THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

[Coram: Odoki, CJ., Tsekooko, Katureebe, Tumwesigye & Kisaakye, JJSC.]

Civil Appeal No. 21 of 2010

Between

1. KOMAKECH GEOFFREY ::: APPELLANTS
2. M/S. VICTORIA ADVOCATES & LEGAL CONSULTANTS

And

1. ROSE AKOL OKULLO ::: RESPONDENTS
2. ELECTORAL COMMISSION
3. AMONG ANNET ANITA

{An Appeal from the ruling of the Court of Appeal at Kampala (Twinomujuni, Kitumba & Byamugisha, JJA.) dated 18th March, 2008 in Election Petition Application No. 35 of 2007}

JUDGMENT OF THE COURT.

This judgment arises from a ruling of the Court of Appeal by which that Court struck out an appeal filed by Among Annet Anita the 3rd respondent, and also ordered the appellants to pay costs for the application in the Court of Appeal, the appeal itself, and, it would seem, costs in the High Court to the 1st and 2nd respondents because of professional negligence in handling the appeal by Among Annet Anita, the 3rd respondent.

Background:

The 3rd respondent instituted in the High Court, at Soroti, an election petition against Rose Akol Okullo, the 1st Respondent, and the Electoral Commission, the 2nd Respondent. The High Court dismissed the petition and awarded costs against the petitioner, the 3rd Respondent. She instructed Komakech Geoffrey, an advocate in the firm of Victoria Advocates and Legal Consultants, hereinafter referred to respectively,

as the 1st and 2nd appellant to appeal against the decision of the High Court. Comments in the ruling of the Court of Appeal, indicate that there was a mess in the process of filing or attempting to institute the Notice of Appeal and or the appeal itself and effecting service of the same on the respondents in that intended appeal. As a result, the 1st and 2nd Respondents successfully moved the Court of Appeal (by Notice of Motion) to strike out both the Notice of Appeal and the Appeal itself for failure to comply with relevant rules governing the institution of such appeals and the serving of relevant records such as the Notice of Appeal, and the Record of Appeal on the respondents to the appeal.

Because two of the learned Justices of the Court of Appeal considered that all this was due to professional negligence on the part of the two appellants, the Court ordered the appellants to pay the costs both in the Court of Appeal in respect of the appeal itself and the application to strike out that appeal and the costs of the petition. The appellants have appealed against the whole order.

Competence of the Appeal:

The third respondent has through her counsel, Messr. Kyazze & Co., Advocates raised preliminary objection to the competence of the appeal. In their written submissions, counsel submitted that the order of the Court of Appeal striking out the Notice of Appeal and the appeal and ordering the appellants to pay costs was interlocutory and merely incidental to the intended appeal but did not involve the Court of Appeal confirming, varying or reversing the decision of the High Court. Learned counsel relied, *inter alia* , on S.6(1) of the Judicature Act and the decision of this Court in the case of ***Uganda National Examinations Board vs. Mparo General Construction Ltd.*** (Sup. Ct Misc. Application No. 19 of 2004) and clauses (2) and (3) of **Article 132 of the Constitution**. Mr. Kiyemba Mutale, counsel for the appellants challenged the objection and contended that the objection is wrong and that the appellants had a right of appeal under S.6(1) of the Judicature Act. Learned counsel argued that the Court of

Appeal reversed the decision of the High Court when it ordered the appellants to pay the costs of the proceedings in the High Court. Counsel for the 3rd respondent orally replied to Mr. Mutale's submission maintaining that the appeal is incompetent.

We would like to point out that there is a misunderstanding of the decision of the Court of Appeal about what it decided on 18th March, 2008 in relation to costs. With respect, the Court contributed to that misunderstanding. Page 4 of the main ruling (now page 68 of the record of appeal) reflects what the Court decided initially. The learned Justices stated—

> *" We propose to order this firm of advocates to pay the costs of* ***this application and of the appeal*** *which has just been struck off as incompetent."*

However at pages 4 and 5 of the final ruling on costs (see pages 73 and 74 of the record of appeal) the Court stated: *"In our judgment, Mr. Komakech Geoffrey and his law firm …….. …….. …….. …….. ……..*
failed to show cause why they should not be condemned to pay the costs of the applicants due to their gross negligence in handling the 3rd respondent's appeal and the application to strike out the appeal. It is therefore ordered that they are liable to pay the costs of ***the petition***, ***the appeal and application to the applicants."***

Thereafter counsel for the applicants extracted an order which in its second paragraph stated that the present appellants were *"liable to pay the costs of the petition, the appeal and the application to the applicants."* Strangely enough the appellants approved that order by signing it which tends to suggest that the appellants did not give thought to what the application had been about.

