THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM: MUSOKE, KIBEEDI AND MUGENYI, JJA

CIVIL APPLICATIONS NO. 9 & 10 OF 2022

(Arising from Election Petition Appeal No. 76 of 2021)

1. **WILFRED NUWAGABA**
2. **ELECTORAL COMMISSION ..... APPLICANTS**

VERSUS

PROTAZIO BEGUMISA ..... RESPONDENT

RULING OF THE COURT

A. Introduction

1. Mr. Protazio Begumisa ('the Respondent') and Mr. Wilfred Nuwagaba ('the First Applicant') were among four candidates that stood in the parliamentary elections held on 14th January, 2021 in respect of Ndorwa County East Constituency, Kabale District in Uganda. On the other hand, the Electoral Commission ('the Second Applicant') is the body that is constitutionally mandated to conducted parliamentary elections in Uganda.

2. At the conclusion of the election, the First Applicant was declared the duly elected Member of Parliament (MP) for Ndorwa County East Constituency, having garnered 15,962 votes as against the Respondent's 15,826 votes. That election result was subsequently published in the Uganda Gazette of 17th February 2021, whereupon the Respondent filed **Election Petition No. 1 of 2021** at the High Court of Uganda sitting at Kabale ('the Trial Court') challenging the authenticity of the electoral process and the validity of the election result. The Trial Court dismissed the petition with costs.

3. Aggrieved by the Trial Court's decision, the Respondent lodged **Election Petition Appeal No. 76 of 2021** in this Court challenging the judgment and decree of the Trial Court (Odoki, J) dated 1st November 2021. The Appeal is vehemently opposed by the Applicants.

B. Factual Background

4. The Respondent contested the electoral process and result in Ndorwa County East Constituency on the premise that there was non-compliance with the provisions of the Parliamentary Elections Act and other electoral laws, which affected the result in a substantial manner; the First Applicant committed various illegal practices and electoral offences, and Mr. Nadduli A. Musisi, the Returning Officer for Kabale District Electoral Commission, failed to superintend the election out of incompetence, negligence or bad faith. These allegations were categorically denied by the Applicants and Mr. Nadduli Musisi, the respondents in the petition.

5. In its judgment, the Trial Court found that the Respondent had failed to prove all the grounds of the petition and was, therefore, neither entitled to be declared the duly elected MP of Ndorwa County East Constituency nor to fresh elections or a vote recount as had been prayed. The petition was dismissed with costs, hence the institution of the Appeal now pending before this Court. The Appeal proffers the following grounds of appeal:

    I. *The trial judge erred in law when he failed to make a general finding on whether the Petitioner's affidavits in support of the petition were in compliance with the law or not.*

    II. *The trial judge erred in law and fact in his specific findings that did not amount to a general finding or declaration as a whole on whether the parliamentary elections for Ndorwa County East Constituency held on the 14th January 2021 were conducted or not in compliance with the Constitution of the Republic of Uganda, the Electoral Commission Act and the Parliamentary Elections Act as amended.*

    III. *The trial judge erred in law and fact when he failed to make a specific finding and declaration on whether there was non-compliance on behalf of the Respondents with the electoral laws or not, which affected the results in a substantial manner.*

    IV. *The trial judge erred in law and fact in his specific findings that do not constitute a resolution or declaration on whether the Appellant failed to prove or notify the 1st Respondent personally and through his agents and supporters committed any electoral offences or illegal practices.*

    V. *The trial judge erred in law and in fact when he failed to evaluate the Appellant's evidence that justified the Appellant's grant of prayers that the Appellant be declared the validly elected Member of Parliament for Ndorwa County East Constituency, or that fresh elections be conducted in the said constituency.*

    VI. *The learned trial judge erred in law and fact when in determining the petition he refused to consider some evidence presented by the Appellant.*

    VII. *The learned trial judge erred in law and fact when in determining the petition against the Appellant. The court did not properly evaluate the evidence leading him to arrive at wrong conclusions.*

VIII. *The learned trial judge erred in law and fact when he used conjecture and fanciful theories and unjustified inferences rather than the evidence on record to determine the petition which occasioned a miscarriage of justice.*

IX. *The learned trial judge erred in law when he relied on evidence of witnesses who were demanded by the Respondents' Counsel for cross examination but who never showed up.*

6. The Applicants have since filed *Applications No. 9 and 10 of 2022*, which are under consideration presently, seeking to strike out the Appeal on account of the Respondent not having taken essential steps in respect thereof. Mr. Nadduli Musisi did also file *Application No. 20 of 2022* seeking to be struck off the Appeal for having been wrongfully enjoined thereto. We consider it necessary to dispose of *Applications No. 9 & 10 of 2022* prior to a determination of *Application No. 20 of 2022* and/ or the Appeal on its merits.

