IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Yohane B. Masara, PJ; Audace Ngiye, DPJ; Charles O. Nyawello; Richard Muhumuza & Richard W. Wejuli, JJ)

CONSOLIDATED APPLICATIONS NOS. 25 AND 26 OF 2020
(Arising from Reference No.18 of 2020)

THE ATTORNEY GENERAL OF
THE REPUBLIC OF UGANDA ..... APPLICANT

VERSUS

MALE H. MABIRIZI K. KIWANUKA ..... RESPONDENT

7TH OCTOBER, 2021

RULING OF THE COURT

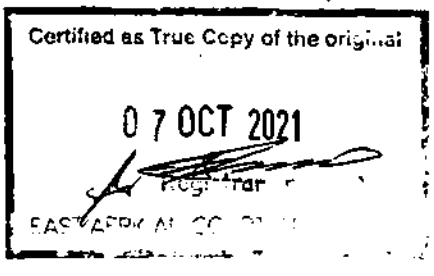
A. INTRODUCTION

1. These Consolidated Applications arise from **Reference No.18 of 2020** ("the Reference") filed by Male H. Mabirizi K. Kiwanuka ("the Applicant") against the Attorney General of the Republic of Uganda ("the Respondent") challenging, among others, the Revised Road Map for the 2021 Presidential and Parliamentary elections. **Application No.25 of 2020** was filed by the Attorney General of the Republic of Uganda. Thereafter, the Applicant filed **Application No.26 of 2020**.

2. The Applications have been preferred under Rules 4, 5 and 52 of the East African Court of Justice Rules, 2019 (for **Application No.25 of 2020**) ("the Rules") and Article 30 of the Treaty for the Establishment of the East African Community ("the Treaty") and Rules 4, 32(1) and 47 of the Rules (for **Application No.26 of 2020**).

3. As to the orders sought of this Court, the Respondent, in its Notice of Motion, prayed as follows:

> ***"(a)*** **time be enlarged within which to serve the Response to the Reference on the Respondent out of time;**
>
> **(b) and/or alternatively, the Response to the Reference, served on the Applicant be validated; and**
>
> **(c) costs of the Application be in the cause."**



4. On the other hand, the Applicant, in his Notice of Motion, prayed for the following orders:

> ***"(a)* the Respondent's Response to the Reference be struck out;**
> **(b) the Respondent pays the costs of this Application to the Applicant."**

5. The Applicant deponed an Affidavit in support of his Application while Mr. Moses Mugisha, a State Attorney in the Ministry of Justice and Constitutional Affairs, deposed an Affidavit on behalf of the Respondent. The Respondent also filed a Supplementary Affidavit deponed by Moses Opiyo, a Records Assistant and Court Process Server in the Ministry of Justice and Constitutional Affairs.

6. On 28th June, 2021 when the two Applications were scheduled for hearing, Mr. Kiwanuka, pursuant to Rule 6 of the Rules, made an oral application for Consolidation of **Application Nos.25 and 26 of 2020.** The application was not opposed. The Court, therefore allowed for consolidation of the two Applications and directed that they be heard simultaneously.

B. REPRESENTATION

7. The Applicant, Mr. Male H. Mabirizi K. Kiwanuka, appeared in person, unrepresented, while the Respondent was represented by Mr. Richard Adrole, Principal State Attorney and Ms. Jacqueline Amsugut, State Attorney.

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C. THE RESPONDENT'S CASE

8. In its Affidavits, and as elaborated during hearing, the Respondent contends that, having been served with the Applicant's Reference, it delivered for filing its Response to the Reference in the Sub-registry of the East African Court of Justice in Kampala on August 6, 2020, within the timeframe prescribed by the Rules.

9. The Respondent further contends that it had intended to file and serve the Response to the Reference on the Applicant on August 6, 2020, but was unable to do so due to reasons beyond its control; namely, the Response to the Reference was not sealed by the "Registrar" as was expected, as the "Registrar" was not at the Sub-registry in Kampala but that the said "Registrar" instructed that the document be left at the sub-registry for sealing.

