THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Geoffrey Kiryabwire, Elizabeth Musoke & Irene Mulyagonja, JJA)

ELECTION PETITION APPLICATION NO.02 OF 2017
(Arising from Kampala High Court Miscellaneous Cause No.272 of 2016)

HON. KATO LUBWAMA PAUL::APPLICANT

VERSUS

BUWEMBO HABIB::RESPONDENT

RULING OF THE COURT

Introduction

The applicant brought this application under rules 2 (2), 6(2) (b), 40 and 43 of the Judicature (Court of Appeal Rules) Directions (SI 13-10) for leave to appeal the whole of the ruling of the High Court (Hon Justice Margaret Oguli Oumo) delivered on the 19th December, 2016 in Miscellaneous Cause 272 of 2016, stay of execution of all orders issued in the cause and the costs of the application.

The background to the application was briefly that the Applicant herein contested for the seat of Member of Parliament for Rubaga Division South Constituency in Kampala District during the Parliamentary Elections held on 18th February, 2016. The Electoral Commission declared and gazetted the Applicant, an independent contestant, as the successful candidate. The respondent, Mr Habib Buwembo, a human rights activist and registered voter in Rubaga Division South Constituency and then Secretary General of the Forum for Democratic Change, a political party with the second largest number of members in the Parliament at the time, sought to challenge the applicant's election on the ground that he did not have the requisite academic qualifications

for Member of Parliament according to the Parliamentary Elections Act, 2005, hereinafter referred to as the "PEA".

Mr Habib Buwembo filed Misc. Cause No. 272 of 2016 in the Civil Division of the High Court of Uganda at Kampala on 12th October 2016, for extension of time within which to file an election petition challenging the validity of the election of the applicant. The trial judge granted the application on the 19th December 2016 and ordered that the applicant/now respondent files his petition within 30 days of the date of the order. Counsel for the respondent made an oral application before the trial judge for leave to appeal the decision to the Court of Appeal but the ruling was reserved to be delivered at a later date.

Pursuant to the orders issued on 19th December 2016, Mr Habib Buwembo filed Election Petition No. 42 of 2016 in the High Court at Kampala on 30th December 2016. He sought declarations, among others, that Hon Kato Lubwama lacks the minimum formal education required for an MP, his nomination by the Electoral Commission was erroneous, improper, illegal and negligent and that the publication that he was a validly elected MP was improper, irregular and illegal. And that as a consequence, his election as a Member of Parliament for Rubaga Division South Constituency be set aside and a fresh election be conducted in accordance with the law. The oral application for leave to appeal made before the trial judge was dismissed in a formal ruling which was delivered on the 5th January 2017.

The applicant herein filed a Notice of Appeal and applied for the record of proceedings in the High Court on 3rd January 2017. After the oral application for leave to appeal was denied by the trial judge, he brought the instant application on the 9th January 2017 seeking leave to appeal against the orders of Oguli Oumo, J, as well as for stay of execution thereof. In response, the respondent filed a Notice of Motion on the 6th

February 2017 in which he sought to strike out the Notice of Appeal and for the dismissal of the application for leave to appeal.

When the matter came up for hearing on 28th August 2017 before this Court (consisting of Kavuma, then DCJ, Cheborion Barishaki and Hellen Obura, JJA) Mr Alaka for the applicant raised a preliminary point that the respondent did not file an affidavit to oppose the application and so court should consider it on its merits without an affidavit filed by the respondent. Mr Ssemakadde's response was that the affidavit in support of his notice of motion was also in reply to the application now before court. He reluctantly conceded that it was erroneous to file an application within this application, with the same court reference number. The court then exercised its discretion to sever the affidavit from that application and consider the affidavit in support of it as the answer to the instant application. The notice of motion was struck out with no order as to costs.

What now comes before us for disposal is the main application filed by Hon Kato Lubwama Paul for leave to appeal against the decision of Oguli Oumo, J granting leave to the respondent to file an election petition outside the time specified by section 60 (3) of the PEA, and for orders to stay the proceedings pending before the High Court in Election Petition No. 42 of 2016.

Grounds of the application

The grounds of the application were stated extensively in the notice of motion and reproduced, almost verbatim, in the affidavit of Kato Lubwama Paul dated the 9th of January 2017. The first was that the trial court declined to grant orders that the respondent did not have the *locus standi* to institute a petition. Secondly, that the court had no residual or inherent jurisdiction to enlarge a period of time set by statute, especially where there were no special circumstances for the

respondent's failure to file a petition in time; implying that he was guilty of dilatory conduct.

Thirdly, that the applicant is dissatisfied with the whole of the trial court's decision and it merits serious judicial consideration by the Court of Appeal. In support of this ground, the applicant set out nine (9) proposed grounds of appeal which we will not reproduce here, but included was a ground that the proposed appeal raises grounds about the interpretation of s. 60 (3) of the PEA and the Rules made under that Act which, in the applicant's opinion, is a strong case that merits the intervention of this Court. In support thereof, the applicant stated that there are over 10 decisions of the High Court with contradictory rulings made about extension of time within which to file an election petition and because of that there is need for the Court of Appeal to give direction to the High Court on the issue before the impending Parliamentary Elections of 2021.

The grounds raised for the application for stay of execution were that the applicant cannot appeal the decision of the High Court without leave but leave was denied by the trial judge and the respondent has already filed a petition and served it on the respondent in January 2017. That if no stay is granted to stop subsequent proceedings the applicant's proposed appeal will be rendered nugatory. That the matter involves the rights of the applicant who will suffer substantial loss if an order to stay subsequent proceedings is not granted. That the application was made without unreasonable delay and it is just and fair that leave is granted to file an appeal. As a result, the order to file and serve the petition should be stayed so that the parties are heard by the Court of Appeal to meet the ends of justice.

Reply to the application

In his affidavit in reply dated 3rd February 2017 the respondent stated that after leave was granted to file the petition, he filed it and by 27th

January 2017 the exchange of pleadings between the parties was concluded. That he went on to request the High Court for a date for hearing of the same. He also contended that the applicant filed a notice of appeal without first obtaining leave of either the High Court or this Court because the applicant's application for leave to appeal and for stay of execution in the High Court was dismissed.

