

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO. 97 OF 2016

KUBEKETERYA JAMES APPELLANT

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VERSUS

1. WAIRA KYEWALABYE

2. ELECTORAL COMMISSION..... RESPONDENTS

CORAM: HON. MR JUSTICE REMMY KASULE, JA

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HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGMENT OF THE COURT

This is an appeal arising from the decision of Hon. Lady Justice Lydia Mugambe delivered at High Court of Kampala on the 3rd day of October 2016, in which the Court dismissed the petition instituted by the appellant.

The appellant being dissatisfied with the decision of the High Court filed this appeal. He filed the Notice of Appeal on 6th October, 2016 and a memorandum of Appeal on 21st October 2016. The record of appeal was filed on 15th December, 2016.

The appellant contested for a seat of Member of Parliament for Bunya County East Constituency in Mayuge District. The Elections were held on 18th February 2016, where the appellant lost the elections to the 1st respondent. Being aggrieved by the results he filed a petition to the High Court to nullify

the Election. The High Court dismissed the petition for lack of satisfactory evidence hence this appeal.

The grounds as per the Memorandum of Appeal are as follows;-

- 5 1. *That the trial Judge erred in law and fact when she failed to properly evaluate the evidence on record and came to a wrong conclusion that she was not satisfied by the evidence adduced that the 1st respondent bribed voters with water tank and maize grains thereby arriving at a wrong decision*
- 10 2. *The learned trial Judge erred in law and fact in holding that there was no evidence that the 1st respondent and his agents committed acts of violence and intimidation against the petitioner and his agents and supporters but instead held that it was the petitioner who meted violence on the 1st respondent and his supporters thereby arriving at a wrong conclusion that occasioned a miscarriage of justice.*
- 15 3. *The learned trial Judge erred in law and fact when she failed to hold that the 1st respondent had a militia group called Majegere brigade and Majegere squad that meted out violence on the petitioners agents and supporters thereby arriving at a wrong conclusion.*
- 20 4. *The learned trial Judge erred in law and fact when she failed to hold that failure to include Election results from 11 polling stations by the 2nd respondent amounted to deliberate disenfranchisement of voters at the expensed of the petitioner thereby arriving at a wrong conclusion*
- 25 5. *The learned trial Judge erred in law and fact by admitting and relying on declaration of results forms from the 2nd respondent in re-examination that had not been attached to the returning officer's affidavit in reply and rejecting the petitioner's declaration of result forms.*

6. *The learned trial Judge erred in law and fact when she held that the acts of violence and irregularities that were there in the election did not affect the results in a substantial manner hence coming to a wrong conclusion.*

7. *The learned trial Judge erred in law and fact when she ordered the petitioner to pay cost of the petition to the 1st respondent.*

At the hearing of this appeal learned Counsel *Mr. Mujurizi Jamil* appeared for the appellant while *Mr. Kennedy Lule* appeared for the 2nd respondent and held brief for *Mr. Ssekaana Musa* for the 1st respondent.

When this appeal came up for hearing before us, it was brought to the attention of Court that, there was a pending Ruling in *Election Petition Application No. 61 of 2016* arising out of this appeal.

That application had been heard by a Coram of three justices, S.B.K. Kavuma, Richard Buteera and Geoffrey Kiryabwire, JJA and the Ruling reserved to be delivered on notice. Up to date the said Ruling has not been delivered. Justice Kavuma, has retired and Justice Buteera appointed to Supreme Court. We allowed the appeal to proceed and the respondent to raise the preliminary objection during the hearing of this appeal which he did.

Since the issues raised in the preliminary objection have the effect of disposing of the whole appeal, we shall have to deal with those issues first.

The objection raised by the respondents is that the appellant filed a Notice of Appeal on 6th October, 2016 the Judgment having been delivered on 3rd October 2016. The Notice of Appeal was served on the respondents on the 7th of October 2016, a day after its filing. Counsel submitted that the appellant had 7 (seven) days within which to file a Memorandum of Appeal. They lapsed on Thursday 13th October 2016. The appellant filed the Memorandum of Appeal on Friday 21st October 2016 which was 8 (eight) days out of time and

that is in contravention of *Rule 30 (a) and (b)* of the Parliamentary Elections (Interim Provision) Rules S. I. 142-2. He prayed to this Court that the Memorandum of Appeal should be struck out for being filed out of time.

5 The other ground for striking out the appeal, according to Counsel for the respondent was that the record of appeal should have been filed on Monday 14th November 2016 but the same was filed on 15th December, 2016 which was more than the 30 (thirty) days stipulated in the law and was therefore in contravention of *Rule 31* of the Parliamentary Elections (Interim Provisions) Rules.

