



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



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

APPLICATION NO. 22 OF 2022
(Arising from Reference No. 11 of 2022)

**THE ATTORNEY GENERAL OF
THE REPUBLIC OF UGANDA APPLICANT**

VERSUS

MALE H. MABIRIZI K. KIWANUKA RESPONDENT

22nd NOVEMBER 2023

RULING OF THE COURT

A. INTRODUCTION

1. This Application was filed by the Attorney General of the Republic of Uganda (“the Applicant”) under Rule 5 of the East African Court of Justice Rules of Procedure, 2019 (“the Rules”).
2. Prior to the filing of this Application, Mr Male H. Mabirizi K. Kiwanuka (“the Respondent”) had filed a Statement of Reference (**Reference No. 11 of 2022**), on 10th March 2022, challenging the decision of the High Court of Uganda, Ssekaana Musa, J, which found him guilty of contempt of Court and ordered him to pay a fine of Ugx 300,000,000/= or serve a prison term. The Statement of Reference was served on the Applicant who, on the 29th day of April 2022, filed a Response to the Statement of Reference but did not serve the same on the Respondent until on 23rd day of May 2022.
3. The Applicant seeks the following orders from the Court:
 - a) **That time be enlarged within which to serve the Response to the Reference on the Respondent out of time;**
 - b) **And/or alternatively, the Response to the Respondent, served on the Applicant be validated; and**
 - c) **Costs of the Application be in the cause.**
4. The Application is supported by the Affidavits deponed by Wanyama Kodoli, Principal State Attorney, and Anthony Otoo, a Process Server in the Office of the Attorney General, Uganda. The Respondent opposed the Application by deponing an Affidavit in Reply on 27th March 2023. The Applicant also, through Anthony Otoo, deponed an Affidavit in Rejoinder on 6th April 2023.

B. REPRESENTATION

5. At the hearing, the Applicant was represented by Ms Goretti Arinaitwe, learned Principal State Attorney, assisted by Mr Ebila Hilary and Mr Brian Musota, both learned State Attorneys. On the other hand, the Respondent appeared in person.

C. APPLICANT'S GROUNDS AND SUBMISSIONS

6. In the Notice of Motion filed in Court on 21st June 2021, it is the evidence of the Applicant, as per the Affidavits filed in support thereof, that the delay to serve the Respondent with the Response to the Statement of Reference was occasioned by failure to find the Respondent at his address of service as stated in the Statement of Reference; that is, Kitalya Prison.

7. According to the Affidavit deposed by Anthony Otoo, on reaching Kitalya Prison, he was informed that the Applicant had applied to court to be transferred to another prison. That he did not immediately know of the Prison where the Respondent was.

8. That, when he reported to Mr Wanyama Kadoli about his failure to serve the Respondent, Mr Otoo was instructed by the said Mr Kadoli to find out from Prison Headquarters the whereabouts of the Respondent. That, at the Prisons' Headquarters, Mr Otoo learned that the Respondent was at Luzira Prison. He visited Luzira Prison where he managed to serve the Respondent on 23rd May 2022.

9. It is the Applicant's assertion that the delay to serve the Respondent within time was unintended, inevitable and inadvertent. That, in his view, the Respondent will not suffer any prejudice by the late service,

having received the Response to the Reference on 23rd May 2023 and that the Application was filed without undue delay.

10. In the written submissions and the oral highlights thereof, the Applicant's Counsel urged the Court to exercise its discretion under Rule 5 of the Rules to condone the delay to serve the Respondent, as the same was due to sufficient cause. Counsel referred the Court to decisions of this Court in **Prof. Anyang' Nyong'o & 10 Others vs Attorney General of Kenya, EACJ Application No. 1 of 2010; Attorney General of Kenya vs Prof. Anyang' Nyong'o & 10 Others, EACJ Application No. 2 of 2010** and **Hon. Sam Njuba vs Hon. Sitenda Sebalu, EACJ Application No. 1 of 2012.**

11. Counsel further urged the Court to consider the gravity of the issues in contention in **Reference No. 11 of 2022** where the Respondent is asking the Court to annul the proceedings, rulings, orders and decisions made by Ugandan Judicial Officers. That, it is in the interest of the Court to hear the Applicant's case in response to the Respondent's prayers. Counsel relied on the decision of the Court of Appeal of Uganda in **Attorney General vs Cairo International Bank Ltd, Court of Appeal Civil Application No. 86 of 2015**, where it was, *inter alia*, held that issues raised in the proposed memorandum of appeal would constitute sufficient cause to allow the application.

