THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL MISCELLANEOUS APPLICATION No. 58 OF 2016

(Arising from Election Petition Appeal No. 24 of 2016; which arose from Fort Portal High Court Election Petition No. 004 of 2016)

KAJARA ASTON PETERSON } ..... APPLLICANT

VERSUS

MUGISHA VINCENT } ..... RESPONDENT

CORAM:

Alfonse C. Owiny - Dollo, D.C.J.; Steven B. K. Kavuma & Barishaki Cheborion, JJ.A.

RULING OF THE COURT

Introduction:

This Application, brought under the provisions of rules 43 and 82 of the Judicature (Court of Appeals Rules) Directions, SI No. 13-10, hereinafter referred to as the Rules of this Court, seeks orders by this Court striking out, with costs, Election Petition Appeal No. 24 of 2016 of this Court; filed by the respondent against the applicant herein. The applicant also prays for costs of the Application.

Background:

In the parliamentary elections held on the 18th February 2016, the applicant and the respondent contested for the Mwenge County South Constituency in Kyenjojo District; in

which the applicant was returned as the duly elected candidate. The respondent was aggrieved by the election outcome; so he petitioned the High Court at Fort Portal, vide Election Petition No. 4 of 2016, for the annulment of the election on the ground that the conduct of the election had been characterised by grave non-compliance with various laws governing elections. After hearing the Petition, the trial judge dismissed it with costs. Being dissatisfied with the decision of the High Court, the respondent appealed to this Court; against which this Application has arisen.

The grounds on which the Application is founded are that: -

(i) The Record of Appeal in Election Petition Appeal (EPA) No. 24 of 2016 was lodged in Court outside the 30 (thirty) days prescribed by Rule 31 of the Parliamentary Elections (Election Petitions) (Amendment) Rules, 2006.

(ii) No leave was sought, and no leave was granted by this Court, for filing the appeal out of time; and the appeal is incompetent by reason of such failure to take an essential step within the prescribed time.

(iii) The notice of appeal was not served onto the Applicant as required by law.

In support of the Application, the applicant has sworn an affidavit; therein reiterating, and explaining the grounds of the Application further. Attached to the affidavit and marked

annexture 'A', is a photocopy of the Memorandum of Appeal in EPA No. 24 of 2016, which was filed in Court on the 4th July 2016. The Record of Appeal, with a photocopy of its first page attached to the affidavit, and marked 'B', was lodged in Court on the 4th August 2016. The Affidavit also has, attached to it and marked 'C', a photocopy of the Joint Conferencing Memorandum; in which the parties agreed that the Memorandum and Record of Appeal were lodged on the various dates stated in the Affidavit.

The applicant deposed further in the Affidavit that the Notice of Appeal, a photocopy of which is attached thereto and marked 'D', was never served on him. He also points out in the Affidavit that the Notice of Appeal, which appears on pages 1, 2, and 3 of the Record of Appeal, has no endorsement of service of such notice on his Legal Counsel. He deposed further still, that, similarly, there is no Affidavit of service in the Record of Appeal as proof of service of the Notice of Appeal either on him or on his legal Counsel.

The Respondent swore an Affidavit in Reply; stating therein that he has understood the instant Application. However, he complained therein that while the application is dated the 13th October 2016, it was only served on him on the 1st day of March 2017; and this was only 15 (fifteen) days to the date fixed for the hearing of the Application. He deponed further that he filed the Notice of Appeal in Court on the 28th

day of June, 2016; and served it on the applicant on the 4th July 2016. He points out therein that in reply to the Notice of Appeal served on him, the applicant lodged in Court, Notice of his address of service, on the 15th July 2016. He deponed further that the Registrar of the High Court at Fort Portal availed to him the Record of Appeal in issue on the 1st day of August 2016; and he has attached thereto, a photocopy of the certified Record of Appeal, marked 'A'.

