

UGANDA / JUDGMENT

Kalungi v Nalumansi and Anor (Election Appeal No. 1 of 2016) [2017] UGHCEP 5 (26 September 2017) [2017] UGHCEP 5

COURT

Election Petitions of Uganda

CASE / FILE NUMBER

Election Appeal No. 1 of 2016

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT Jinja

ELECTION APPEAL No 1 OF 2016 (FROM ELECTION PETITION NO. 34 OF 2016)

KALUNGI REGINA MWEBAZE

APPELLANT

\$V<sub>S</sub>\$

1. NALUMANSI MARIAM KAFUKO 2. ELECTORAL COMMISSION

RESPONDENTS

BEFORE HON. MR. JUSTICE MICHAEL ELUBU

RULING

At the commencement of the hearing of this appeal, Mr Kiiza Moses and Mr Martin Musigire, Counsels for the 1st and 2nd Respondents respectively, made oral submissions in which they raised preliminary points of law. In reply, Makada and Partners, the law firm appearing for the appellant put in written submissions.

The objections are,

- 1. That the appeal is out of time. The ruling in the lower court was delivered on the 16th of August 2016. The Notice of Appeal was filed on the 22 of August 2016 and the Memorandum of Appeal on the 30 of August 2016. That the time lines within which an Election Petition appeal should be filed are well stipulated and the present appeal is out of time.

- 2. That the Notice of Appeal, the Memorandum of Appeal and the Record were never served on the 1st Respondent.
- 3. That the record of appeal was served on the second respondent out of time and not at all on the first respondent.

I shall start with the first preliminary point of law.

It is the submission of Counsel for the respondent that the appellant has been dilatory in her conduct of this matter. That the law applicable in these circumstances is The Local Governments Act (LGA) Cap 243, Parliamentary Elections Act 2005 (PEA), The Parliamentary Election (Election Petitions) Rules (PEEPR) S. I. 141-2.

The Appellants submit that the law applicable in these circumstances, where the appeal emanates from the Chief Magistrates Court, is The Magistrates Courts Act, the Civil Procedure Act and Rules made thereunder.

Which law applies here should be established first as it will determine the law this court will apply in resolving this entire matter. This election was conducted under the LGA. Appeals are provided for under Section 145 of the Act which states.

A person aggrieved by the determination of a lower court on hearing an election petition may appeal to the High Court or Court of Appeal against the verdict.

The detail of the procedure in the conduct of appeals has not been provided for in the LGA. However Section 172 cures this lacuna by providing that,

For any issue not provided for under this Part of the Act, the parliamentary elections law in force for the time being shall apply with such modifications as are deemed necessary.

In my view this section is unequivocal, with the necessary modifications, it the parliamentary elections law that applies in determination of appeals emanating from local government elections. As such I do not agree with Counsel for the appellant who argues that recourse should be had to the Magistrates Courts Act, Civil Procedure Act and Civil Procedure Rules.

Where a question arose, what rules to apply in the conduct of an election appeal to the Supreme Court, that court held that The Parliamentary Elections Rules were the proper rules to apply to election petition appeals since they were made with a specific objective of expediting the hearing of the Election petitions (see *Loi Kageni Kiryapawo And Electoral Commission Vs Gole Nicholas Davis* Civil Application No.15 of 2007).

The Court of appeal was more specific to cases arising out Local Government Elections when it held that this Court has over time applied The Parliamentary Election (Interim Provisions) Rules to appeals in this court arising from the Local Government Act by virtue of Section 172 of the LGA (see *Kakembo Mansur Jamir vs Bogere Susan Nsensebuse COA Election Petition Application 28 of \$2017\$*).

Clearly therefore the correct rules to apply in appeals of this nature are the **PEEPR** since they are enacted for the specific purpose of expediting election petitions and by reference to Section 172 of LGA they apply in these circumstances.

The complaint in the instant appeal is that the Memorandum of appeal was filed out of time.

From the record the ruling of the lower Court was delivered on the 16th of August 2016. On the 22nd of August 2016 the appellant filed a Notice of Appeal. Then on the 30th of August 2016 a Memorandum of Appeal with six grounds was filed. On the 19th of August 2016, through her then Counsel, R Nsubuga Advocates, the appellant applied for a certified copy of the proceedings. It was not until the 24th of November 2017 that the lower court transmitted the certified copy of the record to the Deputy Registrar at the High Court. After several false starts, the matter came up for hearing on the 13th of September 2017, when the above points of law were raised.

Rule 31 of the PEEPR provides for the filing of a Notice of Appeal. It stipulates,

A memorandum of appeal shall be filed with the registrar

- a) \$\\ldots\$
- b) in a case where a written notice of appeal has been given, within seven days after notice was given.

The written Notice in the present case was lodged on the 22nd of August 2016. The memorandum of appeal was filed on the 30th of August 2016. This is a period of eight (8) days after the Notice of Appeal was presented and is therefore a day late. There was no application made by the appellant to enlarge the time provided by the law to file a memorandum of appeal.

That said, the appellant contends that she was under no obligation to file a notice of appeal. The notice when filed in matter governed by the MCA and CPA is only done as a matter of courtesy but not a mandatory requirement of the law.

This court has already ruled that it is not the MCA applicable here. On that basis therefore the argument is untenable. The memorandum of appeal was late.

The other complaint is that the record of appeal was filed out of time. The relevant provision of the **PEEPR** in this case is Rule 31 where it states,

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

The duty is clearly placed on the appellant to ensure that the record of appeal is sent to the Registrar within 30 days of filing the memorandum of appeal. As seen earlier the memorandum of appeal was filed on the 30th of August 2016. The record of appeal was filed with the registrar of this court on the 24th of November 2016. In this case, the 2nd respondent submits that their copy was received after the 12th of January 2017.

Service on the registrar in Rule 31 of PEEPR implies that the time lines of service by extension include service on all parties in the appeal. The 1st respondent on the other hand contends that to-date no service of any of the documents has been effected on them.

In an appeal of whatever nature, the appellant has a duty to be vigilant in the conduct and pursuit of the case. The Court of Appeal has reaffirmed that duty of the appellant to be vigilant when pursuing his appeal. It also noted that the time lines in the law are strict and can only be varied for good cause. In **Kasibante Moses vs Electoral Commission & Anor Election Petition Application No 7 of 2012**, the court stated,

... It was the duty of the respondent, as the intending appellant, to actively take the necessary steps to prosecute the intended appeal.

We also note that at no time did the respondent apply to court, for any valid reasons or at all, for extension of time either to serve the Notice of appeal out of time, or to file the Memorandum or the record of appeal, out of time. We conclude from all this that the respondent was all along not keen on pursuing the appeal with the necessary vigour and diligence that the law demands of an intending appellant in an election petition appeal.

Elsewhere in the same judgment the court held that,

It is now settled as the law that 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 the 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 in time See: **Utex Industries Ltd vs Attorney General Civil Application* No.52 Of 1995 (SC)* And *S. B. Kinyatta & Another vs Subramanian & Another Civil Application No.108 Of 2003 (Court Of Appeal)*.

From the foregoing, it is clear that the appellant in the instant case has flouted the law on time within which to lodge both the memorandum and the record of appeal. No efforts were made to move court to enlarge the time within which the documents could be filed. The memorandum and record of appeal were clearly out of time.

After receipt of the record in November 2016 it was not until the 17th of January 2017 that Counsel for the appellant wrote to Court for a hearing date. There was a lack of diligence on the part of the appellant.

For the foregoing reasons, the preliminary objections raised by the respondents are upheld and this appeal stands dismissed with costs.

Michael Elubu

Judge

26.9.17

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