C. **Applications No. 9 & 10 of 2022**

7. The Applications are brought under Rules 2(2), 43(1) and (2), 44, 78, 82, 86, 87 and 88 of the Judicature (Court of Appeal) Rules, SI 13–10 (hereinafter 'the Court of Appeal Rules'), and Rules 33 and 36 of the Parliamentary Elections (Interim Provisions) Rules, SI 141–2. *Application No. 9 of 2022* is additionally brought under Rule 76 of the Court of Appeal Rules, while *Application No. 10 of 2022* additionally invokes Rule 29 of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules. Both Applications are *inter alia* rooted in the following grounds:

I. The Respondent did not file and serve his Memorandum of Appeal in accordance with the law.

II. The Respondent did not file and serve the Record of Appeal in accordance with the law.

8. The Second Applicant does also contend that it was never served with the Notice of Appeal in this matter.

9. The Applications are supported by the affidavits of the First Applicant and Mr. Hamidu Lugoloobi (for the Second Applicant) that attest to the Notice of Appeal having been filed on 3rd November 2021 but not having been served on the Second

Applicant. It is further averred that the Respondent violated the law in so far as he filed his Memorandum of Appeal on 12th November and served it on the Applicants on the 24th November 2021 and 18th November 2021 respectively. Furthermore, the First Applicant attests to the Respondent having filed the Record of Appeal on 10th December 2021 but neither deponent mentions service of the same upon them.

10. The Applications are opposed by the Respondent who, vide an affidavit in reply to that effect, attests to having lodged his Notice of Appeal in the Trial Court on 4th November 2021 whereupon it was transmitted to and received by this Court on 5th November 2021. It is his affidavit evidence that the Notice of Appeal was served upon both Applicants on 5th November 2021. He thus asserts that the Memorandum of Appeal that was lodged in this Court on 12th November 2021 was filed well within the legally prescribed time frame. He concedes to having served the Memorandum of Appeal upon the Second Applicant on 18th November 2021, which in his view was well within the law, but makes no mention whatsoever of the date of service of the same upon the First Applicant. He does also concede to having filed the Record of Appeal on 10th December 2021, asserting that it was served upon both Applicants on the same day, which was well within the confines of the law.

11. The First Applicant was represented at the hearing by Messrs. Medard Lubega Ssegona, Yohana Balirere and Theodore Ssekikubo; while Mr. Eric Sabiiti and Ms. Angella Kanyiginya appeared for the Second Applicant. The Respondent was represented by Messrs. Vincent Mugisha and Solomon Akenda.

D. **Parties' Submissions**

12. In a nutshell, it is the First Applicant's contention that the Appeal should be struck out under Rule 82 of the Court of Appeal Rules given the Respondent's failure to file and serve the Memorandum and Record of Appeal in accordance with Rules 30 and 31 of the Parliamentary Elections (Interim Provisions) Rules, and Rule 88 of the Court of Appeal Rules. It is argued that a written Notice of Appeal having been filed on 3rd November 2021, the Memorandum of Appeal should have been filed by 10th November 2021 and not 12th November 2021 as transpired in this

case. The Court was referred to **Kasibante Moses v Electoral Commission, Election Petition Application No. 7 of 2012**, as cited with approval in **Abiriga Ibrahim v Musema Mudathir Bruce, Election Petition Application No. 24 of 2016**, where a Memorandum of Appeal that had been filed a day late was held to offend Rule 30 of the Parliamentary Elections (Election Petition) Rules and, on that basis, the Appeal was struck out.

13. It is further argued that the belated Memorandum of Appeal having been filed on the 12th November 2021, it should have been served upon the Respondents within seven days thereof, that is, not later than 18th November 2021. However, it was served upon the First Applicant on 24th November 2021, well beyond the time frame stipulated under Rule 88 of the Court of Appeal Rules. The same Rule is opined to have been contravened in so far as the Respondent had as of 21st February 2022 (the date of the written submissions) not served the Applicants with the Record of Appeal that had been filed in the Court on 10th December 2021. It is proposed that the Record of Appeal should have been served upon them by 17th December 2021. The First Applicant relies upon the following decision in **Kubeketerya James v Waira Kyewalabye & Another, Election Petition Appeal No. 97 of 2016** in support of his case:

> It is now settled as the law that it is the duty of the intending appellant to actively take 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 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: CIVIL APPLICATION NO. 52 OF 1995 (SC) and S. B. KENYATTA & ANOTHER VS SUBRAMANIAN & ANOTHER: CIVIL APPLICATION NO. 108 OF 2003 (COURT OF APPEAL). 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 Petition) 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. .... Election petitions have to be handled

expeditiously. The rules and timelines set for filing proceedings are couched in mandatory terms. They must be strictly interpreted and adhered to.

14. In the same vein, the Second Applicant does in *Application No. 10 of 2022* contend that the Respondent did not serve his Notice of Appeal upon the electoral body as by law required, neither did he either file or serve the Memorandum and Record of Appeal in accordance with the applicable rules of procedure. It is argued that the Respondent only served the the electoral body with a letter that sought the record of proceedings from the Trial Court thus raising doubts as to whether a Notice of Appeal was filed in this matter at all. Learned Counsel cites **Hon. Mayende Stephen Dede v Ochieng Peter Patrick, Election Petition Appeal No. 33 of 2012** where it was held that where an election petition is filed before the filing of a Notice of Appeal the appeal would be incompetent and qualify to be struck off under Rule 82 of the Court of Appeal Rules. Additionally, the Second Applicant reiterates verbatim the First Applicant's proposition that a written Notice of Appeal having been filed on 3rd November 2021, the Memorandum of Appeal should have been filed by 10th November 2021 and not 12th November 2021 as transpired in this case. The Court is referred to the same authorities as had been relied upon by the First Applicant, to wit, **Kasibante Moses v Electoral Commission** (supra), as cited with approval in **Abiriga Ibrahim v Musema Mudathir Bruce** (supra).

