**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT AMPALA**

**ELECTION PETITION APPEAL NO. 4 OF 2011**

*(Arising from the decision of Hon. Justice Joseph Murangira in Election Petition No.3 of 2011 at Arua High Court)*

**BETWEEN**

**OBIGA MARIO KANIA :::::::::::::::::::::::::::::::::::::::: APPELLANTS**

**V E R S U S**

**1. ELECTORAL COMMISSION]**
**2. WADRI KASSIANO EZATI ] :::::::::::::::: RESPONDENT**

**CORAM: HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, DCJ**
**HON. JUSTICE S.B.K. KAVUMA, JA**
**HON. JUSTICE A.S. NSHIMYE, JA**

**JUDGEMENT OF A.E.N. MPAGI BAHIGEINE, DCJ**

This appeal is from the decision of the High Court in Arua, dismissing Election Petition No. 3 of 2011, on 4th June 2011, for want of prosecution.

The learned trial judge issued a number of rulings over the course of a few weeks. Amongst these rulings, the learned judge denied a request by the appellant to have Dr. Engineer Badru Kiggundu, Chairman of the Electoral Commission, to be brought from Kampala to Arua for cross-examination. The judge also denied a request by the appellant for certain documents and leave to amend the petition. Among these requests, the appellant asked for a number of adjournments which were granted several times, although not always for the length of time requested. However, on 4th June 2011 both the appellant's counsel failed to show up for court and the judge dismissed the petition.

It is from these decisions that the appellant alleges that he failed to receive a fair hearing, the judge was biased against him and that the judge erred by dismissing his petition.

For this appeal, Mr. Henry Rwaganika appeared with Mr. Duncan Ondimu for the appellant while Mr. Caleb Alaka was for the 1st respondent.

The petition was fixed for hearing on 9th May 2011. On that date, the petition did not proceed because Dr. James Akampumuza, learned Counsel for the appellant was not in court. Dr. Akampumuza was represented by Mr. Lubega Abdullah from the same firm for purposes of seeking an adjournment which was granted by the court. The matter was thus postponed/adjourned until 16th May 2011 on which date Dr. Akampumuza informed court that he had filed Misc. Application No. 10 of 2011, asserting that the respondent had failed to serve answers to the petition.

The parties agreed that ***Miscellaneanous Application No. 10 of 2011*** must be disposed of before proceeding with the petition, and the judge issued an order that the respondent should serve the appellant within 24 hours. The judge also ordered that the petition would be heard on 20th May 2011.

When the matter came up for hearing on 20th May 2011, Dr. Akampumuza asked for an adjournment of seven days because he claimed, the 2nd respondent had failed to comply with the court order in ***Miscellaneous Application No. 10 of 2011*** and needed more time to respond to the issues raised by the 1st respondent's answer.

The adjournment was opposed by both opposing counsel and, the judge adjourned the hearing until the next day.

On 21st May 2011, Dr. Akampumuza was not in court. The appellant stated that he was ill and on bed rest. With the consent of both parties, the matter was adjourned until 23rd May 2011.

On 23rd May 2011 when the matter again came before the court, Dr. Akampumuza along with Mr. Tendo Simon Kabenge, both appellant's counsel, asked for an adjournment until 7th June 2011 to be able to respond to new affidavits.

Counsel for the respondents asked for a much shorter adjournments, and the judge adjourned the case until 1st June 2011.

On 1st June 2011, Dr. Akampumuza was not in court but Mr. Kabenge was, on his behalf. Mr. Kabenge made requests for cross-examinations, including of Dr. Badru Kiggundu; the production of various documents, and an amendment to the petition to *"demonstrate that several electoral offences and illegal practices were committed by the respondents and their agents."*

The respondents raised some objections, including the cross-examination of Dr. Kiggundu, and also asserted their wish and desire to cross-examine the witnesses for the appellant.

The appellant requested for two days to be able to provide the witnesses requested for cross-examination.

The judge adjourned his ruling on these matters on 2nd June 2011. The judge granted the request to cross-examine by both parties except that of Dr. Kiggundu noting that his cross-examination was unnecessary.

Cross-examinations were to begin that day starting with the appellant's witnesses.

The judge also denied the request to amend the petition observing that either this was an unnecessary clarification of a statutory cause of action or a new cause of action which must be formally applied for.

