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THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA  
ELECTION PETITION APPEAL MISCELLANEOUS APPLICATION NO. 19 OF 2021  
(Arising from Election Petition Appeal No. 032 of 2021)  
(Coram: Richard Buteera, DCJ, Hellen Obura & Catherine Bamugemereire, JJA)

10  
LUBADDE EDGAR:.....:APPLICANT  
VERSUS  
1. NSUBUGA PAUL  
2. ELECTORAL COMMISSION:.....:RESPONDENTS

15  
RULING OF THE COURT

Background

20 The brief background to this application as gathered from the documents on record are that the applicant and Hon. Paul Nsubuga (the 1<sup>st</sup> respondent) together with 4 others contested for the parliamentary seat of Busiro County North Constituency of Wakiso District. The 1<sup>st</sup> respondent was returned and declared by the Electoral Commission (the 2<sup>nd</sup> respondent) as the successful candidate with 21,401 (Twenty-one thousand four hundred and one) votes while the applicant was the last with 199 (One hundred ninety-nine) votes. Being dissatisfied, the applicant filed Election Petition No. 008 of 2021 against the respondents before the High Court of Uganda at Kampala (Civil Division) challenging the election of the 1<sup>st</sup> respondent and declaration of him by the 2<sup>nd</sup> respondent as the Member of Parliament elected for Busiro North County Constituency. On 24<sup>th</sup> September 2021, the High Court delivered Judgment in the said Election Petition No. 008 of 2021 in favour of the respondents.

30 Being aggrieved by the decision of the High Court, the applicant filed a Notice of Appeal on 30<sup>th</sup> November, 2021 within the statutory 7 days from the date of judgment and on that same day requested for the record of proceedings and served the letter requesting for the same on the respondents. On 7<sup>th</sup> October 2021 the applicant filed a Memorandum of Appeal also within the statutory 7 days after the Notice of Appeal had been given.

35 The applicant's lawyers upon failing to get the record of lower court proceedings, wrote another letter to the Registrar High Court at Kampala (Civil Division) on 5<sup>th</sup> November 2021 to follow up on the earlier request which had been made on 30<sup>th</sup> September 2021 and it was on the same day that they found out that the request had been granted the previous day. The applicant then filed the record of proceedings on 08<sup>th</sup> November 2021 and served the



5 Respondents on 18<sup>th</sup> November, 2021 which was outside the stipulated time within which to file and serve the record of appeal.

On the 26<sup>th</sup> November 2021, the applicant filed this application seeking for orders that; the record of appeal which was filed and served out of time be validated by grant of extension of time within which it ought to have been filed and served; and the costs of and incidental to this application abide the result of the appeal. The application was brought under rules 4, 5, 10 42, 43 and 88 of the Judicature (Court of Appeal Rules) Directions and it is premised on several grounds which are contained in the Notice of Motion and in the affidavit in support deposited by the applicant on 26<sup>th</sup> November, 2021. The grounds are briefly as follows;

- 15 a) *"The late filing and service of the Record of Appeal was due to the delay to have the record of proceedings in time and the deadline for filing the Record of Appeal was supposed to be on the 6<sup>th</sup> day of November 2021 which date was a Saturday and the Applicant could not file the same since the court registry was closed and thus Appellant/Applicant filed the Record of Appeal on the 8<sup>th</sup> day of November 2021 which was a Monday.*
- 20 b) *The failure to supply the record of proceedings of Election Petition No. 008 of 2021 on time occasioned the Applicant's inability to file the Record of Appeal within the statutory period of 30 days which were falling on the 6<sup>th</sup> day of November 2021 and the same date was a Saturday outside court working days.*
- 25 c) *The failure to serve the Record of Appeal on time to the Respondents was caused by the Applicant's Lawyer's Clerk who picked the documents from the court registry but failed to effect service within the required statutory 7 days and served when two days had elapsed.*
- 30 d) *The Applicant has valid grounds of appeal which raises serious questions of law and fact for consideration of the Court of Appeal with High probability of success.*
- e) *That the procedural lapses in filing and serving the record of appeal by the Applicant's Counsel do not go into the heart of the Election dispute engaged by the Head Appeal as the Notice of Appeal and Memorandum of Appeal were both filed and served within the required statutory period/time.*
- 35 f) *That Election Petitions and Election Petition Appeal are not only of importance to the parties to such petitions and or Appeals arising therefrom but rather entire human race and hence ought to be determined on their merits.*
- g) *This Honorable Court is constituted for administration of justice and any rule and or Act of Parliament attempting to tie its hands in the administration of justice is obsolete and void.*
- h) *This Honorable Court is enjoined with wide and unfettered discretion to enlarge time within which a Record of Appeal filed and served out of time can be served and/or validated.*
- i) *That it is in the interest of justice that this application ought to be allowed.*
- j) *That delay has not caused prejudice to the Respondents in any form."*



