REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Ojwang and Lenaola, SCJJ)

CIVIL APPLICATION NO. 23 OF 2015

—BETWEEN—

KENYA REVENUE AUTHORITY .....APPLICANT

—AND—

1. HABIMANA SUED HEMED.....
2. ATTORNEY-GENERAL..... } RESPONDENTS

(*An application for extension of time to file a Notice of Appeal in terms of Rules 31 and 53 of the Supreme Court Rules, 2012)*

RULING

1. INTRODUCTION

[1] This is an application for extension of time to file a Notice of Appeal, under Rules 31 and 53 of the Supreme Court Rules, 2012. The application was brought by way of a Notice of Motion dated 11th September 2015, under a certificate of urgency of the same date, in terms of Rule 26 of the Supreme Court Rules. On 15th September 2015, this Court (*Ibrahim SCJ*) certified the application as urgent. The applicant intends to appeal against the decision of the Court of Appeal *(Karanja, Mwilu* and *Azangalala, JJA*) dated 31st July 2015.

2. BACKGROUND

[2] The applicant is the Kenya Revenue Authority, a statutory body established as a body corporate under the Kenya Revenue Authority Act (Cap. 469, Laws of Kenya). It is a legal entity with perpetual succession, a common seal, and with the capability to sue and be sued. The 1st respondent is Habimana Sued Hemed, a Rwandese businessman who carries out a transport business, and transports goods across borders from Mombasa to Kigali, Congo, Uganda, Tanzania and other countries. The 2nd respondent is the Attorney-General of the Republic of Kenya, who is also a member of the board of directors of the applicant.

[3] The legal dispute in this matter began when the 1st respondent was contracted to transport 2 x 40 feet containers imported by M/s. Zayed Ahmed from Mombasa. The containers are numbered MAEU 231779-5 and MAEU 713264-4 respectively. They each contained STC 520 bales of second-hand clothes and shoes. After being cleared by a customs agent, the containers were mounted on the two trucks. This was after the Transit Custom Cargo Manifest Form C35A, Entry Serial Number 2282 relating to truck registration No HZ 3213C/KV6710C and Transit Custom Cargo Manifest Form C35A, Serial No.2283, dated 15th September 1998 for truck HZ 2693C/KV 3471C with Transit Entry C34 No. 1685 of 21st August 1998, were processed. After all the procedures and protocols were complied with, the applicant granted the authority to transport the cargo. The two trucks, together with others, were ready to move.

[4] The trucks were to exit Kenya through the Isebania border point, but on 19th October 1998, one of the 1st respondent's trucks developed mechanical problems, and both trucks had to be parked at the roadside, a short distance from Mai Mahiu. At the prompting of police officers who were concerned about safety in the area at night, the trucks were moved backwards to Tigoni Police Station, for safe custody. On 28th October 1998, Samuel Macharia, the applicant's officer, went to Tigoni Police station and found the trucks parked there. After enquiring about the circumstances under which they were brought to the police station, he decided to seize them, together with the containers, by issuing two notices of seizure, D.No.031804 and D.No.031805. The notices stated that the trucks were seized, and were liable to forfeiture because they were suspected to have been used to convey uncustomed goods contrary to Section 196 as read with Section 184 of the Customs and Excise Act (Cap. 472, Laws of Kenya). The notices also confirmed the containers to be empty.

[5] Upon receiving the information about the seizure of his trucks, the 1st respondent went to Tigoni Police Station to ascertain what had transpired. There, he was served with copies of the notices, and was informed that his trucks were detained at Jomo Kenyatta International Airport. He wrote to the applicant on three different occasions, requesting for the release of his trucks. None of the three letters elicited a response from the applicant. He also offered to deposit Kshs.20 million as security to have his trucks released so that he could continue

with his business. This was also in vain. Desperate to get his trucks back, he filed a notice of claim, to which the applicant did not bother to respond. This caused him to move the High Court by filing a plaint dated 8th August, 2001 to secure the release of this trucks.

