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THE REPUBLIC OF UGANDA

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IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

ELECTION PETITION APPEAL NO. 105 OF 2016

(Arising from Election Petition No. 008 of 2016)

Ikiror Kevin :::Appellant

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VERSUS

Orot Ismael ::: Respondent

**Coram: Hon. Justice Alfonse Owiny Dollo, DCJ
Hon. Justice Remmy K. Kasule, JA
Hon. Justice Hellen Obura, JA**

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JUDGMENT OF THE COURT

This appeal is against the Judgment of the High Court (Batema J.) sitting at Soroti delivered on 23.11.2016 in Election Petition No. 008 of 2016.

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The appellant is a female registered voter of Kanyum County Constituency, Kumi District. The respondent, also a registered voter, stood, was declared winner, and gazetted on 3rd March, 2016

as the candidate with the majority of votes cast in the
30 Parliamentary Election of the Constituency held on 18th February,
2016. The respondent had since taken on his seat in Parliament.

On 22nd September, 2016 more than six months from the election
results gazetting date of 3rd March, 2016, the appellant filed in the
High Court, Soroti, Election Petition No.008 of 2016 challenging
35 the respondent's election on the ground that she, as the petitioner,
had discovered that at the time of his nomination and election, the
respondent was not qualified for election as a member of
Parliament since he did not possess genuine "O" and "A" level
certificates or their respective equivalents. According to the
40 petition, the "O" level certificate presented by the respondent at
nomination belonged to one Ikadarot Stephen, a relative of the
respondent, while the "A" level certificate belonged to one Ikadarot
John Stephen, another relative of the respondent.

Further, the appellant asserted in her petition that the respondent
45 while impersonating Ikadarot John Stephen, his relative, also
claimed to have obtained a Diploma in Business Studies at Uganda
College of Commerce in Soroti, which academic document was also
invalid.

On discovery of the alleged facts, the appellant had demanded in
50 writing of the respondent to resign his seat in Parliament, but the
respondent had ignored this demand. The appellant thus resorted
to Articles 80 and 86 of the Constitution and Section 86 of the
Parliamentary Elections Act (PEA) by herself and 49 other
registered voters in Kanyum County Constituency applying to the
55 Attorney General to commence a petition in accordance with the

above stated provisions of the law. At the expiry of the statutory 30 days from the date of receipt of the application without the Attorney General having commenced a petition, the appellant lodged hers in the High Court, Soroti, pursuant to Section 86(4) PEA.

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In the petition the appellant prayed that the High Court declares the respondent to have been not validly elected as a Member of Parliament for Kanyum County Constituency for lack of the requisite academic qualifications, the said election be set aside and the Electoral Commission be directed to conduct fresh elections. The Appellant also sought a court order that the respondent refunds to the State all monies illegally drawn while in Parliament and also when he served as Chairman LC V Kumi District, before he stood for Parliament.

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In answer to the petition the respondent contended that the appellant's petition was incompetent, as the same was time barred. He also maintained that all the academic certificates he presented for nomination to stand for Parliament were valid, and belonged to him. He had not impersonated anyone. He had also lawfully occupied the office of Chairperson LC V Kumi District.

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The Election Petition was determined by the High Court in a ruling delivered on 24th November, 2016 on the preliminary objection whether or not the said petition was filed in Court under the wrong law and also out of time.

The learned Judge ruled that no election petition should be entertained out of time even if one is making serious allegations of an illegality or non-qualification of the political candidate. He

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elaborated that though a Court of law ought not close its eyes to an illegality there is no illegality, proved at the stage of filing an election petition. Since at this stage it is mere allegations being made. The election petition was thus held to be null and void and was struck out with costs.

Dissatisfied the appellant appealed to this Court.

The Grounds of appeal as per Memorandum of Appeal are:

- 90 **1. The learned trial Judge erred in law when he held that the Petition brought under Article 86 of the Constitution of Uganda 1995 and Section 86 of the Parliamentary Elections Act is subject to Section 60 of the Parliamentary Elections Act.**
- 95 **2. The learned trial Judge erred in law and fact when he held that a valid Petition must have been filed under Section 60 of the parliamentary Elections Act.**
- 3. The learned trial Judge erred in law when he held that an Election Petition filed under Article 86 of the Constitution of Uganda 1995 and Section 86 of the parliamentary Elections Act outside the thirty days is null and void.**
- 100 **4. The learned trial Judge erred in law in deciding a matter of extension of time which was not before him.**
- 105 **5. The learned trial Judge erred in law in holding that the petition did not disclose a cause of action, and was time barred.**
- 6. The learned trial Judge erred in holding that a petition under Article 86 of the Constitution of Uganda 1995**

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and Section 86 of the Parliamentary Elections Act is supposed to be filed within 30 days from the date of gazette and supported by 500 signatures.

