THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT NAKAWA

ELECTION PETITION NO 7 OF 2006

(ARISING FROM KAMPALA HCT E.P. NO. 19 OF 2006)

KAKANDE KENNETH PAUL…….....…….PETITIONER

VERSUS

1. RUHINDI FRED
2. ELECTRORAL PETITION ..... RESPONDENTS

BEFORE: HON. MR. JUSTICE ELDAD MWANGUSYA:

RULING:

This ruling arises out of an oral application by Mr. Katumba, counsel for the petitioner arising out of the ruling of this court to exclude affidavits served by the petitioner outside the time prescribed by this court. According to him the ruling raises a novel point of Law that requires interpretation by the court of Appeal. He also stated that the petitioner wished to appeal the ruling so that the court of appeal determines as to whether or not this Honourable court was justified to reject an extension of time of service in view of the fact that the delay to serve was only one day.

Mr. Kandebe for the 1st respondent and Mr. Okello Oryem for the 2nd respondent opposed the application to grant the petitioner leave to appeal against the ruling of this court. The main thrust of their submission was that by nature of Election Petition trials which have limits this court should not allow the petitioner to appeal against the ruling because it will bog down the trial.

In the first place there is no point of Law raised by the ruling that requires interpretation by the court of appeal. All the ruling does is exclude the evidence that was not served within the time prescribed by this court which is within the discretion of this court to do.

Secondly and more importantly there is nothing in the ruling that warrants an appeal during the hearing of this petition. What Mr. Katumba refers to as novel point of Law can be interpreted

even after the conclusion of the trial of this petition? This position is against the background that S.63 (a) of the Parliamentary Elections Act enjoins this court to determine an election before it within six months after the petition is lodged in that court. This petition was lodged on 26/4/2006, we are already four months behind schedule and yet the petitioner does not seem to be in a hurry to have his petition heard as expeditiously as the requirement of S.63 of the Parliamentary Elections Act demands.

In the circumstances the petitioner's application for leave to appeal the ruling of this court excluding affidavits served out of time is rejected. The costs of this ruling will abide the outcome of this petition.

Eldad Mwangusya
JUDGE
5/9/2006

5/9/2006 at 12.15 p.m.
All parties and counsels as before.

Court:
Ruling delivered in open court.

Eldad Mwangusya
JUDGE
5/9/2006

Mr. Katumba:
My client has instructed me to inform this Hon. Court that he is not satisfied with the manner this court is handling this petition. My instructions are that this court has shown bias in the way it has been handling this matter. The petitioner instructed me that when court convened on 31/7/2006 your Lordship told the petitioner that he is a young man and that he should want for the next election. The biasness has been manifested throughout the hearing of this petition and

his prayer is that His Lordship disqualifies himself from hearing of this petition and that the file be sent back to the registrar for re-allocation because he is not certain that at the end of the day justice will be done. That is all.

Mr. Okello Oryem:

I wish to register my utmost hear felt disappointment in this application. I wish to register my personal apology to the court. The reason is that these type of applications are becoming rampant. Bias does not carry the same meaning as losing on application or a case before a court in law. When a litigant accuses a court of Law of bias there must be clear and specific reasons demonstrating bias. Losing a case is only a consequence of the bias but losing a case on its own does not show bias.

On the reasons advanced by my colleague the first one is that the petitioner is not satisfied. The duty of court is not to satisfy a petition. The duty of court is to dispense justice according to fact and Law and not satisfy a litigant dissatisfaction arises from an error in law pr an error in fact. Even hen the solution lies in filing on appeal after the court has made its judgment.

The second reason is that bias has manifested itself throughout the hearing so far. That is no reason to impute bias. What has happened so far is that the petitioner won 2 applications. The first was on 24/7/2006 and then on 31/7/2006. The respondents lost those two applications. The respondents have won the last two. There are two points I wish to make. Winning and losing is not the basis for imputing bias. Secondly to accuse a court of Law of bias when there are no reasons to demonstrate so in my view amounts to blackmail because it will affect evaluation of the evidence. It will also affect impartiality. I invite court to come out strongly against this accusation and reject the application to step down.