The respondent further stated that he has information from his lawyers that leave to file an election petition did not dispose of the respondent's complaints about the applicant's election as a Member of Parliament contained in Election Petition No. 42 of 2016. Further that leave to file the petition was an interlocutory matter against which no appeal lies to this Court because there is no order capable of being executed. Counsel went on to argue that the impending hearing of the petition cannot prejudice the applicant because he is still an MP and he may eventually emerge the victor rendering the proposed appeal academic. That the applicant has filed a fairly robust reply to the petition and he is thus ready and willing to contest the petition on its merits.

The respondent further stated that the Notice of Appeal and this application will not give the applicant the peace of mind that he desires but will instead imperil the expeditious disposal of the petition, precipitate a multiplicity of proceedings and occasion an injustice to the parties and the electorate in his constituency who are anxious to receive the final determination of the petition, a matter of great public interest. That the piecemeal fashion of adjudication proposed by the applicant and his advocates is not in the interests of justice.

Representation

At the hearing of the application, the applicant was represented by Messrs Caleb Alaka, Luyimbazi Nalukoola and Samuel Muyizi. Mr Isaac Ssemakadde represented the respondent. All Counsel filed written

submissions as ordered by court. The applicant filed submissions on 24th July 2020. Respondent's counsel filed their submissions on 28th July 2020. A rejoinder was filed by counsel for the applicant on the 5th August 2020.

Submissions of Counsel

In his submissions Mr Alaka for the applicant raised three issues for the resolution of this Court; viz: whether the intended appeal raised serious questions of fact and law that warrant judicial consideration, whether there are triable issues to warrant stay of the orders in Misc. Cause 272 of 2016 and the remedies the applicant is entitled to. Mr Ssemakadde for the respondent raised different issues as follows: whether the decision issued by the High Court on 19th December 2016 was interlocutory; whether the applicant missed an essential step, i.e. non-compliance with rule 42 (2) of the Rules of this Court; whether there is merit in the application for leave to appeal; and whether the applicant has made out a case for this court to grant an order to stay the proceedings in the High Court.

It is our opinion that there are basically two issues for the determination of this Court.

1. Whether the application raises sufficient grounds for this Court to grant the applicant leave to appeal.

2. Whether the application raises sufficient reason for this Court to grant an order to stay the proceedings now pending before the High Court as Election Petition No. 02 of 2016.

With regard to the first issue, Mr Alaka submitted that the intended appeal raises serious questions of law and fact that warrant consideration by this Court and that this Court is clothed with wide discretion under rule 2 (2) of the Rules of this Court to ensure that the

ends of justice are met and to prevent any abuse of court process. Further that rule 40 (1) (b) of the Rules of this Court empowers this Court to hear and determine an application for leave upon refusal by the High Court to grant such leave where the intended appeal raises one or more matters of public or general importance which would be proper for the court to review in order to see that justice is done. Mr Alaka relied on the decision in **G. M Combined (U) Ltd. v. A. K Detergents (U) Ltd, Civil Application No. 23 of 1994** in support of his submission.

Mr Alaka further submitted that where the High Court denies a party leave to appeal an application may be made to this Court. He relied on the decision in **Charles Sempewo & 143 Others v. Silver Springs Hotel Ltd., Civil Application No. 103 of 2003** in which the court relied on the decision in **Sango Bay Estates Ltd. v. Dresner Bank [1971] 1 EA 17,** for his submission that leave should be granted if there is an arguable case. He went on to submit that for applications of that nature to succeed it must be shown that, *prima facie,* there are serious issues of law or fact or both that merit judicial consideration by an appellate court.

Mr Alaka enumerated the proposed grounds of appeal and submitted that the applicant emphasises the fact that there are many decisions of the High Court which contradict each other on the question of extension of time within which to file an election petition. He asserted that this requires this Court to examine the matter and make a decision to guide the High Court on that point of law before the anticipated elections of 2021. He referred to the decisions in the following cases as examples of the said contradictions:

1. **Ronald Katumba v. Hon Kyeyune Haruna & Electoral Commission, Masaka High Court Misc Cause 24 of 2016;**

2. **Ikiror Kevin v. Orot Ismael, Soroti High Court Electoral Petition No. 8 of 2016;**
3. **Kakumba Abdul v. Kabbajjo James Kyewalabye, High Court Misc. Application No. 133 of 2011;**
4. **Patrick Nkarubo v. Theodore Ssekikubo, Masaka High Court Misc. Cause 16 of 2016.**

Mr Alaka submitted that in all the above, the High Court decided that the time within which to file an election petition which can be enlarged by court is that which is set by Rules. But in the matter now before court, the trial judge decided that the court has the residual powers under checks and balances of the arms of government to extend the time set by Parliament in a statute. That the decision of this Court in the intended appeal would enable the resolution of that question of law and provide a binding decision for the High Court. Counsel finally submitted that this is a serious matter for the consideration of this Court and so the application for leave to appeal should be allowed.

With regard to the second issue, Mr Alaka relied on rule 6 (2) (b) of the Rules of this Court which states that the institution of an appeal in this Court does not operate as a stay of execution but the court may in any case where a notice of appeal has been lodged in accordance with rule 76 order a stay of execution, an injunction or stay of proceedings on such terms as the court may think just. He relied on the decision in **Kasirye, Byaruhanga & Co. Advocates v. Mugerwa Pius Mugalasi, Civil Application No.104 of 2008** for the submission that the only limitation placed on the court's exercise of discretion for the grant of stay of execution, an injunction or stay of proceedings, is that there should be a notice of appeal filed under rule 71 of the Rules of this Court **(National Housing Corporation v. Kampala District Land Board & Another, Civil Application No. 2 of 2001).** That it was also held in the **Kasirye, Byaruhanga** case that in considering an application for stay

of execution, the court is not supposed to determine the merits or demerits of the appeal.

Mr Alaka asserted that the applicant duly filed a notice of appeal as is required by law and he filed his application for stay of execution without delay. He prayed that stay of the proceedings be granted.

