THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA, AT KAMPALA

ELECTION REFERENCE APPEAL NO. 39 OF 2012

CORAM: HON. JUSTICE M. S. ARACH AMOKO, JA

KIIRYA GRACE WANZALA::APPLICANT

VERSUS

1. **DAUDI MIGEREKO**
2. **THE ELECTORAL COMMISSION::::::::::::::::::::::::::::RESPONDENTS**

[Reference arising from the Ruling of the Assistant Registrar of the Court of Appeal, His Worship Alex Ajiji in Election Petition Application No. 13 of 2012]

RULING OF M. S. ARACH AMOKO, JA (single Judge)

This reference emanates from the decision of the Assistant Registrar of this Court in Election Petition Application No. 13 of 2012. That application was filed by the instant Applicant for an order that the time within which to serve a letter requesting for typed proceedings in Election Petition Appeal No. 9 of 2011 on the Respondents, be extended.

The main ground was that the failure to serve the letter in question was due to the inadvertence on the part of the Applicant's counsel.

The Respondents opposed the application describing it as devoid of merit and a delaying tactic on the part of the Applicant.

The Assistant Registrar of this Court entertained the application and dismissed it with costs to the respondents on the 24th April 2012.

Being dissatisfied with that decision, the Applicant made this reference on the following grounds:

1. That the learned Assistant Registrar erred in law and fact and wrongly evaluated the evidence before him to impute negligence on the Applicant.

2. The learned Registrar erred in law and wrongly and/or considered evidence not before him.

3. The leaned Assistant Registrar exercised his discretion wrongly and/or unreasonably and/or harshly hence rejecting the Application.

The Applicant then prayed for orders that:

a. The learned Assistant Registrar's order rejecting the application be set aside and/or varied.

b. That an order allowing extension of time within which the Applicant serves the letter requesting for typed proceedings in election Petition No. 13 of 2011.

c. Any other orders that this Honourable Court may consider expedient in the circumstances.

Mr. Galisango Julius, learned counsel for the Applicant argued ground 3 and then grounds 1 and 2 together.

Arguing ground 3, Mr. Galisango submitted that it is settled law that the Court of Appeal should not interfere with the exercise of discretion of a judge unless satisfied that the judge, in exercising his discretion, has misdirected himself in some matter and as a result, has arrived at a wrong decision, unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that there has been a

misjustice. (See: Oder JSC [as he then was] in **Bosco Arabe Espanol vs Bank of Uganda, CA No. 8/98 SC**).

In the instant reference, the Applicant contends in ground 3 that the learned Registrar exercised his discretion harshly when rejecting his application and therefore invites this court to interfere with the Ruling of the learned Assistant Registrar.

The applicant had, in his affidavit in support of the dismissed application, stated that the failure to serve the letters requesting for typed proceedings; and indeed the learned Registrar found it to have been so, in line 15 on page 7 of his Ruling that:

> ***"The applicant's contention in this case is that the fault was that of his counsel..."***

The learned Registrar thus erred in so far as he went on to accuse the Applicant of being indolent for the failure by his counsel to serve the letter in that the Registrar assumed that once a person sues or appeals to any court of law, then that person automatically becomes a lawyer and all of a sudden learns all the procedures and technicalities of court.

It would be stretching it too far, according to Mr Galiwango, to assume that a lay person knows all the court processes by reason that he has become a party to a suit. There is no way, he argued, that a lay person like the Applicant would have known the effect of such non-service of the letter in issue on his appeal. In the recent decision of **Hon. Sam Kutesa & 2 Others vs The Attorney General, Constitutional** Petition **No. 45&46 of 2011,** the Constitutional Court stated that discretionary powers must not be exercised on the basis of a personal opinion or feeling but it must be exercised judiciously and with due regard to substantial justice.

Failure to serve a letter requesting for a record of typed proceedings amounts to failure to take a necessary step under the Court of Appeal Rules in a sense that the days within which the Memorandum of Appeal and the Record of Appeal are to be filed will run

unless the letter was served. In other words, that letter serves as a stay of the running days. Failure in that regard would result in striking out the appeal as the days within which to file the Record of Appeal would have lapsed.