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7. The learned trial Judge erred in holding that a petition under Section 86 of the Parliamentary Elections Act is based on the wrong law and cannot stand in law.

8. That the Ruling and orders of the trial Judge interpreting Article 86 of the Constitution of Uganda 1995 and Section 86 of the Parliamentary Elections Act is generally bad in law.

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Counsel Ambrose Tibyasa assisted by Luyimbazi Nalukoola appeared for the appellant while learned Counsel Richard Okalany was for the respondent.

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As to grounds 1,2,3,6 and 7 taken together, appellant's Counsel submitted that the appellant never lodged her petition under Sections 60 and 61 of the PEA that restrict an election petition to be filed by either a losing candidate or a registered voter of the Constituency supported by 500 signatures of registered voters in the constituency and within 30 days from the date of the gazette returning the winning candidate.

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This instant petition had been lodged pursuant to Article 86 of the Constitution and Section 86 of the PEA both of which laws allow questions of membership of a sitting Member of Parliament to be heard and determined by the High Court and the one dissatisfied to appeal against that decision. Section 86 PEA operationalizes Article 86 of the Constitution. The petition lodged pursuant to Section 86 PEA is unique in that, unlike in Section 60(3) PEA

where the petition has to be filed within 30 days from the date of the gazette, under Section 86 PEA the time for filing a petition starts running on the expiry of thirty days from the date of receipt
140 of the application by the Attorney General from not less than 50 registered voters, and the Attorney General has failed to petition the High Court within that period.

In respect to ground 5 Counsel submitted that to the extent that the appellant complied with Articles 80 and 86 of the constitution
145 as well as the procedure laid under Section 86 of the PEA while lodging and prosecuting her election petition, then the learned trial Judge was not justified to hold that the said election petition lacked a cause of action and was thus null and void. The petition aimed at interrogating the validity of the respondent occupying a
150 seat in Parliament when he did not have the requisite academic qualifications to be in Parliament. Counsel invited this Court to, in this regard, rely on **Supreme Court Constitutional Appeal No. 10 of 2015: Hon Theodore Sekikubo & 4 Others -vs- AG.**

Appellant's Counsel contended in respect of ground 4 that the
155 learned trial Judge had no basis to deal with the issue of enlargement of time within which the petition had to be lodged in Court. This issue had not been raised before the trial Judge. At any rate, the petition had been lodged in Court in time since it had been brought under Article 86 of the Constitution and Section 86
160 of the PEA which provided for the right procedure for the appellant's petition, given its special nature.

In ground 8, appellant's Counsel contended that the interpretation and application by the learned trial Judge of Article 86 of the

165 Constitution and Section 86 PEA to be under Section 60 PEA was
wrong in law. This is because Article 86 and Section 86 PEA were
independent in catering for the lodgement and prosecuting a
particular election petition of a special nature, while Section 60 of
the PEA also caters for a different election petition. Accordingly
the trial Judge was wrong to declare a petition filed under Articles
170 80 and 86 of the Constitution and Section 86 PEA to be a petition
filed under the wrong law. Counsel prayed for the appeal to be
allowed by setting aside the ruling of the High Court and to order
that the petition be retried by another High Court Judge.

Counsel for the respondent opposed the appeal

175 With regard to grounds 1,2,3,6,7 and 8, he supported the findings
and conclusions of the trial Judge in striking out the election
petition. He maintained that all election petitions had to be lodged
in Court under or subject to Section 60 of the PEA. Section 86
PEA applies where a question is framed for determination by the
180 High Court or the Constitutional Court. The circumstances are
thus different from those that apply in an election petition under
Sections 60 and 61 of the PEA. Further, Sections 60 and 61 of the
PEA do not envisage the Attorney General as a party to the petition
whereas Section 86 PEA does so.

185 The appellant ought to have lodged her petition in the High Court
under S.60(2) (b) of the PEA and this required her to acquire
support of not less than 500 signatures of registered voters. The
appellant had not done this. So her election petition was a nullity.