In our considered opinion in an application such as the one which was before the Court of Appeal, payment of costs should be limited to the hearing and decision of only the motion but not the appeal because the appeal itself was never heard.

With respect, we think that by ordering the appellants to pay costs in respect of proceedings in the High Court, the Court of Appeal partially reversed the decision of the High Court. It is clear that payment of costs in the High Court was not the subject of the motion before the Court of Appeal.

Furthermore, even if Section 6(1) were inapplicable, which is not the case, in the circumstances of this case, the decision awarding High Court costs against the appellants without the Court of Appeal being moved would empower this Court to exercise its inherent powers under its Rule 2(2) to hear and determine this appeal to ensure that justice is done. That subrule states that *"Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the Court, and the Court of Appeal, to make such orders as may be necessary for achieving the ends of justice."* …. ……. ……. ……. ……. ……. The authorities cited do not support the objection. Therefore we overrule the objections and hold that the appeal is properly before us. We will consider ground 3 next. It touches a fundamental aspect of court jurisdiction.

Ground Three:

The complaint in the third ground states that the learned Justices of Appeal erred in law when they proceeded to make the judicial decision without quorum (Sic) and as such had no jurisdiction thereby occasioning a miscarriage of justice.

The appellants were represented by Messrs Kiyemba & Matovu, Advocates, who filed a brief written statement of arguments and supplemented that statement at the hearing of the appeal with brief oral submissions made by Mr. Kiyemba Mutale who appeared for the appellants in Court on the day of hearing. The respondents who were also represented by counsel, also filed written statements of their arguments. The 1st and 2nd respondents lodged a joint statement (signed by Messr. Ssekaana Associated

Advocates & Consultants (and some official of the 2nd respondent). Messrs. Kyazze &, Co., Advocates, lodged the statement on behalf of the 3rd respondent.

Counsel for the appellants rely on Article 135 and argue in effect that during the hearing of the matter in the court below, as to who should pay the costs, there was no coram as there were only two instead of three Justices of the Court and, therefore, the order as to costs is a nullity.

It was contended on behalf of the 1st and 2nd respondents that there was a proper Coram during the hearing of the application and subsequently on payment of costs. It was contended that in the main ruling which was a result of hearing by a proper Coram, the appellants were condemned except that the court offered the appellants opportunity to be heard on costs. They support the decision of the Court of Appeal.

Counsel for the third respondent supports the decision of the Court of Appeal. Learned counsel contends that there was a Coram of three Justices during the hearing of the application but the third justice, Lady Justice Byamugisha, JA., dissented only on the question of payment of costs.

When the appeal was called up for hearing, counsel for the respondents questioned the competency of the appeal. This arises from the fact that one Member of the panel, the Hon. Lady Justice C.K. Byamugisha, JA., who had fully participated in the hearing of the motion to strike out the appeal in the Court of Appeal and, who, according to the court's main ruling, agreed to have the appeal struck out, declined to sign the joint ruling of the Court apparently because she did not agree with the order that the appellants be ordered to pay the costs. That could not have been an issue if the learned Justice of Appeal had written her own reasons for dissenting and delivered those reasons. She apparently did not because the court record does not reflect it. On the subsequent occasion when the Court heard the appellants about whether they should

pay the costs, the learned Lady Justice Byamugisha did not participate in the hearing itself and the ruling on costs. The hearing was thus before and the ruling was made by only two Justices of Appeal instead of the three of them.

The ruling of the two Members of the Court of Appeal on costs dated 04th April, 2008 is clear. The opening paragraph on page 1of the ruling (page 71 of the Record of Appeal) states as follows—

> ***"The ruling of the Court in this case was delivered on 28th (Sic) March, 2008. Though Hon. Justice C.K. Byamugisha concurred in the ruling, she disagreed with us on who should pay the costs of the appeal. It is for that reason that she did not sign the ruling of the Court. She also did not wish to participate in the proceedings where we ordered the advocates for the respondent to appear before us to show cause why they should not be ordered to pay the costs. (The ruling was actually delivered on 18th, not 28th March.)***

With the greatest respect to the learned Justices of Appeal, the ruling of the Court of Appeal was made in disregard of Rule 33(5) and (6) of the Rules of that Court. These Rules were made under an Act of Parliament (Cap. 13 of the Laws of Uganda) for the proper regulation of court practice and procedure. They have statutory effect and must be followed. It is sometimes said that Court Rules are hand maids of justice, meaning they should not frustrate the operation of justice. The position here is different. We have the greatest respect for the two Justices, but it is our considered opinion that all the three justices were wrong. The two acted irregularly when they heard the issue of costs without proper Coram. The third justice wrongly refused to sign the main ruling and later to participate in hearing parties on costs.

