THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISC. APPLICATION No. 133 of 2011

KAKUMBA ABDUL:: APPLICANT

- VERSUS -

1. KABAJO JAMES KYEWALABYE
2. ELECTORAL COMMISSION ::::::::::::::::::::::::::::: RESPONDENTS

BEFORE: HON. MR. JUSTICE ANDREW K. BASHAIJA

RULING:-

This application is brought under Rule 19 of the Parliamentary Elections (Interim Provisions Election Petition) Rules, Section 98 of the Civil Procedure Act, and Order 52 Rules 1, 2 and 3 of the Civil Procedure Rules. The applicant, Kakumba Abdul, seeks for orders that:

Time for filing an election petition against the Respondent be enlarged and/or extended.

i) Costs of the application be provided for.

The grounds of the application are set out in the Notice of Motion and in the supporting affidavit but mainly are that:

a) The applicant is a registered voter in Kiboga East Constituency.

b) The 1st Respondent was declared by the 2nd Respondent the winner of the Kiboga East Constituency Parliamentary Elections and gazetted on 21st February 2011.

c) The 1st Respondent was at the time of his election not qualified for election as a Member of Parliament.

d) The 1st Respondent uttered false academic documents for nomination and eventual election and/or impersonated a third party.

e) It has taken the applicant considerable time to investigate the academic qualification or want thereof, of the 1st Respondent from the NRM Secretariat, Uganda National Examinations Board, Zimbabwe, National Council for Higher Education and the 2nd Respondent.

f) Upon discovery of the fraud committed by the 1st Respondent, it is imperative that a petition be filed for cancellation of his election as Member of Parliament for Kiboga East Constituency.

g) There exist special circumstances that make it expedient to enlarge time within which to file an election petition against the Respondent.

By way of correction, it needs to be stated at the outset that the Parliamentary Elections (Interim Provisions Election Petition) Rules, under which this application is brought appear to be wrongly cited. The proper citation resides in Rule 1 of SI 141-2 which states as follows:

"These Rules may be cited as the, Parliamentary Elections (Election Petition) Rules."

The Rules were made pursuant to provisions of Section 93 of the Parliamentary Elections Act (supra) which empowers the Chief Justice in consultation with the Attorney General to make rules to govern the practice and procedure to be observed in respect of any jurisdiction which under the Act is exercisable by the High Court and appeals therefrom. Having stated that, however, it is now settled that the wrong citing of the Rules of procedure is not detrimental to the application if the relevant provisions of the Rule have been referred to and relied upon, and no injustice has been occasioned. See ***Bahemuka v. Anywar [1987] HCB 71; HMB Kayondo v. Attorney General [1988-1990] HCB 127 at page 128.*** In such a case, the improper citing of the enabling procedural law is not fatal and could be ignored or regarded as a curable defect under Article 126(2)(e) of the Constitution.

The Applicant's arguments.

Mr. Kawesa Abubaker, Learned Counsel for the Applicant, submitted that a petition should have been filed by 21/3/2011 as required by law under section 60(3) of the Parliamentary Elections Act, but that the Applicant did not do so because it took him considerable time to investigate the academic qualifications of the 1st Respondent from the NRM Secretariat, Uganda National Examinations Board (UNEB), Zimbabwe, the National Council for Higher Education (NCHE) and the 2nd Respondent. Further, that the election of the 1st Respondent is being challenged on his academic qualifications where the applicant is alleging fraud committed by the 1st Respondent, and that there are special circumstances which make it expedient for this court to allow the enlargement of time.

Counsel also submitted that period between March 2011, when the 1st Respondent was declared and gazetted the winner of the election and when this application was filed does not amount to unreasonable delay, and because the petition is based on inadequate academic qualifications it was not easy to establish this fact in a short time from the respective institutions where the officials were reluctant to assist the Applicant.

Mr. Kawesa Abubaker went on to state that the intended petition is based on the fact that the 1st Respondent is not qualified to be elected as Member of Parliament on grounds of grave discrepancies and inconsistencies in his academic documents which show that he is not the person who sat for A' Level in Zimbabwe. The names on the O' Level certificate (Annexture "C" to the affidavit of the Applicant) are ***KIWALABYE JAMES S.*** which differ from those which appear on the A' Level certificate (Annexture "D") as ***"JAMES CHARLES KIWALABYE"***. The name "***CHARLES"*** was adopted for A' Level certificate while initial "S" was dropped. Counsel was of the view that whereas a party is free to adopt any name he wishes, in the instant case adopting the name "Charles" and "dropping" initial "S" makes the document suspicious.

