

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS APPLICATION NO. 186 OF 2022
(ARISING FROM ELECTION APPEAL NO. 013 OF 2021)
(ARISING FROM LUWEERO CHIEF MAGISTRATES COURT ELECTION
PETITION NO. 001 OF 2021)

SEKABIRA HERBERT ::: APPLICANT

VERSUS

1. SUUNA MULEMA

2. ELECTORAL COMMISSION ::: RESPONDENTS

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] This application was brought by Notice of Motion under Sections 79 and 98 of the Civil Procedure Act Cap 71 and Order 52 rules 1, 2 and 3 of the Civil Procedure Rules SI 71-1 seeking orders that;

- a) The 2nd Respondent's Notice of Appeal filed in the Chief Magistrates Court of Luweero on the 3rd day of November 2021 intending to appeal against the judgement and orders of His Worship Samuel Munobe in Election Petition No. 001 of 2021 be struck out.
- b) The 1st Respondent's proposed Memorandum of Appeal filed before this Honorable Court be struck out.
- c) Costs of the application be provided for.

[2] The grounds of the application are set out in the Notice of Motion and in the affidavit in support of the application deposed by the Applicant. Briefly, the grounds are that the Applicant filed Election Petition No. 001 of 2021 at the

Chief Magistrates Court of Luweero against the Respondents where judgement was entered in his favour. On the 3rd day of November 2021, the Respondents filed their respective Notice of Appeal before the Chief Magistrates Court of Luweero and a letter requesting a certified record of proceedings and judgement to enable them pursue their appeal before this Honorable court. The 1st Respondent also filed his proposed Memorandum of Appeal before this Honorable Court on 18th day of November 2021 and served it on the Applicant on 29th November 2021 but the same has never been validated. The record of court's proceedings was ready and certified on the 10th day of December 2021. Since the time the record of proceedings was ready, the Respondents have not taken any step to have their respective memorandum of appeal filed in this court within the statutory required period of 30 days and that more than 100 days have since passed. The failure to prosecute the appeal within 60 days entitled the Applicant to have the Notice of Appeal and proposed memorandum of appeal struck out for failure to take an essential step. It also shows that the Respondents are no longer interested in prosecuting the appeal. The Respondents' motive of lodging the notice of appeal and proposed memorandum of appeal was to delay the Applicant from enjoying the fruits of the judgement. An election appeal, just like an election petition, ought to be conducted expeditiously and immediately disposed of. It is in the interest of justice that the said notice of appeal and proposed memorandum of appeal be struck out.

[3] The application was opposed through an affidavit in reply deposed by Suuna Mulema, the 1st Respondent, in which he stated that there is no requirement for a proposed memorandum of appeal to be validated, that he was not aware that the record of the court's proceedings were ready, typed and certified since he was neither informed by court nor was the record served onto him or his lawyers. The 1st Respondent stated that he wrote a letter to the Chief Magistrates Court of Luweero requesting for the record of proceedings and was

informed that they would be notified by the court. He was only surprised that the Applicant was now alleging that the 1st Respondent was not interested in his appeal. The 1st Respondent further stated that he was aware that time begins to run when the appellant has been served with the court's record of proceedings. He concluded that it is not true that he has failed to prosecute his appeal.

[4] No affidavit in reply was filed for the 2nd Respondent but at the hearing, Counsel for the 2nd Respondent appeared and stated that the 2nd Respondent would oppose the application on points of law only.

Representation and Hearing

[5] At the hearing, the Applicant was represented by Mr. Kajwara Christopher; the 1st Respondent was represented by Mr. Asasira Kiyonga; while the 2nd Respondent was represented by Mr. Eric Sabiiti. Counsel agreed to make and file written submissions which they did, although they failed to comply with the timelines.

Issues for Determination by the Court

[6] Counsel for the Applicant raised a preliminary point of law in respect of the 1st Respondent's affidavit in reply, which he framed as an issue. I will therefore consider the following issues for determination by the Court;

(i) Whether the affidavit in reply deposed by the 1st Respondent is competent before the Court?

(ii) Whether the Notice of Appeal and the proposed Memorandum of Appeal against the judgement of the trial court are incompetent and ought to be struck out?

(iii) Whether the Applicant is entitled to the remedies claimed?

Resolution of the Issues

Issue 1: Whether the affidavit in reply deposed by the 1st Respondent is competent before the Court?