D. THE RESPONDENT'S EVIDENCE AND SUBMISSIONS

12. The Respondent, in his Affidavit in Reply, vehemently opposed the Application. It was the Respondent's view that the decision by the Applicant to file the Response at 3.00pm on the cut-off date was demonstrative of lack of any intention to serve him within time as the

Applicant knew that he was in Prison and that prisons lock-up prisoners at 4.00pm.

13. Further, that the delay of 24 days to serve him at Ruzira Prison was inordinate and gravely prejudiced him. That it would not have taken all those days for the Respondent to know the Prison where he was held; thus, the delay to serve him was intentional and well planned to ensure that he does not get speedy justice, so that he serves the challenged sentence to the end, as he did.
14. The Respondent also stated in his Affidavit that the Applicant has made it a habit to default filing and serving Responses out of time then apply for extension of time, a habit that the Court should curtail.
15. In the written submissions and in the highlights of the said submissions, the Respondent reiterated his assertion that the Applicant had no sufficient reasons not to serve him within time and that the Applicant behaved in a dishonest and dilatory manner.
16. To support his averments regarding what constitutes sufficient grounds for granting an extension of time, the Respondent made reference to the case of **The Managing Editor Mseto & Another vs Attorney General of the United Republic of Tanzania, EACJ Consolidated Applications 3 & 4 of 2019**, where the Appellate Division of the Court stated the general principles governing extension of time. In addition, Mr Mabirizi cited the decision of the Appellate Division in **The Attorney General of the Republic of Uganda vs Media Legal Defence Initiative (MDLI) & 19 Others, EACJ Consolidated Applications Nos 4 & 6**, where it was held that sufficient reason is not just any reason.

17. The Respondent maintained that the Applicant failed to illustrate sufficient reasons for the enlargement of time. That, he was prejudiced and even if prejudice was not the case, lack of prejudice is not a ground for extending time as was held in **Robert Bahinguza & Anor vs Attorney General, Uganda Court of Appeal Misc. Application No. 269 of 2013.**

18. In conclusion, the Respondent urged the Court, in case it was inclined to grant the Application, to order the “Respondent” (sic) to pay him a sum of USD 10,000,000.00 payable before validation of their Response, as general, aggravated and exemplary damages caused to him by the delay.

E. APPLICANT’S SUBMISSIONS IN REJOINDER

19. Counsel for the Applicant differed with the Respondents averments and submissions. With respect to the decision in **Godfrey Magezi** (supra), relied upon by the Respondent, it was Counsel’s view that the same was cited out of context. That the reasons for not allowing the extension in that case was because *‘an appeal against the decision for the court to allow parties as Amicus Curiae was largely for the benefit of the court and not the parties.’*

20. On whether it was impossible for the Applicant’s to serve the Respondent on the date of filing, Counsel for the Applicant contended that the Respondent did not provide evidence to prove the said impossibility and, in case, service could be done through a Prison Officer in charge as per the Prisons Act of Uganda and Rule 19 of the Civil Procedure Rules of Uganda, Cap. 71-1.

21. Regarding the prayer for damages, Counsel retorted that the claims are unsubstantiated and, in any case, such damages are granted at

the discretion of the Court and not the direction of the Respondent. Further, that the Respondent failed to discharge the burden to show that he is entitled to any of the sought damages or costs.

F. COURT'S DETERMINATION

22. Having examined the Affidavits deponed on behalf of the Applicant and that of the Respondent, and taking into consideration the rival submissions of the parties, as well as the authorities referred and supplied to us, the issue to be determined is **whether or not the extension of time to serve the Response to the Statement of Reference should be granted**. We are also alive to the fact that the Response to the Statement of Reference was served on the Respondent, albeit late, and the Applicant is praying, in the alternative, that the late service be validated.

23. The extension of time after lapse of the prescribed period is governed by Rule 5 of the Rules. Rule 5 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 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.”

24. There is a myriad of authorities to the effect that, the granting of the extension of time to enable an action that was late to be performed is a matter of judicial discretion. Indeed, the Court has a wide discretion to grant the extension of time if it considers that the interest of justice would be served by such extension. Nevertheless, the discretion must

be exercised judiciously, based on facts placed before the Court. This was the decision of this Court in **FORSC, FOCODE, PEN Kenya Centre, PALU, PEN International, Reporters Sans Frontiers and World Association of News Papers and News Publishers vs Burundian Journalists' Union and The Attorney General of the Republic of Burundi, EACJ Application No. 2 of 2014.**

25. In this Court, this discretion is codified by Rule 4 of the Rules, which provides:

“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 abuse of the process of the Court.”

