

IN THE EAST AFRICAN COURT OF JUSTICE  
APPELLATE DIVISION AT ARUSHA

(Coram: Emmanuel Ugirashebuja, P; Liboire Nkurunziza, VP; Aaron Ringera; Geoffrey Kiryabwire and Sauda Mjasiri, JJA)

APPLICATIONS NOS. 3 AND 4 OF 2019

BETWEEN

THE MANAGING EDITOR MSETO ----- 1<sup>ST</sup> APPLICANT

HALI HALISI PUBLISHERS LTD ----- 2<sup>ND</sup> APPLICANT

AND

THE ATTORNEY GENERAL OF THE  
UNITED REPUBLIC OF TANZANIA----- 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. Dr. Faustin Ntezilyayo, Hon. Justice Fakihi A. Jundu, and Hon. Justice Audace Ngiye (J) , dated 21<sup>st</sup> June 2018 in Reference No. 07 of 2016]

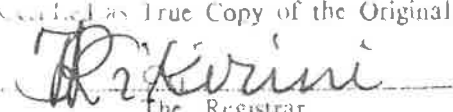
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*P. Kirumi*  
The Registrar  
East African Court of Justice  
DATE: 2.6.2018

02<sup>nd</sup> June, 2020

## RULING OF THE COURT

### A. Introduction.

1. This Ruling arises from Consolidated Applications Nos 3 and 4 of 2019. Application No 3 was filed by the Applicant under Rules 81 of the East African Court of Justice (EACJ) Rules of Procedure, 2013 (hereinafter referred to as "the Rules of this Court") to strike out Notice of Appeal filed by the Respondent on the 19<sup>th</sup> July, 2018. Application No. 4 was filed by the Respondent under Rule 84 (2) of the Rules of this Court for extension of time to file an appeal out of time. Both Applications arise from the Decision of the First Instance Division (hereinafter referred to as "the Trial Court") in Reference No. 07 of 2016 which was filed under Articles 6 (d) and 7 (2) of the Treaty for the Establishment of the East African Community (hereinafter referred to as "the Treaty") challenging the Order issued by the Minister of Information, Culture, Arts and Sports of the United Republic of Tanzania to suspend the publication of the Mseto Newspaper.
2. Judgment in Reference No. 07 of 2016 was entered by the Trial Court in favour of the Applicants. Being dissatisfied with the said Decision, the Respondents filed a Notice of appeal in this Court dated 19<sup>th</sup> July, 2018.
3. At the hearing of the Consolidated Applications, the Applicants were represented by Advocates Mr. Fulgence Massawe and Mr. Jeremiah

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Mtobesya; and the Respondents by Mr. Abubakar Mrisha, Senior State Attorney and Ms. Rowland Mercy Kyamba, Principal State Attorney.

## **B. Background.**

4. On the 10<sup>th</sup> August 2016 vide Gazette Notice No. 242, the Minister of Information, Culture, Arts and Sports of the United Republic of Tanzania issued an Order to suspend the publication of the Mseto Newspaper.
5. The Applicants then filed Reference No. 03 of 2016 before the Trial Court Challenging the Order to suspend the Mseto Newspaper as a violation of the Treaty.

## **C. Proceedings and Decision before the Trial Court.**

6. On the 21<sup>st</sup> June, 2018 the Trial Court delivered Judgment in favour of the Applicant.

## **D. Applications to the Appellate Division.**

7. The Respondents aggrieved by the Decision of the Trial Court on the 19<sup>th</sup> July 2018 filed a Notice of Appeal and served it on the Applicants. The Applicant then filed a Notice of Address for Service on the Respondents on the 26<sup>th</sup> July, 2018.

8. The Applicants on the 24<sup>th</sup> May, 2019 filed and served on the Respondents Application No. 03 of 2019 to strike out the Notice of Appeal under Rule 81 of the Rules of this Court.
9. The Respondents on the on the 1<sup>st</sup> July 2019, filed and served the Applicant Application No. 4 of 2019 for extension of time to file the Appeal.

### **Scheduling of Applications Nos. 3 and 4 of 2019.**

10. During the Scheduling Conference held on the 13<sup>th</sup> November, 2019 the Parties with the approval of the Court agreed to consolidate and hear together Application No 03 of 2019 and Application No 04 of 2019.

### **Agreed issues.**

11. From the Consolidated Applications the Parties agreed to the following issues:-
  - i. Whether the Notice of Appeal filed on the 19<sup>th</sup> July, 2018 by the Attorney General of the United Republic of Tanzania should be struck out or time should be extended to file the appeal out of time.
  - ii. What reliefs if any, are the Parties entitled to.

