

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
ELECTION PETITION APPEAL NO. 106 OF 2016
ELECTION PETITION APPLICATION NO. 042 OF 2017
5 **(ARISING FROM ELECTION PETITION NO. 006 OF 2016)**

GEOFFREY OMARA **APPELLANT**

VERSUS

1. CHARLES ANDIRO GUTOMOI ABACACON

2. THE ELECTORAL COMMISSION **RESPONDENTS**

10 **CORAM: HON. MR. JUSTICE REMMY KASULE, JA**

HON. LADY. JUSTICE ELIZABETH MUSOKE, JA

HON. MR. JUSTICE BARISHAKI CHEBORION, JA

JUDGMENT OF THE COURT

15 **Introduction:**

This is an Election Petition Appeal arising out of the Judgment and orders of Musalu Musene, J delivered on the 13th day of June, 2016 at the High Court sitting at Lira, in which he dismissed the Petition of the petitioner (now appellant) and upheld the election of the 1st respondent as Member of
20 Parliament for Erute County North, Lira District. Therein he made the following orders:-

1. The conduct of the election was free and fair and reflected the will of the people of Erute County North.
2. The publication in the gazette of 3rd March, 2016 was done in error.

3. The correction in the gazette was not only done for the benefit of candidates who took part in the election, but also for the public who voted and who were entitled to know their leader whom they had elected.

5 4. The petition is dismissed and costs shall be paid to the 1st respondent only and the 2nd respondent shall meet their own costs.

Background to the appeal:

The facts giving rise to this appeal are that on the 18th day of February 2016, the respondent *Omara Geoffrey* and the 1st respondent, *Charles Angiro Gutomoi Abacacon* contested for the Member of Parliament seat for Erute County North, Lira District. The 2nd respondent, the *Electoral Commission* declared and gazetted the 1st respondent as the winner of the election having polled 13,334 votes. The appellant was stated to have polled 13,506 votes. These results were gazette in the Gazette dated 3rd March, 2016. The 2nd respondent in a later gazette of 15th April, 2016 clarified that a mistake as to the results of the election had been made in the Gazette of 3rd March, 2016, the correct results being that the appellant had polled 12,506 votes, and not 13,506 as earlier gazetted. Hence the 1st respondent was not the one who had obtained the majority of the votes.

20 The petitioner was dissatisfied with the above results and filed Election Petition No. 004 of 2016 contending that the election was conducted in contravention of the provisions of the Parliamentary Elections Act, 2005 (PEA) and that the said non-compliance affected the election in a substantial manner.

At the hearing of the petition, the following issues were framed for court's determination:-

1. ***Whether the election of the directly elected Member of Parliament for Erute North Constituency was conducted in accordance with the Electoral laws of Uganda.***
2. ***Whether the publication of the petitioner in the official gazette of 3^d March, 2016 with 13,506 votes was done in error.***
3. ***Whether the 2nd respondent was justified in its actions of changing the results in the 15th April, 2016 gazette.***
4. ***What remedies are available to the parties.***

The learned trial Judge answered all the issues in the negative and found in favour of the 1st respondent. He dismissed the appeal with costs to the 1st respondent.

Being dissatisfied with the decision of the learned trial Judge, the appellant appealed to this court. He filed a Notice of Appeal in the High Court of Uganda at Lira on 24th June 2016 and served the applicant on 1st July 2016.

The grounds of appeal as they appear in the Memorandum of Appeal are as follows:-

1. ***That the learned trial Judge erred in law and in fact when he totally failed to evaluate the evidence on Court record thus coming to a wrong conclusion.***
2. ***That the learned trial Judge erred in law and in fact when he failed to correctly apply the law regarding irregularities in the***

electoral process to the facts before him thus coming to a wrong conclusion.

5 **3. That the learned trial Judge erred in law and in fact when he relied on matters that were neither pleaded nor relied upon by the parties.**

4. That the learned trial Judge erred in law and in fact when he ordered for costs against the appellant for an error held to have been committed by the 2nd respondent. (Sic)

At conferencing, the following issues were framed for court's determination:-

10 **1. Whether the learned trial Judge erred in law and in fact when he totally failed to evaluate the evidence on court record thus coming to a wrong conclusion.**

15 **2. Whether the learned trial Judge erred in law and in fact when he failed to correctly apply the law regarding irregularities in the electoral process to the facts before him thus coming to a wrong conclusion.**

3. Whether the learned trial Judge erred in law and in fact when he relied on matters that were neither pleaded nor relied upon by the parties.

