THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MASAKA

Misc. Cause No 16 of 2016

PATRICK NKARUBO::APPLICANT

VERSUS

1. THEODORE SEKIKUBO

2. ELECTRAL COMISSION ::::::::::::::::::::::::::RESPONDENTS

BEFORE: THE HON. JUSTICE DR. FLAVIAN ZEIJA

RULING

:

The applicant and the respondent were dully nominated candidates for Lwemiyaga County Member of Parliament and competed in the 2016 election for members of Parliament for Lwemiyaga County. Upon the elections being held on the 18th day of February 2016, the 1st respondent was declared duly elected as Member of Parliament for Lwemiyaga County. This declaration was made on the 19th day of February 2016 by the returning officer of the 2nd respondent. Having been dissatisfied with the result, the applicant took the option of applying for a vote recount before the Chief Magistrates Court of Masaka. The process of recount hit a snag as various orders were being issued by the Chief magistrates in favour of the applicant and the 1st respondent countering the same until the whole process of vote recount was brought to a permanent halt by the ruling of my learned brother, The Hon Justice Gidudu Laurence in ***HCT-06-CV-CR-0003-2016 Hon Ssekikubo Theodore Vs Nkalubo Patrick*** delivered on the 27th of June 2016. One of the orders issued by the chief Magistrate was to prohibit the Gazetting of the 1st respondent as Member of Parliament for Rwemiyaga County. The 1st respondent

was gazette on the 28th of April 2016 and subsequently sworn in as Member of Parliament for Rwemiyaga County. The 1st respondent applied for revision to vacate the orders against him in the High Court. The High Court vacated the said orders.

On the 20th July 2016 the Applicant filed this application, brought by notice of Motion under Article 126 (2) (e) of the Constitution, S. 98 of the CPA, Order 51 R 5, Or52 rr 1,2, and 3 of Civil Procedure Rules and an Un named section of Judicature Act,

The application is seeking for orders that:

1. The time within which to file a petition challenging the election of the 1st respondent as a Member of Parliament for Lwemiyaga County, Sembabule District, be extended.
2. Costs of the application be provided for.

The Grounds upon which the application was based are more amplified in the affidavit of the applicant in support of Application but briefly are that:

1. The applicant intends to Challenge the elections and Declarations of the 1st respondent as Member of Parliament for Lwemiyaga County, Sembabule District, on grounds among others that the election was irregular, in that it was not conducted in compliance with the Constitution and the Electoral Laws governing the said election.
2. The applicant did not file an election petition against the election of the 1st respondent within 30 days from the 28th day of April 2016, the date the respondent was gazetted due to subsistence of an order preventing the 1st respondent from being gazzetted and the subsequent order degazzetting him, which orders were only discharged on the 27th day of June 2016.
3. The above constitutes sufficient reason and or justifiable ground why the applicant did not file an election petition within the 30 days prescribed by law from the date the 1st respondent's election was published in the Gazette.

4. The Applicant is entitled under the law to exercise his right provided by the law, to challenge the outcome of an election he believes and contends was not free and fair, and was not conducted in accordance and in compliance with the constitution and the electoral laws governing the said election
5. That the intended election Petition concerns public interest and it is just and Equitable that any allegations of Electoral malpractice is subjected to a fair trial and determined on its merits.
6. That the justice of the case requires that the application be allowed.

The application was supported by the affidavit of Nkalubo Patrick in which the above grounds are more buttressed. At the hearing, the applicant was represented by Ojambo Robert Mugenyi and Tonny Okwenyi while Medard Lubega Ssegona and Alaka Caleb represented the 1st respondent. The 2nd respondent was represented by Kayondo Abubakar.

In their submissions, counsel for the applicant submitted that S. 60(3) of the Parliamentary Elections Act 2005 requires/provides the time within which to file a petition. i.e. 30days after gazetting the results. The 1st respondent was gazetted on the 28th of April 2016. By the provisions of the law, a petition should have been filed on the 27th day of May 2016. That was not done due to special circumstances. They further averred that rule 19(1) of the Elections Petition Rules allows court to extend time provided by the rules where special circumstances exist. Counsel sought refuge in the case of ***Sitenda Sebalu Vs Sam Kalega Njuba and Electral Commission*** and stated that their lordships held that r19(1) extends to extension of time that is provided for by the Act. Counsel presented the circumstances being that the 1st respondent was declared by the second respondent as duly elected member of Parliament for Rwemiyaga County on the 19th day of February 2016. The applicant was dissatisfied and opted to exercise his option under the law to apply for a recount in the chief Magistrate's Court. In the process of attempting to proceed with a recount, the 1st respondent requested for time to respond to the application for a recount. Under S 55(2) the chief magistrate appoints a date for a recount within 4 days. The 1st respondent requested for more time as a consequence of which the matter was adjourned to a period that exceeded the 4 days. When the 1st respondent put in