15. However, no submissions were forthcoming from the Second Applicant either in relation to the allegedly late service of the Memorandum of Appeal, or the late filing and service of the Record of Appeal; the case of **Kubeketerya James v Waira Kyewalabye & Another** (supra) simply being cited in relation to the duty of an intending appellant to take the requisite steps to actively prosecute his/ her intending appeal.

16. Conversely, it is the Respondent's contention that the Notice of Appeal though signed on 3rd November, was lodged in the Trial Court's registry on 4th November and received by the Court of Appeal on 5th November 2021. The duly filed Notice of Appeal is postulated to have been served upon both Applicants on the same day, 5th November 2021. It is proposed that although the Second Applicant's Legal Department had been served with the Notice of Appeal alongside the letter

requesting for the Trial court's record of appeal, it wrongfully elected to only endorse the letter. Reference in that regard is made to paragraphs 10 and 11 of an affidavit of service deposed by Mr. Obed Tumwesigye (a court process server) and filed in this Court on 22nd February 2022. It is thus argued that the Notice of Appeal having been filed on 5th November 2021, the seven-day period prescribed in Rule 30 would have expired on 12th November 2021 therefore the filing of the Memorandum of Appeal on that date was legally tenable. The cases of **Kasibante Moses v Electoral Commission** (supra) and **Abiriga Ibrahim v Musema Mudathir Bruce** (supra) are opined to have been cited out of context, an attempt being made to distinguish the **Kasibante** case from the circumstances of the present Applications in so far as no Record of Appeal had been filed in that case hence the court's conclusion that the respondent therein was not serious about prosecuting his Appeal.

17. With regard to the late service of the Memorandum of Appeal, it is asserted that whereas it was duly served upon the Second Applicant on 18th November 2021, despite its best efforts the Respondent was unable to serve the Memorandum of Appeal upon the First Applicant until 24th November 2021. Quite curiously, the Respondent is of the opinion that service of the Memorandum of Appeal on 24th November 2021 did not offend any time limitations, the requisite time frame supposedly lapsing on 25th November 2021. Finally, it is argued that the Record of Appeal was filed and served within the prescribed time on 10th December 2021.

18. The foregoing submissions notwithstanding, it is proposed for the Respondent that if there were any lapses in observing the legally prescribed time frames, there did exist exceptional circumstances justifying the delay, to wit, the negligence of Counsel. Learned Respondent Counsel sought to rely on the decision in **Hon. Ebil Fred v Ocen Peter, Election Petition Applications No. 17 & 24 of 2017** (**Banco Arabe Espanol v Bank of Uganda Supreme Court Civil Application No. 8 of 1998** cited with approval), that an oversight, mistake, negligence or error on the part of counsel should not be visited on a party s/he represents. He urged the Court to follow the precedent set in that case where a memorandum of appeal that had been erroneously filed out of time by the appellant's advocate was validated by the Court.

19. By way of rejoinder, the First Applicant reiterates his contention that the Respondent himself does confirm, vide his letter dated 3rd November 2021, that as at that date he had filed his Notice of Appeal in this matter. It is posited that 3rd November 2021 was presumed by the First Applicant to have been the date of filing because letter in question was so dated. Without providing any reason therefor, learned Counsel for the First Applicant proposes that the Respondent's argument that time starts to run on the date a Notice of Appeal is transmitted to this Court is untenable.

20. Meanwhile, the Respondent's claim to have attempted but failed to serve the First Applicant with the Memorandum of Appeal is dismissed as false given that the address of service was the same as that to which the Notice of Appeal had earlier been served. It is opined that the affidavit of service that supposedly attested to the circumstances surrounding the delayed service of the Memorandum of Appeal had not been served upon the First Applicant, there were doubts as to whether it was on the Court record and, in any case, it was an afterthought that was deposed following the service of *Application No. 9 of 2022* upon the Respondent. The Respondent's proposition that he had up to 25th November 2021 to serve the Memorandum of Appeal upon the Applicants is similarly rebutted with the assertion that the seven-day period within which the said pleading could be filed would have expired on 19th November 2021.

21. Reiterating the duty upon an appellant to take the necessary steps for the prosecution of his/ her case, it is opined that the Respondent bore the onus of proof of service of the Record of Appeal upon the First Applicant but failed in the discharge of that duty.

E. **Court's Determination**

22. We carefully considered the parties' rival submissions in this matter, as well as all the material on record. The striking out of appeals lodged before this Court is indeed governed by Rule 82 of the Court of Appeal Rules. It reads as follows:

> **A person on 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 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.

