



**THE EAST AFRICAN COURT OF JUSTICE AT
ARUSHA FIRST INSTANCE DIVISION**

(Coram: Monica K. Mugenyi, PJ; Charles Nyawello, & Charles Nyachae, JJ)



APPLICATION NO.1 OF 2020

(Arising from Reference No.1 of 2019)

KALALI STEPHEN APPLICANT

VERSUS

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

10TH MARCH, 2020

RULING OF THE COURT

A. INTRODUCTION

1. This is an Application for extension of time for the filing of an additional affidavit in respect of **Reference No.2 of 2019, Kalali Stephen vs. The Attorney General of Rwanda**. The Application was brought under Rules 1(2), 4, 21(4), 73 and 85 of the East African Court of Justice Rules of Procedure, 2013. It is premised on the following grounds as garnered from the Notice of Motion:

- a. The Applicant was due to file and serve the Respondent with an additional affidavit in **Reference No.2 of 2019** on 2nd November 2019, but filed the said affidavit on 25th November 2019 and served it upon the respondent therein on 5th December 2019.
- b. The late service found learned counsel for the respondent had proceeded on his annual leave and could not file and serve the additional affidavits on time.
- c. Learned respondent counsel had to read the applicant's affidavits and get affidavits from different border officials which rendered 'the whole process late.'
- d. It thus became necessary for the respondent state to seek the leave of this Court to regularize the filing of its affidavits in reply out of time.

- e. The sought extension will not occasion prejudice to any party; rather it is in the interests of justice that it be granted.
2. The Application is supported by the Affidavit of Mr. Nicholas Ntarugera that was filed on 14th January 2020 (alongside the additional affidavit sought to be admitted on the court record), and seeks the following orders:
 - a. *The Court be pleased to extend time to enable the Respondent to file and serve the Additional Affidavits in response out of time.*
 - b. *That the Additional Affidavits together with their annexes thereto filed by the Respondent in reply to the Applicant's additional affidavits filed on 25th November and served on the respondent on 5th December 2019 be deemed as properly on record.*
 - c. *An order that the costs of and incidental to this Application abide the result of the case.*
3. The Application is opposed by Mr. Stephen Kalali, the cited Applicant, who vide an Affidavit in Reply that was lodged in this Court on 27th January 2020 *inter alia* questions the competence of the Application, and contends that granting it would cause hardships to and prejudice the speedy determination of the Reference.
4. At the hearing of this Application, the Applicant was represented by Messrs Richard Wananda and Joseph Mutyaba, while the Respondent was represented by Mr. Nicholas Ntarugera. However, given that the nature of the application was that the Respondent State

was the beneficiary of the sought extension of time, it took precedence in the presentation of its case before the Court.

B. PARTIES' SUBMISSIONS

5. Mr. Ntarugera cited Rules 1(2) and 4 of the Court's Rules of Procedure, 2013 to argue that given the late service of the Applicant's additional affidavit upon him, he was unable to file and serve his affidavits in reply within the stipulated time. He thus sought to invoke the Court's inherent powers to extend the time within which the said affidavits could be filed and served. It was his contention that the Applicant stood to suffer no prejudice by the grant of the Application.
6. Conversely, Mr. Wananda raised two (2) points of law: first, that the Application had been filed in the names of his client and was therefore incompetent and, secondly, that the Affidavit in support of the Application had been deposed by an advocate with personal conduct of the matter and was therefore fatally defective. Learned counsel cited this Court's decision in **Mbidde vs. Attorney General of Burundi & Secretary General of the East African Community (EAC), EACJ Appl. No. 6 of 2018** in support of the latter point of law. With regard to the merits of the Application, it was Mr. Wananda's contention that it had been brought in bad faith given that first, the Affidavits in Reply had been deposed by 18th December 2019 but were only lodged in the Court on 14th January 2020, and the Application filed in February 2020; and secondly, Mr. Ntarugera had not furnished proof of his having gone on leave. He asserted that his client stood to suffer hardship and prejudice on account of the unduly delayed proceedings should the Court grant the Application because he would be required to file fresh submissions at an extra cost to him.

7. In reply, without any substantiation whatsoever, Mr. Ntarugera maintained that neither the wrong designation of parties nor the deposition of an affidavit by an advocate with personal conduct of the case were fatal to his case. It was also his contention that delayed filing of the Affidavits in Reply caused no prejudice to the Applicant given that the Respondent's written submissions had been filed within time.

