THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT SOROTI

MISC. APPLICATION NO. 26/2006

(Arising from Election Petition No. 003/2006)

ANTHONY OKELLO .....APPLICANT

VERSUS

1. **OJOK B'LEO**
2. **RETURNING OFFICER,**
   AMOLATAR.
3. **UGANDA ELECTORAL,**
   COMMISSION .....RESPONDENTS

RULING

BEFORE: HON. MR. JUSTICE MUSOTA STEPHEN.

On 23rd February, 2006, Election of directly elected members of parliament took place throughout the Republic of Uganda. One of the contested for constituency was Kioga, in Amolatar District. One Anthony Okello was duly nominated candidate together with another called Ojok B'leo. At the conclusion of the exercise, the returning officer- Amolatar district declared Ojok B'leo as winner and duly elected. This did not go down well with Anthony Okello. He believed he was the rightful winner. He attributed his failure to irregularities, commissions and omissions allegedly perpetuated by Ojok B'leo, the returning Officer – Amolatar District and the Uganda Electoral Commission. As a result Anthony Okello filed Election Petition 003 of 2006 in this court.

After conclusion of formalities prior to the hearing of the petition, Mr. Twontoo Obaa learned counsel for the petitioner applied for a hearing date. This court appointed 10th May, 2006 as the hearing date for the Petition.

When this court duly constituted itself to hear the petition, both the Petitioner and his counsel were not in court. Mr. Jude Otim Atiang for the 1st Respondent and Mr. Philip Mwaka for the 2nd and 3rd respondent were in court and expressed readiness to proceed.

In the absence of the petitioner and his counsel both learned counsel for the respondents moved court to have the Petition dismissed for non –appearance of the petitioner and his counsel. Mr. Jude Atiang urged that the petitioner and counsel had not bothered to furnish court with any reasons for their absence yet the date was within their knowledge. Mr. Mwaka for the 2nd and 3rd respondents associated himself with the prayer by learned counsel for the 1st respondent. Court dutifully up held the request by the respondents and dismissed the petition for want of prosecution and with costs.

At a later date, Mr.Twonto Obaa learned counsel for the petitioner filed this application by way of Notice of Motion under O9 Rules 19, 20(1) and (2); Order 48 Rules (1) and (2) of the Civil Procedure Rules and S. 98 of the Civil Procedure Act. The applicant in this application is Anthony Okello and like in the dismissed petition, the Respondents are Ojok B'leo, the Returning Officer Amolatar District and the Uganda Electoral Commission. Mr. Jude Otim Atiang still represents the first Respondent and Mr. Henry Ddungu is for 2nd and 3rd Respondents.

The orders sought in this application are that:-

1) The dismissal order of this honorable court of the 10th may 2006 by Justice Musota Stephen be set aside.
2) The costs of the application be provided for.

The general grounds of the application are that:-

i. There was sufficient reasons to justify the absence of the petitioner from court when the case file was called and dismissed for want of prosecution in that the private vehicle the Petitioner and advocate were traveling in from Lira to court broke down on the way to Soroti at Lwala in Kaberemaido District. That the two had to wait for alternative means of transport *to wit* a bus coming from Lira. The bus delayed them and they arrived at court at about 9.40 a.m. when the case file had already been called and dismissed.

ii. The applicant believes the petition has good cause with a high likelihood and probability of success.

iii. It is in the interest of justice that the application be allowed.

iv. No injustice, prejudice, loss or damage will be occasioned to the other side by allowing this application.

v. Irreparable damage will be occasioned to the applicant if the application is not allowed.

The Notice of motion is supported by an affidavit deponed to by Mr. Twontoo Oba which reiterates the general grounds in the Notice of Motion. He clarifies that together with the applicant they were traveling in Motor vehicle UAD 376 A, a Toyata Carina 11 belonging to M/S Twontoo and Co. Advocates but the vehicle developed mechanical problems. The applicant also deponed an affidavit in support which was almost in similar terms as that of his advocate. He swore that they were traveling in motor vehicle No. UAD 376 A, a Toyata Carina 11 belonging to his advocate. That the said vehicle broke down at Lwala in Kaberemaido district. That upon learning of the dismissal, he straight away instructed his advocate to file this application.

