IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, JA (IN CHAMBERS)

CIVIL APPLICATION NO. 112 OF 2018

BETWEEN

KENYA NATIONAL HIGHWAYS AUTHORITY..... APPLICANT

AND

VIPINGO BEACH RESORT LIMITED .....1ST RESPONDENT

THE ATTORNEY GENERAL .....2ND RESPONDENT

THE MINISTRY OF ROADS .....3RD RESPONDENT

KENYA RAILWAYS CORPORATION .....4TH RESPONDENT

(An application for extension of time to file and serve the Record of Appeal out of time in an intended appeal from the Judgment of the Environment & Land Court of Kenya at Nairobi (Mary. M. Gitumbi, J) dated 20th February, 2015

in

ELC Case No. 963 of 2012) (Click to open)

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RULING

The application before me is basically made under ***Rule 4*** of the Court of Appeal Rules, 2010 **(the Rules)** although ***Article 159 (2) (d)*** of the Constitution, ***section 3A and 3B*** of the appellate Jurisdiction Act are thrown in for good measure. The application was filed on 12th April, 2018 seeking an order for extension of time to file a record of appeal in an intended appeal.

Rule 4 provides as follows:

> ***"The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or a superior count, for the doing of any act authorized or required by the Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."***

In a recent ruling, ***Motorways Kenya Ltd vs Kenya Engineering Workers Union, Civil Application No. 111 of 2017 (UR)***, I had this to say on the principles applicable under the rule:

> "***The grant of such orders lies in the unfettered discretion of the court which is exercised on principles well settled in a long line of previous decisions of this Court. In one case the court stated thus:***
>
> *"The order whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vicissitudes of life,*

deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time". ***----See Aviation Cargo Support Limited vs St. Mark Freight Services Limited (2014) eKLR.***

The Supreme Court examined several decisions of this Court, and comparable others internationally, in the case of ***Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others*** ***[2014] eKLR*** before laying out the following general approach to such applications:

> ***"From the above case law, it is clear that the discretion to extend time is indeed unfettered. 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....., we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:***
>
> ***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 for 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) Whether there is a reasonable 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, public interest should be a consideration for extending time."***

I will consider the application before me on those principles.

The background to the application is this:-

On 20th February, 2015, the Environment and Land Court **(ELC) [Mary Gitumbi, J.]** delivered a judgment in favour of the 1st respondent before us, **(Vipingo).** The judgment was pursuant to a petition filed by Vipingo seeking various declarations on LR. No. 209/14437 **(suit property)** situated in the proximity of the Nairobi Southern By-pass road. Vipingo asserted ownership to the property through purchase in 2002 and issuance of Grant No. IR 89655 on 3rd November, 2008. It claimed in the petition that the applicant **(KENHA)**, the Ministry of Roads **(Ministry)**, and Kenya Railways Corporation **(Railways),** had in October 2010 laid claim to the suit property as part of the road and railway reserve along the proposed Nairobi Southern By-pass road. They had marked 'X' on the various units developed on the suit property indicating imminent demolition thereof. They had also visited the suit property in February 2012 in the absence of Vipingo, thus confirming their intentions of invading the suit property. That is why Vipingo went to court seeking various declarations to safeguard its interests.

Neither the Attorney General nor Railways filed any response to the petition. But both the Ministry and KENHA responded stating that a 120 meter reserve had been made on the southern bypass to accommodate a road and railway carriageway, which was part of the TransAfrica Highway. This was done way back in the 1980s and survey works had been completed in 1990s. The southern bypass was then prepared as a motorable murram road and opened for public use in 2003. Ultimately it was upgraded to permanent tarmac road and opened for public use. In the process, it did not affect the suit property. Indeed KENHA admitted, as claimed by Vipingo, that written clearance was given by KENHA and Railways in July/August 2010 that their proposed development of residential units on the suit property did not encroach on the road reserve. Other clearances were also given by the Nairobi City Council, as it then was.