his response, he raised an objection that the time had lapsed within which to conduct a recount. The chief Magistrate made a ruling overruling the objections. Both parties agreed that the matters of vote recount be referred to the Constitutional Court for interpretation. The matter was referred to the Constitutional Court and in the process of doing so, the Chief Magistrate made certain orders among which was an order prohibiting the Gazetting of the 1st respondent as duly elected. The constitutional court eventually dismissed the reference for lack of merit. The file was returned to the chief Magistrate to manage the application for recount. The order of the chief Magistrate notwithstanding, upon the Constitutional Court making a decision, the 1st respondent caused himself to be gazetted without discharging the Chief Magistrate's order prohibiting his being gazetted. Upon discovering that the 1st respondent had been gazetted without discharging the earlier orders, the applicant applied and the magistrate issued an order degazzetting the 1st respondent. Following this order, the 1st respondent lodged an application to the High Court for revision and seeking to stay the order degazzetting him. On the 27th of June 2016, the Judge discharged the earlier orders of the Chief Magistrate. Counsel for the applicant contends that the applicant did not file an election petition within the prescribed time due to subsistence of an order preventing the 1st respondent from being gazetted. He referred to the case of ***Handiknison Vs Handikinson,(1952) All ER 568*** and argued that the respondents were duty bound to obey the court order degazetting the 1st respondent. He argued that up to 27th June, court had not yet pronounced itself on whether the 1st respondent was properly gazetted or not. The applicant could not have filed a petition because it required that the there should be a gazette published before a petition can be filed. When His lordship made a ruling on the 2th of June 2016 on the Gazettement, this application for extension of time was filed within 23 days.

Counsel avers that the law on extension of time is that time can be extended only if special circumstances do exist warranting that extension. He referred to the case of ***Katongole Babirye and Anor. Election Petition No 3 of 2016***, where, while referring to the case of Sitenda Sebalu cited above, his lordship Elubu extended time. Failure by court registry was deemed to constitute sufficient cause to extend time. In this application, similar circumstances do exist. The Hon. Justice Laurence Gidudu observed in his ruling

on the application for revision (Page 15 thereof) stated that court had abdicated its duty of discharging the application for a recount and the applicant cannot be held responsible for the delay but court

Counsel further argued that there was no inordinate delay in filing this application because it was filled within three weeks after the application for a recount was discharged by court. He referred to the case of ***Bonny Katatumba Vs Waheed Kharim, CA No 27 of 20017***, where his lordship Mulenga held that even where there is inordinate delay, court may nevertheless grant the extension of time in the interest of Justice. The interest of justice of this case demands court to investigate whether the 1st respondent was validly elected. Counsel sought assistance from the provisions of Ar. 126(2)(e) of the Constitution of the Republic of Uganda which enjoins courts to endeavour to do substantive justice without undue regard to technicalities. He argued that in the case of ***Sitenda Sebalu*** cited above, court was categorical that the purpose of inquiring into elections was intended to ensure that allegations of malpractice are subjected to a fair trial determined on merit. By the respondents objecting to the application, they are arguing that the malpractices should continue. Counsel argued that the provisions of S 33 of the Judicature Act and S. 88 of CPA give this court Jurisdiction to grant the orders sought.

Counsel for the 1st respondent on the other hand argued that this application is an abuse of Court process and is devoid of Merit and an abuse of court process. The application is speculatively brought under various laws. He argued that S. 60 of the Parliamentary Elections Act requires that an election petition must be presented within 30days. He argued that S. 33 of the Judicature Act envisages that there must be matters of controversy before court. The affidavit in support of application is tempting court to speculate what the matters in controversy are because the applicant did not attach a petition. The applicant was tempting court to imagine that he has a case yet he has not presented that case to court. The applicant was a litigant whose intention was to keep the 1st respondent in court. He suggested that rule 19 of the Parliamentary Election Rules are couched in such a language that there must be an election petition pending in court in order for court to consider whether to extend time or not. It is in respect of that petition

that court can be moved. He relied on the case of ***Kakumba Abdul Vs Kabajo James Kyewalabye and Anor. Misc Application No 133 of 2001*** to support his arguments.

On ground 1, counsel for the 1st respondent argued that the applicant claims that the election was not conducted in accordance with the law. There is no petition which was attached to convince court so.