In answer to the first issue, Mr Ssemakadde asserted that no appeal lies against the decision of Oguli Oumo, J. in HCMA No 272 of 2016 because the orders granted were interlocutory orders. He submitted that if this Court resolves that question in the positive, it would follow that no appeal lies against the decision and the notice of appeal on which this application is based ought to be struck out. He referred us to s. 66 (1) of the PEA and relied on the decisions in **Nelson Gagawala Wambuzi v. Kenneth Lubogo, Election Petition Application No. 10 of 2011** and **The Returning Officer Kampala & 2 Others v. Catherine Naava Nabagesera, Civil Appeal No. 39 of 1997**.

Mr Ssemakadde also referred to the decision in **Lukwago Erias v. Attorney General & Another, SC Civil Application No 6 of 2014** for the general principle that where a notice of appeal is filed but the right of appeal does not exist, for example from interlocutory orders or preliminary decrees, the notice of appeal is incompetent and cannot form the basis of an application for stay of execution or stay of proceedings pending appeal.

With regard to the meaning of the term *"interlocutory"* Mr Ssemakadde submitted that the definition in Black's Law Dictionary, 8th Edition presented by the applicant was insufficient for resolution of the jurisdictional issue at hand. He asserted that it needs to be buttressed by the context in which the term is sought to be applied and that the court must seek for the contextually-nuanced meaning, aligning the dictionary definition with the statutory context, s.60 (3) of the PEA,

which is about commencing an election petition. That the impugned decision did not constitute a final resolution of the whole controversy between the parties and so was only interlocutory. Mr Ssemakadde further submitted that the decision was analogous with other interlocutory orders such as ones for enlarging or extending time for doing any act or taking any proceeding under rule 5 of the Rules of this Court and Order 51 rule 6 of the Civil Procedure Rules.

Counsel for the respondent further submitted that the applicant should have filed an application for leave to appeal in the High Court first in compliance with rule 42 (2) of the Rules of this Court. He urged that the concurrent jurisdiction provided for in this rule should not be exploited except where it is merited by special circumstances and in rare cases.

Mr Ssemakadde went on to contend that there is no merit in the application for leave to appeal because the decision of Oguli Oumo, J., was discretionary. He relied on **Ashmore v. Corporation of Lloyds [1992] 2 All ER 486** for the submission that the decision or ruling of a trial judge on an interlocutory matter should be upheld by an appellate court unless his or her decision was plainly wrong since he or she was in a far better position to determine the most appropriate method of conducting the proceedings. He also referred to the decision in **Degeya Trading Stores (U) Ltd. v. Uganda Revenue Authority, Civil Application No. 16 of 1996**.

Mr Ssemakadde further submitted that the fact that the High Court has made various decisions relating to the issue of extension of time within which to file an election petition should not be a reason for this Court to grant leave to the applicant to appeal against the impugned decision. He asserted that if a question of law has already been settled by the highest court, that question, however important or difficult it may have been regarded in the past and however large may be its effect on any of

the parties, would not be regarded as substantial to justify granting of leave to appeal. He cited three decision from courts in India to support his submission.

Mr Ssemakade finally submitted that the applicant failed to show that the interlocutory decision of the trial judge was plainly and obviously wrong; instead the applicant invites this Court to take a second look at the decision. He asserted that this was a wrong principle because the decision did not occasion a miscarriage of justice.

With regard to the application for stay of execution, Mr Ssemakadde submitted that there is no merit in it, first of all because it was overtaken by events. This is because, he said, it is common ground that the respondent already filed and served a petition against the applicant following the order he seeks leave to appeal against. That the applicant's case does not pass the test of suffering irreparable loss as established in **Dr. Ahamed Muhammed Kisuule v. Greenland Bank (In Liquidation), Supreme Court Civil Application No 7 of 2010**. He contended that the applicant made no effort to demonstrate irreparable loss if the hearing of the election petition were not stayed.

Mr Ssemakadde further submitted that there are several reasons as to why the orders of Oguli Oumo, J should not be stayed. Among them was that the matters in Election Petition No 42 of 2016 are of great public interest. He cited the decision in **Mukasa Mbidde & Another v. Law Development Centre, SC Civil Application No 15 of 2015** in support of that contention. He further submitted that the election petition could be dismissed so extinguishing the applicant's fears at once. Further that even if the petition were successful, the applicant would have the comfort of section 95 (3) of the PEA, which secures the MP's tenure until the determination of an appeal instituted, if he is aggrieved by the decision of the High Court. Mr Ssemakadde contended

that it would be injudicious to grant stay of proceedings in the circumstances. He concluded that the balance of convenience tilts on the respondent's side and so the application to stay proceedings should not be granted.

Consideration of the appeal

With regard to the first issue framed here, the trial judge denied the application for leave to appeal in a written decision dated the 5th of January 2017. The reasons she assigned for her decision were that election matters must be disposed of expeditiously by virtue of the provisions of rules 28 and 29 of the Parliamentary Elections (Election Petitions) Rules. Further that the order that the appellant sought to appeal against was an interlocutory order that did not dispose of the substantive matter; that there is no legal provision that allows such an appeal. She relied on **Gagawala Wambuzi v. Kenneth Lubogo (supra)** for her decision. She denied the application for stay of execution for the same reason, that election petitions ought to be disposed of expeditiously.

The application for leave to appeal whose decision the applicant seeks leave of this Court to appeal against was made under the provisions of Article 86 of the Constitution, sections 33 and 39 of the Judicature Act, section 98 of the Civil Procedure Act and Order 52 rule 1 of the Civil Procedure Rules.

