



IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA
APPELLATE DIVISION

**(Coram: Emmanuel Ugirashebuja, P; Geoffrey Kiryabwire and
Sauda Mjasiri, JJ.A)**

**CONSOLIDATED APPLICATIONS NO.6 OF 2019, NO.7 OF 2019 AND
NO. 8 OF 2019**

(Arising from Appeal No.3 of 2019)

DR. MPOZAYO CHRISTOPHE APPLICANT
VERSUS
ATTORNEY GENERAL OF THE REPUBLIC
OF RWANDA RESPONDENT

(Appeal from the Judgment of the First Instance Division of the East African Court of Justice at Arusha by Hon. Lady Justice Monica Mugenyi, PJ, Hon. Isaac Lenaola, DPJ, Hon. Faustin Ntezilyayo, Hon. Fakihi A. Jundu, Hon Justice Audace Ngiye (J) dated 28th September, 2018)

20th
.....November, 2020

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RULING OF THE COURT

A. Introduction

1. This Ruling is in respect of Consolidated Applications Nos 6, 7 and 8 of 2019. Application No. 6 was filed by the Applicant, Dr. Mpozayo Christophe under Article 6 (d) and 8(1) of the Treaty for the Establishment of the East African Community (hereinafter referred to as "the Treaty") and Rules 21(1) and 82 A of the East African Court of Justice (EACJ) Rules of Procedure, 2013 (hereinafter referred to as "the Court Rules") for extension of time to allow the Applicant to file an appeal out of time. Application No. 7 was filed by the Respondent, the Honourable Attorney General of the Republic of Rwanda under Rule 1 (2) and 81 of the Court Rules 2013 to strike out both the Notice of Appeal and the Record of Appeal ("the Appeal"). Application No. 8 was also filed by the Attorney General of the Republic of Rwanda under Rules 1 (2) 4, 73 (1) and 85 of the Court Rules seeking extension of time to serve the Notice of Address of Service to the Applicant (the Appellant in Appeal No. 3 of 2019) out of time.

All the three Applications arise from the decision of the of the First Instance Division (hereinafter referred to as "the Trial Court") in Reference No. 10 of 2014 which was filed under Articles 6(d) and 7(2) of the Treaty. The decision of the Trial Court was delivered on 28th September, 2018.

2. Judgment was entered in favour of the Respondent. Being dissatisfied with the said Decision the Applicant filed an appeal in this Court (Appeal No. 4 of 2018). The Appeal was struck out by

this Court on 26th November 2019 for failure by the Applicant to take essential steps in the proceedings within the prescribed time, hence the Application for extension of time.

3. At the Hearing of the Consolidated Applications the Applicant was represented by Mr. Kimutai Bosek, Advocate who was assisted by Ms. Maureen Okoth, Advocate and Mr. Nicholas Ntarugera, Senior State Attorney in the office of the Attorney General of Rwanda appeared for the Respondent.

B. Background

4. In the Trial Court, Dr. Mpozayo Christophe was the Applicant in Reference No. 10 of 2014 and the Attorney General of Rwanda was the Respondent to the Reference.
5. On 28th September, 2018 the Trial Court delivered its Judgment, whereby it dismissed the Reference with an order that each party should bear its own costs.
6. The Applicant being dissatisfied with the said Judgment lodged a Notice of Appeal in the Registry on 22nd October 2018 and subsequently instituted Appeal No. 4 of 2018 by lodging a Record of Appeal on 27th November, 2018.
7. The Applicant instructed the firm of J.K. Bosek and Company Advocates to file the Appeal against the judgement of the Trial Court dated September 28, 2018 in respect of Reference No. 10 of 2014.

