IN THE EAST AFRICAN COURT OF JUSTICE

AT ARUSHA

APPELLATE DIVISION

(Coram: Anita Mugeni, VP., Kathurima M'Inoti & Cheborion Barishaki, JJ.A.)

APPLICATION NO. 8 OF 2023

BETWEEN

ATTORNEY GENERAL OF THE

REPUBLIC OF BURUNDI.....APPLICANT

AND

RUGO FARM COMPANY.....RESPONDENT

[Application for extension of time to appeal from the Judgment of the First Instance Division at Arusha by Yohane B. Masara, PJ., Dr. Charles Nyawello, Charles Nyachae, Richard Muhumuza, and Richard W. Wejuli, JJ. dated 7th April 2022 in Reference No. 14 of 2018]

INTRODUCTION

1. The **Applicant** is the **Attorney General** of the **Republic of Burundi**, a Partner State to the **Treaty for the Establishment of the East African Community (the Treaty)**. The Applicant is represented in this Application by **Mr. Vyizigiro Diomede,** Director, Civil Litigation and **Mr. Barankiste Pacifique**, Principal State Attorney.
2. The **Respondent**, **Rugo Farm Company,** is a legal person incorporated in the Republic of Burundi and is represented in this Application by **Mr. Janvier Nsabimana**, Advocate. For the purposes of the Treaty, the Respondent is resident in the Republic of Burundi.
3. On 23rd November 2023, this Court struck out Appeal No. 7 of 2022 filed by the Applicant against the Judgment of the **First Instance Division (the Trial Court)** in Reference No. 14 of 2018. The Court found that the Applicant had failed to serve upon the Respondent a copy of the notice of appeal within the time prescribed by the **East African Court of Justice Rules of Procedure, 2019 (the Rules)** and had also failed to include a copy of the notice of appeal in the record of appeal.
4. On 29th November 2023, six days after the Court struck out the appeal, the Applicant applied for extension of time, primarily under **rule 5** of the Rules, to start the process of appeal all over again.

BACKGROUND, REFERENCE AND JUDGMENT OF THE TRIAL COURT

5. On 24th August 2018 the Respondent filed **Reference No. 14 of 2018** in the Trial Court alleging that the Applicant had violated its own laws as well as **Article 6 (d)** and **7 (2)** of the Treaty by expropriating the Respondent's land and putting the same into public domain. The Respondent pleaded that its land was unlawfully repossessed by **COGERCO**, a Company owned by the Government of the Applicant, and that despite litigation in Burundi before the National Commission for Land and other Assets, the Special Court and the Constitutional Court, the Respondent did not obtain any relief. The Respondent contended that by failing to protect its property rights, the Applicant had violated both its laws and the Treaty. The Respondent therefore prayed for declarations that the Applicant had violated the Treaty, an order for compensation, and costs of the Reference.

6. The Applicant opposed the Reference contending that the sale through which the Respondent acquired the land was invalid and that the person who sold the land to the Respondent had no right to do so. The Applicant also resisted the Reference on the grounds that the Court did not have jurisdiction in the matter and that the Reference was time-barred.

7. The Trial Court heard the Reference and by a judgment dated 7th April 2022 held that the Respondent's Reference was not time-barred; that

the sale of the land to the Respondent was lawful, that the Applicant had violated the Treaty; but that the Respondent had failed to prove the value of the land for purposes of compensation. The Court however, awarded the costs of the Reference to the Respondent .

THE APPEAL TO THE APPELLATE DIVISION

8. The Applicant was aggrieved by the Judgment of the Trial Court and filed a notice of appeal on 6th May 2022. Subsequently, on 25th May 2022, the Applicant filed **Appeal No. 7 of 2022** against the Judgment of the Trial Court. On its part, the Respondent was also aggrieved and filed a notice of cross-appeal on 29th June 2022 in which it faulted the Trial Court for failing to order restitution of the property or compensation in light of its finding that the Applicant had deprived the Respondent of the property. That is the appeal which was struck out on 23rd November 2023.

THE APPLICATION FOR EXTENSION OF TIME

9. In the Application now before the Court, the Applicant prays for extension of time to file the record of appeal or in the alternative an order regularizing the appeal which was struck out. The Application is supported by an affidavit sworn by Devote Nzeyimana, the Director of Resources in the Applicant's Ministry of Justice, justifying extension of time.

10. The Respondent opposed the Application vide a Notice of Preliminary Objection dated 19th February 2024. As drafted, the Notice of Preliminary Objection is unnecessarily verbose and prolixious, complete with narration of the factual background to the application and other factual matters that have no room in a preliminary objection as understood in law. As far as we can surmise, the heart of the preliminary object is the contention that this Court lacks jurisdiction to entertain the application for extension of time because the appeal that the Applicant intends to file is a second appeal, which is *res judicata*.