5 In reply, the respondents opposed the application on the grounds stated in their respective affidavits in reply. The 1<sup>st</sup> respondent deposed his affidavit on 16<sup>th</sup> March, 2021. The material parts of his affidavit are as follows;

10 3. ***“THAT I have been advised by above mentioned lawyers which advice I verily believe to be true that the application is vexatious, misconceived, an abuse of court process and brought in bad faith by reason of which court shall be moved to dismiss it with costs for the following reasons:-***

a) *The applicant has not shown sufficient cause warranting this honorable Court to validate the Record of Appeal filed and served out of time by way of extending time within which it ought to have been filed and served.*

b) *The Applicant has not been vigilant in prosecuting Election Petition Appeal No. 032 of 2021.*

15 4. ***THAT I have also found the affidavit of LUBADDE EDGAR to contain material falsehoods intended to mislead this Honorable Court.***

20 7. ***THAT I was the 1<sup>st</sup> Respondent in Election Petition No. 008 of 2021 – Lubadde Edgar versus Nsubuga Paul and the Electoral Commission in which Hon. Justice Dr. Winifred Nabisinde delivered judgment on the 24<sup>th</sup> day of September 2021 at the High Court of Uganda at Kampala wherein Court confirmed me as the validly elected Member of Parliament for Busiro North County Constituency.***

25 8. ***THAT I am reliably informed by my above mentioned lawyers which information I verily believe to be true that the contents of paragraphs 5 and 6 of the affidavit in support of the Application are correct in as far as they relate to filing and serving onto them a letter dated 30<sup>th</sup> September requesting for record of proceedings, however, the applicant shall be put to strict proof of any attempts that were taken by him to procure the same but in vain as alleged up to the 5<sup>th</sup> day of November 2021.***

30 9. ***THAT in specific reply to paragraphs 7, 8 and 9 of the affidavit in support of the Application, I am reliably informed by my above mentioned lawyers which information I have no reason to doubt that the Applicant’s failure to file and serve the record of Appeal on time by law prescribed was due to the Applicant’s dilatory conduct and or inordinate delay in following up on the Record of proceedings for a period of 36 days from the date of the first request being the 30<sup>th</sup> day of September 2021.***

35 10. ***THAT in specific reply to paragraph 10 of the affidavit in support of the Application, I am reliably informed by my above mentioned lawyers which information I verily believe to be true that the sickness of the lawyer’s clerk (Magawa Nelson) that is if it is even true cannot itself justify late service of court process as service could be affected by any other person by law authorized other than the purported sick person.***

40 11. ***THAT in further reply thereto, I am further informed by my above mentioned lawyers which information I verily believe to be true that the Applicant who managed to effect late service of the record of appeal could have as well served the same on time instead of holding onto the purported sick clerk. (See copy of the Record of Appeal served by the Applicant attached hereto and marked as Annexure NP1).***

5           12. **THAT** I swear this affidavit in reply contending that the sickness of the lawyer's clerk does not constitute sufficient cause warranting this honorable Court to validate the Record of Appeal filed and served out of time by way of extending time within which it ought to have been filed and served since the Applicant has not proved to this honorable Court any vigilance in prosecuting his Appeal."

10       The 2<sup>nd</sup> respondent also opposed the application and in their affidavit in reply which was deposited by Eric Sabitti on 18<sup>th</sup> March, 2022, the material parts of which are as follows:

          "10. That the applicant filed the impugned Record of Appeal on 8<sup>th</sup> November 2021 and served upon the Respondent outside the time prescribed in the Rules.

