

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

*[Coram: Egonda-Ntende, Madrama & Kawuma Luswata, JJA]*

**ELECTION PETITION APPEAL APPLICATIONS NO. 08 OF 2022, 11 OF 2022 & 14 OF 2022**

*(Arising from Election Petition Appeal No. 84 of 2021)*

*(Arising from Election Petition No. 006 of 2021)*

**BETWEEN**

Tete Chelengat Everline ===== Applicant /Respondent

**AND**

Electoral Commission ===== Respondent No.1

Chemutai Everlyn=====Respondent No.2/Applicant

**RULING OF FREDRICK EGONDA-NTENDE, JA**

**Introduction**

- [1] The applicant and respondent no.2 were candidates for the seat of the woman representative of Parliament for Bukwo District in the general elections held on 14<sup>th</sup> January 2021. The Electoral Commission returned respondent no.2 as the validly elected Woman representative of Parliament for the constituency. The applicant filed Election Petition No. 006 of 2021 at Mbale High court challenging the outcome of the election.
- [2] On 19<sup>th</sup> October 2021, the High Court of Uganda at Mbale decided the petition in favour of respondent no.2 and dismissed it. On 26<sup>th</sup> October 2021, the applicant filed a notice of appeal and a letter requesting for a

certified copy of the record of proceedings which was served on the respondent no. 2 on 29<sup>th</sup> October 2021. The memorandum of appeal was filed on 28<sup>th</sup> December 2021 after the prescribed time within which to file the memorandum of appeal had elapsed. On 31<sup>st</sup> January 2022, respondent no.2 filed Election Petition Application No. 08 of 2022 seeking to strike out the appeal on the ground that it is incurably incompetent for being filed out of time. The applicant filed Election Petition Application No. 11 of 2022 seeking to adduce additional evidence on appeal. And on 8<sup>th</sup> February 2022, the applicant filed Election Petition Application No. 14 of 2022 seeking to extend the time within which to appeal and to validate the Memorandum of appeal filed in this court outside the prescribed time.

- [3] It is necessary that we dispose of the applications before the court before we consider the main appeal. Much as they are 3 applications in number I will resolve all of them in one joint ruling with subheadings for each application for clarity. I will start by considering Application No. 14 of 2022 though it was the last to be filed as doing so will not pre-empt the decision in relation to Application No. 11 of 2022 in particular. I will consider Application No. 11 of 2022 last as it is pertinent to determine first if there is a competent appeal before this court before we can consider whether or not to admit additional evidence. I will therefore consider Application No. 8 of 2022, last, after I have considered Application No. 14 of 2022

### **Election Petition Application No. 14 of 2022**

- [4] The grounds in Election Petition Appeal Application No. 14 of 2022 were set out as follows:

- i. The Applicant was dissatisfied with the judgement and orders of the learned trial Judge in Mbale Election Petition No. 6 of 2021.
- ii. The Applicant filed her Notice of Appeal and a letter requesting for the typed Record of Proceedings for purposes of the Appeal.

- iii. The Notice of Appeal and letter requesting for typed proceedings were filed and served on both of the Respondents within the stipulated timelines.
- iv. The Appellant has complied with the necessary steps required to be taken in the pursuit of an intended appeal.
- v. The notice of appeal clearly cast that the grounds of Appeal shall be formulated and lodged following the receipt of the typed proceedings from the High Court at Mbale.
- vi. The typed proceedings were finally ready and certified during the Christmas break by the Deputy Registrar at the High Court in Mbale and received by the Applicant's counsel on 27<sup>th</sup> December, 2021.
- vii. The Memorandum of Appeal was filed on the 28<sup>th</sup> day of December 2021 and served on the Respondents on 4<sup>th</sup> January, 2022.
- viii. The Record of Appeal was filed on 7<sup>th</sup> January, 2022 and served on the Respondents within the 30 day period granted for its filing.
- ix. The Memorandum of Appeal and Record of Appeal already on the court record and served on the Respondents should be validated to hear the Election Petition Appeal on its merits.
- x. The court should grant an extension of time within which to file and serve the Memorandum and Record of Appeal on the Respondents.
- xi. The application has been made without undue delay.
- xii. The respondents will not suffer any injustice or prejudice if the application is granted.
- xiii. That this Application has been brought without undue delay to expedite the proceeding of the appeal.
- xiv. It is in the interest of substantive justice that this application be granted to enable court examine the issues in contention.'

[5] Both the respondents opposed the application. Respondent no.2 filed an affidavit in reply to the application and Kugonza Enoch, the principal legal officer to the respondent deponed an affidavit in reply to the application on behalf of respondent no.1.

## Submissions of Counsel

- [6] At the hearing, the applicant was represented by Mr. Elijah Enyimu and Mr. Okiror Morris, respondent no.1 was represented by Mr. Mwase Jude and respondent no.2 was represented by Mr. Ambrose Tebyasa, Mr. Evans Ochieng and Ms. Sandra Vicensia Namigadde. The parties opted to rely on their written submissions on record.
- [7] Counsel for the applicant submitted that the notice of appeal notified the respondents that the applicant intended to file the memorandum of appeal upon receiving the certified copy of the record of proceedings. The record of proceedings was ready on 21<sup>st</sup> December 2021 during the Christmas break and the same was received by the applicant on 28<sup>th</sup> December 2022. The memorandum of appeal was served on the respondents on 4<sup>th</sup> January 2022 without protest. Counsel submitted that the record of appeal was then prepared and filed on 7<sup>th</sup> January 2022 and served on the respondents within the required 30 days.
- [8] Counsel for the applicant submitted that Rule 5 of the Judicature (Court of Appeal Rules) Directions gives this court the discretion, for sufficient reason to extend time. Counsel relied on Ebil v Ocen [2017] UGCA 106 where it was held that the reason advanced for extension of time must be one that is cogent and touching on the inability to take an appropriate step.
- [9] Counsel for the applicant submitted, relying on Kajara v Mugisha [2017] UGCA 122 that rule 82 (3) of the rules of this court pursuant to Rule 36 of the Election Petitions Rules provides that the time within which an appeal may be lodged can be extended if the appellant applied in writing for a copy of the record of proceedings and served the respondent with a copy of the letter.
- [10] Counsel for the applicants submitted that the applicant filed the memorandum of record out of time due to the delay in the preparation of the typed record of proceedings. The file had to be returned to Mbale High court for purposes of typing the proceedings since the judgment had been