He states further that he filed the Record of Appeal on the 4th August 2016; which was within the 30 (thirty) days prescribed by Rule 31 of the Parliamentary Elections (Election Petitions) (Amendment) Rules, 2006. Kiiza Richard Polite, a law clerk at the chambers of M/s Kesiime & Co. Advocates, swore an Affidavit on the 10th day of March 2017 in support of the respondent. He states therein that on the 4th day of July 2016, he served the Notice of Appeal in issue on counsel Victor Businge at the chambers of M/s Ngaruye Ruhindi Spencer & Co. Advocates situated on Ruhandika Street, Fort Portal Municipality. He states further that counsel Victor Businge retained the Notice of Appeal; but declined to acknowledge service of the same on him.

The respondent therefore contended, quite forcefully, that he believes that the instant Application to strike out his Appeal has been brought in bad faith, for the purpose of defeating or delaying the hearing of his Appeal on its merits.

He pointed out further that at the Scheduling Conference for the Appeal, it was an agreed fact between the parties that the appellant had lodged a Notice of Appeal, and later filed a Record of Appeal. He also stated that the applicant did not raise any objection, during the Scheduling Conference, to the fact that the two documents had been filed.

Submissions of Counsel on the issues for determination:

Counsel Cosma Kateeba, Boniface Ngaruye Ruhindi, Kandeebe Ntambirweki, Victor Busingye, and Christine Ntambirweki, appeared jointly for the applicant; and between themselves, argued the case for him. The respondent however appeared in person; and argued his case himself. Counsel for the applicant submitted that the essential steps the respondent failed to take in the pursuit of his Appeal are, first, service of Notice of Appeal on the applicant within the time prescribed by law. Second, service of Notice of Appeal either on the applicant, or on M/s Ngaruye Ruhindi & Co., or on M/s KRK Advocates who had jointly represented the applicant at the trial; and both of whose addresses were on record.

Counsel submitted further that with regard to the need to take essential steps in Election Petitions, or Appeals and Applications there from, time is of the essence. Hence, an intending appellant has a duty to actively take the necessary

steps within the time prescribed by the Parliamentary Elections (Election Petitions) (Amendment) Rules, 2006, (hereinafter referred to as the Parliamentary Elections Petitions Rules) to prosecute the Appeal. Counsel argued that it was incumbent on the respondent (as the intending appellant) proves that he requested from the trial Court, in writing, for a certified Record of the Proceedings and the Judgment, and copied the request to the applicant, as is expressly prescribed by the Rules of this Court. Without such proof, this Court must find that the respondent failed to take a necessary step required of him in the prosecution of the appeal.

Second, Counsel pointed out that rule 31 of the Parliamentary Elections Petitions Rules is strict on the duty of an intending appellant to file the appeal within 30 days after filing the Memorandum of Appeal. He contended that the Record of Appeal in issue was filed in Court one day late. He submitted that, therefore, failure by the intending appellant (the respondent herein) to file the Record of Appeal in this Court within 30 days after the lodgement of the Memorandum of Appeal in Court, as is prescribed by law, means there is no Appeal at all; hence, the impugned Appeal purportedly filed in this Court must be struck out.

Counsel further submitted that the respondent's failure to comply with the clear provisions of the law referred to above

is exacerbated by his failure to apply for extension of time either to serve the Notice of Appeal on the intended respondent, to validate the purported Appeal now on Court record, or to lodge a valid Appeal in Court. Counsel further submitted that Rule 82 of the Rules of this Court prescribes a sanction for non-compliance with the Rules of the Court, by entitling the person adversely affected to apply to have the Appeal struck out; which the applicant has hereby done.

Furthermore, Counsel argued that the respondent's Appeal contravened the provisions of Rule 87 of the Rules of this Court; in that the certificate by the High Court Registrar does not indicate that there was an application for the trial record, and the time taken to prepare the Record of Appeal. Counsel argued that contrary to the provision of Rule 87 (8) of the Rules of this Court, there is no certification by the appellant (the respondent herein), or his counsel, that the Record of Appeal is correct. Counsel then urged Court to strike out the Appeal since, in law, there is no Appeal before it; as the appellant (the respondent herein) had failed to take essential steps in the prosecution of the Appeal. Counsel then prayed for costs of the Application, and of the Appeal.