          11. That after filing the Record of Appeal, the Applicant did not take any other essential step a serious litigant would have taken to prosecute the Appeal in accordance with the rules of this Court.

15       12. That the instant Application discloses no sufficient reason for the Applicant's failure to take the essential step of serving the Respondent with the Record of the Appeal within the prescribed time.

          13. That this Application ought to be dismissed in light of the constitutional command of expeditious disposal and timely resolution of electoral disputes."

## Representation

20       At the hearing, Mr. Christopher Kajwara and Mr. Kefa Nyambane appeared for the applicant while Mr. Chrisostom Katumba and Ms. Juliet represented the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent was represented by Mr. Lugolobi Hamidu and Ms. Gilda Katuutu.

          Counsel for all the parties informed court that they had filed and served their respective written submissions which they sought leave of court to adopt as their arguments in the application.  
25       Court granted them leave and the written submissions were accordingly adopted and this court have considered them in this ruling.

          It should be noted that this application was fixed and heard on the same date with Election Petition Appeal No. 032 of 2021 from which it arises and they were both adjourned for ruling and judgment to be delivered on notice. However, upon studying the application, we have  
30       found it imperative to deal with the application first because resolution of the issues raised in it may dispose of the whole appeal.

5 **Applicant's case**

10 In their written submission, counsel for the applicant submitted that rule 5 of the Judicature (Court of Appeal Rules) Directions gives this Court discretionary powers to extend time for filing and serving the record of appeal if the applicant demonstrates sufficient reason for failing to file and serve the record of appeal within the statutory period of 30 days from the time of filing the Memorandum of Appeal. They added that the expression 'sufficient reason' is not defined anywhere in the Rules but the Supreme Court in **Rosette Kizito vs Administrator General and Others, Supreme Court Civil Application No. 9 of 1986** held that sufficient reason must relate to the inability or failure to take the particular step in time.

15 It was their contention that the applicant has been vigilant and serious in pursuing his appeal and that he is not guilty of dilatory conduct as he took essential steps in the appeal process as required by law and within the statutory period. They argued that the inability to file the record of appeal on or before 6<sup>th</sup> November 2021 was first due to the delay by court to avail the applicant the lower court record of proceedings which caused the record of appeal to be prepared on the last day, a Saturday when Court Registries are closed. Therefore, when the  
20 record of appeal was filed on Monday 08<sup>th</sup> November 2021, a working and non-excluded day, the applicant was outside the statutory deadline for filing the record of appeal by one day (or two if the excluded day of Sunday is added).

25 Counsel submitted that the record of appeal was served on the respondents on 18<sup>th</sup> November 2021, which was 2 days after lapse of the 7 days' statutory period for effecting service. They argued that this was caused by the sickness of the applicant's lawyer's clerk, Magawa Nelson, after he had picked the signed record of appeal from the court registry. In their view, this constituted tardiness or negligence on the part of counsel and not the applicant who has always been vigilant in pursuing his appeal. Counsel prayed that the applicant having established that his inability to file and serve the record of appeal within the statutory period  
30 provided under the law was caused by counsel's negligence, such negligence should not be visited upon the applicant.

35 They further submitted that negligence of counsel has been held to constitute sufficient cause for purposes of extending time for doing an act and in such circumstances, courts have been reluctant to hold the applicant guilty of dilatory conduct. They supported this argument with the decisions in the cases of **Sabiiti Kachope and 3 others vs Margaret Kamuje, Supreme Court Civil Application No. 31 of 1997 (1999) KALR 238; Seperia Kyamulesiire vs**



5 ***Justine Bikanshire Bagambe, Civil Appeal No. 20 of 1995 and Hon. George Patrick Kassajja vs Frederick K. Ngobi Gume & Anor: Court of Appeal Civil Application No. 56 of 2016.***

10 According to counsel, the procedural lapses in the filing and service of the record of appeal by counsel for the applicant do not go into the heart of the election dispute sought to be determined by this Court. They added that the Memorandum of Appeal demonstrates meritorious grounds deserving of consideration by this Court which has discretion to grant the orders sought and that the respondents will not be prejudiced in any way as they will have the opportunity to defend the appeal on the merits. Counsel urged this Court to find that the applicant has demonstrated that there was sufficient reason for his failure to file and serve  
15 the record of appeal within the statutory period. They then prayed that this Court exercises its inherent and unfettered discretion under Rule 5 of the Rules of this Court to validate the record of appeal by granting extension of time within which the record of appeal should be filed and served. They also prayed that the costs of this application abide the outcome of the appeal.