Mr. Kandebe:

Associate myself with the views of Mr. Okello Oryem. I have something little to add. The principle is that there must be an underlying reason that would make the judge biased. In this case the petitioner has not shown that the judge is a friend or neighbour. There is nothing to show that there is any bias and the petitioner has not shown how it has manifested itself. The

basic reason seems to be that they are bent on delaying the trial. It is an attempt to blackmail the court.

As lawyers, we should advise our clients to retrain from making statements that alleged bias without substantiation. Courts are meant to decide cases based on the facts and the Law. It is not a must that one party wins a case.

This application should not be allowed to derail. No ground has been shown to support bias. I pray that the application be rejected and court proceeds to hear the case.

Mr. Katumba (in reply):

I wish to reply by stating that what I have stated are not my words. They are the petitioner's words. I am only communicating my clients sentiments.

Court:

It is now 1.00 p.m. Case adjourned to 6/9/2006 at 9.00 a.m. for a ruling as to whether or not the judge should disqualify himself from hearing this petition.

Eldad Mwangusya

JUDGE

6/9/2006

HE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT NAKAWA

ELECTION PETITION NO. 7 OF 2006

(FROM KAMPALA HCT E.P. NO. 19 OF 2006)

KAKANDE KENNETH PAUL :::::::::::::::::::: PETITIONER

VERSUS

1. **RUHINDI FRED**
2. **ELECTRORAL PETITION ::::::::::::: RESPONDENTS**

BEFORE: HON. MR. JUSTICE ELDAD MWANGUSYA:

RULING:

This court has handled the hearing of this petition filed by, KAKANDE KENNETH PAUL against the election of RUHINDI FRED as member of Parliament for Nakawa Division constituency. The case was first called for mention on 24/7/2006 but nothing significant happened in terms of hearing of the petition because it was not ready. It was adjourned to 31/7/2006 for mention and during the proceedings on that day a schedule for the hearing of the case was set out. The schedule included a scheduling conference which was supposed to be held on 25/8/2006. The scheduling conference was not conducted on 25/8/2006 because one of the lawyers had lost a relative. The case was then adjourned to 4/9/2006 for the scheduling and commencement of hearing of the petition. On 4/9/2006 Mr. Katumba, counsel for the petitioner raised the issue of the affidavits that had been filed on the petition but had not been responded to by the respondents. This issue was tried. Counsel for the petitioner submitted on the issue and counsel respondents replied. The petitioner's counsel replied to the respondents' counsel's submissions. A ruling was given on the issue. Court found that the affidavits in question were not properly served because they were served outside the time prescribed by court. After the ruling of the court counsel for the petitioner made an oral application to be granted leave to appeal against the ruling. This matter was also tried and at the end of the trial court rejected the application. The reason for the rejection were again clearly stated in the ruling. It was at this juncture that counsel for the petitioner raised an objection to the manner in which the petition was being handled. The objection was that court had shown bias in the way it was handing the matter. The basis for this was that the trial judge had told the petitioner that he was a young man and that he should wait for the next election. That the bias had been manifested throughout the

hearing of the petition. He asked the trial judge to disqualify himself and send back the file to the registrar for re-allocation because at the end of the day he was not certain that justice will be done.

Both Mr. Okello Oryem and Mr. Kandeebe counsel for the 2nd and 1st respondents respectively made submissions on the issue of bias and stated that there was no reason for the trial judge to disqualify himself because the allegations of bias had not been substantiated.

After listening to the submissions of all counsel I have given a very serious thought to the matter. I have also read the dictum of the former chief justice of Uganda The Hon. S.W. Wambuzi in the G.M. Combine case C.A. No. 9 of 2000 cited in the case of MUSNGUZI G.J. V. AMAMA MBABAZI Election Petition No. 3 of 2001 which stated:-

> "To conclude I must state that there is a growing tendency in these courts to levy false accusations of bias either to avoid certain judicial officers handling their cases or to cause delay in this disposal of cases. There is a growing tendency to allege corruption or bias when parties lose their cases. No one in this country has a right to choose which judicial officer shall determine his or her case. All judicial officers take the judicial oath to administer justice to all manner of people without fear or favour, affection or ill will. Jusicial officers have a duty to prevent delays on flimsy or unsubstantiated grounds." (emphasis added).
>
> The principle is aptly stated in the above passage. It is simply that judicial officers should not succumb to whims of litigants that make allegations of bias every time they lose a case. This seems to be the case here because the question of bias was raised when two ruling went against the petitioner I have explained the circumstances under which the two rulings came about. They were tried like any other issue would be tried and reasons for the ruling clearly stated. So for someone to suggest that the manner of handling the petition has been biased is not being sincere. One may disagree with the reasons for the ruling but there was absolutely no bias in arriving at the decisions.