10 Counsel for the respondent submitted that election proceeding are special and they must be expeditiously handled and timelines must be complied with. According to Counsel, the appellant could have perused the Court record even before it was typed and be able to formulate the grounds of appeal and file the Memorandum of Appeal in compliance with the law.

15 In reply Counsel for the appellant conceded that, the Memorandum and record of Appeal had both been filed late. He contended that, he did not have the judgment and record of proceedings to formulate the grounds of appeal, within the stipulated time.

20 He submitted that, a Memorandum of Appeal is formulated from the record of proceeding and judgment of the lower Court. According to Counsel, the Judgment of the lower Court was delivered on 3rd October 2016, following which the appellant filed the Notice of Appeal on 6th October 2016 together with a letter requesting for certified copy of both the proceedings and the Judgment. The certified proceedings were ready on 15th November 2016.

25 Counsel contended that, the appellant had taken a step and applied for a draft copy of the Judgment when it was still being typed. He had requested and was

able to peruse the draft Judgment and the uncertified copy of proceedings, following which he was able to formulate the grounds of appeal. He filed the Memorandum of Appeal on 21st October 2016, almost a month before obtaining a certified copy of proceedings and Judgment of the Court.

5 Counsel submitted that, the Parliamentary Election Interim Petition Rules have no specific provision providing for a procedure to be followed when a certified copy of the lower Court judgment and Court Proceedings are not available.

According to Counsel, *Rule 36* of the Parliamentary Elections (Interim
10 Provisions) Rules permits this Court to apply the Court of Appeal Rules in such a scenario, in which case *Rule 83* of the Rules of this Court would apply and it permits Court to take into account the time between preparation of the record of proceedings when computing time for filing a Memorandum of Appeal. Counsel argued that, the time for filing the Memorandum of Appeal
15 started running from the 15th of October 2016 when the lower Court proceedings were availed and 1st December 2016 when the certified copy of the Judgment was availed. He submitted that there was no lapse of time in filing both the Memorandum of Appeal and record of appeal. He asked the Court to dismiss the preliminary objection and to determine the appeal on its
20 merits.

We have carefully listened to both Counsel in this appeal, perused the Court record and also considered the authorities cited to us.

We now proceed to resolve the issue raised in the Preliminary Objection, that the appeal before Court is incompetent and the same should be struck out
25 because both the memorandum and record of appeal were filed out of time. .

This Court has had occasion to consider and state the law as to when the Memorandum of Appeal and the record of appeal should be filed in Election Petitions and the effect of failure to comply.

In *Election Petition Application No. 24 of 2011 Bakaluba Mukasa Peter and the Electoral Commission Vs Nalugo Mary Margret Sekiziyivu*, this Court considering an application on all fours with the instant one and it held as follows;-

“In the matter now before us, the applicant is claiming the respondent failed to take two essential steps in the proceedings within the time prescribed by the rules. The first step is that she failed to file a Memorandum of Appeal within seven days in accordance with Rule 30 (*supra*). The Rule states;-

A Memorandum of Appeal shall be filed with the registrar

- (a) *In a case where oral Notice of Appeal has been given, within fourteen days after the notice was given.*
- (b) *In case where written Notice of Appeal has been given, within fourteen days after notice was given.*

The respondent filed a written notice of appeal on 27th July 2011. The computation of seven days began to run from that day. The Memorandum of Appeal ought to have been filed on or before 10th August 2011.

The second essential step which the applicant claims was not taken within the time prescribed by the rules was failure to file the record of appeal within 30 days after filing the Memorandum of Appeal in accordance with Rule 31 of the *Parliamentary Elections Petitions Rules S. I. 142-2*. The rule provides;

The appellant shall lodge with the registrar the record of appeal within thirty day after filing by him or her of the Memorandum of Appeal.”

This rule which is couched in mandatory words was not complied with by the appellant. The appellant conceded that, he failed to comply with the provisions of Parliamentary Election Petition Rules (supra) but contended that he applied for the record of proceedings and the same was not availed within time thus the failure to file the Memorandum and record of appeal within the prescribed time.

Matters concerning elections litigation by law are supposed to be heard expeditiously. This is contained in Article 140 of the Constitution of Uganda which provides:-

“(1) Where any question is before the High Court for determination under Article 86 (1) of this Constitution, the High Court shall proceed to hear and determine the question expeditiously and may, for that purpose suspend any other matter pending before it.

(2) This Article shall apply in a similar manner to the Court of Appeal and the Supreme Court when hearing and determining appeals on questions referred to clause (1) of this article.”

The wording of this article are reproduced almost in similar terms in Sections 63 (2) and 66 (4) of the Parliamentary Elections Act. The rules of procedure which were made under the Act also use similar words of expeditious disposal of election matters see: Rules 13 and 33 of the Parliamentary Elections Petitions Rules.

