



**IN THE EAST AFRICAN COURT OF JUSTICE**

**AT ARUSHA**

**APPELLATE DIVISION**

**(Coram: Nestor Kayobera, P.; Sauda Mjasiri, VP.; Anita Mugeni,  
Kathurima M'Inoti & Cheborion Barishaki, JJA.)**

**APPLICATION NO. 15 OF 2022  
(ARISING FROM APPEAL NO. 8 OF 2022)**

**BETWEEN**

**MIRONKO FRANCOIS XAVIER.....APPLICANT**

**AND**

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

*[Application for extension of time and to deem as filed on time the Record of Appeal dated 9th June 2022 arising from the Judgment of the First Instance Division at Arusha by Yohane B. Masara, PJ., Audace Ngiye, DPJ., Charles Nyachae, Richard Muhumiza, and Richard W. Wejuli, JJ. dated 6th April 2022 in Reference No. 11 of 2018]*

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East African Court of Justice

Dated..... 21/3/2023 .....

## RULING OF THE COURT

### INTRODUCTION

1. **Mironko Francois Xavier (the Applicant)** has moved the Court by a Notice of Motion dated 7th December 2022 for extension of time and to deem his record of appeal filed on 9th June 2022 to have been filed on time. The Application is taken out under under **rules 4, 5, 52 and 96** of the **East African Court of Justice Rules of Procedure, 2019 (the Rules)** and **Article 35** of the **Treaty for the Establishment of the East African Community (the Treaty)**.
2. The Applicant is a citizen of the **Republic of Rwanda** resident in Amajyambere Village, Gasabo District, Kigali, Rwanda. He is represented in this Application by **Mr. Joel Kimutai Bosek**, Advocate and **Ms. Claire N. Kituyi**, Advocate.
3. **The Respondent** is the **Attorney General** of the **Republic of Rwanda**, a Partner State to the Treaty. The Respondent is represented in this Application by **Mr. Emile Ntwali**, Principal State Attorney and **Mr. Nicholas Ntarugera**, Senior State Attorney.

### BACKGROUND

4. On 6th April 2022 the **First Instance Division** of this Court (**the Trial Court**) dismissed the Applicant's **Reference No. 11 of 2018** which it found to have been filed out of time contrary to **Article 30(2)** of the **Treaty**.

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5. The Applicant was aggrieved by the said judgement and lodged a Notice of Appeal on 5th May 2022. The Notice of Appeal was lodged within the period of thirty (30) days prescribed by **rule 88 (2)** of the Rules. The Applicant also served the Notice of Appeal upon the Respondent on 10th May 2022, which was within the period of fourteen (14) days prescribed by **rule 89** of the Rules. The Respondent acknowledged service and on 11th May 2002 the Applicant filed an affidavit of service of the Notice of Appeal.
  
6. On 19th April 2022 the Applicant, who it is common ground was acting in person and is a layman, applied to the Registrar of the Court by email for copies of proceedings to enable him prepare the Record of Appeal. The Registrar replied to the Applicant's email by an email dated 20th April 2022 and advised the Applicant to liaise with his advocates.
  
7. It is also common ground that the Applicant did not serve upon the Respondent a copy of his email applying for copies of the proceedings, as is required by **rule 96 (4)** of the Rules.

**THE RECORD OF APPEAL AND SCHEDULING CONFERENCE**

8. The Applicant filed the Record of Appeal in **Appeal No. 8** of 2022 on 9th June 2022. On 12th August 2022 the Respondent filed **Application No. 12** of 2022, seeking to strike out the Applicant's Notice of Appeal on the ground that the Applicant had failed to take essential steps within the prescribed time.

At the Scheduling Conference for the Appeal held on 15th August 2022 the parties agreed on three issues for determination, with issue No. 1 being whether the Applicant's appeal was properly before the Court. On

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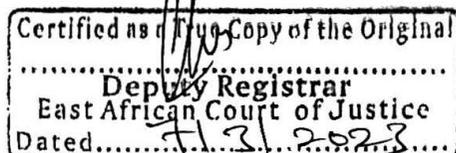
that basis, the Respondent withdrew its application to strike out the Applicant's Notice of Appeal.

10. When the appeal was called up for hearing on 23rd November 2022, the Applicant applied informally for extension of time to deem the appeal as filed within time. The Court drew the Applicant's attention to the fact that under **rule 94** of the Rules, the kind of Application he was contemplating must be made formally, at which point the Applicant successfully applied for an adjournment to consider his position. Subsequently on 7th December 2022, the Applicant filed the Application now before us for extension of time and to deem Appeal No. 8 of 2022 as filed on time.

11. The application is supported by the Applicant's affidavit sworn on 2nd December 2022 in which he has explained why he did not file the appeal within the period prescribed by the Rules.