Mr Alaka relied on the decision in **Charles Sempewo & 143 Others (supra)** to submit that where leave to appeal is denied by the trial court, this Court can grant it, as it did in that case. On granting leave to appeal in that case it was held that,

> *"The right to appeal is a statutory one. Some appeals lie to the appellate (court) as of right and some with leave of the trial court.*

Where the trial court rejects the application for leave as it did in the matter before us, the application is lodged in the appellate court. In order to succeed in an application of this nature, the application has to show, prima facie, that there are serious issues of law or fact or both that merit judicial consideration by the appellate court. This principle was set out in the case of ***Sango Bay Estate v. Dresdener Bank Ltd*** *which was cited to us by both counsel. We agree with that principle."*

The background on which the application for leave was premised in **Sempewo & 143 Others** was set out by the court. The matter concerned ownership of land and the trial judge dismissed the whole suit on the basis of preliminary objections on technical matters that were raised by counsel for the defendant. The dismissal had the effect of disposing of the whole suit and would result in final orders against the defendants. It is distinguishable from the instant case in which the order was made to facilitate the filing of a suit/petition against the applicant.

The East Africa Court of Appeal in **Sango Bay Estates** considered that the decision in respect of which leave to appeal was sought fell under the category of matters provided for by Order 40 rule 1 (2) CPR which provides that,

"An appeal under these rules shall not lie from any other order save with leave of the court making the order or of the court to which an appeal would lie if leave were given."

In other words, for an appeal to lie with leave, it should be against an order made under the CPR, on procedures to take under a particular matter provided for by the CPR. In the **Sango Bay** case, the matter in contention was about summons for directions on the issuance of a third-party notice. This was clearly a matter provided for by the CPR. The court held that an appeal lies with leave, after considering the

decision in **Rene Dol v. Official Receiver of Uganda, (1954), 21 EACA, 116,** where it was held that,

> *"It has sometimes been thought that the effect of this last provision is to make all orders appealable either with leave or without, but that is an over-simplification. Category (iv) above is confined to orders 'made under rules.' Unless the order is made under the Civil Procedure Rules, those Rules cannot be effective to make it appealable, either as of right or with leave."*

The decisions in **Sango Bay Estates** and **Sempewo & 143 Others** were made under the CPR and so fell under the provisions of Order 40 rule 1 (2) of the CPR and the current section 76 (1) (h) of the CPA. The impugned decision on the other hand was made under sections 33 and 39 Judicature Act and s.98 CPA. It is clearly distinguishable from the decisions above because it was not made under rules (CPA), so that the two decision may not apply to this matter.

Counsel for the applicant advanced the argument that where there is a question for serious consideration, in this case, several decisions that he claimed were not consistent on whether leave to file an election petition out of time ought to be granted or not, this Court ought to exercise it discretion and grant leave to appeal under rule 40(1) of the Rules of this Court so that the question is considered. He cited the decision in **G.M Combined v. A. K. Detergents** in support of his argument.

Mr Alaka's view was that, this Court ought to grant leave to appeal under rule 40 (1) of the Rules of this Court so that it reviews the decision of the trial judge which is inconsistent with decisions he cited which were made by other judges of the High Court before the date of the impugned decision. On the other hand, Mr Ssemakadde argued, on the strength of **Pankaj Bhargava v. Mohinder Nath [1991] AIR 1233,** and

Mehta & Sons v. Century Spg Manufacturing Company Ltd [1962] AIR 1314, 1318, both decisions of the Supreme Court of India, that if the general principles to be applied in determining a question are well settled and there is merely a question of applying those principles, the question would not be substantial to justify granting leave to appeal.

The two decisions of the Supreme Court of India cited by Mr Ssemakadde involved the interpretation of the right to bring a second appeal to the High Court of India. The court defined what is meant by the term *"substantial question"* under section 100 of the Civil Procedure Code of India and the circumstances under which leave to file a second appeal could be granted. The ratio from the two cases was therefore not very useful to us.

We observe that the decisions of the High Court that have gone before on applications for various orders under the PEA, including prayers for leave to file election petitions out of time, that were cited by Mr Alaka above (**Ronald Katumba, Ikiror Kevin**, **Kakumba Abdul** and **Patrick Nkarubo)** indeed demonstrate that the High Court has previously held that time set in section 60 (3) of the PEA for the filing of election petitions cannot be extended by Court. Two of the decisions are worth mentioning here.

In **Patrick Nkarubo v. Theodore Sekikubo** (cited above) the judge relied on the decision of the former Supreme Court in **Makula International v. Cardinal Nsubuga** (also cited above) as the *locus classicus.* He ruled that where there is no enabling provision in the statute, court cannot extend time for it would amount to defeating the spirit of the statute. Further that the liberal interpretation by the Supreme Court in **Sitenda Sebalu v. Sam Njuba,** in which counsel for the applicant before him sought refuge, was about section 62 of the PEA which has a corresponding provision in rule 6 of the PE (EP) Rules. That

as a result rule 19 thereof could be employed to extend time within which to file and serve a notice of the petition. But with regard to extension of the time within which to file a petition under section 60 (3) of the PEA, the judge found that rule 19 could not apply because section 60 (3) did not have an equivalent in the PE (EP) Rules; so that a court that extends time to file an election petition would be simply *"acting under speculation."*

In **Ikiror Kevin v. Orot Ismael, Soroti High Court Electoral Petition No. 8 of 2016,** a petition was filed 5 months after the expiry of the time specified in section 60 (3) PEA. The petitioner sought to challenge the election of the respondent as a Member of Parliament using academic documents that belonged to another person which, if proved in a criminal court, would amount to personation under section 383 of the Penal Code Act. It was contended for the petitioner that the petition was brought under Article 86 of the Constitution and section 86 of PEA and required the High Court to conduct an inquiry into whether a sitting Member of Parliament was validly elected. It was further contended that the procedure set out in section 86 (3) and (4) of the PEA was not time bound; it was not subject to the provisions of section 60 (3) of the PEA.

The judge dismissed the petition for the reason that Parliament enacted a law pursuant to the provisions of Article 86 (3) of the Constitution and that law is the PEA and the Regulations thereunder. While dismissing the petition for having been filed out of the time specified by section 60 (3) PEA, the trial judge stated thus:

> *"Election petitions must be filed within the set time. Thereafter all election petitions are locked out. Just like Christians believe that once the wedding is done no caveat can undo the holy matrimony, no election petition should be entertained out of time even if one is making serious allegations of illegality or non-qualification of the*

political candidate. Indeed, political petitions are not an exception to the general holding that court cannot close its eyes to an illegality. No single illegality has been proved at the stage of filing an election petition. All are mere allegations at this stage.