Several affidavits in reply were filed for the 1st respondent. These included affidavits by Mr. Jude Otim Atiang, Counsel for the 1st Respondent, Stella Acan an advocate of the High court, Akello Gloria another advocate, Ongom Patrick and Ogwang Patrick as well as Omara Denis all mechanics at New Hyundai Motor garage located opposite TipoPaco House, Olwol Road Lira

Municipality. The main thrust in these affidavits is that the Petitioner and his advocate could not possibly have traveled in Motor vehicle UAD 376 A because of its poor mechanical condition and therefore the said vehicle could not have broken down along the way as alleged by the applicant and his counsel. The mechanics deponed that they had the said motor vehicle in their custody on the day in question.
Mr. Atiang swore that Mr. Twontoo expressed regret to him for having traveled in a bus from Lira.

Mr. Twontoo Oba filed several affidavits in rejoinder attacking the deponements by the respondent. In his rejoinder, he asserted that the affidavits in reply contained outright lies, hearsay evidence, deceptions, malicious and deliberate untruthfulness, concoctions, baseless, unfounded and uncorroborated allegations, wild assumptions, speculations and imaginations and should be disregarded. That Jude Atiang expressed personal opinion. The other rejoinders were sworn by Yastin Ndogo a mechanic and Godfrey Okii driver to Twontoo.

At the hearing of the application, Mr. Twontoo made a lengthy submission echoing what is contained in the Notice of Motion and the attendant affidavits. He emphasized that sufficient cause prevented him and the applicant from attending court. That the election Petition be reinstated and heard on its merit for ends of justice to be realized.

Before replying to the submission by Mr. Twontoo, Mr. Atiang sought leave to cross examine the applicant upon his affidavit to which Mr. Twontoo did not object.

In cross examination, Anthony Okello said that he was picked by Mr. Twontoo from his house in motor vehicle UAD 367A at 6.20 a.m. and the vehicle broke down at 8.10 a.m.

When examined by court the applicant said he did not know the make of motor vehicle UAD 376A.

In addition to the affidavits sworn by his witnesses, Mr. Atiang sought and put Patrick Ongom and Omara Dennis in the witness box.

Patrick Ongom elaborated that on 8.5.2006, Mr. Twontoo took a vehicle UAD 376A to his garage. It had a faulty break system. He worked on it. Twontoo took the vehicle thereafter but brought it back on 9th May, 2006 because the engine was smoking. It had problems with the carburator and plugs. On this occasion Mr. Twontoo did not collect the vehicle. He collected it on 11th May, 2006. The vehicle was not repaired for lack of money. Vehicle UAD 376A was in the garage on 10th May, 2006.

In cross examination by Mr. Twontoo, this witness generally reiterated his story.

Omara Denis also testified on oath. He said he is a mechanic at Hyundai Motor garage, Lira. That Mr. Twontoo takes his vehicle UAD 376A for repairs in their garage. He worked on the said vehicle's breaking system on 8th May, 2006. Twontoo collected the vehicle thereafter. He took it back to the garage on 9th May 2006 with other problems. It was smoking and plugs were not working. The carburator was also dirty. On this occasion, Twontoo did not collect the vehicle. He collected the vehicle on 11th May, 2006 at around 1.00 p.m.

In his submission, Mr. Jude Otim Atiang told court that since the main petition was dismissed as well as a subsequent application 17 of 2006, the applicant herein had no *locus standi* to institute this application. He referred to S. 7 of the Civil Procedure Act. He further submitted that the applicant has nothing to be reinstated. In the alternative, learned counsel said that this application is premised on falsehoods which go to the root of this application. That the applicant lied to court in his affidavit that they traveled in motor vehicle UAD 376A. The deponent does not know the make of the vehicle. That the applicant and his counsel took time to do other things not connected with court before they came. This did not show diligence. That the vehicle UAD 376A was in the garage on 10th May, 2006. He referred to the case of **Bitaitana V Kamura (l977) HCBN 34** which held that where there are falsehoods in affidavits the entire affidavit has to be disregarded and application rejected.

That this application be thrown out with costs because throughout the submission by Mr. Twontoo, there is no indication that the petition has a likelihood of success.

In his submission, Mr. Ddugu for the 2nd and 3rd respondents referred to the last paragraph of the Notice of Motion on time. That if the times mentioned at different occasions are critically looked at, they indicate falsehoods intended to hoodwink court to believe what did not happen. Learned counsel relied on the case of Kananura (Supra). That an affidavit with falsehoods has to be rejected and struck off the record. Mr. Ddugu referred to the affidavit of Geoffrey Okii who said on the hearing date he went to the home of his boss at 6.00 a.m. The home was 10 miles away. This indicates laxity. That advocates must organize themselves to avoid carelessness and irresponsibility. That the applicants took a foreseeable risk for which they should he held accountable. With falsehoods in the affidavits, no sufficient cause has been shown. There is no evidence to prove such.