23. That legal provision provides for the striking out of appeals on two grounds: where no appeal lies, or where an essential step in the proceedings has either not been taken at all or was not taken within the time prescribed therefor. In the instant case, both Applicants seek to have the Appeal struck out for failure to take some essential steps at all and/ or within the prescribed time. As indicated earlier in this Ruling, the Applications are *inter alia* brought under Rules 78 and 88 of the Court of Appeal Rules, and Rule 29 of the Parliamentary Elections (Interim Provisions) Rules. In addition, reference is made in the Applicants' respective written submissions to Rules 30 and 31 of the latter Rules. For ease of reference, the cited legal provisions are reproduced below.

The Parliamentary Elections (Interim Provisions) (Election Petitions) Rules

Rule 29

Notice of appeal may be given either orally at the time judgment is given or in writing within seven days after the judgment of the High Court against which the appeal is being made.

Rule 30

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; and

(b) **In a case where a written notice of appeal has been given, within seven days after notice was given**.

Rule 31

The appellant shall lodge with the registrar the record of appeal within thirty days after the filing by him or her of the memorandum of appeal.

The Judicature (Court of Appeal) Rules

Rule 78(1)

(1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies of it on all persons directly affected by the appeal; but the court may, on application, which may be made ex parte, direct that service need not be effected on any person who took no part in the proceedings of the High Court.

Rule 88(1)

(1) The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the registry, serve copies of them on each respondent who has complied with the requirements of rule 80 of these Rules.

24. Rule 29 of the Parliamentary Elections (Interim Provisions) Rules, read together with Rule 78(1) of the Court of Appeal Rules, would require an intending appellant to give notice of appeal either verbally or in writing but, where recourse is made to a written notice, such Notice is to be served upon the respondent(s) within seven days. An intending appellant is also required to file a memorandum and record of appeal, and serve the same on the respondent(s) in accordance with Rules 30 and 31 of the Parliamentary Elections (Interim Provisions) Rules, and Rule 88(1) of the Court of Appeal Rules. Thus, the Respondent herein having given written notice of appeal he was under a duty to serve the same on the Applicants within seven days, and serve the Memorandum of Appeal within the same time frame. He was thereafter obliged to serve the Memorandum of Appeal upon the Applicants within seven days, and within the same time frame serve them with a Record of Appeal duly filed within thirty days of lodging the Memorandum of Appeal.

25. The evidence on record is that the Respondent did file a Notice of Appeal in the High Court of Uganda at Kabale on 4th November 2021, which Notice was later transmitted to the Court of Appeal on 5th November 2021. This is clearly depicted in Annexure A to the affidavit in support of *Application No. 9 of 2022*, as well as a copy of the Notice of Appeal that is appended to the Memorandum of Appeal on the Court record. Rule 29 of the Parliamentary Elections (Interim Provisions) Rules

is silent as to where a Notice of Appeal should be lodged for purposes of due filing. However, Rule 36 of the same Rules does mandate this Court to apply to election petition appeals '**any rules regulating the procedure and practice on appeal from decisions of the High Court to the Court of Appeal in civil matters**.' Therefore, the present Applications being civil matters, Rule 76(1) of the Court of Appeal Rules would be instructive. It provides for an intending appellant to this Court to '**give notice in writing, which shall be lodged in duplicate with the registrar of the High Court**.' Accordingly, the written Notice of Appeal in this matter was given on 4th November 2021 when it was lodged in the High Court of Uganda at Kabale. This was well within the seven-day time frame prescribed under Rule 29 of the Parliamentary Elections (Interim Provisions) Rules.

26. A stamp of receipt on Annexure A to the affidavit in support of *Application No. 9 of 2022*, as well as a copy of the Notice of Appeal that is appended to the Memorandum of Appeal on record, do also indicate that the Notice of Appeal was duly served upon the First Applicant on 4th November 2021. This was well within the time prescribed under Rule 78(1) of the Court of Appeal Rules. Whereas there is contestation as to whether the Notice of Appeal was served upon the Second Applicant, it is the Respondent's evidence in paragraph 5 of his affidavit in reply that it was served upon that party together with the letter requesting for the lower court's record. That evidence was not rebutted by the Second Applicant by an affidavit in rejoinder and therefore remains uncontroverted. It is, meanwhile, supported by Mr. Tumwesigye's affidavit of service, as well as Annexure A to *Application No. 10 of 2022*, both of which indicate that having been served with the letter and the Notice of Appeal the Second Applicant elected to only acknowledged receipt thereof on the letter. In the absence of evidence to the contrary, that would not necessarily negate the service of the Notice of Appeal together with the letter. We are therefore satisfied that the Notice of Appeal was duly served upon both Applicants within the legally prescribed time frame.

27. Turning to the Memorandum of Appeal in this matter, the evidence on record is that it was filed on 12th November 2021 and served upon the Applicants on 18th November 2021 and 24th November 2021 respectively. Rule 4(a) of the Court of Appeal Rules enjoins this Court to compute the time of reckoning in respect of any

act exclusive of the day on which that act has been done. In the present circumstances, therefore, the day the Notice of Appeal was filed would be excluded from the computation of the seven-day period within which the Memorandum of Appeal should be lodged. On that premise, undoubtedly, the Memorandum of Appeal was filed a day late. The Notice of Appeal having been filed on 4th November 2021, the Memorandum of Appeal should have been filed by or on 11th November 2021. To compound matters, it was served upon the First Applicant on 24th November 2021, well beyond the seven-day period prescribed under Rule 88(1) of the Court of Appeal Rules.