## E. Proceedings before the Appellate Division

Issue No. 1: Whether the Notice of Appeal filed on the 19<sup>th</sup> July, 2018 by the Attorney General of the United Republic of Tanzania should be struck out or time should be extended to file the appeal out of time.

### Applicant's Case.

12. Counsel for the Applicants submitted that the Notice of Appeal served on them by the Respondents should be struck out because up to the time of hearing, the Respondents had failed to file an appeal within 30 days which is an essential step required under Rule 86 of the Rules of this Court.
13. He submitted that even though the ban on the Mseto Newspaper by the Minister was for 36 months from 10<sup>th</sup> August 2016 and therefore had expired, the Newspaper could not resume publication because the Registrar of Newspapers had denied the Mseto Newspaper a licence on the grounds that there was still a pending Appeal at the EACJ by reason of the said Notice of Appeal. The Applicant was therefore not able to benefit from the fruits of the Trial Court's Decision in its favour.
14. He argued that the only avenue open to the Applicants to resume publication therefore was to have the Notice of Appeal struck out. Counsel further argued in addition that the intended appeal by the Respondent served no purpose as the said ban on the Mseto Newspaper had expired.
15. Counsel for the Applicant also opposed the Application by the Respondent for extension of time within which to file an appeal. He questioned the Respondent's Application which he argued was to

pre-empt the Applicant's own Application to strike out the Notice of Appeal. He further argued that to entertain the Respondent's application to extend time after an application to strike out the Notice of Appeal would make Rule 86 of the Rules of this Court meaningless and that there would be no end to litigation.

16. Counsel further submitted that the Respondents had failed to meet the legal tests for extension of time as provided for in the case of **The Secretary General of the East African Community Versus Sitenda Sebalu** EALS Law Digest (2011-2013) page 147. He argued that in that case, the Applicant wishing the court to grant extension of time would first have to show sufficient reasons to account for the delay and, secondly demonstrate an issue of public importance for the appeal to be heard.

17. In this case, Counsel for the Applicant submitted that the Respondent, in their grounds for Court to extend time, stated that the delay to file an appeal within the time provided for in the Rules of this Court was the restructuring of the Office of the Attorney General which split into the Office of the Attorney General based in Dodoma, that of the Solicitor General based in Dar es salaam and the Director of Public Prosecution. Under the new structure, all litigation was passed over to the Office of the Solicitor General which had not been fully been constituted at the time to follow up with filing an appeal in this matter.

18. Counsel for the Applicant rejected these arguments of the restructuring of the Office of the Attorney General by the Respondent and pointed out that these allegations were not substantiated by any documented proof in the Respondent's Affidavits.

19. Counsel prayed that the Application for extension of time by the Respondents be rejected and the Notice of Appeal be struck out with costs.

### **Respondent's Case**

20. Counsel for the Respondent in the Consolidated Applications submitted that under Rule 4 of the Rules of this Court, this Court has unfettered discretion to extend time provided there are sufficient reasons to do so. He argued that the only limiting factor in the exercise of that discretion was that the Court had to act judiciously. In this regard, the Court would consider such factors as the length and reason for the delay, the likely prejudice to the other party, the importance of the matter to public administration and its effect on the integration process in particular. In this regard, he relied on the case of **Prof. Anyang Nyongo and 10 others Versus The Attorney General of Kenya Application No. 2 of 2010**.
21. Counsel submitted that the main reason for the delay in filing the appeal in this matter was the structural changes that took place in the Office of the Attorney General which, *inter alia*, created a new Office of the Solicitor General with the mandate to litigate and arbitrate all civil matters. Unfortunately, at the time the appeal was to be filed, the said Office of the Solicitor General only had three personnel namely the Solicitor General, The Deputy Solicitor General and the Director of Human Resources. The other staff had not yet been recruited and so it was not possible to file the appeal within time.

