



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



(Coram: Yohane B. Masara, PJ; Charles O. Nyawello, DPJ; Richard Muhumuza, Richard Wabwire Wejuli, & Léonard Gacuko, JJ)

APPLICATION No.12 OF 2021
(Arising from Reference No. 25 of 2021)

JACOB NJENGA MUIRURI: APPLICANT

VERSUS

**THE ATTORNEY GENERAL OF
THE REPUBLIC OF KENYA RESPONDENT**

20TH NOVEMBER 2023

RULING OF THE COURT

A. INTRODUCTION

1. This Application arises from **Reference No. 25 of 2021**. It was brought under Rules 4, 5 and 13 of the East African Court of Justice Rules of Procedure 2019 (“the Rules”).
2. The Applicant in the instant Application is a resident of Kenya. He states that he has been enjoined as the Appellant in the **Supreme Court Petition of Appeal No. 10** following the demise of his wife, Leah Waithera Njenga, whose address of service is c/o O.P Ngoge & Associates, Advocates, Coffee Plaza, 4th Floor, P.O. Box 3430-00200, Nairobi, Kenya.
3. The Respondent is the Attorney General of the Republic of Kenya, sued in a representative capacity, as the Principal Legal Adviser of the Respondent State. The Respondent’s address for service is c/o Office of the Attorney General and Department of Justice, Sheria House, Harambee Avenue, P.O. Box 40112 – 00100, Nairobi.
4. The Applicant seeks extension of time to lodge a Statement of Reference. He specifically seeks for orders that:
 - a) **The Application be certified as extremely urgent and the same be heard electronically via video conference forthwith in the first instance and priority to any other matter in the Reference;**
 - b) **That this Court be pleased to extend the time limited by the Treaty for the Establishment of the East African Community for the Applicant to lodge a Statement of Reference challenging the legality of the judgment rendered by the Supreme Court of**

**Kenya on 4th August 2020 in Petition of Appeal No.10 of 2018;
and**

c) That the costs of the Application be in the cause.

5. The Application is supported by an Affidavit deponed by the Applicant. Peter Ngoge, the Applicants lawyer also filed an Affidavit captioned "Further Affidavit" (*sic*) in which he made several averments regarding his previous engagement and involvement with the Applicant's matters prior to the instant Application.
6. Noteworthy, the Respondent did not file an Affidavit in Reply but instead filed a document captioned "The Respondent's grounds of opposition" in which he raised points of law upon which he based a prayer to have the Application dismissed on grounds of the said preliminary objections.

B. REPRESENTATION

7. The Applicant was represented by Peter Ngoge, Advocate, while the Attorney General was represented by Mr. Matori Matunda, Principal State Counsel.

C. BACKGROUND

8. The brief background to the Application as averred by the Applicant in his Affidavit in Support of the Application is that upon having his **Communication No.570 of 2015** declared inadmissible by the African Commission on Human and Peoples Rights, the Applicant filed **Reference No 25 of 2021** with the Court.
9. While **Reference No. 25 of 2021** is still pending before this Court, the Applicant filed the instant Application.

D. GROUNDS FOR THE APPLICATION

10. The grounds stated for the Application are, that:

- a) The Applicant's Communication No. 570 of 2015 is among the numerous communications which were arbitrarily and unlawfully declared inadmissible by the African Commission on Human and People's Rights on account of, *inter alia*, non-exhaustion of local judicial remedies and decision of the African Commission on human and people's rights is now the subject matter of Reference No.25 of 2021 which is still pending before this Court;
- b) That following the judgment rendered by the Supreme Court of Kenya, the Applicant's Advocates on record immediately petitioned the African Commission on Human and People's Rights to admit the Applicant's Communication No. 570 of 2015 for hearing on merit following exhaustion of local judicial remedies in the Supreme Court of Kenya; and
- c) That to date, the said African Commission on Human and People's Rights has neither acknowledged receipt of the Applicants additional communication nor seized it, to the detriment of the Applicant, thereby deliberately denying him access to justice, contrary to Articles 10 and 48 of the Constitution of Kenya 2010 and in contravention of the Treaty for the Establishment of the East African Community.