28. In the same token, although the Record of Appeal was filed within thirty days of lodging the Memorandum of Appeal as required under Rule 31 of the Parliamentary Elections (Interim Provisions) Rules, there is no evidence whatsoever on record that it was served on the Applicants either within the time delineated in Rule 88(1) of the Court of Appeal Rules or at all.

29. A perusal of the court record reveals that the First Applicant did file a Notice of Address on 12th November, 2021 in accordance with Rule 80(1) of the Court of Appeal Rules. The Record of Appeal does also bear an undated document filed by the Appellant and titled '*2nd & 3rd RESPONDENTS' LAST KNOWN ADDRESS OF SERVICE*', designating the Electoral Commission, Legal Department Law Chambers, Plot 55 Jinja Road, P. O. Box 22678 Kampala, Uganda as their address for purposes of the Appeal.

30. The First Applicant subsequently deposes as follows in paragraph 8 of his affidavit in support of *Application No. 9 of 2022* dated 3rd February 2022:

> *On the 1st day of February 2022, I inquired from my lawyers whether they had been served with a Record of Appeal to which they replied in the negative, prompting me to check from the Court of Appeal Registry from where (I) established that the same had been filed on the 10th day of December 2021.*

31. In paragraph 7 of his affidavit in support of *Application No. 10 of 2022* of the same date (3rd February 2022), Mr. Lugoloobi did on behalf of the Second Applicant herein attest to the Respondent having *'not complied with the law regarding filing*

and serving of the Record of Appeal.' In response, the Respondent asserts in his affidavits of reply in respect of both Applications that the Record of Appeal had been filed on 10th December 2021 and was served upon the Applicants on the same day.

32. The question then is which party presents the more cogent evidence on the balance of probabilities in support of its case? Upon whom does the burden of proof lie? Section 101(1) of the Evidence Act, Cap. 6 provides that '**whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he or she asserts must prove those facts**.' Accordingly, the Applicants being the party that seeks the decision of this court to strike out the Appeal on the basis of the alleged non-service of the Record of Appeal must prove the fact of non-service. They would thus bear the legal burden of proof, **'it usually being incumbent upon the claimant to prove what he contends**.' *See* Halsbury's Laws of England, Civil Procedure, Vol. 12 (2020), para. 697. Stated differently, the party desiring a court to take action (a plaintiff, appellant or applicant) would bear the duty to satisfy the court that the conditions which entitle him or her to judgment have been satisfied. That duty is underscored by section 102 of the Evidence Act, which provides that '**the *burden of proof* in a suit or proceeding lies on that person who would fail if no evidence at all were given by either side**.'

33. However, section 103 of the Evidence Act provides that '**the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence**.' This principle is re-echoed in *Halsbury's Laws of England*,[1] which posits that in respect of a particular allegation the burden of proof lies upon the party for whom the substantiation of that particular allegation is an essential component of his or her case. Consequently, the present Applicants would bear the legal burden of establishing the totality of their case as against the Respondent, including proof to the required standard of all the allegations that they impute to the latter. However, each party would bear the onus of proof of the specific allegations

[1] Civil Procedure, Vol. 12 (2020), para. 698

made by it that, if not substantiated, would leave the gravamen of its complaint or defence (as the case may be) unproven.

34. Thus, whereas the burden of proof in any proceedings (legal burden) would in accordance with section 102 of the Evidence Act lie with the party who would fail if no evidence at all was adduced by either side; the evidential burden (or the burden of adducing evidence) would shift to the opposite party where the party bearing the legal burden adduces evidence tending to prove his claim. As has been compellingly proposed, '**the other party may in response wish to raise an issue** (in rebuttal) **and must then bear the evidential burden in respect of all material facts**.' *See* Halsbury's Laws of England, Civil Procedure, Vol. 12 (2020), para. 699.

35. This evidential rule was espoused in **Col (Rtd) Dr. Besigye Kizza v Museveni Yoweri Kaguta & Another, Election Petition No. 1 of 2001** as follows (per Odoki, CJ):

> As far as the shifting of the burden of adducing evidence is concerned it is stated in Sarkar's Law of Evidence Vol. 2, 14th Ed, 1993 Reprint, 1997, pages 1338 – 1340 as follows:
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> > 'It appears to me that there can be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient *prima facie* to establish the case of the party on whom the onus lies ... what is meant is that in the first instance the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence.'

36. Therefore, in so far as the present Applicants raised the allegation of non-service of the Record of Appeal as a ground for the striking out the Appeal, they would bear the legal and evidential burden of proof of this contestation. They are under a duty to present such evidence in support of their case as, in the absence of evidence to the contrary, would materially prove that allegation against the Respondent. Upon their presentation of affidavit evidence that *prima facie*[2] tends to prove their claims; the evidential burden would shift to the Respondent to

[2] On the face of it, in the absence of evidence to the contrary.

establish on a balance of probabilities that the Record of Appeal was indeed duly served upon the Applicants, as claimed.