10. That the Response to the Reference was finally sealed and served on the Applicant on August 11, 2020.

11. At the hearing, Mr. Androle referred the Court to Rules 4 and 5 of the Rules to advance the Respondents' prayers. He also made reference to the decision of this Court in **Male H. Mabirizi Kiwanuka vs. Attorney General of the Republic of Uganda, Consolidated Applications No. 4 and 6 of 2019; Prof. Anyang' Nyongó and 10 Others vs. the Attorney General of Kenya, Application No. 1 of 2006 and Anthony Calist Komu vs. the Attorney General of the Republic of Tanzania, Reference No.7 of 2012,** to augment the Respondent's imploration that there are sufficient reasons adduced which necessitate granting the prayers sought.

12. Mr. Androle urged the Court to take note that the Applicant suffered no prejudice by the late service of the Response to the Reference as he

was able to file a Reply to the Response. In addition, Counsel urged the Court to take into consideration the fact that the Reference raises matters of great public importance to the Republic of Uganda, the Community and the general public; thus, it is important that the Respondent is accorded a right to present its side of the story.

13. The Respondent, therefore, prays that the Court grants the extension of time within which the Applicant may be served with the Response to the Reference or that the service effected on the Applicant on August 11, 2020 be validated considering the fact that the Application was made within a reasonable time, that the Applicant will not suffer any prejudice and that such an order will meet the ends of justice.

D. THE APPLICANT'S CASE

14. In his Affidavits, and as elaborated during hearing, the Applicant acknowledges that after filing **Reference No.18 of 2020** on 22nd June 2020 and served upon the Respondent on 23rd June, 2020, he did not receive from the Respondent Response to the Reference within the 45 days prescribed by the Rules. That it was served on him on 11th August, 2020 and that he received the same under protest.

15. The Applicant urged the Court to hold that service upon him out of time renders the Respondent's Response null and void and that the same should be struck out. The Applicant claims to be prejudiced by the late service as the same disorganized his time to rejoin and interrupted his other programs.

16. Mr. Kiwanuka further urged the Court to hold that the Respondent did not demonstrate sufficient reasons for extension of time. He made reference to decisions made by this Court's Appellate Division in **Managing Editor Mseto and Another Versus the Attorney General**

of the Republic of Tanzania, Applications Nos. 3 & 4 of 2019 and **The Attorney General of Uganda Versus Media Legal Defence Initiative (MDLI) and 19 Others, Consolidated Applications Nos.4 and 6 of 2018** both of which held that sufficient reasons for the delay is a *sine qua non* for the extension of time to be granted.

17. Mr. Kiwanuka labelled the reasons advanced by the Respondent *mere falsehood* because the Response was received, signed and sealed by the Kampala Sub-registry on the same day it was filed. That the signatory is the same person. In his view, the 7 days amounted to inordinate delay.

18. Mr. Kiwanuka urged the Court to ignore reasons advanced by the Respondent and strike out the Response to the Reference as there are no sufficient reasons advanced as required by Rule 5 of the Rules.

19. On another dimension, the Applicant implored the Court to hold that by the time the Response to the Reference was filed on 6th August 2020, it was already out of time. That, even if the same was filed on time, the fact that it was served on him out of time makes the timely filing of no consequence as the filing and service go together.

20. The Applicant concluded by urging the Court to proceed with the Reference ex parte.

E. THE RESPONDENT'S REPLY

21. Ms Amsugut, learned State Attorney contested the allegations made with regards to late filing of the Response to the Reference. Citing Rules 3(1) and 32(1) of the Rules, Ms Amsugut concluded that the last day within which to file the Response was 7th August, 2020 and therefore

when the Response was filed on 6th August, 2020 it was within the prescribed time.

22. The Respondent implored the Court to exercise its discretionary powers under Rule 4 and deny the prayers made by the Applicant and proceed to hear and determine the Reference on the merits. Elaborating on the authorities cited by the Applicant, the Respondent's counsel urged the Court to *'keep its eye on the beacon of justice'.* Unlike in the case of **Managing Editor Mseto** where the delay was more than a year and the reasons advanced unconvincing, the learned counsel argued, in the instant case the delay was less than a week and the application to condone the delay was filed without undue delay.

