THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT TORORO

MISCELLENEOUS APPLICATION NO.0066 OF 2011

(Arising from Election Petition No.0007 of 2011)

DR.OTIAM OTAALA EMMANUEL……
APPLICANT/PETITIONER

VERSUS

1. OBOTH MARKSONS JACOB }

2. ELECTORAL COMMISSION } ……RESPONDENTS

RULING

This is an application for enlargement of time within which to serve a notice of the presentation of the petition. It is brought under rules 6, 17 and 19 of the Parliamentary Elections (Election Petitions) Rules hereinafter referred to as the PE(EP) rules, and Order 52(1) (3) of the Civil Procedure Rules and section 98 of the Civil Procedure Act. The grounds are set out in the notice of motion supported by an affidavit by the applicant, Dr. Otiam Otaala Emmanuel.

The background to this application is that on 21/3/2011 the applicant filed a petition in this court against the 1st and 2nd respondents. Notice of presentation and the petition were duly served on the 2nd respondent on 25/3/2011 well within the time allowed.

Three attempts were made to serve the 1st respondent in vain. Evidence of this is in annextures D and C of the applicant's affidavit in support. On 30/3/2011, application for substituted service was lodged and heard by the Registrar of this court. The court order is annexture E to the affidavit of the applicant. Pursuant to this court order, there was an attempt to serve in a newspaper on 1/4/2011. On 9/5/2011 the applicant engaged another firm of lawyers who advised him that the service had not been legally effective hence this application for enlargement of time within which to present the petition. The applicant is desirous to have the notice of presentation of the petition and the petition effectively served on the 1st respondent so that the petition can be heard on merit.

Counsel for the applicant submitted that the failure to serve was caused by lapse or mistake attributed to counsel who handled the matter. He failed to guide court at the time when the application was heard. The problem had earlier been precipitated by the conduct of the 1st respondent who evaded service on him of the petition. Annextures D and B are affidavits of the court process server who failed to serve the 1st respondent.

The Registrar of this court heard the application and proceeded to grant orders which were outside her jurisdiction. It was further submitted that the applicant had no control over proceedings before the Registrar and therefore it would not be fair to visit the mistake of court on him.

From all the above, it was submitted this constituted sufficient ground for court to grant enlargement of time. It had to be especially considered that this is a parliamentary election which is a matter of public interest. Under rule 19 courts have wide discretionary powers to grant such prayer. Substantive justice should be the guiding principle, and this can only be done if the 1st respondent is duly served.

Counsel for the respondents submitted that the application be dismissed for lack of merit. The evidence adduced did not show the mistake of counsel. A person is bound by the actions of his counsel, who had actual and apparent authority to whatever he did in furtherance of the interests of his or her client. The applicant cannot be heard to complain about his counsel.

The only mistake the Registrar did was not to dismiss the application as she cannot be faulted for hearing a matter fixed before her and the fact that there is no affidavit by the former counsel conceding that he misadvised his client nor from the Registrar that she was misled by counsel.

The arguments of the applicant were mere hearsay and thus not allowed under Order 19 rule 3 of the Civil Procedure Rules. Court should exercise its jurisdiction to enlarge time judiciously. It was further submitted for the respondent that the alleged failure to serve the 1st respondent was done 4 days after the filing of the petition. This ought to have been done within three days after filing the petition.

Rule 24 of the PE(EP) Rules is to the effect that all interlocutory matters in respect of election petitions apart from those which are excepted by the rule are to be handled by the Judge. Only

matters relating to the withdraw of the petition are to be handled by the Registrar. In this case the Registrar had no jurisdiction to hear an application for substituted service as the jurisdiction therein is reserved only to a Judge.

In *Mathina Bwambale v Electoral Commission & Crispus Kiyonga* Election Petition No.7 of 2006**,** Court held that the registrar had no jurisdiction to entertain or grant an order for substituted service which related to the petition, as all interlocutory questions and matters arising out of the trial of the petition other than those relating to leave to withdraw a petition are to be heard and disposed of or dealt with by a judge. The Registrar therefore had no jurisdiction to entertain an application for substituted service under rule 6(6) of the PE(EP) rules.

