THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA

ELECTION PETITION APPLICATION N0. 266 OF 2011
(Arising from Election Petition Appeal No. 41 & 42 of 2011)

MURIISA NICHOLAS :: APPLICANT

VS

GEORGE RUYONDO & ANOTHER :::::::::::::::::::::::::::::: RESPONDENTS

Coram: Hon. Lady Justice A.E.N. Mpagi Bahigeine, DCJ.
Hon. Justice S. B. K. Kavuma, JA
Hon. Justice A. S. Nshimye, JA

RULING OF COURT.

This is an application brought under Rules 2(2), 43 (1) (2), 44, 76 (1) (2), 78 (1), 80 (3), 82, 84 (a) and 88 of the Rules of this Court seeking orders:

(a) That the respondent's notice of appeal be struck out with costs.

(b) That Election Petition Appeal No. 41 of 2011 be struck out with costs.

(c) That costs of this application be provided for.

The application is based on the following grounds:

1. ***The appellants have failed to take essential steps to prosecute their appeal contrary to rule 84 of this court's rules.***

2. ***The respondents' appeal and notice of appeal are incompetent and bad in law.***

3. ***The notice of appeal was not filed in the High Court of Uganda at Mbarara as required.***

4. ***The record of appeal was served outside the seven (7) days limited by law.***

5. ***There is no letter applying for the record of proceedings.***

6. ***There is no certificate of correctness of the record by the Registrar of the High Court attached to the record of appeal.***

7. ***The record of proceedings in the record of appeal is not certified by the Registrar of the High Court of Uganda at Mbarara.***

8. ***It is just and equitable that the appeal and notice of appeal be struck out with costs.***

9. ***It is in the interest of substantive justice that this application be granted.***

Background of the application;

The background of this application is that in March 2011, both the applicant and the respondent contested for the seat of LCIII Chairperson, Buremba Sub-county, Kazo, Kiruhura District. The Electoral Commission declared the respondent winner and gazetted him in the National Gazette as the Chairperson of the said Sub-county.

The applicant was aggrieved and petitioned the High Court Mbarara, under Election Petition No. 10 of 2011. On 30th September 2011, the Court delivered its judgment, set aside the election and ordered a bye election.

The respondent being dissatisfied with the said judgment filed a notice to appeal to this court. It is the applicant's contention that the notice of appeal was filed in Mbarara High Court on the 11th October 2011 outside the period prescribed by the rules. The record of appeal was also served out of time, hence this application to strike it out.

To the contrary, the respondent agues that the notice of appeal was lodged in the High Court on 6th October 2011 and served on the same day which were both within time.

The application was supported by the affidavit of Akampurira Jude Baks, a lawyer working with M/s Akampumuza & Co. Advocates, narrating the events leading to the application for the striking out the notice of appeal. George Spencer, an advocate working with Ngaruye Ruhindi Spencer & Co. Advocates, swore an affidavit in reply asserting that the notice of appeal was filed within time, in accordance with the law.

The issue framed by the parties in the joint conferencing notes was:

Whether the respondent had missed an essential step in the appeal process to justify striking out the notice of appeal.

Representation.

At the hearing, Dr. Akampumuza appeared for the applicant while Mr. Ngaruye Ruhindi and Masiko Joseph appeared for the respondents.

Submissions for the applicant.

Learned counsel for the applicant submitted that it was the applicant's case that the respondent/appellant failed to take the essential steps to prosecute the appeal, contrary to rule 84 of this Court's rules. The respondents were supposed to have filed their notice of appeal by 6th October 2011 and have it received in the Registry of the High Court at Mbarara which is an essential step. There was no way any subsequent action could be taken on a document not filed hence, it ought to be struck out.

Counsel contended that the record of appeal was served on 11th October 2011 outside the seven days which are mandatory under rule 88 (1) of this Court's rules. This was an essential step that ought to have been taken to prosecute the appeal.

