THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

CONSTITUTIONAL PETITION NO. 8/98

CORAM: HON. MR. JUSTICE S.T. MANYINDO, DCJ;
HON. MR. JUSTICE C.M. KATO, J.A;
HON. MR. JUSTICE G.M. OKELLO, J.A;
HON. LADY JUSTICE A.E. MPAGI-BAHIGEINE,J.A. &
HON. MR. JUSTICE J.P. BERKO, J.A.

BESWERI LUBUYE KIBUKA.....PETITIONER

VERSUS

ELECTORAL COMMISSION & ANOTHER.....RESPONDENTS

JUDGMENT OF THE COURT: The reference arose from an Election Petition No. 12 of 1998 filed in the High Court on the 14/5/98 challenging the election of the 2nd respondent as the LC V Chairperson of Kalangala District.

The Kalangala District Council elections were held on the 19/4/98 in which the 2nd respondent was declared the winner by the First respondent, the Electoral Commission. Mr. Besweri Lubuye Kibuka, the petitioner, challenged the results of the election in an election petition filed in the High Court on the 14/5/1998. Answers to the petition were filed by the First and Second respondents on the 28th May 1998 and 8th June 1998 respectively. Instead of setting the petition down for hearing on or about the 22nd June, 1998, the petitioner, on the 29/6/1998, applied to the Court for leave to hear the petition during the High Court vacation that was to commence on July 15th 1998 and end on 15th August 1998. That application was heard on the 21/7/1998 and granted on the 4/8/1998. The petition was set down for hearing from day to day starting from the 10th August to the 14th August, excluding the 13th.

When the matter came up for hearing on the 10/8/1998, Mr. Serwanga, who held brief for Mr. Ojakol, counsel for the petitioner, applied for an adjournment on the ground that Mr. Ojakol had traveled outside the country. The Judge warned that unless the hearing commenced on the 12/8/1998 and finally determined on the 14/8/1998, then there would be no need to start it.

Mr. Serwanga informed the Judge that he could finish his side of the case within time. Thereupon counsel for the respondents informed the court that they had been served with affidavits by the petitioner the previous day and needed time to reply. Mr. Rwaganika, for the Second respondent, applied for an adjournment to the 14/8/1998. It was during the application for adjournment that counsel for the First respondent submitted that the hearing and final determination of the petition must be done within the time prescribed by S. 143(2) of the Local Government Act, namely, the latest the 14/8/1998.

The Judge felt that if the hearing and determination could not be completed on or before the 14/8/1998, then there would be the necessity for extension of time. He thought that on the authority of Makula International, Ltd. v His Eminence Cardinal Nsubuga & Another, (1982) HCB, the trial of the petition could not proceed beyond the 15th August 1998 as he had no residual or inherent jurisdiction to enlarge the time fixed by S. 143(2) of the Local Government Act.

Both the parties and the court were of the opinion that, to the extent that S. 143(2) limits the court's time within which a case should be heard and determined, it is inconsistent with the Constitution. Consequently the court made the instant reference to this court ***"for declaration under Art 137 of the Constitution as to whether or not, inter alia, S. 143(2) of the Local Government Act, 1997, is inconsistent with the Constitution of 1995".***

The arguments on each side are evenly balanced. The determination of the reference requires a consideration of the provisions of S. 143(2) & S. 173 of the Local Government Act and the ratio decidendi in *Makula International ltd. v His Eminence Cardinal Nsubuga and Another, Civil Appeal No. 4 of 1981.*

S. 139 of the Local Government Act gives power to an aggrieved candidate for Chairperson to petition the High Court for an order that a candidate elected as Chairperson of a Local Government Council was not validly elected. The trial of the petition is regulated by s. 143 of the Act. S. 143 (2) provides:

> ***"S. 143(2) The High Court or Chief Magistrate shall proceed to hear and determine the matter within three months after the day on which the petition was filed and may, for that purpose, suspend any other matter pending before court".***

It is common ground that the Section does not provide for an extension of time, if for some unexpected reason or eventuality the matter could not be determined within the three months period. There is therefore a lacuna.

