

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

REVISION ORDER NO. 12 OF 2012

**(Arising from Makindye Election Petition No. 06 of 2011 -
Lubowa Francis Anthony Vs The Electoral Commission & 2
Ors)**

SSEWANYANA ALLAN
ALOYSIOUS ::::::::::::::::::::APPLICANT

VERSUS

LUBOWA FRANCIS
ANTHONY ::::::::::::::::::::RESPONDENT

BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE

RULING

This is a Revision Application by way of Chamber Summons brought under Section 83 of the Civil Procedure Act and Order 52 rules 1 and 3 of the Civil Procedure Rules for orders that:

- 1) The order of the Chief Magistrate, Makindye made on the 4th day of November, 2011 that each party bears its own costs of the Petition be revised so that the applicant can be awarded costs of the withdrawn petition.
- 2) Costs of this application be provided for.

The grounds on which the application is premised are:

- 1) The respondent herein filed Election Petition No. 06 of 2011 against the applicant jointly with the Electoral Commission of Uganda and the Returning Officer in the Chief Magistrate's Court of Makindye.
- 2) On the 26th day of October, 2011, the respondent withdrew his petition and undertook to agree with the applicant as regards costs of the withdrawal and the Orders were accordingly made by the trial Magistrate.
- 3) On the 4th day of November, 2011, however the trial Magistrate overturned her Order as to costs, supposedly in exercise of discretion which she did not have.
- 4) It is just and equitable that the Order of the Magistrate be revised in so far as she exercised jurisdiction not vested in her by law.

The application was supported by the affidavit of Mr. Lumu Richard, an advocate practicing with M/S Kizito, Lumu & Co. Advocates, dated 17th May 2012 as a person who prosecuted the matter in the lower court. It was opposed by the respondent through an affidavit in reply of the respondent dated 22/9/2014, whereby he maintained that the trial Chief Magistrate exercised her discretion derived from Sections 27 (1 and 2), 98 and 99 of the Civil Procedure Rules Cap 71 by ordering that each party

should bear its own costs; the trial Chief Magistrate exercised her jurisdiction in accordance with the law; that the application had been brought after such a long time and would cause serious hardship to the respondent since he no longer had serious employment, in the event that the application is allowed; and lastly that the application was bad in law, misconceived and an abuse of court process; hence the same be dismissed.

The applicant was represented by Mr. Wetaka Andrew Wobugire, while the defendant by Mr. Brian Kusingura Tindyebwa.

The brief facts which appear to be undisputed are that sometime in 2011 in the aftermath of the Local Council Elections the respondent, who had lost those elections to the applicant as L.C.V Councillor for Makindye Division, filed Election Petition No. 06 of 2011 against 3 persons including the applicant (3rd respondent therein) seeking, inter alia, nullification of the same.

On 26th October, 2011 where parties including the applicant agreed to the withdrawal of the Election Petition before the Chief Magistrate, Makindye but the issue of the applicant's costs remained for discussion by the parties. Court recorded the Order of withdrawal of the petition by the parties' consent but adjourned and asked the parties to agree on costs and file a consent by the next hearing date of 4th November, 2011.

On the 4th November 2011 when the matter came up for hearing, Counsel for the respondent told court that though the court had

asked the parties to reach consensus in respect of costs, there was no agreement reached.

The record shows that Counsel for the respondent admitted then that it was trite law that if a petition was withdrawn, the party that withdrew must bear costs. He, however, went on to ask the court to waive the costs.

The trial Chief Magistrate then decided that in light of the absence of the applicant and his Counsel, Election Petitions should not be seen to frustrate innocent people, therefore, each party should bear its own costs. Hence the present application.

The applicant's Counsel drew court's attention to Section 144 (4) of the Local Governments Act, Cap 243 which governs the Elections of Local Government Councillors and which provides that if a petition is withdrawn, the petitioner shall be liable to pay the costs of the respondent, and submitted that the above section removed the discretionary powers of the court by making it mandatory for the person withdrawing an Election Petition to pay costs of the respondent. This was also pointed out by the respondents' Counsel. Consequently when she waived the costs, the trial Magistrate must have assumed the general discretion granted to her under Section 27 of the Civil Procedure Act when dealing with ordinary matters where it is provided that subject to the provisions of any law in force, award of costs is in the discretion of court. Counsel submitted further that this was not an ordinary matter because there is a specific law regulating the filing and conduct of election petitions of this nature; and the

Chief Magistrate exercised jurisdiction not vested in her by the law contrary to Section 83 (a) of Civil Procedure Act. Further, that in as much as the Chief Magistrate did not have discretionary powers respecting the award or refusal of costs, her decision was a nullity. (See ***Kaloli Mubiru & 21 Ors Vs Edmond Kayiwa & 5 Ors [1979] HCB 212***).

