

UGANDA / JUDGMENT

Wakayima v Hon. Sebunya (Election Petition Application 10 of 2016) [2016] UGCA 93 (30 September 2016) [2016] UGCA 93

COURT

Court of Appeal of Uganda

BEFORE

Byabakama, JA

CASE / FILE NUMBER

Election Petition Application 10 of 2016

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⁵ THE KEPUBUC OF UGANDA**IN THE COURT OF APPEAL OF UGANDA****AT KAMPALA****MISCELLANEOUS APPLICATION NO. W OF 2076****WAKAYIMA MUSOICE NSEREKO APPLICANT****VERSUS****15 HON. KASULE ROBERT SEBUNYA RESPONDENT****BEFORE: HON JUSTICE BYABAKAMA MUGENYI SIMON, JA****RULING OF THE COURT****20****25**

Appeal out of time, for purposes of prosecuting the appeal against the judgment and orders of the trial Court in **Election Petition No.04 of 2016**. The applicant further seeks the costs of the application to be provided for. This is an application by Notice of Motion brought under **Rule *5* of the Judicature (Court of Appeal) Rules SI 13-10, Rules 34 and 36 of the Parliamentary Elections (Elections Petitions Act) Rules**, seeking extension of time within which to file and serve the Memorandum of

³⁰ On the 22nd of September 2016, when this matter came up for hearing, Counsel for the respondent, Mr. Ssekaana Musa, raised a preliminary objection to the effect that this application was filed

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35 after the respondent had filed Miscellaneous Application No. 09/2016, seeking the striking out of the Notice of Appeal filed by the applicant herein on 20th-7-2016, on grounds that the applicant had failed to file the Memorandum of Appeal within seven days after the filing of the Notice of Appeal.

40 45 Learned Counsel contended that the principle upon which this preliminary objection is premised is first in, first out. Since the respondent's application came first, it ought to be considered before the applicant's application for extension of time is heard. In Counsel's view, it would be unjust and unfair to hear this application first, whose effect is to render the application for striking out the Notice of Appeal nugatory. He prayed Court to stay the application for extension pending the determination of the application for striking out.

50 55 ALZAHIRI A. WISSANJI, CIVIL APPLICATION NO. 89/2010, where the Court observed that if the application for striking out the Notice of Appeal was to be heard first, if allowed, it would render the Mr. Latigo Richard, for the applicant, opposed the preliminary objection. He submitted that the application for striking out requires a panel of three Justices and the matter before a single Justice is for extension of time. Although the application for striking out was filed in Court first, there is nothing irregular with the court's determination of the application for extension of time. Counsel referred to the decision of the Court in CONGO TRADING CORPORATION LTD Vs

application for extension of time nugatory and this would result in denial of justice.

Counsel for the applicant rounded up his submissions by inviting Court to dismiss the preliminary objection and proceed to hear the application for extension of time.

65 ^I have given careful consideration to the submissions of both Counsel and the facts before this Court.

The record reveals that **Misc. Application No. 9 of 2016** (for striking out) was filed on- 3rd-8-2016 while the instant application (for extension of time) was filed on 4th-8-2016. The Memorandum of Appeal in **Election Appeal No. 50 of 2016** was filed on 2nd-8-2016, some five days after the expiry of the stipulated period.

The issue for determination by this Court is whether a single judge can proceed to hear an application for extension of time when there is a pending application to strike out a Notice of Appeal and intended appeal to be determined by the full bench.

The facts of this matter are similar to those in **GODFREY MAGEZI & 80 ANOTHER VS SUDHIR RUPARELIA, MISC APPLICATION NO. 6 OF 2003, SUPREME COURT**, where a single judge of the Supreme Court dismissed a similar application on ground that as a single judge, he could not hear an application for extension of time when another application for striking out the appeal was still pending before a full bench. The matter went before the full bench on an application by

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85 way of reference, against the decision of the single judge. The Court stated as follows:

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*"There are a number of authorities of this Court stating that an application for extension of time may be heard even if there is a pending application to strike out an appeal The answer cannot depend on who filed first. This is so because if there is merit in the application for extension of time, the appeal will not be strangled. If there is no merit it will be rejected and the one to strike out the appeal will be heard. An application to strike out an appeal does not act as a bar to an application for extension of time nor does it divest the Court of its Jurisdiction to extend time. When dealing with a matter of this nature the guiding principle should be that the rules of procedure are meant to serve as handmaidens of Justice"

The same Court, in **HAJJI NURDIN MATOVU VS BEN KIWANUKA, CIVIL APPLICATION NO. 12 OF 1991**, had this to say:

"It is to be noticed that in Kiboro's case the application for extension of time was made before the hearing of the Notice to strike out the appeal. Hence Kiboro's case can illustrate, that if there is an existing application, the Court doesn't normally strike out the appeal, but would prefer to allow the application for extension of time to be heard first before the striking out Motion".

The said decisions clearly put to rest the bone of contention in the preliminary objection raised by Counsel for the respondent in this

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'100 110 application. There is therefore no doubt this Court is competently constituted to hear the application for extension of time, even though there is a pending application for striking out the appeal. ^I accordingly overrule the preliminary objection and order the matter proceeds for hearing on the merits.

^I so order.

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DATED AT KAMPALA THIS 30TH DAY OF SEPTEMBER 2016.

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HON. JUSTICE BYABAKAMA MUGENYI, JA

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