

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT – 01 – CV – EP – 0004 OF 2006.

NELSON SANDE NDUNGOPETITIONER
VERSUS
ELECTORAL COMMISSIONRESPONDENT

BEFORE: HON. MR. JUSTICE RUGADYA ATWOKI

JUDGMENT

This is an appeal by way of a petition from the decision of the Electoral Commission the respondent herein, whereby the petitioner was disqualified for election of LC.III Chairperson Kasese Town Council.

The petitioner was one of the two persons who were nominated to stand for elections as Chairperson of Kasese Town Council. His nomination took place on 28/12/2005. At the time of his nomination and in compliance with S.111 (4)(f) of the Local Governments Act, the petitioner attached to his nomination paper a list of at least 20 registered voters from each of the 16 electoral areas which comprise Kasese Town Council.

On 8/2/2006, the petitioner wrote to the respondent a complaint that the voters who supported his nomination were being harassed and intimidated by police officers purportedly investigating his nomination on orders of the respondent.

That same day the petitioner received a copy of a letter, exhibit PE1 written by the respondent to one Buduwe Maseb, also copied to the Election Fraud Squad informing the said Buduwe Maseb that he did not furnish sufficient and or further evidence to support his complaint against the petitioner as he had promised. Nonetheless, the respondent asked the Election Fraud Squad to investigate. The letter of complaint from the said Buduwe Maseb is exhibit DE1 and it was attached to this letter PE1.

Apparently the respondent had received a complaint from this Buduwe Maseb alleging that the petitioner was wrongly nominated, as he did not attach to his nomination paper a full list of 20 names of voters from each of the 16 electoral areas of Kasese Town Council. The allegation was that the list, which was attached, contained non-eligible voters, voters who were dead, and voters who were from electoral areas outside Kasese Town Council.

It was from the investigation by the respondent that a decision was taken by the respondent to disqualify the petitioner from standing for election as Chairperson for Kasese Town Council.

The respondent filed an affidavit in court on 15/3/2006 in which he insisted that the decision to disqualify the petitioner was justified in view of the results of the investigations he carried out, which showed that the petitioner attached to his nomination paper a list of voters which included the dead, those not on the voters register and those who were from outside Kasese Town Council.

When the petition came up for hearing, Mr. Tumuhairwe Naboth who appeared with Mr. Kakooza Rogers for the petitioner raised a point of law for determination. He submitted that the affidavit in reply from the respondent was filed out of time and so sought to be struck off.

On 7/3/06 the petitioner received a faxed letter dated 3/3/06 from the respondent disqualifying him as a candidate. It is from that decision that the petitioner appealed to this court for redress.

The petition was filed on 9/3/2006. On 15/3/06, the respondent was served with a copy of the petition. There is on court record an affidavit of service to that effect deposed by one John Kyeyune. It is dated 16/5/06. That must have been an error because it was filed on 16/3/06 in the High Court Registry in Kampala. The annexure thereto which the same commissioner for oaths commissioned is also dated 16/3/06. That annexure shows that the respondent received the petition on 15/3/06. There is a date stamp of the Electoral Commission for that date plus a signature and the remark "received" "4 .00p.m", with the date of "15/3/06").

In submissions in reply, Christine Kaahwa for the respondent conceded that from evidence on record, the respondent received the petition on 15/3/06.

According to the record, on 23/3/06 the respondent filed the affidavit in answer to the petition under S.15 (3) of the Electoral Commission Act. Again there was no dispute about the date when the respondent filed its affidavit in answer to the petition.

It was submitted for the petitioner that under Rule 7 of the Parliamentary Elections (Appeals to the High Court from Commission) Rules S.I. 141-1, the duty of the Electoral Commission upon being served with a petition is to file an affidavit with the Registrar within 3 days. The petition was served on the respondent on 15/3/06. The respondent had to file the affidavit with the Registrar not later than 18/3/2006. But having filed the affidavit on 23/3/06, five clear days out of time, this, it was submitted contravened the mandatory provisions of the above –cited rules. There was no application to extend the time within which to file the affidavit. The affidavit with all its attachments should therefore be struck off. The case of *Kyabogo Kakiiza Fred vs. Tinkamanyire George and the Electoral Commission* Fort Portal EP No. 2/2006 was relied on.

In reply, Ms Christine Kaahwa learned Counsel for the respondent submitted that Rule 7 of the cited rules is merely directory. It is not mandatory merely because of the use of the word “shall” in its wording. She argued that election petition rules give court a time frame within which to adjudicate matters. That the rules do not have a sanctions clause in event of non-compliance.

It was further submitted that Rule 10 of the same rules provides for hearing within 7 days, yet this had not been complied with in this case. Learned Counsel argued that the Kyabogo case was distinguishable from the present case as that case dealt with rule 5 while this case was dealing with rule 7, and the two rules deal with different situations.

Lastly, it was submitted that Article 126(2)(e) which enjoins courts to determine matters without undue regard to technicalities was relevant. No injustice had been suffered by the petitioner.

Citing rule 14, Ms. Kaahwa stated that even at this stage she was applying for extension of time within which to file an affidavit.

Rule 7 of the Elections Petitions (Appeals to the High Court from Commission) Rules S.I 141-1 provides in part as follows:

“ 7(1) Where the commission has been served with a petition, it shall within three days after the service, lodge an affidavit with the Registrar stating the following facts-

(a – f)

(2)-----

(3) Any documents relied upon by the commission may be annexed to the affidavit”

It was common ground that the respondent filed the affidavit under the above-cited rules on 23/3/06, having been served with a copy of the petition on 15/3/06. This was 8 days later.