#### **1<sup>st</sup> respondent's case**

20 In reply, counsel for the 1<sup>st</sup> respondent submitted that the applicant has not demonstrated sufficient reason for his failure to file and serve the record of appeal within the statutory period. They argued that the applicant's lawyer requested for the record of proceedings on the 30<sup>th</sup> day of September 2021 and only afforded to make a follow up on the 5<sup>th</sup> day of November 2021 which is a period of over 36 days after the same was first filed in court. They added that  
25 this amounts to dilatory conduct on the part of the applicant as the same shows that he was not vigilant in pursuing his appeal. Further that he did not take the necessary steps to "follow" up to find out whether the record of proceedings was ready and yet he was aware that he had a duty to file and serve the record of appeal within the statutory period of 30 days.

30 Counsel also submitted that the sickness of applicant's lawyer's clerk (Magawa Nelson) could not itself justify late service of court process as service could be effected by any other person by law authorized other than the purported sick clerk. He argued that the applicant who himself managed to effect late service of the record of appeal could have as well served the same on time instead of waiting for the purported sick clerk. They cited the case of ***Tiberio Okeny and Another vs The Attorney General and 2 Others C. A Civil Appeal No. 51 of***  
35 ***2001***, to support their submission and added that much as it is trite law that counsel's tardiness or negligence should not be visited upon the applicant, it can only suffice as



5 sufficient cause if there is no inordinate delay or negligence to observe requirements of the law.

Further, that the extension of time and or validation of the record of appeal sought is only intended to delay justice and deny the 1<sup>st</sup> respondent enjoyment of the fruits of his judgment. Counsel prayed that the application for extension of time and/or validation of the record of  
10 appeal be dismissed with costs to the 1<sup>st</sup> respondent.

### **2<sup>nd</sup> respondent's case**

Counsel for the 2<sup>nd</sup> respondent associated themselves with the submissions of counsel for the 1<sup>st</sup> respondent and added that it is not in the interest of justice to allow the instant application in light of the fact that the parties have a duty to ensure they comply with their  
15 respective timelines and the Court must adhere to its own. They added that there must be a fair and level playing field so that no party or the court loses the time that he/it is entitled to and no extra burden should be imposed on any party or the court as a result of omissions, inadvertences which are foreseeable or could have been avoided.

Counsel argued that the rules of procedure were made to enable the expeditious disposal of election related matters. They relied on the case of ***Bakaluba Mukasa Peter & The Electoral Commission vs Nalugo Mary Margret Sekiziyivu, Election Petition Application No. 24 of 2011, Sections 63(2) and 66 (4) of the Parliamentary Elections Act and Rules 13 and 33 of the Parliamentary Elections Petitions Rules*** to support their submission.  
20

They submitted that the applicant's excuse of not serving the record of appeal in time is  
25 extremely flimsy and excessively casual in the sense that service of the same is not a monopoly of one individual. They added that the hearing and determination of the instant application which is frivolous and premised on sloppy grounds will undoubtedly eat into valuable, scarce time and limited resources of the court. Counsel prayed that this Court finds the instant application discloses no sufficient grounds and dismisses it with costs.

### **30 Resolution by Court**

We have carefully considered the court record and the submissions of all the counsel as well as the authorities cited to us on the issues at hand and those not cited but which we find relevant. From the pleadings and the arguments of all the parties, it is not disputed that the applicant filed and served the record of appeal on the respondents outside the 30 days after



5 the filing by him of his Memorandum of Appeal as stipulated under rule 31 of the Parliamentary Elections (Election Petitions) Rules (hereinafter called the Election Petitions Rules). The applicant stated that the 30<sup>th</sup> day fell on Saturday 6<sup>th</sup> November 2021 when the court registry was not open and so he filed the record of appeal on the next working day which was Monday 8<sup>th</sup> November 2021 but this was outside the stipulated time.