The second ground was that there was an order preventing the Gazetting of the 1st respondent. Counsel for the 1st respondent argued that there was no such order. The 1st respondent was gazetted by the 2nd respondent in exercise of its functions and did not need a court order to gazette the 1st respondent. He observed that Justice Gidudu made a finding that the Chief Magistrate issued an order degazetting the 1st respondent by exercising Jurisdiction he did not have. He argued that orders issued without Jurisdiction are void abinitio. In essence there was no such order preventing the 1st respondent from being gazetted.

On the third Ground counsel for the respondent argued that the applicant did not have just cause for extension of time. He is applying for extension of time on the basis of an illegal order which court has already established. Court was always acting at the instigation of the applicant to proceed exparte and engage in illegalities. He faulted the applicant for failing to serve the application for recount on the respondents in order to proceed exparte. The 2nd respondent got wind of the exparte application and appeared in court on his own and applied for time so that he can obtain representation. Such an action cannot be blamed on court but the applicant who was trying to circumvent procedure by not serving the application in order to have the matter heard exparte. Even his application to degazzette the applicant was done exparte and this was also condemned by the judge. He stated that exercise of court discretion is based on equity and that he who comes to equity must come with clean hands but the applicant's hands are dirty. He argued that an election petition is a matter of public interest but there cannot be a petition before it is filed. The grounds the applicant raised are only available to a person who has filed a petition. Public interest also demands that a person who has taken a seat in parliament gets time to represent his people.

Counsel for the 1st respondent argued that this application hinges on whether there are sufficient grounds to bend the provisions of the statute. For court to bend the provisions of a statute, there must be sufficient cause. He argued that to state that the application was filled without undue delay is not correct. 23 days after a ruling is a long time. The decision by Hon. Justice Giddudu was delivered interparty. An oral application could have been made. They instead opted to file a plaint which they eventually withdrew. It was filed when the application for revision was pending. It was withdrawn by letter on the 4th day of July 2016. The application was filled after withdrawing the plaint. He argued that counsel for the applicant's reference to the case of Hendrickson was erroneous. While they were talking about an irregularity, in the present situation, we are addressing an illegality of a court order. He further argued that in ***Boney Katatumba Vs Waheed Karim (2008)KALR 59***, the applicants placed sufficient material before court to enable court take a decision. In this case there is no material before court. ***In the case of Horizon Coarches Limited Vs Rurangaranga and Anor. (208)KALR 375***, Justice Katurebe stated that it is not a licence in the hands of a defaulting litigant to rely on article 126 of the Constitution. In Sitenda Sebalu's case, there were allegations in a petition before court. In this case there is none. Court does not understand the allegations before court. In Muyanja Mbabali's case, the challenge was on academic qualifications. In this case, court cannot ascertain what the applicant wants to challenge.

Counsel for the 1st respondent argued that S60 (1) of the Parliamentary Elections Act does not in any way grant court powers to extend time within which to file a petition. He stated that this was the principle in ***Makula International Ltd Vs His Eminence Cardinal Nsubuga and Anor, (1982) HCB*** 11. He referred to the case of ***Kakumba Abdul Vs Kabajjo James Kyewalabye and Electoral Commission, Misc. App No 133 of 2011*** that applied this principle. He also referred to ***Misc. Appl. No. 12 of 20111, Moses Ali and Santos, Misc. Appl. No 12 of 2021*** that applied the same principle The remedy of a losing candidate is shut out by section 60(1) but also S 86(1) which was intended to ensure that in matters of parliamentary representation, there should be certainty. These sections have no corresponding provisions in the rules. Therefore, this time cannot be enlarged by court. If court had that discretion, then Parliament would have stated so.

Counsel for the 2nd respondent blamed the problems surrounding the recount and this application entirely on the applicant. He stated that going by the provisions of S 63(5) of the PEA, if the applicant had filed a petition, it would have catered for both recount and the petition itself. What he did was to file a plaint and a host of applications which squandered his chance of obtaining the likely remedies. The delay cannot be attributed to court but to the applicant.

In rejoinder, counsel for the applicant argued that rule 19 of the PER does not require that there should be a petition before court can extend time. It requires that there should be proceedings before court and this application is those proceedings. He referred to Black's Law dictionary to explain the definition of proceedings. He also stated that the court in ***Sitenda Sebalu's case*** (supra) was not based on obiter. The court stated that there is no rule of the thumb and court can extend time in consideration of public interest. He said that even where there is delay, court can actually extend time.

Suffice to say, this application calls for determination of only two issues that I must countenance. First, can this court extend time within which to file an election petition? Second, is there sufficient cause for failure to file an election petition in purview of the statutory provisions?