delivered at Land division at Kampala. The draft of the typed record of proceedings had to be returned to the commercial court as the new station of the trial judge for proof reading and finally returned to Mbale High court for certification. Counsel submitted that the memorandum and record of appeal already form part of the record and have been served on and received by the respondents. Counsel for the applicant contended that no prejudice or injustice shall be occasioned to the respondents by the validation of the memorandum and the record of appeal.

- [11] On the other hand, counsel for respondent no.2 submitted in reply that the applicant had all the relevant materials by 19<sup>th</sup> October 2021 to commence the appeal. Counsel was in possession of the pleadings from both parties, the joint scheduling memorandum, submissions from both parties and the judgment. Counsel argued that the applicant was not vigilant because she was notified by court that the proceedings were ready for collection by 16<sup>th</sup> December 2021 but picked up the proceedings two weeks later. Counsel for respondent no.2 stated that the applicant was not vigilant and serious enough as a litigator in election matters should be and she deliberately avoided mentioning the said letter in order to conceal her dilatory conduct from court.
- [12] Counsel submitted that for more than two months, the applicant never took steps to present and pursue her appeal apart from lodging and serving the notice of appeal and the letter requesting for proceedings. Counsel for respondent no.2 submitted that even after the applicant had filed the memorandum of appeal and later the record of appeal in court on 7<sup>th</sup> January 2022, she never served the same on respondent no.2 within 7 days as required by rule 88(1) of the rules of this court and instead served respondent no.2 on 1<sup>st</sup> February 2022 after the respondent had filed Election Petition No. 8 of 2022 to strike out the appeal.
- [13] Counsel contended that it is settled law that in election petitions, the intending appellant has a heavier duty to be more keen and vigilant to commence and prosecute the appeal, relying on Kasibante Moses v Electoral Commission [2012] UGCA 10.

- [14] Counsel for respondent no.2 submitted that the applicant in paragraphs 8, 10, 11 and 12 of her affidavit in support of the application insisted that she had complied with the law and sought to exonerate herself by shifting blame on court for the alleged delay in availing her with the certified copies of the proceedings, however, the applicant did not demonstrate that she was vigilant in pursuing the appeal. Counsel submitted that the appellant did not adduce any evidence proving that she took steps to follow up with court on the processing of the certified copies of proceedings.
- [15] Counsel for respondent no.2 further submitted that election petition appeals are not like ordinary appeals but are special proceedings with special laws and rules of procedure which must be strictly adhered to. Counsel relied on Otada v Tabani and Another [2017] UGCA 224. Counsel prayed that this court finds that the applicant never complied with the law and that she is bound by the wrong strategy and approach adopted by her counsel in presenting and prosecuting her appeal. The applicant having chosen to entrust her case with her lawyers is bound by their acts and omissions. Counsel cited Hadondi Daniel v Yolamu Egondi Court of Appeal Civil Appeal No. 67 of 2003 (unreported) and Mohammed B Kasasa v Jasphar Buyonga Sirasi Bwogi [2009] UGCA 44. Counsel prayed that the appeal be struck out.
- [16] Counsel for respondent no.2 also submitted that the applicant cannot rely on Article 126(2) (e) of the constitution basing on the decision of this court in Abiriga v Musema Mudathir [2017] UGCA 2 where it was held that Article 126(2) (e) is not a magical wand in the hands of defaulting litigants. An intending appellant, more particularly in election petition matters, has a heavier duty to take all necessary steps in commencing and prosecuting the intended appeal and court would not invoke its inherent powers to favour a non-diligent litigant. Counsel relied on Kawombe Lameka v Kafeero Ssekitooleko Robert Election Petition Application No, 15 of 2017 (unreported) to support the contention that this application does not disclose sufficient grounds for extension of time.

- [17] In rejoinder, counsel for the applicant submitted that the securing of the typed record of proceedings was in compliance with the requirements of rule 87(1) (d) and (e) of the rules of this court and was relevant for the expedient determination of the appeal since there are grounds of appeal concerning the treatment accorded by the trial judge to the documents presented by the parties in the prosecution of the election petition. Counsel for the applicant submitted that contrary to the submissions of counsel for respondent no.2, a judgment is not the conclusive premise for examining the issues that arise in an appeal, that what transpired in the preliminary hearing like in the scheduling conference can also form the foundation of a ground of appeal.
- [18] Counsel for the applicant submitted that the certified copy of the record of proceedings was only ready on 21<sup>st</sup> December 2021 which was within the Christmas break for court in light of order 51 rule 4 of the Civil Procedure rules. The record was not ready on 16<sup>th</sup> December 2021 as stated by counsel for respondent no.2, the letter from the registrar clearly stated that the record would be ready upon the payment of requisite fees. Counsel submitted that the certified record of proceedings was accessed on 27<sup>th</sup> December 2021, after the Christmas break thus the applicant took all the necessary steps to present and prosecute the appeal.
- [19] Counsel contended that none of the parties had applied for extension of time in the authorities that respondent no.2 seeks to rely on for striking out the appeal. Counsel referred to the Kasibante Moses v Electoral Commission (supra) where the respondent did not write the letter requesting for the record of proceedings and did not apply for extension of time to file the notice and memorandum of appeal out of time. Counsel submitted that this was the same for the case of Abiriga v Musema Mudathir (supra). Counsel for the applicant submitted that the case of Otada v Tabani (supra) relates to the merits of the appeal rather than the procedure in lodging the appeal whereas Hadondi Yolamu (supra) is not applicable to this case because it concerns a land dispute arising from the Local council courts.