11. At the Scheduling Conference of the Application, the parties identified and agreed on three issues for determination in the Application as follows:

    1. *Whether the Court lacks jurisdiction to hear the application for extension of time because it is res judicata;*
    2. *If the answer is in the negative, whether the Court should extend time for filing the appeal.*
    3. *What remedies are the parties entitled to.*

12. For purposes of judicial economy, the Court directed the parties to argue both the preliminary objection and the merits of the application together, on the understanding that the Court would first determine the merits of the preliminary objection and only proceed to the merits of the application if the preliminary objection failed. If the preliminary objection succeeds, the Court will down its tools.

13. In support of issue No. 1 regarding the preliminary objection, counsel for the Respondent relied on written submissions dated 29th November 2024 and submitted that following the judgment of the Trial Court in Reference No. 14 of 2018, the Applicant filed Appeal No. 7 of 2022 against the judgment and that appeal was struck out for being incompetent. He argued that having struck out the appeal, this Court no longer had jurisdiction to extend time and allow the Applicant to lodge a second appeal from the same judgment. In counsel's view, the matter was *res judicata* and neither the Treaty nor the Rules confer on the Court jurisdiction to extend time so that a party can file a second appeal against the same decision.

14. Counsel further submitted that the Court cannot extend time for a party to file an appeal after the Court has struck out an earlier appeal by the same party against the same judgment. In the Respondent's view, the only option open to the Applicant was to apply for extension of time to regularise the appeal before it was struck out.

15. The Respondent submitted that *res judicata* means a matter decided and is designed to stop parties from re-litigating a claim or a defence that has already been determined; to ensure finality of judgments; and to save judicial resources. It was also contended that it was not in public interest to re-litigate an adjudicated matter.

16. The Respondent concluded by submitting that the Court had already determined the issue of validity of the notice of appeal and failure to serve the same, and that the Applicant cannot raise those issues again.

17. The Applicant opposed the Preliminary Objection on the basis of written submissions dated 28th March 2024. It was submitted that rule 5 empowers the Court to extend the time set by the Rules or by the Court, whether before or after expiry of the prescribed time and whether before or after the doing of an act. It was the Applicant's view that under the same rule, the Court has jurisdiction to extend time, even after having struck out an appeal.

18. The Applicant further submitted that the application for extension of time was not *res judicata* and that for the doctrine to apply, there must be re-litigation of the same cause of action involving the same parties or their representatives. It was contended that the matter before the Court, namely the application for extension of time, was different from the application for striking out of the appeal which was heard and determined by the Court, and that the Court has not previously determined an application for extension of time. The Applicant relied on the decision of this Court in **Dr. Christophe Mpozayo v. the Attorney General of the Republic of Rwanda**, Consolidated Applications Nos. 6, 7, and 8 of 2019, where the Court held that an order striking out an appeal does not bar an applicant from seeking extension of time to file the appeal.

19. Moving on to the 2nd issue on whether the Court should grant the application and allow extension of time, the Applicant submitted that the application for extension of time has been brought without undue delay; that the errors that led to the striking out of the appeal were of a technical nature and ought not to bar the Court from dispensing substantive justice; that the Applicant had complied with all the requirements of the Rules save the failure to serve the notice of appeal upon the respondent on time and to include a copy of the notice of appeal in the record of appeal; that those omissions were as a result of genuine mistake and oversight on the part of counsel for the Applicant, for which the applicant should not be penalised; that the intended appeal has great chances of success and that the Applicant should be afforded an opportunity to pursue it.

20. It was also the Applicant's contention that the mistakes that led to the sticking out of the appeal were made in good faith and that the Applicant had not acted in bad faith in failing to serve the notice of appeal upon the Respondent or by failing to include a copy of the notice of appeal in the record of appeal. The Applicant relied on the decision of the Supreme Court of Uganda in **Boney M. Katatumba v. Waheed Karim,** Application No. 27 of 2007 where the court held that it will extend time if shutting out a party may occasion injustice.

21. In answer to the merits of the Application, the Respondent submitted that the application for extension of time was merely intended to delay the

matter and keep the Respondent from enjoying the fruits of its judgment. It was contended that the factors that guide the Court in determining whether or not to extend time include the length of delay, the reason for delay, the chances of the appeal succeeding, the degree of prejudice to the Respondent, and the effect of the delay on the administration of justice. The Respondent submitted that the Applicant had not satisfied any of the above conditions.

