

UGANDA / JUDGMENT

Ochwa v Hon. Ogwari (Election Petition Application 2 of 2023) [2024] UGCA 53 (5 March 2024)

[2024] UGCA 53

COURT

Court of Appeal of Uganda

BEFORE

Egonda-Ntende, JA, Luswata, JA, Kihika, JA

CASE / FILE NUMBER

Election Petition Application 2 of 2023

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPLICATION NO. 002 OF 2023

(ARTSII{G FROM ELECTIOT{ PETITION APPEAL NO. 04 OF 2022)

OCHWA DAVTD . APPLICANT

\rERSUS

- B. Costs of this application be provided for.

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BACKGROUND.

2. The background to this application is briefly as follows;

The Applicant together with the Respondent and 4 others contested in parliamentary elections that were held on the 14th of January 2021 in respect of the seat of parliament for Agule County Constituency, Pallisa District. The Respondent was declared the duly elected Member of Parliament for Agule County Constituency.

- 3. The Applicant filed Election Petition No. 4 of 2021 at the High Court of Uganda Mbale challenging the Respondent's nomination as candidate as well as the validity of the election result. The election petition was, on the 12th of December 2

- 5. The Respondent filed the Memorandum of Appeal in Election Petition No. 4 of 2022 on the 21st December 2022, but did not serve the same on the Applicant within seven (7) days.
- 6. The Respondent failed to take essential steps in the proceedings prescribed by Rules 29, 30 and 36 of the Parliamentary Elections (Interim Provisions) Rules SI 141-2, and Rules 78(1) and 88 of the Judicature (Court of Appeal Rules) Directions S.1 IV. 13-10 and the failure renders the appeal invalid.

The Notice of Motion was supported by a further affidavit of one MUKWAYA ABBAS which was affirmed on the 28th of December 2022. It briefly states as follows;

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- 1. I am the Chairman LC 1 of Gaafu Central Village in Seeta Ward, Goma Division Mukono Municipality, Mukono District.
- 2. In the month of

SOLOMON OLEA on the 10th November 2023. It briefly states as follows;

- 1. I am a Lawyer working with the firm of Iti/s Alo,ka & Co. Advocates representing the Respondent, having been fully involved with the filing and serving all court documents in relation to this Appeal.
- 2. Following the delivery of the Judgment in the High Court on the 12th of December 2022, the Respondent filed a Notice of Appeal and a letter requesting for the record of proceedings on the 19th day of December 2022 in the High Court of Uganda at Mbale and in the Court of Appeal registry in Kampala on the 24th of December 2022 well within the prescribed time.
- 3. On the same 24th day of December, 2022, I proceeded to the office of Counsel Alfred Okello Oryem of M/s Okello Oryem & Co Advocates located at Plot 592, Kigobe Road, Ntinda who was on record as the Applicant's Counsel in Election Petition No.4 of 2021 in the High Court of Uganda at Mbale for purposes of effecting service of the Notice of Appeal and letter requesting for record of proceedings.
- 4. The receptionist ushered me to the office

- 11. I then contacted Mr. Okoth John Pqul a court process seruer and informed him that I had serued the Notice of Appeal and the Memorandum of Appeal on M/s Okello

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Orytem & Co Aduocates and the firm had retained the documents but claimed that theg had no instructions to represent the Applicant in the Appeal.

- 12. I together tuith the Court of Appeal process seruer in the companA and direction of Mr. Mukwaga Abba the LC ¹ Chairperson of Gwafu Central Village in Seeta Ward, Goma Diuision Mukono Municipalitg, Mukono Dstict went to the Applicant's residential home to effed service.</

Lufugc. Counsel for the Applicant argued that the Respondent did not remotely discharge the burden upon him to satisfy the court that the Notice of Appeal was served upon the Applicant and that it was served on time. He criticised the Respondent for not taking steps to serve the Applicant at his known address of service in the constituency where both parties have resided for decades.

