

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
ELECTION PETITION APPEAL MISCELLANEOUS
APPLICATION NO. 346 OF 2016

(Arising from Election Petition Appeal No.85 of 2016)

PAUL OMARA.....APPLICANT / APPELLANT

VERSUS

- 1. ACON JULIUS BUA**
2. ELECTORAL COMMISSIONRESPONDENTS
3. UGANDA NATIONAL EXAMINATION BOARD
4. NATIONAL COUNCIL FOR HIGHER EDUCATION

(Arising from the Judgment of the High Court of Hon. Justice Wilson Masalu Musene delivered at Lira on the 15th day of May, 2016 in Election Petition No. 003 Of 2016)

CORAM: HON.MR. JUSTICE KENNETH KAKURU, JA
(Single Justice)

RULING OF THE COURT

This is an application brought by way of notice of motion seeking the following orders:-

- 1. The Memorandum of Appeal filed in this Honourable Court on 6th day of September 2016 and the Record of Appeal filed on the 24th day of October 2016 and served unto the Respondents, and any other relevant documents which were otherwise filed out of time, be validated by grant of extension of time within which it ought to have been filed and served.**

- 2. Leave be granted for the applicant to adduce additional evidence in support of the appeal.**
- 3. The costs for this application be provided for.**

The grounds upon which the application is grounded are set out in the notice of motion as follows:-

- a) The High Court delivered judgment in Election Petition No. 003 of 2016, in favor of the respondents on the 15th day of May 2016.**
- b) The applicant being dissatisfied with the decision of the High Court filed a Notice of Appeal within the statutory 7 days.**
- c) The applicant's lawyers requested for the record of proceedings on 15th May 2016 and despite several attempts to procure the same, were finally availed to them on 27th September 2016.**
- d) The said request was in writing and was served unto all the Respondents herein.**
- e) The appellant filed the Memorandum of Appeal on the 6th September 2016 and served on all the respondents within the time required to serve them. The late filing and service was due to the delay in formulating the grounds of appeal which required very extensive and complex research. Drawing the memorandum of Appeal required extensive research and scrutiny of the research findings which were necessary to come with the best product.**

- f) The failure to supply the record of proceedings of election petition NO.003 of 2016 on time and the required extensive research occasioned the applicant's inability to file the Memorandum Appeal and the Record of Appeal within the statutory period of 14 and 30 days respectively.**
- g) The applicant has valid grounds of appeal which raise serious questions of law and fact for consideration of the court of appeal with a high probability of success.**
- h) That the Procedural lapses in filing and serving the Memorandum of Appeal and or other relevant documents by the Applicant's counsel do not go into the heart of the Election dispute engaged by the head appeal.**
- i) That election Petitions and Election Petition Appeals are not only of importance to the Parties to such petitions and or Appeals arising there from but rather entire human race and hence ought to be determined on their merit.**
- j) The circumstance of this appeal requires adducing additional evidence regarding United States' Universities and Colleges in regard to form of its Academic Transcripts and Certificates normally issued to the successful candidates**
- k) The 1st respondent alleged that United States of America Education system is too advanced that a Ugandan educated person cannot comprehend and therefore we seek leave to produce a witness who has the experience of the United States of America Education System.**
- l) This Honourable Court is constituted for administration of justice and any rule and or act of Parliament**

attempting to tie its hands in the administration of justice, is obsolete and void.

m) This Honourable Court is enjoined with wide and unfettered discretion to enlarge time within which a Notice of Appeal can be served or validate a notice of appeal served out of time as well as with powers to call for additional evidence so long as the evidence is relevant in guiding court to reach at a just and fair decision.

n) That it is in the interest of justice that this application ought to be allowed.

o) That delay has not caused prejudice to the Respondents in any form.

The application is accompanied by an affidavit deposed to by the applicant which reproduces and expounds on the grounds set out in the notice of motion.

The respondents filed a number of affidavits in reply opposing the application. I have not found it necessary to reproduce the contents. I will refer to the necessary parts in the resolution of this application.