22. On whether the intended appeal had chances of success, the Respondent went to great length submitting on each of the intended grounds of appeal as though the Court were hearing and determining the substantive appeal at this stage. In all, it was the Respondent's view that the intended appeal had no chances of success and that the delay was inordinate and unexplained, running close to two years from when the Applicant filed the notice of appeal. It was also contended that the Respondent would suffer great prejudice since the dispute involved expropriation of its property. Accordingly, the applicant urged the Court to deny at the application for extension of time.

23. On the last issue regarding remedies, the Applicant submitted that costs follow the event and prayed that the Court allows the application and order costs to abide the outcome of the intended appeal. On its part, the Respondent urged the Court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

24. Having carefully considered the Application before us, the submissions by Counsel for both parties and the authorities that they cited, we determine the three issues agreed upon as follows.

Issue No. 1: Whether the Court lacks jurisdiction to hear the application for extension of time because it is res judicata

25. As correctly submitted by the Respondent, the doctrine of *res judicata* bars a court from entertaining a dispute where the same parties before the court have previously litigated over the same subject matter and the dispute has been heard and finally determined by a court of competent jurisdiction. In **James Katabazi & 21 others v Secretary General, East African Community & another**, Reference No. 1 of 2007, the First Instance Division stated as follows on the doctrine of *res judicata:*

> *"The doctrine is uniformly defined in the Civil Procedure Acts of Kenya, Uganda and Tanzania as follows:*
>
> > *'No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.'*
>
> *Three situations appear to us to be essential for the doctrine to apply: One, the matter must be directly and substantially in issue in the two suits. Two, parties must be the same or parties under whom any of them claim litigating under the same title. Lastly, the matter was finally decided in the previous suit. All the three situations must be available for the doctrine of res judicata to operate."*

26. With great respect to the Respondent, we do not see how the doctrine of *res judicata* is applicable in the application before the Court. The previous application that was before the Court was to strike out the record of appeal, not for extension of time. The two applications are therefore different and distinct. So, it cannot be said that the same issue is directly or substantially in issue in the two applications.

27. Secondly, the contention that the Court will entertain two appeals from the Judgment of the Trial Court is utterly misconceived because no appeal arising from the Judgment of the Trial Court in Reference No. 14 of 2018 has been heard and "finally" determined on merit by this Court. Appeal No. 7 of 2022 was not heard and dismissed, it was struck out for being incompetent. There is a world of a difference between an appeal that has been dismissed and one that has been struck out. In a dismissed appeal, the court will have substantively heard the appeal and found it without merit. In an appeal that has been struck out, the court does not engage with the merits of the appeal, but merely considers whether the appeal is technically competent, and properly before the court. In the present case, the Court did not hear the merits of the appeal. It only considered the competence of the appeal and found that it was incompetent because of failure to serve the notice of appeal and to include the notice of appeal in the record of appeal. In the circumstances of this application, it cannot therefore be said, as the

Respondent submitted, that by extending time, the Court will entertain two appeals from the same judgment.

28. Rule 5 of the Rules confers of the Court wide and unfettered discretion to extend time if there is sufficient reason to justify it. The Rule provides as follows:

> *"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."*

The above rule allows a party whose appeal has been struck out to apply for extension of time to start the entire process of appeal again. That is the import of applying for extension of time "after the expiration of the prescribed time" and even of applying for extension of time "after the doing of the act', that is, after filing an appeal and the same is struck out. As we have stated, an appeal that has been struck out is not an appeal that has been determined finally on merits and therefore cannot be said to be *res judicata*.

29. The decision of this Court in **Dr. Christophe Mpozayo v. the Attorney General of the Republic of Rwanda** (supra), is a perfect answer to the Respondent's preliminary objection in this application. That case involved an application for extension of time after the Court had struck out an appeal for failure by the appellant to take essential steps within

the prescribed time. In allowing the application for extension of time, the Court stated:

> *"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." (Emphasis added).*

30. In the premises, we are satisfied that the Respondent's Preliminary Objection is not well founded and the same is hereby dismissed.

Issue No. 2: If the answer to Issue No. 1 is in the negative, whether the Court should extend time for filing the appeal.

31. In **Mironko Francois Xavier v. Attorney General of the Republic of Rwanda**, Application No 15 of 2022, this Court explained the purpose of extension of time as follows:

> *"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."*

32. This Court has also settled the factors that it will take into account in determining whether or not to extend time. In ***Secretary General of the East African Community v. Sitenda Sebalu***, Application No. 9 of 2012, the Court was interpreting a provision similar to the present rule 5, when it held:

> *"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."