- [20] Counsel for respondent no.1 submitted that election petition appeals are governed by specialised procedures set out in rules 29, 30 and 31 of the Parliamentary (election petitions) Rules SI 141-2. These procedures must be strictly observed and deviation from the same can only happen upon exhaustion all available avenues under the rules. Counsel relied on Speaker of National Assembly v Ngenga Karume [2008] 1 KLR 425 and Abiriga v Musema Mudathir (supra) to support this submission.
- [21] Counsel submitted that an appeal filed out of time is incompetent and should be struck out. In this case, the record of appeal and memorandum of appeal was filed out of time. In support thereof he referred to Kubeketerya James v Waira Kyenalabye & Anor [2017] UGCA 107. Counsel contended that election petitions have to be handled expeditiously, the rules and timelines set for filing proceedings are couched in mandatory terms and must be strictly interpreted and adhered to. Counsel relied on Abiriga Ibrahim v Musema Mudathir (supra) to support this submission.
- [22] Counsel contended, while relying on Omara v Acon & 3 Ors [2016] UGCA 22, that rule 83(2) and (3) of the rules of this court do not apply to institution of election appeals. Counsel submitted that the reasoning of the court in the case was that since parliamentary election petition rules provide for separately filing a memorandum and record of appeal unlike in ordinary civil appeals, an appellant who upon requesting for the record of proceedings which is not availed in time cannot resort to rule 83(2) and (3) because the memorandum of appeal is an independent document strictly filed within 7 days after filing the notice of appeal and the record of appeal must strictly be filed in 30 days after filing the memorandum of appeal.
- [23] Counsel for respondent no.1 contended that in this instant case, the applicant should not have waited for the registrar to avail the record of proceedings as claimed before filing the memorandum of appeal. The applicant had all the necessary documents to formulate the grounds of appeal and to prepare the record of appeal in time. Counsel contended that in the event of any missing information, the applicant would have resorted



to rule 90(3) of the rules of this court that allows an applicant to file a supplementary record of appeal.

[24] Counsel for respondent no. 1 argued that both the applicant and her lawyers were negligent as they did not give the appeal the necessary attention and expedience hence they have not justified the validation of the appeal. Counsel stated that the applicant is guilty of dilatory conduct by failing to comply with the prescribed time which is inexcusable. Counsel for respondent no.1 prayed that this court strikes out the notice and memorandum of appeal with costs.

[25] In rejoinder to counsel for respondent no.1's submissions, counsel for the applicant submitted that that rule 83 of the rules of this court is applicable to the election petition rules pursuant to rule 36 of the Parliamentary Elections (Election Petitions) appeal rules. Counsel relied on Kajara v Mugisha (supra) to support this submission. Counsel submitted that none of the parties in the authorities that respondent no.1 relies on applied for extension of time or validation of the appeal. Counsel submitted that in Abiriga v Musema Mudathir (supra), the respondent did not file the letter requesting for the record of proceedings and did not apply for extension of time within which to file the memorandum and record of appeal while in Kubeketerya James v Kyenalabye (supra), the respondents did not apply for extension of time within which to file the memorandum of appeal. In Omara v Acon (supra), the applicant did not serve the notice of appeal on the respondent and the applicant did not show that he served the letter requesting for the record of proceedings on the respondents.

[26] In conclusion, counsel submitted that the applicant complied with rule 83 (2) and (3) of this court and prayed that the applicant be allowed to prosecute its appeal in the interest of justice.

### **Analysis**

[27] This application is brought under rules 2(2), rule 5, rule 43(1) and (2), and rule 83(2) and (3) of the Judicature (Court of Appeal) Directions S.I 13-10,

rule 36 of the Parliamentary Election (Election Petition) Rules. Rule 2(2) of the Judicature (Court of Appeal Rules) rules vests in this court discretionary powers to make such orders as are necessary to meet the ends of justice. It states:

‘(2) Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent abuse of the process of any court caused by delay.’

[28] Rule 5 of the Judicature (Court of Appeal Rules) Directions S.I 13-10 states;

The court may, for sufficient reason, extend the time limited by these Rules or by any decision of the court or of the High Court for the doing of any act authorised or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to the time as extended

[29] The power granted to this court under this rule is discretionary and can only be exercised upon the applicant satisfying court that there is sufficient cause for the extension of time. In Shanti v Hindocha and others [1973] 1 EA 207 at page 207, the court of appeal at Nairobi stated:

‘The position of an applicant for an extension of time is entirely different from that of an applicant for leave to appeal. He is concerned with showing “sufficient reason” why he should be given more time and the most persuasive reason that he can show, as in Bhatt’s case, is that the delay has not been caused or contributed to by dilatory conduct on his part. But there may be other reasons and these are all matters of degree. He does not necessarily have to show that his appeal has a reasonable

prospect of success or even that he has an arguable case but his application is likely to be viewed more sympathetically if he can do so and if he fails to comply with the requirement set out above he does so at his peril.’

- [30] The applicant in this case seeks to extend the time in which to file the memorandum and record of appeal and consequently validate the appeal. Rule 29 of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules Statutory Instrument 141—2 requires an intending appellant to file the notice appeal, if it is in writing, within seven days after the judgment is passed. It states:

‘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.’

- [31] The judgment that the applicant seeks to appeal against was passed on 19<sup>th</sup> October 2021. The applicant filed the notice of appeal in the High court on 26<sup>th</sup> October 2021 and served the same on respondent no.1 on 28<sup>th</sup> October 2021 and respondent no.2 on 29<sup>th</sup> October 2021. This was done within the prescribed time.

