

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CV-MA-207-2009

(Arising from Election Petition No.1 of 2009)

ODONGO

ZADOKI.....APPLICANT/PETITIONER

VERSUS

1. KASANA BEZA

2. THE ELECTORAL COMMISSION.....RESPONDENTS

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

RULING

The applicant Odongo Zadoki through his advocates M/s Ntende Owor & Co. Advocates brought this application under Article 126 (2) (e) of the 1995 Constitution, S.98 of Civil Procedure Act and S. 33 of the Judicature Act as well as S.172 of the Local Government Act Cap.243 and O.52 r of the Civil Procedure Rules by way of Notice of Motion for orders that,

- i) Time be extended to hear the applicant's petition out of time or leave be granted to hear the applicant's petition No.0001 of 2009 out of time specified by law and upon such order, the petition proceeds to be heard as if it would have been heard within specified by relevant Statute.
- ii) Costs of this application be provided for

The application is supported by the affidavit of the applicant which reiterates the general grounds in the Notice of Motion that;

- a) The applicant's petition has a strong likelihood of success.

- b) The applicant's advocate Mr. Charles Okoth Owor who had personal conduct of the case suffered high blood pressure attack which rendered him indisposed for a period of 2 ½ months and as a result he was unable to attend to the petition and fix the said petition for hearing in time.
- c) It is in the interest of justice and equity that leave to hear the petition out of time is granted so that the same is determined on the merits and substantive justice is done.

The first respondent Kasana Beza represented by M/s Aketch & Co. Advocates filed an affidavit in reply opposing the application. She avers *inter alia* that;

- 1) The petition ought to have been heard within 3 months from the date of filing without exception.
- 2) The firm of M/s Ntende, Owor & Co. Advocates has more than one lawyer and it is not true the lawyer was bedridden all along.
- 3) The applicant was not vigilant in pursuing the election petition and equity aids the vigilant not the indolent. The applicant only found out what his lawyer had done towards the end of September after expiry of the prescribed time.
- 4) The application is made in bad faith and is intended to delay the course of justice and deny the 1st Respondent a democratically elected leader the enjoyment of her office.
- 5) The election petition lacks merit and there is no likelihood of success.

The second respondent, the Electoral Commission also filed an affidavit in reply opposing the application. One Sabit Eric deponed *inter alia* that;

- i) The grounds for extension of time are not genuine or convince.
- ii) Medical reports show that applicant's advocate was hospitalized on 1st July 2009 and a day after, on the 2nd he was served the petition.
- iii) The 2nd respondent served the applicant's advocates on 15th July 2009 two weeks after the advocate was hospitalized which service was acknowledged.
- iv) The sick advocate is not the only partner in the firm. That counsel applying for extension i.e. Rebecca Mutumba had partially participated in the preparation of the petition since she commissioned the affidavits supporting the petition.

- v) That it is not convincing for counsel to have ignored an election petition handled by the firm given the nature, urgency and priority over other court business.
- vi) It was negligence on the part of the firm which should not be condoned by court by extending time.
- vii) The applicant was not vigilant enough to follow up on his case considering the time lag from July when it was filed and September when he found out that counsel was sick.
- viii) Finally that it would be an abuse of court process if this application is granted and it would occasion injustice on the part of the 2nd respondent who is in preparation for the forthcoming General elections.

During the hearing of this application learned counsel on both sides made elaborate submissions in support of their respective cases. Mr. Ntende submitted for the applicant Ms. Aketch submitted for the first respondent and Ms. Kabibi submitted for the 2nd respondent.

I have considered the entire application and related the same to the law and the respective submissions.

As rightly pointed out by Mr. Ntende learned counsel for the applicants, the time prescribed for completing the hearing of an election petition (s. 143 (2) LGA) of 3 months was not intended to be mandatory. It was intended to be directory only to ensure expeditious hearing and determination of election petitions filed under the Act. A trial judge can therefore exercise residual or inherent power to extend time within which to dispose of the petition.

- SITENDA SEBALU AND SAM K. NJUBA & ANOR ELECTION PETITION APPEAL 26/2007;
- BENSERI LUBUYE KIBUKA AND ELECTORAL COMMISSION & ANOR CONSTITUTIONAL PETITION NO.8/98.

However, the power to extend a bridge time within which to hear a petition can be exercised if in the opinion of the court, there exist special circumstances as to make it expedient to do so.

If this statement of the legal position is related to the instant applicant, I have not been persuaded that special circumstances exist to extend time in which to hear petition 001 of 2009. As rightly

pointed out by both learned counsel for the respondent, the applicant was not vigilant in pursuing the petition. He knew he had filed a petition which may result in his re-election but chose to sit back and check on his lawyer to find out about the petition after 4 months of in the fourth month of filing. The firm of advocates representing the petitioner has other advocates as can be shown by the different lawyers who took cognizance of the election petition filed by the said firm. It is not convincing to say that one lawyer had personal conduct of the petition in question. True Mr. Owor fell sick but this was no excuse for the firm not to have pursued the petition in time because the advocates are fully aware of the prescribed time within which political questions should be resolved to allow political temperatures to cool down. That is why the legislature deemed the time fixed for hearing petitions reasonable and proposed that courts hearing petitions must suspend all other work to hear petitions. Any advocate in the firm of advocates should have pursued the petition.

As pointed out by Ms. Aketch the person presenting this application is not Mr. Owor but Mr. Ntende. This ought to have been done earlier in case one of the advocates was indisposed.

Regarding Article 126(2) (e) of the Constitution I agree with the submission by Mr. Kabibi that this article is not intended to fraught court procedure and suit personal convenience of litigants. In fact I see no technicality in the circumstances of this case. The law is straight forward regarding of this nature.

Mr. Ntende learned counsel for the applicant admitted that the firm was negligent and this should not be visited on the litigant. The accepted principle is that a lawyer's negligence should not be visited on a litigant but in my view this was not case of negligence. As submitted by Ms. Kabibi all lawyers who handled the documentation id vigilant and alert. The applicants were merely dilatory and complacent in pursuing the hearing of the petition. The principle that a lawyer's negligence cannot be visited on a litigant does not apply to this case.

The applicant contends that his petition has chances of success. Whereas chances of success of a pending matter succeeding can constitute a special circumstance, this must be demonstrated by the applicant. This has not been done by the applicant. That notwithstanding, it is the likelihood of the petition succeeding that should have propelled the applicant to extra vigilant than he was.

In the final result, I have not found any special circumstances to persuade me grant this application. The application is dismissed with costs.

Musota Stephen

JUDGE

15.6.2010

15.6.2010

Applicant in court

Aketch Robinah for 1st Respondent (absent)

Okuku on brief for Ntende for Applicant.

Wanale Interpreter.

Aketch

For Ruling.