Counsel further submitted that the 1st Respondent never offered Physics and Chemistry subjects at O' Level, but that they appear on the A' Level certificate as subjects he sat. In addition, date of birth on the A' Level certificate is 1st June 1964, yet the birth certificate (Annexture "C2" to the affidavit in reply) shows that he was born on 1st August 1964. Counsel opined that if he attended the Zimbabwe College, he should have tendered the birth certificate and a proper date put on the academic document. Mr. Kawesa Abubaker was further of the view that although the 1st Respondent attempted to correct the mistake by a Statutory Declaration (Annexture "C1" to the affidavit in reply) on the face of it that is not enough because if it was a mistake, it should have been done by the academic authorities in Zimbabwe not by the 1st Respondent. Counsel added that the academic documents from Zimbabwe lack verification by NCHE as required under Section 4(6) of Parliamentary Elections Act for qualifications for election to Parliament, and as such, the suspected fraud on the academic documents coupled with absence of a certificate of from NCHE amount to special circumstances to enlarge time to file the petition since there was non-compliance with the law on part of the Respondent.

Counsel maintained that denying the application would mean the people of Kiboga East Constituency will be represented by a person who has no regard for the law and should not be condoned by court. He relied on ***Makula International Ltd Vs Cardinal Wamala Nsubuga***

[197] HCB 11 to back the proposition that once an illegality is brought to the attention of court it should not be perpetuated and, or condoned.

In addition, Mr. Kawesa submitted that all the other academic documents which the 1st Respondent attached to his affidavit are not relevant in as far as the law applicable only requires a minimum qualification of A' Level certificate, which is now deemed to be wanting, and further that the inconsistencies in the names of the 1st Respondent should be determined in the petition.

The 1st Respondent's arguments.

For his part Mr. Kaggwa David, counsel for the 1st Respondent, countered by arguing that that his client is duly qualified and was properly nominated and elected as Member of Parliament and his academic qualifications are Annextures "A1" to "A7" to the affidavit in reply. He denied having forged or uttered any false documents, and that since all the contents in his affidavit in reply were not rebutted by way of affidavit in rejoinder, they should be taken as the truth.

Counsel for the 1st Respondent was also of the view that the applicant did not make any inquiries as to the academic documents of the 1st Respondent because if he had, he would have found all the information explaining the variations in the names and there would be no need of this application. The Deed Poll made on 13/5/2010 and registered with the Registrar of Documents on 14/5/2010 and published in the New Vision news paper of 17/5/2010 clearly made right the names that appear on the academic documents and hence full names are "***JAMES CHARLES SYLIVESTER KYEWALABYE KABAJO".*** Counsel drew attention to provisions of Section 4(13) of the Parliamentary Elections Act and argued that since the 1st Respondent had obtained in Uganda qualifications higher than the minimum prescribed, there would be no need for the requirement of a certificate by NCHE, and that what court is concerned with at this stage is whether it should enlarge time, but that there are no special circumstances since the inquiries were not carried out as claimed. The alleged inquiry by phone calls to Zimbabwe should also be ignored as evidence from the Bar and in all, and the application lacks merit and should be dismissed with costs.

The 2nd Respondent's arguments.

Mr. Lugolobi Hamidu, counsel for the 2nd Respondent, associated himself with arguments advanced by the counsel for the 1st Respondent, and added that the variation in the 1st Respondent's names on certificates does not necessarily render them false, and that there is no

evidence that the contested documents are false. Counsel maintained that the variations were cured by the Deed Poll and the Statutory Declaration. He prayed for the dismissal of the application with costs since no special circumstances to enlarge time have been shown.

Consideration.

The main issue before court is one of enlargement of time within which to file a petition. The enlargement of time is governed by Rule 19(supra) which I have fully quoted below for ease of reference.