- [32] Rule 30 (b) of the Parliamentary Elections (Interim Provisions) (Election Petitions) rules requires the intended appellant to file the memorandum of appeal within seven days in a case where the notice of appeal was in writing. Rule 30 states:

‘A memorandum of appeal shall be filed with the registrar—  
(a) in a case where oral notice of appeal has been given, within fourteen days after the notice was given; and  
(b) in a case where a written notice of appeal has been given, within seven days after notice was given.’

[33] The memorandum of appeal ought to have been filed by 3<sup>rd</sup> November 2021 but was filed in this court on 28<sup>th</sup> December 2021, out of the prescribed time.

[34] The record of appeal should be lodged in court 30 days after the memorandum of appeal has been filed in court. Rule 31 provides:

‘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.’

[35] The applicant lodged the record of appeal in this court on 7<sup>th</sup> January 2022 which is also out of the prescribed time. The rules and timelines set out above are couched in mandatory terms. There is no doubt that election matters must be handled expeditiously thus the specialized rules of procedure and laws governing the hearing of such matters. This is premised on Article 140 of the Constitution which states:

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

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

[36] The wording of the above provision is re-echoed in sections 63 (2) and 66 (2) of the Parliamentary Elections Act and Rules 13 and 33 of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules.

[37] The applicant sought to rely on rule 83 (2) of the rules of this court which grants an automatic extension of time in consideration of the time taken to prepare and deliver the record of proceedings. Counsel for the applicant

contended that the applicant indicated in the notice of appeal that she intended to file the memorandum of appeal upon receipt of the certified copy of the record of proceedings. Counsel also contended that the delay in filing the memorandum of appeal was occasioned by the delay in receiving the record of proceedings.

[38] Much as rule 36 of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules permits the application of civil procedure rules to election petition appeals to this court with such modifications as the court may consider necessary in the interests of justice and expedition of proceedings, the preponderance of authority is that rule 83 (2) of the rules of this court is not applicable to election petition appeals.

[39] In Paul Omara v Acon Julius Bua and 3 others Election Petition Appeal Miscellaneous Application No. 346 of 2016 (unreported), Kakuru, JA stated:

‘Rule 31 requires an intended appellant to lodge with the registrar of this court a record of appeal with 30 days of filing of the memorandum of appeal. This procedure fundamentally differs from that set out under Rule 83 of the Court of Appeal Rules which stipulates as follows:-

**83. Institution of appeals.**

**(1) Subject to rule 113 of these Rules, an appeal shall be instituted in the court by lodging in the registry, within sixty days after the date when the notice of appeal was lodged—**

**(a) a memorandum of appeal, in six copies, or as the registrar shall direct;**

**(b) the record of appeal, in six copies, or as the registrar shall direct;**

**(c) the prescribed fee; and**

**(d) security for the costs of the appeal.**

**(2) Where an application for a copy of the proceedings in the High**

**Court has been made within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the High Court as having been required for the preparation and delivery to the appellant of that copy.**

**(3) An appellant shall not be entitled to rely on sub rule (2) of this rule, unless his or her application for the copy was in writing and a copy of it was served on the respondent, and the appellant has retained proof of that service.**

As clearly set out in the Rule 83 of the Court of Appeal Rules an intended appellant who applies for a copy of High Court proceedings within 30 days of Judgement is granted a consequential extension of time until the High Court has prepared and delivered to the appellant a copy of certified High Court record. Before then time to file a record of appeal does not begin to run. Again under Rule 83(1) of the Court of Appeal Rules an intending appellant must file a memorandum of appeal together with the record of appeal. This is not so under the electoral law as set out above in respect of election petitions.

In an election appeal a memorandum of appeal is filed separately from the record and different time frames are set by law for the filing the memorandum of appeal and for lodging a record of appeal. My humble understanding of the electoral law in this regard is that no consequential extension of time is provided for both the filing of the memorandum of appeal and record of appeal. Each of these documents must be prepared and filed within the time prescribed by the electoral set out above.’

[40] Further, this court in Kubeketerya v Waira Kyenalabye & Anor [2017] UGCA 107 stated:

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

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

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

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

- [41] No reason has been advanced to convince me that the foregoing interpretation of the law should be departed from.
- [42] Secondly, it is clear that the Constitution, The Parliamentary Elections Act and the Rules made thereunder have introduced a statutory and procedural scheme that must ensure that election petition appeals are heard and determined within 6 months of filing, as part of that scheme set certain time lines that parties and the court ought to comply with. This scheme is dramatically different from that available for ordinary appeals. Even if the rules of this court in relation to ordinary appeals to this court applied it is with such modification and adaptations to fit in with the new scheme, not vice versa.
- [43] The applicant in this matter decided to ignore the scheme provided for election petition appeals and write his own rules aligned to the rules of this court for ordinary appeals. In doing so the applicant was in grave error.
- [44] The only ground in the multitude of grounds raised by the applicant that explains the actual position of the applicant is (v) states,
- ‘The notice of appeal clearly cast that the grounds of Appeal shall be formulated and lodged following the receipt of the typed proceedings from the High Court at Mbale.’
- [45] This applicant chose to set his own rules that he would follow, contrary to the Parliamentary Elections (Interim Provisions) (Election Petition) Rules. Such an approach is simply wrong and unlawful.
- [46] The applicant does not have the luxury of opting to file the memorandum of appeal upon receiving the certified copy of the proceedings. Rule 30 (b) of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules is mandatory.