This court is of the strong opinion that the principles set out in ***Muiya versus Nyangah & Others*** *(supra) that election petitions are governed by a strict law on time for certainty is good law."*

In two of the decisions raised by Mr Alaka before this court, the allegations against the respondents were related to fraud in respect of qualifications [**Ronald Katumba and Kakumba Abdul**]. This court was not informed whether the applicants therein tried to contest those decisions or not. The allegations against Hon Paul Kato Lubwama in **Election Petition No. 42 of 2016** now pending before the High Court, if proved to be true, would be to the same effect; that there was fraud in relation to acquisition of his qualifications. Further suspicion is raised about the qualifications to stand for the position that he now holds because, using technical arguments, he has strenuously resisted the hearing of the petition.

We now must consider whether the situation above can persuade us to exercise the jurisdiction vested in this Court under rule 40 (1) or (2) of the Rules of this Court to grant leave to the applicant to file an appeal. Rule 40 as a whole provides as follows:

"40. Application for certificate of importance or leave to appeal in civil matters

(1) In civil matters—

(a) where an appeal lies if the High Court certifies that a question or questions of great public or general importance arise, application to the High Court shall be

made informally at the time when the decision of the High Court is given against which the intended appeal is to be taken; failing which, a formal application by notice of motion may be lodged in the High Court within fourteen days after the decision, the costs of which shall lie in the discretion of the High Court; and

(b) if the High Court refuses to grant a certificate under paragraph (a) of this sub rule, an application may be lodged by notice of motion in the court within fourteen days after the refusal to grant the certificate by the High Court for leave to appeal to the court on the ground that the intended appeal raises one or more matters of public or general importance which would be proper for the court to review in order to see that justice is done."

It is important to note that in the application for leave to appeal before the trial judge rule 40 (1) of the rules of this Court was not mentioned. Instead, as the ruling of the trial judge states, an oral application for leave to appeal was made *"supported by Order 44 rules 1, 2, 3 and 4 of the Civil Procedure Rules."* It was also stated in the ruling that the application was opposed by counsel for the respondent who relied on sections 76(1) and 77 (1) of the Civil Procedure Act, for his submission that the applicant did not have a right to appeal against the order.

Clearly, the applicant in this case did not comply with the provisions of rule 40 (1) of the Rules of this Court. Neither did he make an application before the trial judge for a certificate of importance orally, nor did he make one formally within 14 days of the date of the decision of the trial judge. He instead came to this Court to raise matters that he should have raised before the trial judge.

However, in that regard, rule 42 (1) of the Rules of this Court provides that whenever an application may be made either in the Court or in the High Court, it shall be made first in the High Court. Rule 42 (2) goes on to provide that,

> **"(2) Notwithstanding subrule (1) of this rule, in any civil or criminal matter, the court may, on application or of its own motion, give leave to appeal and grant a consequential extension of time for doing any act as the justice of the case requires, or entertain an application under rule 6(2)(b) of these Rules, in order to safeguard the right of appeal, notwithstanding the fact that no application for that purpose has first been made to the High Court."**

As a result, this Court has previously ruled that on the strength of this provision and rule 30 of the Rules of this Court, this Court has concurrent jurisdiction with the High Court and so can allow applications made directly to the court without first being made before the High Court, but only if there is sufficient reason for doing so; (See **Kyambogo University v. Isaiah Omolo Ndiege, Civil Application No 341 of 2013**).

We observe that the decision in **G. M Combined v. A. K Detergents** (supra) cited by Mr Alaka in support of the application for leave to appeal because the intended appeal raises one or more matters of great public or general importance is not useful to support his argument. The decision in **G. M Combined** was not about leave to appeal under rule 40 (1) of the Rules of this Court. It was about leave to appeal, generally, where the former Supreme Court, consisting of Manyindo (then DCJ), Oder and Platt, JJSC, explained the order in which applications for leave to appeal to that court ought to have been made, and in respect of which Mr Alaka cited the following dicta:

"The rule is that if the High Court has refused leave to appeal on a proper application, or on what the High Court considers a doubtful application, but one which should have been entertained, it is taken that the High Court has refused leave, and that an application may be made to the Appellate Court. That is precisely the point made in (the) Sango Bay Ltd where the application ought to have been heard. This Court has had occasion to point that out fairly recently."

We respectfully agree with that decision. However, applications under rule 40 (1) (b) of the Rules of this Court are determined on different principles than applications for leave to appeal, generally. Mr Alaka did not assist court with any authorities to support his application on that leg; neither did Mr Ssemakadde address the matter.

Nonetheless, it is pertinent to first of all point out that rule 40 (1) of the Rules of this Court does not stand alone; it springs from the provisions of section 6 of the Judicature Act. With regard to civil matters, section 6 (2) of the Judicature Act provides that,

"Where an appeal *emanates from a judgment or order of a chief magistrate or a magistrate grade I in the exercise of his or her original jurisdiction,* but not including an interlocutory matter, a party aggrieved may lodge a third appeal to the Supreme Court on the certificate of the Court of Appeal that the appeal concerns a matter of law of great public or general importance, or if the Supreme Court considers, in its overall duty to see that justice is done, that the appeal should be heard." **{Emphasis supplied}**

This Court considered the application of section 6 of the Judicature Act and rule 40 (1) of the Rules of this Court in **Sylvester Byaruhanga v. Fr Emmanueal Ruvugwaho & Yofesi Rudigira, Civil Application No 228 of 2014**; **Rwabuhemba Tim Musinguzi v. Harriet Kamakune,**

Civil Application No. 142 of 2009; and **Charles Lwanga Masengere v. God Kabagambe & 2 Others, Civil Application No. 125 of 2009**.

In all these applications the applicants sought leave and certificates to bring third appeals in matters that originated in the Magistrates Courts, either to this Court or to the Supreme Court, on the grounds that the proposed appeals raised matters of great public or general importance.

