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The Republic of Uganda
In the High Court of Uganda Holden at Soroti
Miscellaneous Application No. 35 of 2023
(Arising from Election Petition No. 0072 of 2021)

10 Omara Yuventine Applicant

Versus

Ariko Jonny De West Respondent

Before: Hon. Justice Dr Henry Peter Adonyo

Ruling

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1. Introduction:

This application was brought by way of Notice of Motion under section 98 of the Civil Procedure Act, Cap 71, Order 43 rule 4 (1), (2), and (3) of the Civil Procedure Rules and Order 52 Rules 1 and 2 of the Civil Procedure Rules SI 71-1 for orders that;

20 a) The execution of the Decree and/or orders arising from the Judgement of The Hon. Mr Justice Isah Serunkuma of the High Court holden at Soroti vide Election Petition No. 007 of 2021 be stayed pending the determination of the appeal filed by the Applicant in the Court of Appeal of Uganda.

b) Costs be provided for.

25 The grounds of the application are set out briefly in the application and enhanced in the supporting affidavit deposed by Omara Yuventine, the applicant. The gist of the Applicant's case lies in paragraphs 3,4,5,6,7,9,12,13, and 14 of the affidavit of the applicant which I shall reproduce for ease of reference, that;

30 a) The applicant was the 1st respondent in Election Petition No. 007 of 2021 which was heard by the Hon. Mr. Justice Isah Serunkuma and on the 9th of March 2023, the learned Justice delivered a judgement and made orders to wit:

i. The election of the 1st respondent, Omara Yuventine as District Chairperson for Abim district is nullified, and the district chairperson seat for Abim district is hereby declared vacant.

35 ii. That the 2nd respondent, the Electoral Commission, conducts fresh elections for Abim district chairperson as soon as possible.

iii. Costs of this petition awarded to the petitioner therein, to be met jointly and severally by the respondents.

- 5 b) The applicant is dissatisfied and aggrieved by the fore-mentioned decision and orders of the High Court and has taken an essential step to file an appeal in the court of appeal which could have the effect of reversing the High Court decision.
- c) The said appeal has a very high chance of success as it raises very serious points of law and facts which are yet to be heard and determined by the Court of Appeal.
- 10 d) The High Court allowed the Petition against the applicant essentially on the ground that he had not resigned from the Uganda Peoples' Defence Forces and as such was not eligible for nomination and contest as a candidate which decision the applicant contends was erroneously arrived at without proper consideration of the evidence on record and if the applicant's appeal is allowed, the decision of the High Court will be set aside and/or vacated.
- 15 e) The applicant is likely to suffer substantial loss if this application is not granted by this Honourable Court as the decree and orders of the High Court will be executed, he will be barred from Office and performing his legal mandate, a by-election will be held which will have the effect of rendering his appeal nugatory.
- 20 f) The application is brought without unreasonable delay and before the expiration of the time allowed for appealing under the law.
- g) The applicant is willing and ready to deposit security for the due performance of the decree and /or orders as may be directed by this Honourable Court.
- 25 h) The balance of convenience tilts in favour of the applicant having been duly elected, sworn in and is the incumbent Chairperson L.C.5 of Abim district.
- i) It is in the best interest of justice that thus Honourable Court exercises its discretion in favour of the applicant.

The application was opposed by the respondent in his affidavit in reply, for brevity, I shall reproduce paragraphs 3,5,6,8,9, and 10 of the affidavit in reply which the respondent bases on to oppose the instant application. That;

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- a) It is not true that the applicant is still the incumbent Chairperson for Abim district as his election was nullified and the seat declared vacant in the Judgement delivered on 9th March 2023 in Election Petition No. 007 of 2021.
- 35 b) The office of the Chairperson of Abim district is currently occupied by the Vice Chairperson, Okech Godfrey and any changes to reinstate the applicant to the office will cause inconveniences in the district.

- 5 c) I am not aware of the imminent threat of a bye-election that is to be conducted before the conclusion of the appeal process since it is the Electoral Commission that is mandated under the law to organize the by-election and it is not a party to the present application.
- 10 d) I am aware that declarations made by the High Court cannot be stayed as it would by default tantamount to setting aside the decision in Election Petition No. 007 of 2021 made by this Honourable Court.
- 15 e) There is no merit in the application nor any likelihood of success of the appeal as alleged by the applicant; the reason the Electoral Commission which was the 2nd respondent in the Election Petition No. 007 of 2021 did not appeal against the decision made by this Honourable Court.
- f) The applicant will not suffer irreparable damage nor will the appeal be rendered nugatory if the application is not granted.