22. Counsel disagreed with the argument that the Respondents had provided the Court no evidence of the structural changes at the office of the Attorney General. In this regard, he referred the Court to the Affidavit of James Kibamba who deponed evidence as Director of Administration and Human Resource at the office of the Solicitor General who stated that authority to recruit staff for the office was only obtained on the 30<sup>th</sup> October, 2018. Furthermore, it was necessary to transfer staff from other duty stations around Tanzania to the said office. Finally, there was also a process of transferring files from the Attorney General's Office in Dodoma to the office of the Solicitor General in Dar es Salaam all of which took time. It was for this reason that the filing of the appeal delayed.
23. He also referred the Court to paragraph 3 of the Affidavit of James Kibamba in Application No. 04 of 2019 to which was attached Government Notice No. 05 of 2018 the Solicitor General (Establishment) Order (OSG1) as proof that the restructuring of the Office of the Attorney General did happen as pleaded.
24. Counsel for the Respondent also submitted that the proposed appeal by the Respondent was not moot or of academic purpose. He argued that the appeal is of public importance because it touched on the development of the right and freedom of expression and rights to information for the citizens of Tanzania.
25. He also argued that the Application for extension of time was not an afterthought as Rule 4 of the Rules of this Court allows for an application for extension of time to be made before or after the expiry of such time or before or after the doing of the act required.



26. Counsel further argued that the Notice of Appeal could not act as a stay of the registration of the Mseto Newspaper because Rule 110 (1) of the Rules of this Court clearly provides that an appeal shall not operate as a stay of proceedings or of the decree or order therefrom. He pointed out that if the Mseto Newspaper had failed to be registered, then it was because it failed to comply with the provision of the new Media Services Act.
27. It is the case for the Respondent that it was not due to wilful misconduct or inaction that the appeal was not filed in time but rather due to reforms in the Office of the Attorney General for better efficiency. The Application therefore to strike out the Notice of Appeal is misplaced and the Respondent should be allowed to file the appeal out of time.

#### **Analysis and Determination by the Court.**

28. We have considered the submissions of the opposing Counsel and the authorities supplied for which we are grateful. This is a Consolidated Application to strike out the Notice of Appeal on the one hand, and for extension of time to file an appeal out of time on the other. The thrust of the Applications is whether or not the Notice of Appeal on the Court record should be allowed to progress into a fully-fledged appeal. This is because Rule 86 (1) of the Rules of this Court provide that a party who has filed a notice of appeal must institute the appeal within 30 days of filing the notice of appeal. The Rule reads:-

*“...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...”*

In this matter, the Respondents having filed their Notice of Appeal in time, have not lodged the appeal as required under this Rule. This lapse by the Respondent amounts to a failure to carry out an essential step in the proceedings.

29. Rule 81 of the Rules of this Court 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...”*

The Applicant has therefore applied to have the Respondent's Notice of Appeal struck out for an essential step to lodge the appeal within 30 days had not been done. On the other hand, the Respondent has

applied to Court for extension of time to lodge the appeal. For purposes of economy and logic we shall start with the Application to extend time to lodge the appeal.

30. Rule 4 of the Rules of this Court provides:

*"...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 these Rules to any such time shall be construed as a reference to such time as so extended..."*

31. This Court has addressed Rule 4 of the Rules of this Court in the Appeal of **Godfrey Magezi V National Medical Stores Appeal No 02 of 2016**. In that Appeal, this Court made it clear that the exercise of the court's power to extend time under Rule 4 was discretionary and must be exercised judiciously. Furthermore, for time to be extended, the Court held:-

*"... under Rule 4 "sufficient reason" (and not just "any reason") must exist in order for the Court to exercise its discretion..."*

The Court however noted that the **Prof. Anyang Nyongo** Decision (*Supra*) did not define or indicate what the term "sufficient reason" means or what the term encapsulates or excludes.

32. In the **Godfrey Magezi Case** (*supra*) this Court discussed in detail the effect of the said Rule 4 and we can do no better than restate what was held in that Appeal:-

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

33. 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.

34. In this matter, it has been argued for the Respondent that there was reorganisation of the Office of the Attorney General, which led to the creation of the Office of the Director of Public Prosecution and that of the Solicitor General which was to handle civil litigation but which had not been staffed at the time. It follows that if this reorganisation had not happened at the time it did then the Appeal would have been filed in time and therefore the said reorganisation amounted to sufficient reason for time to be extended by this Court.
35. Counsel for the Applicant submitted that the Respondent in their Application for extension of time provided no evidence in their Affidavit in support of their Application to back up their assertion that there had been a reorganisation in the Office of the Attorney General.
36. With the greatest of respect to Counsel for the Applicant, he clearly misdirected himself as to what amounts to evidence in applications of this nature. In Application No 4 of 2019, there is the supporting Affidavit of Ms Mercy Rowland Kyamba a Principal State Attorney Office of the Solicitor General where in paragraph 8 she deposed that the Respondent was not able to meet the timeline to file an appeal because of the restructuring of the Office of the Attorney General with a view to enhancing and strengthening its capacity by virtue of The Office of The Attorney General (Re-structure) Order, 2018 (GN No. 48 of 2018). She further deposed in paragraph 11 that delay was further occasioned by the need to establish the said Office, recruit new staff and buy furniture before the new mandate could be exercised. Furthermore, in paragraph 11 she deposed that there was need to trace files from the Office of the Attorney General in

Dodoma to be transferred to the Solicitor General's office in Dar es Salaam.