3. COURSE OF LITIGATION

(i) The High Court

[6] In his plaint at the High Court, the 1st respondent sought the following Orders against the 1st and 2nd respondents:

(a) immediate release of the two truck-trailers Reg. No. EZ 2693 C-KN3471 and HZ 3213 C-KN 6710 C;

(b) payment for loss of income;

(c) general damages;

(d) costs of the suit and incidentals; and

(e) interest thereon at the rate of 35% on loss of income, calculated from 28th October 1998 until Judgment, and payment in full.

[7] In support of his prayers, the 1st respondent stated that he used the two trucks for commercial purposes, to transport goods from Mombasa to Rwanda at the rate of 7,500 US$ per trip, and used to make four trips in one month, earning a total of 60,000 US$ per month. He further averred that he would make 6,000 US$ per trip, per vehicle, on the return trip—amounting to a grand total of

84,000 US$ per month. The applicant contested the claim, through M/s Twahir Alwi Mohammed, Advocates. It filed a statement of defence, denying liability on the ground that the said trucks were seized for conveying uncustomed goods, and that the seizure was lawful.

[8] The 2nd respondent in its statement of defence, raised a preliminary objection, to the effect that the 1st respondent had failed to comply with the terms of the Government Proceedings Act (Cap. 40, Laws of Kenya), which required a statutory notice to be served upon the Attorney-General, before a suit is instituted against the Government. The preliminary objection was heard and dismissed by *Mbaluto J* (as he then was) on the ground that the issue fell outside the concept of a preliminary objection. The issue was, therefore, deferred for hearing. However, before the matter could be scheduled for hearing, the 1st respondent filed a notice in terms of Order XXIV, Rule 1 and 2(2) of the Civil Procedure Rules (repealed), to withdraw the suit against the 2nd respondent, leaving the applicant only, as a party to the suit. The application was allowed; and so it became unnecessary to determine the preliminary objection. Yet, subsequently, the applicant dragged the 2nd respondent back to the proceedings, by means of chamber summons dated 4th July, 2002—now in the status of a third party, who would indemnify the applicant, in the event that the Court found against the applicant. That application was allowed.

[9] After considering the evidence, and the submissions by the parties, the trial Court found that the applicant's acts "*of searching, seizing and detention of the [1st respondent's] trucks are unlawful and without legal foundation or just cause".* As against the 2nd respondent, the Court found that neither the Commissioner of Police nor the Attorney-General had been shown to have done anything amounting to a cause of action against the applicant. The applicant could not, therefore, be indemnified by the 2nd respondent. In the end, the Court found that the 1st respondent had proved loss of income against the applicant, and ordered payment of compensation as follows:

(a) an amount of 84,000 US$ per month, or its equivalent in Kenya shillings, to be calculated as from 28th October, 1998 until August 2002, when the trucks were released;

(b) an amount of Kshs. 5,000,000 as general damages with interest, at the rate of 18% as from 28th October, 1998, until payment in full; and

(c) Costs of the suit.

(ii) The Court of Appeal

[10] Dissatisfied with the above findings of the trial Court, the applicant appealed to the Court of Appeal, on the basis of 18 grounds which were later re-set in 6 broad categories. The applicant contended that the proceedings in the High Court were a nullity, because the 1st respondent failed to comply with

Section 13A of the Government Proceedings Act. It was also urged that the trial Court erred in declaring Section 3(2)(a) of the Kenya Revenue Authority Act (as amended) unconstitutional. As for the 1st respondent, he maintained that the trucks were seized at the behest of the applicant, and not of the 2nd respondent, and that the issue of apportionment of liability did not, therefore, arise. To support this contention, he relied on the cases of ***Birmingham and District Land Company v. London and North Western Railway Company*** [1986] 34 Ch D261; and ***Eastern Shipping Co. v. Quah Bang Kee*** [1924] AC 177—as persuasive authority.

