

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPLICATION NO. 002 OF 2023

(ARISING FROM ELECTION PETITION APPEAL NO. 04 OF 2022)

OCHWA DAVIDAPPLICANT

VERSUS

HON. OGWARI POLYCARP.....RESPONDENT

CORAM: HON. JUSTICE F.M.S EGONDA NTENDE, JA

HON. JUSTICE EVA K. LUSWATA, JA

HON. JUSTICE OSCAR JOHN KIHICA, JA

RULING OF COURT

1. The Applicant filed Election Petition Application No. 002 of 2023 under Rules 28, 29, 30 and 36 of the Parliamentary Elections (Interim Provisions) Rules SI 141-2 and Rules 2(2), 43(1) and (2), 44, 78 (1), 82 and 88 of the Judicature (Court of Appeal Rules) Directions SI 13-10 seeking for orders that;
 - A. Election Petition cited as Election Petition Appeal No. 04 of 2022 be struck out as it is not valid and no appeal lies; and
 - B. Costs of this application be provided for.



BACKGROUND.

2. The background to this application is briefly as follows;

The Applicant together with the Respondent and 4 others contested in parliamentary elections that were held on the 14th of January 2021 in respect of the seat of parliament for Agule County Constituency, Pallisa District. The Respondent was declared the duly elected Member of Parliament for Agule County Constituency.

3. The Applicant filed Election Petition No. 4 of 2021 at the High Court of Uganda Mbale challenging the Respondent's nomination as candidate as well as the validity of the election result. The election petition was, on the 12th of December 2022, allowed by the trial court wherein the election of the Respondent was set aside and an order to conduct fresh elections for the Member of Parliament for Agule County was issued.
4. Being dissatisfied with the decision of the trial court, the Respondent on the 15th of December 2022 filed Election Petition Appeal No. 04 of 2022 in this Court. The Applicant then filed the present Application seeking to strike out the Appeal on the ground that the Respondent had not taken the essential step of serving the Applicant with the Notice of Appeal within the time prescribed by the law.

GROUND OF THE APPLICATION

5. The grounds upon which this application is premised are set out in the Notice of Motion and the affidavit of **OCHWA DAVID** (the Applicant) sworn on the 15th of March 2023 and are briefly that;

- 1. The Applicant was one of the candidates that contested for election as Member of Parliament for Agule Constituency in Pallisa District in the general elections of 2021 together with the Respondent.*
- 2. The Respondent was declared winner of the election and was sworn in as Member of the 11th Parliament.*
- 3. The High Court nullified the election by its Judgment delivered on the 15th of December 2022.*
- 4. The Respondent filed a Notice of Appeal in the High Court on the 19th December, 2022 but did not serve the same on the Applicant within seven (7) days.*
- 5. The Respondent filed the Memorandum of Appeal in Election Petition No. 4 of 2022 on the 21st December 2022, but did not serve the same on the Applicant within seven (7) days.*
- 6. The Respondent failed to take essential steps in the proceedings prescribed by Rules 29, 30 and 36 of the Parliamentary Elections (Interim Provisions) Rules SI 141-2, and Rules 78(1) and 88 of the Judicature (Court of Appeal Rules) Directions S.I No.13-10 and the failure renders the appeal invalid.*

The Notice of Motion was supported by a further affidavit of one **MUKWAYA ABBAS** which was affirmed on the 28th of December 2022. It briefly states as follows;



1. *I am the Chairman LC 1 of Gwafu Central Village in Seeta Ward, Goma Division Mukono Municipality, Mukono District.*
 2. *In the month of December three gentlemen came to office in Gwafu Central Village next to Havilla Supermarket.*
 3. *The three gentlemen stated that they were looking for one of my residents with intention of serving him court documents from the Court of Appeal.*
 4. *They gave me the documents and I read through after which I escorted them home of the person whose name they mentioned to me and I thought was one of the residents of my village.*
 5. *Upon reaching the home we found a young man who introduced himself to us as Jona and he told us that the owner of the home was not around or at home.*
 6. *The said Jona advised us to look for the owner of the home in his village in Pallisa District.*
 7. *That one of the gentlemen wanted to throw the court papers over the gate but I told him it was not acceptable.*
 8. *The three gentlemen told me to tell court that they had come and to confirm that I received them at my office.*
 9. *As I was signing the Court papers, one of the three gentlemen told me to write the words "RECEIVED AND WITNESSED THE SERVICE" against the stamp of my office and that is what I wrote.*
 10. *Thereafter the three gentlemen left with all their papers.*
-
6. The Respondent opposes the application and he filed an affidavit in reply which was deposed by one **ATIBA**