> ***"The court may <u>of its own motion or on application by any party to the proceedings</u>, and upon such terms as the justice of the case may require, enlarge or a bridge the time appointed by these Rules for doing any act if, in the opinion of the court, <u>there exists such special circumstances</u> as make it expedient to do so."*** (*Underlined for emphasis).*

The Rule unequivocally confers on court wide discretion to enlarge time appointed by the Rules, which is only limited by the words "special circumstances". The implications of the Rule have been considered in a number of cases. For instance in the case of ***Kwera Stella Ngirabakunzi v. Ntabgoba Jeninah, Parliamentary Elections Election App. No. 17/1996 (Arising from Election Petition No. 40 of 1996),*** the Court of Appeal considered provisions of Rule 19 of the Parliamentary Elections (Election Petition) Rules 1996 which were similar to the current SI 141-2 Rule 19. Manyindo DCJ held that the Rule gives court wider powers to extend the period provided special circumstances are shown. The Court of Appeal went on to hold that special circumstances vary from case to case, but must relate to the inability or failure to take the particular step within the prescribed time. It is trite law that the fact that the petition appears likely to succeed cannot alone amount to a special circumstances. The Court of Appeal then quoted with approval ***Shanti Vs Hindocha & Or's [1973] EA 207*** where it was held that –

> "***The position of an applicant for an extension of time is entirely different from that of an applicant for leave to appeal. He is concerned with showing sufficient reason*** *(read special circumstances)* ***why he should be given more time and the most persuasive reason that he can show is that the delay has not been caused or contributed to by dilatory conduct on his own part. But there are other reasons and these are all matters of degree."***

Similarly, in ***Sitenda Sebalu v. Sam Njuba & the Electoral Commission, Election Petition Appeal No. 26 of 2007*** the Supreme Court while considering similar provisions as Rule 19(supra) also took the occasion to observe that court has power under the said Rule to extend time within which to serve a notice set by Rule 6(1) of the same Rules which required service of such notice to be made within seven days after filing the petition. See also ***Mukasa Anthony Harris v. Dr. Bayiga Michael Philip Lulume, Election Petition Appeal No.18 of 2007(SC)***. Based on the position by the superior courts one can state with certainty that it is now settled law that the court is seized with wide powers under the Rules to extend time for doing an act beyond the time appointed by the Rules.

The next issue to establish is what amounts to special circumstances? In ***Kawesa Stella case*** (supra), the Court of Appeal gave guidance that words "special circumstances" have not been defined in the Rules, but are understood to mean an exceptional event or surroundings affecting a given situation or person. "Special circumstances" appear to be used in the same manner the words "sufficient cause" are used when applying for leave to extend time within which to appeal or file notices or take other action. For instance in ***National Pharmany Ltd Vs Kampala City Council [1977] HCB, 132,*** it was also held that the expression "sufficient cause" must relate to the inability or failure to take the particular steps in time although other considerations may be invoked. A similar stance was taken in ***Mugo & O'rs v. Wanjuri & Anor [1970] EA 481;*** and in ***Florence Nabatanzi v. Naome Binsobedde, SCC App. No. 61 of 1987,*** where it was held that sufficient cause depends on circumstances of each case and must relate to the inability or failure to take a particular step in time. Invariably, there appears to be no rule of the thumb or a universal rule of application in determining what amounts to special circumstances. Each case depends on its own set of facts.

It is my considered opinion that Rule 19(supra) on the "enlargement or abridgement of time" does not cover the situation posed by circumstances of the instant application or for the late filing of petitions. The opening sentence to Rule 19(supra) states as follows:-

> ***"The Court may of its own motion or on application by any party to the proceedings,….."*** *(Underlined for emphasis).*

Two aspects come to the fore regarding this Rule. The first one is that the court may "of its own motion" enlarge or abridge time. The second one is that "the party can apply" to enlarge or

abridge the time. In both instances, however, there must be “proceedings” on record as a condition precedent before the court can "of its own motion or on the application of the party to the proceedings" act to enlarge time. In case of a party applying for extension, he or she must also show that he or she is a party to the proceedings on record which predate the application. In effect, an application by a party seeking to extend time does not itself constitute the proceedings contemplated under Rule 19(supra). The Rule envisages proceedings to which the applicant is party; and arising out which the application is instituted to enlarge or abridge the time appointed by the Rules for doing any act.