Regarding the request for various documents, the court denied the request on the ground that some had already been availed to the appellant and others constituted a "fishing expedition." However on 2nd June 2011, neither counsel for the appellant was present in court.

The appellant stated that Dr. Akampumuza was attending to a matter in a different court and Mr. Kabenge was attending to the health emergency of his wife in Kampala.

The appellant also requested for an adjournment until 6th June 2011 so that his counsel could be in attendance. The judge adjourned the case to 4th June 2011 and warned the appellant that this was the last adjournment. He advised that the appellant contact his attorneys to ensure that they are in court or to engage new attorneys based in Arua to prosecute the case.

When the case came up for hearing on 4th June 2011, neither counsel for the appellant showed up in court. The appellant again informed court that Dr. Akampumuza was attending to another hearing in Mbarara and Mr. Kabenge was still attending to the health emergency of his wife. He also indicated that because of the public holiday on 3rd June, he was unable to contact Dr. Akampumuza. When contacted, Mr. Kabenge stated that he was unable to travel. Additionally, the holiday prevented the engagement of new Advocates at such a short notice.

The appellant then asked the judge to step aside because of the bias he felt was exhibited against him during the proceedings.

Counsel for the 2nd respondent applied to have the case dismissed for lack of prosecution.

The appellant subsequently filed the appeal on the following grounds:

1. ***The learned trial judge erred in law and fact when he declined to allow an amendment to the petition.***

2. ***The learned trial judge erred in law and fact in so far as he denied a fair hearing to the petitioner.***

***3. The learned trial judge erred in law and fact when he dismissed the petition without hearing it.***

***4. The learned trial judge erred in law and in fact when he proceeded to dismiss the petition and did not hear when the petitioner was present in court in person.***

***5. The learned trial judge exhibited bias against the petitioner and refused to step down when he was asked to do so as stated grounds.***

***6. The learned trial judge erred in law and fact when he denied the petitioner's application to be availed original documents in possession of the 1st respondent that were used in the election and declaration of the 2nd respondent as winner.***

***7. The learned trial judge erred in law and fact when he refused to allow the petitioner's application to cross-examine the 1st respondent's witness who had deponed affidavits on record.***

***8. The learned trial judge erred in law and fact when he exhibited bias against the petitioner's Advocates and thus denied the petitioner legal representation.***

Grounds **3** and **4** were handled together, grounds ***1, 2, 6*** and ***7*** together too and so were grounds ***5*** and ***8.***

**Grounds 3 and 4:**

Concerning grounds ***3*** and ***4*** the allegation was that the trial judge erred by dismissing the petition for lack of prosecution.

It was argued for the appellant that the judge erred to rule that the appellant's counsel was perpetually raising flimsy excuses for not proceeding. All applications for adjournments were for sufficient reasons, and not an attempt to delay proceedings as the judge found.

Counsel submitted that is settled law that a lawyer's mistake should not be visited on his clients, citing ***Ggolooba Godfrey v Harriet Kizito, SCCA No. 7 of 2006*** where the court allowed the appeal against the dismissal of the suit for non-appearance at the hearing.

While conceding that dismissing a matter was discretionary, he also referred to ***Yahaya Kariisa v Attorney General, SCCA No. 7 of 1994*** where it was held:

> ***"It is in the discretion of a trial court to allow or refuse an application for adjournment. It is settled law that the discretion must be exercised judiciously. The***

***appellate court would normally not interfere with the exercise of the discretion unless it has not been exercised judiciously."***

In this case the reasons given for seeking adjournments were found to be valid and the dismissal by the trial court was set aside.

Learned Counsel concluded that the appellant was being denied his right to be heard on merit. His right to a fair hearing is guaranteed under ***Article 44 of the Constitution.*** The learned judge had not exercised his discretion judiciously, he claimed.

He prayed court to set aside the dismissal and order that the petition be heard on merit.

On the other hand learned counsel for the respondents pointed out that there were numerous adjournments at the instance of the appellant coupled with the failure by the appellant to inform court of when he would be able to get lawyers to proceed with the petition.

Learned counsel singled out one instance when the learned judge had to contact the Registrar at Mbarara High Court to ascertain whether Dr. Akampumuza was indeed conducting an Election Petition there, only to be informed that there was no hearing in which Dr. Akampumuza was participating as claimed. The learned judge was right to contact Mbarara High Court. The petition was judiciously dismissed.