PRELIMINARY OBJECTION

11. When the Application came up for hearing, Counsel Matunda confirmed that the Respondent raised only preliminary points of law. Counsel Matunda submitted that the learned Attorney General had opposed the Application on points of law communicated in a document filed on 10th March 2023. That the Application having been brought under Rules 4, 5 and 13 of the Rules, it does not require arguing the merits but only the points of law. He also contended that the Applicant's **Reference No. 25 of 2021** bearing similar parties and the same subject matter as the instant Application is still pending hearing and determination before this Court and that therefore the instant Application would only lead to a multiplication of suits.
12. To this, Counsel for the Applicant replied that **Reference No. 25 of 2021** was different from the one he seeks to file, in that whereas in **Reference No. 25 of 2021** he seeks to challenge the decision of the African Commission, in the intended Reference for which the instant Application seeks leave for belated filing, the Applicant intends to challenge a decision of the Supreme Court of Kenya.

E. DETERMINATION BY COURT

13. Whereas **Reference No. 25 of 2021** is already properly before this Court, we were perplexed by the fact that this Application seeks to have time extended to file another Reference ostensibly arising from it.
14. A lot of time was spent on questions put to Counsel by Court, in an effort to get clarification on the nexus, if any, between the instant Application and **Reference No. 25 of 2021**.

15. It transpired that the Applicant seeks to file a completely new Reference, albeit based on the same facts, out of the time limitation stipulated by the Treaty regarding filing References. He seeks to have Court extend the time, so that he can file a second Reference and then apply to have it consolidated with **Reference No. 25 of 2021** which is already before this Court.
16. The merits of **Reference No. 25 of 2021**, which is yet to be determined and those of the intended Reference as articulated by Counsel for the Applicant notwithstanding, the critical issue for determination entails the jurisdiction of this Court to grant extension of time within which a Reference can be filed. However, before we address the issue, it is important that we resolve the apparent anomaly on the face of the Applicant's pleadings.
17. The instant Application is indicated to be arising from **Reference No. 25 of 2021** which indeed is properly before this Court but is yet to be heard and determined. The procedure adopted by the Applicant, of basing an application to file a new Reference on another Reference that is already on Court record is alien to the Treaty, including the Rules of and practice in this Court. No matter the nexus arising from the facts and issues between **Reference No. 25 of 2021** which is already before this Court and the intended Reference in respect of which the instant Application is made, the course adopted by the Applicant is un-procedural.
18. This Court's Rules and the Treaty do not envisage nor provide for the possibility of seeking to be granted leave to belatedly file a new Reference out of time in order to consolidate the belatedly filed Reference with the existing one. It is a misconceived adventure that is alien to the Court's procedures.

19. Premised on this, we would agree with the learned Attorney General that the instant Application is frivolous, misconceived and is untenable in law.
20. Be that as it may, for jurisprudential exactitude and completeness, we shall now address the question as to whether this Court has the jurisdiction to extend time within which a Reference can be filed.
21. Counsel for the Applicant submitted that Articles 13 and 14 of the UN Convention against Torture allows this Court to extend the time limited by the Treaty.
22. He further submitted that the Court has inherent powers under Rule 4 of the Rules to extend time limited by the Treaty.
23. This submission was contested by Counsel for the Respondent who contended that this Court does not have the mandate to grant the prayers sought by the Applicant.
24. Articles 13 of the UN Multilateral Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“the Convention”) states that:

“Each state party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and have his case promptly and impartially examined by its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against ill treatment or intimidation as a consequence of his complaint or any evidence given.”

25. Article 14 of the Convention provides that:

“Each state party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to a fair or adequate compensation, including means for as full rehabilitation as possible. In the event of death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.”

26. The two Articles of the Convention are in respect of prevention and redress of torture and inhumane treatment. Their focus is on the rights and protection of individuals who allege that they have been subjected to torture.

27. Article 13 regards the right to complain and examination. The Article emphasizes that each country that has ratified the Convention is obligated to ensure that any individual who claims to have been subjected to torture within its jurisdiction has the right to make a complaint. Article 14 regards redress and compensation.

28. Evidently, nothing in Articles 13 and 14 of the Convention as cited by Counsel for the Applicant concerns extension of time by Court. Premised on the foregoing, the submission by Counsel for the Applicant that the said Articles allow Court to extend time is a misrepresentation, in our view, intended to mislead the Court.