For the applicant it was submitted that the Judgment, High Court *Election Petition No. 003 of 2016* was delivered in favour of the respondents on 15th May 2016. Being dissatisfied with the decision the applicant filed a notice of appeal within the required seven days and on the same day applied for a certified record of proceedings from the High Court. It is contended that the applicant did not receive the said record until 27th September 2016.



It was submitted further that the applicant filed a memorandum of appeal on 6th September 2016 and served all respondents with the same.

The applicant concedes that the memorandum of appeal was filed and served out of time prescribed by the law hence this application.

He contends that the late filing and service of the memorandum of appeal was occasioned by extensive research required before counsel could formulate the grounds of appeal. Further that the failure to file and serve the record of appeal in time was occasioned by the High Court's delay to prepare and certify the same within the time, prescribed by law.

It is contended again that the applicant's appeal raises serious questions of law and fact to be determined by this Court and has great likelihood of success. The applicant asked Court not to visit mistakes of counsel on the litigant.

In reply to the application the respondents contended that this application had no merit.

They contended that failure by the applicant and his counsel to file and serve the memorandum of appeal and the record of appeal was entirely due to their own dilatory conduct and inexcusable failure to take necessary steps to prosecute the appeal. All the respondents contended that the applicant had failed to show sufficient cause

why this application ought to be granted. They asked court to dismiss it.

I have listened carefully to all parties. I have also perused the Court record and the authorities cited to me. It is not in dispute that the applicant failed to prepare and serve a memorandum of appeal in Court of Appeal *Election Petition No. 85 of 2016* from which this application emanates. That is clearly conceded by the applicant and that is why he is seeking the orders set out in the notice of motion herein.

The issue to be determined is whether or not sufficient reasons have been adduced by the applicant for the grant of the orders sought in the notice of motion.

The reasons adduced by the applicant for grant of the orders sought are set in his notice of motion excerpts of which have been reproduced above. Briefly they are that, the complexity of the appeal required excessive legal research, and further that the appeal raises serious issues of law and fact that require determination by this Court.

The Judgment sought to be appealed from was delivered on 15th of May 2016. The memorandum of appeal was filed on 6th September 2016 after a period of 114 days.

The Rule 29 of the Parliamentary Election (interim) Interim Provisions) Rules Statutory Instrument No. 141 -2 requires a party

intending to appeal against a decision of the High Court to this Court to file a written notice of appeal within seven days of the Judgment or to give it orally immediately upon delivery. *Rules 30 (2)* requires a memorandum of appeal to be filed within 7 days of the filing of the notice of appeal whereas in this case a written notice has been given.

Rule 31 requires an intended appellant to lodge with the registrar of this Court a record of appeal with 30 days of filing of the memorandum of appeal. This procedure fundamentally differs from that set out under *Rule 83* of the Court of Appeal Rules which stipulates as follows:-

83.

(1) Subject to rule 113 of these Rules, an appeal shall be instituted in the court by lodging in the registry, within sixty days after the date when the notice of appeal was lodged—

(a) a memorandum of appeal, in six copies, or as the registrar shall direct;

(b) the record of appeal, in six copies, or as the registrar shall direct;

(c) the prescribed fee; and

(d) security for the costs of the appeal.

(2) Where an application for a copy of the proceedings in the High Court has been made within thirty days after the date of the decision against which it is desired to



appeal, 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.

(3) 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.

As clearly set out in the Rule 83 of the Court of Appeal Rules an intended appellant who applies for a copy of High Court proceedings within 30 days of Judgment is granted a consequential extension of time until the High Court has prepared and delivered to the appellant a copy of certified High Court record. Before then time to file a record of appeal does not begin to run. Again under Rule 83 (1) of the Court of Appeal Rules an intending appellant must file a memorandum of appeal together with the record of appeal. This is not so under the electoral law as set out above in respect of election petitions.

In an election appeal a memorandum of appeal is filed separately from the record of appeal and different time frames are set by law for the filing the memorandum of appeal and for lodging a record of

appeal. My humble understating of the electoral law in this regard is that no consequential extension of time is provided for both the filing of memorandum, of appeal and record of appeal. Each of these documents must be prepared and filed within the time prescribed by the electoral law set out above.