23. On whether the Response was signed and sealed on the same day, the Respondent urged the Court to dismiss that allegation as there is no evidence on record to substantiate the Applicant's claims.

F. REPLY AND REJOINDER BY THE APPLICANT

24. Mr. Kiwanuka reiterated his assertion that the Respondent filed and served the *Response* late and that he has not adduced sufficient reasons for the said delay. On the importance and public interest of the matters in the reference, Mr. Kiwanuka urged the Court to make a distinction of the matters in the **Male H. Mabirizi Kiwanuka** (Supra) case and those pertained in the Reference subject of this Application.

25. The Applicant reiterated his prayers and asked the Court to grant him costs of the two Applications herein.

G. COURT'S DETERMINATION

26. We have carefully considered the Affidavits, submissions and rival arguments in support and against the Parties' Applications.

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27. In our considered view, two issues crave for determination; namely, whether the Response to the Reference was filed and served out of the prescribed time thus contravening Rule 32(1) of the Rules and whether the Respondent has demonstrated sufficient reasons for the delay to enable the Court to sanction the late service of the Response to the Reference on the Applicant.

ISSUE NO.1: <u>Was the Response to the Reference Filed and Served Out of the Prescribed Time</u>?

28. To address this issue, we find it pertinent to break it into two components; namely, whether the Response was filed within the prescribed time but served on the Applicant out of time as contended by the Respondent, or, whether the Response to the Reference was both filed and served out of the prescribed time as contended by the Applicant.

29. According to the Applicant's Affidavit in support of **<u>Application No.26 of 2020</u>** and his Submissions in Court, **<u>Reference No.18 of 2020</u>** was filed on 22nd June, 2020 and served on the Respondent on 23rd June, 2020. That, in his view, the 45 days within which the Respondent was to file a Response to the Reference expired on 5th August, 2020 but that he was served with the Response on 11th August, 2020.

30. Ms. Amsugut for the Respondent did not agree with the calculations of the number of days as presented by the Applicant. In her estimation, the time to file and serve the Response to the Reference was to elapse on 7th August, 2020. That, when the Response was presented for filing on 6th August, 2020, the same was within time.

31. In order to appreciate the arguments from both parties, the Court had to consult the relevant rules. Rule 32 of the Rules provide as follows:

"32. (1) The respondent shall within forty-five (45) days after being served with a notification of the reference file and serve upon the applicant a response stating:

(a) the name and address of the respondent;

(b) concise statement of facts and law relied on;

(c) the nature of evidence in support where appropriate; and

(d) the reliefs sought by the respondent."

32. From the facts obtained from the pleadings and submissions of the parties herein, there is no contestation that the Respondent was served with the Reference on 23rd June, 2020. That is the day that he was effectively "notified" about the Reference. The Respondent had 45 days within which to file and serve upon the Applicant a response.

33. It is not in dispute that filing of the Response was made on 6th August, 2020. What is contested by the Applicant, in our considered opinion, is whether the Response was filed outside the 45 days prescribed by Rule 32(1) of the Rules.

34. Rule 3(1) provides for computation of time. For clarity the same is reproduced hereunder:

"3(1) Any period of time fixed by the Treaty, these Rules or by any order of the Court for doing any act shall be reckoned as follows:

(a) where a period is to be calculated from the moment at which an event occurs or an action takes place, <u>the day during which that event occurs or that action takes place shall not be counted as falling within the period in</u>

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question; and the period shall end with the expiry of the last day of the period;

(b) periods shall include official holidays, Saturdays and Sundays;

(c) periods shall not be suspended during the Court vacations;

(d) if a period would otherwise end on a Saturday, Sunday or an official holiday, it shall be extended until the end of the first following working day." (Emphasis provided)

35. Guided by the two provisions cited above, we are in agreement with the Respondent's counsel that on 6th August, 2020 when the Response to the reference was filed at the Court's Sub-registry in Kampala, the 45 days prescribed by the Rules for the Respondent to file a Response had not lapsed.

