

THE REPUBLIC OF UGANDA

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NO.23 OF 2011**

(ARISING OUT OF ELECTION PETITION APPEAL NO.17 OF 2011)

*(ARISING OUT OF ELECTION PETITION NO.4 OF 2011 OF THE HIGH
COURT OF UGANDA AT MASINDI)*

NYENDWOHA BIGIRWA NORAH.....APPLICANT

VERSUS

**1. THE RETURNING OFFICER,
BULIISA DISTRICT**

2. THE ELECTORAL COMMISSION...RESPONDENTS

**CORAM: HON.JUSTICE S.B.K.KAVUMA, JA
HON.JUSTICE A.S.NSHIMYE, JA
HON.JUSTICE REMMY KASULE, JA**

RULING OF THE COURT

Introduction

This application is brought under Rules 43 & 82 of the **Judicature (Court of Appeal Rules) Directions; S.I 13-10.**

It seeks an order that the Notice of Appeal filed into the High Court be struck out with costs to the applicant. It is brought by way of Notice of Motion and is supported by

the affidavit of Ms. Nyendwoha Bigirwa Norah. It is opposed through the affidavit in reply sworn by Francis Gimaru Advocate.

Background

The background to the application is that the applicant successfully petitioned the High Court of Uganda at Masindi for the nullification of the election of Ms.Mpairwe Beatrice as the Woman Member of Parliament for Bulisa District. The respondent, being dissatisfied with the said decision, appealed against it. She lodged a Notice of Appeal in the High Court of Uganda at Masindi on the 29th day of July 2011. It is this Notice of Appeal that this application seeks to strike out.

Grounds of the application

The grounds of the application are set out briefly in the Notice of Motion and restated with substantiation in the affidavit in support of the application to the effect that:

- *on the 22nd day of July 2011, Judgment was passed against the respondents in the applicant's favor by the High Court of Uganda in Election Petition No.4 of 2011,*

Nyendwoha Bigirwa Norah versus Mpairwe Beatrice, The Returning Officer, Buliisa District, and Electoral Commission,

- *it was brought to the attention of the applicant by her counsel that the respondents filed a Notice of Appeal in the High Court of Uganda on the 29th July 2011 and the said Notice Of Appeal was served upon her counsel on 1st August 2011,*
- *she has been further informed by her counsel, whose information she verily believes to be true, that the respondents did not serve the applicant with a copy of the letter requesting for the proceedings in the above said High Court Election Petition No.4 of 2011,*
- *she was further advised by her counsel that;*

a) the applicant herein being a party who would be affected by the intended appeal ought to

have been served by the respondents or their Counsel with the letter requesting for proceedings.

b) it is an essential requirement under the rules of this court for a letter requesting for proceedings by an intending appellant to be served upon her as the applicant or her counsel.

c) failure to serve the said letter upon her or her said counsel within the time prescribed by the rules, or at all, renders the Notice of Appeal or the intended appeal incompetent,

d) the respondents, therefore, failed to take all the legal steps that are necessary to prosecute the intended appeal,

- *the intended appeal, being a matter concerning elections, the intending appellant ought to take all necessary legal steps and within the time stipulated by the*

law to ensure expeditious handling of the matter and that the appeal is in time,

- *the intending appellant in the present case has not been vigilant and does not appear serious with the intended appeal.*

- *she is informed by her counsel, that because of the failure of the respondents to file a letter requesting for proceedings, and or the failure to serve upon the applicant the said letter, the applicant as a party affected by the intended appeal would not be able to follow up or know as to whether the respondents have applied for, or are in the process of obtaining the proceedings or even to compute time relevant to appeals in this court,*

- *she seeks orders that the respondents' Notice of Appeal dated 29th July 2011 which was filed in the High Court on the 29th July 2011 in Election Petition No.4 of 2011,*

Nyendwoha Bigirwa Norah versus Mpairwe Beatrice, the Returning Officer, Buliisa District, and the Electoral Commission, be struck out with costs.

Issues

The issues as framed by counsel in their Joint Conferencing Notes are:

1. Whether the respondents' Notice of Appeal should be struck out for failure to serve the Applicant with the letter requesting for proceedings.

2. Whether the Respondent's reply to the Applicant's letter stating

"counsel: We have applied for the record from MSD (Masindi) though have not yet received it. However when we file it in the 30 days, we shall avail a copy",

constituted having taken an essential step required to prosecute this appeal.

3. What are the remedies available to the parties?

Representation

At the hearing of the application, the applicant was represented by Mr. Birungi Wycliffe, (counsel for the applicant). The respondent was represented by Mr. Isaac Bakayana, (counsel for the respondent).

The applicant's case

Counsel for the applicant read and heavily relied on the affidavit in support of the application. He submitted that on the 1st day of August 2011, the respondent served the applicant with a Notice of Appeal. He, however, did not serve the applicant with a copy of the letter requesting for proceedings in Election Petition No.4 of 2011. He pointed out that it is an essential requirement under rule 83(1) (2) & (3) of the Court of Appeal Rules to serve the copy of the letter but the respondent did not do so.

In his view, that failure prejudiced the applicant as a party affected by the intended appeal as she would not be able to properly follow up the progress of the appeal. He contended, that the respondent's claim that her lawyer sent the applicant a note informing her that the

respondent had applied and was waiting for the record of proceedings, could not rectify the defect.

Counsel cited and relied on the cases of **Reamaton case Ltd v Uganda Corporation Creameries Ltd, CACA No.53/97**, and **Kasirye Byaruhanga & Co. Advocates v Uganda Development Bank S.C.Civil Appeal No.2 of 97**, in support of this contention. He prayed court to strike out the Notice of Appeal with costs to the applicant.

