

ADVOCATES STRIKING OUT A NOTICE OF APPEAL
RIGHT OF APPEAL - IN ELECTION MATTER
THE REPUBLIC OF UGANDA

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IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. MR. JUSTICE G.M. OKELLO, JA
HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON. LADY JUSTICE C.K. BYAMUGISHA, JA



ELECTION APPLICATION NO. 005 OF 2006

BETWEEN

MUSIITWA HERBERT MULASA.....APPLICANT

AND

- 1. ELECTORAL COMMISSION }
- 2. HAJI JAKIRA MOHAMED SSALI}RESPONDENT

(An application arising from
Civil Appeal No.11 of 2006 which in turn arose from
Election Petition No.003 of 2006).

RULING OF THE COURT:

This application was brought by Notice of Motion under section 145(1)
of the Local Governments Act (LGA) and Rules 82, 43(1) & (2) of the
Court of Appeal Rules Directions (SI 13-10) for orders that:-

(1) The respondents' Notice of Appeal Civil Appeal No.11 of 2006
be struck out.

(2) Costs of this application be provided for.

(3) the matter will be fixed and heard after the results are gazetted within the law.”

The court did not make any necessary consequential order following the upholding of the preliminary objection.

On 7/8/2006 when the petition was called up again for hearing, the respondent raised another preliminary objection. He submitted to the effect that the petition was not properly before the court since its competence for being filed before the election results were gazetted was successfully challenged in the earlier objection. There was thus no competent petition before the court for hearing. Therefore, he argued, court should absolve the parties from appearing before it for that case.

The learned trial judge reserved her ruling on that preliminary objection to 8/8/2006. On that day, she delivered her ruling in which she made the following orders:-

- “(a) the preliminary objection is overruled.
- “(b) the parties should go ahead and present their case for scheduling.
- “(c) the respondent should pay the petitioner’s costs.
- “(d) the respondent will bear the parties costs for the preliminary objection.”

After the above ruling was delivered, the learned trial judge recorded thus:

The parties intend to appeal against the ruling.”



In their joint submissions, counsel for the respondents did not agree with the above submissions.

5 On jurisdiction, learned counsel contended that the point raised at the trial as a preliminary objection was a point of law that went to the root of the whole petition. It was about non-compliance with section 138(4) of the Local Governments Act. They cited as authority the often cited case of Mukula International Ltd vs. His Eminence Cardinal Nsubuga (1982)
10 HCB 11 at page 13 where the predecessor of this court held 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 and Rules, it is appealable unless the appeal is
15 specifically excluded by some special legislation or unless it can be brought within the rangoon group of authorities.”

Learned counsel submitted that Margaret Ziwa's case (supra) was distinguishable from the instant one in that that case was decided under
20 section 96 of the Parliamentary Elections Statute (PES). That statute has been repealed and that section 96 has not been replaced. The instant case was brought under the Local Governments Act. Therefore, they reasoned, the interpretation given to the repealed section 96 of the Parliamentary Elections Statute does not apply now.

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On leave to appeal, learned counsel contended that the respondents sought court's leave orally and they understood their request to have been granted by the High Court. That was why the High Court took no further action on the matter thereafter.

"The parties intend to appeal against the ruling."

5 That minute is clearly vague but we are more inclined to believe counsel for the respondents that they sought from the trial court leave to appeal against the ruling of the Court. The Court, however, was not clear from the record whether it granted or declined the request. We give the benefit of doubt to the respondents that the trial court granted the leave.

10 On jurisdiction of this court to entertain appeals arising from interlocutory orders made by the High Court while trying election petition, our attention have been drawn to the decision of this court (Manyindo DCJ, as he then was in Margaret Ziwa's case (supra)). That case interpreted section 96(1) of the Parliamentary Elections Statute No.4 of 1996 which section is identical with its successor section 66(1) of the Parliamentary Elections Act No.16 of 2005 and also with section 145(1) of the Local Governments Act.

The repealed section 96(1) of the Parliamentary Elections Statute reads:-

20 "A person aggrieved by the determination of the High Court on hearing an election petition may appeal to the Court of Appeal against the decision."

25 That section was reproduced in section 66(1) of the current Parliamentary Elections Act 2005 which reads:-

"A person aggrieved by the determination of the High Court on hearing an election petition may appeal to the Court of Appeal against the decision."



We find, with respect, that that order was bizarre. A petition that is a nullity does not exist and therefore can not be fixed for hearing. The proper order in such a situation would have been to strike out the petition to give room to the petitioner, if he wished, to file a fresh petition in accordance with the law.

We have no doubt in our mind that the decision of this court (Manyindo, DCJ, as he then was) in Margaret Ziwa's case (supra) is still good law. However, that case is distinguishable from the instant case on their facts. In that case, there was before court a valid petition which had to be heard before determination. In the instant case, there is no valid petition before court. There is no petition to hear and determine.

We, therefore, find that there is a right of appeal in the instant case as that was a point of law that went to the root of the petition.

In the result, we dismiss the application with costs to the respondent.

Dated at Kampala this 30th day of June 2007.

G.M. Okello
Hon. Justice G.M. Okello
JUSTICE OF APPEAL

A.E.N. Mpagi-Bahigeine
Hon. Justice A.E.N. Mpagi-Bahigeine
JUSTICE OF APPEAL

C.K. Byamugisha
Hon. Justice C.K. Byamugisha
JUSTICE OF APPEAL