36. Other than the assertion made by the Applicant in his affidavit, the Applicant did not demonstrate to the Court why, in his opinion, he thought 6th August, 2020 was beyond the 45 days.

37. Guided by Rule 3(1) (a) of the Rules, we confirm the assertion made by the Respondent's counsel that 45 days were to expire on 7th August, 2020.

38. We do, however, agree with the Applicant that the computation made by the Respondent's counsel was not stated in the Respondent's Affidavit in reply to the Applicant's Affidavit in support of the Notice of Motion.

39. Nevertheless, we hasten to add that the omission, if at all, does not preclude the Respondent from challenging an apparent error in the computation of dates as was made by the Applicant in this Application.

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Even if the Respondent's counsel was to remain mute on it, the Court was entitled, in its own motion, to rectify the distortion.

40. In the premises, it is the holding of this Court that the Response to the Reference filed on 6th August, 2020 **was filed within the prescribed time.**

41. Regarding service on the Applicant, both parties are in agreement that the Response to the Reference was not served within the 45 days prescribed by law. The effect of such delay is discussed in the next issue.

42. The first issue is thus answered in the negative; that is to say, the Response to the Reference was not filed out of the prescribed time. It was filed within time but served on the Applicant out of time.

ISSUE NO.2: **Has The Respondent Demonstrated Sufficient Reasons for the Delay to Enable the Court to Sanction the Late Service of the Response to the Reference on the Applicant?**

43. Our scrutiny of the Respondent's case reveals four main grounds which the Respondent advances in support of its plea to have the time extended to allow its Response to be properly in the Records of **Reference No.18 of 2020.**

44. The Respondent contends that, having filed its Response to the Reference on 6th August, 2020, it was precluded from serving the same on the Applicant because the filed documents were yet to be Sealed with the Seal of the Court, given that the "Registrar" at the Sub-registry in Kampala was not in office and that the documents were not collected from the said Registry until the 11th day of August, 2020.

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45. The Respondent further contends that the subject of the Reference under consideration presents matters of great public interest to the Government of Uganda, the region and the general public; thus, it is important that the Government of Uganda's side of the story is presented for the interest of justice.

46. Thirdly, the Respondent urges the Court to consider that the Applicant will not suffer any prejudice if the late Response is condoned.

47. Lastly, the Respondent contends that the Application to have the late service condoned has been preferred before this Court without undue delay proving that the Respondent has been diligent.

48. It is important also to note that the Applicant does not acquiesce to any of the above stated grounds. In his view, the application to extend time has not been brought in good faith and that the grounds of extension of time are nothing but falsehoods.

49. Several decisions of this Court were referred to by the parties. These decisions relate to this Court's determination of what is considered to be sufficient reasons for the delay against which an application for extension of time can be granted.

50. This Court had an opportunity to address a similar matter in **Male H. Mabirizi Kiwanuka vs. Attorney General of the Republic of Uganda** (Supra). The Court declined to strike out the "Answer to the Reference" as had been requested by the Applicant. In arriving at that decision, the Court made reference to a number of decisions; particularly the decision of this Court in **Prof. Anyang' Nyong'o & 10 Others vs. the Attorney General of the Republic of Kenya** (supra) and **Godfrey Magezi vs. National Medical Stores, EACJ Appeal No.2 of 2016.** In the latter case, the Appellate Division of this Court, while dealing with the issue

relating to "sufficient reason" provided for under Rule 4 of the 2013 Rules of the Court (akin to Rule 5 of the 2019 Rules) had the following to say:

> **"In determining whether 'sufficient reason' for the 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 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, 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, ... 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."**

51. The Court, taking into consideration the subject of the Reference under consideration, held that the matter before it raised matters of great public importance to the Republic of Uganda. Regarding prejudice on the Applicant, the Court stated the following:

> **"We deduce no prejudice to the Respondent, Mr. Mabirizi, should the prayer for extension of time be granted, neither were we satisfactorily addressed on any such prejudice. In any event, the grant of the Application would merely formalise the service upon him of a document that is already on Court record."**

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52. Before the Court, the Applicant sought to distinguish the facts and decision in the **Male H. Mabirizi Kiwanuka vs. Attorney General of the Republic of Uganda.** In his view, the subject of the Reference under consideration relate to a Road Map for the 2020 – 2021 elections while in the referred case the reference dealt with amendments of the Constitution.