It is indisputable that dismissal of a case is discretionary, the question being whether the discretion was judiciously exercised.

As the record indicates multiple adjournments were granted in this case at the request of the Appellant. While some reason was always offered by the appellant or his counsel, the fact remains that adjournment after adjournment was requested on a matter that was statutorily required to be dealt with as quickly as possible. While it is correct that any petitioner before court has a right to be heard (***Article 28 of the Constitution***); that right must be balanced with free and fair elections. The voters have a right to know, in a reasonable amount of time, the winner of the election and to have confidence that any dispute will be resolved quickly so that their elected member may represent them in Parliament.

Another important aspect of the law is the expedient manner with which election petitions must be disposed of. Election Petitions take precedence over other matters before court. This is what the ***Parliamentary Elections Act*** is all about. ***Sections 13 of the Parliamentary Elections Act*** stipulates expeditious hearing with adjournments in exceptional cases. The trial court is to sit from day to day including holidays until the matter is disposed of.

Whereas other matters may take years to be resolved, election petitions are statutorily required to be dealt with as quickly and judiciously as possible. This therefore should be no surprise to the appellant or his counsel given the emphasis given to the need for quick and efficient disposal resolution as aforesaid.

In this case, the appellant had the opportunity to present his case but, for whatever reasons, chose to continually ask for more time. The needs of the voters must win out and grounds ***3*** and ***4*** must fail.

I turn to grounds ***1, 2, 6*** and ***7***

The issue here is whether the appellant received a fair hearing in light of the denial of the requests to amend the petition, cross-examine Dr. Eng. Badru Kiggundu, and be availed of the original copies of several documents.

Learned counsel for the appellant argued that all applications were made in accordance with the law. In addition counsel submitted that mistakes by the advocates should not be visited upon clients, citing ***Ggolooba Godfrey v Harriet Kizito (****supra)* ***Civil Appeal No. 7 of 2006,*** while conceding that the judge had the discretion to allow or deny applications before court. He noted, however that the discretion was not absolute, and referred to – ***Yahaya Kariisa v Attorney General and Anor;*** (supra). The judge peremptorily dismissed the petition without due regard to the appellant's interests and the voters.

He submitted that the appellant was denied his constitutionally guaranteed right to a fair hearing by the trial judge.

In response, learned counsel for the respondent argued that the judge correctly denied the request for original documents and cross-examination of the Chairman of the Electoral Commission because the requests were unnecessary given that the appellant had already received certified copies of all the documents and all the presiding officers could be easily cross-examined. As to the denial of the request to amend the petition, the respondent supported the judge's decision noting that the time for pleadings had closed given the expedient nature of election petitions disposal.

Given the facts of the case, the respondent stood by the rulings of the judge and argued that the appellant was given a fair hearing. He prayed court to allow grounds ***1, 2, 6*** and ***7***.

The right to a fair trial is guaranteed by ***Article 28 of the Constitution.*** Further, ***Article 44 of the Constitution*** makes that right non-derogable.

However, "the Constitution appears to only give the salient features of what constituted fair trial, i.e. it must be before 'an independent and impartial court or tribunal established by law. It does not define the term 'fair trial'" – ***Bakaluba Peter Mukasa vs Nambooze Betty Bakireke, Election Appeal No. 4 of 2009. Black's Law Dictionary*** defines a fair and impartial trial as, "A hearing by an impartial and disinterested tribunal; a proceeding which hears before it condemns, which proceeds upon injury and renders judgment only after trial, consideration of evidence and facts as a whole." Further ***Black's Dictionary*** goes on to elaborate on 'fair hearing' as, "one in which authority is fairly exercised: that is, consistent with the fundamental principles of justice embraced within the concept of due process of laws."

In order to determine whether a party received a fair hearing or not in that particular circumstances, the court must look to the statutes, case law, and regulations that govern the decisions the court made.

Fair hearing is a wide concept. In the instant case the denial of fair hearing is linked with the judge's denial of the several applications to amend the petition, cross-examine Dr. Kiggundu, and obtain the various original documents.

As the appellant conceded in his arguments, these are all decisions left to the discretion of the judge. Reviewing a judge's discretion is governed by well known principles.