## THE APPLICANT'S CASE

12. Arguing the application in turns, counsel for the Applicant submitted that under **rule 5**, the Court has wide and unfettered discretion to extend time so as to meet the ends of justice. They submitted that the Applicant, a layman was acting in person and was not familiar with the Rules of the Court when he applied for proceedings but omitted to serve upon the respondent a copy of the letter of application. Counsel added that the delay in filing the appeal was not inordinate because the record of appeal was filed only six days out of time.



13. It was counsel's further submission that the Applicant's application was made in good faith and that the Applicant had made an excusable mistake in failing to serve the Respondent with his letter of application for the proceedings and as a result, was denied the benefits of relying on a certificate of delay under **rule 96(2)** of the Rules. It was contended that the Applicant had been diligent in pursuing his appeal, as demonstrated by the fact that he filed and served the Notice of Appeal on time as required by the Rules but only faltered in failing to copy the email bespeaking proceedings to the Respondent.

14. Lastly counsel submitted that the Respondent had not demonstrated the prejudice that they stood to suffer if time was extended and the Record of Appeal which is already filed, deemed to have been filed on time. Counsel urged us to do substantive justice by deeming his appeal as filed on time .

#### THE RESPONDENT'S CASE

15. The Respondent opposed the Application vide a Replying Affidavit sworn on 19th January 2023 by **Ms. Ingabire Mackline**, Senior State Attorney, Ministry of Justice/Attorney General of the Respondent. Counsel for the respondent, also submitting in turns argued that there was no good reason advanced to justify extension of time. As regards the Applicant's professed lack of familiarity with the Rules of the Court, it was submitted that ignorance of the law is not a defence and that to allow the application on that ground would be tantamount to asking the Court to disregard the rules and would also open the floodgates for flouting the rules of the Court. The respondent doubted whether the Applicant was really ignorant of the rules, having filed and served the Notice of Appeal on time.

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16. It was the Respondent's further submission that the Applicant failed to serve on the Respondent the letter applying for the proceedings and that he was at liberty to apply for extension of time before filing the Record and Memorandum of Appeal as well as his submissions in the Appeal. Counsel urged that it was now too late in the day to entertain the application for extension of time because it was a waste of the Court's time as and an abuse of the process of the Court. According to counsel, the last date for filing the appeal was 3rd June 2022, but the Applicant filed the same 6 days late, on 9th June 2022.

17. Counsel also submitted that the application for extension of time was itself incompetent because the Applicant had invoked **rule 52** of the Rules, which is applicable to the Trial Court rather than **rule 94** which applied to this Court. He also urged that even on merit, the Appeal already filed by the Applicant had no chance of success.

18. Counsel concluded by submitting that the application for extension of time was malicious and an afterthought intended to salvage a fatally defective appeal. They also took issue with the Notice of Appointment of the Applicant's counsel, which they said cited the ~~wrong~~ rule and created doubt whether the appointment was for an advocate or an agent. Accordingly, the Respondent urged the Court to dismiss the Application with costs.

19. In a short rejoinder, counsel for the Applicant argued that they were appointed primarily as advocates and that the failure to apply for extension of time earlier was a mistake of counsel, which should not be visited on the Applicant. They added that under **rule 5** there was no stipulated time within which the application for extension of time may be

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made. Counsel concluded by submitting that whatever prejudice the Respondent could suffer would be sufficiently remedied by award of thrown away costs.

## THE COURT'S ANALYSIS AND DETERMINATION

20. We have carefully considered the application and the submissions by learned counsel. There can be no doubt that under **rule 5**, the Court is vested with power to extend the time set by the rules for the doing of an act. For clarity, it is apposite to set out the provisions of the that rule, which provides as follows:-

*"5. 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 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 so extended."*

21. Under **Rule 5**, so long as a party is able to present "sufficient reason" the Court has power to extend the time set by the Court or by the Rules. It is noteworthy that under the rule, the Court can extend time before or after expiry of the prescribed time or either before or after the doing of the Act. This means that, even though it is preferable, a party is not precluded from applying for extension of time after, for example, filing out of time a Notice of Appeal or a Record of Appeal. The application may be made before or after.