The respondent never applied by letter for the record of proceedings as required by rule 78 so that, he could put himself within the ambit of showing why the record was late. Secondly, there was no Registrar's certificate in the entire record certifying the time taken to prepare the record for collection. In his view, what was in court was not a court record.

Counsel further submitted that the affidavit filed in reply deponed by John Spencer, an advocate with the respondent's lawyers' firm, should be struck out because he tells lies that the Registrar of the High Court proofread the typed copies but does not say that he was seated with the Registrar all the time so as to be able to see and know what he stated.

In paragraph 9, he made an admission that it was not necessary for the Registrar to certify as to the correctness of the record when this is a requirement of the law. It does not depend on the likes or dislikes of a party.

Counsel pointed out that in paragraphs 6 and 7, the deponent told lies about service of the record in time by attaching annexures **"F"** an affidavit by Byaruhanga Fred deponed on 23rd January 2012, long after the respondent had been served with this application; and **"G"** which was the purported affidavit of service by their law clerk, as proof of service which was neither received in any court nor bore a court stamp.

In paragraph 4, he claimed to have served a clerk of the applicant's lawyers' firm and stated that the clerk signed and he retained a duly signed and stamped copy which he claimed to have returned as proof of service. However, there was no annexure on the affidavit of service upon which he relied as evidence of proof of service. That was, according to counsel, a lie which was disapproved by the affidavit evidence of Yafesi Mwijusya filed on 24th February 2012 and remained unchallenged.

According to paragraphs 4, 5 and 7, service was on counsel Mwene Kahima on 24th November 2011 who endorsed the word "with protest".

Finally, counsel submitted that, in the circumstances, this was a proper case for striking out both the notice of appeal and the appeal because the essential steps had not been taken for the filing of the appeal, under rules 29 and 31 of the Parliamentary Elections Rules SI 14/2, which applies to matters arising from the Local Government Act by virtue of Section 172, Cap. 243.

He reiterated their prayers in the Motion.

Submissions for the respondent.

In reply, Mr. Ngaruye Ruhindi submitted that this was a frivolous and vexatious application. The issue of the propriety of the notice of appeal was raised in Election Application No. 39 of 2011 and the court resolved that, there was a properly filed notice of appeal. The ruling of this court is annexure **"D"** to the affidavit of George Spencer.

It cannot be brought through another application; the word used in the statute is "lodged". The respondent filed photocopies, and surrendered his original which was sealed. When one photocopies an embossed seal, it can not be seen on a photocopy.

Counsel referred us to annexure **"D"**, the ruling and submitted that all the above matters were raised by the same counsel and court ruled on them. In counsel's view, raising them again as if it were an application for review or appeal would be an abuse of court process.

With regard to service of the record, counsel pointed out where the respondent's answer to the petition in the high court appears. The record was received by Benzire of Mwene Kahima Advocates.

Counsel referred to the first page of the record of the appeal marked annexure **"F"** he stated that the original was available for the court's viewing. At the bottom it was Benzire who received the record as he had always received court process like he did on pages 67 and 314. It would be dishonesty to claim that there was no service. When the affidavit of service was served on counsel, Benzire should have sworn a rebuttal affidavit in rejoinder but instead a different person, one Mwijusya did, in rejoinder.

Counsel Ngaruye Ruhindi further challenged the alleged service on Mwene Kahima which did not bear his signature. He should have filed an affidavit in rejoinder owning the endorsement. Counsel contended that the application was intended to delay justice.

On the matter of an advocate deponing to matters within his knowledge, counsel explained that he did not have to sit in court all the time. The affidavit of Spencer raised the necessary defence to the application which was that he saw the stamp being affixed. He knew the signature of the Registrar and it would not be wrong for him to say what he knew, in any case the applicant and his counsel were at liberty to go to Mbarara and verify the signature of the Registrar.

With regard to the certificate of correctness, counsel cited rule 87 (8) of rules of this court and contended that a certificate of correctness was duly signed and was on the record of the appeal. Counsel explained that what his learned friend called a certificate of correctness was the Registrar's certificate. When the Registrar endorsed "certified true copy of the original", he certified the first page of the record and the last page of the judgment. Counsel suggested that if his learned friend had a different record, he should have put it in as a supplementary record. He wondered what else he was relying on.

