THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI

MISCELLANEOUS APPLICATION NO. HCT-12-CV-MA-0122 OF 2014

(ARISING FROM MISCELLANEOUS APPLICATION NO. 0012/2013; ELECTION PETITION NO. 09/2011)

ELECTORAL COMMISSION :::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

BAMWESIGYE WELLEN :::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE BYABAKAMA MUGENYI SIMON

RULING

The application is brought under section 33 of the judicature act, order 44 rules 2, 3 & 4 of the civil procedure rules (CPR) seeking the orders that:-

1. Leave to appeal be granted.

2. Costs of this application be in the cause.

The grounds briefly are that:-

1. The respondent filed Misc. Application No. 0012 of 2013 arising out of Election Petition No. 0009 of 2011 against the applicant.

2. The court on 7th October 2014 delivered a ruling in which the applicant was found guilty of contempt and condemned to costs of the application.

3. The applicant being aggrieved and dissatisfied with the ruling, findings and orders of the High Court intends to appeal against the entire ruling of the court.

4. That the orders sought to be appealed against are not appealable of right and the applicant will be greatly prejudiced if leave to appeal is not granted.

5. The intended appeal involves primafacie questions of fact and law that merit judicial consideration by the appellate court.

The application is supported by the affidavit of KayondoAbubaker, a Legal Officer of the applicant. The affidavit in reply was deposed by the respondent while the said Kayondo affirmed an affidavit in rejoinder.

The background facts briefly are that, this court, in Election Petition No. 0009/2011, nullified the election of Samuel Nirere as Chairman LCIII Rutete Sub-county, Kibaale District, and ordered, inter alia, the Electoral Commission to conduct fresh elections for the said post. The orders were issued by Hon. Justice Kwesiga on 16-11-2011.

On 20-2-2013 the applicant herein filed Misc. Application No. 0012/2013 against the respondent, Attorney General, Kibaale District Local Government and Nirere Samuel, for orders, inter alia, that the respondents and their officials show cause why they should not be committed to Civil Prison for contempt of court orders issued in Election Petition No. 009/2011. This was prompted by the failure of the respondent herein to conduct fresh elections as ordered by court.

In his ruling delivered by the Assistant Registrar on 7-10-2014, Hon Justice Ochan found the four respondents mentioned in the preceding paragraph were jointly guilty of contempt of court and required the contemnors to purge themselves of their contempt of court order by complying with the said orders. The respondents were specifically ordered to comply with the orders issued by Kwesiga J in the following terms:

i. 4th respondent, Samuel Nirere, vacates office of Chairman LCIII Rutete sub-county within 7 days from today's date.

ii. The 1st& 2nd respondents (Attorney General &Kibaale District Local Council respectively), specifically the CAO Kibaale District to ensure that the 4th respondent vacates office as ordered within the time period laid in paragraph (i) above.

iii. The 3rd respondent (Electoral Commission) complies with court orders as per annexture "C".

Following the said ruling and orders of this court, the applicant filed the instant application on 21-10-2014.

The applicant was represented by Mr. AhamiduLugolobi while Dr. Akampumuza James appeared for the respondent.

At the hearing, counsel for the respondent raised two preliminary points of law.

The first point is to the effect that the application is barred by law and therefore incurably defective, incompetent and an abuse of court process. Counsel argued that this being an election related application it ought to have been brought under the relevant electoral laws, viz s.172 of the Local Government Act that provides for the applicability of the Presidential Elections Act & Parliamentary Elections Act to elections of local councils, with such modifications as deemed necessary by the Electoral Commission. Counsel pointed out that under the Parliamentary Elections (Election Petitions) Rules, the instant application ought to have been filed within 7 days, which is mandatory according to the rules. The application was filed out of time by 9 days. In Counsel's view, this application is another attempt by the applicant to purge itself of its contempt without complying with the orders of court, under the guise of filing for leave to appeal.