- [47] There is no justification to validate the memorandum of appeal filed out of time, and consequently there is no appeal before this court.
- [48] Rule (2) of the Parliamentary Elections (Election Petitions) (Production of Records of Appeals) Directions, S1 141-4 mandates the trial court to ensure that the record of proceedings is typed and produced in time for the expeditious production of the record of appeal. Where the High Court fails in its duty to produce the record of proceedings in time as required by the aforesaid rules it would be possible in my view for this court to allow an applicant extension of time to file the record of proceedings. However, the court would have to bear in mind the overall statutory scheme for hearing of election petitions and determining them in a very limited period.
- [49] Notwithstanding the foregoing, for purposes of this application, the fact that the applicant had failed, without any justification, in complying with an earlier step of filing the memorandum of appeal, this point is rendered moot, as there is no appeal before this court.
- [50] I am satisfied that the applicant, deliberately, did not take a necessary step to ensure that the appeal is lodged in time. I find that there is no sufficient cause for extension of time.
- [51] I would dismiss this application for lack of merit.

## **Election Petition Appeal Application No. 8 of 2022**

### **Introduction**

- [52] This application was instituted by respondent no.2 against the applicant under rule 2(2), rule 43(1) and (2), rule 82 of the Judicature (Court of Appeal Rules) Directions and rules 30 and 31 of the Parliamentary Election (Interim Provision) (Election Petitions) rules. Respondent no.2 sought an order that the notice of appeal, memorandum of appeal and record of appeal be struck out.

[53] The grounds for the application were set out in the notice of motion as follows:

- 'a) That the Respondent's purported appeal offends the rules of this court, the provisions of the Parliamentary Elections Act and the rules made thereunder for failure to take essential and necessary steps in filing, serving and prosecuting the appeal and the same is as such incompetent, bad in law and barred by law.
- b) That the Respondent failed to file and serve a Memorandum of Appeal within the time prescribed by law.
- c) That the Respondent failed to file and serve a Record of Appeal within the prescribed time by law.
- d) That it is in the interest of justice that the application is granted.'

[54] Mr. Okiror Morris Andrew, counsel for the applicant swore an affidavit in reply to the application. The grounds in opposition to the application as deduced from the affidavit were:

- '4. That the Notice of Appeal and letter requesting for typed proceedings was filed with the Court of Appeal on 28<sup>th</sup> October, 2021 and served on the Applicant herein on 29<sup>th</sup> October. A copy of the duly served notice of appeal and letter requesting for a typed record of proceedings are attached hereto marked "A" and "B" respectively.
- 5. That the notice of appeal clearly reflected that the appellant (respondent herein) would file her memorandum of appeal after receiving the typed record of proceedings from the trial court.
- 6. That we retained proof of service on the Applicant of the notice of appeal and the letter requesting for a typed record of proceedings. A copy of the affidavit of service is attached hereto marked "C".
- 7. That the respondent has duly complied with provisions of the law regarding the necessary steps required to be taken in the pursuit of an intended appeal.

8. That the Judgment in Election Petition No.6 of 2021 was delivered by the trial Judge at her primary station being the Land Division at Kampala.
9. That there were unavoidable delays in the preparation of the typed record of proceedings occasioned by the fact that the main file in Election Petition No. 6 of 2021 had to be officially moved from Kampala and returned to Mbale High Court.
10. That this task of moving the file could only be executed by the Judiciary staff which further prolonged the delays.
11. That after a draft of the record of proceedings was typed, the same had to be returned for the perusal and approval of the trial judge who had now been transferred to the Commercial Division.
12. That the certified typed record of proceedings was only made ready on the 21<sup>st</sup> day of December, 2021 during the Christmas break. A copy of the certified record of proceedings is attached hereto marked "D)".
13. That the same was only received by our office on the 27<sup>th</sup> day of December, 2021 due to the closure of the Registry at Mbale and the Christmas holiday.
14. That the proceedings/rulings made prior to scheduling by the learned trial Judge during the hearing of the Election petition were pertinent to the prosecution of the Appeal by the respondent hence the necessity for the securing the certified typed record of proceedings from the trial court.'

### **Submissions of Counsel**

- [55] At the hearing, the applicant was represented by Mr. Elijah Enyimu and Mr. Okiror Morris and respondent no.2 was represented by Mr. Ambrose Tebyasa, Mr. Evans Ochieng and Ms. Sandra Vicensia Namigadde. The parties opted to rely on their written submissions on record.
- [56] I have considered the submissions filed by counsel for the applicant and respondent no.2. Both counsel more or less reiterated their submissions in

Election Application Petition No. 14 of 2022. It is therefore not necessary to reproduce the same submissions here.

## **Analysis**

[57] Rule 82 of the Rules of this Court provides:

‘82. Application to strike out notice of appeal or appeal.  
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.’

[58] This rule permits an applicant who has been served with a notice of appeal to move court to strike out an appeal or notice of appeal where the intending appellant has not taken an essential step in the proceedings within the prescribed time as in this instant case. I have already established in Election Petition Application No. 14 of 2022 that the applicant failed to file the memorandum of appeal in time. That is sufficient ground to strike out the appeal.

[59] I would therefore allow this application and strike out the appeal with costs.

## **Election Petition Appeal Application No. 11 of 2022**

[60] In light of the finding in Election Petition Applications No. 14 of 2022 and no. 8 of 2022, it is not necessary to consider this application, as there is no appeal for which additional evidence can be called. However, for the benefit of the applicant and his counsel that brought this application, I will consider the grounds he set forth.

[61] The applicant filed Election Petition Application No. 11 of 2022 seeking to adduce additional evidence for the purpose of hearing Election Petition Appeal No. 84 of 2022. The grounds for the application were set out as follows:

- i. The intended additional evidence was not available to the trial Judge during the adjudication of Mbale Election Petition No. 6 of 2021.
- ii. The intended additional evidence is credible, material and relevant to the issues in Election Appeal No.84 of 2021.
- iii. The additional evidence shall enable this Honorable Court to arrive at a balanced, fair and just decision.
- iv. The respondents will not suffer any injustice or prejudice if the application is granted.
- v. That this Application has been brought without undue delay.
- vi. It is in the interest of substantive justice that this application be granted to enable court examine the issues in contention.'