The petitioner referred to a remark made on 31/7/2006 to make his allegation that the court was biased. But the petitioner has forgotten that there was a lot of discussion about the case especially his failure to file affidavits in support of the petition which he had filed on 26/4/2006. The lengthy discussion culminated in his being allowed more time to file the affidavits and serve them on the respondents by 2/8/2006. it is his failure to serve the affidavits in the time set that is causing more arguments about the issue. The rejection of the affidavits was in accordance with the principle that orders of court should always be adhered to unless court decides otherwise. It is not because court is biased against the petition that any of the decisions so far made were made.

In the circumstances there is absolutely no reason for me to step down from the hearing of the case. I have tried the case in accordance with my judicial oath and I will continue to abide by that oath till conclusion of the trial. The application for me to step down from the trial of this petition is dismissed.

Eldad Mwangusya

JUDGE

6/9/2006

All parties as before except for addition of Ms. Ntamibirweki who is assisting Mr. Kandeebe. Ms. Nahihuka Mariam court clerk.

Court:

Ruling signed and read in open court.

Eldad Mwangusya

JUDGE

6/9/2006

Mr. Kasumba:

In view of the ruling that has just been delivered by this Honourable court I seek for an adjournment to enable me discuss the implications of the three rulings so far delivered by this court. These ruling's have a far reaching implication to the petition especially the fact that further affidavits in support of the petition has been rejected by this Honourable

court. The leaves only the petitioners affidavit in support of the petition on record. In view of these developments I wish to consult my client as to the next course of action that we may take either to continue with the petition or otherwise. There are sentimental and emotional feelings attached to election petitions. All these deciding to continue with the petition or otherwise. I pray for an adjournment to 8/9/2006 at 9.00 a.m. when I will infor court as to the next of action that the petitioner intends to take. I believe the time is reasonable in the circumstances.

Mr. Kandeebe:

I oppose the application for an adjournment only in respect of the time. To me this morning is enough for whatever consultation he wishes to make. I pray that court gives counsel till this afternoon to enable him make his consultation. The whole of next week I am engaged in other petitions and I will be so engaged till the end of the month. In case court is inclined to grant any adjournment I pray for costs of to day and tomorrow because they had already been set down for hearing of this case.

Mr. Okello Oryem:

I associate myself with submissions of Mr. Kandeebe. For the second respondent this petition is more serious that the petitioner appears to be taking it. The time table was set by court. The hearing of Electoral Petitions is very important. There are only three lawyers handling petitions at the Electoral Commission. If this matter was to be adjourned to Friday as proposed by my colleague I would not be able to appear because following the time table set by this court. I have fixed matters before other courts up to Thursday 28 and then again from 3rd October up to 15th that is the implication of an adjournment is to be granted till Friday.

On the implications raised by Mr. Katumba there are only two either the petition is prosecuted on the evidence available or it is withdrawn.

He does not need two days to consult on that. The problem is that the time prayed for by the petitioner is only available to him and not to all of us.

Finally I wish to state that emotions have no place in courts of Law.

In these circumstances I oppose the application for an adjournment till Friday. I have no objection for counsel's request for time to consult.

I also requests for costs of to day if court is inclined to adjourn the matter.

Mr. Katumba:

I concede that the time prayed is too long. I pray I should be allowed till tomorrow afternoon to report on results of my consultation with the petition.

Court:

In view of the petitioners request for time to consult with the petitioner on the next course of action to take considering the rulings of this court I will grant on adjournment to 7/9/2006 t 2.30 p.m. Depending on the out come of the consultation a scheduling conference will be held after counsel for the petitioner has reported outcome.

On costs I am the view that the petitioner might not have anticipated the developments in the trial of the case and he may not be faulted for this adjournment.

In the circumstances the costs of this adjournment will abide the out come of the petition.

Eldad Mwangusya

JUDGE

6/9/2006

7/9/2006

All parties as before.