"*General public importance*" to warrant certification for a final appeal to the Supreme Court of Kenya was defined in **Hermanus Phillipus Steyn v. Giovani Gnecchi-Ruscone, Application No. Sup. 4 of 2012** as follows:

> *"The importance of the matter must be public in nature and must transcend the circumstances of the particular case so as to have a more general significance. Where the matter involves a point of law, the applicant must demonstrate that there is uncertainty as to the point of law and that it is for the common good that such law should be clarified so as to enable the courts to administer the law, not only in the case at hand, but also in such cases in future. It is not enough to show that a difficult question of law arose. It must be an important question of law."*

The categories of cases that fall in that class were also identified in the same case and this Court adopted the classification in **Sylvester Byaruhanga** (supra) where this Court agreed with the Supreme Court of Kenya in the categorisation as follows:

> *"A matter of general public interest could take different forms for instance, an environmental phenomenon involving the quality of air or water which may not affect all people, yet it affected an identifiable section of the population; a statement of the law which may affect a considerable number of people in their commercial*

practice or in their enjoyment of fundamental or contractual rights; or a holding on law which may affect the proper functioning of public institutions or governance or the court's scope for dispensing redress or the mode of discharge of duty by public officers."

We observe that the instant application does not fall in the category of cases under rule 40 (1) of the Rules of this Court because it is a first appeal from the High Court to this Court. A certificate therefore cannot be issued to the applicant under section 6 (2) of the Judicature Act and rule 40 (1) of the Rules of this Court to lodge an appeal. It can only be considered under rule 40 (1) which is about applications to this court for leave to appeal, generally, where the High Court has denied such leave to the applicant.

Be that as it may, we see no harm in this Court adapting the definition and description of *"matters of great public importance"* or *"general public interest"* that was adopted by this Court in the case of **Sylvester Byaruhanga.** We say so because the courts, including this Court have on many occasions agreed with the principle that electoral matters are of great public interest and importance (**Nelson Gagawala Wambuzi, supra**).

We now must address Mr Ssemakade's submission that no appeal lies against the impugned decision because the order proposed to be appealed against was interlocutory. *"Interlocutory"* signifies something which is done between the commencement and the end of a suit or action which decides some point or matter, which however is not a final decision of the matter in issue. This Court considered whether such orders are appealable in **Nelson Gagawala Wambuzi v. Kenneth Lubogo** and the **Returning Officer of Kampala & Margaret Zziwa v. Naava Nabagesera,** cited above.

In **Gagawala Wambuzi**, this Court considered the provisions of s.66 of the PEA and held,

> *"The appeal envisaged here is an appeal against a decision determining an election petition rather than a decision from an interlocutory matter. We cannot read in this section any right of appeal against decisions of the High Court on interlocutory matters."*

It was unanimously held that the respondent had no right of appeal against the interlocutory orders of the trial judge. This Court considered the same question in **Returning Officer of Kampala & Margaret Zziwa v. Naava Nabagesera** and distinguished between appeals against interlocutory orders within a substantive matter concluded by the trial court, and interlocutory orders appealed from before the conclusion of the election petition. It was held that while a party can appeal against interlocutory orders within an appeal against the final decision in an election petition, appeals against interlocutory orders before the conclusion of the suit cannot be entertained.

In coming to that decision, the Court considered the decision in **Hannington Wasswa & others vs. Maria Ochola & 3 others, Supreme Court Civil Appeal No.5 of 1995,** where it was held that it was not necessary to file separate appeals, one against interlocutory orders made in the court of hearing and another one against the final decision. The Supreme Court went on to observe that,

> *"To hold otherwise might lead to a multiplicity of appeals upon incidental orders made in the course of the hearing when such matters can more conveniently be considered in an appeal from the final decision."*

However, in the instant case, the time within which to file the Petition had expired when the respondent brought Miscellaneous Cause No. 272 of 2016 seeking extension of time within which to file a petition. In

effect, there was no petition before court before the ruling that is contested. When the ruling was delivered, the matter was conclusively determined. It cannot therefore be said that the order was made in an interlocutory matter given the meaning of the expression in Black's Law Dictionary 2nd Edition; it is stated there that

> *"interlocutory order is an order intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy."*

As a consequence, it becomes clear that the order made by the trial Judge in Miscellaneous Cause No. 272 of 2016 was not an order intervening between the commencement and the end of a suit which merely decided some point or matter therein. Instead it was a final decision of the trial court which conclusively determined the whole controversy as to whether the applicant could file an election petition, or not. As a consequence, the decision might be appealable with leave of the High Court or this Court in order to bring clarity to that area of the law.

But that does not put an end to the question before court. Mr Ssemakadde for the respondent also submitted that an appeal would not lie against the decision of the trial judge because the orders she made were discretionary. Further that on authority of **Ashmore v. Corporation of Lloyds** (supra) such decisions should he upheld by appellate courts unless they are plainly wrong. Mr Alaka did not respond to this contention, save for emphasising that the decision was contrary to decisions made by other judges of the High Court on similar facts and so requires an appeal to this Court to clarify the correct legal position in preparation for the impending 2021 Parliamentary Elections.

The decision in **Ashmore v. Corporation of Lloyds** cited by Mr Ssemakadde is not useful to us because it was made in a matter where

the judge had control of the whole proceeding. He made a ruling touching upon an issue within the dispute which would contribute to the final determination thereof, i.e. the duty of care of an insurer and an agent to their client. The situation is distinguishable from the instant case where the judge made a preliminary order to facilitate the filing of the petition whose hearing, she might not have control over. However, in **Mohamed Moti v. Chanchalbhai [1915-1916] 6 KLR 1 at 2**, it was held that an appeal court will not interfere with an order within the discretion of the court appealed from, even though the appeal court may be clearly of the opinion that it would have made a different order. Further, that a court of appeal will not hesitate to interfere if satisfied that orders were made without the exercise of judicial discretion or with an improper exercise of such discretion.

In the matter now before us, because there appeared to be no specific provision laid down in the PEA and the Rules thereunder to extend time within which to file an election petition, the trial judge made her order under the general provisions of sections 33 and 39 of the Judicature Act, and section 98 of the Civil Procedure Act. She exercised her discretion to grant the contested order under the inherent powers of the High Court. Except for the various decisions in similar matters that the trial judge went against to grant the order, Mr Alaka advanced no arguments to show that the trial judge's discretion was wrongly exercised. A judge of the High Court is not bound by the decisions of brother and sister judges of the same court. That she made a decision that is contrary to those made by other judges of the same court on similar facts is no reason, on its own, to grant leave to the applicant to appeal to this Court.