The second point of law is to the effect that, the matter is res judicata in that, all that Ochan J did was to order the respondents to comply with the orders of Kwesiga J in Election Petition No. 009/2011, which orders were not appealed against. Since the applicant and others never

complied with the orders in Election Petition No. 009/2011, all they are trying to do vide this application is re-enacting the wheel of circumventing the orders of Kwesiga J.

In reply, counsel for the applicant submitted that the application was filed in time, for applications for leave to appeal by law have to be filed within 14 days. He conceded they did not appeal the judgment and orders in Election Petition No.0009/2011 because the applicant was intent on implementing the said orders, but were rendered factually impossible by the absence of the Parish Tribunals whose membership is appointed by the Judiciary in accordance with section 25 of the Electoral Commission Act.

On the issue of res judicata, Counsel argued that the contention by counsel for the respondent is misconceived. The applicant's intended appeal is premised in the finding by Ochan J that it was in contempt of the orders issued by Kwesiga J, whereas compliance became impossible owing to the absence of Tribunals whose establishment is outside the applicant's mandate.

I have considered the grounds of this application, the affidavit for and against as well as the submissions of both counsel.

There is no doubt this application stems from Election Petition No. 0009/2011, which gave rise to Misc. Application No. 0012/2013 whose ruling is the subject of this application. Section 172 of the Local Governments Act, Cap. 243 provides:-

> "***For any issue not provided for under this part of the Act, the Presidential Elections Act & Parliamentary Elections Act in force shall apply to the elections of the local councils with such modifications as may be deemed necessary by the Electoral Commission***."

Election Petition No. 0009/2011 was brought under section 138 & 172 of the Local Governments Act, sections 93 & 101 (3) of the Parliamentary Elections Act, No. 17/2005 (PEA), and rule 4 (1) & (2) of the Parliamentary Elections (Election Petition) Rules, SI 141-2.

Part III of the Rules (SI 141-2) is concerned with appeals to the Court of Appeal from decisions of the High Court on determination of election petitions. Under rule 29, notice of appeal may be given either orally at the time judgment is given or in writing within seven days after the judgment of the High Court against which the appeal is being made.

To my understanding, the timeframe of 7 days in rule 29 is in respect of an appeal from the judgment of the High Court delivered in an election petition. This interpretation is buttressed by rule 3 (c) which defines petition as:-

> '***"Petition" means an election petition & includes the affidavit required by these rules to accompany the petition***.'

It is not in contention the decision in Election Petition No. 0009/2011 was not appealed against and the instant application does not seek leave to appeal against that decision. It is not disputed that Misc. Appl. No. 0012/2013 arose from the said Election Petition and that this application seeks leave to appeal against the ruling of Ochan J. The application No. 0012/2013 was brought by way of Judicial Review. In my considered view, the seven days timeline within which to file a notice of appeal under rule 29 (supra) is inapplicable to the decision of this court given in a judicial review, albeit its origin is an Election Petition. To my thinking, had the framers of the Rules under SI 142-2 intended to extend the rules strictly to cover all matters/causes arising out of or incidental to election petitions they would have expressly said so.

Having stated as above, it is my considered view, the applicable law is rule 40 of the Judicature (Court of Appeal) Rules, SI 13 – 10, which provides, inter alia, that a formal application for leave to appeal by notice of motion may be lodged in the High Court within 14 days after the decision. Further, orders issued in Judicial Review proceedings are not appealable as of right under O.44 r. 1 of the CPR. The intending appellant is therefore required to first obtain leave of court as per O.44 r.2. The orders in Misc. Application No. 0012/2013 having been issued on 7-10-2014, and, the instant application was filed on 21-10-2014, it is evident the same was filed within the stipulated 14 days.

I accordingly overrule the first preliminary objection that the application is time-barred.