37. In the instant case, the First Applicant clearly discharged his evidential burden. There is proof on record of a Notice of Address having been duly filed by him, which would entitle him to service of the Record of Appeal in accordance with Rule 88(1) of the Court of Appeal Rules. In addition, he attests to not having been served with the Record of Appeal as at 3rd February 2022 when he deposed his affidavit in support of the application to strike out the Appeal. In the absence of evidence from the opposite party, the First Applicant would have sufficiently established his case so as to secure judgment in his favour. To that extent, he does adduce *prima facie* evidence in proof of his Application and thereby shifts the evidential burden to the Respondent to establish his counter-argument that the Record of Appeal was indeed duly served upon the First Applicant. No such evidence was forthcoming from the Respondent in this matter. Beyond the sweeping assertion that the Record of Appeal was indeed served, no proof of service was adduced by him as would establish this for a fact. We are satisfied, therefore, that no such service was effected upon the First Applicant as by law required.

38. With regard to the Second Applicant, the Record of Appeal bears a document that clearly designated its address of service for purposes of the Appeal from which the present Applications arise. The document is filed by the Respondent. A similar document is filed in respect of the First Applicant, despite his having filed a Notice of Address. What is the evidential worth of this document that is unsupported by any rule of procedure? Had the document been filed in respect of the Second Respondent only, it would raised the presupposition that it was the Respondent's way of acknowledging non-service of a Notice of Appeal by that party. However, given that it is filed in respect of both Applicants, despite the First Applicant having filed a Notice of Address, the document seems to represent the Respondent's recognition of the Applicants' respective addresses of service. It would thus appear to be acquiescence on the part of the Respondent and thus raises the inference, on the balance of possibilities, that a Notice of Address was served in respect of the Second Applicant as well. That being so, the electoral body would similarly

have been to service of the Record of Appeal in accordance with Rule 88(1) of the Court of Appeal Rules.

39. The evidential burden was thus shifted to the Respondent to establish due service of the Record of Appeal. Clearly, a party upon whom no Record has been served can only say as much. S/he cannot manufacture any other evidence in proof thereof beyond such an averment. Not so with the party that claims to have duly served the requisite court process. That party should have proof of such service. Again, the Respondent fell short in proof of his contestations in that regard to the required standard. We are satisfied, therefore, that no such service was effected upon the Second Applicant either as by law required.

40. A myriad of authorities abound as to the effect of non-compliance with procedural electoral rules on an election appeal. We deem them instructive on our determination of the Applications before us. In **Geoffrey Omara v Charles Andiro Gutomoi Abacacon & Another, Election Petition Appeal No. 106 of 2016**, where the Notice, Memorandum and Record of Appeal were all filed out of time, **Election Petition Application No. 42 of 2017** that sought to strike out the Appeal was allowed and the Appeal was duly struck out.

41. On the other hand, in **Hon. Ebil Fred v Ocen Peter** (supra), the Notice and Memorandum of Appeal had been filed in the High Court of Uganda at Lira but the Memorandum of Appeal was lodged in the Court of Appeal out of time. Whereas *Application No. 17 of 2016* sought to strike out the Appeal, *Application No. 24 of 2016* sought to extend the time within which to appeal, as well as validate the belated Memorandum of Appeal. It was argued for the applicant in the latter application that learned Counsel had misinterpreted Rule 30(b) of the Parliamentary Elections (Interim Provisions) Rules and filed the Memorandum of Appeal in the High Court rather than the Court of Appeal. This Court held that an oversight, mistake, negligence or error on the part of counsel should not be visted on a party s/he represents, and validated the Memorandum of Appeal. The circumstances of that case were distinguished from those that pertained to **Sanjay Tanna & Another v Ofwono Yeri Apollo, Court of Appeal Election Application No. 8 of 2006** on account of the appellant therein having applied for the extension

of time within which to lodge his appeal, which was not the case in the **Sanjay Tanna** case.

42. Meanwhile, in **Kubeketerya James v Waira Kwewalabye & Another, Election Petition Appeal No. 97 of 2016**, the Court observed that the electoral rules of procedure had been made to enable the expeditious disposal of election-related matters and therefore the luxury of extension of time provided under Rule 83 of the Court of Appeal Rules was not available to the appellant. In so holding, the Court cited with approval the decision in **Electoral Commission & Another v Piro Santos Eruga, Civil Application No. 22 of 2011** where the following dictum from the Kenya High Court case of **Muiya v Nyagah & Others (2003) 2 EA 616** was applied:

> 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.

43. However, in **Kajara Aston Peterson v Mugisha Vincent, Civil Miscellaneous Application No. 58 of 2016**, the Court adjudged Rule 83(2) to be applicable to election petition appeals pursuant to Rule 36 of the Parliamentary Elections (Interim Provisions) Rules as reproduced earlier in this Ruling. In that case, the exclusion of the time within which the record of appeal was being prepared was only disallowed on account of non-proof by the respondent of his having sought such record of appeal in the first place.

