

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

**MISCELLANEOUS APPLICATION NO. 303 OF 2016
[ARISING OUT OF ELECTION PETITION NO. 0035 OF 2016 OF THE CHIEF
MAGISTRATE’S COURT OF JINJA AT JINJA]**

MUSISI KIBUGUJJU BADMAN.....PETITIONER

VERSUS

1. NAMAKULA ZAM

2. THE ELECTORAL COMMISSION.....RESPONDENTS

RULING

BEFORE THE HON. LADY JUSTICE EVA. K. LUSWATA

The applicant filed this application under Section 33 of the Judicature Act, Section 18[1][b][i] of the Civil Procedure Act, Section 218[1][b][i] of the Magistrates Courts’ Act, Section 98 of the Civil Procedure Act Cap. 71, Order 51 Rules 1, 2 and 3 of the Civil Procedure Rules SI 71-1 seeking an order that the High Court calls, for, or withdraws the file in respect of Election Petition No. 20/16 from the Chief Magistrate’s Court of Jinja to the High Court for hearing and determination by the High Court and for costs to be provided for. The grounds of the application are briefly that:-

[1] The applicant through his lawyers, filed Election Petition No. 35/16 contesting the election results that returned the 1st respondent as the chairperson of Walukuba Masese Division, Jinja Municipality, Jinja District

[2] By error of his lawyers, the above petition was wrongly filed in the Chief Magistrate’s Court of Jinja instead of the High Court, the latter which has jurisdiction in such matters.

[3] The election petition is a matter of great public concern requiring its prosecution on merit.

[4] It is just and equitable for Election Petition No. 35/16 to be called up by the High Court for hearing and determination.

The applicant swore an affidavit to support the application and there was a reply by the 1st respondent. I choose not to reproduce their contents but will consider both fully in my ruling.

Both parties complied with my directives to file written submissions, and supplied ample
5 authorities that I will refer to.

In their submissions, counsel for the applicant recounted the brief facts which was the account largely given in the applicant's affidavit and not contested by the 1st respondent. I will briefly summarize that account.

10 Following the Local Council III elections of Walukuba, Masese Division that returned the 1st respondent as victor, the applicant through his lawyers, M/s Lukwago & Co., Advocates, contested the outcome by filing Election Petition No. 35/2016 in the Chief Magistrate's Court of Jinja at Jinja on 9/5/16 [hereinafter referred to as the election petition]. That the 1st respondent
15 then filed M/A No. 40/2016 seeking to strike out the election petition for being filed in a Court that lacked jurisdiction. The respondent (now applicant) filed a reply to that particular application whose hearing actually took off. The latter then turned around to file this application in this court.

20 Principally, the applicant admits that the petition was filed in the wrong court, a mistake that he attributes to his counsel on whom he relied for professional and technical guidance to contest the 1st respondent's victory in the poll. His counsel equally accept, the mistake and are prepared to take the blame. They argue however that the mistake of an erring advocate should not be visited on an innocent litigant and that this being an election petition, it is a matter of great public
25 concern and importance that requires the Court clothed with jurisdiction to hear it on merit. They conclude that the 1st respondent will not be prejudiced thereby.

Both the 1st respondent and her counsel disagreed. Citing issue with the jurisdiction of the Chief Magistrate's Court, she filed in that court, M/A No. 40/2016 to strike out the election petition, to
30 which the applicant filed a response. That that application came up for hearing three times and

adjourned on all occasions at the instance of applicant's counsel, in her view, a design to delay it and avoid its consequences. She was then surprised by this application.

5 The fact that the election petition was filed in the wrong court is not in dispute. Applicant's counsel admits it was a professional oversight or mistake that can be remedied by taking a liberal approach by the High Court calling for the file from literally the "wrong" court to the "correct" court. Counsel argued that the courts of record have previously adopted a liberal approach in cases for example seeking extension of time fixed by statute, or where the mistakes in proceedings are purely blunders of counsel and not the litigants themselves. (For example the
10 Supreme Court in **Mukasa Anthony Hamis Vrs Dr. Bayiga Micheal Philip Lulume EP No. 18/07** and **Julius Rwabinumi Vrs Hope Bahimbisombwe C/A 14/09**).

An exposition of the laws quoted by both sides is imperative at this point.

15 It is provided by Article 139(1) of the Constitution that:-

"The High Court shall, subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law."

20 Similarly, under Section 33 Judicature Act,

*"The High Court shall, in the exercise of the jurisdiction vested in it by the constitution, this Act or any written law, grant absolutely on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly
25 brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided."*(emphasis of this Court).

30 It is then provided under Section 18 [1] CPA that:-

"[1] On application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage –

[b] withdraw any suit or other proceeding pending in any court subordinate to it, and
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- [i] try or dispose of the suit or proceeding;
- [ii] transfer the suit or proceeding for trial or disposal to any court subordinate to it and competent to try or dispose of it; or
- [iii] retransfer the suit or proceeding for trial or disposal to the court from which it was withdrawn.”

The foregoing section is reproduced verbatim in Section 218 MCA.