SOLOMON OLEA on the 10th November 2023. It briefly states as follows;

1. *I am a Lawyer working with the firm of **M/s Alaka & Co. Advocates** representing the Respondent, having been fully involved with the filing and serving all court documents in relation to this Appeal.*
2. *Following the delivery of the Judgment in the High Court on the 12th of December 2022, the Respondent filed a Notice of Appeal and a letter requesting for the record of proceedings on the 19th day of December 2022 in the High Court of Uganda at Mbale and in the Court of Appeal registry in Kampala on the 20th of December 2022 well within the prescribed time.*
3. *On the same 20th day of December, 2022, I proceeded to the office of Counsel **Alfred Okello Oryem** of **M/s Okello Oryem & Co Advocates** located at Plot 592, Kigobe Road, Ntinda who was on record as the Applicant's Counsel in Election Petition No.4 of 2021 in the High Court of Uganda at Mbale for purposes of effecting service of the Notice of Appeal and letter requesting for record of proceedings.*
4. *The receptionist ushered me to the office of Mr Alfred Okello Oryem whereupon I introduced myself and the purpose of my visit and then served him with the Notice of Appeal and the letter requesting for the certified record of proceedings.*
5. *Mr Alfred Okello Oryem declined to append his signature and firm stamp stating that the firm did not have instructions in the Appeal. I left copies of aforesaid*

Handwritten signature and initials in blue ink, appearing to be 'J.P.' and 'ELK'.

documents with him and left with my copies which were not signed and stamped.

6. I called the Respondent and informed him that I had served the Notice of Appeal and the letter requesting for the record of proceedings on **M/s Okello Oryem & Co Advocates**, and that Counsel Alfred Okello Oryem had declined to accept service stating that they had no instructions but I left the said documents with him.
7. The Respondent told me for caution to also serve the Applicant and give me the Applicant's personal telephone numbers **07013700594/0782370594**.
8. I then immediately called the Applicant, introduced myself and explained to him that I had served his lawyers with copies of the Notice of Appeal and letter requesting for the record of proceedings in Election Petition No. 4 of 2021 but that they had declined service. I told the Applicant that I wanted to meet him personally to serve him the documents upon which he made his phone busy.
9. On the 21st of December 2021, I filed the Memorandum of Appeal in the Registry of the Court of Appeal at Kampala.
10. On the 22nd of December 2022, I called the Applicant who refused to pick my phone call and I again proceeded to the law firm of **M/s Okello Oryem & Co Advocates**, effected service of the Memorandum of Appeal which they retained but refused to stamp.
11. I then contacted **Mr. Okoth John Paul** a court process server and informed him that I had served the Notice of Appeal and the Memorandum of Appeal on **M/s Okello**



Oryem & Co Advocates and the firm had retained the documents but claimed that they had no instructions to represent the Applicant in the Appeal.

12. I together with the Court of Appeal process server in the company and direction of **Mr. Mukwaya Abba** the LC 1 Chairperson of Gwafu Central Village in Seeta Ward, Goma Division Mukono Municipality, Mukono District went to the Applicant's residential home to effect service.
13. The Court process server tendered the Notice of Appeal, letter requesting for the record of proceedings and the Memorandum of Appeal to a gentle man at the gate, who went with the same inside the house and when he came back he claimed that the Applicant was not around. All this was witnessed by **Mr. Mukwaya Abba** the LC 1 Chairperson of Gwafu Central Village in Seeta Ward, Goma Division Mukono Municipality, Mukono District who appended his signature and stamp on the aforementioned documents.
7. The Applicant did not file any affidavit in rejoinder.