In this case therefore the notice of appeal having been filed on 15th June 2016, the memorandum of appeal ought to have been filed on or before the 22nd June 2016. This was not done. The memorandum of appeal was filed on 6th September 2016 as indicated in the notice of motion. The record of appeal ought to have been lodged at the Registry of this Court within 30 days of the date of filing of the memorandum of appeal that is by the 22nd of June 2016. It was lodged on at this Court on 24th October 2016. This was not all. The applicant having filed a notice of appeal within the prescribed time failed to serve it upon the respondent within time prescribed by the law, prompting him to apply to this court for extension of time within which to serve the said notice. That application (*Court of Appeal Election Petition Application No. 02 of 2016*) was heard and granted by Cheborion , JA on 24th November 2016. The applicant did not bother to use the same proceedings to seek the orders he now seeks. Instead, he filed this application on 19th January 2017. It appears this too was prompted by the 4th respondent's application filed at this court seeking to strike out the appeal on account of the applicant's failure to take necessary steps in prosecuting it.

In a recent decision by this Court ***Abiriga Ibrahim vs Musema Mudathir Bruce Court of Appeal (Election Application No. 24 of 2016)*** (*unreported*) a full Coram of this Court dealing with a similar matter stated as follows;-

“We agree with the conclusion of the Supreme Court in the two cases that Article 126(2) (e) is not a magical wand in the hands of defaulting litigants. This Court holds that computation of time follows the specific legislation in election matters and that is Rule 30 of the Parliamentary Elections (Interim Provisions) Rules SI 141-2. This Rule provides that; a Memorandum of Appeal shall be filed with the Registrar in a case where a written notice of appeal has been given within seven (7) days after the notice was given.

In the instant application, since the Notice of Appeal was given on the 24th of June 2016, the 7 days expired on the 1st of July 2016 and the respondent should have filed the memorandum of Appeal within that time.

We accept the contention of counsel for the applicant that an intending appellant ought to actively take the necessary steps to prosecute his/her intended appeal.”

In *Kirya Grace Wazala vs Daudi Migereko and another (Election Reference Appeal No 39 of 2012.)* This Court stated that:

“I do not take this simply as the mistake or tardiness of the counsel but, I must say that the applicant himself contributed to this mistake and he was negligent, not serious and is therefore guilty of dilatory conduct. You cannot sit on your rights even when you see a real threat at your nose. I see no where in his affidavit where he put pressure on his counsel upon learning of the striking out application or even the conferencing directions for striking out his application. if he never got to know about them then surely he was negligent and he slept and was leaving everything to his counsel. He has not demonstrated that he was on toe with his advocate in ensuring that everything was being done diligently. I shall therefore want to distinguish this applicant from on who is vigilant.”

There are a host of other authorities on this subject. See;

Bakaluba Mukasa Peter & Another vs Nalugo Mary Margret Sekiziyivu, Court Of Appeal (Election Petition No. 24 of 2011, Kasibante Moses vs Electoral Commission, Court of Appeal (Election Petition Application No. 7 of 2012.) I find the reasons advanced by the applicant for grant of this application wanting to say the least.

I find that both the applicant and his counsel were guilty of very dilatory conduct. Their failure to comply with time frame set by the law is inexcusable. The reasons advanced for the applicant's failure to comply with the law are laughable and as they are just a joke. This Court has no time for frivolous and vexatious applications such as this one.

I am unable, therefore, to grant the first order sought in the Notice of motion. Since I have declined to grant the first order sought, I find that no appeal lies. Consequently I am unable to grant the second order which is premised on the first. Needless to say, I find no merit whatsoever in this application and I hereby dismiss it with costs to each of the respondents. Since I have held that no appeal lies, the notice of appeal herein is redundant and I hereby strike it out.

Before I take leave of this matter I would like to apologise to the parties for the delay in delivery of this ruling. It was inadvertent. It ought to have been delivered within a week of its hearing. I regret the inconvenience this delay may have caused to the parties.

Dated at Kampala this.....^{12th}.....day of ^{May}.....2017.

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HON. KENNETH KAKURU
JUSTICE OF APPEAL