[11] On the question of mandatory service of notice upon the 2nd respondent, the Court found that the turn of events during the course of proceedings eliminated the need for the 1st respondent to prove that service was effected. It further found that the applicant's failure to raise the issue, and its subsequent bringing back of the 2nd respondent without the notice, amounted to a representation that the statutory notice was served on the 2nd respondent. The Court also found that the initial citing of the 2nd respondent in terms of Section 3(2) (a) of Customs and Excise Act, was to enable that respondent to represent the applicant. However, the applicant still instructed its own advocates, and this led to the 1st respondent excluding the 2nd respondent's name in the suit papers. The Court of Appeal confirmed the trial Court's findings as to the unconstitutionality of the Section, on the basis that it was oppressive.

[12] With regard to the validity of the seizure notices, the Court of Appeal found that seizure entails deprivation of property, and if it is done unlawfully it violates a person's fundamental right to own property. The Court held that before one's property is seized, the agency concerned must ascertain the existence of some breach of law, rather than act on mere *suspicion*. The Court found that the seizure of trucks was based on mere suspicion, rather than on reasonable belief; and that the seizures did not comply with *Section 199(1) of Customs and Excise Act*. The Court further found that the applicant had not served the 1st respondent with *seizure notices*, as required by law. The Court observed that the applicant should have released the trucks at the earliest opportunity, rather than wait for Court's intervention.

[13] On the role of the 2nd respondent, the Court found that the seizure notices were issued by the applicant's officer, Mr. Macharia, and not by police officers. This absolved the 2nd respondent of any culpability; and the Court held that its joinder was unprocedural, given that the 2nd respondent was sued on the basis of Section 3(2)(a) of the Customs and Excise Act. The Court declined, in the circumstances, to allow apportionment of liability.

[14] On the last issue of damages, the Court of Appeal found that the amount of US$60, 000 was clearly pleaded, and should be maintained. It however found that the extra amount of 24, 000 US$ was not pleaded, and should not have been

granted; and it set aside that element. The applicant was partially successful, as the Court ordered the applicant to make payment to the 1st respondent as follows:

(a) US$ 60,000 per month, or its equivalent in Kenya shillings, from the 28th October, 1998 to August 2002, when the trucks were released;

(b) the award of Kshs. 5,000 000 was left undisturbed, as the 1st respondent had not claimed any punitive or exemplary damages;

(c) Order No.1, to attract interest at 18% as from the date of filing the suit, till payment in full;

(d) Order No.2, to attract the same interest of 18%, with effect from the date of the Judgment of the High Court, until payment in full; and

(e) appellant to pay the 1st respondent 70% of the costs of this appeal and before the High Court.

The appeal against the 2nd respondent was dismissed in its entirety, with costs to the 2nd respondent.

(iii) The Supreme Court

[15] The applicant's case is set out in an affidavit dated 11th September 2015, sworn by its advocate, Mr. Twahir Alwi Mohammed, and in the written submissions filed on 30th November 2015. It urged this Court to overlook its failure to file a notice of appeal within the time prescribed in Rule 31(1) of the

Supreme Court Rules, 2012—which provides that a person who intends to appeal to the Supreme Court shall file a notice of appeal within 14 days from the date of Judgment or Ruling. The Judgment of the Court of Appeal was delivered on the 31st of July, 2015. The applicant should therefore have filed the notice of appeal by 14th August, 2015; but it failed to do so, hence the instant application.

4. SUBMISSIONS OF THE PARTIES

(i) Applicant

[16] Learned counsel for the applicant, Mr. Wakwaya, held brief for learned counsel, Mr. Ligunya. It is the applicant's case that its failure to file the notice of appeal within the prescribed time was inadvertent, and beyond its control. It urged this Court to exercise a discretion under Rule 53, and grant the extension, in light of this Court's Ruling in ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission and 7 Others*** [2014] eKLR. In that case, this Court laid down the test in respect of applications for extension of time.

[17] The applicant submitted that this case is deserving of this Court's discretion, in terms of Rule 53 of the Supreme Court Rules. It is the applicant's further submission that it had difficulties in obtaining a copy of the Judgment of the Court of Appeal, and that after obtaining it, it was essential to analyse it and

to consider the necessity of an appeal. The Judgment was availed to it only on 7th August 2015. The applicant pleaded for extension of time, on the basis that this case raised weighty matters involving a public entity, as well as large sums of money.