The Law:

Article 135(1) of the Constitution of Uganda prescribes the composition of the Court of Appeal this way—

1) ***The Court of Appeal shall be duly constituted at any sitting if it consists of an uneven number not being less than three Members of the Court.***

Section 12 of the Judicature Act in effect provides that a single justice has powers to hear interlocutory matters, but for **the court to hear cases, there should be three justices**. Neither the Constitution nor the Act allows two justices to hear a case including an application.

Rule 33 of the Court of Appeal Rules provides good guidance in that it describes how judgments / rulings and orders of the Court of Appeal are to be written and delivered. In particular, Rule 33(5) & (6) provide as follows—

> *(5) In Civil Appeals, separate judgments shall be given by the Members of the Court unless the decision being unanimous, the presiding judge otherwise directs.*
>
> *6) **In applications in criminal and civil matters,** the decision shall be delivered and embodied in a **ruling and order** as follows—*
>
> *(a)* ……
> *(b)* ……
> *(c) in applications to the full Court in civil matters, separate rulings shall be given by the Members of Court, unless the decision being unanimous, the presiding judge otherwise directs."*

This paragraph is illuminating. When read together with Rule 6(3) a clear distinction is made. In criminal appeals, the Court is required to give one judgment and a dissenting judge shall not be required to sign the judgment. This is not the case in civil matters. Furthermore, it is our considered opinion that the word "shall" used in the provisions of Rule 33 is mandatory and not directory and therefore judges should follow the procedure prescribed by the rules.

These provisions are intended to ensure consistence and certainty in practice and procedure in decision making by the Court. Individual justices who are part of a panel in civil causes must give reasons in writing for dissenting. That would enable anybody to understand the Court's decision. Allowing individual judges to ignore prescribed mandatory rules can lead to undesirable consequences.

From the statement of the Court of Appeal quoted earlier in this judgment, the Court was apparently unanimous when considering to strike out the appeal. Yet because of disagreement about who should pay costs, the learned Lady Justice of Appeal decided not to sign the ruling nor give her own ruling. This affected the whole decision.

In the light of the provisions of Rule 33(6), in the absence of her own written reasons the ruling itself cannot stand.

This is a very interesting point. The Court record shows that the Court was in a full coram in that there were three justices during the hearing of the application to strike out the appeal. Judging from the contents of the main ruling striking out the appeal, there appears to have been agreement among the three justices constituting the Court to strike out the appeal. This is repeated in the order about payment of the costs. Surprisingly the third learned Justice of Appeal declined to sign the main ruling apparently because of the order as to who should pay the costs. However she did not give her own dissenting ruling as required by Rule 33(6) of Court of Appeal Rules. She also declined to participate in the subsequent hearing on costs because she disagreed as to who should pay costs. From the subsequent ruling on costs itself there is no doubt that there was no coram when the hearing and final decision on costs was made. What has surprised us though is that on 02/04/2008, when the hearing on the question of payment of costs was conducted, the advocates for both sides appear to have condoned and allowed the hearing to proceed without a coram of three justices as required by law. None raised the question of lack of coram. In ordinary cases, this conduct would work against the appellants. But Article 135 and Rule 33 would be violated. Of course two wrongs never make a right. The order as to payment of costs is obviously incompetent. The question then is if C.K. Byamugisha, JA., participated in the hearing of the application, and reportedly concurred in ordering the striking out of the appeal, did her refusal to sign the main ruling and her absence from the hearing on costs render the ruling / order of the court incompetent? Our answer is yes, it did.

It is our considered opinion that the ruling by the Court of Appeal is a nullity because it lacked Coram during hearing and decision.

That would dispose of the appeal. However we will briefly consider the other grounds.