The timeframe within which to file an election petition is delimited by S.60 (3) of the Parliamentary Elections Act which provides:

Every Election Petition shall be filed within 30 days after the day on which the results of the election is published by the commission in the Gazette

In essence, the applicant should have sought court's intrusion within the 60 days from the date the 2nd respondent gazetted the 1st respondent as a duly elected representative for Rwemiyaga County. The applicant did not. For some unknown reason, the Act is silent on how this time frame can be enlarged. The only provision that can come to the aid of court on how this time can be enlarged is Rule 19 of the Parliamentary election rules. It provides:

The court may of its own motion or an application by any party to the proceedings, and upon such terms as the justice of the case may require, enlarge or abridge the time appointed by these rules for doing any act, if in the opinion of the court, there exists such special circumstances as to make it expedient to do so.

This rule however raises more questions than answers. Can it be used to extend time under S 60(3) of the PEA? My answer is No. The rules could not have been intended to enlarge the provisions of the Act that is silent on the enlargement of time. That would be ultravires. Rule 19 states in no uncertain terms that it refers to circumstances the provision of which are spelled out in the rules. The time that can be enlarged is that set by the rules not by the Act.

Analogous to this is whether court can move to extend time within which to file petition when there is no petition subsisting before court. I'am persuaded by the finding of my brother Justice Andrew Basheija in ***Kakumba Abdul Vs Kabajjo James Kyewalabye and Electoral Commission, Misc. App No 133 of 2011*** where he stated thus:

The opening sentence of rule 19 (supra) states as follows:-
"<u>The Court may of its own motion or on application by any party to the proceedings"(underlined for emphasis).</u>
Two aspects come to the fore regarding this rule. The first one is the court may "of its own motion" enlarge or abridge time. The second one is that "the party can apply" to enlarge or abridge the time. In both instances, however, there must be "proceedings" on record as a condition precedent before the court can "of its own motion or on the application of the party to the proceedings" act to enlarge time. In case of a party applying for extension, he or she must also show that he or she is a party to the proceedings on record which predate the application. In effect, an application by a party seeking to extend time does not itself constitute the proceedings contemplated under rule 19(supra). The rule envisages proceedings to which the applicant is a

party; and arising out of which the application is instituted to enlarge or abridge the time appointed by the rules for doing any act. Rule 19 (supra) would certainly be redundant in respect of court "acting of its own motion" if it did not envisage the existence of proceedings on record prior to the application for enlargement of time. This is premised on the logic that court cannot "of its own motion" initiate a petition but can only move itself to act to enlarge time after the petition has been filed. The words "its own motion " in rule 19 refer to where court's discretion is exercisable upon proceedings prior to a subsequent application seeking to extend the time fixed by the the rules for doing any act. Therefore "of its own motion" must be construed to mean that court's discretion to enlarge time appointed by the rule to do any act on the proceedings can only be based upon an existing petition. Again the logic here is that court's discretion however wide, cannot be exercised in vacuum.

Similarly, the clear wording "on application of a party to the proceedings" would in my view imply that only a party to the proceedings can bring an application under rule 19(supra). Thus proceedings must exist to which the application in a subsequent application is party. Even though both the proceedings and the application are deemed to be "proceedings" in the general sense, rule 19(supra) makes a clear distinction in that court can "act on its own "or "on application by a party to the proceedings". The word "proceedings" as used in rule 19 has a prefix "the" implying that the proceedings must necessarily predate the subsequent application for enlargement of time.

The situation at hand presents circumstances where court has to speculate what the petition is or will be. This court has been relegated to the role of a soothsayer. I'am not even sure whether the applicant has any grounds for a petition because he has presented none for my persuasion! There are no proceedings before me for which to enlarge time.

Can court extend time fixed by statute?

This question has been answered by various precedents, ***Makula International Ltd Vs His Eminence Cardinal Nsubuga and Anor, (1982) HCB*** 11 being the *locus classicus*. Where there is no enabling provision in the statute for court to enlarge or abridge time, then court cannot attempt to do so, as to do so would be to defeat the spirit of the statute.

Suffice to note is that the arguments about the time frame for election petitions have been alive not only in Parliamentary but presidential elections as well. In fact, for presidential elections, the argument has been that it is practically impossible to gather evidence in the whole country and file a petition in 10 days. That being the case, the Supreme Court has never found it expedient to extend time because their hands are tied by statute. It is not different for the High Court in Parliamentary Election petitions. The spirit of the framers of the electoral laws on timeframe intended to deflate the balloon of a politically charged atmosphere that is riddled with emotions, anger and hatred. It was intended to heal the political wounds as quickly as possible so that people can settle down and concentrate on development. That is why Election Petitions are given priority.