The rules of procedure were made to enable the expeditious disposal of election related matters and therefore the luxury provided by Rule 83 of the Court of Appeal Rules are not available, in our view, to the appellant.

In *Civil Application No. 22 of 2011, The Electoral Commission and Another Vs Piro Santos Eruga* this Court held that;-

5 *“Elections are serious matters of a state with its citizens. As elections are held, the outcome announced, the electorate must know their political leader quickly and assuredly. There must be limited or no uncertainty about this. Roles of elected representatives are many and diverse vis-a-vis their electors. To perform the roles well elected must be sure of his post and the elector of his leader. And the sooner the better to give that certainty. So either the election is accepted at once or if challenged, that challenge must be moved along to the end swiftly enough to restore certainty. And for that, election petitions are governed by this Act with its rules in a very strict manner. Election petition law and the regime in general, is a unique one and only intended for elections. It does not admit other laws and procedures governing other types of disputes, unless it says to itself. Here it spells out firmly and clearly that a petition must be presented and served within 28 days of the publication of election results. Anything outside that time is invalid and this one here is thus invalid.” (sic).*

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We agree with the above stated legal principles and we shall apply them to the facts of this appeal. The judgment was delivered on 3rd October, 2016, the appellant filed the Notice of Appeal on 6th October, 2016 and the same was served on respondents on 7th October, 2016. Under Rule 30 (b) of the Parliamentary Elections Act (Interim Provisions) Rules S. I. 142-2, the Memorandum of Appeal should be filed within seven day after the Notice is given. The appellant did not comply with this provision, he filed the Memorandum of Appeal on the 21st of October, 2016 which was 8 days out of time. Rule 31 of the Parliamentary Elections Act (Interim Provisions) Rules (supra) provides that the record of appeal should be filed within 30 days after filing the Memorandum of Appeal, the appellant filed the same on 15th December, 2016 which was a contravention of Rules of the Rules.

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It is conceded by the appellant that he failed to comply with the above provisions. However, he appears to rely on *Rule 83* of the Rules of this Court, which grants an automatic extension of time. The question as to whether *Rule 83* of the Rules of this Court is applicable to Parliamentary election petition matters has been considered and determined by this Court in a number of petitions similar to this one before us.

In *Kasibante Moses Vs Katongole Singh Marwaha, Court of Appeal Election Petition Application No. 8 of 2012*, stated as follows at page 12-13;-

“At any rate the rules of procedure dealing with election litigation have no provision with writing of letters requesting for record of proceedings and the exclusion of the period spent on compiling the record from computation of the time within which to file the appeal. To allow an intending appellant to take his or her time to file the record of appeal outside the time set by the rules without exceptional circumstances being shown would defeat the purpose of the time frame provided in the Constitution, the Parliamentary Elections Act and the rules made there under for the expeditious disposal of elections matters. The respondent in his affidavit did not state the dates when he visited the civil registry and he did not give the names or names of the officer who gave him information that the record of proceedings was not ready to write letters and sit back without being vigilant, The registry staff, in our view, has no interest whether or not an intending appellant files the appeal within the time allowed by the rules.”

Rule 83 of the Rules of this Court is applicable only in respect of Local Council Elections and not in Parliamentary election petitions. See: *Wanyama Gilbert Mackmot Vs Hisa Albert and Electoral Commission, Court of Appeal Election Petition No. 99 of 2016*. (Unreported)

In *Kasibante Moses Vs Katongole Singh*, (*supra*) again this Court held as follows at pages 3-4 of the Judgment.

5 *“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 his 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, Supreme Court Civil Application No. 52 of 1995 and S.B.Kinyatta and Another Vs Subramian and Another, Court of Appeal Civil Application No. 108 of 2003.*

10 *In case of an election petition appeal, the intending appellant has 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 Election Petitions) enjoins 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.”*

20 We agree with the position of the law as set out above.

Election petitions have to be handled expeditiously. The rules and timeliness set for filing proceedings are couched in mandatory terms. They must be strictly interpreted and adhered to.

We find that the appellant failed to take the essential steps of filing the
25 Memorandum and record of appeal within the stipulated time.

Consequently, the Notice of Appeal herein is struck out, we find that no appeal lies in this Court in respect of High Court Election Petition No. 008 of 2016. The Judgment of the lower Court therefore stands unchallenged and should be upheld. Had we not struck out the Notice of Appeal, we would still have dismissed it as all the grounds of appeal had no merit whatsoever.

We so order.

Dated at Kampala this 1st day of December 2017.

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HON. JUSTICE REMMY KASULE
JUSTICE OF APPEAL

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HON. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL

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HON. JUSTICE GEOFFREY KIRYABWIRE
JUSTICE OF APPEAL