

5 **THE REPUBLIC OF UGANDA**
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
ELECTION PETITION APPLICATION NO. 0017 AND 24
OF 2017

(Arising from Election Petition Appeal No.83 of 2016)

10 **HON. EBIL FRED ::::::::::::::::::::::::::::::::::: APPLICANT**

VERSUS

OCEN PETER ::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE S.B.K KAVUMA, DCJ

HON. JUSTICE ELIZABETH MUSOKE, JA ✓

15 **HON. JUSTICE CHEBORION BARISHAKI, JA**

RULING OF THE COURT

Background:-

The applicant and the respondent were contestants in the General National Elections held on the 18th February, 2016, where they vied for the seat of Member of Parliament for Kole South Constituency. The Electoral Commission returned the respondent herein as the validly elected Member of Parliament for the constituency. The applicant filed a Petition in the High Court at Lira challenging the outcome of the election and alleging several electoral



5 offences as having been committed by the respondent during the election process.

On the 12th August, 2016, the High Court passed Judgment in favour of the applicant; the election of the respondent was nullified and the Parliamentary seat of Kole
10 South Constituency was declared vacant. On the 15th August, 2016, the respondent filed a Notice of Appeal in the High Court of Lira, and on 19th August, 2016, he filed a Memorandum of Appeal in the same Court. Subsequently, on 1st September, 2016, the applicant filed a Memorandum
15 of Appeal in this Court after the prescribed time within which to appeal had lapsed.

On the 16th April, 2017, the applicant filed Election Petition Application No.17 of 2017, seeking to strike out the Appeal on grounds that it was incurably incompetent for being
20 filed out of time. On the 19th May, 2017, the respondent filed Election Petition Application No.24 of 2017, seeking to extend the time within which to appeal and to validate the Memorandum of Appeal lodged in this Court outside the prescribed time.

25 When the Applications came up for hearing, they were consolidated by court with the consent of the parties.



5 Election Petition Application No. 17 of 2017, seeking to
strike out the Appeal was based on several grounds
contained in the Notice of Motion and the Affidavit in
Support of the Application deponed by the applicant.
Briefly the grounds in support of the Application were
10 that:-

1. The Memorandum of Appeal filed in this Court on 1st
September, 2016, was incompetent and irregular
considering that it ought to have been filed by the 22nd
August, 2016.
- 15 2. The filing of the Memorandum of Appeal on 1st
September, 2016, was an afterthought and could have
been a result of an illegal process of tampering with
the Record of Appeal.
3. The Memorandum of Appeal served upon the
20 applicant/his Advocates was that filed in the High
Court at Lira and not that filed in this Court.

On the other hand, the respondent swore an Affidavit in
Reply and a supplementary affidavit thereof. Briefly, the
grounds in opposition of the Application were that:



- 5 1. The Notice of Appeal and the Memorandum of Appeal
were lodged within the prescribed time at Lira High
Court and the same were served upon the applicant.
- 10 2. The filing of the Memorandum of Appeal at Lira High
Court was a genuine error by Advocates representing
the respondent upon misinterpretation of the Rules.
3. The applicant has been vigilant in pursuing the
appeal.
4. The Application lodged by the applicant in bad faith.
- 15 5. The applicant had filed the Memorandum of Appeal in
this Court.
6. It would serve the ends of justice if the Memorandum
of Appeal filed in this Court was validated.

20 Election Petition Application No.24 of 2017, seeks the
extension of time within which to file the Memorandum of
Appeal/validation of the Memorandum of Appeal filed
outside the prescribed time. It was supported by the
affidavit of Abwang Otim Mike, who was one of the
Advocates representing the respondent. The grounds in
support of the Application are briefly that:-

- 25 1. As result of the genuine misinterpretation of rule 30(b)
of the Parliamentary (Election Petition) Rules, the



5 respondent's Advocates filed the Memorandum of Appeal in the Lira High Court.

2. The Memorandum of Appeal was subsequently filed in this Court outside the prescribed time.

3. The Memorandum of Appeal filed within the
10 prescribed time at Lira High Court and later filed in this Court was included in the Record of Appeal.

4. Save for the procedural errors, the actions of the respondent's Advocates were geared towards obtaining the expeditious prosecution of the Appeal.

15 5. The appeal raises important issues for this Court's consideration.

6. The applicant herein would not suffer prejudice if the application is granted.

The applicant opposed the Application through his Affidavit
20 in Reply dated 27th May, 2017. Briefly, the grounds in opposition of the Application are that:-

1. The language in Rule 30(b) of the Parliamentary
(Election Petitions) Rules was plain and the allegation
by counsel for the respondent that there was a
25 genuine misinterpretation of the rule was a lie.