Learned counsel further submitted that the application was bad in law in that it was brought against two respondents, but proceeded against one.

Secondly, the affidavit did not cite the number of the case. When one looks at the conferencing notes, only one respondent is mentioned which is sufficient evidence to show that the application is not a serious one. Counsel Ngaruye Ruhindi finally asked us to dismiss the application with costs with a certificate for two counsel.

Counsel Masiko submitted that the application was unserious and an abuse of court process. The application was supported by the affidavit of Akampurira who is a lawyer and yet contains a number of anomalies.

In **paragraph 4**, counsel Akampurira deponed, contesting the terminology that annexure **"A"** was lodged in Mbarara. This was a serious breach by an advocate because rule 76(1) of the Court of Appeal rules talks of "lodged". The advocate made an allegation contrary to what is stated on page 2 which was a serious abuse of court.

In **paragraph 5** of his affidavit he stated:-

That the record of appeal was filed outside 7 days but did not state by how many days, this was not evidence that could support an application of this nature.

In **paragraph 6:**
"That there was no certificate of correctness by the Registrar", counsel failed to show what law and rule were breached.

In **paragraph 7:**
That the record of appeal was not certified, he should have attached a copy to show that it was not certified, he deliberately omitted that because he knew that it was a lie, Counsel Masiko pointed out that Mr. Ngaruye had shown court where it was certified.

In **paragraphs 8 and 9:**

The deponent, who is a lawyer, stated that the appellant never wrote a letter requesting for proceedings. He cited rule 83 of rules of this court and submitted that the rule does not state that an appellant must write such a letter. On the statement that there was no letter of the Registrar calling the appellant to collect the record, counsel submitted that no law was cited as having been breached.

Finally, in answer to the attack on the affidavit of Spencer that was argumentative, he replied that the attack was just misconceived and that George Spencer was an advocate working with the Law Firm that handled the matter in the lower court.

In his view, an advocate could state the law as it is because he knows the law. There was nothing argumentative when he stated the law and what transpired in his presence.

Submissions in rejoinder.

Dr. Akampumuza in rejoinder submitted that for all the documents claimed to have been served, the respondent indicated that his address for service was through Mwene Kahima Mwema & Co. Advocates but no process was served on them that done on 18th November 2011.

Counsel referred us to the signature of Beronzire who stated that he was a clerk of Mwene Kahima, & Co. Advocates. There was an artistic signature while on page 67, the name is printed. The matters that had been raised from the bar are more serious and that he knew the clerk in Mwene Kahima was George. He prayed that the objection be overruled.

In respect of counsel's submission that there was a certificate of the record by the Registrar he referred us to page 262 where there appear the words "true copy of the original" the date thereon is different from the date of 13th October 2011 appearing on page 420 of the record and the two dates are inconsistent to each other. The inconsistencies could have been resolved by the Registrar under rule 83 (2) & (3) and in its absence, there is no date of certificate court can take. The attack therefore, on the affidavit was uncalled for.

Mr. Ngaruye.

Upon obtaining leave to respond, Mr. Ngaruye referred us to the affidavit of George Spencer and Annexures **"B"** and **"C"** being a bank advice form dated 6th October 2011, and court receipts which were issued on the same day.

Decision of Court.

Whether the respondent has missed an essential step in the appeal process to strike out the notice of appeal.

The gist of this application is that the respondent missed the essential steps in the prosecution of the appeal justifying the striking out of the Notice of the Appeal, namely;

(1) That he did not file the notice of appeal in Mbarara High Court.

(2) That he served the record of appeal outside the period of 7 days provided by the Law.

(3) That there was no letter applying for the record of proceedings and the same was not served on the applicant and the respondent retained evidence of service.

(4) That the record of proceedings is not certified by the Registrar of the High Court at Mbarara.

