

THE REPUBLIC OF UGANDA

IN THIGH COURT OF UGANDA AT MBALE

MISCELLANEOUS APPLICATION NO. 39 OF 2002

AKORA SIMON PETER.....APPLICANT

VERSUS

- 1. WASUGIRYA FRED**
- 2. RETURNING OFFICER (PALLISA DISTRICT)**
- 3. ELECTORAL COMMISSIONRESPONDENTS**

BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI

RULING

This is an application for leave to file a petition out of time. It was brought by way of notice of motion under sections 139 and 173 of the Local Government Act, and Rule 19 of the Parliamentary Elections (Elections Petitions) Rules, 1996. The application is supported by the affidavit of the applicant dated 19th March, 2002, and that of one Peter Wandera who at the initial stages of this matter acted as Counsel to the Applicant.

The relevant facts of this application are thus. The applicant was one of the candidates in the elections for the District Chairperson for Pallisa District. The elections were conducted by the 3rd Respondent who had the 2nd Respondent as its agent in the field. The elections were held on 14th February 2002, and the 1st respondent was returned as the winning candidate. He has since been sworn in as the District Chairperson for Pallisa District, and has commenced his duties as such.

The applicant was aggrieved by the results of the elections and sought to petition in respect thereof. He was advised by his lawyers that he was out of time to do so hence this application for leave to file the petition out of time.

Three grounds were set out in the notice of motion as follows.

1. That the applicants former advocates failed to file the petition within the time stipulated in the law.
2. That there is no dilatory and /or negligent conduct on the part of the applicant who exercised reasonable and due diligence;
3. That the application coming promptly, it is just and equitable that the applicant be given to file the petition out of time.

Two affidavits in reply were filed. The first was by Fredrick Mudangha, Counsel for the 1st respondent dated 26th April, 2002, and the second by Okello Oryem Alfred, a Legal May, 2002. The applicant filed an affidavit in rejoinder dated 15th May, 2002. In the affidavit of Okello Oryem it was deposed that the results of the disputed elections were gazette on 18th February, 2002. The petition ought to have been filed by 4th March 2002.

The application was adjourned once due to the absence of Counsel for the applicant. At the adjourned hearing, the applicant told court that he was appearing in person. He thus argued his application personally. Mr. Fredrick Mudangha represented the 1st respondent, while Mr. Mwaka Phillip represented the 2nd and 3rd respondents.

The applicant swore in his affidavit that he gave instructions to file a petition to Odere and Nalyanya Advocates on 20th February 2002, which was well in time, but that firm of advocates failed to file the petition within the stipulated time,

On 5th March 2002, he approached Ms. Ojambo, Wejuli-Wabwire & Co. Advocates who informed him that the intended petition was out of time. Hence the filing of this application. It is worth nothing at this point that this application was filed in court on 20th March, 2002.

Sub Section (1) of Section 139 of the Local Governments Act, 1997, gives an aggrieved candidate for election of Chairperson of Local Government Council the right to petition the High Court challenging the results of such elections. Sub section (4) thereof provides for the filing of such elections petition within 14 days after the day on which those results were notified by the Electoral Commission, 3rd respondent herein, in the Gazette.

The results of the elections for District Chairperson were notified by the 3rd respondent in the Gazette on 18th February, 2002. An aggrieved candidate had therefore to file a petition before the

expiry of 14 days from that date. The applicant did not do so. According to his affidavit, this was because his lawyers failed him inspite of having given them instructions to do so in time.

The parliamentary Elections (Elections Petitions) Rules 1996, which were applied to Local Government Council elections by sections 173 of the Local Governments Act 1997, in Rule 19 thereof provide for the enlargement of time if, “in the opinion of the court, there exist such special circumstances as make it expedient to do so.”

The special circumstances being advanced in this case for the failure to file the petition on time was that the lawyers did not do so.

The lawyers response to this is contained in the affidavit of Peter Wandera who deposed that he received instructions on 25th February, 2002, to file the petition. That he contracted the 3rd respondent for certified copies of the elections results tally sheets for Pallisa district. He further deposed that he received the said tally sheets on 14th March, 2002. He annexed copies of tally sheets of 4 sub counties to his affidavit. These are the sub counties of Kadama, Kibuku, Kirika and Tirinyi. The tally sheets were allegedly required to give the lawyers information which would enable them to file the petition.

Mr. Mwaka learned Counsel for the 2nd and 3rd respondents submitted that from the affidavit of Okello Oryem, it was clear that results tally sheets were not required prior to filing a petition. The rules of civil procedure only require a list of documents, not necessarily the documents themselves. These could have been filed later once they were mentioned in the list. The argument that the tally sheets were required for information is also untenable as this information was available to the applicant from the results declaration forms. It was from this information that the applicant sought to challenge the results. It was not from the tally sheets.