Rule 19(supra) would certainly be redundant in respect to court "acting of its own motion" if it did not envisage the existence of proceedings on record prior to the application for enlargement of time. This is premised on the logic that court cannot “of its own motion” initiate a petition but can only move itself to act to enlarge time after the petition has been filed. The words “of its own motion” in Rule 19(supra) refer to instances where the court’s discretion is exercisable upon the proceedings prior to a subsequent application seeking to extend the time fixed by the Rules for doing any act. Therefore, “of its own motion” must be construed to mean that court’s discretion to enlarge time appointed by the Rules to do any act on the proceedings can only be based upon an existing petition. Again the logic here is that court’s discretion, however wide, cannot be exercised in a vacuum.

Similarly, the clear wording “...on application of a party to the proceedings” would, in my view, imply that only a party to the proceedings can bring an application under Rule 19 (supra). Thus, proceedings must exist to which the applicant in a subsequent application is party. Even though both the proceedings and the application are deemed to be “proceedings” in the general sense, Rule 19 (supra) makes a clear distinction in that court can "act of its own" or "on application by a party to the proceedings". The word "proceedings" as used in Rule 19 has a prefix "the" implying that the proceedings must necessarily predate the subsequent application for the enlargement of time.

It should be emphasized that Rule 19 is in reference to only those acts whose time is set in, and fixed by the Rules themselves. Where time appointed by the Rules for doing any act is of essence, Rule 19 acts as a "safety value" to provide for a way out of the strict time delimitations set by the Rules. In the ***Mukasa Anthony Harris v. Dr. Bayiga Michael Philip Lulume*** case (supra) the Supreme Court put to rest this issue and observed that Rule 19 has curative provisions where there is default in complying with any of the Rules after the petition is presented and or

during trial of the petition. Rule 19(supra) therefore, applies where the time fixed is fixed by the Rules, and would not apply to the time fixed by the Act under Section60 (3) of the Parliamentary Elections Act within which to file a petition.

Whereas the court may be seized with the discretion to enlarge or abridge time appointed by the Rules, the same does not appear to be the case with time laid down by the Act to initiate an action. In the instant application, the time within which to file a petition is fixed by the Act under Section 60(3) (supra) and not by the Rules. My understanding is that if there is no provision in the Act which gives court discretion to extend or abridge the time set by the Act, then court has no residual or inherent jurisdiction to enlarge a period of time laid down by the Act. In my view, the same would apply to the Rules if they do not confer on court discretion to enlarge time appointed for doing any act, then court cannot of its own enlarge the time. To my mind that is the *ratio decidendi* in ***Makula International Ltd v. His Eminence Cardinal Nsubuga & A'nor [1982] HCB 11 (CA)*** by which has also been cited by Counsel. In the result, the late filing of a petition does not fall within the ambit of Rule 19(supra). I would accordingly hold that failure to present a petition within the time set by the law under Section 60(3) of the Parliamentary Elections Act (supra) put the intended petition outside time, and the court has no residual or inherent jurisdiction to enlarge a period of time laid down the Act.

By way of a general observation, I would state that the whole essence of fixing time lines in the Rules and the main body of the Electoral Law was, *interalia*, to ensure that election disputes are resolved expeditiously and brought to a quick end - if not for their importance but also for the tension they tend to evoke in the public. The ends of justice demand that the public should not be kept in a perpetual state of tension imbued with electoral uncertainties. There are several instances in the Act which categorically demonstrate this legislative intention, and few pertinent ones would suffice and I have pointed them out below.

Section 60(3) of the Parliamentary Elections Act (supra) requires that an election petition shall be filed within thirty days after the day on which the results of the election is published in the gazette. Section 63 (2) (supra) requires that court shall suspend any other business before it so as to expeditiously hear and determine election petitions. Rule 13 (supra) follows up that court shall declare its findings not later than thirty days from the date it commenced hearing of the petition; and in order to achieve that shall sit from day-to-day.