Upon considering the affidavit evidence placed on record and the submissions of counsel, the trial court made findings and issued the following declarations:

> ***(i) that Vipingo was the owner of the suit property and was entitled to quiet enjoyment thereof.***
>
> ***(ii) that the threatened entry by the respondents to demolish the developments thereon was in breach of Vipingo's constitutional right to property ownership.***
>
> ***(iii) that the threatened entry into the suit property was a breach of the right to fair administrative action and a breach of the legitimate expectation that the state will observe and respect Vipingo's constitutional rights.***
>
> ***(iv) that the rights of Vipingo to the suit property were threatened by the acts of the respondents.***
>
> ***(v) that the threat to enter and demolish all or part of the developments on the suit property was unconstitutional and therefore null and void.***
>
> ***(vi) that pursuant to Article 40 (3) (b) (1) of the constitution Vipingo was entitled to just compensation as may be determined by the National Land Commission if the respondents entered into the suit property and demolished the developments thereon.***

(vii) that no damages would be awarded to Vipingo.

If any party was dissatisfied with those declarations, no intention was shown by filing a notice of appeal within 14 days in accordance with ***Rule 75 (2)*** of the Rules. Only KENHA returned one year and eight months later and sought leave to appeal out of time. A consent of the parties was recorded on 5th October, 2016 for the appeal process to begin and a notice of appeal was filed forthwith. On the same day, KENHA's advocates applied for a certified copy of the judgment *'together with typed copy of the proceedings'* and the letter bespeaking the copies was copied to counsel for the other parties.

Ordinarily, the appeal ought to have been filed on or before **5th December, 2016**, by dint of ***Rule 82*** of the rules, but none was filed. The proviso to the rule, however, excludes the time certified by the registrar as having been required for the preparation and delivery of such copies. The deputy registrar informed counsel for KENHA on 27th June, 2017 that copies of the proceedings were ready for collection and these were collected on 12th July, 2017 upon payment. But the advocates did not collect a copy of the certified judgment, which according to them, was only supplied on 14th September, 2017. The Deputy Registrar, however, insisted that the judgment was always available since its delivery and ought to have been collected together with the proceedings or even earlier. He declined to certify the period taken to collect it up to 4th September, 2017. The period certified was thus 258 days from 12th October, 2017, when the letter bespeaking copies was lodged, to 14th July, 2017 when the proceedings were supplied. Instead of filing the appeal, KENHA embarked on a challenge of the Deputy Registrar's refusal to certify the period of 79 days taken to supply a copy of the judgment. In their view, no record of appeal could be filed without a copy of the judgment. They filed an application before the Deputy Registrar on 3rd October, 2017 seeking certification of the 79 days, but in a ruling made on 15th November, 2017, the Deputy Registrar dismissed the application. There was no further challenge to that ruling. KENHA then went silent on pursuing the intended appeal until **12th April, 2018** when it filed the application before me -- a period of about five months since the dismissal of the application by the Deputy Registrar.

In an effort to explain the delay, KENHA swore a further affidavit disclosing that instead of pursuing the appeal, it had filed an application for review of the judgment of the trial court delivered on 20th February, 2015. The decision was prompted by a special notice published in the Kenya Gazette by the National Land Commission **(NLC)** on 7th July, 2017 declaring the suit property, among others in the same vicinity, as public property and revoking the Grants/Titles issued thereon. I may reproduce two paragraphs of the affidavit:

> ***"7. THAT I am advised by the Applicant's Advocates on record which advice I believe to be true that the Gazette Notice No 6862 of 2017 drastically altered the setting in which the Judgment of 20th February, 2015 was delivered and brought to fore new evidence that confirms illegality of the 1st Respondent's title to the property together with 22 other titles adjacent to the suit property along Nairobi Southern By-pass.***
>
> ***8. THAT the decision to apply for review could only be made after the discovery of the new evidence and was also partly informed by the decision by the Deputy Registrar of the Superior Court on the 15th November, 2017 in which she delivered a ruling refusing to review and vary the Certificate of Delay issued on 29th September, 2017."***

The application for review was filed on 8th December, 2017 but was opposed by Vipingo on the basis that it was filed in abuse of court process and contrary to the provisions of ***Order 45 Rule 1 (1) (a)*** of the Civil Procedure Rules (CPR) which prohibit review of a decree or order where an appeal has been preferred. Vipingo also filed a petition before the High Court on 23rd August, 2017 seeking orders of *Prohibition, Certiorari* and *Mandamus* in respect of the Gazette Notice published by the NLC on 17th July, 2017. It obtained interim orders of stay pending the hearing and determination of the main application which has since been filed. Those two matters are still pending hearing and determination by the lower courts. Despite the pendency of the matters, however, KENHA sought to proceed with the main appeal as earlier intended, hence the application before me.