26. The two Rules above cited enjoin the Court to exercise its discretion in its quest to dispense justice. Meeting the ends of justice is, to say the least, the prime consideration for the exercise of the discretion envisaged by Rules 4 and 5 of the Rules.

27. This Court has, since its inception, dealt with a number of applications regarding extension of time. In the case of **Attorney General of Kenya vs Prof. Anyang' Nyong'o & 10 Others, EACJ Application No. 4 of 2009**, the Court stated:

“Rule 4 of the Rules of this Court empowers this Court, for sufficient reasons, to extend the time prescribed by these rules ... What constitutes “sufficient reason” is left to the Court's unfettered discretion. In this context, the Court will accept either a reason that prevented an applicant from taking the essential step in time, or other reasons why the intended appeal should be allowed to proceed though out of time. For

example, an application that is brought promptly will be considered more sympathetically than one that is brought after an unexplained inordinate delay. But even where the application is unduly delayed, the Court may grant the extension if shutting out the appeal may appear to cause injustice.”

28. What the Court guided in the above case is that, in order to avoid an injustice, the Court will not only base its decision to extend time on the veracity of the reason or reasons that prevented the applicant from acting in time, but it will also accept either a reason or other reasons why the intended application should succeed.

29. In **Godfrey Magezi vs National Medical Stores, EACJ Appeal No. 2 of 2016**, the Appellate Division of this Court echoed and articulated the jurisprudence on time enlargement in the following terms:

“It was settled law that the Court had discretion according to Rule 4 to extend time if sufficient reason was shown by the Applicant. The Court distilled from the case of Attorney General of Kenya vs Prof. Peter Anyang' Nyong'o [Appeal No. 1 of 2009] and the Secretary General of the East African Community vs Hon. Sitenda Sebalu [Application No. 9 of 2012] the following propositions of law:

- a) Rule 4 requires a qualitatively higher standard to extend time (namely, sufficient reason), than the case with the standard of "any reason" which is prescribed under the corresponding rules in some member States; and
- b) The Court's discretion to extend time under Rule 4 only comes into existence after sufficient reason for extending

time has been established and that it is only then that the other considerations such as the absence of any prejudice and prospects or otherwise of the success in a reference or appeal can be considered.”

30. In the instant Application, the Applicant urges the Court to extend time so that the Response to the Statement of Reference filed with the Court on 29th April 2022 is belatedly served on the Respondent, or that the late service of the said Response on the Respondent be validated. To appreciate the matter before this Court, we feel it necessary to quote the appropriate Rule governing filing and serving of a Response to the Reference. Rule 32(1) of the Rules provide, *inter alia*, as follows:

“The respondent shall within forty-five (45) days after being served with a notification of the reference file and serve upon the applicant a response ...” (Emphasis added)

31. Thus, filing and serving a Response has to be done within the forty-five days provided by the Rules. Whereas the Response was filed within the time specified in the Rules, service on the Response was not made until the 23rd of May 2022, 24 days later.

32. The Applicant justifies this delay on the change of address of the Applicant who was serving a prison term at that time. The Respondent was first sent to Kitalya Prison but was later sent to Luzira Prison. This fact was not controverted by the Respondent. What the Respondent contested is the delay to serve him, as the Applicant could have easily and without delay known which Prison the Respondent was. He therefore labelled the two Affidavits by the Applicant as falsehood and full of lies.

33. As noted by the Respondent in his submissions, this is not the first time that Parties herein have appeared before us contesting about whether or not time should be extended. In the Attorney General of Uganda vs Male H. Mabirizi K. Kiwanuka, EACJ Consolidated Applications Nos 25 & 26 of 2020, this Court validated late service of a Response to the Statement of Reference despite strong objections by the Respondent therein. In arriving at the decision, the Court, *inter alia* stated:

“We are therefore unable to deduce the falsehood alleged by the Applicant. An Affidavit is evidence on oath; a fact therein is taken to be true unless there is credible evidence to the contrary. On the premises, we do take the contents of the two affidavits to be correct and true. In the evident, we find that the Respondent was diligent in the way it handled the matter.”