Grounds 1 and 2 and 4:

1. *The complaint in ground one is that the learned Justices of Appeal erred in fact and law in holding that both appellants were grossly negligent in handling the first respondent's appeal and the application to strike out the appeal and should therefore pay the costs of the appeal, application and petition in the High Court.*

2. *The complaint in the second ground of appeal is that the learned Justices of Appeal erred in law in as much as they did not apply the principles relating to payments of costs personally by an advocate and thereby occasioned a miscarriage of justice.*

3. ……

4. *The complaint in ground four is that the learned Justices of Appeal erred in law in making the orders without affording the second appellant an opportunity to be heard and as such occasioned a failure of justice.*

These three grounds are related and this is clear from the arguments of counsel for the appellants. Indeed, counsel for the appellants virtually abandoned the 4th ground of appeal as rightly pointed out by counsel for the 3rd respondent. Be that as it may, learned counsel contended that the Justices of Appeal erred when they ordered the appellants to pay costs of the proceedings in the High Court, in the absence of any complaint from the 3rd respondent in respect of the conduct of the petition in the High

Court since nobody addressed the Court regarding the conduct of the case in the High Court.

Counsel for the appellants first criticized the Court of Appeal for ordering the appellants to pay the costs awarded against the 3rd respondent in the High Court.

There are three issues raised in these grounds. First payment of costs in respect of the petition in the High Court. Then negligence and lastly payment of costs in the Court of Appeal.

Messrs. Kiyemba & Matovu, Advocates, counsel for the appellants contended that the Justices of Appeal erred when they ordered the appellants to pay costs for litigation in the High Court.

Counsel for the 1st and 2nd respondents did not address Court on this issue because the issue did not adversely affect these two respondents.

Messrs. Kyazze & Co., Advocates, counsel for the 3rd respondent, essentially contends that because the appellants were negligent in pursuing the appeal against the High Court decision dismissing the election petition of the 3rd respondent, the Court of Appeal was right in ordering the appellants to pay costs in both the Court of Appeal and in the High Court. Counsel appears to rely on S.27(1) of the Civil Procedure Act for the view that the Court of Appeal exercised its discretion properly by ordering appellants to pay costs in both courts.

We are not persuaded by arguments by counsel for the 3rd respondent. As appellants' counsel pointed out in their written arguments, there is no complaint against the appellants that they were negligent in their prosecution or the conduct of the election petition in the High Court in Soroti. Indeed the record of the proceedings of both

Justices A. Twinomujuni and Lady Justice C.N.B. Kitumba, JA., (as she then was) show that on 02/04/2008, when they heard arguments about whether the appellants should pay costs, the 3rd respondent herself addressed the Court. According to the record, the 3rd respondent criticized the appellants only in respect of how they handled matters in relation to the appeal. Evidently, she did not blame the appellants in the manner they prosecuted the petition in the High Court. In the circumstances and with all due respect, the Court of Appeal had no justification for ordering the appellants to pay the costs in the High Court. We do not think that the discretion given to courts by S.27(1) of the Civil Procedure Act would protect such a decision.

Negligence:

The second point is negligence. Counsel for the appellants in effect contends that no negligence was found on the part of the appellants. Counsel contended that it was a Clerk (appellants' process Server) who did not serve the Notice of Appeal in time and, therefore, the appellants should not be punished in form of paying costs. Counsel cited **Myers vs. Elman** (1939) 4 ALLER. at page 484 and referred to a passage at page 509 which, with respect, appears to us to be against the appellants. Even if the process server was one who did not serve in time, what did the appellants do to correct the situation? Therefore, the appellants bear the blame. Be that as it may, our conclusion on lack of coram means that even if the appellants were negligent, we can't confirm the decision of the Court of Appeal.

Essentially because the notice of motion was decided without coram and because the Court of Appeal erroneously reversed the High Court decision about costs, this appeal should succeed. We make no order as to costs because the appeal arises partly from Court of Appeal error to which appellants contributed by failing to object to the hearing of the motion for lack of coram. We order that the motion be heard by the Court of Appeal before a proper coram.

Delivered at **Kampala** this **……21st……** day of **…December…... 2012.**

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B.J. Odoki.
Chief Justice.

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J.W.N. Tsekooko.
Justice of the Supreme Court.

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B.M. Katureebe.
Justice of the Supreme Court.

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J. Tumwesigye.
Justice of the Supreme Court.

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Dr. E. Kisaakye.
Justice of the Supreme Court.