Section 66(supra) also requires that an appeal arising out of an election petition shall be determined within six months from the date of filing the appeal. The Court of Appeal is also

required to suspend any other matter pending before it in order to determine the election petition appeals. Section 66(3) (supra) appoints the Court of Appeal the final appellate court in respect of election petitions. I am alive to ramifications of the possible inconsistencies which may arise from provisions of Article 2(2) of the Constitution and Section 66(3) (supra) with regard to a party's constitutional right of appeal up to the last appellate court in the land, given the pronouncements by the Supreme Court in the case of ***Baku Raphael Obudra and Obiga Kania v. Attorney general, Constitutional Appeal No.3 of 2003***. I am also mindful of the principle that constitutional interpretation and/or pronouncements by the Constitutional court become part of the Constitution, and therefore attains the constitutional supremacy in line with Article 2(1). This is, however, a different matter which raises different issues from the instant one. I would hasten to add that it is not the province of this court but the constitutional mandate of the Legislature to make laws. What the cited provisions of the Parliamentary Elections Act (supra) underscore, in my view, is the clear intention of the Legislature underpinned by clearly defined timelines for the expeditious filing and determination of election petitions. See also ***Serapio Rukundo v. Attorney General, Constitutional Case No.3 of 1997.***

Even under the Rules where court has discretion to enlarge time, it would also appear clearly that time was never intended to be inelastic given the import of Rule 19 (supra). Indeed time is clearly of essence even under the Rules, 5(1) (2) (4) (5); 8; 9(1) (5); 10 (3) (4), 11(1); and 13 (1) (2) which specifically fix the time for doing any act after the filing of the petition; and not before.

It is worth clarifying on Rule 5(1) of the Rules, which requires the Petitioner to present a petition at the office of the registrar within thirty days after the declaration of the results of the election. *(underlined for emphasis)*. It would appear that the thirty days in the Rules are not pursuant to the thirty days under Section 60(3) of the Act. The distinction lies in the deliberate choice of words used - "published" and "declared"- and the manner in which the "thirty days" period is provided for under the Act. Section 60(3) (supra) states:-

> ***"Every election petition shall be filed within thirty days after the day on which the results of the election is published by the commission in the Gazette."*** *(Underlined for emphasis).*

Rule 5(1) on the other hand, states:-

> ***"The presentation of the petition shall be made by the petitioner leaving it in person or through his or her advocate, if any, named at the foot of the petition, at the office of***

the registrar <u>within thirty days after the declaration of the results of the election."</u>
(Underlined for emphasis).

It is my considered opinion, that the two are treated differently given that the Act refers to thirty days after the "publication of the election results" in the gazette; while the Rules refer to thirty days after the "declaration of the results". The declaration of results is a process right from the Presiding Officer (see Section 50(supra)) to the Returning Officer (see Section 58(supra)) and finally to the Commission (see Section 59 (supra)). The period for the declaration of results at each stage is different from the other, and the Rules do not specify from which particular stage of declaration the thirty days begin to run. Even assuming the thirty days commence from the declaration by the Commission, still it would not clarify the issue, unless the date of declaration by the commission is read to mean the same as the date of publication in the gazette. On the other hand, thirty day after publication in the gazette under Section 60(3) (supra) is quite clear, and it is the period appointed by the Act – not the Rules - within which to file a petition. Therefore, I would consider that Rule 5(1) of the Rules does not refer to filing of petitions under Section 60(3) of the Act, but to Sections 50, 58 and 59 of the Act which refer to declaration of results, which has nothing to do with the time within which to present the petition. It could have as well been a case of poor draftsmanship to use the words "declaration" and "publication". Nonetheless, the intention is clear that the petition must be filed within the period of thirty days appointed under Section 60(3) of the Act, and not by the Rules. As already stated, the time set under Section 60(3) of the Act is not among those which the Rules confer discretion upon this court to enlarge. For this reason alone, the application would not succeed.

Besides the above, the Applicant needed to demonstrate “special circumstances” to warrant the exercise of the court's discretion. The fact that the petition appears likely to succeed if the application is allowed cannot alone amount to special circumstances. At best it can amount to whimsical conjecture, and court can envisage no situation when late filing of petitions will ever end if Rule 19 (supra) is to be had resorted to even for petitions still nascent in people’s contemplations. To enlarge time to allow late filing would, in my view, lead to absurdity and would defeat the intention of the legislature of fixing statutory timelines. The clear intention of the legislature in enacting provisions of Sections 60(3) and 63(2) (supra) was to limit the time within which to bring as well as complete the petition respectively. “Inability to take a particular step” acknowledges the fact of the existence of a process with steps which have a beginning and an end. The process is a progressive one and each step leads to another and moves successively

till the entire process is exhausted. It is within the process that a party's inability to take a particular step to the next may be excusable by enlargement of time within which to take it, but cannot mean extending time outside the process to take into account the particular steps not taken even before the process could be commenced. If that was to be the case, it would amount to giving effect to parties' contemplations and speculations of what might or might not be done. Even where a party subsequently realizes that it could have had a good case had it petitioned in time, it would alone not amount to special circumstances to merit extension under Rule 19 (supra).