34. From the evidence provided on behalf of the Applicant, we consider the circumstances herein to be akin to those that we considered in the case cited above. The imputation of falsehood and lies made by the Respondent are not backed by empirical proof. We have no reasons to doubt the evidence of the Process Server that he went to serve the Respondent at the address he had provided in the Reference but could not serve him as he had moved to Luzira Prison.

35. It may also be true that time taken by the Applicant to trace the new address of the Respondent was a bit long, but we restrain ourselves from labelling it as inordinate.

36. Further, the Applicant pleads the prompt filing of the Application for the extension of time, as well as the absence of prejudice to the Respondent if the Application is granted. In our considered opinion, the

argument of the Applicant falls squarely within the parameters spelt out by the numerous decisions of this Court.

37. The Respondent submits that he was prejudiced as his matter was not attended to within time, which would have enabled his release from prison. While we sympathise with the Respondent on his incarceration, we are not convinced that the delay of service had anything to do with the delay to fix the Reference for hearing.

38. The issue of prejudice featured prominently in the case of The Attorney General of Uganda vs Male H. Mbirizi K. Kiwanuka (supra). The Court stated thus:

“Regarding prejudice on the part of the Applicant, having determined that the Response to the Reference was filed on time, we are unable to fathom the arguments made by the Applicant about prejudice on his part. The Applicant seems to suggest that he was prejudiced by the delay to serve him as he could not file a reply to the Reference on time and that “he should not be made to appear with a person who is not fit to be with him”. The fact that the Applicant sued the Respondent, it cannot be prejudicial to him if that person appears with him. Further, the Applicant had 45 days from the time of service within which to file a Reply to the Response, according to the Rules. He has not informed the Court whether he was forced to reply within a shorter period as a result of late service on him. Consequently, we do not agree with him that he was prejudiced.”

39. Equally, in this Application, the fact that the Applicant filed the Response on time militates against the accusation of prejudice made

and the innuendo that the Applicant was bent to delay service so that the Respondent continues to languish in jail. We are satisfied that the delay was due to sufficient cause as aptly demonstrated in the Affidavits in support of the Application.

40. This Court is also mindful of the ramifications of the issues contained in the Statement of Reference. To do justice to both parties, the Court shall benefit more if both parties would be allowed to present their sides of the story. That requires that the Respondent be allowed to respond to the claims made regarding the impugned acts or omissions of its judicial and other officers and institutions.


41. Regarding the conditional precedent proposed by the Respondent, we are in agreement with Counsel for the Applicant that the claims for damages are not backed up with justification. With due respect to the Respondent, this Court is not a forum for personal enrichment of litigants. Further, it is not a body constituted to inflict exorbitant damages to defaulters of its Rules. It would have been sufficient for the Respondent to ask for costs other than general, punitive and exemplary damages. There exist other avenues for a litigant who has suffered damages as a result of an action or omission of another to pursue compensation claims. To say the least, the Respondent chose a wrong avenue to avenge his claims. Such claims cannot be made in the written submissions opposing an application for extension of time.


G. CONCLUSION

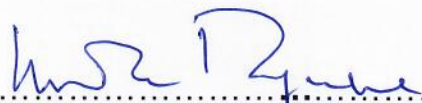
42. In the result, we find that the Applicant was, for sufficient reasons, prevented from serving the Response to the Reference within the time limits stipulated by the Rules.

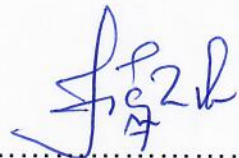
43. Accordingly, the Applicant succeeds and the time within which to serve the Response to Reference No. 11 of 2022 is enlarged.
44. As the Applicant had prepared the Response to the Reference and filed it in this Court; and as service to the Respondent was duly made, we hereby validate the service of the Response to the Reference made on 23rd May 2022.
45. The Respondent, if he so wishes, is at liberty to file a Reply thereto within the time prescribed in the Rules and serve the same upon the Applicant. In case he had already done so, the same is accordingly validated.
46. Costs of the Application shall abide the outcome of the Reference.
47. It is so ordered.

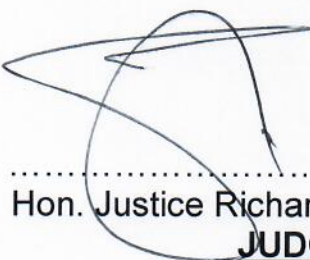
Dated, signed and delivered at Arusha this 22nd day of November
2023.


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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 Charles A. Nyachae
JUDGE


.....
Hon. Justice Richard Muhumuza
JUDGE


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Hon. Justice Richard Wabwire Wejuli
JUDGE