Rule 84 of this court's rules provides:-

> ***"If a party who has lodged a notice of appeal fails to institute an appeal within the prescribed time-***
>
> ***(a) He or she shall be taken to have withdrawn his or her notice of appeal and shall, unless the court otherwise orders, be liable to pay the costs arising from it of any persons on whom the notice of appeal was served; and***
>
> ***(b) Any person on whom the notice of appeal was served shall be entitled to give notice of appeal notwithstanding that the prescribed time has expired, if he or she does so within fourteen days after the date by which the party who lodged the previous notice of appeal should have instituted his or her appeal".***

The above rule stems from **Rule 82** which creates an avenue for applications to strike out a notice of appeal or the actual appeal. The rule thus provides that;

> ***"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 of 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 time".***

It is the applicant's contention that the notice of appeal was filed on the 11th October 2011 and later served out of time.

The time for lodging a notice of appeal is provided for under section 29 the Parliamentary Elections (Election Petitions) Rules, 1996, which provides:-

> ***"Notice of appeal may be given either orally at the time judgment is given or in writing within seven days after the judgment of the High Court against which the appeal is being made"***

According to the respondent's affidavit evidence and documents, namely, annexure **"A"** which is a photocopy of the notice of the appeal and annexures **"B"** and **"C"** which are BPAF and the general receipt, the notice of appeal was lodged on the 6th day of October 2011.

In the absence of contrary evidence, we agree with Mr. Ngaruye Ruhindi that the issue of propriety of the notice of appeal was settled by this court in **Election Application No. 39 of 2011 – George Ruyondo V. Murisa Nicholas** that there was a properly lodged notice of appeal.

We find that a notice of appeal was lodged in Mbarara High Court on 6th October 2011. It was also stamped as having been received by the firm of the applicant's Lawyers within time.

Counsel for the applicant contended that the record of appeal was served outside the seven days which are mandatory under rule 88 (1) of this court's rules which provides:-

> ***" (1) the appellant shall, before or <u>within seven days</u> after lodging the memorandum of appeal and the record of appeal in the registry, serve copies on them on each respondent who has complied with the requirements of rule 80 of these rules".***

Sections 30 of the Parliamentary Elections (Election Petitions) Rules, 1996 also provide that:-

> ***"A memorandum of appeal shall be filed with the Registrar-***
> ***(a) In a case where oral notice of appeal has been given, within fourteen days after the notice was given;***
>
> ***(b) In case where a written notice of appeal has been given, within seven days after notice was given."***

Then, rule 31 of the Parliamentary Elections (Election Petitions) Rules, 1996 provides that:-

> ***"The appellant shall lodge with the Registrar the record of appeal within thirty days after the filing by him or her of the memorandum of appeal".***

In accordance with the evidence before us, the memorandum of appeal was filed on 11th October 2011and the typed record of proceedings and judgment were available and certified on 13th October 2011. The memorandum of appeal was lodged on 3rd November 2011 as evidenced in annexures **"F"** and **"A"** of the documents of the respondent and applicant respectively.

Whereas in the affidavit of George Spencer paragraph 6, the record was served on counsel for the respondent on 7th November 2011, in the affidavit in rejoinder of Mwijusya Yafeesi paragraph 4, he deponed that the record of appeal was served on 24th October 2011 and annexure **"A"** was attached in support of it with the words *"received with protest".*

According to rule 88(1) cited earlier, the record was supposed to be served on 10th November 2011.

An affidavit of service on the applicant's counsel on 23rd January 2012 appears as annexure **"G"** sworn by Byaruhanga Fred a process server with M/s Ngaruye Ruhindi, Spencer & Co. Advocates and stated as follows:-

Paragraph 2;

> ***That on 3rd November 2011, I received copies of the record of appeal from the Court of Appeal for service upon counsel for the respondent and the 2nd appellant therein.***

Paragraph 3;

> ***That on the same day I proceeded to Bombo road and to the chambers of M/s Karuhanga Tabaro & Associates at Esami house wherein at around 2:00 pm I found counsel Mwebaza who is well known to me and after explaining the purpose of my visit, I tendered to him copies of the above said court process and required him to acknowledge receipt thereof by signing and stamping on a copy which he did in my presence.***