- ¹1. Counsel further submitted that an application for the enlargement of time by the party in default is a mitigating factor in that the Court can then validate, for good reason, pleadings that have otherwise been lodged or served out of time. Counsel contended that where no such application has been filed by the Respondent, the Court has no option but to strike out the offending pleadings. He relied on the cases of *Wl\red. Nttuagaba & Another as ProtazTo Begumlsa*,

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- 16. Counsel for the Respondent submits that under Rule 78(2) of the Court of Appeal rules, the copy of the Notice of Appeal can be served on an advocate who has not been retained for purposes of an appeal as long as that advocate's firm was the address of service for purposes or in connection with the proceedings in the High Court.
- 17. Relying on paragraphs 4, 5, 6, 7 and 8 of the affidavit of Atiba Solomon Olea, Counsel submitted that following the delivery of the Judgment of the High Court on the 12th of December 2022, the Respondent filed the Notice of Appeal and the letter requesting for the record of proceedings on the 19th of December 2022 in the High Court of Uganda at Mbale, and in the Court of Appeal registry at Kampala on the 20th day of December 2022. He further submitted that both documents were served on the firm of M/s Oke[O Oryem & Co Advocates where upon Mr. Okello Oryem received the documents but he declined to append his signature claiming that he had not been given instructions in the Appeal.
- 18. Counsel contended that this was effective service given that the firm of M/s Okello Oryem & Co Advocates was the address of service given by the Applicant during the proceedings in the High Court and that it was effected within two (2) days from the filing of the Notice of Appeal which was

- 22. It is common ground that the Respondent filed the Notice of Appeal in the High Court of Uganda at Mbale on the 19th of December, 2022 and that it was filed within the time

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prescribed by the Rules of this Court. Thus, according to the submissions of Counsel for the Applicant, the Notice of Appeal ought to have been served upon the Applicant by the 26th of December 2022. Counsel for the Applicant further submits that, the Notice of Appeal together with Memorandum of Appeal, was instead served upon the Applicant on the 19th of January 2023.

- 23. Taking pause for a moment, it is worth noting that Counsel's submission that the Applicant was served on the 19th of January 2023, is not backed by any evidence. No mention of this allegation was made in the affidavits sworn in support of this application. It is our considered view that Counsel's assertion in regard to service of the Notice

at his place of residence at Gawfu Central Village in Seeta Ward, Goma Division Mukono Municipality, Mukono District in the company off one Mr.

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Mukwaya Abbas the LCI Chairperson. It is further deponed that upon arrival at the Applicant's residence they found a relative/security guard upon whom they served the Notice of Appeal and letter requesting for the typed record of proceedings.

- Olea further that the 26. Atiba Solomon depones relative/security guard informed them that the Applicant was not around whereupon he left the documents with the relative/security guard to hand them over to the Applicant as soon as possible. All this was done in the presence of the LCI chairperson.
- 27. The affidavit of service of Mr. Okoth John Paul a Court of Appeal Process server basically recounts the events as stated in Atiba Solomon Olea's affidavit of service.
- 28. As stated earlier, there was no affidavit in rejoinder filed by the Applicant offering evidential rebuttal. It can therefore be the Respondent's version of

any person required to be served with a copy of a notice of appeal at any address for service in or in connection with the proceedings in the High Court, and has not subsequently given any other address for service, the copy of the notice of appeal may be served on him or her at that address, notwithstanding that it may be that of an advocate who has not been retained for the purpose of an appeal.

Rule 78(2) is quite clear and self-explanatory. The firm of M/s Okello Oryem & Co Advocates ought to have accepted service of the Notice of Appeal given that it was the firm on record during the proceedings at the High Court. And at the

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time service was attempted on the firm on the 20th of December, 2022, the Applicant had not provided an

Dated at Kampala this \$\dots\$ day of \$\dots\$ arch.....

Fredrick Egonda-Ntende Justice of Appeal

Eva K Luswata

Justice of Appeal

Oscar John Justice of Appeal

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