

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPLICATION NO.07 OF 2012

(Arising from Election Petition Appeal No.47 of 2011)

5 **CORAM:** HON. LADY JUSTICE C.K. BYAMUGISHA, JA

HON. JUSTICE S.B.K. KAVUMA, JA

HON. JUSTICE REMMY KASULE, JA.

KASIBANTE MOSES :::::::::::::::::::::::::::::::APPLICANT

VERSUS

10 ELECTORAL COMMISSION:::::::::::::::::::::::::::::RESPONDENT

RULING OF THE COURT

The applicant applies to have *Election Petition Appeal No.47 of 2011 to be struck out. The application is brought under Rules 43 (1) (2), 44 and 82 of the Court of Appeal Rules and Rule 30 of the Parliamentary*
15 *Elections (Election Petitions) Rules.*

The grounds of the application are that the respondent failed to file a Notice of Appeal within the prescribed seven (7) days after the delivery of the High Court Judgement, failed to lodge in court a Memorandum of Appeal within
20 seven days after the Notice of Appeal had been filed, and also failed to lodge a Record of Appeal within thirty (30) days after filing the

Memorandum of Appeal. In effect the applicant contends that the Respondent has failed to take essential steps to appeal and prosecute ***Election Petition Appeal No.47 of 2011.***

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The application is supported by an affidavit of the applicant dated 20.02.2012.

30 The respondent opposes the application and for that purpose filed in court an affidavit in reply dated 28.03.2012, deponed to by one Enock Kugonza, the respondent's legal officer. Through this affidavit the respondent sets out the grounds for opposing the application.

35 At the hearing, the applicant was represented by learned counsel Chrysostom Katumba, while Counsel Tom Magezi appeared for the respondent.

40 Though the parties never framed any issues at conferencing, in the view of this Court, from the pleadings and the conference notes of the respective parties, the issue for determination is whether or not the respondent has failed to take any essential step(s) to prosecute ***Election Petition Appeal No.47 of 2011.***

The facts leading to this application are that on 18.02.2011 Parliamentary
45 elections conducted by the respondent were held in Uganda. The applicant
and one Honourable Katongole Singh Marwaha and others were
candidates and contested the Parliamentary seat of Rubaga North
Constituency, Kampala capital city.

50 On 20.02.2012 the Respondent declared the applicant winner of this
election. The runner up, Honourable Katongole Singh Marwaha,
dissatisfied with the result, and pursuant to the electoral law, applied for a
recount on 22.02.2011. The Chief Magistrate's Court, Mengo, allowed the
application, and a recount was conducted on 28.02.2011 at the said court
55 premises. After the recount, on 01.03.2011 the respondent declared and
gazetted Hon. Katongole Singh Marwaha as the winner of the election. On
30.03.2011 the applicant, disputing the result of the election after the
recount, petitioned in the High Court, Kampala, through ***Election Petition
No.23 of 2011***. The Election Petition was heard and determined by the
60 High Court (***Musoke-Kibuuka, J.***) in favour of the applicant on 24.10.2011.
The respondent appealed to this court against the judgement of the High
Court by lodging ***Election Appeal No.47 of 2011***.

The case of the applicant is that under Rule 29 of the Parliamentary
65 Elections (Election Petitions) Rules, a written Notice of Appeal has to be
filed within seven (7) days after delivery of the Judgement being appealed
against. In this case, the respondent filed the Notice of Appeal on

31.10.2011, being eight (8) days from the 24.10.2011 the date of delivery of judgement.

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The said Notice of Appeal, applicant further contends, was served on his lawyers on 08.11.2011, again a day later than the stipulated period of seven days contrary to **Rule 78 of the Court of Appeal Rules**.

75 As to the Memorandum of Appeal, it is submitted for applicant that the same was filed in court out of time since **Rule 30 of the Parliamentary Elections (Election Petitions) Rules** requires that the same has to be filed within seven (7) days after the Notice of Appeal has been given. In this case the Notice of Appeal having been filed in court on 31.10.2011, the
80 seven (7) days expired on 07.11.2011. Yet, the Respondent filed the Memorandum of Appeal on 08.11.2011, a day out of time of the filing of the Notice of Appeal.

In respect of filing the Record of Appeal, it was contended for the applicant,
85 that the respondent had not applied to be supplied with the High Court record of proceedings of the High Court for the purpose of preparing the record of appeal. The High Court had communicated that the record of proceedings was ready by the 13.12.2011 and on 16.01.2012 the same had been forwarded to the Court of Appeal. In spite of this readiness of the
90 court proceedings of the High Court, the respondent had failed to file in court a record of appeal, even as by the time of hearing of this application.

Finally, it was submitted for the applicant that the respondent had at no time applied to Court for any extension of time in respect of taking any essential step.