[62] The applicant contended in paragraph 4-9 in her affidavit in support of the motion that:

4. That my former lawyers that prepared the Election Petition documents erroneously and negligently omitted to include the back pages of the Declaration of Result forms when compiling the Petition and supporting affidavit.
5. That as a result the same were filed with one sided faces of the Declaration of Results forms relied on at the hearing of the election petition.
6. That at the preliminary mention my counsel sought leave to file a supplementary trial bundle with the complete Declaration of Results forms which was opposed by the 1<sup>st</sup> respondent's counsel.
7. That the trial Judge also declined to grant me the leave to present the complete declaration of result forms citing no new evidence will be allowed.

8. That this evidence could not be produced at the time of the petition in light of the Judge's ruling on my counsel's request.

9. That the trial court went ahead to make its findings without having the benefit of examining the back pages of the said declaration of result forms which were not available to the trial judge.'

[63] The respondents opposed the application. Kugonza Enoch, the principal legal officer for respondent no.1 swore an affidavit in reply to the application on behalf of respondent no.1 and respondent no.2 also swore an affidavit in reply in opposition to the application.

### **Submissions of Counsel**

[64] At the hearing of the application, the applicant was represented by Mr. Elijah Enyimu and Mr. Okiror Morris, respondent no.1 was represented by Mr. Jude Mwase and respondent no.2 was represented by Mr. Ochieng Evans, Mr. Ambrose Tebyasa and Ms. Namigadde Vicensia Sandra. The parties opted to adopt their written submissions on record.

[65] Learned counsel for the applicant stated the principles and conditions upon which an appellate court can exercise its discretion to allow an application for adducing additional evidence as was stated in Kawooya v National Council for Higher Education [2014] UGSC 132. Counsel submitted that the application satisfied all the conditions stated therein. Counsel for the applicant submitted that the applicant has new and important matters of evidence that could not be produced at the time of trial due to the circumstances she stated in paragraphs 4 to 9 of the affidavit in support. Counsel for the applicant contended that the evidence sought to be adduced is relevant to the issues in the appeal because the declaration of result forms sought to be adduced as additional evidence are relevant in proving the election offences and malpractices which are the subject of the appeal.

[66] Counsel for the applicant contended that the complete declaration of results forms are credible since they are the original documents issued to the

applicant's polling agents during the voting process. Council contended that since one of the grounds of appeal relates to wrong results or altered results on the declaration of results forms, the complete forms with the back side attached will have an influence on the determination of the election petition appeal. Counsel for the applicant submitted that annexure 'C' attached to the affidavit in support of the application constitutes the additional evidence that the applicant is seeking to adduce.

[67] Counsel for the applicant further submitted that the application was brought without unreasonable delay. The application could only be filed after 7<sup>th</sup> January 2022 when the record of appeal had been filed and it was filed before the summons to appear for conferencing were issued on 10<sup>th</sup> February 2022 in the appeal. The applicant prayed that this court grants the application since it is in the interest of justice of having a balanced, fair and just decision in determining of the appeal.

[68] In reply, counsel for respondent no.1 submitted that the applicant has not demonstrated any credible reason for grant of the leave sought. Counsel contended that the applicant did not change her lawyers since inception of the petition as alleged. The applicant and her lawyers neglected to photocopy both sides of the declaration of results forms that were in their possession as primary evidence during the preparation of the petition hence they cannot be claimed as new matters of evidence on appeal.

[69] Counsel contended that the intended additional evidence is immaterial to the appeal since the issues to be resolved by this court revolve around the allegations of alteration, multiple voting, forgery and making wrong returns. counsel for respondent no.1 contended that the applicant does not need the back pages of the declaration of results forms to prove her allegations since all relevant information to do with figures is found at the top face of the declaration form which is on record. Counsel for respondent no.1 submitted that even if the documents were relevant to the case, respondent no.1's affidavits in support of the answer to the petition contained certified double faced copies of all declaration of results forms being questioned by the applicant.

- [70] Counsel further submitted that the intended additional evidence is not credible because the applicant has not demonstrated that the forms originated from the Electoral Commission. There is no correlation between the top page and the purported back page of the declaration forms since they are separate. Counsel submitted that in the absence of the original which is a single double faced form or one duly certified by respondent no.1, the two separate two-page declaration forms cannot be relied upon. Counsel for respondent no.1 further submitted that it is trite law that public documents can only be proved by production of the original or certified copies which the applicant has not done. Counsel relied on sections 73 and 76 of the Evidence Act and also submitted that presenting two separate pages of a declaration form may risk the top and back pages being mismatched.
- [71] Counsel for respondent no.1 submitted that during the scheduling conference, leave was granted to the applicant's lawyers to certify all documents originating from the Electoral commission which included copies of the declaration of results forms in issue but the applicant elected to certify only packing lists that were adduced as additional evidence.
- [72] Counsel for respondent no.2 reiterated the position of the law in Kawooya v National Council for Higher Education (supra) and contended that the applicant had not demonstrated any sufficient reason for the grant of the application. Counsel contended that the evidence that the applicant seeks to adduce is not new as it was in possession of the applicant and her lawyers, a fact that the applicant admitted to in paragraphs 6, 7 and 8 of her affidavit in support of the application.
- [73] Counsel contended that the applicant never sought leave of court to file the complete declaration of results forms as alleged. Counsel referred to the evidence on page 314 of the record proceedings to support this submission. Counsel contended that it was not negligence of counsel but it was a deliberate move by the applicant to file an incomplete declaration of results forms. Counsel for respondent relied on Hadondi Daniel v Yolamu Egondi



