

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KANPALA
ELECTION PETITION APPEAL NO. 17 OF 1997

EDWARD K. WESONGA..... APPLICANT

VERSUS

1. THE INTERIM ELECTORAL COMMISSION)
2.THE RETURNING OFFICER MBALE).RESPONDENTS
3.HON.WANJUSI WASIEBA SILVESTER

CORAN: HON. MR. JUSTICE C.M. KATO, JA. HON. MR. JUSTICE G.M. OKELLO, JA.
HON. LADY JUSTICE A.E.MPAGI-BAHIGEINE, JA

RULING OF THE COURT:

This ruling arises out of a preliminary objection to Election Petition Appeal No. 17/1997 raised by Mr. Sam Serwanga, Senior State Attorney, appearing for the 1st and 2nd respondents, to the effect that the appeal is time-barred and should be dismissed.

It was filed on 21/4/1997, challenging High Court Orders (Kania J) which were passed on 23/9/1996 and 18/10/1996 at Mbale, in Election Petition No. 2 of 1996. It has had a protracted history of abortive hearing dates. When it eventually came up for hearing on 8/12/1999, Mr. Sam Serwanga pointed out that it was in contravention of Rule 34 of the Parliamentary Election (Election Petitions) Rules, 1996 — Statutory Instruments 1996

No. 27 which provides:-

“34 Unless the court extends the time on exceptional grounds, the hearing of an appeal shall be completed within thirty days from the lodging of the record of appeal .

Mr. Serwanga submitted that it was over two years since the filing of the appeal on 21/4/1997. Thirty days stipulated by the Rule expired on 20/5/1997. No exceptional circumstances were advanced to court. The appellant was simply never serious in prosecuting his appeal as is amplified by the numerous adjournments sought at his instance. He prayed court to dismiss the appeal with costs.

Mr. Oulanyah assisted by Mr. Lubega-Matovu for the appellant countered that Rule 34 did not impose a duty on the appellant to present exceptional grounds to the court, especially where an appeal has been in progress and more so where the delay was caused by the respondent. He considered the fact that the appeal had been going on as sufficient ground for the Court to proceed to determine the appeal on merit. The delay had not been caused by the appellant but by the respondents entirely. He equally faulted the court which he said had to rule on the series of objections which were in his view quite baseless and caused the adjournments. He prayed court to overrule the objection. In the alternative but without prejudice, Mr. Oulanyah submitted that should the court hold that the appellant had a duty to move the court, he sought informally to apply to court to extend the time under Rule 42(3) (a) of the Rules of this Court and Rule 19 of the Parliamentary (Election Petitions) Rules 1996 — S. 1 No. 27 of 1996. He stated that Justice demanded that Election Petitions be determined on merit relying on *Besweri Lubuye Kibuka vs Electoral Commission and 2 others — Constitutional Petition No. 8/98*.

Mr. Lubega—Matovu, complementing Mr. Oulanyah’s arguments, submitted that the grounds advanced by the Court in its rulings on the objections did constitute exceptional grounds for extending time in themselves and that the respondents should be condemned in costs.

The chronology of events leading to Mr. Serwanga’s objection on 8/12/1999 is as follows:

On 23/9/1996 the learned trial judge allowed an application and extended the time for the 1, 2nd

and 3rd respondents to file their answers to the Petition, within three days of the date of the order. The hearing of the Petition was adjourned to 27/9/1996.

On 18/10/1996 the Judge on application struck out the Petition against the 3rd respondent Hon. Wanjusi Sylvester Wasieba with costs. This was on the ground that the Petition had been brought by the Petitioner who had not been validly nominated as a candidate, under Section 90(2) (a) of the Parliamentary (Interim Provisions) statute.

On 18/4/1997 the Petitioner filed a Notice of Appeal in the Court of Appeal. The memorandum of appeal was filed the following day, on 19/4/1997. In accordance with Rule 34, the appeal should have been completed within thirty days from 19/4/1997 i.e. on 21/5/1997. To date it has not been disposed of.

Quite strangely, the record indicates that the appeal first came up for hearing on 15/9/1997.

It is silent as to the reasons for the lapse of time between 19/4/1997 and 15/9/1997. Curiously enough on 15/9/1997, both the appellant and his counsel were absent from court, though duly served (the affidavit of service was on record). The petition was therefore dismissed but there was no order as to costs since the respondents were not in Court either. An application to have the appeal reinstated was lodged in court two days later, on 17/9/1997. The appeal was reinstated on 7/1/1998 vide Misc. Application No.

