

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPLICATION NO.24 OF 2016

ABIRIGA IBRAHIM Y.A.:.....;.....:APPLICANT

VERSUS

MUSEMA MUDATHIR BRUCE:.....:RESPONDENT

CORAM: HON. MR. JUSTICE S.B.K. KAVUMA, DCJ

HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. MR. JUSTICE ALFONSE OWINY DOLLO, JA

RULING

The applicant and the respondent participated in the General **National** parliamentary Elections held on the 18th of February 2016, where they contested for the position of Member of Parliament for Arua Municipality. The applicant was declared as the validly elected Member of Parliament. The respondent challenged the outcome of the election and lodged a petition in the High Court of Uganda at Arua contending that at the time of the elections, the applicant had been disqualified for election as a Member of Parliament on the premise that he lacked academic qualifications of advanced level its equivalent. He prayed for a declaration that the applicant was unlawfully elected as Member of Parliament, a declaration that the petitioner (now respondent) was the duly elected Member of Parliament for Arua Municipality and any other remedy as the Court deemed fit.

On the 24th day of June 2016, John Eudes Keitirima J dismissed the Petition and upheld the election of the applicant. It is common ground that the respondent filed a Notice of Appeal on the same day and the same was served upon the applicant.

This application is brought under the provisions of Rules 43(1) & (2) and 82 of the Rules of this Court and Rule 31 & 36 of the Parliamentary Election (Election Petitions) Rules SI 141-2 for orders that Election Petition Appeal No.25 of 2016 be struck out and the respondent be ordered to pay the costs of this application and the Appeal. It is premised on several grounds which are contained in the Notice of Motion and in the affidavit in support deponed on the 16th day of August 2016 by the applicant. Briefly the grounds are that:-

1. There is no valid Appeal on record by the respondent.
2. The respondent failed to take an essential step in the proceedings.
3. The respondent did not file a Memorandum of Appeal within the prescribed time.

In reply, the respondent opposed the application through an affidavit in reply, which he deponed on the 24th day of November 2016 wherein he avers inter-alia that:-

- a). the Memorandum of Appeal was lodged with the Court of Appeal on the 5th day of July 2016 and the same was served on the applicant on the 11th day of July 2016,
- b). the time within which he was required to file a Memorandum of Appeal in Election Petition No.25 of 2016 had not lapsed,
- c). he did not fail, ignore or neglect to file the Memorandum of Appeal as required by law and therefore he took all essential steps in filing the appeal,
- d). there is a valid appeal before this Court and the same ought not to be struck out with costs.

The applicant filed an affidavit in rejoinder to the respondent's reply and stated

that:-

- i), the respondent did not file a Memorandum of Appeal within seven (7) days from the filing or giving of a notice of appeal as required by law.
- ii) this application to strike out the appeal was filed on the 17th of August 2016.
- iii. by the letter dated 18th August 2016, Counsel for the respondent were duly notified of the filing of this application and served with copies of this application.
- iv) to date no application has been filed to extend time and or validate the late filing of the memorandum of appeal as required by law.

- v). the respondent has not exercised due diligence in the prosecution of the intended appeal
- vi). there is not a valid appeal on Court record and the same ought to be struck off the record with costs.

At the hearing of the application, Mr. Kiryowa Kiwanuka assisted by Mr. Osama Sebuufu, appeared for the applicant while the respondent was represented by Mr. Ronald Munyani.

Counsel for the applicant submitted that on the 5th day of September 2016, the main appeal was called for conferencing and counsel for the respondent was present. During the scheduling, it was brought to the attention of the respondent's counsel that an application to strike out the Appeal for failure to file a Memorandum of Appeal within the time stipulated by the law had been filed but to date no application for extension of time within which to file a Memorandum of Appeal or validation of the same has been filed. Counsel argued that Election appeals have got a specialized procedure and the same is set out in Rules 29, 30 and 31 of the Parliamentary Election (Election Petitions) Rules SI 141-2.

Counsel further argued that the procedure as set out in the law must be followed. He submitted that for Election Petitions, a Notice within 7 days from the date of judgment and the Memorandum of appeal is filed within 7 days from the date of filing of the Notice of Appeal. The Record of Appeal is then filed 30 days after the filing of the Memorandum of Appeal.

However, in the instant case; judgment was delivered on 24th June 2016 and the respondent filed the Notice of Appeal on the same day. The Memorandum of Appeal was filed on 5th July 2016 which was out of time as it should have been filed on the 1st of July 2016. Counsel relied on the case of **Kasibante Moses V Electoral Commission Court Of Appeal Election Petition Application No.7 of 2012** to support his submission. In that case Court struck out an appeal because the Memorandum of Appeal had been filed one day out of time.