In our view it was in order to cater for such possible unforeseen circumstances that Parliament enacted S. 173 which provides:

> ***" 173 for any issue not provided for under this part of the Act, Parliamentary Elections Law in force for the time being shall apply with such modifications as are deemed necessary."***

The part of the Act referred to by S. 173 is Part X. Both sections 143 and 173 fall under Part X of the Act. Therefore it can be relied upon to fill the gap in S. 143(2).

The Parliamentary Elections law in force are The Parliamentary Elections (Interim Provisions) Statute, 1996. (Statute No. 4). S. 121 of the Statute has given power to the Chief Justice to make rules as to the practice and procedure to be observed in respect of any jurisdiction which under the Statute is exercisable by the High Court concerning:

(a) the practice and procedure to be observed in the hearing of election petitions,

(b) the service of the petition on the respondent and

(c) priority to be given to the hearing of election petitions and other matters coming before the courts under the Statute.

In the exercise of those powers the Chief Justice made The Parliamentary Elections (Election Petitions) Rules, 1996. One of the Rules is rule 19 which provides:

> ***"19 The Court may of its own motion or on 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 the Rules for doing any act if, in the opinion of the court, there exist such special circumstances as make it expedient to do so".***

We would have thought that the learned trial Judge could have relied on this rule to extend time as it is part of the Parliamentary Election Law in force which, by S. 173 of the Local Government Act, could be applied to cover the lacuna in S. 143(2). The learned trial Judge felt he could not do so because of the authority in Makula International Ltd. (Supra).

It is therefore necessary to determine what Makula International Ltd. (supra) decided. The Supreme Court said:

> *"It is well established that a court has no residual or inherent jurisdiction to enlarge a period laid down by Statute".*

This holding has been interpreted by both the practitioners and the court to mean that where time is set by Statute, it cannot be extended by the court relying on rules of the court, but that where time is set by Rules of the court, it could be extended by using rules of the court. Accordingly it is relevant to find out if this interpretation is correct.

The Supreme Court relied on two cases in support of its proposition. The first case is *Osman v United India Insurance Co. Ltd. (1968) EA 102.* This was an appeal with leave of the High Court of Tanzania from a decision of a Judge of that court

allowing an application by the plaintiffs in a suit to substitute for the name of the defendant the name of the executor of his will. The application was made under Order 22 r 4 of the Civil Procedure Code 1966 of Tanganyika, sub-rule (3) reads:

> (3) *Where within the time limited by law no application is made under sub-rule (1), the suit shall abate against the deceased defendant".*

The application to make the executor a party to the suit was made four months and one week after the death of the deceased. The learned Judge held that the period of limitation applicable was that prescribed by art 177 of the Indian Limitation Act 1908, which he held to be ninety days, and although the application was, in his view, barred by limitation, the learned Judge nevertheless allowed it, because he considered that the interest of Justice, so required. Against that decision the executor appealed on the main ground that as the application was barred by limitation and as S. 5 of the Limitation Act, which empowers the court in certain circumstances to extend time, was not applicable to applications under Order 22 r 4, the Judge's decision was made without jurisdiction and should be set aside.

When the appeal came up for hearing, the respondent was allowed to cross-appeal against the Judges finding *"that the period of limitation applicable to applications under Order 22 r 4 is six months and not ninety days as held by the learned Judge".*

Allowing the appeal, Law J.A said: *"clearly if the period of limitation applicable to applications under Order 22 r 4 is ninety days, and S. 5 of the Limitation Act has not been made applicable to applications under that rule, then a court has no residual or inherent jurisdiction to extend this period beyond the period limited by law".* Before arriving at the above conclusion the learned Judge said: *"By S. 3 of the Indian Limitation Act 1908, as applied to Tanganyika, every application made after the period of limitation prescribed therefor shall be dismissed. This section is mandatory. By S. 5 of the Act an application to which the Section may be made applicable by any enactment or rule may be admitted after the period of limitation prescribed therefor, if the*

applicant satisfy the court that he had sufficient cause for not making the application within such period. It is common ground that S. 5 has not been made applicable to applications under Order 22 r 4 by any enactment or rule. The learned judge appreciated this, but appears nevertheless to have extended time in the purported exercise of general discretion under his inherent powers. In my opinion it was not open to him to do so".