36/1997. Thereafter it seems to have gone into limbo with nobody taking any action either way, until it surfaced on 19/2/1999. On that day however, Mr. Serwanga had intimated to court vide his letter of 12/2/1999 that he would not be able to attend court. The appeal was adjourned to the next session, apparently on this ground. It is difficult to understand why an earlier date could not have been sought and given.

It came up again on 17/5/1999. This time Mr. Matsiko for the 3rd respondent was indisposed. The last adjournment was granted till 18/6/1999.

On 18/6/1999 Mr. Lubega-Matovu had on 11/6/1999 served Mr. Matsiko counsel for the 3' respondent with a supplementary record of Appeal and a list of his authorities under Rule 89(2) of the Rules of this Court. Mr. Serwanga had however not been served. Mr. Lubega-Matovu conceded the omission, sought an adjournment and undertook to serve Mr. Serwanga immediately after the adjournment. The session was nearing the end, on

20 22/6/1999; the appeal was adjourned till the next session.

By 23/9/1999 when the matter came up for hearing, Mr. Serwanga had not been served. Mr. Lubega-Matovu was at first adamant that service had been effected. After an argument he conceded it was an omission on his part not to file the affidavit of service. He contended this should not be visited on the appellant who had shown 30 interest in the appeal. He amusingly ventured that the appeal had only dragged for two years and not three as had been suggested by Mr. Serwanga. He attributed the delay on the endless objections raised by Mr. Serwanga. He sought a last chance. Mr. Matsiko for the 3rd respondent echoed Mr. Serwanga's arguments and called for a dismissal of the appeal. The court granted a last adjournment.

The matter came up on 8/12/1999 when Mr. Serwanga 40 raised the objection which is the subject of this ruling.

It is clear whilst this appeal remains undisposed of; the term for which the appellant seeks nullification of the 3rd respondent's election continues to run.

It is well settled that an appeal does not prejudice the operation of the decision appealed against, the general rule being that an appeal does not operate as a stay of proceedings unless the court so orders. Such an order is impractical in these proceedings. For this reason the practice prescribed by the Rules for expeditious disposal of electoral proceedings caters for this peculiar situation. Rule 13 provides that an election petition should be disposed of within thirty days from the date of commencement of the hearing, and requires the court to sit from day to day, for the purpose of determining the petition and to suspend all other matters pending before it.

Similarly Rule 34 dealing with electoral appeals stipulates for the appeal to be disposed of within thirty days from the lodging of the record of appeal unless the court extends the time on exceptional grounds. The compelling reason for prompt action in disposing of election contests to the end is that a decision may be reached before the term has wholly or in great part expired as pointed out above. This seems to be the spirit of the law. This is why electoral proceedings are special proceedings and summary in nature. The questions involved are political. Hence the

special rules of procedure to facilitate the expeditious disposal. This particular appeal has been exceptionally tardy. On 15.9.97 when it first came up for hearing the thirty days had already expired. In the absence of extension of time this court had no jurisdiction to deal with the matter. 40 In the alternative Mr. Oulanyah informally applied for extension of time under R. 42 (3) (a) of the Rules of this Court and Rule 19 of the Parliamentary (Election petitions) Rules 1996.

Rule 42(3) (a) permits informal applications by a party. Rule 19 empowers the Court to extend time where there are exceptional or special circumstances. In the instant case Mr. Oulanyah gave the rulings of this Court adjourning the appeal as exceptional circumstances justifying the extension. The Rulings given by the Court on 10 to the numerous objections, in our view, cannot constitute exceptional grounds envisaged by the Rule since the objections were made after expiry of the time limit. The omission by the Court to enforce compliance with Rule 34 was most unfortunate; we cannot now ignore it once the illegality has been drawn to our attention. The case of Besweri Lubuye Kibuka Vs. Electoral Commission 4c Another, Constitutional Petition No. 8/98 cited by Mr. Oulanyah in support of his

20 contention that we have the power to extend time, is not very helpful because in that case the learned trial judge was not sure that he had jurisdiction to enlarge the time fixed by S. 143(2) of the Local Government Act, which section he had thought to be inconsistent with the Constitution. In the matter before us, that is not the issue. We know we have the power to extend time once special circumstances are shown to exist.

We must say the appellant himself has equally exhibited extraordinary lack of diligence; he ought to have known that time was of essence, and should have sought earlier dates.

By allowing the appeal to go on, we would be rendering the rules to become a dead letter. For the reasons given the preliminary objection is upheld. The appeal is accordingly dismissed with costs to the respondents.

Dated at Kampala this 4th day of January 2000

C.M Kato

Justice of Appeal

G.M. Okello

Justice of Appeal.

Mpagi-Babigeine

Justice of Appeal.