30. The Applicant implored Court to invoke its mandate under Rule 4 of the Rules, which states that:

“Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders or give such

directions as may be necessary for the ends of justice or to prevent the abuse of the process of the Court.”

31. We have carefully addressed our minds to the spirit of this Rule in the context of the Applicant’s prayer and the circumstances of the Application.
32. Whereas under the said Rule, the Court has the authority to make any orders or give any directions it deems necessary to achieve the ends of justice, the exercise of this authority must be done judiciously and lawfully to avert the possibility of abuse of its own processes, which is a critical aspect of maintaining its integrity and court users’ confidence.
33. When invoking Rule 4, the Court must therefore act in the interest of justice while protecting the integrity of its own processes. It must guard against the possibility of a party manipulating or misusing the Court's procedures in a way that would undermine the Court's authority or fairness.
34. The Court can therefore only act within precincts of the Treaty, even when invoking its mandate of inherent jurisdiction under Rule 4.
35. Consequently, whereas under the Rules, Rule 5 acknowledges that there may be legitimate reasons for parties to seek additional time to comply with Court Rules or Orders, and the Rule grants the Court the discretion to consider such requests and determine whether an extension is warranted based on the specific circumstances of the case, the Rule only mandates Court to extend time prescribed by the Rules.
36. For brevity, Rule 5 states that:

“The Court may for sufficient reason, extend the time limited by these rules...for the doing of any act authorised or required by these Rules, whether before or after the expiration of such time...”

37. The time within which an action can be brought before this Court, including the requirement to file a Reference within 2 months, is not an act prescribed by the Rules but by the Treaty. Articles 30(1) of the Treaty provides that:

“Subject to the provisions of Article 27 of this treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, Regulation, directive, decision or action of a Partner State or an institution of the Community ...”

38. Article 30(2) then states that:

“The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be.”

39. The time limits within which a Reference can be filed is, as evinced by Article 30, a Treaty matter and therefore takes precedence over the Rules of this Court. Rule 5 therefore has no bearing on the time limits for filing References in the Court.

40. It is a long-established position in the jurisprudence of the Court that the Treaty does not grant the Court any express or implied jurisdiction to extend the time set for filing a Reference, - See **ABBA Limited vs.**

Attorney General of the Republic of Rwanda, EACJ Appeal No. 10 of 2022.

41. Extension of time within which to file a Reference, if granted by this Court, would be an attempt to amend Article 30(2) of the Treaty. The Court has no power to amend the provisions of the Treaty. It cannot act outside the Treaty provisions.
42. The Application would appear to be premised on a misconception of the Court's procedures, jurisprudence and jurisdiction regarding time limitations.
43. Counsel for the Applicant appears to have misled his client probably owing to his misapprehension of the jurisprudence and Rules of this Court. We would like to graciously share the following remarks made by Lord Templeman in **Ashmore vs. Corp of Lloyds [1992] 2 All ER 486 at page 493** where he stated thus:

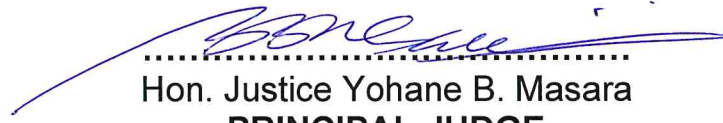
“It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner.”


44. There is absolutely no merit in the instant Application. The orders sought are untenable under the Treaty. They are outside the mandate of this Court.


F. CONCLUSION

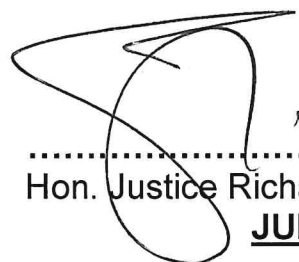
45. From the above, we find the Application to be devoid of merit. The same is accordingly dismissed with costs.

Dated, signed and delivered at Arusha this 20th Day of November 2023.


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Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE


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Hon. Justice Dr Charles O. Nyawello
DEPUTY PRINCIPAL JUDGE


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Hon. Justice Richard Muhumuza
JUDGE


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Hon. Justice Richard Wabwire Wejuli
JUDGE


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Hon. Justice Dr Léonard Gacuko
JUDGE