It is clear from this case that a period of limitation laid down under Civil Procedure rule can be extended if a statutory provision that permits the courts to extend time is made applicable to it by any enactment or rule. What the court cannot do is to go outside the limits of the Act, and extend time "*in the purported exercise of a general discretion under his inherent powers".* In other words, it is the use of the residual or inherent power to extend or enlarge time, when there is no enactment or rule that permits it, that is not authorised.

The Second case is Pritan Kaur (administratrix of Bikar Singh (deceased) v Russel & Sons Ltd. [1973] 1 All ER. 617. The plaintiff's husband was killed at work on 5th September 1967. On 7th September 1970, the Plaintiff issued a writ against her husband's employers claiming damages for negligence and breach of statutory duty under the Fatal Accidents Acts of 1846 to 1959 and the Law Reform (Miscellaneous Provisions) Act 1934. It was impossible for the Plaintiff to issue her writ on 5th or 6th September, for the two days, being Saturday and Sunday, the courts offices were closed on those days. The defendants contended that the plaintiff's action was barred by S. 3 of the Fatal Accidents Act 1846, as amended, because the three year period expired on the 5th September, 1970 and therefore the writ was issued out of time.

We wish to emphasise that the period of limitation here is prescribed by the statutes. It is not prescribed by the rules of court. To resolve the situation Lord Denning MR looked at parallel fields of law to see the rule there. The nearest parallel he found was the case where time was prescribed by the rules of the court for doing any act. He found that the rule prescribed both in the county court and in the High Court was that if the time for doing the act expired on a Sunday or any other day on which the court's

office was closed, the act was done in time, if it was done on the next day on which the court office was open. He accordingly held that, *"When a time is prescribed by statute for doing any act, and that act can only be done, if the court office is open on the day when the time expires, then, if it turns out in any particular case that the day is a Sunday or other dies non, the time is extended until the next day on which the court office is open."*

In support of that conclusion, he relied on the principle enunciated by Eire C.J. in Hughes v Griffiths (1862) 13 CBMS 324 that *"Where an act is to be done by the court, and the court refuses to act on that day, the intendment of the law is that the party shall have until the earliest day on which the court will act".*

He therefore held that the plaintiff had until 17th September 1970 in which to issue the writ and as she issued it on that day, she was in time.

In this case the time was fixed by statutes, but the court used the county court rules and the High Court rules to extend the time.

In our view, the correct ***ratio decidendi*** of Makula International Ltd. is that if there is no Statutory provision or rule which gives the court discretion to extend or abridge the time set by Statute or rule, then the court has no residual or inherent jurisdiction to enlarge a period of time laid down by the Statute or rule. This interpretation is in consonant with the decisions in the two cases the Supreme Court relied upon.

The learned trial Judge, therefore, could have relied on rule 19 of the Parliamentary Elections (Election Petitions) Rules, which has been made applicable to S. 143(2), by S. 173 and extended the time beyond the 15/8/98, if he was unable to complete the petition within the ninety days period. If he had done that, he would not have acted contrary to the authority in Makula International Ltd as he would not have extended the time in the exercise of a general discretion under his residual or inherent powers, but in the exercise of the jurisdiction given to him by Section 173 of the Act.

Accordingly, we hold that the Judge had jurisdiction to enlarge the time laid down in S. 143(2). Indeed under the Parliamentary Election Statute the Court has discretion to extend period set for the hearing of Parliamentary Election Petitions. Therefore by so holding we make the law consistent in itself and we avoid confusion to practitioners. Consequently we hold that S. 143(2) is not inconsistent with any provision of the Constitution. The matter shall be sent back to the learned Judge to carry on.

Before we take leave of this case, we wish to comment on one matter that came to our notice. The reference was to the effect that "S. 143(2) of the Local Government, 1997, is inconsistent with the Constitution of 1995". We are not sure if the learned Judge had in mind that the Section is inconsistent with all the provisions of the Constitution of 1995. It would have been better if he had specified the particular provision or provisions of the Constitution the Section is said to be inconsistent with.

Dated at Kampala this 23rd day of December 1998.

S.T. Manyindo
Deputy Chief Justice.

C.M. Kato
Justice of Appeal.

G.M. Okello
Justice of Appeal.

A.E. Mpagi-Bahigeine
Justice of Appeal.

J.P. Berko
Justice of Appeal.