53. Just as Constitutional matters are of particular Public Interest, we do not see why elections may not be accorded the same status. We are of considered opinion that the matter under consideration is equally of great public importance not only to the Government of the Republic of Uganda but to the general public as well. Elections are held for the purposes of filling top leadership office of a Country. The Executives and Legislature are constituted through the process of a general election. If the process is halted or disrupted, there is a danger that there could arise a power vacuum and consequently a constitutional crisis. It is against that consideration that we find the distinction made by the Applicant in this regard rather moot.

54. The Applicant also sought to make another distinction relating to the duration of delay. In his view, the delay, which he estimated to be 7 days, was inordinate compared to one day which was the subject of the cited decision. He asked the Court to hold that in light of the decision of the Appellate division in **Managing Editor Mseto and Another vs. the Attorney General of the Republic of Tanzania** (Supra) and **The Attorney General of Uganda vs. Media Legal Defence Initiative (MDLI) and 19 Others** (Supra), the delay to serve him with the Response to the Reference cannot be condoned.

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55. A scrutiny of the decisions cited to us reveal that they do not deviate from the decision in **Godfrey Magezi vs. National Medical Stores** (Supra) discussed above. In **Managing Editor Mseto and Another vs. the Attorney General of the Republic of Tanzania** (Supra) the Court affirmed its decision in **Godfrey Magezi vs. National Medical Stores** (Supra) and had this to say:

> **"It is therefore the Court's judicial duty to interrogate the Application for extension of time with a view to satisfying itself that sufficient reason for extension of time existed and if not avoid indeterminate timelines which is contrary to the objective of expeditious justice."**

56. The Court declined to extend time due to the lapse of time and the reasons advanced. The Court stated:

> **"Instead what we find is that the Application to extend time was filed on the 27th June, 2019 more than a year after the Notice of Appeal was lodged; when there is clear evidence that the Respondent was capable of filing papers in court more than 5 months after the General Notice was made. This is in our considered view shows dilatoriness on the part of the Respondent. The summation of our findings as to whether the Respondent has established sufficient reason for the Court to exercise its discretion to extend time for them to lodge their appeal out of time, is that they have not."**

57. In **The Attorney General of Uganda vs. Media Legal Defence Initiative (MDLI) and 19 Others** (Supra) the Court was asked to validate a Notice of Appeal filed outside the prescribed time. After

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confirming its earlier decision in **Godfrey Magezi vs. National Medical Stores** (Supra) the Court stated:

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

58. The Appellate Division did not validate the Notice of Appeal on the grounds that the reasons advanced did not satisfy the test of sufficient reason. It held:

> **"... 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. 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. Lastly we agree with counsel for the Respondent that in this matter that the Applicant has persistently 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."**

59. Consequently, all decisions referred to us are consistent that this Court has unfettered discretion to enlarge time if the Party applying satisfies

the Court that he was unable to do an act within the prescribed period due to sufficient reasons.

60. Sufficient reasons for the extension of time cannot be defined with precision. The ambit of what amounts to sufficient reason or good cause for the delay as expounded in **Godfrey Magezi Versus National Medical Stores** (Supra) is not peculiar to this Court. Domestic Courts have also discussed the same.