Ms. Nakibuka Marriam court clerk.

Mr. Katumba:

When this matter was adjourned it was for purposes of enabling me consult my client and report to court as to the next course of action to take in view of the ruling that had been given by this Hon. Court.

Under sub (3) leave has to sought by way of an application which has been supported by an affidavit. I have discussed this issue with Mr. Kandeebe counsel for 1st respondent and Mr. for 1st respondent and Mr. Okello Oryem counsel for the 2nd respondent and they seem to have no objection to the withdrawal. The only issue remaining is that of costs

and Mr. Okello Oryem does not insist on the 2nd respondent being paid costs by the petitioner. Each party would meet its own costs. As far as Mr. Kandeebe for the respondent is concerned he informed me. I have discussed this matter with the petitioner and this petitioner has decided to withdraw this petition because he felt that after rejection of the petition he did not have sufficient evidence to proceed with the petition.

Rule 22 sub rules 1, 2 and 3 of the Parliamentary Elections (Election Petition Rules) govern withdrawal. Under sub (1) and (3) the petition can only be withdrawn with leave of court. That he would require costs to the tune of shs.10,000,000/=.

Mr. Okello Oryem:

I did give due consideration to the withdrawal of the petition without a protracted trial and each party meets its own costs.

The current prevailing transition is that the Electoral Commission cannot claim instruction fee. If I was to insist on costs it would amount to only shs.200,000= which is requisible. So I am not insisting on costs.

Mr. Kandeebe:

I have no objection to the withdrawal of the petition without a formal application. Costs follow the event. I informed my learned friend that if I was to ask for costs on scale it would be in the region of shs.30 – 50,000,000=. But I also put into consideration the fact that the case has not gone full trial and asked the petitioner to refund only shs.10,000,000/= that the 1st respondent deposited and I have already used.

Mr. Katumba:

I agree with my learned friend that costs follow the event and I appreciate his offer that we pay shs.10,000,000/= as full settlement of his costs. I pray that court leaves the issue of costs for me to discuss with Mr. Kandeebe.

Court:

Counsel for the petitioner has applied for leave of court to withdraw the petition and both counsel for both respondents have no objection.

Therefore under Rule 22(1) of Parliamentary Elections (Election Petition) Rules Leave is granted for withdrawal of the petition and it is withdrawn.

On costs between the petitioner and the 1st respondent both counsel will have further discussion on the amount and if no agreement is reached the petitioner will pay the 1st respondent the taxed costs of this withdrawal.

As between the petitioner and the 2nd respondent each party will meet its own costs.

Eldad Mwangusya

JUDGE

7/9/2006

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ELECTION PETITION NO. 19 OF 2006

KAKANDE KENNETH PAUL :::::::::::::::::::::::::: PETITIONER

VERSUS

3. **RUHINDI FRED**
4. **ELECTRORAL PETITION ::::::::::::: RESPONDENTS**

BEFORE: HON. MR. JUSTICE ELDAD MWANGUSYA:

RULING:

This petition was filed under the Parliamentary Election Act by KAKANDE KENNETH PAUL (hereinafter referred to as the 1st and 2nd respondents respectively.) It was in respect of the Parliamentary elections that were held throughout the contrary on 23rd February 2006. The petitioner and the respondent with others contested for the Nakawa Division Constituency Parliamentary seat and at the end of the election the 1st respondent was declared the winner. The result of the Election was published in the Uganda Gazzette of 27th March 2006. Following the publication of the results the petitioner contested the outcome of the election and filed this petition on 26/4/2006. in the petition he alleged that the 1st respondent had committed a number

of Electoral Offences and that the 2nd respondent failed to conduct the Election in accordance with the constitution and the Parliamentary Elections Act.

The 1st respondent filed his reply to the petition on 15th May 2006 while that of the 2nd respondent had been filed on 8th May 2006. They both denied any wrong doing and prayed this court to dismiss the petition filed by the petitioner.