- [74] Counsel for respondent no.2 contended that the proceedings that the applicant attached to the application show that the applicant sought leave to file the national voters' register for Kapkoloswa, Kaptererwa and Kapsarur in Kapnandi town council and also be allowed to number the pages of the petition. Counsel submitted that the trial court in its ruling granted leave to the applicant to file complete certified copies of documents attached but the applicant ignored the order.
- [75] Counsel for respondent no.2 submitted that the applicant ought to have appealed against the ruling of the trial court if it were true that she indeed made the application instead of making an application to admit what the trial judge initially rejected. Counsel submitted that complete records of the declaration of results forms were produced by respondent no.1 and admitted in evidence as exhibits and were analysed by the trial court in the determination of the appeal.
- [76] Counsel for respondent no.2 further contended that the documents that the applicant intends to adduce into evidence as additional evidence are not credible because they are uncertified public documents. Counsel averred that the applicant has failed to prove to court how the admission of the additional evidence will influence the results of the case. Counsel contended that declaration of results forms is not evidence of mal practice in the absence of proof of alteration of results by relevant cogent, credible and independent evidence. Counsel for respondent no.2 further submitted that the applicant has failed to prove that the application was expeditiously filed in court because the applicant filed the application four months after the judgment was passed upon realising that respondent no.2 had applied to strike out the appeal.
- [77] Counsel for the respondents prayed that this court dismisses the appeal with costs for lack of merit.

## Analysis

[78] This application is brought under rule 2 (2), rule 30 (1) (b), rule 43 (1) and (2) of the Judicature (Court of Appeal Rules) Directions. Rule 30 (1) (b) vests in this court discretionary power to grant an application for adducing additional evidence. It states:

‘30. Power to reappraise evidence and to take additional evidence.

(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—

(a) reappraise the evidence and draw inferences of fact; and

(b) in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner’

[79] In Attorney General v Paul K Ssemogerere and Ors [2004] UGSC 3, the Supreme Court laid down the principles upon which courts should take consideration for the grant of an application for adducing additional evidence. It stated:

‘There are no authorities on what principles or conditions this Court may allow an application such as the present, but our opinion is that authorities or decided cases which are relevant to this Court's discretion to admit additional evidence on appeals to it do provide useful guidance for that purpose, and are of persuasive value. We have in mind: **Ladd Vs Mashall (1954) 3 All ER 745 at 148 Skone Vs Skone (1971), 2 All ER 582 at 586; Langdale Vs Danby (1982) 3 ALL ER. 129 at 137; Sadrudin Shariff Vs Tarlochan Singh (1961) EA.72, Elgood Vs Regina (1968) EA 274; American Express International Vs Atulkimar S.Patel, Application No.8B, of 1986 (SCU) (unreported); Karmali Vs Lakhani (1958), EA.567 and Corbett (1953), 2 ALL ER, 69.**

A summary of these authorities is that an appellate court may exercise its discretion to admit additional evidence only in exceptional circumstances, which include:

(i) Discovery of new and important matters of evidence which, after the exercise of due diligence, was not within the knowledge of, or could not have been produced at the time of the suit or petition by, the party seeking to adduce the additional evidence;

(ii) It must be evidence relevant to the issues;

(iii) It must be evidence which is credible in the sense that it is capable of belief;

(iv) The evidence must be such that, if given, it would probably have influence on the result of the case, although it need not be decisive;

(v) The affidavit in support of an application to admit additional evidence should have attached to it, proof of the evidence sought to be given;

(vi) The application to admit additional evidence must be brought without undue delay.

These have remained the stand taken by the courts, for obvious reasons that there would be no end to litigation unless a court can expect a party to put its full case before the court. We must stress that for the same reason, courts should be even more stringent to allow a party to adduce additional evidence to re-open a case, which has already been completed on appeal.'

[80] The applicant seeks leave to adduce copies of back pages of the declaration of result forms attached to her affidavit in support of the application and marked as annexure 'C'. The applicant contended that her former lawyers negligently omitted to include the back pages of the declaration of results

forms while compiling the petition and the supporting affidavits. Counsel for the applicant averred that the applicant sought leave to file a supplementary trial bundle with the said documents but the trial court declined to grant the leave. At the same time counsel for the applicant alleged in the grounds of the application that the documents were not available to the applicant at the time of hearing the election petition which is false.

[81] It is not true that the applicant sought to adduce the additional evidence at the preliminary hearing of the application. The record of proceedings of 18<sup>th</sup> August 2021 is clear on what transpired in court. The relevant part of the proceedings at page 3 of the record of proceedings states as follows:

**‘Enyimu:**

We want to invoke Court under Order 10 R. 2(a) for receiving from the 1<sup>st</sup> Respondent for the National Voter Registration for Kapkolosaw Stadium.

We also pray for the party lost [*sic*] for Kaptererno and Kapsarur and Kapnandi T.C.

We need to get copies to rely on and pray for leave to file a supplementary Trial bundle once availed by the 1<sup>st</sup> Respondent.

We will also seek to number the pages of our petition during marking of the documents.

**Ojok:**

I am holding brief for Counsel Tebyasa. The prayers by Counsel for Petitioner go to Rules of Evidence and Prejudice the 2<sup>nd</sup> Respondent. The Pleadings have been filed and will need as to further respond

**Mwase:**

The pleadings closed the matter as for scheduling otherwise we will keep on re-opening the Petition.

**Court:**

In the circumstances no new evidence of discovery will be allowed since it will re-open the petition and prejudice the Respondent’s case.

However being a Public interest matter the documents on the Petition attached and alleged to be from the Electoral

Commission should be certified to confirm to the rules of evidence and avoid descending into technicalities that do not address the root of the matter.

Accordingly the prayer for supplementing Trial Bundle is denied and Electoral Commission directed to confirm the documents that fall under their statutory mandate.

Parties to file a signed memorandum of facts agreed and issues on 30/08/21 and appear in Court on 31/08/21 at 9:00 a.m. for scheduling and getting schedules for filing written submissions.'