Counsel further submitted that the trial Judge was right in the
190 way he handled the matter of enlargement of time and the essence

of time in Election Petitions. The issue had been canvassed at the hearing and it was necessary, for the sake of completeness, for the trial Judge to deal with the said issue.

195 Counsel supported the trial Judge's holding that the petition did not disclose a cause of action and was time barred. This is because the petition did not disclose any framed question for determination by the Court and as such in terms of Article 86 and Section 86 of the PEA, the petition lacked a cause of action. Counsel prayed for the dismissal of the appeal with costs.

200 We have carefully considered the pleadings, the submissions and authorities of respective Counsel as regards the grounds of appeal.

The resolution of this appeal depends very much on the interpretation as to the meaning and effect of a number of provisions of the Uganda 1995 Constitution and those of the
205 Parliamentary Elections Act No. 170 of 2005 (PEA).

This Court thus recalls the Constitutional principle of interpretation that:

210 *"The Constitution is to be interpreted contextually as a whole and as an ambulatory living instrument for the good governance, liberties, welfare and protection of all persons in Uganda".*

See: **Supreme Court Constitutional Appeal No. 1 of 1997: Ag V Major General David Tinyefuza (Kanyeyihamba, JSC).**

215 It follows from the above principle that while interpreting the Constitution, the true text of the Constitution must not be overlooked or ignored. Where the text is imperfect or not clear, the

Court has to ascertain the meaning of that text of the Constitution by being guided by the overall spirit of the Constitution.

As to interpretation of a statute the principle this Court finds
220 persuasive is that:

“.....For words, and particularly general words, cannot be read in isolation: Their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use
225 ‘context’ in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended
230 to remedy.” Per viscount Simonds in *Attorney General v Prince Ernest Augustus of Hanover*: [1957] A.C. 436 at P.461.

This Court will apply those above stated principles while analysing the relevant provisions of the 1995 Constitution and those of the Parliamentary Elections Act No. 17 of 2005 (PEA) relevant to this
235 appeal.

Section 1(1) of the PEA defines an “Election Petition” as being a petition filed in accordance with Section 60 of the PEA. This Section is part X of the PEA, that is Sections 60 to 67, which provides for election petitions.

240 Section 60 provides that Election Petitions are to be filed in the High Court by a candidate who loses an election or a registered voter in the Constituency supported by at least 500 voters’ signatures. The election petition has to be filed in Court within

thirty days after the day on which the result of the election is
245 published by the Electoral Commission in the Gazette: S.60(3) of
PEA.

Amongst the grounds for setting aside an election, according to
S.61(1) PEA, is one that the candidate was at the time of his/her
election not qualified or was disqualified for election as a Member
250 of Parliament. The petition has to be served upon the respondent
within 7 days of its being filed and the High Court has to proceed
to hear and determine the petition expeditiously, and for that
purpose, may suspend any other matter pending before it. At the
conclusion of the hearing, the Court may determine and declare
255 the respondent as having been duly elected or that he/she was not
duly elected and that some other candidate was the one duly
elected or that the respondent was not duly elected and that no
other person was duly elected and the seat of the respondent is
declared vacant and a re-election is ordered to be held. The High
260 Court has to determine the election petition within six months
after its being lodged in Court.

The grounds of the petition are proved on the basis of a balance of
probabilities and one aggrieved by the determination of an election
petition by the High Court, has a right of appeal to the Court of
265 Appeal through lodgement of a Notice of Appeal within 7 days of
the decision. The Court of Appeal must determine the appeal
within six months from the date the appeal is filed. The decision
of the Court of Appeal is final.

The whole of Part X (SS 60 to 67) of the Parliamentary Elections
270 Act (PEA) is characterized by strictness as to time of lodgement and

prosecution of an election petition, including an appeal, if any. This strictness has been expressed upon by the High Court of Kenya in a language that equally applies to us in Uganda. The **Kenya High Court in Muiya -V- Nyagah and Others: [2003]2**

275 **EA 616 at p.621** remarked:

“Elections are serious matters of a Sate 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-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 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 to other laws and procedures governing other types of disputes, unless it says so itself”

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This Court is satisfied that the necessity for strictness and certainty expressed in the above quotation equally applies to the election petitions lodged and prosecuted under part X(SS 60 to 67) of the Parliamentary Elections Act. These provisions must thus be

interpreted and applied with this aspect of strictness as to time lines being of material significance.