Counsel submitted that the respondent had not exercised due diligence in the prosecution of the intended appeal because the notice of this application was given to the respondent on the 18th of August 2016 before it was fixed and when the same was filed a copy of a letter was sent to counsel for the respondent who acknowledged receipt of the same. To date the respondent has not found it necessary to file an application for extension of time within which to file a Memorandum of Appeal for validation of the same. He relied on the case of **Kirya Grace Wazala V Daudi Migereko & Anor Electoral Reference Appeal No.39 of 2012** to support his submission.

Counsel prayed that Court finds that the Memorandum of Appeal was filed out of the time provided for by law and strike out the Appeal with costs.

In reply, counsel for the respondent submitted that Rule 3(k) of the rules of procedure of this Court is to the effect that a Notice of Appeal in relation to a means a notice lodged in accordance with Rules 59, 60 and this Court and in relation to Civil appeals, a notice lodged in accordance with Rule 76 of these rules. He further argued that Election Petition Appeal No.25 of 2016 is a civil appeal hence the Notice of Appeal must be

lodged in accordance with Rule 76 of the rules of this Court. He relied on the case of **Bahinguza & Anor V Attorney General Miscellaneous Application No.269 of 2013** to support his submission.

Counsel further submitted that the Notice of Appeal was lodged on the 28th of June 2016 and the 7 days started running on the 29th of June 2016 until 5th of July when the Memorandum of Appeal was filed and the same was filed within time. He submitted that the respondent had taken all the essential steps in prosecuting Election Petition Appeal No.25 of 2016. He invited Court to find that if the Memorandum of Appeal had been filed out of time, then it was excusable under **Article 126(2) (e)** of the Constitution and that the same principle was followed in the case of **Tegras Byeitima 8s Others V Asaba Jaiden Court Of Appeal Civil Application No.248 of 2013**. In that case, the Memorandum of Appeal was filed out of time but Court went ahead to hear the appeal on the basis of **Article 126(2) (e)** of the Constitution.

Counsel prayed that Court dismisses the Application with costs and allows Election Petition Appeal No.25 of 2016 to proceed.

In rejoinder, counsel for the applicant submitted that procedure provided for by the law, then Courts should be guided by that law but where there is no such procedure, then this Court should be Rules of this Court. In the instant Application, Court ought to be guided by the

Parliamentary Elections (Election Petitions) Rules SI 141-2. Counsel further submitted that in Election Petitions, a document is effective at the time it is filed. Since the Notice of Appeal was given on the 24th of June 2016, the 7 days expired on the 1st of July 2016 and the respondent should have filed the Memorandum of Appeal within that time.

We have read and considered the pleadings as well as the submissions of both counsel for and against this Application. The issue for resolution is whether, on the facts of the case as stated above, the respondent failed to take an essential step to prosecute Election Petition Appeal No.25 of 2016.

Rule 36 of the Parliamentary Elections (Election Petitions) Rules provides for application of Civil Procedure Rules to apply to Election Petitions with such modifications as the Court may direct in the interests of justice.

Rule 82 of the Judicature (Court of Appeal Rules.) Directions allows a person on whom a Notice of Appeal has been served to apply to Court to strike it out on the ground that no Appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Rule 29 of the Parliamentary Elections (Election Petitions) Rule provides that a notice of appeal may be given either orally at the time judgment, or is given in writing within seven days after the judgment of the High Court against which the Appeal is being made.

Rule 30 of the Parliamentary Elections (Election Petitions) Rules requires that a Memorandum of Appeal in Election Appeals has to be filed within seven (7) days after the Notice of Appeal has been given.

The case of the applicant is that the respondent had not exercised due diligence in the prosecution of the intended Appeal because the notice of this application was given to the respondent on the 18th of August 2016 before it was fixed and when the same was filed, a copy of a letter was sent to counsel for the respondent who acknowledged receipt of the same. To date the respondent has not found it necessary to file an application for extension of time within which to file a Memorandum of Appeal and/ or validation of the same. This contention is made out in paragraphs 6 and 7 of the applicant's affidavit in rejoinder. Annexure LI is a letter by the applicant's lawyers informing the respondent's counsel of the application to strike out Election Petition No. 25 of 2016 and a copy is enclosed therein. A receipt stamp shows that the letter was received by the respondent's counsel on the same day.