[7] Counsel for the Applicant submitted that the 1st Respondent's affidavit is not competent before the Court as it contains a forged signature. Counsel submitted that it was revealed during cross examination of the 1st Respondent that the signatures on documents exhibited as AE3 (the specimen taken before the Court) and AE4 (the affidavit in reply) are not the 1st Respondent's known signatures and the 1st Respondent owes an explanation to the Court as to why he signed differently from the other signatures on earlier documents. Counsel stated that in absence of such an explanation, the conclusion is that the affidavit in reply was signed by the lawyer who prepared the affidavit. Counsel concluded that the said affidavit in reply is untenable, incompetent, bad in law and brought in abuse of the court process. He prayed that the same be struck off the record. Counsel for the 1st Respondent, on the other hand, submitted that when cross examined upon his signatures, the 1st Respondent owned up his signatures and demonstrated that he could still sign the same signature as it appears on the affidavit in reply. Counsel prayed to the Court to disregard this allegation as raised by the Applicant.

[8] This matter raised by the Applicant as a preliminary point of law would require evidence to establish the allegation as to whether the signature on the 1st Respondent's affidavit in reply is forged or not. A matter that cannot be proved or established on the pleadings cannot be entertained as a preliminary objection. In ***Lweza Clays & Another vs Tropical Bank & Another, SC Misc. Appeal No. 31 of 2018***, the Supreme Court emphasized that matters that require evidence to be proved cannot be brought as preliminary objections. According to the famous case of ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696***, a preliminary objection consists

of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. A matter that requires further proof by way of evidence such as the one in the present case cannot, therefore, be sustained as a preliminary objection. The objection raised by the Applicant herein is therefore disregarded by the Court on that account.

Issue 2: Whether the Notice of Appeal and the proposed Memorandum of Appeal against the judgement of the trial court are incompetent and ought to be struck out?

Submissions by Counsel for the Applicant

[9] It was submitted by Counsel for the Applicant that although there are no specific rules providing for timelines for filing appeals from decisions governed by the Local Governments Act, the Court of Appeal has held that the Judicature (Court of Appeal) (Rules) Directions are applicable. Consequently, this Court has adopted a practice of following timelines provided by the Civil Procedure Rules. Counsel submitted that in this case, the Respondents filed their Notices of Appeal on 3rd November and served the same on the Applicant on 9th November 2021. The 1st Respondent also filed a proposed memorandum of appeal. Since then, more than 8 months have passed and the proposed memorandum of appeal has never been validated, the appeal has not been prosecuted hence the Respondents have failed to take essential steps. Counsel submitted that failure to file a memorandum of appeal within 30 days entitles the applicant to have the memorandum and notice of appeal struck out. He stated that election petitions have to be handled expeditiously and that the filing of the notice of appeal was a calculated move to delay the Applicant from enjoying the fruits of the judgement. Counsel prayed that the said documents be struck out on those grounds.

Submissions by Counsel for the 1st Respondent

[10] Counsel submitted that the 1st Respondent filed a proposed memorandum of appeal in the Court on the 18th day of November 2021 which was endorsed, sealed by the Court. Counsel submitted that there was no need for validation of the memorandum of appeal. If by validation, Counsel for the Applicant was referring to the requirement under ECCMIS, by the time of filing of the said proposed memorandum of appeal, the system was not yet in place. Counsel further submitted that it is not true that the 1st Respondent has failed to prosecute the appeal and, as such, the present application is devoid of merit. Counsel submitted that judgement was delivered on 29th October 2021, a notice of appeal together with the letter requesting for the record of proceedings was filed on 3rd November 2021 and a proposed memorandum of appeal filed on 18th November 2021. Several letters were then written to the lower court asking for the certified record of proceedings but in vain. Counsel submitted that time starts running after provision of the certified record of proceedings to the appellant. Counsel further stated that this Court itself issued an order on 19th September 2022 to the effect that the record be certified by lower court and availed to the parties. Counsel prayed that the application be disallowed.

Submissions by Counsel for the 2nd Respondent

[11] Counsel for the 2nd Respondent stated that when the matter came up for hearing, the Court observed that indeed the record of proceedings had not been availed to the 2nd Respondent. The Court ordered that the same be availed. Counsel submitted that this is proof that the Appellants have not been availed the necessary documentation to enable them prosecute the appeal. Counsel submitted that the duty to prepare, certify and avail the record of a trial court lies upon the registrar of the court. Counsel referred to the decision in ***Wanume David Kitamirike Vs Uganda revenue Authority, Civil Application No. 138 of 2010***. Counsel concluded that the 2nd Respondent had sufficient cause for the delay in prosecution of the appeal and invited the

Court to dismiss the application. The Applicant did not file any submissions in rejoinder.