Nonetheless, we observe that the dilemma that the trial judge was faced with was no different from that which was experienced by other judges in the same position, though they made decisions that recognised the

bar set by section 60 (3) PEA. It is clear to us that the provisions of section 60 (3) PEA seem to fetter the powers of the High Court, and indeed this Court after it, to examine allegations of illegalities and fraud committed by candidates which may amount to criminal offences if proved before a criminal court. This in turn facilitates candidates in Parliamentary Elections that may not have the requisite qualifications to fall through the net, get into Parliament and occupy positions of honour, a situation that does not augur well in promoting development of a young democracy like the one in Uganda.

It is now a settled principle that a court of law cannot sanction what is illegal and illegality once brought to the attention of the court, overrides all questions of pleadings, including any admissions made thereon (**Makula International Ltd v His Eminence Cardinal Nsubuga and Anor, [1982] HCB 15**). However, such illegality must be obvious or clear from the evidence before court. Where it is not clear or obvious, then the court must carry out further inquiry to establish the illegality by giving the parties an opportunity to explain their positions (**Crane Bank v. Nipun Narottam Bhatia, SCCA No 2 Of 2014**).

We are also mindful of the decision in **Makula International** that *a court has no residual or inherent jurisdiction to enlarge a period laid down by statute*, but that is a ratio that has often been misconstrued and quoted out of context. (See **Bwesweri Lubuye Kibuuka v. Electoral Commission & Another, Consitutional Petition No. 8 of 1998,** where this court corrected the ratio in **Makula International**.) The courts have often purposed to interpret legislation on the basis of specific facts so that this Court will not be deterred from making a decision in the instant case on the basis of the general *ratio decidendi* in a particular case.

The provisions of section 60 (3) of the PEA seem to be an absolute bar that prohibits all courts from examining electoral malpractices, frauds

and illegalities once the limitation period of 30 days sets in. The trial judge tried to escape from the stranglehold of that provision by invoking the decision in **Sitenda Sebalu v. Sam Njuba & Electoral Commission, Election Petition Appeal No 26 of 2007,** where extension of time was granted to serve notice of the petition as is required by section 62 of the PEA, so validating the petition and enabling it to be heard.

Rule 2 (2) of the rules of this Court vests powers in the Court to make orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of court. Mr Alaka argued that the decisions in **Gagawala Wambuzi** and **Naava Nabagesera** (above) followed in **Sitenda Sebalu** can be distinguished from the case at hand because they dealt with orders relating to extension of time under other provisions of the PEA, not section 60 (3) thereof. We are of the view that for the same reason, there is need to determine whether the ratio in **Sitenda Sebalu (supra)** applies to all the processes relating to filing and hearing of election petitions; and if it does not apply to extend time within which to file such petitions, what should be done when serious illegalities are discovered after the expiry of the 30 days provided for in section 60 (3) of the PEA, in order to bring justice to the parties.

The question whether an order of the High Court qualifies to be appealed against to this Court was considered extensively by the Court in **Seyani Brothers & Company (U) Ltd. v. Simbamanyo Estates Ltd., Court of Appeal Civil Application No. 6 of 2009** (Arising from COA C/A 92 of 2004). The court considered an application to strike out an appeal against a decision for the dismissal of an application to set aside an arbitral award under the Arbitration and Conciliation Act. It was argued for the respondents in the appeal that the appellant had no right to appeal because an appeal is a creature of statute. Further that no appeal lay from any other order other than those set out in section 76

of the Civil Procedure Act, which was understood to restrict orders that can be appealed against. The applicant in that case relied on the decision in **Attorney General v. Shah (No. 4) [1970] EA 60,** that court has no inherent appellate jurisdiction; it therefore cannot grant a right of appeal where none lies under statute.

In coming to its decision, this court considered the decisions in **Makula International v. Cardinal Nsubuga & Another *(cited above)***; **Dennis Bireije v. Attorney General, Court of Appeal Civil Application No. 31 of 2005,** and **Pius Niwagaba v. Law Development Centre, Court of Appeal Civil Application No. 18 of 2006** and affirmed the decision in **Makula International** where the court ruled that,

> *"It is clear that where an order is made by the High Court on a matter brought to it by some statutory provision other than the Civil Procedure Act or Rules, it is appealable unless that appeal is spsecifically excluded by some special legislation."*

In this case, the contested order was made under sections 33 and 39 of the Judicature Act and section 98 of the Civil Procedure Act. In particular, section 33 of the Judicature Act provides that,

> **"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."**

Section 39 of the Judicature Act simply provides directions for the procedure to be used in the High Court, and states that where none

have been provided for, the High Court is to adopt appropriate procedure under section 39 (2).

In **Bireije v. Attorney General** (cited above) it was argued that an appeal against an order made under setion 36 of the Judicature Act is appellable according to the provisions of Article 134 (2) of the Constitution, section 10 of the Judicature Act and section 66 of the Civil Procedure Act. Article 134 (2) provides that an appeal shall lie to this court from decisions of the High Court as may be prescribed by law. Section 10 of the Judicature Act provides for the jurisdiction of this court in the following terms:

> **"An appeal shall lie to the Court of Appeal from decisions of the High Court prescribed by the Constitution, this Act or any other law."**

The provisions of section 66 of the Civil Procedure Act amplify the right to appeal against the decrees and orders of the High Court as follows:

> **"Unless otherwise expressly provided in this Act, an appeal shall lie from the decrees or any part of the decrees and from the orders of the High Court to the Court of Appeal."**

Section 66 of the Civil Procedure Act is the equivalent of section 68 of the same Act before its re-enactment in 2000. It is the same provision that the former Supreme Court interpreted in **Makula International** and ruled that,

> *"Under section 68 an appeal lies as of right from the **orders** of the High Court **not made under the Civil Procedure Act** (as in this case) to the Court of Appeal. Section 82 provides that the provisions of Part VII of the Act relating to appeals from original decrees shall apply to orders of the High Court made under section 68 unless some*

different procedure for appeal is provided under any other law. In our opinion, these sections confer a right of appeal to this court against orders made by the High Court in a matter which is brought by some statutory provision unless the appeal is ***specifically excluded by some some special legislation*** *..." {**Emphasis supplied**}*

As a result, in **Bireije v. Attorney General** this court ruled as follows:

"In our view, section 10 of the Judicature Act means that once any law prescribes that a decision is made by the High Court, then the decision is appealable to this court. Section 36 empowered the High Court to issue orders of mandamus, prohibition and certiorari. In our view, those are prescribed by law within the meaning of section 10 of the Judicature Act."