Applicant’s counsel argued that the powers of the High Court to transfer cases from a lower court to itself is part of its residual unlimited powers of supervision to ensure that justice prevails and is done, without due regard to technicalities. On the contrary, counsel for the 1st respondent, argued that filing pleadings in a wrong court is not a mere technicality and that the jurisdiction to hear a petition against elections of LC III chairpersons is vested in the High Court which is a matter of law. She continued that, jurisdiction once conferred by Statute in a Court cannot be ousted or revested into another court to permit the High Court to transfer the election petition from a lower court unto itself where the lower court did not have the vested jurisdiction in the first place. In counsel’s view, the election petition was filed in a court with no jurisdiction to hear it, making it fatal and liable to be struck out.

Section 18 CPA empowered the High Court to transfer cases unto itself or to other subordinate courts but made no mention of jurisdiction or lack of it of the Court from which such a matter originates. Udo Udoma J in **Kagenyi vs. Misiramo & ors [1968] EA 43** opined that the onus lies on the party applying for a case to be transferred to make out a strong case to the satisfaction of the court that the application ought to be granted. He proceeded to give the principles that the High Court could consider in allowing such an application e.g. balance of convenience, questions of expense, possibilities of undue hardship and interests of justice. He did stress however that jurisdiction of the court of first instance, remains a fundamental question.

Much of the arguments put forward by the applicant’s counsel did not converse the important point of jurisdiction. I noticed that much of the authorities they provided were instances where the Courts of record took a liberal approach to extend time within which to take certain steps to prosecute election related actions, in particular, extension of time to serve the petition, a notice of

petition or to file an appeal. These are matters purely procedural and the Courts rightly chose to uphold the jurisdiction of the court to hear the matters irrespective of the irregularities mentioned. Again, I would agree with applicant's counsel that our court jurisprudence has firmly developed to overlook mistakes of counsel where the outcome would be to prejudice an otherwise vigilant litigant. However, the question before me is one not of procedural error but lack of jurisdiction by a court of law.

The jurisdiction to hear election petitions for LCIII Chairpersons is under Section 138[1] Local Government Act Cap. 243 [as amended] vested in the High Court. It was therefore filed in a Court without jurisdiction. I would agree with Justice Bashaijja's finding in **Musisi Gabriel Vs Edco., Co., Ltd & George Ragui Kamoi H/Ct Civil Appeal No. 52/10** that the fact of jurisdiction is not a mere technicality but one that goes to the core of the case between the parties and the arbiter trying the same. Justice Kibuuka Musoke put it more strongly when he stated in **Kasibante Moses Vs Katongole Singh Marwa & Anor E/P No. 23/11** that:-

"The term jurisdiction is not a term of art. It is a term of law. It is a term of very expensive legal import. It embraces every kind of judicial actions. It confers upon the Court the power to decide any matter in controversy.....it is trite law that no court can confer jurisdiction upon itself. It is equally trite law that no court can assign or delegate jurisdiction vested in it".

The High Court can only exercise its powers of transfer under Section 18 [1] CPA with respect to matters that were properly and legally filed in the correct court clothed with jurisdiction in the first place. If the reverse were true, it would create a mischief to be exploited by litigants who have cases that are non-starters or have no foundation in law, to seek recourse in higher courts to avoid the dire consequences that in fact go to the root of the cases they have filed. This can never be the intention of the legislature or meet the ends of justice. I would thereby agree entirely with the decision of Justice Henry Kaweesa Isabirye in **Wilson Osuna Twani Vs Apollo Yeri Ofwono HCT M/A 77/2012** following the authority of **Kagenyi Vs Misiramo & Ors [supra]**.

"A suit filed in a court without jurisdiction cannot be transferred from that court....." and therefore,

“An order for transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it.”

5 The provisions of Section 33 Judicature Act are clear. The High Court can only exercise jurisdiction and grant remedies only in matters properly placed before it in law or equity. Udo Udoma in **Kagenyi’s case** sounded a warning that if a suit is instituted in a court without jurisdiction, it is incompetent to have the High Court have the suit withdrawn therefrom. Again, the powers of the same Court under Section 98 CPA are limited to meet the ends of justice or
10 prevent abuse of court process. In my view, a request by a party for the High Court to transfer unto herself, a case which they agree was a nullity in the first place, would be an absolute affront of court process and prejudicial to the opposite party. The applicant has every right to challenge the outcome of the election, but he must do so within the law. The 1st respondent should not be expected to answer and be party to proceedings whose foundation is a nullity.

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I thereby find no merit in the application. It is dismissed with costs to the 1st respondent. Counsel for the applicant did acknowledge their mistake in filing the petition in the wrong court. I therefore order that the costs of the application shall be shared between the applicant and his counsel in equal proportion.

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As a consequential order, I direct that the files with respect to Election Petition No. 35/2016 and Misc. Application No. 40/2016 be transferred back to the Chief Magistrates Court of Jinja for trial and disposal in line with Section 18(1)(iii) CPA. I decline to make a final decision in the election petition as I have no jurisdiction to do so. However, in line with Section 18(1)(iii) CPA,
25 I direct that once both records are so returned, the Chief Magistrate Jinja should stay further hearing of the election petition and instead, give priority to hearing and disposing of M/A 40/2016. The outcome of the latter, should determine the fate of the applicant’s Election Petition No. 35/2016.

30 I so order.

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EVA K. LUSWATA

JUDGE

20/10/2016