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8. The Appeal was filed as instructed by the Applicant. However, the same was struck out by the Court due to the Applicant's failure to effect proper service. According to Counsel for the Applicant, its law firm served the appeal record using courier services.
9. The Applicant's Advocate filed another Notice of Appeal dated 11th December 2019 against the decision of the Trial Court in Reference No. 10 of 2014. The Applicant also filed on the same date a Notice of Motion (Application No. 6 of 2019) under Rule 82 A of the Court Rules seeking extension of time to file an Appeal out of time.
10. In response thereof the Respondent, the Attorney General of the Republic of Rwanda filed a Notice of Address for Service, and two Notices of Motion (Application No. 7 of 2019) seeking to strike out the Notice of Appeal and Record of Appeal (Application No. 8 of 2019) and seeking extension of time to enable the Respondent to serve the Applicant with the Notice of Address for service out of time. The Respondent also prayed for costs.
11. Applications No. 6, 7 and 8 were consolidated during the Scheduling Conference.

C. Proceedings and Decision before the Trial Court

12. On 28th September 2018, Judgment was delivered in favour of the Applicant by the Trial Court.

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D. Applications made to the Appellate Division

13. Being aggrieved by the Decision of the Trial Court, the Applicant filed a Notice of Appeal and served it on the Respondent. The Applicant then filed Application No. 6 of 2019 for extension of time to file the Appeal out of time.
14. The Respondent on 23rd December 2019 filed Application No. 7 of 2019 to strike out the Notice of Appeal and Application No. 8 of 2019 for extension of time to file Notice of Address of Service out of time.

Scheduling of Applications Nos 6, 7 and 8 of 2019

During the Scheduling Conference held on 12th June, 2020 the parties with the approval of the Court agreed to consolidate the three applications (No. 6, 7 and 8) given the fact that all the three applications involved the same parties and related to the same subject matter.

Issues Agreed Upon

15. The Parties agreed on the following issues in respect of the Consolidated Applications during the Scheduling Conference.
 1. *Whether this Honourable Court has jurisdiction to grant leave to file the Appeal out of time pursuant to Rule 82 A of the EACJ Practice and Procedure Rules 2013.*

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2. *Whether the Applicant should be granted leave to appeal out of time or the Notice of Appeal filed in court on 11th December, 2019 should be struck out.*
3. *Whether the Respondent should be granted leave to file the notice of address for service out of time.*

E. Proceedings before the Appellate Division

Issue No 1

Whether this Honourable Court has jurisdiction to grant leave to file the Appeal out of time pursuant to Rule 82 A of the EACJ Practice and Procedure Rules 2013.

Applicant's case

16. The Appeal was filed as instructed by the Applicant. However, the same was struck out due to the Applicant's failure to effect proper service. According to Counsel for the Applicant, its law firm served the appeal record using Courier services.
17. The Applicant who is in prison in Rwanda could not access funds to effect personal services. According to the Counsel for the Applicant, his client could not access his funds deposited in a Bank in Tanzania where he was previously working. The Applicant is an innocent litigant who is not in a position to comply with the Court Rules, due to his incarceration. The Applicant's counsel could not assist in funding personal service as the brief is *pro bono*. The

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Applicant should therefore not be penalized in any way for any mistakes committed by his advocate.

18. The Applicant's appeal has a great chance of success and the same has not been substantially determined by this Court. This Honourable Court has jurisdiction to grant the Applicant's prayers.

19. The Applicant's Counsel made reference to Rule 4 of the Court Rules 2013 which provides this Court with the discretion to extend time.

20. The Applicant's Counsel relied on the case of **Wasike v Khisa & Another [2004] KLR 197** According to Counsel for the Applicant, the Court in exercising its discretion is guided by such factors as merits or otherwise of the intended appeal; whether the extension will cause undue prejudice to the Respondent and the length of delay. He also made reference to the case of **Anyang' Nyong'o v the Attorney General of Kenya**, Application No. 2 of 2010.

21. Counsel for the Applicant prayed that the Court exercise its discretion conferred under Rule 4 of the Court Rules taking into consideration the following circumstances:-

- (i) There was a pending appeal before this Honourable Court and that it was only after the Appeal was struck out on a technicality, that is for lack of proper service, that the Applicant could seek extension of time.