REPRESENTATION

8. At the hearing of this application, Mr. Okello Oryem and Ivan Omoloi appeared for the Applicant while Mr. Caleb Alaka appeared for the Respondent. Both parties filed written submissions which were adopted as their legal arguments. This application has therefore been determined on the basis of the affidavit evidence and written submissions.

Handwritten signature and initials in blue ink, located at the bottom right of the page.

APPLICANTS SUBMISSIONS

9. The Applicant contends that the Respondent filed their Notice of Appeal and Memorandum of Appeal within time but did not serve the same within the stipulated seven days from the date of filing. The Applicant contends that the Respondent ought to have served the Notice of Appeal by Thursday 26th December 2022.
10. The Applicant further contends that in an application of this nature the burden is upon the Respondent to satisfy the court that the Notice of Appeal was served upon the Applicant on time. In support of this proposition, Counsel for the Applicant relied on the case of ***Election Petition Application No. 17 of 2022, Electoral Commission vs. George Willy Lubega***. Counsel for the Applicant argued that the Respondent did not remotely discharge the burden upon him to satisfy the court that the Notice of Appeal was served upon the Applicant and that it was served on time. He criticised the Respondent for not taking steps to serve the Applicant at his known address of service in the constituency where both parties have resided for decades.
11. Counsel further submitted that an application for the enlargement of time by the party in default is a mitigating factor in that the Court can then validate, for good reason, pleadings that have otherwise been lodged or served out of time. Counsel contended that where no such application has been filed by the Respondent, the Court has no option but to strike out the offending pleadings. He relied on the cases of ***Wilfred Nuwagaba & Another vs Protazio Begumisa***,



***Election Petition Appeals No.9 & 10 of 2022; and
Election Petition Applications No.17 & 24 of 2017, Hon.
Ebil Fred vs Ocen Peter.***

12. Counsel for the Applicant submitted that the Respondent did not offer any corroborative evidence showing that he had served the firm of **M/s Okello Oryem & Co Advocates**. Counsel argued that once a litigant chooses not to effect personal service there must be evidence that service was effected on an agent such as the advocate of the litigant. Counsel contended that there was none in this case save for the story told by Atiba Solomon Olea.
13. Counsel submitted that under regulation 2(1) of the Advocates (Professional Conduct) Regulations provides that no Advocate shall act for any person unless he or she has received instructions from that person. He contends, therefore, that Rule 78(2) of the Rules of this Court is only applicable to an Advocate who has been retained for the purposes of an appeal.
14. Counsel further argued that the story of Atiba Solomon Olea to the effect that he visited the law firm of **M/s Okello Oryem & Co Advocates** was not backed by evidence. Counsel concluded by asserting that the Court must refrain from setting a dangerous precedent that a litigant who simply leaves pleadings at a firm that has not received instructions has nonetheless discharged the duty to serve the Notice of Appeal or Memorandum of Appeal.

RESPONDENTS SUBMISSIONS

15. Counsel for Respondent in his submissions, frames one issue; *whether the Respondent failed to take an essential step of serving the Applicant with A Notice of Appeal within the prescribed time.*
16. Counsel for the Respondent submits that under Rule 78(2) of the Court of Appeal rules, the copy of the Notice of Appeal can be served on an advocate who has not been retained for purposes of an appeal as long as that advocate's firm was the address of service for purposes or in connection with the proceedings in the High Court.
17. Relying on paragraphs 4, 5, 6, 7 8 and 9 of the affidavit of Atiba Solomon Olea, Counsel submitted that following the delivery of the Judgment of the High Court on the 12th of December 2022, the Respondent filed the Notice of Appeal and the letter requesting for the record of proceedings on the 19th of December 2022 in the High Court of Uganda at Mbale, and in the Court of Appeal registry at Kampala on the 20th day of December 2022. He further submitted that both documents were served on the firm of **M/s Okello Oryem & Co Advocates** where upon Mr. Okello Oryem received the documents but he declined to append his signature claiming that he had not been given instructions in the Appeal.
18. Counsel contended that this was effective service given that the firm of **M/s Okello Oryem & Co Advocates** was the address of service given by the Applicant during the proceedings in the High Court and that it was effected within two (2) days from the filing of the Notice of Appeal which was



well within the time prescribed by the Rules of this Court. Counsel also relied on the affidavit of service sworn by Atiba Solomon Olea which was sworn on the 6th day of January 2023 which was attached as annexure D to the affidavit in reply.

