THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO.30 OF 2012

(Arising out of Election Petition Appeal No.3 of 2011 and Election Petitions Nos.26 and 27 of 2011)

THE ELECTORAL COMMISSION ::APPLICANT

VRS

1. SEBULIBA MUTUMBA RICHARD
2. NAJJA TWAHA ::RESPONDENTS
3. KANYIKE WILLIAM

CORAM

HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, DCJ

HON. MR. JUSTICE A.S. NSHIMYE, JA

HON. MR. JUSTICE REMMY KASULE, JA

RULING

The applicant, the Electoral Commission, applies to be added as a respondent to Election Appeal No.3 of 2011. The application is made under Rules 2(2), 43(1) and (2) of the Rules of this court. It is supported by an affidavit of Mr. Erick Sabiiti, a legal officer with the applicant.

The 1st respondent Sebuliba Mutumba Richard opposes the application, while the 2nd (Najja Twaha) and 3rd (Kanyike William) respondents do not oppose it.

By way of background, the 1st, 2nd and 3rd respondents were candidates in the Parliamentary elections of 18.02.2011 in Kawempe South Constituency. The 1st respondent was declared the winner of the elections. The 2nd and 3rd respondents respectively petitioned the High Court at Kampala through election petitions Numbers 26 of 2011 and 27 of 2011 to which both the applicant and 1st respondent were respondents challenging the result of the election.

The petitioners complained that the election had been conducted with irregularities, errors and or omissions that were contrary to the law and that these had substantially affected the results of the election.

Both petitioners prayed for a recount of votes to be done and the winner, after the recount, be declared the validly elected Member of Parliament, or in the alternative, the election of the 1st respondent be set aside and new elections ordered.

The applicant and 1st respondent, as respondents to the petitions, denied the allegations in the petition. Each one contended that the election had been properly conducted in accordance with the law and that the 1st respondent had properly won the same and accordingly been declared by the applicant the duly elected Member of Parliament, Kawempe South Constituency. Both the applicant and 1st respondent prayed the High Court to dismiss the petitions with costs.

The two petitions were consolidated for purpose of the trial. The hearing started on 19.05.2011 before Honourable Justice Geoffrey Kiryabwire of the High Court, at Kampala.

On 01.06.2011 in the course of scheduling, the learned trial judge ordered that there be a recount of votes in respect of the seven (7) polling stations that were not taken into account

in declaring the overall results for Kawempe South. Dissatisfied with the said Order, counsel for the 1st respondent applied for leave to appeal. The learned trial judge granted such leave. The 1st respondent lodged in this court **Election Petition Appeal No.03 of 2011** against the said High Court Order.

The appeal was brought by the 1st respondent as the appellant against the 2nd and 3rd respondents only. The applicant who is not a party to the appeal lodged this application to also be added as a respondent.

At the hearing of the application, the applicant was represented by learned Counsel Enos Tumusiime, the 1st respondent by learned counsel Caleb Alaka assisted by Julius Galisonga, while Counsel Kigozi Nasser represented the 2nd respondent and Counsel Babu the 3rd respondent.

For the applicant, counsel Enos Tumusiime has submitted that the applicant as the one who conducted the election, is interested in the appeal since the Order to recount that is being appealed against was issued to be carried out by the applicant. The outcome of the appeal is likely to directly affect the applicant. Therefore the hearing of the appeal without the applicant's involvement is likely to occasion an injustice to the applicant. Further, the applicant, as the one who organized and conducted the election, the subject of the appeal, is privy to information vital to the just and equitable determination of the appeal.

The application is strongly opposed by the 1st respondent, the appellant. His counsel submitted that it was the 1st respondent's right as appellant to choose against whom and against which Orders to appeal. The 1st respondent chose not to make the applicant a party to the appeal because he is not aggrieved against the said applicant.

The record of appeal contains all the necessary proceedings and pleadings in the lower court to enable the appeal court to effectually and completely determine the grounds of appeal without the applicant being a party to the appeal.

The appeal is seeking to set aside the court's Order directing a recount of votes at seven (7) polling stations. Whether or not the appeal succeeds, the applicant cannot be affected adversely or otherwise as he has no personal stake in the recounting of votes. The applicant will carry out what the court orders in accordance with the law as relates to the recounting of votes. The court Order to recount is not directed at the applicant as the one to conduct the recount. The law provides as to who carries out this role.

The applicant did not disclose any information he is in possession of and is not available to court, and how that information is going to be helpful for the disposal of the appeal.