2. The terms of **rule 5** therefore fully answer the Respondent's contention that the application for extension of time should have been filed before the Applicant filed the Record of Appeal out of time. Similarly, a proper reading of the rule does not bear out the Respondent's fear that extending time constitutes a violation of the



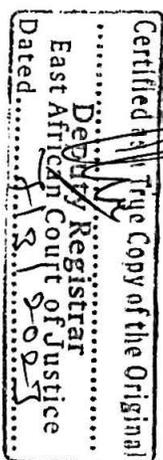
rules and renders otiose the prescribed timelines, or that extension of time will open a flood-gate for the violation of the rules. This is because, first, the rules themselves provide for extension of time, meaning that the prescribed timeliness are not cast in stone. The provision for extension of time in **rule 5** is informed by the eminently common sense appreciation that in life, parties may be unable to meet the prescribed timelines due to very good reasons. Second, under **rule 5**, the Court does not extend time as a matter of course. For a party to be entitled to extension of time, that party must put before the Court "sufficient reason" why he or she did not comply with the set timelines.

23. Several decisions of this Court have expounded on the power of the Court to extend time under **rule 5**. For example, in **Secretary General of the East African Community v. Sitenda Sebalu**, Application No. 9 of 2012, the Court, while interpreting **rule 4** of the East African Court of Justice Rules of Procedure, 2010, which is largely in *pari materia* with the current rule 5, held as follows:-

*"The courts have also emphasized that the discretion under Rule 4, just like any other discretion, must be exercised judicially and not arbitrarily or capriciously, nor should it be exercised based on sentiment or sympathy. That the burden lies squarely on the party seeking the Court's discretion, to place before the Court the material upon which the discretion is to be exercised. Sufficient reason depends on the circumstances of each case..."*

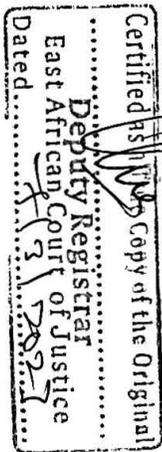
*Some of the factors that the courts take into consideration in deciding whether to grant an extension or not were enumerated by counsel for both parties, they include:*

- a) the length of delay;*
- b) the reason for delay;*
- c) the chances of the appeal succeeding if the application is granted;*
- d) the degree of prejudice to the respondent if the application is granted;*
- e) The effect of the delay on public administration."*



24. Subsequently in **Godfrey Magezi v. National Medical Stores**, Appeal No 2 of 2016, the Court elaborated on the meaning of "sufficient reason" under the rule to mean as follows:-

*"...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 the essential procedural steps in time, but also any other consideration that may impel a court of justice to excuse a procedural lapse and incline to a hearing on merits. In our considered opinion, such other considerations will depend on the circumstances of the 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 sought to be challenged on merit 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 but only a tool, a stratagem or a device in the hands of a Court for doing justice or, in the converse, avoiding injustice. The 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 beacon of justice. The Court's eyes must remain firmly fixed on that beacon."*



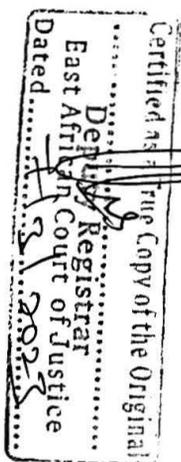
(See also **Prof. Anyang' Nyong'o & 10 Others v Attorney General of the Republic of Kenya**, Applications Nos. 1 and 2 of 2010)

25. Thus, the considerations that guide the Court in an application for extension of time under rule 5 are not a closed catalogue and will depend on the facts and circumstances of each case, the overriding consideration always being to do justice to the parties. From decided cases the Court has extended time for a myriad of reasons. For example, in **Dr. Mpozayo Christophe v Attorney General of the Republic of Rwanda**, Applications Nos. 6, 7 & 8 of 2019, the Court

extended time because the Applicant was handicapped by reason of incarceration in prison. In **Attorney General of the Republic of Uganda v Male H. Mbirizi K. Kiwanuka**, Application No. 9 of 2021, the Court extended time because the Applicant was not able to meet the set timelines due to Covid-19 lockdown. And lastly, in **Godfrey Magezi v. National Medical Stores** (supra) on appeal, the Court extended time because the Applicant's Advocate was unable to comply with set timelines following the drowning of his worker which forced the Advocate to be out of the office.

26. Turning to the application now before us, the delay in question is a mere six days, which in the circumstances of this case cannot be described as inordinate. A delay of six days cannot have much adverse effect on the administration of justice. On the contrary, administration of justice is more likely to be adversely affected by shutting out the Applicant from prosecuting his appeal on merits.

27. The reason for failure to file the appeal within the prescribed time is explained by the fact that the application for proceedings was made by the applicant in person, who due to lack of the familiarity with the Court's Rules, failed to serve a copy upon the respondent and was thus denied the opportunity to rely on a certificate of delay. There is no dispute that at the time the applicant applied for proceedings on 19th April 2022, he was acting in person. The Notice of Appointment of Advocates on record shows that **Messrs J. K. Bosek & Company Advocates** were appointed to act for the applicant on 19th May 2022, exactly a month after the applicant had in person applied for proceedings and committed the blunder of failure to serve the application upon the respondent. In our considered opinion, that is sufficient reason in the circumstances of this appeal.

