notice of Appeal in the wrong registry is a reason in our finding that struggles to meet the test of *"sufficient reason"* and amounts to finding "any reason" for purposes of the said application yet a qualitatively higher standard would have been expected.

48. Thirdly, whereas we agree that substantive justice should be promoted and such perceived errors of counsel should not be used to prejudice litigants, in this matter, any benefit of an amicus brief will go to the court and so the position of a litigant being prejudiced in these circumstances is misconceived.

49. Lastly we agree with counsel for the Respondent that in this matter that the Applicant has persistent fallen short of the timelines of the Rules of this Court. Such a pattern depicting the lack of promptitude cannot merely be explained away as procedural

lapses. It is simply evidence of failure to adequately prepare for court; which we find unacceptable. This Court has already cautioned in **MLDI 1** (Supra) that:

> *"....We therefore hope and pray that well intentioned parties will sparingly resort to this right of appeal against interlocutory rulings of orders which are likely in the long run to lead to a miscarriage of justice if no immediate redress is sought and obtained."*

The net effect of this lack of promptitude is that Reference No 16 of 2014 has stalled in the Trial Court and indeed one of the parties therein has passed on. The interests of justice in our finding, is for the main Reference to proceed to avoid further miscarriage of Justice.

Conclusion

50. The foregoing being our findings and holdings, we accordingly dismiss this Application.

51. With regard to the issue of costs, since this Application has brought further clarity as to the admission of Amicus Curiae in a Reference we hold that each party should bear their own costs.

We So Order

Dated delivered and signed at Arusha this....28th....day of May 2019

.....
Liboire Nkurunziza
VICE PRESIDENT

.....
Aaron Ringera
JUSTICE OF APPEAL

.....
Geoffrey Kiryabwire
JUSTICE OF APPEAL

Certified as True Copy of the
The Registrar
East African Court of
DATE: 28/05/2019