C. COURT'S DETERMINATION

8. It will suffice to point out from the onset that the Rules of Procedure upon which the Application is grounded have since been amended, the applicable Rules presently being the East African Court of Justice Rules, 2019 ('the Rules') which came into force on 1st February 2020. Given that the Application before us presently was filed before the commencement of the Rules, we shall determine it with recourse to the Rules with appropriate adaptation.
9. The present Application primarily hinges on the provisions of Rule 5 of this Court's Rules (as amended), which reads:

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 in these Rules to any such time shall be construed as a reference to such time as so extended.
(our emphasis)

10. However, even before we consider the merits of the Application, it is dogged by serious procedural gaffes. First and foremost, the

Application is filed in the name of Mr. Stephen Kalali yet the intended beneficiary thereof is the Attorney General of the Republic of Rwanda. This *modus operandi* quite clearly offends Rule 35(1) of the Rules, which requires that **'every pleading shall contain a concise statement of material facts upon which the party's claim or defence is based.'** The filing of the Application in the name of opposite party defeats the requirement for a claimant's pleading to reflect the basis of such claimant's claim. The Applicant in the present Application is not a beneficiary of the Application, neither is his case premised on the claim set out in the Application. On the contrary, he opposes the Application that is brought in his name. That cannot have been the intention of the framers of this Court's Rules of Procedure. We take the view that is clearly an abuse of court process. Although Mr. Ntarugera was given ample opportunity to address himself to the fatality of this error owing to its sheer absurdity, he did not rise to the occasion.

11. To compound matters, he did depose the Affidavit in support of the Application himself yet he had personal conduct of the case. This Court has quite succinctly pronounced itself on this undesirable practice denouncing it as fatally defective to an affidavit. See **Mbidde vs. Attorney General of Burundi & Another** (*supra*). Try as we did to get reason to depart from our position in the event that there was a jurisprudential divergence on the issue, again Mr. Ntarugera failed to persuade us on good authority as to why we should depart from our previous position. In the premises, we find no reason to do so and would hold that the Affidavit before us today is fatally defective and is hereby struck off the record.

12. Having so struck the Affidavit off the record, the fatality of the abuse of process afore-mentioned notwithstanding, we find no evidence as would duly expound upon and thus provide sufficient reason to grant the remedy of extension of time sought herein. We are therefore inclined to disallow the Application.
13. Be that as it may, even in the event that we had yielded to a consideration of the merits of the Application, in the case of Godfrey Magezi vs. National Medical Stores, EACJ Appeal No. 2 of 2016, it was held:

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, 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, 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.

14. The import of that decision is that over and beyond the sufficiency or otherwise of the reasons for the procedural lapse of compliance with the time allotted to an action, a court faced with an application for extension of time must consider attendant factors such as the

promptitude with which an application to remedy the procedural lapse ensued, the prejudice to opposite party etc.

15. In the instant case, the Affidavit in reply was deposed a month after it was due to have been filed and served, and the application for the extension of time was filed close to 2 months after the scheduled date of filing the affidavit. Suffice to note that in paragraph 7 of the Affidavit in Reply, it is deposed (with an annexed screen shot of discussions between the 2 gentlemen) that upon receipt of Mr. Kalali's additional affidavit, Mr. Ntarugera had undertaken to file his affidavit in reply thereto within time to enable a rejoinder thereto before submissions. This did not happen. Worse still, the additional affidavit that Mr. Ntarugera wishes to have admitted on the court record does also run afoul of the principle in the **Mbidde** case that frowns upon an advocate with personal conduct of the case deposing an affidavit in the same matter. Finally, and perhaps most controversial, the impugned Affidavit was filed on the same date that the written submissions for the Applicant in the Reference were filed. Whereas it is apparent from Annex B to the Affidavit in Reply that Mr. Ntarugera's additional affidavit was filed before receipt of Mr. Kalali's written submissions, such inordinate delay is unacceptable.

D. CONCLUSION

16. The nature of the current Application is such that Mr. Ntarugera was sufficiently aware that his Application was, if not fatally defective, at least manifestly untenable. Filing such an Application in the names of the wrong party is inexcusable. Purporting to defend an undesirable practice that was also alluded to in submissions that he had the benefit of perusing prior to the hearing of the Application without the backing of legal authority or divergent jurisprudence is not entirely

wise or pragmatic. He had ample time within the hearing of the Application to consider withdrawing his Application and salvage the merits thereof by filing a more tenable one. Instead, in his words, he opted to leave the decision 'to the discretion of the Court.' As it is, having considered the totality of the material on record, this Court is left with no option but to dismiss this Application. In exercise of our discretion under Rule 127(1) of the Court's Rules, we order that each party bear its own costs.

17. It is so ordered.

Dated, signed and delivered at Arusha this 10th day of March, 2020.



Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE



Hon. Dr. Justice Charles O. Nyawello
JUDGE



Hon. Justice Charles Nyachae
JUDGE