On 25th June, 2018, counsel for the parties appeared before me to orally urge the application. Learned counsel, **Mr. Brian Ochieng,** instructed by M/s Albert Mumma Company Advocates, represented KENHA; **Mr. Njoroge Regeru** appeared for Vipingo; **Ms. Mwalozi,** appeared for the Attorney General and the Ministry; while **Mr. Thuku** held brief for Mr. Mumia for Railways.

In his submissions, Mr. Ochieng urged me to consider four factors as sufficient to dispose of the application: the length of delay, the reasons for delay, likely prejudice if the application is granted, arguability of the intended appeal and public importance. In his view, the only delay that was relevant for consideration was from 15th November, 2017 when the Deputy Registrar delivered the ruling on the certificate of delay and 12th April, 2018 when this application was filed -- that is 148 days. That is because, in his view, the delay between the judgment and 5th October, 2017 was excused by the consent recorded by the parties. The period between 12th October, 2017 and 15th November, 2017 is also fully explained as it was taken up by the process of obtaining the proceedings and judgment for purposes of the appeal. Counsel, however, conceded that he had misapprehended the provisions of ***Rule 87*** as requiring the mandatory filing of a copy of the judgment, and that he overlooked the provisions of ***Rule 88*** which allows for the filing of a supplementary record of appeal where the judgment was not available at inception.

It is in this light that counsel explained the pursuit of extension of time before the Deputy Registrar, culminating in the ruling of 15th November, 2017. Counsel emphasized that it was evident throughout that period that KENHA was diligently pursuing its intention to appeal and the delay should not be held against it. He cited the case of ***Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others [2014] eKLR*** where the Supreme Court stated that it would not be in the interests of justice to turn away an applicant who has, *prima facie*, exercised all due diligence in pursuit of his cause, but is impeded by the slow-turning wheels of the courts' administrative machinery. That period of delay, therefore, urged counsel, ought to be excluded.

Explaining the period of 148 days delay up to the filing of this application, Mr. Ochieng submitted that KENHA was perfectly entitled to pursue a review of the judgment so long as they had not filed the substantive appeal. Only where an appeal has been pursued to conclusion is a review curtailed. In this case, only a notice of appeal had been filed. He cited the case of ***African Airlines International Ltd vs Eastern &***

Southern African Trade & Development Bank (The PTA Bank) [2003] 1EA 1 (CAK) where it was held that an application for review is not a bar to an appeal.

As for prejudice, counsel cited the Supreme Court case of ***Aviation & Allied Workers Union Kenya vs Kenya Airways Limited & 3 Others [2015] eKLR*** for the proposition that it is the respondent who should show what prejudice may befall it, but in this case, none was shown.

Counsel further submitted that the intervention of the NLC in declaring the suit property as public property and revoking the Title, enhanced the chances of success of the intended appeal. It will be argued that the impugned judgment was a nullity for failure to enjoin the NLC in the suit. The case of ***James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another (2016) eKLR*** was cited in aid.

Finally, counsel underscored the immense public importance in the matter where a public road was in danger of being lost to private developers or alternatively where the public would be called upon to compensate private developers for public property illegally acquired.

In those submissions, Mr. Ochieng was supported by Ms. Mwalozi and Mr. Thuku who simply stated as much before sitting down. None of them had filed any affidavits in support of the application either.

In response, Mr. Regeru first took up a preliminary issue with the validity of the motion which, in his view, was filed in abuse of court process. Citing ***Order 45 Rule 1 (a)*** of CPR, he submitted that an application for review cannot be pursued simultaneously with an appeal against the same decree. An appeal can only arise after determination of a review application but not the other way round. For that submission counsel relied on the case of ***Chairman Board of Governors Highway Secondary School vs William Mmosi Moi (2007) eKLR.*** Counsel further objected to the filing of the application on the basis that it was *res judicata,* a similar application having been made before the Deputy Registrar who dismissed it on 15th November, 2017.

On the merits of the application, counsel submitted that it had no legal or factual legs to stand on. He conceded that the first period of delay was covered by the consent of the parties. As for the delay between 5th October, 2017 and 15th November, 2017, counsel submitted that there was no reason for failing to file the appeal on the basis of the certificate of delay issued in September 2017, even without a copy of the judgment. The period of 79 days sought to be certified by the Registrar was rejected and so, according to counsel, the issue cannot be canvassed again before this Court. To buttress this point counsel cited the cases of ***Kenya Commercial Bank Limited vs Muiru Coffee Estate Limited & Another (2016) eKLR; Africa Oil Turkana Limited (preciously known as Turkana Drilling Consortium Limited & 3 Others vs Permanent Secretary, Ministry of Energy & 17 Others (2016) eKLR;*** and ***William Koros (Legal personal representative of Elija C. A. Koros) vs Hezekiah Kiptoo Lomen & 4 Others (2015) eKLR***.