19. Counsel contended that there was effective service and prayed that the Application ought to be dismissed with costs.

RESOLUTION

20. We have carefully studied and considered the pleadings, written submissions of both Counsel and the authorities relied upon. The question central to this application is whether or not the Respondent served the Notice of Appeal upon the Applicant within the time prescribed by the Rules of this Court.

21. Rule 78 (1) of the Court of Appeal rules provides as follows;

“78. Service of notice of appeal on persons affected.

(1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies of it on all persons directly affected by the appeal; but the court may, on application, which may be made ex parte, direct that service need not be effected on any person who took no part in the proceedings in the High Court.”

22. It is common ground that the Respondent filed the Notice of Appeal in the High Court of Uganda at Mbale on the 19th of December, 2022 and that it was filed within the time

prescribed by the Rules of this Court. Thus, according to the submissions of Counsel for the Applicant, the Notice of Appeal ought to have been served upon the Applicant by the 26th of December 2022. Counsel for the Applicant further submits that, the Notice of Appeal together with Memorandum of Appeal, was instead served upon the Applicant on the 19th of January 2023.

23. Taking pause for a moment, it is worth noting that Counsel's submission that the Applicant was served on the 19th of January 2023, is not backed by any evidence. No mention of this allegation was made in the affidavits sworn in support of this application. It is our considered view that Counsel's assertion in regard to service of the Notice of Appeal having been effected on the 19th of January 2023, amounts to testimony from the bar. This Court has previously held that assertions based on alleged set of facts contained in written submissions, if not supported by affidavit evidence, are not evidence. See ***Bujingo Ayub & 3 Others vs Abubakali Kikoba & 2 Others, Misc. Application No. 234 of 2023*** and ***Uganda Revenue Authority vs National Social Security Fund Civil Application, Misc. Application No. 43 of 2023***.

24. Whereas Counsel for the Applicant has in his submissions stated that the Notice of Appeal was served on the 19th of January 2023, the evidence as to service (or attempted service) of the Notice of Appeal is contained in the affidavit in



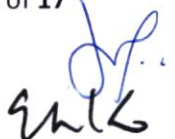
reply sworn by Atiba Solomon Olea sworn on the 10th of November 2023. As highlighted earlier in this ruling, it is Atiba Solomon Olea's testimony in paragraphs 6, 7 and 8 of his affidavit that he on the 20th of December, 2022 proceeded to the office of Alfred Okello Oryem of **M/s Okello Oryem & Co Advocates** gave him copies of the Notice of Appeal and the letter requesting for the record of proceedings where upon he (Alfred Okello Oryem) declined to append his signature and firm stamp on the grounds that the firm had not received instructions in the Appeal. He further testifies that he left the documents with Alfred Okello Oryem.

25. Atiba Solomon Olea attached as annexure "D" two affidavits of service. The first was by Okoth John Paul, a process server of the Court of Appeal, sworn on the 6th of January 2023. The second was by Atiba Solomon Olea, also sworn on the 6th of January 2023. The affidavit of service of Atiba Solomon Olea, in a nutshell, states that he attempted to effect service on Mr. Alfred Okello Oryem who declined to receive the documents on the grounds that he had not received instructions in the appeal. Upon Mr. Oryem's refusal to accept service, Atiba Solomon Olea depones that he called the Applicant on his personal numbers to wit **0701370594/07802370594**. Atiba Solomon Olea further depones that he contacted Mr. Okoth John Paul a Court of Appeal Process server with whom he went to serve the Applicant at his place of residence at Gawfu Central Village in Seeta Ward, Goma Division Mukono Municipality, Mukono District in the company off one Mr.

Handwritten signature and initials in blue ink, located at the bottom right of the page.

Mukwaya Abbas the LCI Chairperson. It is further deponed that upon arrival at the Applicant's residence they found a relative/security guard upon whom they served the Notice of Appeal and letter requesting for the typed record of proceedings.