Determination by the Court

[12] The appeal from which this matter arises originates from proceedings governed by the Local Governments Act Cap 243. The Act makes no provision for timelines within which an appeal from a lower court may be instituted in the High Court. In a number of decisions, the Court of Appeal, when confronted with this nature of appeals, adopted the timelines provided for under the Judicature (Court of Appeal) (Rules) Directions. See: ***Makatu Augustus vs Weswa David & Another, EPA No. 13 of 2016; Kwoba Herbert vs Ssebugwawo Tadeo, EPA No. 108 of 2016; Bandikubi Boniface Musisi & Ors vs Sserwanga William Tom & Anor, EPA No. 110 of 2016;*** and ***Mpanga Farouq vs Ssenkubuge Isaac & Anor, EPA No. 13 of 2021.***

[13] It follows, therefore, that in the case of an appeal to the High Court, the Court would adopt timelines for appeal provided for under the Civil Procedure Rules. This position is also supported by the provision under *Section 143 (1) of the Local Governments Act* which states that in the hearing of a petition brought under the Act, the powers of the court and rules of procedure shall be those which apply to a civil action in a court of law. In that regard, *Section 79 (1) of the Civil Procedure Act (CPA)* provides that an appeal shall be filed within 30 days from the date of the decree or order of the court. *Section 79 2) of the CPA* provides that in computing the above stated period of limitation, the period taken by the court in making a copy of the decree, order and proceedings on which the appeal is founded shall be excluded.

[14] In the present case, it is not in dispute that a notice of appeal and a request for the certified record of the trial court were filed on 3rd November 2021 which was within time; the decision of the court having been delivered on

29th October 2021. The 1st Respondent also filed a proposed memorandum of appeal on 18th November 2021. It was shown by the Respondents that despite a number of reminders communicated to the trial court, they were not availed with certified copies of the record as provided for under the law. When the case came up for hearing before this Court on 19th September 2022, there was, on record, no formal evidence of service of the certified record upon the Respondents. A dispute arose between the parties as to whether service had been effected. It was noted by the Court that although the original file of the lower court was before the Court, it only had one copy of the judgment that was certified and one copy of the proceedings that was not certified. In absence of any other evidence, there would be no way the Court would believe that a certified record was served upon the Respondents when no complete copies were on the original file. The Court therefore directed the Registrar of this Court to ensure that the complete record is certified and supplied to the Respondents/Appellants.

[15] In view of the foregoing, it is clear that once the Respondents filed their respective notices of appeal and letters requesting for the record of the trial court, time stopped running until the record would be availed to them. Since the record had not been availed to them by the time this application was filed, the application is without merit and ought to be dismissed on this ground.

[16] Regarding the proposed memorandum of appeal, it was explained by the 1st Respondent that he filed the same as a precaution just in case the record was not availed urgently. Counsel for the Applicant appeared to argue that a proposed memorandum of appeal is not a memorandum of appeal and therefore the one filed needed validation. I do not agree with this view. *Order 43 rule 1 of the CPR* provides for the form of appeal. Under *sub-rule (1) thereof*, every appeal to the High Court shall be preferred in the form of a memorandum signed by the appellant or his or her advocate and presented to the court or to

such officer as it shall appoint for that purpose. Under *sub-rule (2) thereof*, the memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and the grounds shall be numbered consecutively.

[17] It is clear to me that the memorandum filed by the 1st Respondent, even if it went by the title “proposed memorandum of appeal”, possessed all the attributes of a memorandum referred to under the law. The mere addition of the word “proposed” would not change that fact. It is perfectly understandable that because the 1st Respondent was filing the memorandum before receiving the record of proceedings, he needed to put the Court on notice that he reserved a right to change the same into a final memorandum. I do not find any error in this course of action. Indeed, I find it to be an exercise of due diligence on the part of the 1st Respondent. Accordingly, I do not find any basis for the claim that the said memorandum required any validation. The Applicant, indeed, established no such basis to the Court. In the circumstances, the application also fails on this ground.

Issue 3: Whether the Applicant is entitled to the remedies claimed?

[18] In view of the above findings, the Applicant has failed to establish that the notices of appeal and the proposed memorandum of appeal filed by the Respondents were incompetent and ought to be struck out. The application, therefore, fails and is dismissed with costs to the Respondents. It is so ordered.

Dated, signed and delivered by email this 17th day of February, 2023.



Boniface Wamala

JUDGE