

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA

ELECTION PETITION APPLICATION NO. 0010 OF 2011
(Arising out of Election Petition No.8 of 2011 at the High Court at Jinja)

BETWEEN

HON. GAGAWALA NELSON G. WAMBUZI:.....:APPLICANT

VERUS

KENNETH LUBOGO:.....:RESPONDENT

CORAM: HON. JUSTICE C.K.BYAMUGISHA, JA
HON. JUSTICE S.B.K.KAVUMA, JA
HON. JUSTICE M.S.ARACH AMOKO, JA

RULING OF COURT

Introduction

The applicant brought this application seeking orders that the respondent's Notice of Appeal filed into Court on the 20/06/2011 be struck out with costs. The application is brought by way of Notice of Motion under Rules 43 and 82 of the **Judicature (Court of Appeal Rules) Direction, S.1.13-10**. It is supported by the affidavit of the applicant sworn on the 24th June 2011.

The grounds and background

The grounds of the application are briefly set out in the Notice of Motion but substantiated with amplification in the applicant's affidavit in support of the application. The affidavit also gives the background to the application.

In it, the applicant avers, *inter alia*, to the effect that he participated as a candidate in the parliamentary elections held on the 18th Feb.2011 in Bulamwogi County Constituency but that those elections were marred with election malpractices. These led him to file Election Petition No. 8 of 2011 at the High Court at Jinja. At the hearing of the petition, the respondent, through his lawyers, raised a preliminary objection to it which was overruled by the learned trial judge. The respondent thereafter filed a Notice of Appeal into court. It is that Notice of Appeal that the applicant seeks to have struck out for, according to him, being incompetent and misconceived.

Representation

At the hearing of the application, Mr. John Matovu, (counsel for the applicant), represented the applicant. Mr. Robert Bawutu, (counsel for the respondent), represented the respondent.

Arguing the case for the applicant, his counsel submitted that the respondent's Notice of Appeal is unsustainable in law as there is no right of appeal to this court against interlocutory orders of the High Court in Election Petitions. Relying on S66(1) of the Parliamentary Elections Act, (PEA), counsel contended that in election matters, appeals to this court can only be against final determinations by the High Court. He prayed court to strike out the Notice of Appeal with costs to the applicant.

The case for the respondent

Counsel for the respondent opposed the application. He relied on the respondent's affidavit in reply to that of the applicant and submitted that the Election Petition Appeal before court raises a substantial point of law which goes to the root of the petition filed at the High Court. He submitted that the Registrar of the High Court entertained an application for substituted service extending the time to serve in Election Petition. No. 11 of 2011 when he had no jurisdiction to

do so. Counsel contended that Rule 24 of the Parliamentary Elections (Election Petitions) Rules preserves the jurisdiction the Registrar purported to invoke to a judge. To counsel, the order of the Registrar was a nullity. Counsel further contended that there was no petition in this Court and that should Court be inclined to rule in favour of the applicant, it would, in effect, be validating a nonexistent petition.

Counsel cited and relied on **Musitwa Herbert Mukasa vs. Electoral Commission and Another, Election Appeal No. 5 of 2006** for his submission that there is a right of appeal in interlocutory matters where a substantial point of law in an appeal goes to the root of the petition. He, therefore, prayed court to dismiss the application with costs.

By way of reply, counsel for the appellant submitted that the case of **Musitwa** (supra) was on totally different facts from the instant case. He pointed out that **Musitwa** (supra) was filed under Section 138(4) of the Local Government Act. S.66 (1) of the PEA has no exceptions.

As for **Margret Zziwa vs. Catherine Naava Nabagesera, Misc Application No.9 of 1996**, counsel submitted that the case was good law but contended that the court saw an illegality there and proceeded on that. To counsel, there is no illegality in the instant case. He contended that in the instant case, a petition was filed but time for service ran out necessitating substituted service.

Counsel contended, further, that the Registrar had jurisdiction to handle matters of service and all pre-trial proceedings. He cited Rules 24 and 17 of the Parliamentary Elections (Election Petitions) Rules which according to him, incorporates the Civil Procedure Rules made under the Civil Procedure Act. He submitted that to require a judge to handle matters of service would be working against the six months rule yet the issue here is not interlocutory orders but pre-trial matters. He re-iterated his earlier prayers.