61. In a Tanzanian case of **Tumsifu Kimaro (The Administrator of the Estate of the Late Eliamini Kimaro) vs. Mohamed Mshindo, Civil Application No. 28/17 of 2017** (unreported) the Court of Appeal of Tanzania, while considering an akin application held *inter alia*:

> **"Before dealing with the substance of this application in light of the rival submissions, I find it apposite to restate that although the Court's power for extending time under rule 10 of the Rules is both broad and discretionary, it can only be exercised if good cause is shown. Whereas it may not be possible to lay down an invariable definition of good cause so as to guide the exercise of the Court's discretion under rule 10, the Court must consider factors such as the length of the delay, the reasons for the delay, the degree of prejudice the Respondent stands to suffer if time is extended, whether the Applicant was diligent, whether there is point of law of sufficient importance such as the illegality of the decision sought to be challenged." (Emphasis supplied)**

62. With regard to the length of delay, the Applicant's affidavit and the submissions thereof suggest that it was seven (7) days. He is incorrect. Having determined that the last day of filing, according to the Rules,

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was 7th August, 2020, and service having been effected on 11th August, the actual delay was not more than four (4) days. Considering the reasons advanced in the affidavits of Moses Mugisha and Moses Opio, we are unable to hold the delay as inordinate.

63. Regarding prejudice on the part of the Applicant, having determined that the Response to the Reference was filed on time, we are unable to fathom the arguments made by the Applicant about prejudice on his part. The Applicant seems to suggest that he was prejudiced by the delay to serve him as he could not file a reply to the Reference on time and that "he should not be made to appear with a person who is not fit to be with him". The fact that the Applicant sued the Respondent, it cannot be prejudicial to him if that person appears with him. Further, the Applicant had 45 days from the time of service within which to file a Reply to the Response, according to the Rules. He has not informed the Court whether he was forced to reply within a shorter period as a result of late service on him. Consequently, we do not agree with him that he was prejudiced.

64. Relating to diligence, we are unable to hold otherwise. Having realised that they had served the Applicant late, the Respondent knocked at the doors of this Court by filing **Application No.25 of 2020** on 4th September, 2020. That was slightly over three weeks after they had served the Respondent. The Notice of Motion was supported by two affidavits, both of them explaining the quagmire which necessitated the late service on the Applicant.

65. The Applicant, on his part, vehemently oppose the reasons advanced by the Respondent. He labels them falsehood and an attempt to look for "any reason" to get the extension of time. The only evidence the

Applicant submitted in support of his averments is a copy of the Respondent's Response to the Reference. In his view, the document was received, signed and sealed on the same date.

66. A scrutiny of the two affidavits filed by the Respondent do not seem to suggest that the Response to the Reference was signed by a different person. Paragraphs 4, 5 and 6 of the Affidavit attested by Moses Mugisha provide that as the "Registrar" was not in office on that day, the Process Server was instructed to leave the documents at the Registry and that on 11th August, 2020, he received a call to pick the sealed documents. The same information is provided by Moses Opio in his supplementary affidavit.

67. We are, therefore, unable to deduce the falsehood alleged by the Applicant. An Affidavit is evidence on oath; a fact therein is taken to be true unless there is credible evidence to the contrary.

68. In the premises, we do take the contents of the two affidavits to be correct and true. In the event, we find that the Respondent was diligent in the way it handled the matter.

69. **Issue No.2** is, therefore, answered in the affirmative.

H. CONCLUSION

70. In the result, we decline the invitation extended to us to strike off the Court record the Response to the Reference. As the same was served and received by the Applicant on 11th August, 2020, albeit under protest, we, in exercise of discretion bestowed on us by Rule 5 of the Rules, do hereby enlarge the time within which the response to the Reference may be served and do deem the said Response previously served upon the Applicant to have been validly served.

71. Finally, considering the circumstances of the matter herein and in the exercise of our judicial discretion, we make no order as to costs.

72. It is so ordered.

Dated, signed and delivered in Arusha this 7th day of October, 2021

.....
Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE

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Hon. Justice Audace Ngiye
DEPUTY PRINCIPAL JUDGE

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Hon. Justice Dr. Charles O. Nyawello
JUDGE

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Hon. Justice Richard Muhumuza
JUDGE

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Hon. Justice Richard W. Wejuli
JUDGE

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