Counsel for the applicant sought refuge in the case of ***Sitenda Sebalu Vs Sam K. Njuba and Anor, Election petition appeal No 26 of 2007*** to argue that court reserves the discretion to extend time. While indeed court was interpreting S 62 of the PEA which is essentially procedural, the court did not in any way depart from its earlier position in **Makula International** (Supra). Court only adopted a liberal approach to cater for extreme cases of illegality that are apparent. Court interpreted part X of the PEA to which S 6o (3) belongs in a liberal manner thus:

"It is evident from the provisions on limitation of time within which to file the petition(section 60(3)) and to serve the notice, (Section 62) together with the directive to the trial and appellate courts to expeditiously dispose of the petition and appeals arising from it, giving them priority over matters pending before the courts, (section 63(2) and 66(2) and (4)), that the purpose and intention of the

legislature , was to ensure, in public interest, the disputes concerning election of people's representatives are resolved without undue delay . In our view, however, that was not the only purpose and intention of the legislature. It cannot be gainsaid that the purpose and intention of the legislature in setting up an elaborate system for judicial inquiry into alleged electoral malpractices, and for setting aside election results found from such inquiry to be flawed on defined grounds, was to ensure, equally in the public interest, that <u>such allegations</u> are subjected to a fair trial and determined on merit (Emphasis added).

It should be noted that in Sitenda Sebalu (supra) S. 62 of the PEA had a corresponding regulation in R6 of the PER, which then grants powers to Court to extend time under R.19 of the PER. There was an existing petition before court. Court did not in any way state that court has the luxury to extend time under S.60 (3). The only issue before court was that notices had not been served within the stipulated period in accordance with the law. In this application, I have no petition. I have a request to extend time to file a petition. I don't have the slightest idea about what the allegations against the 1st and 2nd respondents are. Court cannot simply act on speculation.

I must hasten to add that in case of a party applying for extension of time, he or she must also show sufficient cause why a legal step was not taken in the prescribed time. The main reason advanced by counsel for the applicant for failure to file a petition was because of the delays caused by court to dispose of the application for a recount. While there is an attempt to blame court and indeed court is partly culpable, the applicant was a key player in the ping pong game that manifested in the prosecution of the application for a recount. A close look at the proceedings of the lower court in ***Misc. Cause No 011 of 2016*** for a recount shows that the applicant conducted the application in a cavalier manner. There was always a desire by the applicant to proceed exparte without serving the 1st respondent. When the application for a recount came up for hearing on the 1st day of March 2016, counsel for the applicant informed

court that he had served the 1st and the 2nd respondent (Electoral Commission and District Returning Officer) but he did not inform court that he had served the 3rd respondent (Theodore Sekikubbo). Indeed, the third respondent learnt of the proceedings through his own sources and stormed Court without counsel and requested for extension of time to enable him obtains counsel. He informed court that he was not served and counsel for the applicant did not contest this fact. Counsel for the applicant only observed that there was a time constraint of 4 days within which to conduct a recount and prayed that the 3rd respondent be given a short adjournment. Thereafter, a ping pong game begun between the applicant and third respondent whereby the applicant obtained many exparte illegal orders until the High Court set aside the entire process of recount together with the said illegal orders in Civil Revision Cause No 3 of 2016. Indeed the Judge observed in his ruling in the said revision cause thus:

"In this matter before me, a perusal of the proceedings of the lower court reveals that things went wrong from day one. Had the applicant not stormed those proceedings, it was clear that the Chief Magistrate was being moved to entertain an application exparte without proof of service. The desire to proceed exparte manifests itself throughout the proceedings up to the time this application was filed. All the time the Chief Magistrate came into contact with the application for a recount, he never focussed on the grounds for that application but was Hijacked and taken to issues different from the proceedings before him"

Surely, the applicant cannot blame court entirely for his inaction. He was the engine that powered the illegal machinery, the consequence of which time within which to file a petition lapsed.

In the result, I find that the applicant does not have sufficient cause to justify extension of time given his conduct. It should also be noted that under S.63 (5) of the PEA, a recount is one of the remedies that the High Court can order among other things. Had the

applicant taken this path, he would have achieved his objective of filing a petition while at the same time applying for a recount. He decided to choose a thorny path the consequences of which are these legal challenges in his closet.

In the result, I find no merit in this application and dismiss it with costs to the respondents.

I so order.

Flavian Zeija
JUDGE
24/1/2017