> ***"A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."*** **Mbogo v Shah (1968) E.A. 93 at 94.**

With the above in mind I do consider that the judge was within his discretion on the decisions he made. The amendment to the petition was denied because of the necessity of dealing with election petition in an expedient manner, the failure to conform to correct procedure, and the statutory nature of the election petitions. In dealing with the denial of cross-examination and original documents, the trial judge explained the unnecessary nature of both applications given the numerous individuals available for cross-examination and so elicit the required information, coupled with the certified copies of documents required already availed to the appellant.

The appellant has failed to show that the trial judge abused his discretion and has not given any convincing reasons why, the court should believe him.

Under these circumstances, grounds ***1, 2, 6*** and ***7*** would also fail.

As regards Grounds ***5*** and ***8*** the issue is bias. It is alleged that the learned judge exhibited bias against the appellant in his handling of the case. Learned counsel for the appellant objected to the assertion by the judge that the appellant sought to blackmail the court, and allowed such statements from the respondent's counsel to that effect.

Further, learned counsel for the appellant objected to the decision of the judge to contact the Registrar at Mbarara to confirm the whereabouts of Dr. Akampumuza and to allow Dr. Akampumuza's conduct to be discussed in court while absent. These acts constituted evidence of bias, so argued learned counsel, citing ***Professor Isaac Newton Ojok v Uganda, Criminal Appeal No. 33 of 1991, 39 (1993) vi KALR. Xpp 11.***

For the respondents it was contended that the judge was correct in that election petitions are statutorily to be dealt with as expeditiously as possible, asserting that judicial bias is not determined merely by conjecture but the circumstances must clearly show real judicial bias. Considering that the judge granted all the prior adjournments at the notice of the appellant, the allegation of bias was unjustified.

Considering both counsel's arguments, I would point out that this court takes allegations of bias very seriously as it might render all proceedings null and void if proved. It affects the entire justice system if people start to lose "confidence in the judicial system, in the officers of the court who decide cases." – ***Professor Isaac Newton Ojok*** (supra).

There are two tests that have been applied in the part, to determine whether there has been bias:

a) the oldest test is whether there is a real likelihood of bias, which is accomplished by *"ascertaining whether the judicial officer laboured under an interest, pecuniary, proprietary or of kindred."*

*b)* The other modern test looks at "*the expectations of reasonable right-minded people."* In applying this second test:

> *"The court does not look at the Justice himself/herself or at the mind of the Chairman of the tribunal or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. <u>The court looks at the impression, which would be given to other people.</u> Even if he was as impartial as could be, nevertheless if fair minded persons would think that, in the circumstances, there was a real likelihood of bias, then he should not sit, and if he does sit, his decision cannot stand. <u>Nevertheless, there must appear to be real likelihood of bias.</u> Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the Justice … would*

*or did favour one side unfairly at the expense of the other."* ***Ex parte Barusley and District Licensed Valuers Association (1960)2 Q B D 169, Devlin J. as*** cited by ***Oder JSC (RIP) in G.M. Combined (U) Ltd v A.K. Detergent Ltd & 4 Others, Civil Appeal No. 7 of 1998."***

Applying either of the above common tests, to determine bias, the learned judge did in fact grant many of the requests of the appellant and his counsel. The judge granted all of the cross-examinations requests save one, the prayers in ***Miscellaneous Application No. 10 of 2011,*** and most of the adjournments. On perusal of the record, a reasonable person would not find any appearance of bias. I am of the view that the judge was as patient as any judge would and for a long time. He was only moving the process of justice forward as mandated by law. Although the judge responded to the accusation of bias from the appellant with strong words, this cannot be taken as evidence of bias but rather evidence of the flippant or discourteous nature with which the appellant leveled such a charge, against the judge.

Finally no reason was given as to why the judge would be biased in the case, let alone any evidence of actual bias.

Grounds ***5*** and ***8*** are consequently dismissed.

Consequently I would dismiss the appeal with costs to the respondent.

Since my Lords S.B.K. Kavuma and A.S. Nshimye, JJA both agree, the appeal stands dismissed as above stated.

Dated this …**24th** … day of ……**August** …… **2012.**

A.E.N. Mpagi Bahigeine
**DEPUTY CHIEF JUSTICE**