In view of those decisions, urged counsel, the period of 79 days remains unexplained. Add to that the period of five months between 15th November, 2017 and 12th April, 2018 which is totally unexplained and the total period of unexplained delay would be in excess of six months. Without explanation for delay, a court of law lacks jurisdiction to exercise any discretion and the application should fail.

As regards prejudice, counsel submitted that Vipingo had a legitimate expectation to enjoy the judgment of the ELC which declared it the owner of the suit property. The residential units developed on the property had also been bought and transferred to third parties who may pursue Vipingo if the judgment is disturbed, thus causing further prejudice. There was also further prejudice caused by the multiplicity of suits filed by KENHA. Counsel cited and relied on the case of ***Kenya Breweries Ltd vs Lawrence Ndutu & Others [2004] eKLR*** to the effect that a respondent is bound to be prejudiced by the conduct of a party which has all along been holding itself out as not opposed to its course.

Finally, counsel submitted that the issue of public interest did not lie in this application but in the Judicial Review application and the Review application, both of which are pending before the lower courts. That is where the issue of revocation of the Title of Vipingo and others will be contested and the issue thrashed out. It does not arise in the current application, since the impugned judgment came long before the NLC purported to publish the Gazette Notice. The case of ***Fidelis Kitili Kivaya & Another vs Karanja Kabage & Another [2004] eKLR*** was cited in aid. At all events, concluded counsel, enforcement of socio-economic rights does not override private rights to property as stated by this Court in the case of ***Kenya Airports Authority vs Mitu Bell Welfare Society & 2 Others [2016] eKLR.***

I have anxiously considered the application before me. As stated earlier, whether or not I grant the extension of time lies within my unfettered discretion. But I cannot do so on the basis of whim or caprice. The applicant must lay a proper basis for consideration. Counsel on both sides were indeed alive to the principles applicable and addressed me at length citing various authorities which I have considered. I am grateful for their assistance.

At the end of the day, the application stands or falls on the length of delay occasioned in seeking extension of time and the explanation offered for it. For it is only in the rare case where an intended appeal will have good prospects of success which would outweigh the considerations of timeous compliance with the rules. This Court was of that view on a reference placed before it in the case of ***Rajesh Rughani vs Fifty Investment Ltd & Another (2005) eKLR*** where it stated thus:

> ***"The authorities cited before us are consistent that the delay in taking the necessary steps to mount an appeal should not be inordinate and that there should be reasons given for any delay. The period and the reasons given therefor were indeed the two factors first considered by the learned single Judge and were found wanting. In effect they could not form the basis of exercise of his discretion in favour of the applicant. On a reference, the full court would have no basis to interfere with such finding. We think the two factors must take primacy of consideration if the time table laid in the rules for conduct of court business will have any meaning. As stated earlier, it would be a rare case where the arguability of the intended appeal would outweigh all other considerations, and it would at best, in our judgment, be considered in borderline cases".***

The Supreme Court has had occasion to lay emphasis on compliance with court rules even as courts continue to be guided by the principle that *'justice shall be administered without undue regard to technicalities'* in ***Article 159 (2) (d)*** of the **Constitution**. The Article is not a panacea for all procedural shortfalls, the Court has stated. In the case of ***Zacharia Okoth Obado vs Edward Akong'o Oyugi & 2 Others***

[2014] eKLR the Supreme Court agreed with the dicta of Kiage, JA in ***Nicholas Kiptoo Arap Korir Salat vs IEBC & 6 Others [2013] eKLR*** stating thus:

> ***"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned…"***

So that, the applicant in this case ought to show compliance with the rules or give an explanation where there was no such compliance. The decision of the trial court was made on 20th February, 2015 and, as stated earlier, any party dissatisfied with the decision should have so intimated within 14 days and proceeded to file the appeal within 60 days thereafter. All other things being equal, the appeal should have been filed by **5th May, 2015**. There is thus a period of delay of about three years up to the time of filing the motion before me.

How is this period explained?