The case for the respondent

Counsel for the respondent submitted that they too neither disputed the non service of the letter in issue to the applicant nor the fact that the letter was filed at the High Court at Masindi. He contended, however, that the failure to serve the copy of the letter to the applicant was remedied when counsel for the applicant wrote to the respondent on 17th August 2011 and the respondent's counsel responded with a note stating that there was a process to procure the proceedings from the court at Masindi.

Counsel relied on the case of **Steven Mabosi vs Uganda Revenue Authority SC Civil application No. 16 of 1995** and argued that the essence therein was that as long as the other party had information, the rules were complied with. He also relied on **Plaxeda Sembatya vs Tropical Africa Bank, [SC Civil Application No. 6 of 1987]**

Counsel contended that the applicant in the instant case was not prejudiced she was also trying to get the record of proceedings since she wanted to appeal. Counsel contended, further, that Annexure "A" to the affidavit in reply, (the letter requesting for the proceedings), showed that it had been addressed to the Registrar. The note thereon was to inform the respondent of the appellant's efforts to get a copy of the proceedings.

He prayed court to dismiss the application with costs.

Reply

In reply, counsel for the applicant contended that the failure to serve on her a copy of the letter to the Registrar actually prejudiced the applicant. He pointed out that

there was an existing judgment from the lower court which the applicant won whose fruits she could not enjoy. He reiterated his earlier prayers.

Court's consideration of the application

The gist of this application is the applicant's contention that the respondent, in not giving her a copy of the letter to the Registrar requesting for the record of proceedings, missed an essential step in the prosecution of the appeal justifying the striking out of the Notice of Appeal with costs to her.

Rule 82 of the **Judicature (Court of Appeal Rules) Directions** provides:

82 "A person on whom a notice of appeal has been served may at any time, either before or after the institution of the appeal, apply to the court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken

or has not been taken within the prescribed time.” (sic)

Rule 83(2) of the same Rules provides:

“Where an application for a copy of the proceedings in the High Court has been made within thirty days after the decision desired to be appealed against has been made, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the High Court as having been required for the preparation and delivery to the appellant of that copy.”

Rule 83(3) of the same Rules provides:

“An appellant shall not be entitled to rely on subrule (2) of this rule, unless his or her application for the copy was in writing and a copy of it was served on the respondent, and the appellant has retained proof of that service.”(sic)

In the instant case, it is not disputed that the respondent did not serve the applicant with a copy of the letter applying for the proceedings. However, counsel for the respondent sought to seek refuge in their response to the applicant's own request for a copy of the record of appeal.

That response came twenty three days after the respondent had written to the Registrar and yet had not, till then, bothered to give the applicant a copy of the letter in question.

The service envisaged under Rule 83 (supra) must, in our view, be effected on the affected party immediately on the other party applying for the copy of the proceedings. Election related litigation must be handled expeditiously and the rules governing that litigation must be strictly construed and complied with.

We reject the respondents contention that the failure to serve the copy of the letter in question did not prejudice the applicant. She remains justifiably interested in the final outcome of the appeal.

We, further reject the respondents' contention that his

failure to give the applicant a copy of the letter was remedied by a note from one advocate to another, twenty three days after the writing of the letter applying for the proceedings and promising to pass on the record to the applicant when they are got. To accept the contention would amount to flouting the very rules meant to guide election related court proceedings.

We find the authorities cited by counsel for the respondent distinguishable on facts from the instant application. In the case of **Stephen Mabosi** (supra), the letter requesting for proceedings was in the same document as the Notice of Appeal and, therefore, service of the Notice of Appeal on the respondent was found sufficient. Further, **Stephen Mabosi** (supra) was decided on 2nd February 1996, much earlier than the cases of **Reamaton** and **Kasirye Byaruhanga** (supra). The Supreme Court in these cases, invoking its powers to depart from its earlier decision, altered its position in **Stephen Mabosi** (supra) by deciding that proof of service of the copy of the letter requesting for the proceedings was necessary.

We note that this application arises out of a parliamentary election petition. **Article 140** of the Constitution and sections 63(2) and 66 (2) and (4) of the Parliamentary Elections Act as well as Rules 13 and 33 of the Parliamentary (election Petitions) Rules enjoin the parties involved and the courts to expeditiously dispose of election matters. Time is, therefore, of the essence in election matters. It is the duty of the intending appellant to actively take the necessary steps within the time prescribed by law to prosecute his/her appeal. This court has held in **Election Petition Application No.24 of 2011: Bakaluba Mukasa Peter & Another vs Nalugo Mary Margret Sekiziyivu**, that:

“Delay in taking the right step in litigation at the right time hinders successful parties from enjoying the fruits of their judgement which was obtained in their favour. The respondent has delayed in taking the right step at the right time with the result that the application would be allowed and the notice of appeal will be struck out.....”(sic)

In view of what has been stated above, we find that failure by the respondent to serve the applicant with a copy of the letter requesting for the proceedings immediately it was written to the court amounted to failure by the respondent to take an essential step in prosecuting the appeal. It was a fatal failure too.

In the final result, we allow the application and accordingly strike out the Notice of Appeal.

We grant the costs of this application to the applicant.

We so order

Dated at Kampala this ...**30th** ...day of ...**April**...2012

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S.B.K.Kavuma
Justice of Appeal

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A.S.Nshimye
Justice of Appeal

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Remmy Kasule
Justice of Appeal