2. Representation:

20 M/s Ochieng Associated Advocates and Solicitors represent the applicant while M/s J Byamukama and Company Advocates and M/s KOB Advocates and Solicitors jointly represent the Respondent.

3. Issues:

- 25 a) Whether there are any justifiable grounds for a stay of execution of the orders in Election Petition No. 007 of 2021?
- b) What remedies are available to the parties in the circumstances?

4. Resolution:

The applicant and the respondent filed written submissions. I thank the counsel of each party, and I have considered all the submissions accordingly.

It is pertinent to first cite the law under which the applicant filed his application. Thus;

30 **Section 33 of the Judicature Act, Cap 13 provides that;**

General provisions as to remedies

35 *The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided.*

5 Section 98 of the Civil Procedure Act, Cap 71

98. Savings of inherent powers of the court

Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

10 The applicant admitted that the application was brought under the wrong law, that is, Order 43, Rule 4 (1), (2), and (3) of the Civil Procedure Rules, which relates to an order for stay by the High Court from an appeal to the High Court and not to the Court of Appeal as it is in this instant application. Upon such admission and with silence from the respondent, I will also not dwell on it. However, I hasten to add that in the case of
15 ***Francis Wazarwahi Bwengye vs. Haki W. Bonera, HCCA No. 0033 of 2009***, Justice Yorokamu Bamwine J (as he then was) relied on the decision in ***Tarlol Singh Saggi vs. Road Master Cycles (U) Limited, CACA No. 46 of 2000***, and observed that where an application omits to cite any law at all or cites the wrong law, but the jurisdiction to grant the order sought exists, then the irregularity or
20 omission can be ignored and the correct law inserted. I agree with this position as the correct one in the circumstances.

Upon perusal of the pleadings and the submissions, I deciphered a mutual position of both counsel for each party that a stay of execution is alien to election petition appeals under the Local Governments Act, as the Act is silent on the procedure regarding
25 appeals, viz a viz such stays, unlike the Parliamentary Elections Act.

I intend to first deal with the possibility of a stay of execution in local government election petitions and appeals under the auspices of the Local Governments' Act before I delve into the merits of the application.

It is trite that the Local Governments' Act, Cap. 243 (as amended), is the primary law
30 that regulates Local Government Council election petitions and all other matters concerning petitions, appeals from election petitions, and the instant application. I shall not belabor the details of those pertinent provisions unless they are necessary for the resolution of the issues before the court.

Under paragraph 11 of his affidavit in support of the application, the applicant
35 admitted that he is advised by his lawyers, which advice he believes to be true, that the Local Government Act under which the petition was filed does not have explicit provisions staying the implementation of the orders issued by the court in election



5 matters when an appeal is preferred, thus the need for the applicant to seek an order to stay the enforcement of the orders sought in this instant application.

The respondent, in reply to the applicant's averment under paragraph 7 of his affidavit, deposed that this is an election matter and the Local Governments' Act, Cap 243, has no legal provision for a stay of execution.

10 Counsel for the applicant in his submissions reiterated the applicant's paragraph 11 of his affidavit in support and pointed out that whereas the Parliamentary Elections Act No. 17 of 2005, provides for an automatic stay where an appeal is lodged under Section 95 of the Parliamentary Elections Act, the Local Governments' Act is silent on this point, and the question remains what remedy is available to a local government official
15 who has lost a petition and has preferred an appeal like the applicant in the instant case.

Upon this dicey circumstance, the applicant's counsel contended that since the law provides for a right of appeal, which the applicant has exercised, the High Court should invoke its powers under Section 33 of the Judicature Act and Section 98 of the Civil
20 Procedure Act to issue orders in the interest of justice so that the pending appeal is not defeated and rendered nugatory.

The respondent submitted in reply that a provision for a stay of execution was not envisaged under the Local Government Act, Cap. 243, was not envisaged by parliament in regard to local government election petitions because the Local
25 Government Act, Cap. 243, envisages casual vacancies in the office of the district chairperson and provides a remedy for them.

The position obtaining on applicability of Section 95(3) of the Parliamentary Elections Act in relation to Section 172 of the Local Government Act is that the same is not applicable to election petitions of the conducted under the auspices of the Local
30 Government Act. This was held in the case of *Peter Odok W'oceng vs Markly Vicent Okidi and 5 others Election Petition No. 29 of 2011* where the Court of Appeal's holding was to the effect that; Section 172 of the Local Governments Act was plain and unambiguous as referring to the Electoral Commission and not any other body and by virtue of which section 95 (3) of the Parliamentary Elections Act does not
35 apply to Local Government officials. The Court of Appeal added that;

We are fortified in our reasoning by the very clear provisions of Section 18(5) of the Local Governments Act which reads as follows:

5 “(5) Subject to Section 171(4), if the Chairperson dies, resigns or is removed from office, the vice chairperson shall assume the office of the chairperson until the election of the new chairperson and the election shall take place within six months of the occurrence of the event.” (underlining provided for emphasis.