Counsel submitted further that even if the trial Chief Magistrate were to have that jurisdiction, it was not exercisable on a consent by the parties where what remained was to agree on quantum of costs; the trial Magistrate could not set aside the consent by the parties in the absence of lawful grounds for setting aside a consent. He relied on ***Attorney General & Anor Vs James Mark Kamoga & Anor SCCA No. 8 of 2004*** for the proposition that a Consent Judgment is a fresh agreement by the parties and may only be interfered with on limited grounds such as; illegality, fraud, mistake, misapprehension or contravention of Court Policy.

Counsel concluded that the trial Chief Magistrate exercised jurisdiction not vested in her by the law and as such in the interests of justice this application should be allowed and the Order for costs of the withdrawal of the respondent's Election Petition made in place of the one made by the trial Chief Magistrate that each party bear its own costs. He also prayed for costs of this application.

In reply, Counsel for the respondent first of all pointed out that the affidavit in support of the application sworn by an advocate, Mr. Lumu Richard dated 17th May 2012 in support of the application was incurably defective as it offended Order 3 rule 1 of the Civil Procedure Rules SI-71, since it did not show that the deponent was an agent of the respondent and authorized as such. Counsel relied on ***Banco Arabe Espano Vs Bank of Uganda SCCA No. 8/98*** to state that an affidavit sworn by Counsel for the respondent was defective and should not have been allowed in evidence; and ***Kabenge Advocates Vs Mineral Access Systems (U) Ltd HCMA 565/2011*** for the proposition that clients should make their own affidavits and leave advocates with the function of representation, or they may risk contravening rule 9 of the Advocates Professional Conduct Regulations SI 267-2, where the matter in issue is a contentious matter.

Counsel concluded that the application sworn by Richard Lumu (Advocate) was prejudicial and should be struck out and or disregarded as evidence.

Further that the said affidavit evidence was hearsay contrary to Order 19 rule 3 of the Civil Procedure Rules, and that the affidavit was full of lies. The record of proceedings of the Chief Magistrate's Court of Makindye showed that on the 26th October 2011, Mr. Lumu Richard was not in court and therefore there is no way he could have prayed for costs when he was not in court. (See paragraph 4 of Lumu affidavit in support where he stated that he prayed for costs).

As was noted by the petitioner's Counsel, in accordance with the record of proceedings, the applicant herein conceded to the withdrawal of the petition but was to speak to his lawyer regarding costs. Much as the trial Chief Magistrate ruled that a consent was to be filed there was no consent filed between the applicant herein and the respondent/petitioner since the parties had failed to agree on the issue of costs. Hence there was no consent reviewed or set aside by the trial Chief Magistrate.

On the main issue at hand, Counsel disagreed with the applicant's Counsel's interpretation and applicability of Section 144 (4) of the Local Government Act Cap 243, and contended that the said section could only apply in a directory manner and was not mandatory. Where the Legislature intends the provision to be mandatory, it provides sanctions for non-compliance with the provision. He relied on ***Edward Byaruhanga Katumba Vs Daniel Kiwalabye Musoke Civil Appeal No. 2/98*** and ***David B. Kayondo Vs The Co-operative Bank Ltd Civil Appeal No. 10/91 SC.***

Counsel contended further that the trial Chief Magistrate exercised her discretion vested to her under the provisions of the law and that the reliance of the applicant's Counsel on the ***Mukula International Ltd Vs D.E. Cardinal Nsubuga [1982] HCB 1*** was out of context and could not override the discretionary principle under the law that the trial court can exercise under section 27, and 98 of the Civil Procedure Act Cap 71. He further relied on ***Sitenda Seballu Vs Sam Njuba & Another Supreme Court Election Petition Appeal No. 26/2007*** to state that there was no rule of the thumb

or a universal rule of interpretation for determining if in a given statutory provision the word “shall” is used in the mandatory or directory sense, and that the court must formulate its criteria for determining whether a particular provision to be regarded as mandatory or as directory; that the whole scope and purpose of enactment must be considered; and one must assess the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act.

Counsel asked court to find Section 144 (4) of the Local Government Act as directory.

On remedies, Counsel prayed that under Section 83 (e) of the Civil Procedure Act Cap 71, this application should further be dismissed with costs because it had been brought after lapse of time because the respondent first heard of this on the 15th September 2014, the day that it was coming up for hearing. This application arises from Election Petition No. 06/2011 and the same was disposed of on the 4/11/2011. It is now three (3) years from the date of the disposal of the Election Petition that this application is being pursued by the applicant.

Counsel concluded that costs are awarded at the discretion of the court, and prayed that this application had no merit and should be dismissed with costs.

In his submissions in rejoinder, Counsel for the applicant referred court to Order 3 rule 1 of the Civil Procedure Rules which directs

that apart from parties themselves, Advocates may on behalf of their clients undertake any act in any court required or authorized by the law to be made; and Order 19 rule 3 (1) of the Civil Procedure Rules which provides that affidavits shall be confined to such matters as the deponent can of his own knowledge prove. The affidavit in support in paragraphs 1 and 2 states that Lumu Richard was the lawyer who handled this matter in the first place on behalf of the applicant who was the respondent then, and the lower court record shows this.