This court has therefore been consistent in its finding that all orders of the High Court are appealable as of right or with leave, except where some statute specifically provides that there shall be no appeal. The order that the applicant propses to appeal against was made under sections 33 and 39 of the Judicature Act and there is no provision that prohibits an appeal from such orders. We therefore have no reason to depart from the ealier decisions of this court.

We have established that there is need to determine whether the reasoning in **Sitenda Sebalu** (cited above) applies to enable extension of time in all the processes relating to filing and hearing of election petitions. And if it is found that it does not apply to the filing election petitions out of time, in particular, there is need to determine what course of action to take when illegalities are discovered in an election after the expiry of the 30 days provided for in section 60 (3) PEA. There is also need for this court to determine whether rule 19 of the Parliamentary Elections (Election Petitions) Rules enables one to bring

an application for extension of time within which to file an election petition.

We are mindful that the right to appeal against orders made before the hearing of an election petition should be restricted because if it is not, it may result in unnecessary appeals crafted to defeat the hearing of election petitions in the High Court and delay in concluding them. However, we are of the opinion that criteria can be established to avert the floodgate of litigation in this court by delimiting appeals that can be brought during the hearing and others that should abide final determination of the petitions. In the circumstances of this case therefore, the applicant will be granted leave to appeal the contensted order.

With regard to the application for stay of execution, Mr Alaka's assertion was that it ought to be granted on the strength of the notice of appeal filed in this Court, according to the decision of this Court in the case of **Kasirye, Byaruhanga & Co, Advocates** (supra). However, though the court in that case ruled that the only requirement for the Court to grant a stay of proceedings was a notice of appeal filed in accordance with rule 76 of the Rules of this Court, court also found that in the notice of motion and the affidavit in support, the applicant raised other matters that required the consideration of the court. The applicant complained that the orders and directions issued by the trial judge were not provided for in the Civil Procedure Rules and had caused a miscarriage of justice. The facts in that case can clearly be distinguished from those in the case at hand for us to come to the conclusion that more would be required than the mere filing of a notice of appeal.

The basis for applications for stay of execution or proceedings to this Court is rule 6 (2) (b) of the Judicature (Court of Appeal Rules) Directions, which provides that in any civil proceedings were a notice of

appeal has been lodged in accordance with rule 76 of the Rules, the court may order a stay of execution, injunction, or stay of proceedings on such terms as the court may think just.

The Supreme Court re-stated the principles upon which orders for stay of execution should be granted in **Theodore Ssekikubo & 3 Others v. Attorney General & 4 Others, Constitutional Application No. 6 of 2013**, following the decision in **Akankwasa Demian v Uganda, Constitutional Application No. 7 and 9 of 2011** as follows:

i. The Applicant must establish that his appeal has a likelihood of success; or a prima facie case of his right of appeal;
ii. The applicant must prove that he/she will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted;
iii. If 1-2 above have not been established, court must consider where the balance of convenience lies; and
iv. That the application was instituted without delay.

With regard to the first principle, it has been established that there is need to look into the decision of the trial judge; as to whether applications for leave to extend time set by section 60 (3) EPA ought to be granted by the courts. Therefore, the condition that there is a *prima facie* case justifying an appeal has been satisfied.

Turning to the two principles next following, i.e. whether the applicant will suffer irreparable damage, or the appeal being rendered nugatory, the applicant has not made out a case that he will suffer any damage if the application in not granted. On the other hand, Mr Ssemakadde urged us to consider the provisions of section 95 (3) of the PEA which provides for postponement of vacation of office. Section 95 (3) provides that where as a result of an election petition the election of a person

who has been elected is set aside the decision shall not have the effect of causing that person to vacate his or her office until, (a) where no appeal is lodged, the expiry of the time within which an appeal may be lodged, and (b) where an appeal is lodged, the appeal has been fully disposed of or withdrawn.

In this case, the order for stay of execution/proceedings is not merely to prevent the hearing of the petition now pending before the High Court. Rather, it is to enable this Court to consider the application afresh by hearing an appeal to establish whether leave to file election petitions ought to be granted after the expiry of the 30 days set by the Legislature in section 60 (3) of the PEA.

The application for stay of execution was filed without delay since the applicant was anxious to prevent the hearing of the election petition against him. He secured an interim order for stay of execution on the 22nd March 2017 by virtue of which the proceedings in the High Court were suspended. We see no reason not to grant a substantive order to stay the proceedings in High Court Election Petition No 42 of 2016 to enable the proposed appeal to be heard. Therefore the proceedings in the High Court ought to be stayed.

In the end result, this application is granted with the following orders:

i) Leave is hereby granted to the applicant to file an appeal against the decision in High Court Misc. Cause 272 of 2016, such appeal to be filed within 14 days from the date of this order.

ii) The Registrar shall ensure that the appeal is placed before a panel of Justices for expeditious disposal by this Court, as is required in election matters.

iii) The hearing of Kampala High Court Election Petition No 42 of 2016 shall abide the hearing and determination of the appeal to be filed in this Court.

iv) Costs shall abide the hearing of the appeal.

Dated this ....13th.... Day of ~~September~~ oct 2020

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GEOFFREY KIRYABWIRE
JUSTICE OF APPEAL

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ELIZABETH MUSOKE
JUSTICE OF APPEAL

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IRENE MULYAGONJA
JUSTICE OF APPEAL