In the application before court it was argued by Mr. Kawesa for the Applicant, that the Applicant needed time to carry out investigations into the academic qualifications of the Respondent hence the delay to file the petition in time, and according to him this amounted to "special circumstances". Mr. Kaggwa for the Respondent countered by arguing that the documents pertaining to qualifications were available and could be accessed easily from public offices, and that it would not require all the time to investigate.

I am of the opinion that in a situation where the application and the intended petition are based on "suspicion of fraud" in the academic papers of the Respondent, what is needed is for the Applicant simply to point out the fact of the suspected fraud in time for the attention of the relevant institutions and they would be well placed to conduct the investigations and take the necessary measures against the fraudster. The institution of the EC is legally and constitutionally mandated to do so. Advantage should have been taken of Article 61(f) of the Constitution which mandates the Electoral Commission "to hear and determine election complaints arising before and during polling", and section 15 (1) of the Electoral Commission Act (Cap. 140) which concerns the same issue. The alleged fraud falls within the complaints that the EC is mandated to entertain and the take the necessary action to correct the irregularity and any effects it may have caused. As matters stand now, it seems the Applicant suspected a fraud, and being alive to the statutory time limitations, he took off time to conduct investigations after his own style into the alleged fraud; and more than two months from the expiry of the time fixed for filing the petition he just came up only to apply for the enlargement of time to be allowed to determine whether or not he can prove his suspicions correct. In my view this would tantamount to fishing expedition because the Applicant had all the time and opportunity to get his grievance addressed but did not rise to the occasion. He is guilty of dilatory conduct and as such cannot seek to have time enlarged as it would fall nothing short of an abuse of process, which court is enjoined to curtail

under provisions of Section 98 of the Civil Procedure Act, and Section 17(2) of the Judicature Act (Cap. 13).

There is no doubt that the academic documents of the Respondent were at all material times at the disposal of all and sundry to access from the various public offices which are open to the public. The counsel for the Applicant himself conceded that much. It would not require over two months to investigate the alleged fraud, if it existed at all. The purported inquiry is, therefore, nothing but just a smoke-screen intended to cover up his dilatory conduct and failure to comply with the statutory requirement to file the petition within the prescribed time.

I am of the view that in substantive electoral matters, the fact of the grievance of a party is ordinarily rooted in the existence of the available evidence to support it. It cannot be that a party intrinsically gets aggrieved as a consequence of which he or she goes about in search for evidence to support or vindicate his or her grievance. To hold so would render the whole process ridiculous and rather futile. Similarly in the instant case, it should have been the evidence of the existence of the alleged fraud on the academic papers of the Respondent which should have precipitated the grievance of the Applicant, and not the reverse. In effect, the Applicant needed not to trouble with investigations because evidence of fraud would obviously be there.

Regarding Section 4(6) of the Parliamentary Elections Act (supra) as to the production of a certificate issued by NCHE to establish the A' level qualifications obtained outside Uganda, it is my view that this requirement would not apply to the Respondent in the instant case who, under Section 4(13) (supra) had obtained in Uganda qualifications higher than the minimum prescribed. The applicant does not seek to impeach the authenticity of Annextures “AI” and “A2” to the affidavit in reply, which are Masters Degrees of Business Administration and Computer Science respectively obtained from Makerere University, Kampala. His singular interest appears to be premised on the A 'Level qualification. I would, however, consider that the non-production of the NCHE certificate by the Respondent to verify his A' Level from Zimbabwe is adequately covered under Section 4(13) (supra). Therefore, the Applicant’s submission in that regard is in vain. On the whole, the application fails and is dismissed with costs.

ANDREW K. BASHAIJA

JUDGE

23/06/2011.

Ruling read in open court before the parties and their counsel.

Court Clerk: Mr. Masongole present.

ANDREW K. BASHAIJA

JUDGE

23/06/2011.