The burden to prove the allegations in the petition lies on the petitioner and according to Rule 15(1) of the Parliamentary Election (Election Petitions) Rules all the evidence at the trial, in favour of or against the petition shall be by way of affidavits read in open court. This presupposes that by the time of the trial each party has adduced his or her evidence in form of affidavits and this evidence has been served on the other party

As already pointed out this petition was filed on 26/4/2006, an affidavit in support of the petition was filed together with the petition. It was incumbent upon the petitioner to adduce all the other evidence he intended to rely on during the trial and serve it on the respondents who in turn would adduce their evidence against the petition. As it was no other evidence was adduced by the petitioner to support the allegation as a consequence of which the respondents never filed any other evidence against the petition.

This petition was first called for mention on 24/7/2006. This was about three months from the time the petition was fled. The petitioner had had more than ample time to adduce his evidence supporting the petition. Instead Mr. Katumba Counsel for the petitioner informed court that he was not ready to proceed with the hearing of the petition because the petitioner was out of the country. Neither the 1st nor the 2nd respondents was ready for the hearing. The petition was set down for mention on 31/7/2006 and on this day all the parties and their counsel attended. The proceedings which are vital for this ruling are set out below:-

Court:

The case was for a pre conference and it is noted that the petitioner has not filed evidence in form of affidavits to support the petition. By consent of all parties:

1. The petitioner will be allowed till 1/8/2006 at 5.00 p.m. to file the affidavits in support of the petitioner and serve them on the respondents by 2/8/2006 at 5.00 p.m.
2. The respondents will file their affidavits in reply by 16/8/2006 at 5.00 p.m.
3. The scheduling conference shall be held on 25/8/2006 at 9.00 a.m.
4. The hearing of the petition shall be held on 4th to 7th September 2006.

The scheduling conference was not held on 25/8/2006 because counsel for the 1st respondent was bereaved. It was agreed that the scheduling conference would be held on 4/9/2006 and the actual hearing of the case would commence thereafter.

When the case was called up for hearing 4/9/2006 Mr. Katumba counsel for the respondent informed court that he had served the respondents with the affidavits in support of the petition but that they had not responded. He stated that since an Election is a matter of Public Interest the respondents should be given more time to respond to the petitioners evidence. Alternatively he prayed that if court was to find that there was no proper service the petitioner should be allowed another two or three days to effect service of the affidavits.

Both Mr. Kandeebe and Mr. Okello Oryem counsel for the 1st and 2nd respondents respectively opposed the application for the petitioner to be give more time to serve the respondents. They both denied having been served with the affidavits. They prayed that the affidavits be excluded and that the case proceeds with the evidence that is already on the court record.

Mr. Katumba's application raises two issues. The first is whether there was proper service of the affidavits. The second is the fate of the affidavits in case court finds that they were not properly served.

On the first issue it is my view that none compliance with a court order setting down the time when the affidavits should have been filed negates the service. It was clearly stated that the petitioner should file his affidavits on 1/8/2006 and serve by 2/8/2006 at 5.00 p.m. according to the affidavit of the process server he served the 1st respondent on 3/8/2006 at 1.16 p.m. and the 2nd respondent was served at 3.00 p.m. Both services were outside the time stipulated by court. To me it is immaterial that service was outside the stipulated time by a few hours or that in the

circumstances prevailing it was difficult to comply with the court order as the affidavit of the process server seems to suggest. In such circumstances the petitioner should have applied to court for expansion of the time instead of trying to 'force' service on the respondents. This should not have taken more a month to do and to condone such an inordinate delay would defeat the purpose of the parliamentary elections act that provides for expeditious trial of Electoral Petitions. The answer to the 1st issue is that the purported service of the affidavits on the two respondents was not proper and the fate of these affidavits is that they will not be admitted. They are excluded from the record of this petition.

I am aware that court can allow filing of affidavits every the trial of the case proceeds. (See MATSIKO WINIFRED KOMUHANGI V. BAHIHUGA J. WINNIE (Election/Petition Appeal No. 9 of 2002) but the bulk of the affidavits should be filed at the time of filing the petition and others would be additional to the bulk of the evidence.

Mr. Katumba also raised the public importance of an Election Petition. Unfortunately the petitioner has not demonstrated that he attaches such importance to the petition when he has failed to file affidavits in support of the petition for the last four months. I am not inclined to give the petitioner more time to adduce evidence.
In the circumstances the affidavits filed in this court on 1st and 2nd August 2006 will be excluded from the trial which will proceed with the evidence already filed.

Eldad Mwangusya
JUDGE
5/9/2006