- 5 2. The applicant had not demonstrated that he was a
 curious litigant interested in pursuing the Appeal.
3. The Memorandum of Appeal filed at Lira High Court
 and later filed belatedly before this Court was a nullity.
- 10 4. No sufficient ground has been put forward for
 validation for the applicant's Appeal. (sic)

Representation:-

At the hearing of the consolidated applications, the
applicant was represented by Mr. Kamba Hassan while the
respondent was jointly represented by Mr. Nester
15 Byamugisha and Mr. Abwang Otim.

The following issue was agreed upon by the parties for
Court's consideration:

***1. Whether Election Petition Appeal No. 83 of 2016
can competently be validated or not.***

20 **Applicant's submissions:-**

In his submissions, counsel for the applicant submitted
that Election Petition Appeal No. 83 of 2016 was
incompetent, an illegality and incapable of being validated.
Counsel submitted that the applicant had received the
25 Memorandum of Appeal filed in this Court in protest for



5 being filed out of time but the respondent did not apply for
its validation or for extension of time until after a period of
8 months. It was his contention that the application to
validate the Memorandum of Appeal was an afterthought
and ought to be dismissed by this Court. He relied on
10 ***Kawombe Lameka Versus Kafeero Ssekitoleko Robert
& Anor, Court of Appeal Election Petition Application
No. 0015 of 2017***, to support the above submission.

Counsel made reference to the evidence of the respondent
that the filing of the Memorandum of Appeal at Lira High
15 Court instead of this Court was due to the
misinterpretation of the law by counsel for the respondent.
He relied on ***Sayjay Tanna & Anor Versus Ofwono Yeri
Apollo, Court of Appeal Election Application No.08 of
2006***, and submitted that the Court in the said case
20 dismissed the application which was based on arguments
that the Memorandum of Appeal had been filed in the
wrong Court owing to the misinterpretation of the law by
counsel. Further, that it was held that the Memorandum of
Appeal having been filed in the wrong Court, it was of no
25 legal consequence. It was counsel's further contention that
the argument that counsel misinterpreted the law was not



5 a genuine excuse considering that it took 8 months for the applicant to apply for the validation of the Appeal.

Counsel further submitted that it was doubtful whether the respondent had subsequently filed the Memorandum of Appeal in this Court considering that there was no receipt
10 for payment of Court fees or payment of security for costs on record.

It was counsel's further submission that the filing of the Memorandum of Appeal in Lira High Court and subsequently filing the same Memorandum of Appeal in
15 this Court belatedly was an illegality which ought not to be compromised upon by this Court.

Respondent's submissions:-

On his part, Mr. Nester Byamugisha for the respondent submitted that counsel received instructions to appeal and
20 executed the instructions by filing a Notice of Appeal, serving the Notice upon counsel for the applicant and writing a letter requesting for the record of proceedings. However, that the problem arose when counsel filed the Memorandum of Appeal in the Lira High Court instead of
25 this Court. It was counsel's contention that the above mistake of counsel was based on a genuine

True
[Signature]

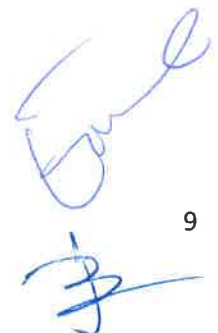
5 misinterpretation of the law. However, that the Memorandum of Appeal was later, although belatedly, filed in this Court.

It was counsel's submission that the authorities relied upon by counsel for the applicant were distinguishable
10 from the present case. His submission was that in the said cases, the applicants were guilty of dilatory conduct and delay, which was not the case in the present case.

Counsel further submitted that the Appeal raises matters of public importance including illegalities, which warrant
15 for it to be heard on merit. Further, that no prejudice would be caused to the applicant if the application was granted. He conceded that a mistake was done in filing the Memorandum of Appeal, however, that the mistake ought not to be visited on the respondent.

20 **Court's findings:-**

We have considered the pleadings and the evidence on record, as well as the submissions of counsel for either party in support of and in opposition to the Application respectively.



5 Rule 5 of the Judicature (Court of Appeal Rules) Directions gives this Court the discretion, for sufficient reason, to extend time limited by the rules for doing any act authorized by the Rules whether before or after the expiration of that time and whether before or after the
10 doing of the act. In ***Nalugo Mary Margaret Sekiziyivu Versus Bakaluba Mukasa Peter, Court of Appeal Civil Reference No.79 of 2011***, it was held that the reason advanced for extension of time must be one that is cogent and touching on the inability to take an appropriate step.

15 Rule 30 of the Parliamentary Elections (Election Petition) Rules, states that a Memorandum of Appeal in Election Appeals ought to be filed within seven days after the Notice of Appeal has been given.

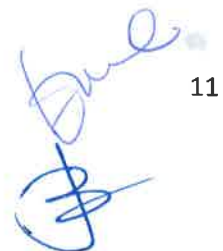
The evidence on record reveals that the trial Court
20 delivered Judgment on the 12th August, 2016. On the 15th August 2016, the respondent filed the Notice of Appeal with the trial Court and also served the said Notice upon the applicant. On the 19th August, 2016, the respondent, through his Advocates filed a Memorandum of Appeal in
25 the High Court at Lira.