- (ii) The Notice of Appeal and the Notice of Motion were filed promptly without any delay after the dismissal of the Applicant's first Appeal (Appeal No. 4 of 2018) on 26th November 2019. The Applicant lodged a Notice of Appeal on 11th December 2019 and a Notice of Motion (Application No. 6 of 2019) seeking extension of time to file an appeal.
 - (iii) The Respondent would not be prejudiced in any way if an extension of time is granted.
 - (iv) The Respondent did not comply with the Court Rules when moving this Honourable Court.
22. The Applicant has demonstrated sufficient reasons as required under Rule 4 of the Court Rules as provided under paragraph 14 of the Applicant's affidavit.
23. The physical and financial constraints faced by the Applicant who has been incarcerated since 2013 should not be used by the Respondent to deny him access to justice. The striking out of the Appeal has caused a great prejudice to the Applicant denying him the chance for the appeal to be determined substantively.
24. Counsel made reference to the case of **The Secretary General of the East African Community v Hon. Sitenda Sebalu**, where the Court laid down some of the factors to be taken into consideration in deciding whether or not to grant extension of time, such as the length of the delay, chances of the appeal succeeding and the effect of the delay in public administration.

25. The Appeal has an overwhelming chance of success. The Applicant has already filed a Notice of Appeal as required under Rule 82 A of the Court Rules and a *draft memorandum of appeal* has been attached to his Supplementary Affidavit filed on 25th February 2020 in paragraph 13. The Application has been filed expeditiously and without undue delay and it is brought in good faith and in the interest of justice.

26. The Rule for effecting services on the party personally is no longer the exclusive mode of service. The amendment to the Rules on services in the Court Rules 2019, was clearly prompted by hardship and possible mischief by litigants and the fact that modern technology provides more user friendly and less costly and effective mode of service.

27. The Applicant did not have any objection to Application No. 8 of 2019 filed by the Respondent seeking extension of time to serve the Applicant with the Notice of Address for service.

28. The Applicant asked the Court to grant extension of time within which to lodge the Appeal and to be granted costs of the Consolidated Application.

Respondent's case

29. Counsel for the Respondent argued that the Notice of Appeal should be struck out on the ground that some essential steps in the proceedings were not taken within the prescribed time. The Notice of Appeal filed by the Applicant on 11th December 2019 was

received by the Respondent on 12th December 2019. The Notice has been filed under the wrong provisions of the law (Rule 82 A of the Court Rules 2013) which is no longer applicable following the coming into force of the 2019 Rules on 23rd July 2019.

30. The Notice of Motion (Application No. 6 of 2019) was filed under the wrong provisions of the law. Articles 6(d), 7(2), 21(1), 8(1) and 82 (a) of the Treaty for the East African Community are not applicable to the application for extension of time as provided in Rule 69(2)(a) 93, as Appeal No. 4 of 2018 was filed on 22nd October 2018 and struck out on 26th November 2019.

31. The two Notices of Appeal filed on 28th November, 2019 and 11th December 2019 were filed under the wrong provision of the law, that is Rule 82 (A) of the Court Rules.

32. The Appeal was properly struck out for not being properly filed and served to the other party.

33. According to counsel for the Respondent, no extension of time should be granted to the Applicant as doing so would prejudice the Respondent and the cause of justice as there is no basis for granting the extension of time.

34. The Applicant's second Notice of Appeal filed on 11th December, 2019 which was served on the Respondent on 12th December 2019 was filed in Court and served to the Respondent more than 15 months late and therefore in violation of Rule 88 of the Court Rules 2019. In this matter, the Respondent having filed

the Notice of Appeal in respect of Appeal No. 3 of 2019 on 11th December 2019, following the striking out of Appeal No. 4 of 2018 has not lodged the appeal as required under this Rule. Failure to do so by the Respondent amounts to a failure to take an essential step in the proceedings.

35. Counsel for the Respondent opposed the application for extension of time and argued that Rule 78(2) of the of the Court Rules provides that:-

“Every 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”.

36. Under Rule 81 of the Court Rules, failure to take an essential step in the proceedings within the prescribed time is a ground for striking out a notice of appeal.

37. 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 striking out the Appeal.

38. The Respondent filed Application No. 7 of 2019 to strike out the Notice of Appeal because it was out of time and in violation with the requirements under Rule 88 of the Court Rules.

