

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
ELECTION PETITION APPLICATION NO. 33 OF 2012

[Arising from Election Appeal No. 04 of 2012]

5

BETWEEN

HON. MAYENDE STEPHEN DEDE :::::::::::::::::::::::::::::::::::APPLICANT

AND

OCHIENG PETER PATRICK:::RESPONDENT

10

(CORAM: HON. JUSTICE A. S. NSHIMYE, JA; HON. JUSTICE M. S. ARACH AMOKO, JA; HON. JUSTICE R. KASULE).

RULING OF THE COURT

This ruling arises out of an application to strike out **Election Petition Appeal No. 04 of 2012**.

15

It was brought by way of Notice of Motion under **Rules 2(2), 43(1) and (2), 44, 82, and 83 of the Judicature (Court of Appeal) Rules S I 13-10**.

It is premised on the ground that the respondent has failed to take an essential step in the appeal, to wit, lodging the appeal without serving the Notice of appeal and the letter requesting for the proceedings on the applicant.

20

As summarised at the scheduling conference conducted by the Registrar of this Court on the 7/6/2012, the background of the application is as follows: The applicant and the respondent were among the four candidates who participated in the Bukholi South Constituency Parliamentary elections on the 18/2/2011.

The Electoral Commission declared the applicant the winner and subsequently gazetted him as the MP for Bukholi North Constituency.

The respondent, being dissatisfied with the result, petitioned Jinja High Court to annul it on the ground of non-compliance with electoral laws which had, in his view, substantially affected the result. The presiding judge, **Monica Mugenyi J**, in her judgment delivered on the 29/7/2011, dismissed the petition with costs to the applicant.

Aggrieved by the decision of the High Court, the respondent filed a Notice of Appeal and a letter requesting for the proceedings on the 3rd and 5th August 2011, respectively.

Unfortunately for the respondent, his lawyers did not serve these documents on the applicant within the prescribed time. Consequently, counsel for the respondent on the 30/3/2012, filed **Election Application No. 19 of 2012**, for extension of time within which to serve the said documents and a memorandum of appeal on the applicant. That application was dismissed with costs on the 12/7/2012.

The respondent again filed **Election Application No. 22 of 2012**, seeking a similar order. On the 16 / 5/ 2012, the Assistant Registrar, **His Worship Ajiji** granted the application and ordered that the said documents should be served on the applicant within seven days from the date of the ruling.

On the 17/5/2012, however, the respondent instead filed **Election Appeal No. 04 of 2012**, the subject of this application, without complying with the Assistant Registrar's order.

The Notice of Appeal, the letter requesting for the record of proceedings and the memorandum of Appeal were served on the applicant on the 28/5/2012.

Consequently, on the same day, the applicant filed the instant application to strike out the appeal on the ground stated earlier on in this ruling.

Meanwhile, the respondent was prompted to file yet another application for extension of time within which to serve the Notice of Appeal, the letter
5 requesting for proceedings on the applicant vide **Election Application No.34 of 2012**. That application is pending in this Court.

The only issues for determination by the Court are:

- 1) Whether the respondent has failed to take an essential step in the appeal.
- 2) Remedies available.

10 **Submissions:**

Mr. Hassan Kamba, learned counsel for the applicant submitted on both issues that on the 16/5/201, the Assistant Registrar allowed the respondent to serve the Notice of Appeal and the letter requesting for the record of proceedings on the applicant within seven days but the next day, the respondent instead, filed the
15 Appeal. That it was not until the 28/5/2012, that the respondent casually served the applicant's counsel with the said documents together with the Appeal. That was well outside the time prescribed under **Rule 78 (1) of the Court of Appeal Rules**. The respondent had thus failed to take an essential step to regularise the appeal, with the consequence that the appeal is incompetent. It should be struck
20 out **under Rule 82 of the Court of Appeal Rules** (See: **Bakaluba Mukasa Peter And Another vs. Nalugo Mary Margaret Sekiziyivu Election, Petition Appeal No. 24 of 2011 and Kasibante Moses vs. The Electoral Commission, Court of Appeal Election Petition Appeal No. 7 of 2012**).