The issues

There are two agreed issues in this application namely:

- i. Whether the Respondent has a right of appeal against an interlocutory decision of the High Court in an Election Petition under S.66 (1) of Parliamentary Election Act 17 of 2005.**
- ii. Whether the applicant is entitled to the remedies sought.**

Court's consideration of the issues

Issue one

The gist in this issue is whether the respondent has a right of appeal to this court from interlocutory orders of the High Court in Election Petitions.

It is trite that the Court of Appeal, being a creature of Statute derives jurisdiction only from a Statute. The court has no inherent appellate jurisdiction. See: **(1) Sydney Grant Ralph v R/1960/E.A.310 and (2) Attorney General v Shah (No.4)/1971/E.A. 50.**

Clearly such a right has been prescribed by the Legislature in section 66(1) of the PEA. It provides in part:

66 Appeals

“(1)A person aggrieved by the determination of the High Court on hearing an election petition may appeal to the Court of Appeal against the decision.

(2) The Court of Appeal shall proceed to hear and determine an appeal under this section expeditiously and may, for that purpose, suspend any other matter pending before it.

The appeal envisaged here is an appeal against a decision determining an election petition rather than a decision from an interlocutory matter. We cannot read in this section any right of appeal against decisions of the High Court on interlocutory matters.

The section has no exceptions or provisos relating to substantial points of law going to the root of a petition. The Legislature makes no mistakes when it legislates. It is presumed to know what it wants provided in the law it makes. That law must be interpreted as it is and not, as it may be considered by some, as ought to be.

The spirit behind that section and Rules 28 and 29 of the Parliamentary Elections, (Election Petitions) Rules, S1 141-2 is that election petitions should be heard and concluded expeditiously, hence the absence of a provision for appeal against interlocutory orders of the High Court. Rules 28 and 29 above provide:

“28 This part applies to appeals to the Court

of Appeal from decisions of the High Court on determination of election petitions.

29 Notice of Appeal may be given either orally

at the time judgment is given or in writing within seven days after the judgment of the High Court against which the appeal is being made.”

The word “determination” in Rule 28 (supra) clearly denotes a decision on the petition after hearing evidence and submissions.

Election petitions are matters of great public importance, hence the requirement for speedy trials as can be seen in Rule 13(1) and (2) of the Parliamentary Elections (Election Petitions) Rules, which provide:-

13 Expeditious hearing

“(1) The court shall, in accordance with section 63(2) of the Statute hear and determine the petition expeditiously; and it shall declare its findings not later than thirty days from the date it commenced the hearing of the petition unless the court for sufficient reason extends the time.

(2) The Court shall sit from day-to-day and may, for the purpose of hearing and determining the petition suspend any other matter pending before it.”

In this Court’s civil Application No. 22 of 2011, Electoral Commission and Another vs. Piro Santos, Court quoted with approval the Kenyan case of Muiya vs. Nyangah and Others,

[2003]2 EA 616 C.H.C.K) where the importance of elections, of expedience in election related litigation and of the need to strictly adhere to the law relating thereto held:

“On this strictness, this Court has one thing or two to say: Elections are serious matters of state with its citizens. As elections are held, the outcome announced, the electorate must know their political leader quickly and assuredly. There must be limited or no uncertainty about this. The Roles of elected representatives are many and diverse vis-à-vis their electors. To perform the roles well, the elected must be sure of his post and the elector of his leader. And the sooner the better to give that certainty. So either the election is accepted at once or when challenged, that challenge must be moved along to the end swiftly enough to restore certainty. And for that, election petitions are governed by this Act with its rules in a very strict manner. Election petition law and the regime in general, is a unique one and only intended for elections. It does not admit to others laws and procedures governing other types of disputes, unless it says so itself...”

We therefore, find that the respondent has no right of appeal against the interlocutory orders of the learned High Court Judge made in High Court Election Petition No. 8 of 2011. We find in the negative to issue one.

Issue two

This issue is on remedies. Having found as we have in issue one, we find that the Notice of Appeal filed into this Court by the respondent on the 27/06/2011 ought to be struck out for being incompetent and unsustainable in law.

In the final result and for the reasons given above, we order that the respondent’s Notice of Appeal stands struck out with costs to the applicant.

We so order

Dated at Kampala this ...14th ...day of ...June...2012

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C.K.Byamugisha

Justice of Appeal

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S.B.K.Kavuma

Justice of Appeal

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M.S.Arach Amoko_

Justice of Appeal