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The respondent, on the other hand, maintained that he had taken the necessary essential steps. The Notice of Appeal had been lodged in time for the day of delivery of Judgement had to be excluded in computing the seven (7) days from 24.10.2011. This also applied to lodgement of the
100 Memorandum of Appeal.

Respondent's counsel invited us, that if we were to find that the Notice and/or the Memorandum of Appeal, or one of them, had been filed late, then this was not inordinate delay and was excusable under **Article 44**
105 which makes the right to a fair hearing non-derogable. The respondent should also be heard in appeal. Further, **Article 126 (2) (e)** enjoins court not to give undue regard to technicalities at the expense of justice. A delay of one day should therefore not result in extinguishing the respondent's appeal. Also **Rule 26** of the Parliamentary Elections (**Election Petitions**)
110 **Rules** bars proceedings of a petition being defeated by any formal objection or by the miscarriage of a notice.

Respondent's counsel relied on the Kenyan case of **Kenya Court of Appeal Civil Application No.72 of 1999: CECILIA GATHONI HARUN V**
115 **GEORGE KABUGU**, where the court disregarded an inordinate delay of

143 days of lodging the record of appeal on the premise that no real prejudice was suffered by the Respondent and that the applicant ought to be given a chance to have a final say in the highest court. Counsel invited us to accord the same treatment to the respondent in this Application.

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He further submitted with regard to the assertion that the respondent had failed to file a record of appeal in court in time, that the record of appeal was not available to the Respondent within the prescribed thirty (30) days of the filing of the memorandum of appeal through no fault of his own. The record of appeal only became available to him on 06.01.2012, way outside the thirty (30) day period. The Registrar, High Court, had also compiled and certified the record and forwarded the same to the Court of Appeal Registry without any notification being made to the respondent.

130 As to the law applicable, this application is brought under **Rule 82 of the Rules of this Court**, among others. This Rule provides:-

135 ***“A person to whom a notice of appeal has been served may at anytime, either before or after the institution of the appeal, apply to the court to strike out the notice of appeal or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.”***

The **Rule** provides for two instances where a person served with a Notice
140 of Appeal can move court to strike out the Notice of Appeal or the appeal
itself. The first, is where, according to the one served with the Notice of
Appeal, no appeal lies. The second is where the person served claims that
the intending appellant has not taken an essential step at all in the
proceedings, or has taken the same but outside the time prescribed by the
145 rules: See ***Court of Appeal Election Petition Application No.24 of
2011: Bakaluba Mukasa Peter & Another V Nalugo Mary Margaret
Sekiziyivu.***

Taking an essential step is the performance of an act by a party, whose
150 duty is to perform that fundamentally necessary action demanded by the
legal process, so that, subject to permission by court, if the action is not
performed as by law prescribed, then whatever legal process has been
done before, becomes a nullity, as against the party who has the duty to
perform that act.

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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 judgement is delivered, the intending appellant
160 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).

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In case of an election petition appeal, the intending appellant has even a higher duty to expeditiously pursue every step in the appeal so that the appeal is disposed of quickly. This is so because **Section 66 (2) of the Parliamentary Elections Act and Rule 33 of the Parliamentary Elections (Election Petitions) Rules** enjoin this court to hear and determine an appeal expeditiously and may, for that purpose, suspend any other matter pending before it. **Rule 34** requires this court to complete the appeal within thirty (30) days from lodging the record of appeal, unless there are exceptional grounds. Time is thus of the essence in election petition appeals.

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Rule 29 of the **Parliamentary Elections (Election petitions) Rules** requires that a Notice of Appeal be filed within seven days after the judgement of the High Court against which the appeal is to be made.

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Judgement in **Election Petition No.25 of 2011** was delivered on 24.10.2011 and the respondent to this application filed the Notice of Appeal on 31.10.2011.

185 The language of **Rule 29 of the Parliamentary Elections (Election Petitions) Rules** is to the effect that the Notice of Appeal, when in writing, is to be given:

“**within seven days after the Judgement of the High Court against which the appeal is being made.**” (Emphasis is by this court). The
190 ordinary dictionary meaning of the word “**after**”, among other meanings, is “**subsequent in time to**” or “**at a later time than**” See: **The Free Dictionary by FARLEX, 2012.**

It follows therefore that, in terms of **Rule 29**, in case of a written Notice of
195 Appeal, the same is to be filed seven days excluding the date of delivery of judgement.

The law as to computation of time, election petitions inclusive, also supports the above conclusion. **Section 34 (1) (a) of the Interpretation
200 Act, Cap.3**, provides that in computing time for the purposes of any Act, a period of days from the happening of an event or the doing of any act shall be deemed to be exclusive of the day in which the event happens or the act or thing is done.