The delay ending on 5th October, 2015 presents no difficulty as it was compromised consensually. That is about eight months. Another period of 258 days, or about eight and a half months also presents no difficulty because the Registrar certified it to have been necessary for preparation of proceedings. It follows that the record of appeal could have been validly filed as at 14th July, 2017 when the proceedings were collected, but it was not. What followed was unnecessary drama fired by a misunderstanding of the rules. Counsel for the applicant belatedly conceded that he had misunderstood or misconstrued the provisions of ***Rule 88*** which was amended way back in 2010 to allow for filing of supplementary records where documents, such as a judgment, was unavailable at the time of filing the record. A futile exercise of filing an application for extension of time was thus embarked on, in the process wasting another period of about four months from July to November 2017. As the saying goes, ignorance of the law is not a defence. But it is also true that mistakes in construction of legal provisions are made even by senior counsel. The epic words of Madan, JA (as he then was) in ***Murai vs Wainaina (No. 4) [1982] KLR 38,*** quickly come to mind:

> ***"A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of 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."***

In my view, counsel for the applicant made a blunder in construing procedural provisions but I would exercise my discretion in excusing that mistake. I would thus consider the delay period of four months as explained.

What about the period of five months between the ruling of the Deputy Registrar and the filing of this application? There lies the *'achilles heel'* of the application. The applicant appears to say that it abandoned pursuit of the intended appeal in preference to an application for review of the judgment. For some reason however, the process of review is not over and is pending hearing and determination before the ELC. Arguments were advanced on both sides on whether it was appropriate for the applicant to pursue the review simultaneously with the appeal, but for obvious reasons, these are arguments I cannot resolve in this application. It may prejudice or embarrass the proceedings before the trial court. So too the import of the Judicial Review application pending before the High Court. I will give both matters a wide berth and free the lower courts to decide as they will on the basis of the evidence placed before them. At any rate, the matters do not preclude me from considering the current application.

I have carefully considered the documents placed before me as well as the submissions of counsel, but I am afraid none amounts to an explanation for the delay. In my view, the applicant simply abandoned pursuit of the intended appeal, and the notice of appeal may well have been deemed to have been withdrawn under ***Rule 83***.

There is no persuasive evidence that the applicant had exercised all due diligence in pursuing the intended appeal or that it was *'impeded by the slow-turning wheels of the court's administrative machinery'* in pursuing its cause. Instead, there was simply pure inaction, over an inordinately long period, which cannot form the basis of the exercise of judicial discretion. I would on this ground alone decline to exercise my discretion in favour of the applicant.

Nevertheless, as the parties urged other issues of arguability, prejudice and public interest, I will briefly consider them too. Whether or not the intended appeal has good chances of success would obviously be in the province of the full Court to decide. It is only a factor put forward for possible consideration by the single judge in an application like this. See ***Mutiso vs Mwangi, Civil Application No. Nai. 255 of 1997 (UR).*** No material, beyond mere hope, has been placed before me to goad me into considering the chances of success of the intended appeal.

As for prejudice, I agree with counsel for the 1st respondent that the lengthy delay gave the impression that the intended appeal had been abandoned, and there is no denial that third parties have acquired interests in the suit property. In my view, the 1st respondent had shown what prejudice would befall it in terms of the ***Aviation & Allied Workers Union Kenya case (supra)*** which was relied on by the applicant.

Finally on public interest. This is a relevant factor to consider as declared by the Supreme Court in the ***Salat case (supra)***. The nature of the public interest as urged by the applicant is a possible loss of a public utility through a fraudulent process or in the alternative, spending huge public finances to compensate the fraudsters if the same property was to be compulsorily acquired. There is certainly all the merit and

urgency in protecting public property wherever it may be from the greed of land grabbers, corrupt individuals, institutions and cartels. But this country is governed by the rule of law which every person and institution is bound to follow. It is not clear to me whether the applicant was keen on protecting public property when it commenced and completed the road infrastructure without first taking steps to reclaim the suit property. Hypocrisy is a strong word to use, but in my view, the conduct of the applicant in proceeding by indecisive slow motion, as well as the conduct of Kenya Railways Corporation and the Attorney General who filed no papers before the trial court to show their indignation towards alienation of public property, comes close to that adjective. It is instead the NLC which appears to have belatedly risen to the occasion and taken action in the interests of the public. Whether this effort ultimately succeeds is a matter before the lower court.

The upshot of my consideration of this application is that it is lacking in merit and I order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 28th day of September, 2018.

P. N. WAKI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR