THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT MENGO

CORAM: Hon. Justice Tsekooko, single Judge of the Supreme Court.

CIVIL APPLICATION No. 5 OF 2008

BETWEEN

IDDI KISIKI LUBYAYI ::::::::::::::::::::::::::::: APPLICANT

AND

SSEWANKAMBO MUSA KAMULEGEYA :::::: RESPONDENT
[Application arising from decision of the Supreme Court dated 5th February, 2008 in Civil Application No. 26 of 2007]

RULING:

This is a ruling on objections raised by counsel for the respondent.
This matter has a chequered history. Let me produce first the orders for which the applicant, Idd Kisiki Lubyayi prayed, in the notice of motion. I shall then give its background before making an order I consider to be proper after consideration of counsel's arguments.

PRAYERS

In the notice of motion, the applicant sought for two main orders couched in these words–

(a) Time of the institution of the appeal arising out of ………………………. Election Petition Appeal No. 8 of 2006 be extended.

(b) The Notice of Appeal filed by the applicant arising out of Election Appeal No. 8 of 2006 (Idd Kisiki Lubyayi Versus Ssewankambo Musa Kamulegeya) struck out by this Honourable Court be validated/reinstated.

BACKGROUND

On 23rd February, 2006, Idd Kisiki Lubyayi, the applicant, together with one Kagimu Kiwanuka Maurice contested for the Parliamentary seat of Bukomansimbi Constituency and the former was declared the winner. The respondent in this application who was only a registered voter successfully petitioned the High Court against the election of the applicant. The High Court set aside the election. The applicant thereafter unsuccessfully appealed to the Court of Appeal against the decision of the High Court. On 22nd February, 2007, he insitituted a Notice of Appeal against the decision of the Court of Appeal. On the same day his counsel, Messrs Birungi & Co., Advocates, wrote to the Registrar of the Court of Appeal requesting for certified copies of the proceedings and the judgment of the Court of Appeal before he could institute the appeal.

Apparently, on 24th July, 2007, the Registrar of the Court of Appeal wrote to Messrs Birungi & Co. Advocates, advising that proceedings were ready. Indeed Annexture "D" to the Respondent's affidavit in reply shows that the Advocates received a copy of those proceedings and the judgment on the **1st August, 2007**. However, they did not institute the appeal during the rest of 2007. Because of the delay to file the appeal, counsel for the respondent filed Civil Application No. 26 of 2007 asking this Court to strike out the Notice of Appeal. That motion was fixed for hearing by the full court on 5th February, 2008. This appears to have prompted the applicant to take action. Before the hearing date, the applicant instituted the appeal in this Court on 1st February, 2008. However, on the 5th February, 2008, Civil Application No. 26 of 2007 was heard by the full court and the Notice of Appeal was struck out. Consequently the applicant instituted Civil Application No. 3 of 2008 and Civil Application No. 5 of 2008 seeking for leave to be allowed to file a fresh Notice of Appeal out of time or alternatively asking the court to validate the Notice of Appeal which had been struck out on 5th February, 2008.

Civil Application No. 3 of 2008 came up before me for hearing on the 14th February, 2008. There were problems. But by agreement of both parties, the application was withdrawn with leave of court. Subsequently application No. 5 of 2008 was fixed for hearing today.

The file was brought to me last week for directions about fixing it for hearing. I noted that this is an election matter where the law requires courts to proceed to hear such matters expeditiously. Initially I thought that the order sought under prayer (b) presented problems which could be appropriately determined by the full court. Currently one member of the court is on his annual leave and so the motion cannot be heard by the full court. However a single judge could, under Rule 50(1) hear the motion at least in so far as the prayer (a) is concerned. So as I was available this week, I ordered for the motion to be fixed before me for hearing especially as regards the pray for an order for extension of time under paragraph (a) of the motion.

When the matter was called up for hearing, Mr. Lukwago, counsel for the respondent, raised two main points of objections to the competence of the application. The first point of objection is that paragraph (b) of the Notice of Motion renders the motion incompetent by praying for this Court to validate or reinstate a Notice of Appeal which was struck out by the full court. He argued that the proper procedure should be for the applicant to move full court to set aside its order striking out the Notice of Appeal and this would be done by the full court. The second point of objection is that this application has been overtaken by events, namely, that the pleadings show that the Bukomansimbi seat has been declared vacant by the Clerk to Parliament and the process for nomination is in progress in the field. So he prayed that the application should be struck out with costs.