205 Also **Rule 36** of the **Parliamentary Elections (Election Petitions) Rules**, allows the rules of procedure and practice on appeal from decisions of the High Court to the Court of Appeal in civil matters to apply to Election Petition Appeals, subject to such modifications as this court may consider

necessary in the interests of justice and expedition of the proceedings.
210 Therefore under this authority, resort can be made to **Rule 4 of the
Judicature (Court of Appeal Rules) Directions. Rule 4 (a)** of these
Rules is a repeat of the already referred to Section 34 (1) of the
Interpretation Act. The **Rule** provides:

“4. Computation of time.

215 **Any period of time fixed by these Rules or by any decision of the
court for doing any act shall be reckoned in accordance with the
following provisions:-**

220 **(a) A period of days from the happening of an event or the doing of
any act or thing shall be taken to be exclusive of the day on
which the event happens or that act or thing is done;”.**

The legal position is therefore that the date of delivery of judgement is
excluded when computing the seven (7) days within which a written Notice
of Appeal has to be filed in court.

225 It follows therefore that the respondent’s notice of appeal which was lodged
in court on 31.10.2011, when judgement had been delivered on 24.10.2011
was lodged within the prescribed time of seven (7) days, thus in
compliance with **Rule 29 of the Parliamentary Elections (Election
Petitions) Rules.**

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As to service of the Notice of appeal by the respondent upon the applicant, the evidence that there is, according to annexure "A" of the applicant's affidavit in support of the motion, is that the applicant's lawyers acknowledged receipt of the Notice of Appeal on 08.11.2011. The
235 respondent has not adduced specific evidence as to when, earlier than 08.11.2011, the Notice of Appeal was served upon the applicant's lawyers, or when the same was collected from the Court Registry for service upon the applicant. The burden is upon the respondent to satisfy court that the Notice of Appeal was served upon the applicant in time. On the basis of
240 the evidence that is before court, excluding the 31.10.2011 when the Notice of appeal was lodged in court, court finds that service of the Notice of appeal upon the applicant on 08.11.2011, was a day out of time of the seven days prescribed by **Rule 78 (1) of the Judicature (Court of Appeals) Rules.**

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Rule 30 enjoined the respondent to file a Memorandum of Appeal with the Registrar of this Court, in case where a written notice of appeal had been given, which was the case in this application, within seven days after notice had been given.

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Taking the 31.10.2011 as the date when the Notice of Appeal was filed in court, thus the date when the notice of appeal was given, the seven (7) days, excluding 31.10.2011, expired on 07.11.2011. This is the last date when the Memorandum of appeal ought to have been filed in court. Its
255 being filed in court on 08.11.2011 was therefore out of time by one day

contrary to **Rule 30 of the Parliamentary Elections (Election Petitions) Rules.**

Rule 31 of the Parliamentary Elections (Election Petitions) Rules,
260 required the respondent to file the record of appeal within thirty days after
the filing of the Memorandum of Appeal.

The evidence that there is on record is that since 08.11.2011 when the
Memorandum of appeal was filed up to by the time of hearing of this
265 application on 10.04.2012, the respondent had not filed a record of appeal
in court. He had even never written to court and served a copy to the
opposite party, requesting to be supplied with a certified copy of the court
proceedings for the purpose of preparing the record of appeal to be filed in
court. Yet, according to the evidence before court, certified copies of
270 proceedings and judgement were ready and had been forwarded to this
court by the trial court by the 16.01.2012.

This court is unable to accept the submission of learned counsel Tom
Magezi for the respondent, that the record of appeal was not available to
275 the respondent within the prescribed period of thirty (30) days through no
fault of the respondent, and that even by the 16.01.2012, when certified
copies were forwarded to this court, the respondent was not so made
aware by the Registrar. We wonder how the respondent expected to be

made aware of the readiness of the record when the respondent never
280 even wrote to the trial court requesting to be supplied with such a record.

The respondent's submission that because there was a notice of appeal on
record showing the address of the respondent as one interested in the
appeal, and that this fact ought to have made the court Registrar to notify
285 the respondent of the readiness of the court proceedings has no validity in
law whatsoever. It was the duty of the respondent, as the intending
appellant, to actively take the necessary steps to prosecute the intended
appeal.

290 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
295 demands of an intending appellant in an election petition appeal.

We accordingly allow the application and strike out Election Petition Appeal
No.47 of 2011.

300 We further order that the respondent pays the costs of the application to
the applicant.

Dated at Kampala this30thday ofApril.....2012.

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Hon. Lady Justice C.K. Byamugisha

JUSTICE OF APPEAL

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Hon. Justice S.B.K. Kavuma

JUSTICE OF APPEAL

Remmy. K. Kasule

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JUSTICE OF APPEAL