33. Similarly, in **Godfrey Magezi v. National Medical Stores**, Appeal No. 2 of 2016, the Court reiterated as follows at paragraph 62:

> *"…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 devise 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." (Emphasis added).*

34. The Court concluded as follows at paragraph 69:

> *"...the wording of rule 4, namely, that "the Court may, for sufficient reason, enlarge time" is permissive enough to allow the Court to take into account, suo motu, any reason or ground which is pertinent to the exercise of its discretion. In other words, in our view, Rule 4 is a standing invitation to the Court to consider an application for extension of time with its eyes wide open, taking a helicopter view of the matter placed before it." (Emphasis added).*

35. In the application before the Court the applicant applied for extension of time within six days of its appeal being struck out. In our perception that is not inordinate delay. The Applicant has explained that the appeal was struck out due to its omission to serve the notice of appeal upon the Respondent within the prescribed time and to also include a copy of the notice of appeal in the record of appeal, which rendered the appeal incompetent. The applicant has candidly owned up to its mistake. Genuine mistake of counsel is normally accepted as sufficient reason for extension of time. In the case of **Belinda Murai & 9 others v. Amos Wainaina,** CA. No. Nai. 9 of 1978, the Court of Appeal of Kenya held as follows, in an application for extension of time:

> *"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring, in their*

interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so requires. It is all done in the interests of justice."

36. The same sentiments were echoed in **Peter Anyang' Nyong'o & 10 Others v. Attorney General of the Republic of Kenya,** Applications Nos. 1 and 2 of 2010) where this Court held as follows:

"...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."

37. On the chances of the intended appeal, at this stage we are not called upon to determine the merits of the appeal. That is the duty of the Court when it ultimately hears the appeal and considers fully the argument of each side. For now, all that is required of the Court is to satisfy itself on a *prima facie* basis, that the intended appeal is not frivolous. Indeed, in **Mironko Francois Xavier v. Attorney General of the Republic of Rwanda** (supra), the Court held that:

"When it comes to that consideration (chances of success of the intended appeal), the Court has to walk a very thin line least it prejudges 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."

38. Among the issues that the Applicant intends to canvass on appeal is whether the Trial Court erred by holding that the Applicant had expropriated the Respondent's property in violation of the Treaty without evidence and in failing to consider the Applicant's evidence. Appreciating that at this stage we cannot make any definitive findings on the merits of the intended appeal, all that we can say is that were are unable to conclude that the intended appeal is frivolous.

39. The other consideration is the respective prejudice each party stands to suffer. On the one hand the Respondent has a judgment in its favour while on the other hand, the Applicant has a right of appeal conferred by Article 35A of the Treaty. If we do not extend time, the Applicant shall effectively lose its right of appeal. If we allow the application, the Respondent will only be delayed in realising the fruits of its judgment, but will eventually enjoy those fruits if the appeal does not succeed. In these circumstances, we are persuaded that the Applicant stands to suffer the greater prejudice.

40. Taking all the foregoing into account, we answer Issue No. 2 in the affirmative, namely that the Court should extend time in favour of the Applicant.

Issue No. 3: What remedies are the parties entitled to?

41. The Applicant prayed that the Court extends time for it to file the appeal or in the alternative to regularise its appeal which was struck out. The

applicant also prayed that the costs of this Application be in the appeal. On its part, the Respondent prayed that the Application be dismissed with costs.

42. It is not possible to regularise and deem as properly filed an appeal that has already been struck out. Once the appeal was struck out, it ceased to exist and therefore cannot be regularised. Taking into account what we have stated above, the remedy that the Applicant is entitled to is an order for extension of time to enable it re-start the appeal process. Towards that end, we direct the Applicant to file and serve upon the Respondent a notice of appeal within ***Seven (7) days*** from the date of this ruling. Thereafter, the Applicant shall file and serve upon the Respondent the Memorandum of Appeal and the Record of Appeal within ***Twenty-one (21) days*** from the date of filing the notice of appeal.

43. As regards costs, they are at the discretion of the Court though as a general rule they follow the event. In the circumstances of this Application, we bear in mind that the appeal was struck out due to mistakes of the Applicant, which made this application necessary. In the premises, we award costs of the Application to the Respondent.

DISPOSITION

44. The upshot of our consideration of the Applicant's Application is that:-

a. The application is allowed; and

b. The Respondent is awarded costs of the Application.

IT IS SO ORDERED

DATED, DELIVERED, AND SIGNED in Arusha on this 28th day of November 2025.

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Anita Mugeni
VICE PRESIDENT

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Kathurima M'Inoti
JUSTICE OF APPEAL

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Cheborion Barishaki
JUSTICE OF APPEAL

Certified as a True Copy of the Original
.....
For-Deputy Registrar
East African Court of Justice
Dated.....28/11/2025.....