In his response, the respondent contended that he duly complied with the rules regulating the process of appealing to this Court. He submitted that the Notice of Appeal was served on the applicant's counsel at Fort Portal; and, this

explains why the counsel duly filed a notice of their address of service in Court; following which he (respondent) as the intending appellant then, also filed a Notice of his address of service in Court. He submitted that he filed the Memorandum of Appeal in Court; and duly served it on counsel for the applicant (the intended respondent) at their Mbarara offices. As for the Record of Appeal, he submitted that he filed it in Court two days after receiving it from the Registrar of the trial Court; which was within the time for filing the Appeal in Court.

He then submitted that if this Court finds that he had not taken any or some essential steps in pursuit of the appeal, it should consider this failure inconsequential; since it did not occasion any miscarriage of justice to the applicant who, in fact, filed Notice of his Address of Service pursuant to the Notice of Appeal. He argued further that failure to take essential steps to prosecute the Appeal should not be visited on him; since this was failure by his counsel, M/s Byamukama, Kaboneke, & Co. Advocates, who handled the initial stages of the Appeal process on his behalf. He therefore urged Court to determine the Appeal on its merits.

In rejoinder, counsel for the applicant pointed out that it is manifest from the Notice of Appeal itself that it was intended to be served on the applicant C/o Ngaruye Rubindi Spencer & Co. Advocates, Plot 46 Rwizi Lane, P.O. Box 1799

Mbarara. Hence, the contention by the respondent that the Notice of Appeal was instead served on counsel Busingye, in chambers located in Fort Portal, was without any basis. Furthermore, counsel clarified that the applicant's address of service was filed, not in response to any Notice of Appeal; but rather, as is required by law, pursuant to the service of the Memorandum of Appeal on his counsel (M/s Ngaruye Ruhindi Spencer & Co. Advocates) at their Mbarara address shown above, which is their correct and known address.

Second, counsel argued, under the provision of Rule 80 (3) of the Rules of this Court, neither was the filing of the applicant's address of service an admission that the Appeal was competent, nor was it a waiver of the applicant's right to challenge the competency of the Appeal on grounds of irregularities. Counsel further submitted that despite being served with this Application to have the Appeal struck out, the respondent has not bothered to apply to Court either for extension of time for validation of the Appeal purportedly filed in Court, or to file a valid Appeal. This, counsel argued, would have been the remedy for the respondent's failure to take the necessary steps in the prosecution of his appeal.

Court's consideration and resolution of the issues:

We have given due consideration to this Application, and the arguments put forward by learned Counsel for the respective

parties hereto. Rule 82 of the Judicature (Court of Appeals Rules) Directions (hereinafter referred to as The Rules of this Court), S.I. No. 13-10 provides as follows: -

"***82. Application to strike out notice of appeal or appeal.***

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 the 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."

In the instant matter, there is contention between the parties regarding the time the respondent served the Notice of Appeal in issue on the applicant. Rule 36 of The Parliamentary Elections (Election Petitions) (Amendment) Rules, 2006, contained in Part III of the Rules, and covers Appeals to this Court from decisions of the High Court on determination of Election Petitions, provides as follows: -

"***36. Procedure generally.***

Subject to such modifications as the Court may direct in the interests of justice and expedition of the proceedings, any rules regulating the procedure and practice on appeal from decisions of the High Court to the Court of Appeal in civil matters shall apply to appeals under this Part of these Rules."

In addition, Rule 78 of the Rules of this Court, which deals with civil Appeals to this Court, enjoins the intending appellant to serve a copy of the Notice of Appeal on the intended respondent within seven days after giving or filing Notice of Appeal in Court. Similarly, Rule 83 (2) and (3) of the Rules of this Court makes it mandatory for the intending appellant to apply to the High Court, in writing, for the certified record of the proceedings at the trial; and to serve the intended respondent with a copy of the application.

Proof of service, on the intended respondent, of such Notice of Appeal or application for certified record of the proceedings at the trial, lies with the intending appellant. It is therefore in his or her interest to retain evidence of application for the certified record of the proceedings at the trial, and of service on the intended respondent of the Notice of Appeal and the application for certified record. This is the evidence necessary to prove due compliance with the provisions of the law regarding the necessary steps required to be taken in the pursuit of an intended Appeal. Thus, in the instant case, since compliance with some provisions of the law is contested, it was incumbent on the appellant to present to Court proof of such compliance.