39. The Respondent also argued that as Appeal No. 4 of 2018 has been struck out, the Applicant cannot seek extension of time to file an appeal. The door is therefore closed for the Applicant to file another appeal.

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40. The Respondent prayed for an order that the Notice of Appeal filed by the Applicant was filed under the wrong provision of the law and out of time and should be struck out with costs.

41. The Application for extension of time should be dismissed as it was filed under the wrong provision of the law.

F. Analysis and Determination by the Court

42. We have carefully considered the rival submissions by Counsel for both Parties and the authorities presented. The Respondent's serious objection to the Applicant's application for extension of time to file the appeal is that the Applicant has relied on wrong provisions of the law. According to counsel for the Respondent, the Applicant wrongly made reference to the Court Rules 2013 instead of the Court Rules 2019. The Court Rules 2013 were no longer applicable as the 2019 Court Rules came into effect in July 2019. Counsel for the Respondent also submitted that an order granting the Applicant extension of time to file an appeal would highly prejudice the Respondent in terms of time and costs. The Respondent having filed the Notice of Appeal in respect of Appeal No. 3 of 2019 on 11th December 2019, following the striking out of Appeal No. 4 of 2018 has not lodged the appeal as required under this Rule. Failure to do so by the Respondent amounts to a failure to take an essential step in the proceedings.

43. Counsel for the Applicant on the other hand argued that extension of time was justified, given the peculiar circumstances

surrounding the Applicant. His incarceration since, 2013 and the impossibility of accessing his funds to facilitate services and other requirements. According to the Counsel for the Applicant, the hardship being faced by the Applicant constitutes sufficient reasons under Rule 4 of the Court Rules 2013, for extension of time to be granted to the Applicant.

44. This is a Consolidated Application to strike out the Notice of Appeal and the Record of Appeal filed by the Applicant; for extension of time to file an appeal out of time by the Applicant and for extension of time to serve the Notice of Address for service to the Applicant, by the Respondent.

45. According to Rule 86(1) of the Court Rules 2013, a party who has filed a Notice of Appeal must institute the appeal within 30 days of filing the Notice of Appeal. The Rule provides as follows:-

“...1) Subject to the provisions of Rule 119, 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;

(b) The record of appeal in quintuplicate;

(c) The prescribed fee; and

(d) Security for the costs of appeal...”

46. Rule 81 of the Court Rules, 2013 provides that where:-

"...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..."

47. The Respondent therefore applied to have the Applicant's Notice of Appeal struck out for failure by the Applicant to take an essential step of lodging the appeal within a period of 30 days.

48. We shall commence with the application for extension of time to lodge an appeal. The Court Rules provides for extension of time in Rule 4 as follows:-

"...A division of the Court may, for sufficient reason, extend the time limited by these Rules or by any decision of itself for the doing of any act authorized 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 of these Rules to any time shall be construed as a reference to such time so extended..."

The Court is therefore accorded by the Rules a wide discretion to extend time provided that there is sufficient reason to do so.

49. The application of Rule 4 of the Court Rules was extensively considered by the Court in the case of **Godfrey Magezi v National Medical Stores**, Appeal No 02 of 2016. The Court stated in clear terms that extension of time under Rule 4 of the Court Rules is

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discretionary and must be exercised judiciously. The Court stated thus:-

*"...We hold that in determining whether "sufficient reason" for extension of time under Rule 4 exists, the court seized of the matter should take into account not only the considerations relevant to the applicant's inability or failure to take essential procedural steps in time, but also any other considerations that might impel a court of justice to excuse a lapse and incline a hearing on merits. In our considered opinion, such other considerations will depend on the circumstances of individual cases and include, but are not limited to, such matters as the promptitude with which the remedial application is brought, whether the jurisdiction of the Court or the legality of the decision 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, 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 but 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 post is the***

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beacon of justice. The Court's eye must remain firmly fixed on that beacon..."