44. First and foremost, it is pertinent to remind ourselves of the Common Law doctrine of *stare decesis*. This was aptly elucidated in **The Attorney General v Uganda Law Society, Constitutional Appeal No. 1 of 2006** (Supreme Court) as follows (per Mulenga, JSC):

> Under the doctrine of *stare decesis*, which is a cardinal rule in our jurisprudence, a court of law is bound to adhere to its previous decisions save in exceptional cases where the previous decision is distinguishable or was over-ruled by a higher court on appeal or was arrived at *per incuriam* without taking into account a law in force or a binding precedent. In absence of any such exceptional circumstances, a panel

> of an appellate court is bound by previous decisions of other panels of the same court.

45. In the instant case, drawing on areas of convergence in the foregoing authorities, it becomes abundantly clear that the Court of Appeal Rules are indeed applicable to election petition appeals. This is the clear import of Rule 36 of the Parliamentary Elections (Interim Provisions) Rules that provides for the application of the Court of Appeal Rules with such modification as the Court may deem fit. Indeed, **Muiya v Nyagah & Others** (supra) that was followed in **Electoral Commission & Another v Piro Santos Eruga** (supra) and **Kubeketerya James v Waira Kwewalabye & Another** (supra), does recognize that election petitions are exclusively governed by the electoral law regime only to the extent that other laws are not admitted to the electoral laws. Given the succinct provisions of Rule 36 that recognize the applicability of the Court of Appeal Rules thereto, with utmost respect, it can scarcely be maintained election petition appeals are the exclusive preserve of electoral laws. It is on that premise that the Court of Appeal Rules are relied upon in this Ruling.

46. Further, and perhaps more importantly, we are cognizant of the unique circumstances of electoral dispute resolution and the need for special diligence in relation thereto as espoused in **Kasibante Moses v Electoral Commission** (supra) as follows:

> 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[3] enjoin this Court to hear and determine an appeal expeditiously and may, for that purpose suspend any other matter before it.

47. Section 66(3) of the Parliamentary Elections Act, 2005 and Rule 34 of the Parliamentary Elections (Interim Provisions) Rules are reproduced below:

[3] Now referred to as the Parliamentary Elections (Interim Provisions) Rules.

The Parliamentary Elections Act

Section 66(2)

(1) .....

(2) The Court of Appeal shall proceed to hear and determine an appeal under this section within six months from the date of filing of the appeal and may for that purpose suspend any other matter pending before it.

The Parliamentary Elections (Interim Provisions) (Election Petitions) Rules

Rule 34

Unless the court extends the time on exceptional grounds, the hearing of an appeal shall be completed within thirty days from the lodging of the record of appeal.

48. The foregoing provisions underscore the observation of the Supreme Court in **Sitenda Sebalu v Sam K. Njuba & Another, Election Appeal No. 26 of 2007** that '**the purpose and intent of the legislature was to ensure, in the public interest, that disputes concerning the election of people's representatives are resolved without undue delay**.' In that case, the Supreme Court did also recognize that in setting up an elaborate system for judicial inquiry into alleged electoral malpractices, the legislature additionally sought to ensure (equally in the public interest) that such allegations are subjected to a fair trial and determined on their merits. The apex court held that '**the only way the two complimentary interests** (timely disposal of electoral disputes and fair trial on its merits) **could be balanced was to reserve discretion for ensuring that one purpose is not achieved at the expense or to the prejudice of the other**.' Indeed, as was observed in that case, provision for the balancing of those two complimentary interests is to be found in rules of procedure.

49. Against that background, it seems to us that rules of procedure are particularly pivotal to the expeditious determination of electoral disputes in as fair and judicious a manner as possible, and must be rigorously adhered to by all court actors. This is particularly so given that non-compliance with the electoral laws and rules is often at the heart of most petitions to courts. The courts could then lead the way, with appropriate judicial discretion as espoused in the **Sitenda Sebalu** case, in

restoring due respect for and adherence with legal processes. They should judiciously balance the constitutional duty of fair trial on the merits of the case with due application of rules of procedure which, as handmaidens of justice, are designed to entrench the notion of equality of parties before courts.[4] Whereas, as observed in **Patel v EA Cargo Handling Services Ltd (1975) EA 75** the main concern of a court exercising its judicial discretion should be to do justice as between the parties, a party's ineptitude in the institution and/ or prosecution of its appeal would, in our view, be just as antithetical to the course of justice as evasion of court process and other dilatory conduct. *See* ***Shah v Mbogo (1967) EA 116***.

50. In the instant case, the Memorandum of Appeal was not only filed out of out of time pursuant to apparent misdirection as to the import of Rule 30(b) of the Parliamentary Elections (Interim Provisions) Rules; no effort was made to serve the Record of Appeal on the Applicants at all, nor was any attempt made to seek the enlargement of time within which to undertake the requisite procedural steps. In determining whether the Respondent's proven non-compliance with the rules of procedure would warrant the striking out of the Appeal, we draw inspiration from Supreme Court's handling of a related matter in **Sitenda Sebalu v Sam K. Njuba & Another** (supra). In that case, on the question as to whether non-compliance with a mandatory provision would invalidate an act, the following observation in **Regina v Soneji & Another (2005) UKHL 49** (per Lord Steyn) was cited with approval:

> The emphasis ought to be on the consequences of non-compliance, and posing the question whether the Parliament can be fairly taken to have intended total invalidity.

