THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPLICATION NO.36/97

CORAM: HON. MR. JUSTICE C.M. KATO, JA.

EDWARD KAMANA WESONGA ::::::::::::.:::::: ::: PETITIONER

- VERSUS -

INTERIM ELECTORAL COMMISSION & 2 OTHERS :: ::: RESPONDENT

RULING OF C.M. KATO, J.A. (Single Judge)

This is an application for the reinstatement of Civil Appeal No.17 of 1997 which was dismissed for want of prosecution on 15/9/97. The application is by a notice of motion dated 17/9/97. It is supported by a total of 4 affidavits all dated 17/9/97. It was lodged under the provisions of Rules 55 and 99(2) of Court of Appeal Rules 1996. There were two affidavits in reply. There is only one ground upon which this application is based, namely that the applicant and his counsel could not attend court on 15/9/97 because the counsel's law clerk had mistakenly given them a wrong date of 17/9/97.

It is worth noting that on 30/7/98 this same application was argued before a panel of 3 judges who eventually discovered that the application was supposed to be handled by a single judge and the parties were accordingly advised.

Mr. Olanya learned counsel for the applicant submitted that the applicant had a reasonable cause for not appearing in court on 15/9/97 as he was misled by his counsel. It was his argument that counsel's mistake however negligent should not be visited on a client. In support of this argument he cited: Ahamada B. Zirondomu vs. Mary Kyamulabi [19751 HCB 337, Kyobe Senyange vs. Naks Ltd. [19801 HCB 31 and National Insurance Corporation vs. Mugenyi & Co. Advocates, [19871 FICB 28. He further argued that the applicant filed this application within only two days on learning that his appeal had been dismissed. He also submitted that the case was of public interest as it involved an election petition and that the appeal should be heard on its

merits.

On his part Mr. Sam Serwanga who appeared for the first and second respondents argued that the application lacked merit as the affidavits supporting it were defective because in one affidavit it was being said that it was the applicant who telephoned the chambers of his counsel to find out about the hearing date and in another affidavit it was being said that it was the counsel who telephoned the applicant. According to him the affidavits were telling lies. He however conceded that the matter was of some public importance.

Mr. Matsiko who represented the third respondent strongly opposed the application on the ground that no reasonable or substantial reason had been put forward by the applicant in support of his application. He submitted that the applicant's counsel was greatly negligent in not appearing in court on 15/9/97 and his negligence should be visited on the applicant. Mr. Matsiko also attacked the affidavits in support of the application as being inconsistent on the issue of who telephoned who. In his view such affidavits were unreliable and useless and therefore should be ignored all together.

Rule 99(2) of the Rules of this court upon which this application is based reads as follows:-

"99(2) Where an appeal has been dismissed under subrule (1) or any cross-appeal heard under that subrule has been allowed, the appellant may apply to the Court to restore the appeal for hearing or to re-hear the cross-appeal, if he or she can show that he or she was prevented by any sufficient cause from appearing when the appeal was called on for hearing."

Subrule (2) above must, however, be read together with subrule (5) of the same rule 99.

In order for an applicant to succeed under rule 99(2) he must satisfy the court that he or she was prevented by sufficient cause from attending court when the appeal was called for hearing. What constitutes sufficient cause depends on facts of each individual case. The test to be applied, however, is whether the applicant intended to attend court and did the best he could to attend but in vain (see: National Insurance Corporation vs. Mugenyi and Co. Advocates [J9871 HCB 284.

In the case before me now, the applicant swore an affidavit in which he said that he contacted the chambers of his counsel on 12/9/97 to ascertain as to when his appeal would be coming up for

hearing so that he could attend court. His counsel assured him that the case was coming up on **17/9/97** and indeed on that day he came to court only to find that his appeal had been dismissed on 15/9/97. His affidavit is supported by that of his former counsel Mr. Augustine Lubega Matovu and that of Fred Semugenyi. The two counsel who appeared for the three respondents attacked these affidavits on the ground that they were contradictory as to who telephoned who. I find this attack baseless because all the three affidavits are in agreement that on 12/9/97 the applicant was in telephone contact with the chambers of his former counsel Mr. Lubega Matovu whereby he was positively informed his appeal was scheduled to be heard on 17/9/97. It is immaterial whether it was Mr. Lubega Matovu who telephoned him or it was he who telephoned Mr. Lubega Matovu; what is important is that they talked on telephone on 12/9/97 about the hearing date of the appeal.

I am satisfied that the applicant intended to attend court and did all in his power to be present when his appeal was supposed to come up for hearing but he was let down by his counsel who gave him the wrong date.

There is, however, one pertinent question which must be answered. The question is whether the applicant should be made to suffer because of mistakes made in the chambers of his former counsel. A similar question arose in the case of: Mary Kyamulabi vs. Ahamada Zorondomu Civil application No.41 of 1979 (unreported) where Nyamuchoncho, J.A. (as he was) sitting as a single judge in the then Court of Appeal for Uganda had this to say on the matter:

"It would indeed be very deplorable for a vigilant litigant to be punished by refusing him to appeal because of the negligence of his counsel over whose actions he has no control."

In my view that statement represents the correct principle of the law, although each case must be considered on its own merits. In the instant case I feel the applicant should not be punished for what happened between his counsel and the counsel's clerk. The applicant had no control over their actions. He did all in his power to ascertain the hearing date and he was wrongly assured by his counsel that it was 17/9/97. Considering all the facts surrounding this application, the applicant did not only act diligently but he also acted promptly by filing this application within two days from the date of the dismissal of the appeal.

As regards to the issue of whether the matter is of public interest, there is no doubt that this being an election petition it is obviously a matter of public importance, at least as far as the people in the concerned constituency are concerned. It has to be appreciated that Mr. Sam Serwanga who appeared for the first and second respondents in this application conceded that this was a matter of public importance.

In the result this application is allowed. It is hereby ordered that Civil Appeal No.17 of 1997 which was dismissed by this court on 15/9/97 be reinstated for hearing. As counsel for the applicant concedes to costs, the respondents will get the costs of this application.

Dated at Kampala this 7th day of January 1999

C.M. KATO

JUSTICE OF APPEAL