The argument that the rule is directory and not mandatory does not, in my opinion save the respondent. The provisions of the law are clear and unambiguous. They must therefore be given their natural meaning. The provision imposes upon the Commission a duty to perform a certain act or acts within a specified time. In this case, they are enjoined to file an affidavit, which must be filed within 3 days after service upon them of a copy of the petition.

It was submitted that there is no sanction for failure to comply with that provision. It could not therefore be said to be mandatory, but merely gave court guidelines for carrying out certain acts within given time frames. An example was given of Rule 10 of the same Rules which directs that the petition be heard and ‘*so far as possible, be completed within seven days.*’ (Emphasis mine.) This provision was not strictly complied with in the present case. It could not be said, on account of that reason, that these proceedings were void.

With respect, that argument adds more weight to the petitioners submission. The highlighted words above show that the framers of the provision were aware of the possibility of the petition not being completed in the period specified hence the addition of the words, ‘*so far as possible.*’

There is no such provision in the other rules including Rule 7, which give a specific time for doing certain acts.

In the *Kyaboogo case (supra)*, this court decided that the provisions of Rule 5 of the same rules now under consideration, which enjoins the petition to be presented within 5 days after the decision of the decision of the Commission complained of was couched in mandatory terms. Failure to comply with the time limits set out therein would lead to the petition being rejected.

I did not find any difference in intent between that provision and the one now under consideration, in so far as each of them directed that an act be done within a time therein specified. In my opinion the consequences of non-compliance would, *mutatis mutandis*, be similar.

It was argued that Article 126 (2)(e) of the Constitution should be applied. That Article enjoins courts to apply the law without undue regard to technicalities. In the case of *Utex Industries Ltd. v. A.G.* SCCA No. 52 of 1995 it was held that the provisions of Article 126 (2)(e) of the Constitution were not meant to do away with the rules of procedure. To apply the rules of procedure in regard to time limits is not an exercise in legal gymnastics or technical semantics.

It was lastly submitted for the respondent that court should use its discretion and grant leave to file the affidavit out of time. I agree with learned Counsel only to the extent that court is clothed with discretion to extend time. Such discretion must however be exercised judicially. Before exercising the discretion whether or not to extend time, court considers inter alia, matters such as the extent of the delay, and the reasons for the failure to, comply with the time limit, and the likely injustice or prejudice to the other party.

In this case, the respondent did not file the affidavit till 5 days after the expiry of the time limit. It has to be noted that the limit was only 3 days. A delay of 5 days was therefore not a short one. There were no reasons advanced for the delay or failure to file in time. Court could not exercise its discretion in a vacuum. The application came at a time when the petitioner had filed all his pleadings including his affidavits in reply. It was not indicated anywhere in the respondents

pleadings that such an application would be made. To grant the application in these circumstances would invariably cause injustice to the petitioner. Rule 14 was cited but I found that it refers only to notices and other documents from the registrar. It was not of relevance to the objection. I would therefore decline to grant the prayer to extend time.

In view of the reasons I have given above, the preliminary objection is accordingly upheld. The affidavit was filed out of time in contravention of rule 7 of the Parliamentary Elections (Appeals to High Court from Commission) Rules S.I. 141-1. The affidavit and all the documents annexed thereto are accordingly struck off.

I was rather surprised at the prayer by the petitioner in event of upholding the preliminary objection. Counsel for the petitioner asked that the matter proceed *ex parte*. Election petitions are, by the nature of their pleadings matters to be disposed of by way of affidavit evidence. In this case, all pleadings were on record. There was nothing else to add save to seek judgment.

Once the affidavit of the respondent was struck off, it meant that the petition remained unopposed. The petition not having been opposed by way of affidavit as required under Rule 7, it is accordingly allowed. The decision of the respondent in which the petitioner was disqualified as a candidate for the election of Chairperson of Kasese Town Council is hereby set aside. The petitioner is reinstated as a duly nominated candidate therein, and the respondent is directed to proceed with the election of the Chairperson of Kasese Town Council. Any orders or directives of the respondent, which are contrary to this directive, are null and void.

There was a prayer for damages for the inconvenience suffered by the petitioner for the disqualification. The court has directed that the petitioner be reinstated as a duly nominated candidate. It was argued that the petitioner suffered heavy costs in campaigns. It is not clear to me how he was to recoup such so-called heavy costs if he were not disqualified. At the very most optimistic, the petitioner would be elected Chairperson, and would presumably earn a salary. But he was not seeking reimbursement for lost salary earnings. In any event, there was no guarantee that he would win. There was always the distinct possibility that he could well lose the election. I found the prayer for damages rather ridiculous in these circumstances and it is rejected.

The preliminary objection was raised on the day when the petition was set down for cross examination of one of the deponents, and then final submissions would follow. Prior to this adjournment, there was an elaborate, if not laborious scheduling conference lasting a whole day. Even on that day, Counsel for the petitioner intimated to court that he was ready for cross-examination of respondents witness, and then make final submissions.

A preliminary objection ought to be raised at the earliest opportunity, as the determination of the same might have the effect of disposing of the suit. In this case court was led though an unnecessary exercise of scheduling the petition. An adjournment was sought to enable the respondent produce his witness for cross-examination. It was later at the adjourned hearing that the preliminary objection was raised. All these attendant costs could well have been saved plus the time of court if the preliminary objection was raised at the very beginning of the petition. For the above reasons, I will order that the petitioner shall have only half of the taxed costs of the petition.

RUGADYAATWOKI

JUDGE

16/06/2006.