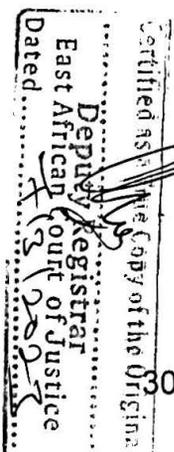


28. We do not think that we should shut out the applicant from agitating the merits of his appeal merely because the Applicant has cited wrong rules of procedure. The Respondent complains, justifiably, that the Applicant has relied on **rule 52** which applies to the Trial Court rather than **rule 94**, which applies to this Court. He also points out that the Advocates' Notice of Appointment is indicated to be under **rule 19(3)** which relates to an agent rather than an Advocate. While its is the duty of counsel to thoroughly familiarise themselves with the rules of the court and that in this application vigilance by counsel is not readily apparent, the citing of the wrong rule *per se* does not deprive the Court of the jurisdiction vested in it by the Rules. The Court is inclined to overlook such slips, particularly when no obvious prejudice is demonstrated to have been occasioned to the other party. As is often stated, the rules of procedure are but handmaidens of justice and the Court is not a robotic slave to those rules.

29. In **Peter Anyang' Nyong'o & 10 Others v. Attorney General of the Republic of Kenya** (*supra*), this Court reiterated thus:

*"In this connection, our Court (which is pre-eminently a Court of Justice), stands prepared to administer substantive justice without undue regard to technicalities – especially technicalities of practice, process or procedure. It is, no doubt, for the pursuit of justice that rule 10 of this Court's Rules readily permits even the acceptance and filing of documents lodged out of time. And it is for this principle, that rule 1 (2) of the Court's Rules mandates the Court to use its inherent power to make any orders necessary for the ends of justice."*

30. The issue was also hotly contested whether the Applicant's intended appeal has any chances of success. As this Court appreciated in **Secretary General of the East African Community v. Sitenda Sebalu** (*supra*), when it comes to that consideration, the Court has to walk a very thin line least it prejudices an appeal which is not before it



and which the parties have not had a chance to fully agitate. It is a consideration that has to be considered with great circumspection and to be invoked in the clearest of cases that the appeal is utterly hopeless. In the circumstances of this case, the parties have already agreed on the issues to be determined in the appeal. To say that the appeal is not arguable is to contradict what the parties themselves have already settled and also to preempt that appeal. We are accordingly satisfied that at this stage, we cannot say that the Applicant's appeal is not arguable.

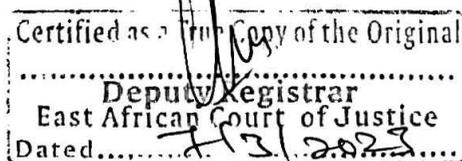
31. Taking all the above into account and in particular the circumstances of this Appeal, we are satisfied that the Applicant's application for extension of time is merited, and we accordingly allow the same and deem the Record of Appeal dated 9th June 2022 as duly filed on time.

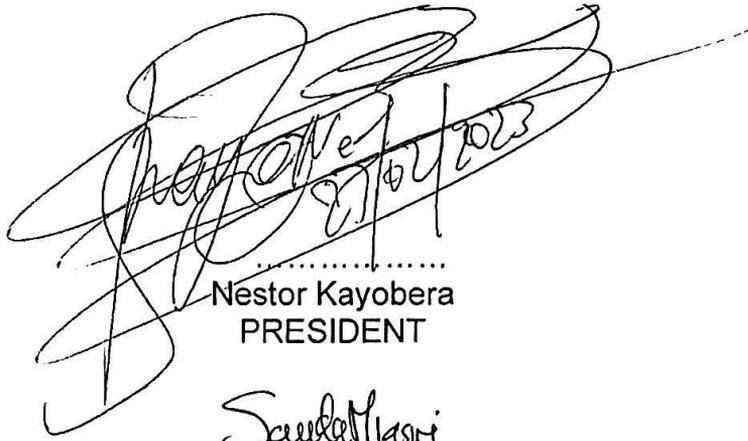
#### DISPOSITION

32. The upshot of our consideration of the Applicant's application is that:-
- a. The Application is allowed; and
  - b. Costs of the Application to abide the outcome of Appeal No. 8 of 2022.

IT IS SO ORDERED

DATED, DELIVERED, AND SIGNED in Arusha on this <sup>27<sup>th</sup></sup>..... day of February 2023.





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Nestor Kayobera  
PRESIDENT



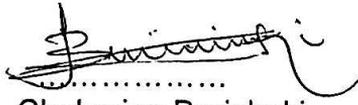
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