37. We yet again are confronted with the misunderstanding of the effect of affidavits in applications before this Court. In the **Godfrey Magezi** Appeal (Supra) we held:-

*"...A statement or statements made on oath in an affidavit are evidence and it was improper to treat them as mere statements or allegations which required evidential proof (as would undoubtedly have been the case if they had been in a pleading)..."*

Indeed the reference to The Office of The Attorney General (Re-structure) Order, 2018 (GN No. 48 of 2018) is a matter which this Court can take judicial notice of.

38. Counsel for the Applicant further argued that the Application for extension of time being filed shortly after the Applicant had filed an Application to strike out the Notice of Appeal was nothing more than an afterthought designed to prolong litigation which this Court should not entertain. Once again the Counsel has misdirected himself as to the import of Rule 4 of the Rules of this Court. The Rule has very wide latitude to grant extension of time:-

*"...whether before or after the expiration of such time and whether before or after the doing of the act, and any reference to these Rules to any such time shall be construed as a reference to such time as so extended..."*

So the Respondent was well within his legal rights to apply for extension of time even after an application had been made to strike out the Notice of Appeal.

39. However, the real interrogation as to whether or not extension of time should be granted must relate to the reason given by the Respondent relating to the re-structuring of the Office of the Attorney General. It is pertinent to examine the timelines in this matter. A careful look at The Office of The Attorney General (Re-structure) Order, 2018 (GN No. 48 of 2018) shows that it was published on the 13<sup>th</sup> February 2018. This is the time when the re-structuring of the Office of the Attorney General was to begin. However the Judgment of the Trial Court is dated 21<sup>st</sup> June 2018 more than 4 months after the said General Notice was made. The Respondent then filed a Notice of Appeal within time on the 19<sup>th</sup> July 2018 more than 5 months after the General Notice; it would appear by the Attorney General. It is strange therefore why the Respondent could not file the appeal within time. Clearly, the General Notice was made long before the Judgment in the Trial Court and did not affect the filing of the Notice of Appeal on time and logically that meant that the Respondent could still file the appeal as well. It is unclear why the Office of the Attorney General undertook the duty to file the appeal when under the General Notice this function had been moved to the Office of the Solicitor General. Counsel for the Respondent when tasked to explain this apparent anomaly conceded that there was no directive that prohibited the Office of the Attorney General from filing the appeal while the re-structuring was on going. That being the case, we find that there was no plausible reason as to why the appeal was not filed in time in the same manner in which the Notice of Appeal was filed.

40. Instead what we find is that the Application to extend time was filed on the 27<sup>th</sup> 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 in our considered view shows dilatoriness on the part of the Respondent.
41. 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. This in itself would be sufficient to dispose of the Consolidated Applications. However, we need to address the Prayer by the Applicant to dismiss the Notice of Appeal.
42. Rule 82 (a) of the Rules of this Court provides:-

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

*(a) he shall be deemed to have withdrawn his notice of appeal and shall, unless the Court orders otherwise, be liable to pay the costs of any persons on whom the notice of appeal was served arising from that failure to institute the appeal...”*

This clearly means that the Respondent by failing to institute the Appeal within the prescribed time in this matter is deemed to have withdrawn the said Notice of Appeal and is liable to suffer costs. To our minds therefore the application by the Applicant to strike out the Notice of Appeal which is already deemed to have been withdrawn, simply served as a wakeup call.



**Final Result.**

43. The Application for Extension of Time to lodge an appeal out of time is denied and the Notice of Appeal dated and lodged in this Court on the 19<sup>th</sup> July 2018 is struck out with costs to the Applicant.

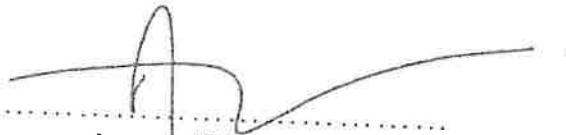
**IT IS SO ORDERED.**

DATED AND DELIVERED at Arusha this 02<sup>nd</sup> day of June, 2020



Emmanuel Ugirashebuja  
**PRESIDENT**

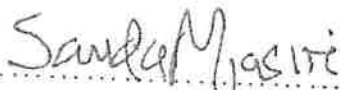
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