The effect of the refusal by the Registrar of the Applicant's application will result in dismissal of the appeal altogether and that would in effect mean that the Applicant will not have an opportunity to put his case before the Court of Appeal, since failure to take necessary steps have been found to be reason for dismissal of an appeal. (See: **Kasibante Moses vs Katongole Singh Marwaha P. Election Application No. 08 of 2012**).

In **Mulowooza & Brothers Ltd vs Shah SCCA No. 20/2010** Katureebe, JSC stated that, If it appears to the court that refusing to grant the extension of time may shut out the appeal altogether and may cause injustice, the court may grant the application. In that case, the inadvertent failure by counsel constituted sufficient cause.

Ground 1 & 2:

Mr. Galinsonga was brief on these two grounds since his arguments on ground 3 also covered them. The thrust of his submissions on this ground remained that the Applicant had his lawyer to rely on and any omission could only be blamed on his counsel. That the Registrar never at any time required the Applicant to explain what he did when he realised that his lawyer had not served the letter in issue.That not withstanding, the Registrar proceeded and accused the Applicant of indolence. This was unfair.

In the premises, he prayed that court finds that the learned Registrar exercised his discretion wrongly and unreasonably in rejecting the application. Consequently, Court should set aside the order of the Registrar, extend the time within which the letter requesting for proceedings should be served on the Respondents' counsel and make any other order that the court considers expedient in the circumstances.

Mr. Kiryowa Kiwanuka appeared with Mr Ochaya on behalf of the Respondents. Mr. Kiryowa supported the decision of the learned Registrar. He argued all the three grounds

generally under one issue, namely, whether there was sufficient cause shown by the Applicant for extension of time within which to serve the letter requesting for typed proceedings.

He submitted that it is important to note that this is not an ordinary appeal, it is an Election Petition appeal. The authority of Mulowooza is thus distinguishable on that ground alone since that was an ordinary appeal.

He then emphasised the following particular facts in the genesis of the reference:

- On the June 28th 2011, judgment was delivered in Election Petition No.9 of 2011;
- On July 7th 2011, the file was returned to the Civil Registry at the High Court;
- On 12th July, 2011, the Memorandum of Appeal was filed;
- On 20th July, 2011, a Notice of Address was filed;
- On 15th February, 2012, the Applicant filed a Record of Appeal (Seven months later and outside the 30 days allowed).

- On that same day, the Applicant's counsel obtained scheduling conference directions from the Court of Appeal which they undertook to serve on the Respondent, but didn't.

- On the 23rd February, 2012, the Respondent filed an application to strike out the appeal.
- On the 5th March, 2012, before the application to strike out the appeal was fixed for hearing, counsel for the Applicant was notified of the Application which was accompanied by an affidavit in support and a supplementary affidavit. That application was not only about the letter, but it was also telling the Applicant that he had failed to take the necessary steps in his appeal and one of the reasons was failure to serve the letter requesting for the record of proceedings.

- On the 20th March, 2012, the application that was dismissed by the Registrar was filed. That application did not seek to extend time within which to file the Record

of Appeal or to hear the appeal itself, but only talked of extension of time within which to serve the said letter.

The letter requesting for record of proceedings is irrelevant in election appeals and court has the discretion to extend the time for taking any steps in the proceedings. However, for the court to find that there was a mistake of counsel there must be credible evidence because it points to professional negligence and ethics. Therefore, it cannot be such evidence as was adduced by the Applicant.

He submitted that in the whole affidavit of the Applicant, only two paragraphs (8 and 12) attempted to give the reason for delay. The rest of the affidavit does not state why counsel for the Applicant never took any essential step.

Those two paragraphs could not suffice as evidence of failure on the part of counsel as such averments could not be within the personal knowledge of the Applicant.