Secondly, Mr. Kamba submitted that non-compliance with a Court order is
25 fatal. The appeal should be struck out with costs to the respondent. (See: **Goyal vs. Goyal [2009] 2 EA 143**).

In his spirited submissions on behalf of the respondent, Mr. Ambrose Tebyasa on his part contended that the whole mistake had stemmed from the inadvertent omission by the respondent's former lawyers to serve the documents in issue within the prescribed time. However, the respondent, upon discovery of the
5 mistake, filed **Applications No. 19 and 22 of 2012** respectively, for extension of time within which to serve the same on the applicant. That Assistant Registrar had indeed granted that application on the 16/5/2012 and had given the respondent seven days within which to serve the said documents on the applicant. However the respondent failed to comply with the order of the
10 Assistant Registrar due to the misunderstanding on his part that the order had stayed the proceedings as well to allow the applicant to pursue a reference before a single judge which the Assistant Registrar had allowed him to file.

He further submitted that on the 28/5/2012, after perusing the Court record, counsel for the respondent discovered that the applicant had not filed the said
15 reference. The respondent's counsel thus instructed his clerk to serve the applicant's lawyers with the documents in issue. The respondent also filed **Election Application No. 34 of 2012** for extension of time to serve the applicant afresh with the same documents. That application is pending in this Court.

20 Counsel for the applicant, however, without filing the reference he had prayed for, filed the instant application to strike out the appeal.

According to Mr. Tebyasa, the respondent's contention therefore is that, his actions were in strict compliance with the orders of the Assistant Registrar which included staying the proceedings pending a reference before a single
25 judge; the appeal is properly founded in law, the respondent having taken all the necessary steps in law and had even served the 2nd respondent, (the Electoral Commission) which has no objection to his appeal. The applicant has not come

with clean hands, the application is premature and an abuse of court process, the respondent has not failed to take the necessary steps envisaged under the law and if there are any mishaps, they are excusable. The respondent is a vigilant litigant whose only prayer is that his appeal be determined on its merits as opposed to technicalities. The court should not be misled by the instant application since it is intended to circumvent the due process of the law and the applicant's actions are intended to suffocate justice.

In Mr. Tebyasa's view, the case of **Kasibante Moses vs. Electoral Commission** (supra) is distinguishable from the instant case in light of its peculiar facts.

He contended that the respondent had also filed **Election Application No. 34 of 2012** which is still pending before this Court and according to the authority of **Hajji Nurdin Matovu vs. Ben Kiwanuka SCC Application No. 12 of 1991**, this Court is enjoined to hear that application first before the application for striking out the appeal.

For the reasons above, Mr. Tebyasa prayed Court to dismiss the application with costs to the respondent so that the appeal is heard on merit.

The Court's Findings

Rule 78 (1) of the **Court of Appeal Rules** provides that:

"(1) An intended appellant shall within seven days after lodging the notice of appeal, serve copies of it on all persons directly affected by the appeal..."

It is not disputed that the Notice of appeal was lodged on the 3 /8/2011. It was not served on the respondent within the seven days prescribed by **Rule 78(1)** above. That is why the respondent filed **Election Applications 19 and 22 of 2012** for extension of time to serve on the applicant not only the Notice of Appeal but the letter requesting for typed proceedings as well. The former

application was dismissed but the Assistant Registrar heard the latter application, granted it and indeed gave the respondent another seven days extension to serve the said documents from the date of his ruling on 16/ 5/2012.

It is also not in dispute that the respondent did not comply with that order.

5 Instead of serving the said documents on the applicant within the extended time, he actually served them on the 28 /5/2012.This was clearly outside the extension granted to him by the Assistant Registrar.