[18] The applicant contended that it had not deliberately caused delay and *that it had to consult the 2nd respondent, before deciding to lodge an appeal.* It was argued that between 7th and 14th August, 2015, the applicant was engaged in intergovernmental and interdepartmental consultations, in view of the large sums of money to be paid to the 1st respondent, which would issue forth from the public coffers.

[19] The applicant submitted that the 1st respondent will not suffer any damage that cannot be recompensed in damages, if the extension is granted. The applicant submitted that Article 159 of the Constitution requires this Court to dispense justice without undue regard to procedural technicalities; and that substantive justice can only be attained if the intended appeal is decided on the merits. The applicant invoked in aid, the observations of this Court in ***Raila Odinga v. IEBC and 4 Others*** [2013] eKLR and ***Zacharia Okoth Obado v. Edward Akong'o Oyugi & 2 Others*** [2014] eKLR (***Obado***), that the essence of Article 159 of the Constitution is: a Court not allowing prescriptions of procedure and form to trump the primary object of dispensing substantive justice

to the parties. The applicant asked this Court to grant the application, in the interests of justice. It was urged that in exercising its jurisdiction, all this Court needed to do was to consider whether the delay had been explained, and whether time should be extended – rather than the question whether there is an arguable appeal.

(ii) 1st Respondent

[20] The 1st respondent was represented by learned counsel, Mr. Nderitu, holding brief for learned counsel, Dr. Muigua. The 1st respondent's case is set out in a replying affidavit sworn by his advocate, dated 2nd November, 2015, and in written submissions dated 4th December, 2015. In the said affidavit, the 1st respondent contended that the powers of this Court, under Rule 53 of the Supreme Court Rules, are purely discretionary; and that in determining applications such as the instant one, the Court is concerned not only with the period of delay, but also with the reasons proffered to explain the delay. He urged that there is no legal duty resting upon the 2nd respondent to grant the applicant permission to file an appeal.

[21] It was the 1st respondent's contention that the applicant misrepresented to the Court, that delay had been occasioned by the need to consult the 2nd respondent. He lamented that the applicant had frustrated his cause for some 17

years, maintaining that the application has been filed in bad faith, for the sole purpose of forestalling the execution of the Judgment. He asked this Court to take into account the principle of finality of litigation.

[22] The 1st respondent submitted that the exercise of this Court's discretion under Rule 53 is reserved for deserving, and exceptional cases; and that in this case, there is no basis for exercising the discretion to grant extension of time. Like the applicant, he relied on the decision of this Court in ***Salat***, to validate the foregoing submission. Learned counsel further relied on this Court's decision in ***Obado*** (at paragraph 36), where it was held that the Notice of Appeal signifies intent on the part of the potential appellant to file an appeal – and an appellant does not need a text of the Court of Appeal Judgment, in order to file a Notice of Appeal.

[23] The 1st respondent perceived the collaboration between the applicant and the 2nd respondent, as a compromise to Court process, such as would deprive him of the opportunity to realize the fruits of the Court of Appeal's Judgment. He submitted that the applicant only considers itself a corporate body when it suits them; and in this case, the applicant had been represented by a private law firm. When, however, the Judgment turned against the applicant, it now considered seeking advice from the 2nd respondent – rather than from its advocates on record.

[24] In response to the applicant's invocation of Article 159 of the Constitution, the 1st respondent urged that the said Article does not protect acts of impunity, bad faith, abuse of Court process, or oppressive and prejudicial acts, such as those to be associated with the applicant's case. He lamented that he would continue to suffer the same prejudice and oppression he has suffered for over 14 years at the hands of the applicant, if extension of time is granted. He asked that the application be dismissed with costs.

(iii) 2nd respondent

[25] Learned counsel Ms. Odhiambo, holding brief for learned counsel Mr. Onyiso, for the 2nd respondent, submitted that the Court should be at liberty to determine this matter as it would find fit. The 2nd respondent was not able to confirm whether or not it had held intergovernmental or interdepartmental consultations with the applicant, such as would account for the delay in filing the notice of appeal.