It is our considered finding from the record that the respondent has failed to discharge the duty that rested on him to prove that the Notice of Appeal was served on the

intended respondent (the applicant herein) within the period provided for by law. It is clearly manifest from the record that the Notice of Appeal was instead served on the intended respondent (applicant herein) much later, as part of the Record of Appeal. We find so, basing on a number of reasons. There was no justification for serving the Notice of Appeal on a law firm in Fort Portal when the intending appellant was fully aware of the Mbarara address of counsel who had represented the intended respondent at the trial.

We find the alleged service of the Notice of Appeal on Counsel Businge in Fort Portal not persuasive. The affidavit of service was not sworn immediately after the alleged service on Counsel Businge; but, instead, almost a year after the alleged service; when the Appeal itself had been filed, and this Application to have it struck out had been lodged in Court. It would appear the deponent brought in the name of Businge upon realising that he is a joint counsel for the applicant. In our considered opinion, the balance of probabilities weighs against attaching any useful value to the affidavit of service. Instead, we are inclined to believe that the Notice of Appeal was belatedly served on the applicant, together with the Memorandum of Appeal.

Albeit that the Notice of Appeal was served on the intended respondent (applicant herein) far beyond the time prescribed by law, the fact that it was served on him means he is a

person on whom a notice of appeal has been served'; pursuant to the provision of Rule 82 of the Rules of this Court. On this account, he is entitled to apply to have the Appeal struck out on the ground that the appellant failed to take an essential step in the pursuit of his Appeal. The applicant could also have sought to have the Appeal struck out either on the ground that the appellant had taken the essential step outside the prescribed time, or that the Appeal purportedly lodged in Court was in fact no Appeal at all.

There is a rich corpus of authorities propounding this proposition of the law. In the case of ***Dr. S.B. Kinyatta & Rugyeyo Coffee Factory Ltd. vs Subramania Gopalan & Anor., [2001-2005] HCB (Vol. 2) 95***, Court was quite explicit that failure by an appellant to take an essential step in the prosecution of his or her appeal, or to do so within the time prescribed by law, renders the Appeal incompetent. Similarly, in the case of ***The Environment Action Network Ltd. vs Joseph Eryau [2008] ULR 314***, this Court reiterated the legal position that failure by an appellant to take some essential step in the prosecution of the Appeal, renders the purported Appeal no Appeal in fact.

This position of the law was further, and more elaborately, stated in ***Kasibante Moses vs Electoral Commission [2012] HCB, Vol. 1, 60***, where the appellant had filed the Record of Appeal outside of 30 days after filing the Memorandum of Appeal. In

striking out the Appeal, Court restated and emphasised, at p. 61, the legal position as follows:-

"It is the duty of the intending appellant to actively take the necessary steps to prosecute his/her intended appeal. It is not the duty of Court or any other person to carry out this duty for the intending appellant. Once judgment is delivered, the intending appellant has to take all the necessary steps to ensure the appeal is being processed in time. 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 of quickly."

The Court made further clarification on the law, as follows: -

"Rule 31 of the Parliamentary Elections (Election Petitions) (Amendment) Rules, 2006, required the respondent to file the Record of Appeal within thirty (30) days after the filing of the Memorandum of Appeal. The respondent's contention that because there was a Notice of Appeal on record showing the address of the respondent as one interested in the appeal, and that this fact ought to have made the Registrar to notify the respondent of the readiness of the Court proceedings cannot be sustained. It was the duty of the respondent, as the intending appellant, to actively take the necessary steps to prosecute the intended appeal."

It is worthy of note that with regard to Appeals from Election Petitions, the Election Petitions Appeal Rules have different provisions from those contained in the Rules of this Court. For instance, Rule 30 of the Rules of this Court provides for the filing of a Memorandum of Appeal separately from the Record of Appeal; and this would be before the intending appellant has been provided with a certified Record of Appeal. Rule 33 of the Election Petitions Appeal Rules provides for expeditious hearing of the Appeal. Rule 34 of the Election Petitions Appeal Rules enjoins Court to determine the Appeal within thirty days from the lodging of the record of Appeal. In the pursuit of such an Appeal, therefore, time is of the utmost essence.