The record also shows and the respondent does not deny that he filed **Election Appeal No. 04 of 2012**, the subject of this application on the 17/5/2012, before
10 complying with the Assistant Registrar’s order. The end result of this action was that **Election Petition Appeal No 04 of 2012** was filed before serving the Notice appeal on the applicant at all, as the law requires. Such an appeal is incompetent and qualifies to be struck out under the provisions of **Rule 82** of the **Court of Appeal Rules** which provides that:

15 “ *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 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.*” (Underlining is added for emphasis).

20 The explanation given by the respondent is untenable, in our view, because it is not supported by the record of the proceedings before the Assistant Registrar. Indeed the record shows that at the end of his ruling, the learned Registrar granted the application and ordered that:

25 “*The notice of appeal and letter requesting for proceedings should be served 7 days from today.*”

Mr. Kamba’s response is recorded as follows:

5 *“ I wish to inform that we shall seek a reference to a single justice of this Court to determine whether in view of the circumstances of this case he complied with the decisions, and whether the luxury of rule 83 of the rules of this court is not available in these matters and shall pray for the reference not to be rendered nugatory the orders should not be carried out under rule 2(2) for the ends of justice to be made(sic).”*

This was followed by the following court order:

“Court:

10 *Let the record be typed and the application shall be referred to a single judge for determination.”*

It is clear from the above that the order did not contain any mention of a stay of proceedings either expressly or impliedly. The language was clear and unambiguous and could not in our view, have led to the alleged misunderstanding by the respondent or his lawyers. Even so, if the respondent had harboured any doubt as alleged, the prudent thing for him to do in the circumstances would have been to immediately seek for clarification from the Assistant Registrar who had issued the order before the expiry of the 7 days he had been given. Apparently, he did not do so. Instead, he filed the appeal the next day. Clearly, this is not the action of someone who sincerely believed that the Registrar had given an order of stay of proceedings as the respondent alleged. Otherwise, if he was to be believed, it would amount to a serious contradiction to the effect that the order meant that the respondent should not file the Notice of appeal and the letter requesting for typed proceedings on the one hand and yet allowed him to file the appeal itself, on the other hand. In the premises, we find his explanation unconvincing and we reject it.

We further find that the case of **Kasibante Moses vs. the Electoral Commission** (supra) is relevant and applicable to the instant application. In that

case and in several other applications of a similar nature, this Court emphasised the fact that in election matters, time is of the essence. The Court stated emphatically that:

5 ***“In case of an election petition appeal, the intending appellant has even a higher duty to expeditiously pursue every step in the appeal so that the appeal is disposed off quickly. This is so because S.66 (2) of the PEA and Rule 33 of the Parliamentary Election (Election Petitions) Rules enjoin this court to hear and determine an appeal expeditiously...”***

10 In the matter before us, this appears not to have been the case in that the respondent, instead of complying with the rules, delayed and resorted to multiple applications seeking extension of time. Even after getting an order of extension from court, he failed to comply with the same and gave flimsy excuses. To us, this amounted to an abuse of the court process which this court cannot condone. Indeed in **Goyal v Goyal (supra)** it was held that:

15 ***“A court order is not a mere technical rule of procedure that can simply be ignored. Court orders must be respected and complied with. A court order must be obeyed as ordered unless set aside or varied. Those who ignore them do so at their own peril.”***

20 In the result and for the reasons given above, we find that the appeal as filed is incompetent. It is accordingly stuck out **under Rule 82 of the Court of Appeal Rules** for failure to take an essential step.

25 As for costs, we hold the view that the applicant did not also comply with the Assistant Registrar’s order when he did not file the reference to a single Judge, moreover this was after his own counsel, Mr. Kamba had applied for it. He thus contributed somehow to the confusion which gave rise to the instant application. Each party shall therefore bear his own costs.

It is so ordered.

Dated at Kampala this05th.....day of September, 2012.

5

HON. A S. NSHIMYE
JUSTICE OF APPEAL

10

HON. M. S. ARACH AMOKO
JUSTICE OF APPEAL

HON. JUSTICE REMMY KASULE
JUSTICE OF APPEAL