Mr. Ddugu further submitted that if at all the applicant and his lawyer took a bus they should have exhibited receipts to corroborate their evidence. They did not do this. That court should not entertain flimsy excuses which could open the flood gates for flimsy applications.

In reply, Mr. Twontoo told court that his application is not affected by the doctrine of *resjudicata*. That the earlier application was before a wrong forum. That his application has no falsehoods and/or contradictions. That he was diligent in whatever steps he took. He agrees with the pronouncement in **Bitantana's case** (supra). That on the whole, the applicant's evidence has been left unchallenged thus establishing just cause for setting aside the dismissal.

The success or failure of this application revolves around establishing whether there is sufficient cause shown to set aside the dismissal of election petition 003 of 2006. Secondly, whether there are established falsehoods in either affidavits which would render the application a nullity or successful.

I have had an elaborate consideration of this application. I have meticulously read the entire content thereof. I have related the same to and analysed the respective submission by counsel. My considered impression and conclusion is that on a balance of probabilities, it has been proved that much of the averments by the applicant, his counsel, and their witnesses comprised of

blatant false hoods that cannot be accepted by this court. I am satisfied that Mr. Twontoo and his client did not use motor vehicle UAD 376A to travel to court on the day the petition was dismissed i.e. on 10th May, 2006. I am convinced by the affidavits in reply and the testimonies by Omara Dennis and Patrick Ongom that Motor vehicle UAD 376A did not leave their garage between 9th May 2006 and 11th May 2006.
When cross examined the applicant despite his standing in society could not tell the type of vehicle they traveled in if at all. That cemented my conclusion that he did not know the vehicle because he did not sit in it.

What amazes me is that the applicant meticulously described the same vehicle in his affidavit in support of the notice of motion. In his affidavit and submission, Advocate Twontoo attempted to deny the garage which renders service to him. He did not convince me on this. I am left wondering why Mr. Twontoo and his client decided to conspire to tell this court lies. This has left the integrity of the applicant in question. I will uphold the submissions by both counsel for the respondents that, the applicant and his advocate did not exercise due diligence to ensure that they attend to the hearing of their petition. They left Lira late and arrived in Soroti late in a means of transport they have decided to conceal. They took a foreseeable risk for which they are to blame.

In addition to saying that he has established sufficient cause, Mr. Twontoo referred this court to ss. 98 CPA and Articles 126 (2) (e) of the constitution. He urged that these laws be invoked to allow his application. S.98 C.P.A. is only applicable in ambiguous situations. Where there are clear provisions to cover a dispute, court can not invoke its inherent powers. Likewise, Article 126 (2) (e) of the constitution cannot come in given that the dismissal of the petition was not a technicality. It was a step provided for in law and a straight forward procedure.

Regarding whether the application for reinstatement is *res judicata* I do not agree with Jude Otim Atiang. The application filed before the registrar was of no consequence for he had no jurisdiction to handle it. No result came out of it as envisaged under S. 7 of the Civil Procedure Act.

It was held in the case of **Bitaitana V Kananura (l972) HCB** that where there are false hoods in affidavits, the entire affidavit has to be disregarded and application rejected. Where an affidavit in support of an application contained obvious falsehoods, such false hoods rendered the entire affidavit suspect and an application based on such an affidavit must fail. "**Joseph Mulenga V Photo focus (U) Ltd (l996) VI KALR 19"**

In deciding whether or not to reinstate a suit, the main test is whether the applicant honestly intended to attend the hearing and did his best to do so. The other two tests are the nature of the case and whether there is a *prima facie* chance of success of the case.

Throughout his submission learned counsel for the applicant did not endeavour to convince this court that he had chances of success. He did not show that he had sufficient cause for non appearance or that he intended to appear in view of the false hoods discovered by this court. This has left the notice of motion with no supporting affidavits. Since the falsehood go to the root of the entire application, it cannot stand. The applicant and his counsel did not take advantage of the privilege the law gives election Petitions under S. 63 (2) of Act 17 of 2005. No flimsy and false excuses will be condoned.

For the reasons I have given herein above, this application must fail. It is dismissed with costs.

Musota Stephen
AG. JUDGE.
24.7.2006