20 **4. Whether the learned trial Judge erred in law and in fact when he ordered for costs against the appellant for an error held to have been committed by the 2nd respondent.**

At the hearing of this appeal, Counsel Adams Makmot Kibwanga appeared for the 1st respondent, while the 2nd respondent was represented by Counsel

Kato Ali Hassan. The appellant was neither present nor represented by Counsel.

Counsel for the 1st respondent submitted that the appellant was no longer interested in the pursuit of this appeal. He argued that the Election Petition Appeals are urgent matters, and since the appellant had failed to take essential steps required by law, and had also failed to prosecute the appeal, the same should therefore be dismissed on account of the above reasons.

Counsel further submitted that Civil Appeal No. 106 of 2016 was non-existent since the Notice of Appeal was filed late. He referred Court to **Rule 29 of the Parliamentary Election (Interim Provisions) Rules S.I 141-2** which requires the Notice of Appeal to be filed in writing within 7 days. The Notice of Appeal was filed on 24th June, 2016 and served on 11th July, 2017, out of time. Further, the Memorandum of Appeal under the said Rule ought to have been filed 7 days after the filing of the Notice of Appeal, but it was filed on 6th December, 2016 together with the Record of Proceedings yet the Judgment had been delivered on 13th June, 2016. He concluded that service of the Notice of Appeal, the Memorandum of Appeal and the Record of Proceedings was done out of time.

Relying on **Andrew Maviri versus Jomayi Property Consultants Limited, Court of Appeal Civil Application No. 274 of 2014**, Counsel stated that rules regarding time of filing and service were mandatory and had to be adhered to. The only remedy available to a prudent litigant was to apply for extension of time. This was not done in the present appeal.

He prayed that the Notice of Appeal, Memorandum of Appeal and the Appeal itself be struck off the record with costs.

Counsel for the 2nd respondent associated himself with the submissions of Counsel for the 1st respondent.

- 5 Counsel had earlier made submissions in respect to an application filed by the 2nd respondent vide **Election Petition Application No. 042 of 2016**, to which the appellant had not replied. The application had been filed under Rules 43 (1) & (2) and 82 of the Judicature (Court of Appeal Rules) Directions S.I. 13-10 and Rules 30 and 36 of Parliamentary Elections (Election Petitions) Rules S.I. 141-2 for an order striking out the Notice of Appeal, because the
10 Notice of Appeal was served on the 2nd respondent out of time.

There was no affidavit in reply to the said application on record at the time of hearing the application and the appeal. Counsel referred Court to **Rule 36** of the Parliamentary Election Petition Rules to state that any rules
15 regulating the procedure and practice on appeal from decisions of the High Court to the Court of Appeal in civil matters would apply to appeals under that part. He then relied on **Rule 78** of the Rules of this Court which provides that service of Notice of Appeal on persons affected had to be done within 7 days, which had not been the case in this matter.

- 20 Further, that the appellant ought to have filed the Record of Proceedings within 30 days after the filing of the Memorandum of Appeal in accordance with **Rule 31** of the Parliamentary Election Petition Rules. The Record should have been filed by 1st August, 2016, but none was filed by that date, and none had ever been served upon the respondents to date. The appellant

had, therefore, failed to take essential steps in the appeal. **See Kasibante Moses versus the Electoral Commission, Court of Appeal Election Petition Application No. 007 of 2012.**

5 He concluded that service out of time of the Notice of Appeal and failure to apply for extension of time amounted to inordinate delay on the part of the appellant which was inexcusable. He prayed that the Notice of Appeal be struck out with costs.

10 We have carefully considered all the pleadings on record. We also reviewed the Record of Proceedings, the Judgment, the applications, and the affidavit in support of the motion as well as the annexures thereto. We have also carefully listened to the submissions of counsel on either side.