Further, the applicant's conduct has been dilatory in bringing the application to be added as a party to the application, a whole year after the applicant had been served with both oral (on 01.06.2011) and written (06.06.2011) notice of appeal.

The 1st respondent's counsel prayed for dismissal of the application. Counsel for the 2nd and 3rd respondents did not oppose the application.

Court will now proceed to resolve the issues.

The applicant applies to be added as a respondent to the appeal by this court under its inherent powers under Rule 2(2) of the Rules of this court. Under that Rule, nothing in the Rules of this court is taken to limit or otherwise affect the court's inherent power to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of court.

In the High Court under **Order 1 Rule 10(2)** of the **Civil Procedure Rules,** that court, may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order the name of any person who ought to have been joined or whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, be added.

Though the **Civil Procedure Rules** do not necessarily apply to this court, it is legitimate for this court to apply the principles of law that have been developed under those Rules when this court is exercising its inherent powers.

The law as to joinder of parties to a suit, which includes an appeal, makes a distinction between the joinder of one party who ought to have been joined as a defendant and the joinder of one whose presence before the court is necessary for the court to effectively and completely adjudicate upon questions involved in the suit.

This distinction has been clearly pointed out by the Supreme Court (Uganda) in **DEPARTED ASIANS PROPERTY CUSTODIAN BOARD V JAFFER BROTHERS LTD: [1999] EA 55,** when **Mulenga, JSC,** stated:

"In order for a person to be joined to a suit on the ground that his presence was necessary for the effective and complete settlement of all questions involved in the suit, it was necessary to show either that the orders sought would legally affect the interests of that person and that it is desirable to have that person joined to avoid multiplicity of suits, or that the defendant could not effectually set up a desired defence unless that person was joined or an order made that would bind that other person."

It is also a principle of law that, subject to the principle quoted above, no person ought to be compelled to bring an action without his/her consent: See: **LOMBARD BANKING KENYA**

LTD V. SHAH BHAICHAND BHAGWANJI [1960] EA 969. Since a cause of action is always brought against some other person, it follows also that a party who by his/her own choice decides that he/she has no cause of action against a particular party ought not to be forced to maintain a cause of action by adding that particular party to the suit. It has not been possible to get a Supreme Court and Court of Appeal cases on this point. The one available is of the High Court, but very relevant to the issue in our view. It is **FATUMA OSMAN HUSSEIN VS MAHENDRA UMADBHAI PATEL [1995] KALR 671** where the court **(Katutsi,J.)** observed as regards 0.1 r 10(2) of the **Civil Procedure Rules:**

"It seems to me that this rule ought to be strictly construed so, because its provision might be made use of in a manner exceedingly harassing to plaintiffs by forcing them to include in their actions persons against whom they have no interest to proceed. Only in very strong cases should one be forced to encounter a defendant he did not desire to meet in court."

The above principles also equally apply, in our considered opinion, to appeals as well.

In this application, the applicant has offered no explanation to court as to what has prompted him to apply to join the respondents to the appeal, when at trial in the High Court he was co-respondent with the 1st respondent to the petitions filed by the respondents he now wants to join.

In paragraph 9 of the application supporting an affidavit of Mr. Eric Sabiiti, it is asserted that: **"……the applicant is privy to information vital to the just and equitable determination of the questions before this honourable court in Election petition Appeal No.3 of 2011".** However, the applicant did not in any way disclose to court what this information is about, and how it is vital to the determination of the appeal. We agree with the submission of counsel for the 1st respondent that the appeal is to be determined on the basis of what transpired at trial in the High Court as is contained in the record of appeal.

We have thus come to the conclusion that the applicant has not convinced us that there is a valid reason for him to be added as a respondent to the appeal thus crossing over to the side of the 2nd and 3rd respondents, when the appellant himself asserts he has no cause of action to appeal against him. He has also not convinced us in which way he, the applicant, is going to be adversely prejudiced, or otherwise affected, if he is not made a party to the appeal.

We accordingly find no merit in this application and dismiss the same with costs payable by the applicant to the 1st respondent only, as the 2nd and 3rd respondents did not oppose the application.

We so order.

Dated at Kampala …**13th** …day of …**June**… 2012

A.E.N. Mpagi-Bahigeine
DEPUTY CHIEF JUSTICE

A.S. Nshimye
JUSTICE OF APPEAL

Remmy K. Kasule
JUSTICE OF APPEAL