5 Counsel for the respondent conceded that the filing of the Memorandum of Appeal in the High Court at Lira was an error by counsel owing to his misinterpretation of the law. Counsel, therefore, prayed that the said error ought not to be visited on the respondent and that the Memorandum of
10 Appeal filed in this Court on the 1st September, 2016, outside the prescribed time should be validated/ extend the time within which to file the Memorandum of Appeal.

It is settled law that mistake of counsel should not necessarily be visited upon a litigant. This depends on the
15 circumstances of each case and whether it is proved that such mistake constitutes sufficient cause for extension of time. (**See Hon. George Patrick Kassajja Versus Fredrick K. Ngobi Gume & Anor, Court of Appeal Civil Application No.56 of 2016**). In **Banco Arabe Espanol Versus Bank of Uganda, Supreme Court Civil Application No. 8 of 1998**, it was stated as follows:
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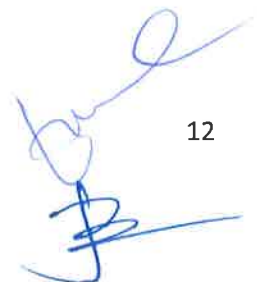
*“The question of whether an “oversight”, “mistake”, “negligence”, or “error”, as the case may be, on the part of counsel should be visited on a party the counsel
25 represents and whether it constitutes “sufficient cause” justifying sufficient remedies from courts has been*


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5 *discussed by courts in numerous authorities. Those*
authorities deal with different circumstances; ... But
they have a common feature whether a party shall, or
shall not, be permanently deprived of the right of
putting forward a bona fide claim or defence by reason
10 *of his professional advisor or advisor's clerk”.*

According to the evidence contained in the affidavit of the respondent dated 6th April 2017, and the affidavit of Abwang Otim Mike dated 19th May, 2017, it is apparent that the respondent had given joint instructions to two
15 Firms of Advocates to lodge an appeal on his behalf within the prescribed time. However, although the said Advocates took steps in an attempt to execute the instructions and lodge the Appeal, contrary to the law, they lodged the Memorandum of Appeal in the wrong Court.

20 In the circumstances of this case, we find that the filing of the Memorandum of Appeal in the wrong Court was through no fault on the part of the respondent. He instructed two Firms of Advocates in time to lodge the appeal. However, through an error, which we believe was
25 not intentional on the part of counsel, the Memorandum of Appeal was lodged in the wrong Court.



5 In **Hon. George Patrick Kassajja Versus Fredrick K. Ngobi Gume & Anor, (Supra)** the Court held that once a litigant instructs his/her counsel to handle his matter, he cannot again share the conduct of the case with him/her, and we agree with that finding. We do not accept the
10 submission of counsel for the applicant that the respondent was guilty of dilatory conduct and had not proved that he was personally involved in pursuing the appeal. The respondent had instructed counsel whom he entrusted with the lodging of the Appeal and who are
15 presumed to be well grounded in matters of law and procedure. It would, therefore, be unreasonable to presume that the respondent ought to have known that the lodging of the Memorandum of Appeal in the High Court by his Advocates was an error.

20 We have looked at the decision in **Sayjay Tanna & Anor Versus Ofwono Yeri Apollo (Supra)**, which was relied upon by counsel for the applicant to submit that the present Appeal was an illegality. We are of the opinion that the said case is distinguishable from the present case
25 because in the former, there was no application for extension of time/validation of the appeal. In the present



5 case, there is an application for extension of time and
validation of the Appeal; it became like any other Petitions
where the Memorandum was filed late and application
made for extension of time and validation of Appeal.
Further, there was no proof of payment of court fees or
10 security for costs so as to presume that the Appeal had
indeed been filed in the wrong Court.

We do not find proof as to the allegations of tampering with
the record by the respondent raised by the applicant. It is
apparent that by the time the Record of Appeal was
15 prepared and availed, the respondent had already filed the
Memorandum of Appeal in this Court. Therefore, it is only
logical that the said Memorandum of Appeal filed in this
Court appears as part of the Record.

In the circumstances of this case, it is in the interest of
20 justice that the respondent be allowed to prosecute his
Appeal on merit.

In conclusion, we find that the respondent has proved the
existence of sufficient ground for the grant of the
Application for extension of time/validation of the
25 Memorandum of Appeal filed belatedly in this Court.



5 Accordingly, the Memorandum of Appeal filed on the 1st
September, 2016, is validated.

Each party shall bear its own costs.

We so order.

10 Dated at Kampala this *29th* day of *Mar.* 2017

.....
Hon. Justice S.B.K Kavuma

15 **DEPUTY CHIEF JUSTICE**

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.....
Hon. Justice Elizabeth Musoke,

JUSTICE OF APPEAL

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Barishaki
.....
Hon. Justice Cheborion Barishaki,

JUSTICE OF APPEAL