IN THE HIGH COURT OF UGANDA

HOLDEN AT MBARARA

HIGH COURT-05-CV-EPA-0003 OF 2001

MUSINGUZI GARUGA JAMES PETITIONER

VERSUS

AMAMA MBABAZI RESPONDENT NO. 1
ELECTORAL COMMISSION RESPONDENT NO. 2

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING (2)

1. During the course of cross examination of Mrs Jackleene Mbabazi by Mr. Walubiri, learned Counsel for the Petitioner, asked the witness whether Respondent No. 1 had given or passed to her a list of the Petitioner's agents. Dr. Byamugisha, learned Counsel for Respondent No. 1, objected to the question on the ground that it was not relevant. In the course of replying to the submission by Mr. Walubiri in response to this objection, Dr. Byamugisha made another application. He requested that forthwith under Rule 15 of the Parliamentary Elections (Election Petitions) Rules, 1996, the Petitioner must apply to court for leave to cross examine any of the Respondents' witnesses, and do so only with leave of the court. It is those two matters that form the subject of this ruling. I will take them in reverse order.
2. Dr. Byamugisha contends that Petitioner's counsel, Mr. Walubiri, is acting unreasonably, by asking of the witness now before the court irrelevant questions. That in order to save time of the court, and the witnesses (the current one and those lined up present in Mbarara), and the costs likely to incurred by his client on these witnesses, it is necessary for this court to grant leave, upon application, to the party wishing to cross examine witnesses, and in due course to restrict such counsel's cross examination of witnesses to specific matters that will have been set out, in the order for leave.
3. Mr. Deus Byamugisha, learned Counsel for Respondent No. 2, supported Dr. Byamugisha's application. He submitted that this court had residual authority to ensure that Counsel does not abuse the opportunity provided to him to cross-examine a witness. He

submitted that Counsel was abusing the agreement reached this morning. He referred me to Cross & Tanner on Evidence, 8th Edition, at page 319 in support of his submission.

4. Mr. Walubiri, learned Counsel for the Petitioner, opposed the application. He submitted that the application made by his learned friend, was contrary to the consent order only reached in the morning of 6th February 2002. He submitted that the matter under Rule 15 of the Parliamentary Elections (Election Petitions) Rules, had been handled during the scheduling conference, and later set out fully in the consent order signed by counsel for the three parties. He submitted that part four of the consent order now governed this issue and could not be varied by one party.

5. Rule 15 of the Rules referred to reads as follows, "(1) Subject to the this rule, all evidence at the trial, in favour of or against the petition shall be by way of affidavit read in open court. (2) With the leave of the court, any person swearing an affidavit which is before the Court, may be cross-examined by the opposite party and re-examined by the party on behalf of whom the affidavit is sworn."

6. Part 4 of the consent order signed yesterday morning states, "The Petitioner shall cross-examine the 20 deponents of the 1st Respondent's affidavits and the one deponent from the 2nd Respondent's affidavits as listed in the letter of 20.9.2001 addressed to Counsel for the Respondents by the Petitioner's Counsel." This consent order was signed by counsel for the three parties, and subsequently countersigned by myself, after Dr. Byamugisha presented it to court.

7. In my view the consent order took care of the matters envisioned under Rule 15 of the Rules. To return to proceed under Rule 15 the consent order must be set aside. To set it aside there must exist grounds upon which consent orders or judgements are ordinarily set aside. These grounds were discussed in the case of Brooke Bond Liebig (T) LTD. V Mallya [1975] E.A. 266. The court quoted with approval a passage from Seton of Judgments and Orders, 7th Edn., Vol. 1, p.124 (which had been quoted too with approval in Hirani v. Kassam (1952), 19 E.A.C.A.131). It reads, "Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them……..and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court….or if the consent was given without sufficient

material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."

8. None of the matters referred to in the above passage have been cited by learned counsel as existing in the present circumstances. What is essentially put forward is that counsel for the petitioner is asking irrelevant questions, and thus acting unreasonably. I think the proper procedure in case of objection to questions put in cross examination on ground of irrelevance is to raise the objection with court, and the court would rule on such objection, and the hearing of the petition proceeds. An application contrary to what is contained in the consent order, without grounds for setting aside an order of that nature cannot succeed.

9. The passage referred to by Mr. Deus Byamugisha reads, "The judge has a residual discretion to regulate the proceedings before him and this may be used to curb excessive cross-examination. Such a power should however be used sparingly, and only as a last resort if counsel abuse the restraint expected of them. The judge may also curb cross-examination if the witness becomes too ill, or distressed, for it to continue…". See Page 319, Cross & Tanner on Evidence, 8th Edition.

10. I find the above passage useful, not in relation to the application made for Rule 15 (2) of the Rules to apply forthwith but to the objection raised by Dr. Byamugisha with respect to the question put by Mr. Walubiri to the witness, Mrs Mbabazi. This passage is not relevant to setting aside consent orders or overriding consent orders, as Dr. Byamugisha's application would have me do. In the result I decline to order the petitioner to apply for leave to cross-examine the witnesses set out in paragraph 4 of the consent order. The witnesses shall be produced as agreed.

11. I am mindful of the fact that this is an expensive undertaking to the parties to this petition, and in particular to the Respondent No. 1. Everything ought to be done that expedites the hearing of this petition to minimise as much as possible the costs incurred by the parties, and inconvenience suffered by the witnesses. It may be possible for parties to explore the possibility of only having a certain number of witnesses in Mbarara on different dates, taking into account, the estimated time it may take to cross-examine such witnesses. Such information could be shared with the court, and we could draw up some kind of schedule for the appearance of witnesses. This is just one possible suggestion. The parties are free to consider any other appropriate arrangement. I leave it to counsel at this stage.

12. Turning to the objection raised by Dr. Byamugisha to the question put by Mr. Walubiri to Mrs Mbabazi, Dr. Byamugisha submitted that the question raised matters not traversed in the petition, affidavits in support of the petition, the replies to the petition, and the affidavits in support thereof. He submitted that counsel should be ordered to be relevant.

13. Mr. Walubiri, in reply, stated he is trying to establish the witness's role in Kanungu Kinkizi West during the elections. She stayed 2 weeks in May, and the whole of June, with her husband. There are serious allegations against her, which she denies, claiming she did not campaign for her husband. He submitted that he must therefore establish what she knew or did not know.

14. I agree with Dr. Byamugisha that counsel must ask only relevant questions. There is no dispute over this. What is in dispute is whether the particular question asked by Mr. Walubiri is relevant or not. Dr. Byamugisha contends it is not relevant. Mr. Walubiri on the other hand contends that it is relevant. He asserts that he seeks to establish what the witness knew or did not know at the time in relation to the elections with a view to establishing her role in the elections. The role of the witness is put in issue in light of the allegations against her and her response to those allegations.

15. On the face of it, I am unable at this stage to say that the question objected to is irrelevant to the petitioner's case or to these proceedings. The objection raised by Dr. Byamugisha is accordingly overruled.

16. Finally, as pointed out by Mr. Deus Byamugisha, I agree that this court has residual power to limit cross-examination of a witness where counsel exceeds the restraint that should be observed during cross-examination. As the text points out this power should be used sparingly. I will not hesitate, nevertheless, to overrule questions that are clearly irrelevant to the proceedings.

Delivered at Mbarara this 7th day of February 2002.

FMS Egonda-Ntende
Judge