In *Bangirana Anifa Kawooya v Kabatsi Joy Kafura* Misc.App.No.0028 of 2009 it was held that jurisdiction is a creature of statute and no court or judicial officer can confer jurisdiction upon himself or itself.

In *Desai v Warsama* [1967] E.A 351 it was held that a judgment of a court without jurisdiction is a nullity and as such it is something which a person affected by it is entitled to have set aside ex-debitis justitiae and any order made thereby ought to be treated as a nullity**.** Clearly therefore what the Registrar did was a nullity.

It was submitted that the action of counsel bound the petitioner. The argument being that the petitioner was bound by the decision of his counsel who filed an application for substituted service and this was heard wrongly by the Registrar of the court. Cases of the duty of counsel to their clients and the responsibility of the clients for the acts of their lawyers were cited to the court by counsel on both sides.

Rule 6(6) of the PE(EP) Rules provides for substituted service. The petitioner applied to this court on the basis of the above rule in MA No. 51 of 2011. As is the usual practice the application was not directed to any particular judicial officer, but was filed in the court registry for placement before the relevant judicial officer.

It was not intimated that Counsel instructed that the matter be placed before the Registrar. The court is expected to know the law. Counsel for the petitioner cannot be faulted for the mistake of

the court, when a judicial officer who was not clothed with the jurisdiction took on the matter and purported to dispose of it.

There was neither negligence nor wrong strategy by counsel in this case. The cases cited in this respect were therefore not relevant. This was a matter outside the control of the petitioner. His only option once an error was committed by court was to seek leave of court to extend time within which to serve the petition and notice of presentation of the same to the 1st respondent.

Rule 19 (1) of the PE(EP) rules is to the effect that the court may on its own motion or on the application by any party to the proceeding and upon such terms as the justice of the case may require, enlarge or abridge the time appointed by the rules for doing any act if in the opinion of the court there exists such special circumstances as make it expedient to do so.

The question therefore would be whether these constituted special circumstances to make it expedient for court to grant the extension of time.

In *Hadondi Daniel v Yolamu Egondi* M.A. No.67 of 2003, it was held that extension of time should be done if sufficient cause is shown and this sufficient cause must relate to the inability or failure to take necessary steps within the prescribed time.

In this case there was an attempt to serve the 1st respondent according to annexture D to the affidavit in support of this application. The petition was filed on 21/3/2011. It was deposed that the applicant made further attempts to serve the 1st respondent on the following three successive days in vain. He was not where he was expected to be and as the rules direct that service of the petition on the respondent be personal, the failure to trace the 1st respondent made it impossible to serve him personally as directed by the rules.

It should be noted that the applicant served the notice of presentation of the petition effectively on the 2nd respondent. The 1st respondent was not being truthful when it was intimated on his behalf that he did not have a residence in the senior quarters of this town. Service was attempted on his town residence without success. No wonder the petitioner assumed that the 1st respondent was dodging service of court process.

I found that in this case, an error was made by the court. The said error had the effect of prejudicing the applicant. A person who comes to court is entitled to justice. He or she ought not

to instead receive or be meted with injustice. To disallow this application would mean that the petition would not be heard on its merits. That would be an injustice to the applicant who was not at fault. Katureebe JSC., in *Mulowoza & Brothers Ltd. v. N. Shah & Co. Ltd.* C.A. No. 20 of 2010 (SC), held that if it appears to court that refusing to grant the extension of time will shut out the appeal altogether and may cause injustice, the court may grant the extension of time.

The error by court constituted the special circumstance which made it expedient for this court to enlarge the time within which the applicant should serve notice of presentation of the petition and the petition to the 1st respondent.

The application is granted with costs of the application to the 1st respondent in any event.

The applicant shall serve the 1st respondent with notice of presentation of the petition and the petition within 2 days from date hereof.

RUGADYA ATWOKI

JUDGE

24/06/2011.