10 We think that the intention behind section 18(5) is to fill the void left in case the Chairperson of the District Local Government is removed for any reason from office to ensure that the district is not brought to a standstill as a result of such absence. In that case, the district Vice Chairman continues to run office pending the
15 determination of the appeal. On the other hand, the case of a Member of Parliament is quite different; he or she has no vice, his or her constituency would have no representation in parliament if he or she vacates the seat during appeals, which have been known to take years before completion.”

20 This case of *Peter Odok W’oceng vs. Markly Vicent Okidi and 5 others Election Petition No. 29/2011* is on all fours with the instant application. In that case, the applicant (Peter Odok W’oceng) sought an order of stay of execution preventing the respondents or any other person(s) from enforcing the judgment and decree in election petition No. 9 of 2011 until disposal of the Election Petition Appeal
25 No. 35 of 2011 pending before that court. To my mind, the Court of Appeal in the case of Peter Odok W’oceng vs. Markly Vicent Okidi and 5 others (supra) tested and determined such applications for a stay of execution of elections under the Local Governments’ Act as the case in the instant case.

 In the Peter Odok W’oceng case (supra), evidence was led to show that;
30 “*the then Chief Administrative Officer of Agago District Local Government had received a copy of the decree from the High Court Gulu which had annulled the applicant’s election with effect from 23rd August 2011.*

 The applicant was according to the decree, ordered to vacate the
35 office immediately. Consequently, on the same day, the District Council met and passed a resolution directing the Chief Administrative Officer, through the Speaker, Agago district, to

5 ***implement the decree immediately and to recover all government properties from the applicant.***

The District Council authorized the Vice Chairperson to assume office as required by the law. He immediately wrote to the applicant to vacate the office, but the applicant resorted to
10 ***violently resisting the handover and instead fled the district with the official car. He thereafter handed over the office to the Vice Chairman as the lawfully recognized person to take over the office, pending fresh elections and since then, the district is running smoothly. The vehicle was recovered from the appellant with***
15 ***assistance from the office of the Inspector General of Government who was also looking for the applicant for some other offence and was handed to the Chief Administrative Officer.***

It is upon the foregoing evidence that the court held that not only was the applicant removed from office but that the vice
20 ***chairperson had effectively taken over and was running the affairs of the district. The decree whose execution is sought to stay had thus been executed and there is thus no decree to stay. The application was accordingly dismissed.***

In the instant case, the respondent under paragraph 5 of his affidavit in reply averred
25 that the office of the chairperson of Abim district is currently occupied by the vice chairperson, Okech Godfrey, and any changes to reinstate the applicant to the office will cause inconveniences in the district. Annexed and marked "A" is the letter by the Speaker of the Abim district Local Government Council dated 13th March 2023 acknowledging receipt of the court's order and decree.

30 Whereas upon the perusal of the said annexure marked "A", the letter sought the Attorney General's advice, and the maker of the same, the Speaker has not furnished an affidavit in reply to that effect, this fact was not controverted by the applicant in a rejoinder or in submissions. It is trite that uncontroverted facts are taken as true against the party who does not respond to them, in this instance the applicant.

35 It is therefore the finding of this court by virtue of Section 18(5) of the Local Governments' Act and the respondent's uncontroverted fact in his affidavit in reply evidenced by the letter dated 13th March 2023, that the office of the LCV chairperson of Abim district is being occupied by the vice chairperson. Therefore, the decree that

5 is sought to be stayed has been overtaken by events, as the *status quo* has already changed.

Importantly, by the doctrine of *stare decisis*, this court is bound by the Court of Appeal decision in the case of ***Peter Odok W'oceng vs. Markly Vicent Okidi and 5 others Election Petition No. 29 of 2011*** where the court as indicated above
10 pronounced itself on the respondent's preliminary objection that the instant application is an election matter and the Local Governments' Act, Cap 243 has no legal provision for stay of execution.

The preliminary objection is in effect upheld that a stay of execution is not envisaged in elections conducted under the auspices of the Local Governments' Act because of
15 Section 18(5) of the same Act which provides for the occupation of the office of chairperson by the vice chairperson in the event that the chairperson is removed from office.