I find that argument attractive. Where one so wished, a list of documents including tally sheets could have been filed along with the petition. The excuse of not filing the petition ostensibly because one was waiting for copies of certified tally sheets is too naïve to be called a special circumstance which would justify extending time.

In paragraph 3 of the affidavit of Peter Wandera, it was deposed that soon after receiving instructions, he applied to the 3rd respondent for certified copies of tally sheets for Pallisa district. He annexed tally sheets of 4 sub counties.

In reply, Okello Oryem in his affidavit swore that the only request the 3rd respondent received in respect of tally sheets for Pallisa District was from a candidate by the names of Kedi Sammuel. A copy of his letter of request dated 25th February, 2002, was annexed to the affidavits. The sub counties whose tally sheets were requested were Kadama, Kibuku, Kirika, and Tirinyi. Coincidentally, if not rather surprisingly, these are the very sub counties whose tally sheets Peter Wandera allegedly received from the 3rd respondent on 14th March 2002, and which he annexed to his affidavit.

There was nothing to show that any such request was made to the 3rd respondent by Peter Wandera's firm. There was only a statement on oath which was rebutted with a supporting document. The applicant filed an affidavit in rejoinder but did not specifically rebut this deposition. The affidavit of Peter Wandera was grounded on the fact that the tally sheets were requested, but not delivered on time by the 3rd respondent. It comes out that no such request was made. The only request received by the 3rd respondent was from another candidate, but not the applicant nor his counsel.

Section 100 of the Evidence Act provides that whoever desires court to give judgment as to any right or liability dependent on the existence of the facts which he asserts, he must prove that those facts exist. The applicant sought to prove that the failure to file petition in time was due to the none availability of tally sheets from the 3rd respondent. He has failed to prove that tally sheets were demanded from the 3rd respondent.

The affidavit of Peter Wandera is not to be relied on, for containing a falsehood. By deposing that he demanded for tally sheets and received them late when it comes out that he in all probability, Peter Wandera did not, is a falsehood which renders that affidavit unreliable. In Bitaitana & 4 others V. Kananura [1977] HCB 34, it was held that inconsistencies in an affidavit cannot be ignored however minor, since a sworn affidavit is not a document to be treated lightly. If it contains an obvious falsehood, then it naturally becomes suspect.

From the two affidavits of the applicant, it is clear that by the 5th March, 2002, he was aware that there was something the matter with his petition. He moved to a second firm of advocates who confirmed to him on that date that his petition was time barred. However even after realizing this, he sat back and waited for two weeks till 15th March, 2002, when he went back, only to discover that the first firm of Lawyers did not file any petition.

It is not clear why the applicant was jumping from one firm of lawyers to another, but that is his business and indeed his right. However when none of them was even able to represent him at the hearing of the application, for the reason that he failed to pay their fees, it becomes difficult to believe him when he asserts that it was the lawyers, and not himself, who did not act with speed and diligence.

As early as the 5th March, 2002, the applicant was aware that his intended petition was time barred, but the application for leave to file the petition out of time was not filed till 20th March, 2002, more than two weeks later. This was inspite of having instructed two firms of lawyers. As was pointed out by Mr. Mudangha, Counsel for the 1st respondent, on the day when Counsel Peter Wandera was swearing the affidavit in support of this application, the applicant was effecting part payment of fees to Counsel Ojambo Wejuli & Co. Advocates.

In his affidavit in rejoinder, the applicant deposed that he instructed the firm where Advocate Peter Wandera operates from on 20th February, 2002, but this Peter Wandera in his affidavit swore that they were given instructions on 25th February, 2002. This apparent contradiction was not explained. It shows that either the applicant or his Counsel was not telling the truth. This symptomatic of the way the applicant appears to have handled his case, with lies and contradictions.

I do not agree that the application was brought promptly. There was dilatory conduct on part of the applicant, though he tried to lay the blame on his lawyers. At the hearing of the application, he was able to sufficiently conduct his case without the lawyers.

Rule 19 of the Parliamentary Elections (Elections Petitions) Rules 1vides for enlargement or abridgment of time requires that there must exist special circumstances. The special circumstances must be such as make it expedient to justify enlarging or abridging the time. I have not found any special circumstances in this case.

For the above reasons this application must fail. It is accordingly dismissed with costs to the respondents.

RUGADYA ATWOKI

JUDGE

24/5/2002