In the case of Kirya Grace Wazala V Daudi Migereko & Anor Electoral Reference Appeal No.39 of 2012, Court stated that "surely in this case, a vigilant applicant gets to know that he has filed a record of appeal, on the 15th/2/2012 and that an application for striking his appeal has been filed on the 23rd /2/2012 as well as a supplementary affidavit and the applicant is put on notice to strike out his appeal on the ground that the letter requesting for proceedings has not been served on them but he does not act until 18 days later when he files an application for extending time to serve the letter requesting for proceedings onto the respondent and this was even after court has served conferencing directions on the striking out application." (Sic) Court further stated that "I do not take this simply as the mistake or tardiness of the counsel but, I must say that the applicant himself contributed to this mistake and he was negligent, not serious and is therefore guilty of dilatory conduct. You cannot sit on your rights even when you see a real threat at your nose. I see no where in his affidavit where he put pressure on his counsel upon learning of the striking out application or even the conferencing directions for striking out his application. If he never got to know about them then surely he was negligent and he slept and was leaving everything to his counsel. He has not demonstrated that he was on toe with his advocate in ensuring that everything was being done diligently. I shall therefore want to distinguish this applicant from one who is vigilant."

The applicant contended that the procedure and timelines for filing a Memorandum of Appeal as set out in the law must be followed. That for Election Petitions, a Notice of Appeal is filed within 7 days from the date of judgment and the Memorandum of Appeal is filed within 7 days from the date of the filing of the Notice of Appeal. The Record of Appeal is then filed 30,-days after the filing of the Memorandum of Appeal. However, in the instant case; judgment was delivered on 24th June 2016; the respondent files the notice of Appeal on the same day. The Memorandum of Appeal was filed on the 5th July 2016 which was out of time as it should have been filed on the 1st of July 2016.

In the instant case, the respondent failed to take an essential step in the proceedings by filing a Memorandum of Appeal out of time prescribed by the law. In the case of **Utex Industries Ltd V Attorney General SCCA No.52 of 1995**, Court stated that *“taking an essential step is the performance of an act by a party whose duty is to perform that fundamentally necessary action demanded by the legal process, so that subject to permission by court, if the action is not performed by law prescribed, then whatever legal process has been done before becomes a nullity, as against the party who has the duty to perform that act”*.

In the case of an Election Petition, the intending appellant has even a higher duty to promptly take all the necessary steps so that the appeal is heard and determined as quickly as possible because matters regarding Election Petitions are supposed to be heard expeditiously as required by **Article 140(1) and (2)** of the Constitution which requirement and wording are reproduced in similar terms in Sections 63(2) and 66(2) and (4) of the Parliamentary Elections Act and Rule 33 of the Parliamentary Elections (Election Petitions) Rules. Section 66 specifically enjoins this Court to hear and determine an appeal expeditiously and may, for that purpose suspend any other matter pending before it.

Rule 4(a) of the Judicature (Court of Appeal Rules) Directions

“Any period of time fixed by these Rules or by any decision

Of court for doing any act shall be reckoned in accordance with the following provisions:-

(a) A period of days from the happening of an event or the doing of any act or thing shall be taken to be exclusive of the day on which the event happens or that act or thing is done”

The position is therefore that the date of filing of the Notice of Appeal is excluded when computing the seven (7) days within which a Memorandum of Appeal has to be filed in Court.

The respondent argued that the Notice of Appeal was lodged on the 28th of June 2016 and the 7 days started running on the 29th of June 2016 until 5th of July 2016 when the Memorandum of Appeal was filed and the same was filed within time. He maintained that he had taken all the essential steps in the prosecution of Election Petition Appeal No.25 of 2016.

Rule 30 of the of the Parliamentary Elections Rules requires the respondent to file the Memorandum of Appeal with the registrar of this Court in case where a written notice of appeal had been given within seven days after notice had been given.

In paragraph 5 of the affidavit of the applicant in support of the application, he attaches as Annexure “C” a copy of the notice of appeal dated 24th June 2016 which was filed in Court on the same date. The notice states that judgment was delivered on the 24th day of June 2016 at Arua High Court. The notice was lodged with the Registrar on the 28th June 2016. The applicant computation of time for filing the memorandum ought to have sorted running from the date of filing i.e 24/6/2016 while the respondent argued that it starts from the date it was lodged i.e date when the registrar signed it that is 28/6/2016.

This Court in **Election Petition Application No. 7 of 2012 Kasibante Moses Vs Electoral Commission** had occasion to deal with a similar situation which required to determine when to start counting the seven days for purposes of **Rule 30**. In that case, judgment was delivered on 24/10/2011 and the respondent filed the Notice of appeal on the 31/10/2011. In allowing the application to strike out the appeal, the Court said;

“taking the 31.10.2011 as the date when the notice of appeal was filed in Court, thus when the notice of appeal was given, the seven days (7) days, excluding 15 31.10.2011 expired on 7.11.2011. This is the last date when the memorandum of appeal ought to have been filed in Court. It’s being filed in Court on 8.11.2011 was therefore out of time by one day contrary to Rule 30 of the Parliamentary Elections (Election Petitions) Rules”.