The second ground of objection is that the matter is res judicata. Elaborating on this point, Counsel for the respondent strongly submitted that since the applicant and other respondents in Election Petition No. 0009/2011 did not appeal the orders of Kwesiga J or comply with the same and Ochan J found them in contempt thereby ordering them to comply with the same in order to purge themselves, the matter was therefore res judicata. In counsel's view the instant application serves no purpose. Counsel further pointed out, the issues raised in the applicant's affidavit evidence were considered before Ochan J who rejected them in his ruling.

From my analysis of the pleadings in this application and Misc. Appl. No. 0012/2013, all the applicant is saying, to put it rather plainly is that; look, we did take steps to implement the orders of Kwesiga J but hit a snag owing to the absence of Parish Tribunals which are supposed to be put in place by the Judiciary in accordance with section 25 of the Electoral Commission Act. The applicant's contention is that it was improper to find them guilty of contempt whereas they raised a defence of impossibility to comply owing to inaction by other stakeholders when they appeared before Ochan J.

I have studied the pleadings in Misc. Appl. No. 0012/2013 where the Electoral Commission was the 3rd respondent. The affidavit in reply on its behalf was deposed by Richard BaaboKamugisha. Paragraph 7 of the said affidavit stated:-

> "***7. That in further execution of its constitutional mandate and in a bid to comply with court orders issued generally, the 3rd respondent wrote a letter to the Chief Registrar, Courts of Judicature dated 10th May 2012 requesting for the arrangement and appointment of Parish Tribunals for purposes of the display exercise in accordance with the law, a copy hereof is attached & marked 'B'.***"

The said annexture 'B' is a letter from the Secretary, Electoral Commission, addressed to the Chief Registrar, informing him the Commission had finalized the programme for elections and by-elections at various levels of Local Government in 97 districts which arose as a result of, inter alia, court order. It went on to say:-

"***This is, therefore, to inform and request you to arrange for the appointment of the Parish Tribunals for purposes of the Display Exercise, in accordance with section 25(5) of the Electoral Commission Act, Cap. 140 (as amended).***

A copy of the Programme and the Districts affected is herewith attached."

Annexture'C' to Kamugisha's affidavit is the response by the Secretary to the Judiciary, dated 30-6-2012, stating:-

"…….. We appreciate the election and by-elections have to be held but it is not possible to do it immediately as this activity was not included in our budget. This activity requires approximately 200 million which is not part of our budget. I therefore wish these elections be extended as we seek for funds from Ministry of Finance, Planning & Economic Development."

Another correspondence from the Electoral Commission to the Secretary to the Judiciary (annex. D), dated 29th October 2012, stated:-

"***As you may recall, the commission postponed the electoral programme because the said Tribunal members were not in place following a response from your institution that there were no funds to effect the payments.***

Elections of the above mentioned local government levels are long overdue and there is an outcry from the public to have the elective positions filled.

The purpose of this letter, therefore, is to request that the said appointments be made in accordance with section 25(5) of the Electoral Commission Act, Cap. 140. The appointment of the Parish Tribunals will enable the Commission to conclude the pending Local Government activities."

The Commission made another communication on the matter (annex. D3), dated 21-3-2013, addressed to the Chief Justice, stating:-

"***This is to further draw your attention to the need to have in place tribunal members for the purpose of elections/by-elections.***

You will recall that the Commission postponed the conduct of the Local Government Councils elections/by-elections due to the non-compliance with section 25(5) (5a) of the Electoral Commission Act Cap. 140.

The Commission will, therefore, be grateful and as a reminder if Tribunals are constituted by the Judiciary before the closure ofFinancial Year 2012/2013 to enable it conclude the conduct of the above mentioned elections/by-elections."

The response by the Chief Justice (annex D4), dated 16-7-2012, stated:-

"***The position regarding the inability of the Judiciary to conduct the exercise of appointing Tribunal Members required to handle objections arising out of the display exercise as provided by the law is still the same as communicated by the Secretary to the Judiciary to the Secretary Electoral Commission in her letter dated 21-6-2012. The reason is that the money to facilitate the exercise was not budgeted for and the Secretary to the Treasury has been unable to find additional funds for Judiciary to undertake the exercise***."