Be that as it may, the court observed that the very fact that the Local Governments Act has no legal provision for a stay of execution in instances of appeals by aggrieved
20 persons from orders in election petitions conducted under the Act, it is a lacuna that needs to be resolved in the interest of justice.

The applicant contended that if the decree and orders of the High Court are not stayed, he will be barred from office and from performing his legal mandate; a by-election will be held which will have the effect of rendering his appeal nugatory.

25 This is all against the background that he avers that he lodged an appeal in the Court of Appeal (under paragraph 4 of the affidavit in support and annexure marked "A," the Notice of Appeal DRF COA-00-CV-EPP-0004-2023 dated 9th March 2023) and that the said appeal has a very high chance of success as it raises very serious points of law and facts in the memorandum of appeal (marked "B1") that are yet to be heard and
30 determined by the Court of Appeal (paragraphs 5 and 6 of the affidavit in support of the application).

Counsel for the respondent submitted that the only residual order that the court can afford the applicant is to stay the holding of the by-election but not the applicant's continued stay in office, as that would be a violation of Section 18 of the Local
35 Governments' Act.

The applicant while acknowledging the deficiency of having no provisions for stay of executions under the auspices of the law under which the petition was brought,

5 beckoned the court to invoke its inherent powers as preserved under Sections 33 of the
Judicature Act and Section 98 of the Civil Procedure Act in the interest of justice.
Section 98 of the Civil Procedure Act calls upon the court to make such orders as may
be necessary for the ends of justice or to prevent abuse of the court's process.

The orders that were sought to be stayed are that;

- 10 i. The election of the 1st respondent, Omara Yuventine as District Chairperson
for Abim district is nullified, and the district chairperson seat for Abim district
is hereby declared vacant.
- ii. That the 2nd respondent, the Electoral Commission, conducts fresh elections
for Abim district chairperson as soon as possible.
- 15 iii. Costs of this petition awarded to the petitioner therein, to be met jointly and
severally by the respondents.

Due to the lacuna in the law and in order not to render the appeal nugatory if it
succeeds, the court is aware that;

Section 145 (2) of the Local Governments Act enjoins the Court of Appeal in
20 case of a subsequent appeal to proceed to hear and determine the appeal within three
months after the day on which the petition was filed and may for that purpose, suspend
any other matter pending before it.

Furthermore, by operation of the law, the Vice Chairperson pursuant to Section 18(5)
of the Local Governments Act assumes the office of the Chairperson until the election
25 of a new chairperson to be elected within six months after the occurrence of the event.
In the instant case, it is the evidence of the respondent that the vice chairperson has
already assumed office.

It is my considered opinion that since the law envisages the hearing of the appeal in
the shortest time possible and which has already kicked off with the memorandum of
30 appeal being filed by the applicant, this court invokes its powers to stay the Electoral
Commission from holding the by-election to fill the seat of the LCV Chairperson of
Abim district, which was declared vacant, until the disposal of the applicant's appeal
or until the end of the three months within which the Court of Appeal is enjoined to
have determined the appeal, whichever comes earlier.

35 For the avoidance of doubt, and as a consequence of the preliminary objection being
allowed, this court maintains/sustains the following declarations/orders given in
Election Petition No. 0072 of 2021 to the extent that;

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- i. The election of the 1st respondent, Omara Yuventine as District Chairperson for Abim district is nullified, and the district chairperson seat for Abim district is hereby declared vacant.
 - ii. Costs of this petition awarded to the petitioner therein, to be met jointly and severally by the respondents.


10 The net effect, therefore, is that this application partially succeeds with half the costs to the respondent.

Since the application has partially been allowed this court invokes its powers to stay the Electoral Commission from holding the by-election to fill the seat of the LCV Chairperson of Abim district, which was declared vacant, until the disposal of the applicant's appeal or until the end of the three months within which the Court of Appeal is enjoined to have determined the appeal, whichever comes earlier.

15 5. Orders:

- a. The execution of the Decree and/or orders arising from the Judgement of The Hon. Mr Justice Isah Serunkuma of the High Court holden at Soroti vide Election Petition No. 007 of 2021 be stayed pending the determination of the appeal filed by the Applicant in the Court of Appeal of Uganda or until the end of the three months within which the Court of Appeal is enjoined to have determined the appeal, whichever comes earlier.
- b. The Costs of this application to abide the outcome of the appeal in the Court of the Appeal.

25 I so order



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Hon. Justice Dr Henry Peter Adonyo

Judge

06th April, 2023

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