Rule 82 of the Rules of this Court - which is applicable to an Election Petition Appeal, such as this one, pursuant to the provision of Rule 36 of the Election Petitions Appeal Rules - provides in sub Rule (3) thereof that the time within which an Appeal may be lodged can be extended. This is however only applicable where the appellant had applied to the High Court in writing, for a copy of the proceedings; and had copied to and served the respondent with such written request. The sub Rule is categoric that the appellant must retain proof of such service on the respondent; meaning that in the absence of such proof, the appellant cannot benefit from the provision of sub Rule (3) of Rule 82 (supra).

The appellant has not adduced evidence in proof of the alleged service, on the respondent (applicant herein), of his application to Court for a copy of the Record of the Proceedings. This, alongside his failure to serve notice of appeal on the intended respondent, was clearly another failure to take an essential step in the pursuit of his Appeal. This failure by the appellant to take essential steps provided for in the pursuit of an appeal attracts the sanctions provided by Rule 82 of the Rules of this Court cited above. It was open to him to move this Court to extend the time within which to appeal or take whatever essential step he might not have taken; or for the validation of the Appeal.

However, the respondent who is himself an officer of this Court, being an advocate of the Courts of judicature of Uganda, took no step whatever to have the deficiencies in his Appeal rectified. He ought to have known better the resultant ramifications from lodging an Appeal in breach of clear rules for which there are specific sanctions provided. It is inexplicable that he made no step whatever in the pursuit of rectification; even when he had the opportunity to do so after this Application seeking to strike out the Appeal was served on him. Instead, he was adamant that he had done nothing wrong in the process of appealing to this Court.

True, Rule 19 of the Parliamentary Elections (Election Petitions) Rules mandates this Court to exercise the remedy

of extending the time within which an essential step, which the appellant had failed to take, can be taken; or to validate a purported appeal, or act improperly done in the appeal process. This remedial provision states that:-

"*The Court may on its own motion or on the application by any party to the proceedings and upon such terms as the justice of the case may require, enlarge or abridge the time appointed by the Rules for doing any act if in the opinion of the Court, there exists such special circumstances as make it expedient to do so.*"

However, as with every case where Court may exercise discretion in the determination of a matter before it, Court has to do so in a judicious manner. It has to take a holistic consideration of the circumstances of each case. Accordingly then, this Court can only exercise its discretion to the benefit of the appellant/respondent if it is demonstrated by evidence that there exists some special circumstance making it expedient to do so. However, in the instant case, no such special circumstance has been demonstrated to exist. To the contrary, everything that the appellant/respondent has done, as has been pointed out above, is a total negation of any possible consideration based on special circumstance.

The decision by the appellant/respondent not to seize the opportunity presented by the threat inherent in this

Application, and so move this Court for rectification of the process that resulted in his incompetent Appeal, and thereby validate the appeal, was most imprudent. Accordingly then, the failure by the appellant/respondent to take essential steps in the pursuit of his appeal is not an exception to the rule prescribing express sanction for such failure. In the event, it is our well-considered finding that this application has merit; wherefore, it is hereby allowed. This Court therefore makes the following orders: -

(i) Election Petition Appeal No. 24 of 2016 between the parties hereto is hereby struck out.

(ii) The appellant (respondent in this application) shall meet the costs incurred by the respondent (applicant herein) for both the appeal and this application.

Dated at Kampala; this 21. day of Dec 2017

1. **HON. MR. JUSTICE ALFONSE C. OWINY - DOLLO, D.C.J.**

2. **HON. MR. JUSTICE STEVEN B.K. KAVUMA, J.A.**

3. **HON. MR. JUSTICE BARISHAKI CHEBORION, J.A.**

21/12/17

James Byamukama for the Respondent is in court.

Ngaruye Rukundi for the Applicant is in court

de Susan Nanyonga

Ngaruye. For ruling. I am ready to receive the ruling.

Court: Ruling read out in court.

21/12/17.