Had the appellant pursued her election petition under the said part
300 X of the PEA, then she would have lodged her petition in the High Court within thirty days as from 3rd March, 2016 the date of the gazetting of this particular election. Since the appellant was presenting the election petition as a registered voter then she had to have the support of not less than five hundred voters registered
305 in the Constituency, the support being shown by their signatures attached to the petition. The petition had to be filed by the 3rd April 2016, latest.

The appellant however challenged the election of the respondent to Parliament through a different route. She purported to do so
310 through Articles 80 and 86 of the Constitution and Section 86 PEA. She lodged her petition to the High Court, at Soroti on 22nd September, 2016. So in terms of Section 60(3) PEA, the appellant's election petition was lodged in Court out of time. Accordingly the same is null and void by reason thereof.

315 The appellant submits otherwise however. She maintains that her petition is valid in law and was not in any way filed out of time. She relies on Articles 80 and 86 of the Constitution and section 86 PEA.

The crust of the dispute in this appeal is whether or not the
320 applicant is applying the said provisions of the law rightly. The trial Judge found that she was not. This Court has to resolve whether or not the trial Judge was right in the holding that he made.

Article 80 of the Constitution provides for the qualifications and
325 disqualifications of Members of Parliament. The provision of the
Article relevant to this appeal is 80(1) (c) to the effect that:

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(1) **A person is qualified to be a Member of Parliament if**
330 **that person.....**
(a)
(b).....
(c) **has completed a minimum formal education of**
Advanced Level standard or its equivalent which shall
335 **be established in a manner and at a time prescribed**
by parliament by law.”

Article 86 provides:

“86 Determination of questions of membership.

(1) **The High Court shall have jurisdiction to hear and**
340 **determine any question whether:**
(a) **a person has been validly elected a Member of**
Parliament or the seat of a Member of Parliament has
become vacant; or
(b) **a person has been validly elected as Speaker or**
345 **Deputy Speaker or having been so elected, has**
vacated that office.

(2) **A person aggrieved by the determination of the High Court**
under this article may appeal to the Court of Appeal.

(3) **Parliament shall by law make provision with respect to:**

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***(a) the persons eligible to apply to the High Court for determination of any question under this article; and
(b) the circumstances and manner in which and the conditions upon which any such application may be made.***

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The Parliamentary Elections Act No. 17 of 2005 is an operationalisation of Article 86 of the Constitution. Part X (SS 60-67) of the Act deals with Election Petitions, that is challenging in Courts of law of the results of an election conducted by the Electoral Commission starting with lodgement of an election
360 petition, that is a petition filed in accordance with Section 60 of the PEA (See S.1(1) of PEA) its trial and appeals, the Court of Appeal being the last appellate Court.

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There is however also part XIII of the PEA dealing with "General" matters. It covers Sections 84 to 101 of the PEA. Section 84 deals
365 with instances where a sitting Member of Parliament shall vacate his/her seat in Parliament.

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These instances are where one voluntarily and in writing resigns, where circumstances arise that disqualify one for election, if he/she were not a Member of Parliament, or being absent without
370 permission for fifteen sittings, being guilty of violating the leadership code of conduct, being recalled by the electorate, a Member of Parliament leaves the political party for which he/she was elected to Parliament to join another, or becomes independent, and accepting appointment to be a public officer.

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Section 86 of Part XIII of the PEA deals with determination of questions of membership of Parliament. While this Section is, like

Sections 60 to 67 of Part X of the Constitution, also an operationalisation of Articles 80 and 86 of the Constitution, this Section has in it specific provisions which exclude some of its own
380 very provisions from applying to election petitions whose adjudication is the preserve of part X, (SS 60 to 67) of the PEA. Thus Section 86(3) and (4) provide:

***“(3) Subject to the provisions of this Act in relation to election petitions, and to the provisions of Article 137 of
385 the Constitution, the Attorney General may petition the High Court under Article 86 of the Constitution for the determination of the question referred to in that Article.***

***(4) If upon application to the Attorney General in writing signed by not less than fifty registered voters stating
390 that a question referred to in subsection (1) has arisen stating the ground for coming to that conclusion, the Attorney General fails to petition to the High Court within thirty days after receipt of the application, any one or more of the persons who made the application
395 may petition the High Court for determination of the question.”***

The effect of the above quoted provisions is that it is only after there has been compliance with part X (Sections 60 to 67) PEA, that the Attorney General or any petitioners can carry out what is
400 required by S.86 (3) and (4) PEA.