Counsel relied on ***Samwiri Massa Vs Achen [1978] HCB 297***, for the proposition that a person should not swear an affidavit in a representative capacity except if that person is an Advocate or a holder of a power of Attorney duty authorized; and ***Yonah Kanyomozi Vs Motor Mart (U) Ltd SCCA No. 8 of 1998*** to state that there was now a deliberate liberal approach to affidavits by the court when dealing with defective affidavits in line with Article 126 (2) of the 1995 Constitution of the Republic of Uganda.

It was further contended that even if the said affidavit were to be held to be incurably defective for non-disclosure of the agency relationship and for containing lies, such decision would not in the instant case affect the application in its entirety, which is in respect of a point of Law and which has its self clearly set out in general terms the grounds thereof.

Counsel therefore prayed that the objections be disregarded; and that Regulation 9 of the Advocates (Professional Conduct) Regulations cited by the respondent's Counsel was of no

application here because Lumu Richard is not the lawyer prosecuting this matter now.

On whether the word “shall” used in Section 144 (4) of the Local Government Act was directory or mandatory, Counsel rejoined that the provision was clear with respect to costs, and that the Sections of the Civil Procedure Act cited by the respondent’s Counsel were inapplicable because there is a more specific provision in the Local Government Act. In any case Section 27 (1) is subjected to **“such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force**” showing that Section 27 (1) of Civil Procedure Act was not an absolute provision with regard to costs. Further that the Civil Procedure Act enacted in 1929 predated the Local Government Act and as such, the only logical conclusion was that the law makers had the Civil Procedure Act in mind when Section 144 (4) of the Local Government Act was enacted in 1997. He contended that the cases cited by Counsel for the respondent were irrelevant given that the issues and facts in those cases were different from the instant.

Counsel reiterated his earlier arguments and prayed that this application for a Revisional Order be allowed.

I have considered the Revision application and the submissions of Counsel on either side.

Section 83 of the Civil Procedure Act, on which this application is premised provides:

“The High Court may call for the record of any case which has been determined under this Act by any Magistrate’s court, and if that court appears to have;

a) exercised jurisdiction not vested in it in law;

b) failed to exercise a jurisdiction so vested; or

c) acted in the exercise of its jurisdiction illegally or with material irregularity or injustice, the High Court may revise the case and may make such order in it as it thinks fit;

I have also noted Section 144 (4) of the Local Governments Act Cap 243, which governs the elections of Local Government Councillors which provides;

“If a petition is withdrawn, the petitioner shall be liable to pay costs of the respondent.”

It is the respondent’s case that the “shall” as used in the above section of the Local Government Act, was only meant to be directory and not mandatory. It is trite that while the court must rely on the language used in a statute to give it proper interpretation, the primary target and purpose is to discern the intention of the legislature in enacting the provision. However, I must say that this provision on its own says all it has to say, without the need to refer to the other provisions of the statute. If a person drags another to court in an election petition, which cannot be classified as simple proceedings; and he serves him with the relevant notice and the petition itself, the sued party is bound to take all necessary steps to defend the petition, including instructing an advocate to handle the matter. Costs in a

withdrawn matter are very important even where withdrawal is by consent. Even the Civil Procedure Rules attach great importance to the payment of costs in a withdrawn matter. (See Order 25 rules 1(1) and (2), (3) and (4)).

In my mind there is no possibility of interpreting the “shall” in the Local Government Act as directory because costs have to be paid on withdrawal, unless waived by the respondent in the petition. Even if the trial Chief Magistrate was to have discretion in the matter, such discretion would have to be exercised judiciously. But as I have already found, she had no discretion in the matter.

I therefore find that the trial Chief Magistrate acted outside her jurisdiction when she ordered that each party should bear its own costs.

On the complaint that there were some lies in the affidavit in support, I find that these are not very material and they do not go to the core of the issues herein. The parts involving lies can, therefore, be severed and the application would still stand.

Regarding the complaint that Mr. Lumu Richard, an advocate, deponed to an affidavit in support, I don't find this to be prejudicial to the respondent's case so as to warrant its being struck off. Yes, he did not mention he was an agent of the applicant, but he mentioned that he was the advocate who represented the applicant in the lower court, and therefore had knowledge of the facts that he was deponing to. Mr. Lumu is not

the advocate representing the applicant in the present application so the fears that there may be a conflict when he is called as a witness do not arise.

Further I don't find that there was any delay in the filing on the application. The record shows that this application was filed on 22nd May 2012. The withdrawal of the petition was effected on the 26th October 2011; and the impugned decision was made on 4th November 2011. The period in between the 4th November 2011 and 20th May 2012 is not 3 years as Counsel for the respondent wants court to believe. The application is cited as Revisional Order No. 12 of 2012, only that it was given a hearing date of 15/9/2014 by court. The delay in fixing the hearing date cannot be attributed to the applicant.

For the above reasons, the application is granted. The order of the trial Chief Magistrate regarding costs is set aside. The applicant's bill of costs in the lower court shall be presented to the relevant court for taxation. This application is granted with costs.

Elizabeth Musoke
JUDGE
31/10/2014