51. The Supreme Court then held that the legislature could not have intended the exclusion of judicial discretion yet in section 93 of the Parliamentary Elections Act it had sanctioned the formulation of procedural rules to guide the courts (including this Court) in their determination of electoral disputes. *See section 93(1) and 2(a) of the Act.*

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[4] *Principle 5* of the *Bangalore Principles of Judicial Conduct, 2002* states that '**ensuring equal treatment to all before the courts is essential to the due performance of the judicial office.**'

52. Although the Parliamentary Elections (Interim Provisions) Rules were formulated under the Parliamentary Elections (Interim Provisions) Statute that has since been repealed, they were saved under section 101(3) of the Parliamentary Elections Act of 2005. In so far as those Rules provide for the application of the Court of Appeal Rules they do, in turn, make appropriate provision for the enlargement of time of any acts encapsulated thereunder. Accordingly, we take the view that it could not have been the intention of the Ugandan legislature that non-compliance with procedural rules automatically invalidated an Appeal, as is the issue of focus before us presently. Rather, appropriate provision was made for the extension of time within which an overlooked act may be undertaken and/ or validation of a pleading that run afoul of the procedural rules.

53. In the matter before us, however, the Respondent did not bother to utilize the remedies available to him under the Court of Appeal Rules. Indeed, given the distinguishing factors in **Hon. Ebil Fred v Ocen Peter** (supra) *viz* the matters presently before us, we are disinclined to abide the decision therein to validate a memorandum of appeal that was filed out of time. To begin with, unlike the circumstances of that case, in the present Applications no effort was made by the Respondent to seek to extend the time within which the actions caught by limitation of time could be undertaken. No application for the extension of time was filed in this matter.

54. Would this then be a case where the mistakes of Counsel should not be visited upon the party? We think not. Unlike the **Hon. Ebil Fred** case where a categorical admission was made by Counsel that they had misconstrued the provisions of Rule 30(b) of the Parliamentary Elections (Interim Provisions) Rules, in this case the misdirection of that Rule was unearthed by opposite Counsel in submissions in rejoinder and adjudged so by the Court. Learned Respondent Counsel simply made a cursory reference to a possible mistake having been made at the tail end of written submissions filed on behalf of the Respondent. To compound matters, that was not the only non-compliance made by the Respondent, no Record of Appeal having been served upon the Applicants at all in the matter.

55. Whereas therefore we are sympathetic with the present Respondent who lost the election by a paltry 136 votes, with respect, the Court would appear to have been confronted with ineptitude and a lackluster approach to the rules of procedure, rather than the rigor and diligence that should underpin electoral appeals. In any event, the nature of electoral contests is such that however narrow a candidate's win, it remains so unless reversed by a competent court. In the premises, therefore, we would exercise our judicial discretion to allow the present Applications and strike out **Election Petition Appeal No. 76 of 2021**. Having so held, it follows that *Application No. 20 of 2022*, the application to strike Mr. Naduli Musisi from the Appeal, is rendered redundant and thereby abates.

F. **Conclusion**

56. It is trite law that costs in civil matters should follow the event unless a court for good reason decides otherwise. *See section 27(2) of the Civil Procedure Act (CPA)*. However, Rule 27 of the Parliamentary Elections (Interim Provisions) Rules gives the High Court discretion in the determination of costs in election petitions without necessarily following the general rule in civil proceedings. It reads as follows:

> **All costs of and incidental to the presentation of the petition and the proceedings consequent on the petition shall be defrayed by the parties to the petition in such manner and in such proportions as the court may determine.**

57. We find this Rule instructive on how costs in election petition appeals may similarly be addressed. Thus, in **Aisha Kabanda Nalule v Lydia Daphine Mirembe & 2 Others, Election Petition Appeal No. 90 of 2016**, recognizing electoral litigation as a matter of great national importance, it was observed that costs should not deter aggrieved parties with a legitimate cause of action from seeking redress from the courts. In that case, where the vote margin between the parties to the appeal was only 67 votes, this Court considered it inappropriate to condemn either party to costs.

58. We agree with this reasoning and think parties should be spared the incidental costs that would ensue from electoral contestations as this would temper their inclination to test the authenticity of an election result within legal confines. Given the slim vote margin in this Appeal, the Appellant was well entitled to verify the authenticity of the electoral process in Ndorwa County East Constituency in this Court and should not be condemned to costs therefor. In so far as the present Applications conclusively dispose of the **Election Petition Appeal No. 76 of 2021**, we would address costs in both this Court and the Trial Court.

59. In the result, *Applications No. 9 & 10 of 2022* are hereby allowed with the following orders:

    I. **Election Petition Appeal No. 76 of 2021** is hereby struck out for failure by the Respondent to take essential steps in its institution.

    II. Each party to bear its own costs in the Court of Appeal and the High Court.

It is so ordered.

Dated and delivered at Kampala this ..22nd.. day of ..April.., 2022.

Elizabeth Musoke
JUSTICE OF APPEAL

Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL

Monica K. Mugenyi
JUSTICE OF APPEAL