Mr. Tumwesigye, counsel for the applicant, contended that the Notice of Motion has not been overtaken by events because under Section 95(3) of the PEA, 2005, a parliamentary seat cannot be declared vacant until an appeal is finally disposed of. He appears to believe that the appeal filed on 1st February, 2008 was not affected. He further contended

that annexure “A”, the letter by which the Clerk to Parliament informed the Electoral Commission that Bukomansimbi seat is vacant is illegal or irregular since the appeal has not been disposed of by this Court. He further contended that counsel for the respondent acted irregularly when on the 8th February, 2008, he wrote a letter to the Clerk asking that the seat be declared vacant. He also contended that the Clerk to Parliament acted without receipt of authoritative information from this Court on the status of the appeal. He again contended that in relation to the appeal and by 5th February, 2008 there were still pending in this Court Civil Applications No. 3 of 2008 and No. 5 of 2008. So the appeal had not been finally disposed of. When court inquired of him whether he still wanted to press for prayer (b) of the Notice of Motion, bearing in mind the provisions of Rule 50 of the Rules of this Court, learned counsel argued that if the application to extended time is granted, the grant is retrospective in operation. When I pointed out that a single judge cannot seat in appeal against the decision of a full court, Mr. Tumwesigye then applied under Rule 50(1) of the Rules of this Court for the application to be adjourned for hearing by the full court. He then asked that I should intervene and ask the Electoral Commission to stop the process now taking place in the field regarding holding a bye election.
Mr. Lukwago, in rejoinder, clarified that annexture “A” (which is a letter by the Clerk to Parliament) shows in its second paragraph that the Clerk to Parliament acted on the ruling of this Court which he had received on 7th February, 2008 and not on the letter from Mr. Lukwago’s firm. Learned counsel further contended that if the actions by the Clerk to Parliament and those of the Electoral Commission are illegal, then the applicant should follow normal procedures of challenging administrative decisions taken by the Clerk and the Electoral Commission by way of applying for court review. He opposed the application by the applicant’s counsel that I adjourned the hearing of the Notice of Motion for the full court to hear it. He then added that intervention by court, at this stage, in this application, would be inappropriate because of heavy costs that have been involved in the steps taken so far.

With respect to counsel who drew the notice of motion, I consider the prayer made in paragraph (b) to be omnibus and not quite clear. It is not surprising that the last part of the prayer asking for reinstatement of the Notice of Appeal was added in ink, suggesting

it may be an after-thought concerning what remedy the applicant wishes to get. He does not specifically ask for setting aside the order striking out the Notice of Appeal. Assuming that the applicant prays that the order of the full court striking out the notice of appeal be set aside, I pointed out during arguments that this has to be done by the full court. In that regard Mr. Lukwago, counsel for the respondent is right in his objection that a single judge cannot set aside the order of the full court. However I do not, with respect, agree with learned counsel that I should strike out the notice of motion. This is because firstly I think that I have jurisdiction as a Single judge of this court to hear at least paragraph (a) of the motion. The least I could do would be to strike out only paragraph (b). But however vague paragraph (b) may be, by virtue of Rule 50(1) of the Rules of this Court, I have power to adjourn the hearing to the full court for determination.

Let me point out that when the file was brought to me last week for direction, I realised that this matter is an election matter in which case the law requires court to hear and determine it expeditiously. In fixing it for hearing by a Single judge I had two things in mind. First, the full court could not sit urgently for lack of a coram as one of its member is on his annual leave. Secondly I had hoped that parties could consent to the extension of time which they haven't, sadly.

In the circumstances I adjourn the hearing of the application to be heard by the full court as soon as a Coram can be realised.

May I also point out that I have deliberately avoided commenting on delay on the part of the applicant in instituting the appeal last year.

Mr. Tumwesigye has urgued me to intervene and, presumably, halt the alleged process by the Electoral Commission to hold a bye-election in Bukomansimbi. After hearing statements from the two learned counsel, I inquired from her Worship, H. Wolayo, the Registrar of this court, whether she informed the Clerk to Parliament about the court's decision to strike out the Notice of Appeal or whether she sent to the Clerk the ruling of the court embodying that order. The learned Registrar orally informed me that she did

neither and that she is not aware how the ruling of the court was communicated to the Clerk to Parliament.

In these circumstances, and with scanty material available, court's hands are tied. One hopes, though, that the steps alleged to be taking place are not intended to frustrate or interfere with court process. I say this because as of now I am not quite certain that striking out the notice of appeal determined the appeal itself. I will leave the matter to the full court. The Registrar is directed to fix the matter for hearing as soon as a Coram can be realised.

I order that costs resulting from the objections and this ruling will abide the disposal of the application itself by the full court.

Delivered at Mengo this 26th day of February. 2008.

J. W. N. TSEKOOKO
JUSTICE OF THE SUPREME COURT.