26. Atiba Solomon Olea further depones that the relative/security guard informed them that the Applicant was not around whereupon he left the documents with the relative/security guard to hand them over to the Applicant as soon as possible. All this was done in the presence of the LCI chairperson.
27. The affidavit of service of Mr. Okoth John Paul a Court of Appeal Process server basically recounts the events as stated in Atiba Solomon Olea's affidavit of service.
28. As stated earlier, there was no affidavit in rejoinder filed by the Applicant offering evidential rebuttal. It can therefore be taken that the Respondent's version of events is unchallenged. What is rather intriguing however, is that the Applicant, in further support of this application, attached the affidavit of Mr. Mukwaya Abbas the LCI Chairperson Gawfu Central Cell Seeta ward, Goma Division Mukono Municipality which was affirmed on the on the 28th day of December 2022, some three months before the application was filed in this court. This application was filed on the 15th of March 2023. We have noted that the affidavit of Mr. Mukwaya Abbas was drawn and filed by the firm of **M/s Okello Oryem & Co Advocates**, the firm that refused to accept service and is the one that has filed this application on behalf of the Applicant.



29. This in our view is significant. It would appear that after having declined to accept service of the Notice of Appeal and the letter requesting for the record of proceedings in the High Court, the firm of **M/s Okello Oryem & Co Advocates** in anticipation of service going to be effected on their client, the Applicant, they quickly obtained the affidavit of the LCI Chairperson on the 28th of December 2022. They apparently did this in anticipation of filing this application which seeks to have the Respondent's appeal struck out. This is indicative of obstructionist behaviour on the part of the firm of **M/s Okello Oryem & Co Advocates**.

30. This conduct in our view is totally unacceptable. The firm of **M/s Okello Oryem & Co Advocates** deliberately declined to accept service of the Notice of Appeal in total disregard of Rule 78(2) of the Rules of this Court which provides as follows;


"Where any person required to be served with a copy of a notice of appeal gave any address for service in or in connection with the proceedings in the High Court, and has not subsequently given any other address for service, the copy of the notice of appeal may be served on him or her at that address, notwithstanding that it may be that of an advocate who has not been retained for the purpose of an appeal"

Rule 78(2) is quite clear and self-explanatory. The firm of **M/s Okello Oryem & Co Advocates** ought to have accepted service of the Notice of Appeal given that it was the firm on record during the proceedings at the High Court. And at the

dy.
ELK

time service was attempted on the firm on the 20th of December, 2022, the Applicant had not provided an alternative address of service as required by Rule 78 (2). See ***Waira James Kyewalabye v Kubeketerya James, Election Application No. 38 of 2022.***

31. In the instant case, we are of the firm view that there is ample evidence of effective service of the Notice of Appeal. There is the uncontroverted evidence of Atiba Solomon Olea contained in his affidavit in reply to the effect that he on the 20th of December 2022, went to the chambers of Mr. Alfred Okello Oryem to serve him with the Notice of Appeal and the letter requesting for typed proceedings. Mr. Okello Oryem declined to accept service. The documents were left at the firm. As stated before no affidavit in rejoinder was sworn and filed challenging this version of events. We therefore take the position that as Counsel on record in the High Court, in terms of Rule 78(2) of the rules of this Court, Mr. Okello Oryem was put on notice that a Notice of Appeal had been filed. He therefore had a duty to inform his client about this development. We are not in doubt that he must have indeed notified his client because the Applicant's subsequent evasive conduct is indicative of one who did not want to be served with the Notice of Appeal.
32. It can therefore be said that in the circumstances of this case, the Notice of Appeal can be deemed to have been served on the advocate that had conduct of Election Petition No. Election Petition No. 4 of 2021 at the High Court of Uganda Mbale.

Handwritten signature and initials in blue ink, located at the bottom right of the page.

33. We would therefore hold that, in terms of Rule 78(2) of the Rules of this Court, there was effective service of the Notice of Appeal upon Mr. Alfred Okello Oryem and therefore the Applicant.
34. That being the case, we decline to strike out Election Petition Appeal No. 04 of 2022 and accordingly dismiss this application with costs.

We so order.

Dated at Kampala this ...^{5th}...day of ...March.....2024.


Fredrick Egonda-Ntende
Justice of Appeal


Eva K Luswata
Justice of Appeal


Oscar John Kihika
Justice of Appeal