In paragraphs 5 and 6, the Applicant stated that on the 11th of July, 2011, they were in court and actually obtained a copy of the typed judgment.

In the entire affidavit, the Applicant referred to the many letters he wrote, but none of the letters are on the file or were attached to the affidavit. The Registrar could not therefore be faulted in his findings at page 8 line 15 where he stated that:

"I see nowhere in his affidavit where he put pressure on his counsel upon learning of the striking out application or even conferencing directions for striking out his application..."

The Registrar was actually lamenting that the Applicant had not put his evidence before him. It was not his duty to look for evidence. The Registrar therefore had no choice but to find on the evidence before him as he did.

The purpose of the application is so that the Applicant can take benefit of Rule 83 (3) of the Court of Appeal Rules where the time taken to prepare the record of Appeal is not taken into account in computing the time within which the appeal is to be instituted. However, Rule 83 is not applicable to Election Petition appeals (See:**Moses Kasibante vs S. Katongole (supra)**

Even for court to exercise its discretion, you must show vigilance. (See: **Moses Ali vs Piro Santos Eruaga Court of Appeal Civil Application No. 22 of 2011,** pages 17, 18, 24 – 28)**.**

In that case, the court emphasised that you have 30 days to file a Record of Appeal.

In the instant case, the Memorandum of Appeal was filed on 12th July, 2012.

The Applicant had until 12th August 2012 to file the Record of Appeal. (R31). This was not done. Instead the Record of Appeal was filed on the 15th February 2012, seven months late; and to this date, there is no application for extension of time within which to file the Record of Appeal. Hence the submission that even if this application were allowed, it would not be of any use to the Applicant because the time has already run out and they will not have the benefit of Rule 83 courts do not make orders in rain.

Section 66 of the Parliamentary Elections Act gives six months within which to determine an Election Petition Appeal, yet there is no application for extension of time within which to hear the appeal.

If the time started running from 28th June, 2011 when the Notice of Appeal was filed, the time will have expired on the 28th December, 2011, that is, even before the Record of Appeal was filed.

This shows lack of vigilance or impotence the Applicant attached to this appeal.

If the time started to run on 12th July 2011, when the Memorandum of Appeal was filed, then the appeal should have been determined by the 12th February, 2012. That time again ran out before the Record of Appeal was filed.

These dates are important because the Applicant and his counsel were interacting with the court all the time and these dates should have reminded them that election appeals are very important yet time was running out.

Even if the court takes even a more liberal approach and computes the time from the date of filing the Record of Appeal (which was out of time,) the Applicant still had until the 13th March 2012, to have the appeal heard since the record of Appeal was filed on the 15th February, 2012. (Rule 34 of the Parliamentary Elections (Election Petitions) Rules A provides that the Election Appeal shall be completed within 30 days unless court extends it on exceptional grounds.)

Between the February and 15th March 2012, the following important things which go to show the lack of diligence on the part of the Applicant and his counsel:

- On the 15th February 2012, he was given conferencing directions to pursue his appeal. They did not serve the Respondent's counsel despite undertaking to do so.
- On the 23rd February 2012, an application to strike out the appeal was filed.
- On the 4th March 2012, a supplementary affidavit was filed.
- On the 5th March, 2012, by a letter to counsel for the Applicant, they were told that all these things were happening.

The application, the subject of this reference was filed on the 30th March 2012; five days after the time allowed by Rule 34 of the PEA Rules.

That was the evidence before the Registrar to show how vigilant the applicant was. However, this was a clerical case of lack of diligence and the Applicant, though he had all the time to explain to court, never did so.

This kind of conduct was discussed in the **Kasibante vs Electoral Commission case at PP. 7 – 8; and 12 to 13**.

Time was of the essence. The Appellant was at every stage put on notice that the appeal was proceeding; and he did nothing about it.

No amount of argument can save the applicant in the circumstances and enable the Court to exercise its discretion in his favour.