5. ANALYSIS

[26] The historical origins of Courts' powers, in the common law jurisdiction, to extend time to file Court documents where a party has failed to comply with prescribed timelines, was summed up by this Court in ***Salat***, as follows:

> ***"At common law, equity developed in the courts of the Chancery Division to check the excesses of common law. If one showed that [one] had a*** *bona fide* ***cause of action and time had lapsed, but was constrained to pursue within time that cause, because of some compelling reasons, the courts of the Chancery Division could intervene and indulge such a person if it was established that he was not at fault***."

[27] This Court's power to grant extension-of-time applications is codified in Rule 53 of the Supreme Court Rules, which thus provides:

> "***The Court may extend the time limited by this rule or by any other decision of the Court."***

[28] In ***Salat***, this Court stated that a party who seeks an "[e]xtension of time being a creature of equity . . . can only enjoy it if he acts equitably: *he who seeks equity must do equity*." The only difference between ***Salat*** and the instant case, is that the former dealt with an application for extension of time to file a *petition of appeal*. The applicable legal principles are, however, similar. After a survey of both domestic and foreign case law, this Court laid down the legal principles governing applications for extension of time as follows:

"1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;

"2. a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court;

"3. whether the Court should exercise the discretion to extend time is a consideration to be made on a case-to-case basis;

"4 where there is a [valid] reason for the delay, the delay should be explained to the satisfaction of the Court;

"5. whether there will be any prejudice suffered by the respondents if the extension is granted;

"6. whether the application has been brought without undue delay; and

"7. whether in certain cases, like election petitions, the public interest should be a consideration for extending time."

[29] The above principles were given further judicial *imprimatur* by this Court, in ***Fahim Yasin Twaha v. Timany Issa Abdalla & 2 Others*** [2015] eKLR,

and ***John Ochanda v. Telkom Kenya Limited*** [2014] eKLR. However, it is to be signalled that these principles do not apply in a check-list fashion. The Courts will adopt a casuistic approach, which enables them to consider the circumstances of each case, and to take account of equitable factors. In ***Salat*** and ***Ochanda***, we remarked that the discretionary power to extend time should be exercised with caution, care, and even-handedness. We observed that this discretion must be *exercised judicially, regularly, and not capriciously; and due regard must be had to the principles enshrined in the Constitution.* Just as in ***Ochanda***, the issue that arises in this case is *"whether a basis has been satisfactorily laid to warrant this Court extending time to file a notice of appeal"*. The answer depends on whether the applicant has satisfied the principles outlined above.

[30] The applicant has delayed in filing the notice of appeal by more than a month, attributing this largely to the need to consult the 2nd respondent, on whether or not to appeal. The applicant further states that it had difficulty obtaining the Appellate Court's Judgment, getting it only on 7th August, 2015. The applicant states also that, between 7th and 14th August 2015 it was engaged in interdepartmental and intergovernmental consultations to determine whether or not to file an appeal. The applicant, however, provided no chronology of the events that took place during that period. Without such information, this Court is left to merely speculate as to the cause of the alleged impediments. There is

only the vague signal that the applicant "was consulting". As was observed in ***Ochanda***, the cause of delay is to be candidly stated. It has not been, in this instance.

[31] The applicant set much store by the need to consult the 2nd respondent on whether or not to appeal, as a cause of delay. With respect, we fail to appreciate the relevance of the 2nd respondent, in the present proceedings. In any event, the 2nd respondent has not confirmed that there were any consultations with it; and the applicant has not shown the mode of any such consultations. As aptly noted by the 1st respondent, it is surprising that the applicant now seeks consent to lodge proceedings – and from its erstwhile opponent, whom it once maintained, should bear an apportionment of liability. The Court of Appeal had held that the applicant was not an organ of State, and that it was a legal entity capable of suing and being sued, and which did not require the permission of the 2nd respondent (the Attorney-General) to institute or defend legal proceedings. The applicant continued, however, to involve the 2nd respondent in these proceedings, and is alleging that it acted belatedly because it had to consult with the 2nd respondent. No legal basis has been shown for attaching the 2nd respondent to these proceedings. In ***Law Society of Kenya v. the Centre for Human Rights & Democracy & 12 Others*** [2014] eKLR, this Court had held that the *notice of appeal* is a *signification of intent* by the potential appellant to contest by way of

appeal, the decision of a lower Court. The Court cannot, therefore, accept the alleged need-to-consult, as a reason for delay in filing the notice of appeal.