We find that the Notice of Appeal in this case having been filed on the 24th day 20 of June 2016; thus the date when it was given, the seven (7) days excluding 24th June 2016 expired on 1st of July 2016. This is the last date when the Memorandum of Appeal ought to have been filed in Court. In this case it was filed on the 5th of July 2016 and this was therefore out of time by 4(four) days contrary to Rule 30 of the parliamentary elections (Election petitions) Rules.

In Kasibante Moses v Katongole Singh Murwaha Election Application No.8 of 2012, where the

respondent had failed to file a memorandum of appeal within seven days after the notice of appeal had been filed, this Court held that; to allow an intending appellant to take his or her time to file the record of appeal outside the time set by the rules without exceptional circumstances being shown would defeat the purpose of the time frame provided in the Constitution, the Parliamentary Elections Act and the rules made there under for expeditious disposal of election matters.

Counsel for the respondent submitted that if Court were to find that the Memorandum of Appeal had been filed out of time, then it was excusable under **Article 126(2) (e)** of the Constitution. The same principle having been followed in the case of *Tegras Byeitima & Others V Asaba Jaiden Court Of Appeal Civil Application No.248 of 2013*, where the Memorandum of Appeal was filed out of time but Court went ahead to hear the Appeal on the basis of **Article 126(2) (e)** of the Constitution.

Article 126 (2) (e) of the Constitution of the Republic of Uganda provides as follows:

”In adjudicating cases both of a criminal and civil nature, the courts/shall subject to law, apply the following principles: (e) substantive be administered without undue regard to technicalities.”

The Supreme Court interpreted **Article 126 (2) (e)** of the Constitution in the

case of Utex Industries V Attorney General S.C.C.A. No. 52 of 1995, where there was no certificate indicating the time that had been taken to prepare the record of proceedings under the Rules of this Court. The respondent had not applied for leave to extend time since the appeal had been filed after the stipulated 60 days. The court referring to article 126 (2) (e) of the Constitution on which the appellant sought to rely to save the appeal from a plea of time bar stated:

“We think that the article seems to be a reflection of the saying that rules of procedure are handmaidens of justice- meaning that they should be applied with due regard to the circumstances of each case. We cannot see how in this case article 126 (2) (e) or the Mabosi case can assist respondent who sat on his rights since 18/8/1995 without seeking leave to appeal out of time.”

The Court held that they were not persuaded that the legislature intended to do away with the rules of procedure by enacting **Article 126 (2) (e)** of the Constitution. The Court further interpreted **Article 126 (2) (e)** to mean that the principles to be followed are *“Subject to law”*.

The same Court in dealing with the same Article in Kasirye Byaruhanga & Co. Advocates V Uganda Development Bank S.C.C.A. No.2 of 1997 stated that:

“ We adopt the same reasoning here and say that a litigant who relies on the provisions of article 126 (2) (e) must satisfy the court that in the circumstances of the particular case before the court it was not desirable to have undue regard to a relevant technicality. Article 126 (2) (e) is not a magical wand in the hands of defaulting litigants” (sic)

We agree with the conclusion of the Supreme Court in the two cases that **Article 126(2) (e)** is not a magical wand in the hands of defaulting litigants.

This Court holds that computation of time follows the specific legislation in 10 election matters and that is Rule 30 of the Parliamentary Elections (Interim Provisions) Rules SI 141-2. This Rule provides that; a Memorandum of Appeal shall be filed with the Registrar in a case where a written notice of appeal has been given within seven (7) days after the notice was given.

In the instant application, since the Notice of Appeal was given on the 24th of 15 June 2016, the 7 days expired on the 1st of July 2016 and the respondent should have filed the Memorandum of Appeal within that time.

We accept the contention of counsel for the applicant that an intending appellant ought to actively take the necessary steps to prosecute his/her intended appeal.

We therefore hold that the respondent was not diligent as the law requires of-an intending appellant in an Election Petition Appeal. We exercise our discretion otherwise in view of the clear provision relating to time within which to file the memorandum of appeal.

In conclusion and for the reasons given above, we allow the Application and find that the appeal as filed is incompetent. It is accordingly struck out.

Costs of this Application and in the Court below shall go to the applicant.

We so hold and order.

Dated this 6th day of January 2017.

HON.MR.JUSTICE S.B.K KAVUMA, DCJ

HON.MR. JUSTICE CHEBORION BARISHAKI, JA

HON.MR. JUSTICE ALFONSE OWINYI DOLLO, JA