Paragraph 4;

> ***Thereafter on 7th November 2011, I proceeded to the chambers of counsel for the above named respondent M/s Mwene-Kahima, Mwebesa & Co. Advocates wherein at around 10:00am, I found Beronzire a clerk working with the said chambers who is well known to me and after explaining to her the purpose of my visit I tendered to her copies of the above said documents and required her to acknowledge receipt thereof by signing on the first page of the said record of appeal which she did in my presence.***

Paragraph 5;

> ***That I then left a copy of the above said documents in possession of the above said persons and retained a duly signed and stamped copy which I herein with forward as return of service.***

A perusal of annexure **"F"**, clearly shows that it was stamped as received by M/s Karuhanga Tabaro & Associates on top and below there is a note that it was received on 7th November 2011 by Beronzire. On the other hand, annexure **"A"** as submitted by the applicant is only stamped by this court and marked received with protest on 24th November 2011. It does not bear the stamp of M/s Karuhanga Tabaro & Associates and the original was not presented to us. This raises a question as to which affidavit evidence to believe.

On the balance of probabilities, we prefer to believe annexure **"F"** as presented by the respondent and not the applicants because of the inconsistencies in annexure **"A".** This resolves the issue as to whether or not the record of appeal was served within seven days.

> ***No letter applying for the record of proceedings, no certificate of correctness of the record by the Registrar of the High Court and that the record of proceedings in the record are not certified by the Registrar of the High Court of Uganda at Mbarara.***

Rule 32 of the Parliamentary Elections (Election Petitions) Rules, 1996 provides:-

> ***"The Chief Justice may give directions as maybe necessary as to how the record of appeal shall be produced expeditiously".***

This issue has its basis in rule 83 (1) and (2). It provides that;

> ***(1) Subject to rule 113 of these rules, an appeal shall be instituted in the court by lodging in the registry, <u>within sixty days</u> after the date when the notice of appeal was lodged-***
>
> ***(a) …***
> ***(b) …***
> ***(c) …***
> ***(d) …***
>
> ***(2) "Where an application for a copy of proceedings in the High Court has been within thirty days or 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 of the Appellant of that copy''.***
>
> ***(3) An Appellant shall not be entitled to reply on sub rule (2) of this rule***

unless his/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".

The judgment appealed from was delivered on 30th September 2011; the notice of appeal as was settled as having been lodged on 6th October 2011 which means that the appeal was supposed to be lodged by 5th December 2011. The memorandum of appeal was filed on 11th October 2011, the typed record of proceedings and judgment were availed on 13th October 2011 and were annexed as **"H1"** and **"H2"**. All these were done in the prescribed time within which to lodge an appeal.

Learned counsel for the applicant argued that it was mandatory to apply for the record of proceedings but he seems not to appreciate the pivotal effect of rule 83 (2) & (3). It gives a lee way for late delivery of certified copies of the record but is not mandatory. Though risky, where counsel is sure that the record will be ready within time provided under rule 82, it is not a must that he has to apply for the record. Counsel for the respondent was right when he submitted that it was not mandatory to apply for the record of proceedings.

Equally, the argument of learned counsel for the applicant that there was no certificate of correctness of the record by the Registrar and that the record of proceedings in the record were not certified by the Registrar of the High Court Mbarara is unacceptable. This is because counsel for the respondent presented to us certified copies of the judgment and proceedings dated 13th October 2011. That was enough evidence to prove that the appeal documents were in order.

For the reasons given above, we find no merit in the application which is dismissed. We order that costs will abide the results of the appeal.

Dated at this……6th……..day of …August……2012.

HON. LADY JUSTICE A. E. N. MPAGI BAHIGEINE,
DEPUTY CHIEF JUSTICE.

HON. JUSTICE S. B. K KAVUMA,

JUSTICE OF APPEAL

HON. JUSTICE A. S. NSHIMYE,
JUSTICE OF APPEAL