[32] The applicant submitted that the 1st respondent will not suffer any prejudice that cannot be compensated in damages, if the application is granted. He also stated that the execution of the Judgment has already begun. However, the history of this matter shows an unresponsive posture on the part of the applicant, when the 1st respondent sought to reclaim his assets arbitrarily impounded by the applicant. It is clear that he has already suffered considerable prejudice, on account of the applicant's conduct.

[33] The 1st respondent has already begun executing the Court of Appeal Judgment; and the applicant intends to have that process suspended, or forestalled, through further litigation. To permit this to happen would not only prejudice the 1st respondent, it would negate the principle of finality of litigation. As we stated in ***Salat,*** extension of time is an attribute of equity; and "*he who seeks equity must do equity.*" This Court had further stated in ***Ochanda***, that the power to extend time is founded upon considerations of fairness. While it is true that the applicant is entitled to seek extension of time, the history of this case, regrettably, bears an account of unfairness and inequity, in the applicant's handling of the 1st respondent's matter.

[34] It is surprising that the applicant expects the 1st respondent to demonstrate to the Court that he stands to suffer prejudice. Such an approach is, with respect, contrary to legal principle. The duty to convince the Court that it should exercise its discretion in favour of granting the application, rests on the applicant, who has to take into account the pertinent factors outlined in ***Salat***. That burden cannot be cast upon, nor apportioned to, the 1st respondent. In ***Salat***, this Court had thus pronounced itself:

> *"It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and* ***whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant****"* [emphasis supplied].

[35] It is the applicant's responsibility to convince the Court that it should exercise its discretion and grant extension of time. We find that the applicant has failed to satisfy the Court that the 1st respondent will not suffer prejudice if the application for extension of time is granted.

[36] The applicant has also sought reliance on ***Raila Odinga***, urging that Article 159 of the Constitution requires this Court to dispense substantive justice, without undue regard to technicalities. In that case, this Court observed:

"It may be argued that the Supreme Court ought to apply the principle of substantial justice, rather than technicalities, particularly in a petition relating to Presidential election, which is a matter of great national interest and public importance. ***However, each case must be considered within the context of its peculiar circumstances. Also, the exercise of such discretion must be made sparingly, as the law and Rules relating to the Constitution, implemented by the Supreme Court, must be taken with seriousness and appropriate solemnity. The Rules and time-lines established are made with special and unique considerations"*** [emphasis supplied].

[37] It is clear from the foregoing passage that, although the Court in ***Raila Odinga*** underlined the need to avoid compromising substantive justice on account of technicality, it by no means detracted from the importance of certain prescriptions of time-lines. The importance of time-lines in this case runs alongside the fact that the applicant had already been accorded audience by two competent Courts. It is immaterial that the applicant was dissatisfied with the findings of those Courts. The applicant cannot sustain the position that, declining to grant time-extension even where no proper case is made, would deny it substantive justice.

6. CONCLUSION

[38] The overall picture is that, the applicant has failed to convince this Court that this is a proper case for an exercise of discretion in the terms of Rule 53, and for the grant of extension of time to file a notice of appeal.

7. ORDERS

[39] From the foregoing analysis, it is our finding that the scales of justice tilt in favour of dismissing the application. Consequently we make the following Orders:

(i) The Applicant's Notice of Motion dated 5th June, 2014 is dismissed.

(ii) The Applicant shall bear the costs of the Respondents in this application.

Orders accordingly.

DATED and D**ELIVERED** at Nairobi this 26th day of January, 2017.

.....	.....
J.B. OJWANG	**I. LENAOLA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**