The respondents have both applied to strike out the appeal under **Rule 82** of the Rules of this Court, among others. This Rule provides:-

15 ***"A person to whom a notice of appeal has been served may at any time, 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."***

20 The **Rule** provides for two instances where a person served with a Notice 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 rules: **See: Bakaluba Mukasa Peter & Another versus Nalugo Mary Margaret Sekiziyivu, Court of Appeal Election Petition Application No. 024 of 2011.**

5 We accept the proposition in **Kasibante's case** (supra) that taking an essential step is the performance of an act by a party, whose 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
10 a nullity, as against the party who has the duty to perform that act.

Furthermore, election matters are by their very nature a unique breed of litigation where time is of great importance. This Court in **Kasibante's case** (supra) underscored the need for expediency in handling, hearing and determining election matters. It emphasized the need for the intending
15 appellant to vigilantly pursue his/ her appeal. Court held:

"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 court or any other person to carry out this duty for the intending appellant..."

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Further in **Electoral Commission and Another versus Piro Santos; Civil Application No. 022 of 2011**, this Court quoted with approval the Kenyan case of **Muiya versus Nyangah and Others, [2003] 2 EA 616 C.H.C.K)** and stated that:-

5 *"On this strictness, this Court has one thing or two to say: Elections are serious matters of 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. The roles of elected representatives are many and diverse vis-à-vis their electors. To perform the roles well, the 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 when 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..."*

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We note that in the instant appeal, Judgment in the trial court was delivered on 13th June, 2016 and the appellant filed a Notice of Appeal on 24th June, 2016. The said Notice was endorsed by the Registrar on 29th June, 2016.

20 **Rule 29** of the Parliamentary Elections Petition Rules is to the effect that the Notice of Appeal, when in writing, is to be given within seven days after the judgment of the High Court against which the appeal is being made.

It follows therefore that the appellant's Notice of Appeal which was lodged in court on 24th June, 2016, after judgment had been delivered on 13th June,

2016 was lodged outside the prescribed time of seven (7) days, in contravention of Rule 29 of the Parliamentary Elections (Interim Provisions) Rules.

5 We further find that the appellant, having filed the Notice of Appeal in June, also failed to comply with the other requirements in pursuit of the appeal, that is to say, lodging the Memorandum of Appeal within 7 days after filing the Notice of Appeal; and lodging the Record of Appeal within 30 days after filing the Memorandum of Appeal; and serving the respondents in time. We find that the law places a duty on the appellant himself to be vigilant in the
10 pursuit of his appeal. We are satisfied, given the evidence on record and the particular circumstances of this case, that the appellant fell short of sufficiently carrying out that duty.

We also note that at no time did the appellant apply to court, for any valid reason(s) or at all, for extension of time either to serve the Notice of Appeal
15 out of time, or to file the Memorandum or the Record of Appeal, out of time. Further, we note that even when the appellant was served with a hearing notice for this appeal, he did not show up at court to prosecute the same. We, therefore, conclude from all the above that the appellant was all along not keen on pursuing the appeal with the necessary vigour and diligence that
20 the law demands of an intending appellant in an election petition appeal.

In the result, we allow the respective applications by the respondents and strike out the Notice of Appeal filed into Court by the appellant. We accordingly allow **Election Petition Application No. 042 of 2016**, and also strike out **Election Petition Appeal No. 106 of 2016**.

The respondents are granted costs of the appeal as the appellant had no reasonable grounds to pursue the appeal. Even after lodging the appeal, he failed to take essential steps towards its execution. The 2nd respondent is further granted the costs of his application in this Court in Election Petition
5 Application No. 042 of 2016.

As to costs in the High Court, the same are awarded to the 1st respondent against the petitioner. No costs are awarded to the 2nd respondent as it was the error of the 2nd respondent in gazetting the wrong votes that caused the litigation.

10 **We so order.**

Dated at Kampala this 31st day of October 2017.



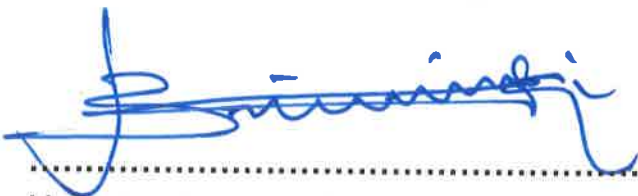
Hon. Mr. Justice Remmy Kasule

15 **JUSTICE OF APPEAL**



Hon. Lady Justice Elizabeth Musoke

20 **JUSTICE OF APPEAL**



Hon. Mr. Justice Barishaki Cheborion

25 **JUSTICE OF APPEAL**