In highlighting the foregoing, court is not making an attempt to review the evidence in Misc. Appl. No. 0012/2013. The purpose is to determine whether it is arguable the circumstances did not merit the finding the applicant was guilty of contempt of court order to conduct fresh elections.

The principle upon which leave to appeal can be granted was spelt out in the case of ***SANGO BAY ESTATES LTD & OTHERS VERSUS DRESDNER BANK AG (1971) E.A 17***, where SPRY V.P stated:-

"***As I understand it, leave to appeal from an order in Civil Proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial considerations, but where as in the present***

> ***case, the order from which it is sought to appeal was made in the exercise of a judicial discretion, a rather stronger case will have to be made out***."

The Supreme Court of Uganda, in the case of ***G.M COMBINED (U) LTD VERSUS A.K DETERGENTS (U) LTD, CIVIL APPEAL NO. 23 OF 1994,*** alluded to this principle and it was followed by the Court of Appeal in ***DEGEYA TRADING STORES (U) LTD VERSUS UGANDA REVENUE AUTHORITY, CIVIL APPLICATION NO. 16 OF 1996***, where it was stated:-

> "***An applicant seeking leave to appeal must show either that his intended appeal has reasonable chance of success or that he has arguable grounds of appeal and has not been guilty of dilatory conduct***."

In the present case, there appears to be a strong point requiring serious judicial consideration with regard to the question whether, in view of the concerted efforts by the Electoral Commission in moving the Judiciary to appoint members of the Parish Tribunals as required by the Law, so that it (Electoral Commission) conducts by-elections as, inter alia, ordered by court, and, the Judiciary having expressed its inability to do so, the Electoral Commission was in contempt when it did not carry out the fresh elections for the post of Chairperson LCIII Rutete Sub-county.

It is noteworthy, as seen from the annextures reproduced above, that the applicant took steps to comply with the court orders in Election Petition No.009/2011 as far back as May 2012, long before Misc. Appl. No. 0012/2013 was filed (on 20-2-2013).

Dr. Akampumuza further argued that the applicant is raising the same defence of inability to hold the by-elections which was dealt with and rejected by the court. Granted, the question remains whether by requiring the appointment of Tribunals before it could conduct the by-elections, this was a deliberate ploy by the Electoral Commission to disregard a court order.

The Court of Appeal, in ***HOUSING FINANCE BANK LTD & ANOTHER VERSUS EDWARD MUSISI, MISC. APPL. NO. 158/2010*** stated:-

> "***We hasten to add that it is the responsibility and duty of the party concerned, in case that party for some genuine reason, finds compliance with the court order not possible, to appropriately move the court issuing the order and bring to the attention of the court reasons for non-compliance. This is to ensure that the court issuing the order not only must not hold the one in contempt, but must not, whatever the circumstances, appear to be held in contempt by any litigant.***
>
> ***Otherwise to disobey an order of court, or offer no explanation for non-compliance to the issuing court, at any party's choice or whims, on the basis that such an order is null or irregular, or is not acceptable or is not pleasant to the party concerned, is to commit contempt of court****……."*

The question in this case is, by tabling the correspondences between itself and the Judiciary before the court in Misc. Appl. No. 0012/2013; whether the Electoral Commission brought to the attention of court the reasons for non-compliance and whether or not the absence of the Tribunals constituted a good reason. All these are matters that would be resolved in the intended appeal.

On the whole, taking into account the circumstances of this case, I dismiss the preliminary objections and do find there are arguable grounds of the intended appeal meriting granting this application. The same is accordingly allowed. Costs to abide the intended appeal.

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BYABAKAMA MUGENYI SIMON
JUDGE
8-1-2016