Further, it is of significance that the decision of the High Court determining the question referred to it under the above quoted provisions of Section 86 is appealable to the Court of Appeal, and

from the Court of Appeal to the Supreme Court under Section
405 86(5). This is very different from the case of election petitions
covered by part X (Sections 60 to 67) PEA where the right of appeal
from the High Court decision only stops at the Court of Appeal
according to Section 66(3) PEA.

On the basis of the above, it is the conclusion and holding of this
410 Court that a petition relating to the determination of whether or
not one has been validly elected a Member of Parliament through
a general or by-election conducted by the Electoral Commission in
accordance with the Constitution and the Parliamentary Elections
Act No. 17 of 2005, can only be lodged and determined by the High
415 Court through and pursuant to part X (Sections 60 to 67) of the
PEA and an appeal against the decision of the High Court in such
election appeal is to the Court of Appeal which is the final Court.

By contrast, under Sections 86(3) and (4) PEA the Attorney General
or a petitioner can pursue a petition involving a question as to
420 membership of someone to Parliament on grounds other than
those that one has to rely upon by lodging an Election Petition
under part X (SS 60 to 67) PEA.

Our so holding is in conformity with the contextual interpretation
and application of the Constitution, particularly Articles 80 and 86
425 of the Constitution and parts X (SS 60 to 67) as well as XIII (SS84
to 101) PEA to the effect that an Election Petition challenging an
election must be determined with speed so as to establish certainty
in governance of the country. This is in contrast to a petition over
a set question regarding membership to Parliament of an
430 individual member that may arise when the rest of the whole

Parliament is in place and actually most likely, when that concerned member is also still in Parliament until the question is determined by Court, with a right of appeal up to the Supreme Court. Thus in this latter case covered by Section 86(3) and (4) 435 PEA time is less of the essence compared to the determination of an Election Petition. Certainty of Parliament is also already established after the general elections and where thereafter, elections petitions are expeditiously determined.

Accordingly, we are unable to accept the submission of Counsel 440 for the appellant that the appellant's petition was competent, even though filed in the Court more than five months late, contrary to Section 60(3) PEA, because the same had been lodged under "a unique law" of Article 86 of the Constitution and Section 86 of the PEA. We hold so because S.86 (3) PEA mandatorily required the 445 appellant to first comply and to be "subject to the provisions of this Act in relation to election petitions" in whatever she purported to do under S.86(3) and (4) of the PEA. As we have already noted earlier, the whole of S.86 PEA is an operationalisation of Article 86 and other relevant Articles of the Constitution. Obedience to 450 S.86(3) and (4) is thus obedience to the Constitution.

We agree with the reasoning and conclusion of the trial Judge that the petition of the appellant had been filed under the wrong law and thus more than five months out of time. All the eight grounds of appeal which rotated on the principal issue as to whether or not 455 the appellant's petition had been filed in Court under the right law and whether the same had been filed in time therefore fail.

This appeal stands dismissed with costs to the respondent here and in the Court below.

Both in this Court and also at trial, allegations of criminality have
460 been made with regard to the academic qualifications upon which
the respondent was elected to Parliament. Due to the illegality of
the petition, the Courts have not been able to establish the
authenticity of these allegations.

In our considered view, the best that can be done in the
465 circumstances, is to refer the proceedings of this appeal and those
of the trial Court, to the Director of Public Prosecutions to cause
appropriate criminal investigations to be made, to enable the said
DPP decide whether or not any criminal prosecution of anyone
should be carried out.

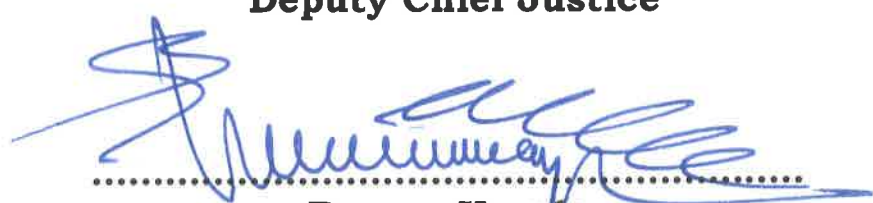
470 We so order.

Dated at Kampala this ^{1st}..... day ^{March}..... of **2019**.



Alfonse Owiny Dollo
Deputy Chief Justice

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Remmy Kasule
Justice of Appeal

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Hellen Obura
Justice of Appeal

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