In conclusion, the learned Registrar exercised his discretion judiciously on the facts available to him on the court record and should not therefore be faulted for not asking the Appellant for any other evidence. If the Appellant felt that he needed any other evidence, he should have brought it. The application should be dismissed with costs, irrespective of the consequences, for justice does not always require tear the tardy or negligent be given audience.

Meru Farmers vs A.A Sulaiman [1966] E.A 449, a reference was made to the E.A Court of Appeal to review the refusal to grant extension of time by a single justice of Appeal. The Court held that a reference is in the nature of an appeal. The application is that I should review the evidence and the law which was before the Assistant Registrar and decide whether he properly exercised his discretion in making his decision that may be did. (See: also **MOTOR MART (U) LTD VS YONA KANYOMOZI – SCC Application No.6 of 1999** (unreported).

The application before the Registrar was for extension of time within which to file a letter requesting for typed proceedings in Election Petition No.9 of 2011.

It was supported by the affidavit of the Applicant dated 20th March 2012.

The application was opposed by the Respondents and the 1st Respondent filed an affidavit in reply on 2nd April 2012 and one Mmassa Jude a legal officer with the Electoral Commission filed one on behalf of the Commission dated 3rd April, 2012.

Rule 5 under which the application was brought states:

"The Court may.....extended."

Before an application can be granted under the above Rule, the applicant must show sufficient cause for his failure to comply with the legal requirement in issue.

In his effort to do so, the Appellant stated in his supporting affidavit that:

"2 to 14."

As Mr. Kiryowa rightly pointed out, the only issue to be decided here is whether the reasons given by the Applicant constitute "sufficient reason" to justify this court to interfere with the Registrar's discretion in favour of the Applicant.

The reason advanced by the Applicant for failure to serve the letter in time is that:

"8.....due to the inadvertence of M/S Katuntu and Co. Advocates none of the above letters was served on the Respondents."

First of all, none of the copies of the purported letters were annexed to the applicant's affidavit. There is no way one could tell the kind of letters he was referring to.

Secondly, there was no affidavit was filed by counsel Katuntu or anyone from that law firm to verify the inadvertence. The applicant's affidavit is thus hearsay as far as this averment is concerned because he deponed in paragraph 17:

"17 whatever is stated herein is correct and true to my knowledge and belief." Sic.

Even more importantly, it took over seven months from the 28th July 2011 to .....for the Applicant to file the said application. This was after the Respondent had not only filed an application to strike out the appeal but had served it on the Applicant's counsel pointing out the failure to serve the letter as one of the steps that had been fulfilled by the Applicant. Election petitions are time bound tenure as of the essence. Politicians need to get over the hassle and tussle of elections and settled down to the business of legislating and government. That is why this court has adopted a strict approach as evidenced by the recent decisions in the case of **Kasibante Vs S. Katongole** and **Piros Santos Grunga vs Moses Ali. (Supra).**

Clearly there is a limit to the extent to which litigants can benefit from the many decisions of the Supreme Court and this court that a litigant should be penalised by mistake of his counsel. This only benefits litigants if the mistake of counsel amounts to an error of judgment. This is not the case here. Counsel did not care. The applicant did not pursue his appeal with vigilance required in election petitions where the stakes are high.

The law governing extension of time is well settled. It is in the discretion of the judge. It being a judicial discretion, it must be exercised on sound principle. It was stated in **Shanti vs Hindocha and Others [1973] E.A 207 at 209** that:

> ***"The position of the applicant for extension of time is entirely different from that of an applicant for leave to appeal. He is concerned with showing "sufficient reason" why he should be given more time and the .....persuasive reason he can show, as in Bhat's case, is that the delay has not been caused or contributed by dilatory conduct on his part."***

On the evidence before me, I am not satisfied that sufficient reason has been shown why the purported letters were not served in time. There is in the circumstances no reason to justify any interference with the Assistant Registrar's decision.

This Reference stands dismissed with costs for that reason.

Dated at Kampala this....**28th** .....day of ....**June**....2012.

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M. S. ARACH AMOKO

JUSTICE OF APPEAL