[Emphasis provided]

50. In the case of **Prof. Anyang' Nyong'o and 10 Others v The Attorney General of Kenya**, Applications No.1 and 2 of 2010, the Court did not fully define what the term sufficient reason means or what that encapsulates or excludes. However the decision did not in any way narrow down the discretion of the Court. It was held that:-

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

The Court emphasized that:-

"...the crucial issue upon which the determination of this Application depends on is whether the Applicant has shown sufficient reason".

51. In **Wasike v Khisa & Another** [2004] 1 KLR 197, in considering an application for extension of time under Rule 4 of the Kenya Court of Appeal Rules, Githinji JA held that the Court's discretion to extend time is unfettered but must be exercised judicially. He stated thus:-

"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 would fetter the wide discretion of the Court to extend time under Rule 4...It is not every delay in taking any appropriate step that would disentitle a party to any relief".

52. In **Boney M. Katatumba v Waheed Karim**, Civil Application No. 27 of 2007 (unreported), the Supreme Court of Uganda, **Mulenga JSC (as he then was) held:-**

"Under Rule 5 of the Supreme Court Rules, the Court may, for sufficient reasons, 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 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]

53. Before considering whether or not the Applicant in this consolidated application has established sufficient reason to justify extension of time, we need to elucidate which Court Rules are applicable in this matter, that is the 2013 Court Rules or the 2019 Court Rules. We have noted that even though the Respondent argued that the Application for extension of time by the Applicant

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was filed under the wrong Court Rules, as the rules applicable were the Court Rules 2019, Applications No. 7 and 8 by the Respondent were equally also made under the same Court Rules (2013).

54. According to the **Legal Notice No. EAC/23/2020** dated 28th January 2020, the Court Rules 2019 came into force on the 1st day of February, 2020. This means that Application for extension of time to file the appeal out of time was properly made in Court under the Court Rules 2013.

55. Rule 5 of the Court Rules 2019 relating to extension of time is similar to Rule 4 of the Court Rules 2013 with no changes.

56. Having resolved the question on the applicable Court Rules, the major issue for consideration and decision is whether or not the Applicant has established sufficient reason for the Court to extend him time to lodge his appeal out of time. Given the hardship conditions of the Applicant and the surrounding circumstances of this case as outlined hereinabove, we are of the considered view that the Applicant has established sufficient reasons under the requirement of Rule 4 of the Court Rules 2013. Furthermore, we are of firm view that the Respondent will not be prejudiced in any way by granting the Applicant extension of time to file his appeal.

57. We would like to state that the order striking out Appeal No. 3 of 2018 does not bar the Applicant from seeking extension of time to file an appeal. This is because the Appeal has not been

considered on merit. See the case of **Ngoni Matengo Cooperative Marketing Union v Ali Mohamed Osman (1959) EA 577.**

58. Issue No. 1 is therefore answered in the affirmative.

59. Having answered issue No. 1, in the affirmative, we conclude issue No. 2 in favour of the Applicant. We find that the Application to strike out the Notice of Appeal is not justifiable under the circumstances.

60. Given our findings on the extension of time to file the appeal, we can now consider the Applicant's application to serve the notice of address of service to the Respondent out of time which falls under issue No. 3. The Applicant did not oppose this application. The outcome of this application depended on whether or not the application for extension of time to file the appeal was granted.

Final Result

61. The Applicant's application for extension of time to lodge the appeal out of time is hereby granted as prayed. The Respondent's application for extension of time to serve the Applicant with its address for service is hereby granted as prayed. It follows therefore that the Respondent's application to strike out the Notice of Appeal is hereby dismissed.

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The Applicant should file the record of appeal together with all the necessary documents within fortyfive (45) days from the date of the delivery of this Ruling.

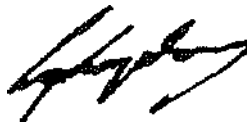
Costs to be costs in the cause.

ORDER ACCORDINGLY

**DATED AND DELIVERED AT ARUSHA THIS ...30th...DAY OF
...November.....2020**



.....
Emmanuel Ugirashebuja
PRESIDENT



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Geoffrey Kiryabwire
JUSTICE OF APPEAL



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Suda Masiri
JUSTICE OF APPEAL