[82] As seen above, the learned trial judge directed the parties to certify the documents already attached to the petition alleged to emanate from the Electoral Commission but the applicant did not certify the declaration of results forms. During the joint scheduling conference, counsel for the applicant indicated at page 48 of the record of appeal that they do not agree with the Electoral Commission's certified results thus produced uncertified copies of the documents. The documents were not admitted into evidence but marked as PID with a corresponding number. These included the front pages of the back pages of the declaration forms that the applicant seeks to adduce as additional evidence. The front pages of the declaration of results forms being uncertified copies of public documents are already of no evidential value in light of section 73, 75 and 76 of the Evidence Act. It is pointless to allow the applicant to adduce the back pages of the uncertified copies of the declaration of results forms since they would not also have any evidential value as they cannot be relied upon by court.

[83] The applicant may blame her former lawyers for omitting to include the back pages of the declaration of result forms when compiling the petition and the supporting affidavits because the applicant and her counsel were aware of the omission throughout the trial. The applicant did not bother to rectify the matter when ordered to file certified copies from the Electoral Commission. At page 315 of the record of appeal, respondent no.1 raised this issue in its affidavit in support to the answer to the petition deposed by Msika Elijah Ndinyo in paragraph 9 but the applicant did not take the necessary steps to rectify the issue. Besides, a copy of the complete

certified declaration of results forms was adduced by respondent no.1 in evidence and is on record.

[84] Lastly it must be pointed out the evidence sought to be adduced in this court has all along been in the hands of the applicant and her counsel. It has just not been discovered. The failure to produce it in the trial court was negligent conduct of the applicant's counsel. And that is not sufficient reason to allow an applicant adduce additional evidence on appeal.

[85] In *Mohammad B. Kasasa v Jasphar Buyonga Sirasi Bwogi* (supra), this court stated:

‘A client is bound by the actions of his counsel. Negligently drafting the plaint or incompetence in doing the same is not an excuse for a client to escape being bound by his counsel's action. See: **Capt. Philip Ongom Vs Catherine Nyero** Civil Appeal No.14 of 2001 SC (unreported) and **Handon Daniel Vs Yolamu Egondi** (supra).’

[86] I find no sufficient reason for the grant of the application. I would therefore dismiss the application with costs for lack of merit.


### **Decision**

[87] As Madrama and Luswata, JJA, agree, Election Petition Appeal App No. 14 of 2022 is dismissed with costs.

[88] As Madrama and Luswata, JJA, agree, Election Petition Appeal App No. 08 of 2022 is allowed with costs. Election Petition Appeal No. 84 of 2021 is accordingly struck out with costs.

[89] As Madrama and Luswata, JJA, agree, Election Petition Appeal App No. 11 of 2022 is moot and is struck out with costs.

Signed, dated and delivered at Kampala this 06<sup>th</sup> day of May 2022.



Fredrick Egonda-Ntende  
**Justice of Appeal**

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

*[Coram: Egonda-Ntende, Madrama & Kawuma Luswata, JJA]*

**ELECTION PETITION APPEAL APPLICATIONS NO. 11 OF 2022, 08 OF 2022 & 14 OF  
2022**

*(Arising from Election Petition Appeal No. 84 of 2021)*

*(Arising from Election Petition No. 006 of 2021)*

**BETWEEN**

Tete Chelengat Everline ===== Applicant /Respondent

**AND**

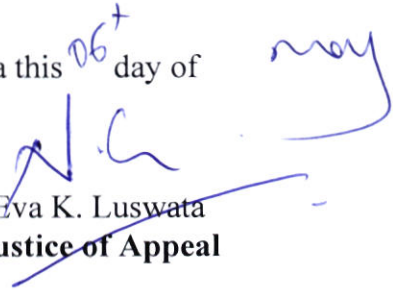
Electoral Commission ===== Respondent No.1

Chemutai Everlyn=====Respondent No.2/Applicant

**RULING OF EVA K. LUSWATA, JA**

- [1] I have had the opportunity to read in draft the rulings of my brother, Egonda-Ntende, JA. I do agree with his findings, and decision and have nothing to add.
- [2] I would dismiss Election Petition Application No. 14/2022 with costs for lack of merit.
- [3] I would allow Election Petition Application No. 08/2022 to strike out Election Petition Appeal No. 84 of 2021 with costs.
- [4] I would dismiss Election Petition Application No. 11/2022 with costs for lack of merit.

Dated, signed and delivered at Kampala this <sup>06<sup>+</sup></sup> day of <sup>may</sup> 2022

  
Eva K. Luswata  
**Justice of Appeal**



**THE REPUBLIC OF UGANDA,  
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA  
(CORAM: EGONDA NTENDE, MADRAMA AND LUSWATA JJA)  
ELECTION PETITION APPEAL APPLICATIONS NO 11 OF 2022, 08 OF 2022  
AND 14 OF 2022**

**(Arising from Election Petition Appeal No 84 of 2021)**

**(Arising from High Court Election No 006 of 2021)**

**BETWEEN**

**TETE CHELENGAT EVERLINE} ..... APPLICANT/RESPONDENT**

**AND**

**1. ELECTORAL COMMISSION} .....RESPONDENT NO 1**

**2. CHEMUTAI EVERLYN.....RESPONDENT NO 2/APPLICANT**

**RULING OF CHRISTOPHER MADRAMA, JA**

I have had the benefit of reading in draft the ruling of my learned brother Hon. Mr. Justice Frederick Egonda – Ntende, JA in Election Appeal Application No. 14 of 2022, dismissing the application for extension of time for lack of merit.

Secondly, I have also read the ruling of my learned brother Hon. Mr. Justice Frederick Egonda – Ntende, JA in Election Appeal Application No. 08 of 2022 allowing the application to strike out the appeal with costs.

Thirdly I have read the ruling of my learned brother Hon. Mr. Justice Frederick Egonda – Ntende, JA in Election Appeal Application No.11 of 2022 dismissing the application with costs.

I agree with all the above rulings and orders for the reasons given in the three rulings and I have nothing useful to add.



Dated at Kampala the 06 day of may 2022



Christopher Madrama

Justice of Appeal