10 The Interpretation Act gives very useful guidance on computation of time. Section 34 of thereof provides for computation of time as follows;

***“34. Computation of time, etc.***

*(1) In computing time for the purpose of any Act—*

15 *(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or the act or thing is done;*

*(b) if the last day of the period is a Sunday or a public holiday (which days are in this section referred to as “excluded days”), the period shall include the next following day, not being an excluded day;*

20 *(c) where any act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day; or*

*(d) where any act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of time.”*

25 In the instant case, since the last day was a Saturday and it is not an excluded day, it is included when counting the 30 days. This therefore makes it clear that the 30 days within which the record of appeal should have been filed lapsed on Saturday 6<sup>th</sup> November 2021 and the record of appeal was filed on Monday 8<sup>th</sup> November 2021 thus making it two days late since Sunday would have only been excluded if it was the last day of the 30 days.

30 The issue for resolution by this Court therefore is whether the applicant has shown sufficient reasons for his failure to file and serve the record of appeal in time to justify extension of the time within which to file and serve the record of appeal.

35 Before we address this issue, we wish to make some observations from the onset in regard to the averments in paragraph (m) of the notice of motion and paragraph 14 of the applicant's affidavit in support wherein he stated that this Court is constituted for administration of justice and any Rule and or Act of Parliament attempting to tie its hands in the administration of justice, is obsolete and void. The import of this averment is that rule 31 which provides for lodging of the record of appeal within 30 days after the filing of the memorandum of appeal





5 and rule 88 of the Judicature (Court of Appeal) Rules SI 13-10 which provides that the record of appeal shall be served before or within 7 days after lodging it in the registry should be treated by this Court as obsolete and void for purposes of granting the orders sought in this application.

10 In our view, it would be tragic if courts which are established to enforce laws and the rules made under them were to adopt that view. We do not want to imagine the chaos that would ensue in the temple of justice. It is very unfortunate that counsel who drafted both the Notice of Motion and the supporting affidavit could present such averments in court. We hope this is not how they view the laws and the rules that facilitate their work.

15 We take this opportunity to emphasize that this Court and all the other courts in the judicial system are established to administer justice through the enforcement of Acts of Parliament and the Rules of procedure made under them. Any call for it to ignore or treat as obsolete and void the Acts of Parliament and Rules of procedure, as in this case, amounts to a call for it to turn into a 'kangaroo court' where there is no regard for the prescribed laws and rules. As we conclude on this observation, we wish to make it categorical that we shall determine this  
20 application in accordance with the laws and rules that govern election matters.

We now turn to address the issue beginning with the aspect on extension of time for filing the record of appeal and validation of what was filed out of time. We must start by pointing out that there is no rule under the Election Petitions Rules that provide for extension of the time appointed under those Rules for filing documents on appeal to this Court. However, rule 36  
25 of the Election Petitions Rules allows this Court to apply any rules regulating the procedure and practice on appeal from decisions of the High Court to this Court in civil matters subject to such modifications as this Court may direct in the interest of justice and expedition of the proceedings. It therefore follows that the applicable rule is rule 5 of The Judicature (Court of Appeal Rules) Directions, SI 13-10 (the Rules of this Court) which empowers this Court to  
30 extend time if sufficient reason is shown.

As we proceed to consider the reasons given by the applicant for his failure to file the record of appeal in time, it is pertinent to note from the outset that the strictness inbuilt in the timelines for handling election matters is in the spirit and the letter of the constitutional and statutory requirements that election matters should be expeditiously handled.

35 To that end, Article 140(1) and (2) of the Constitution provides thus;



5           **"140. Hearing of election cases.**  
          (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*  
10           *hearing and determining appeals on questions referred to in clause (1) of this article."*

The first part of the question under Article 86(1) (a) is whether a person has been validly elected a member of Parliament which in effect is to do with election petitions.

Section 66 (2) of the Parliamentary Elections Act (the Act) captures the spirit of Article 140 of the Constitution by providing that this Court shall hear and determine election petition appeals  
15           within six months from the date of filing the appeal and may for that purpose suspend any other matter pending before it. Rule 33 of the Election Petitions Rules echoes this provision by providing for expeditious hearing and determination of the election petition appeals.

The rationale for the strict timelines has been stated by this Court in a number of cases. In **Edward K. Wesonga vs Electoral Commission, the Returning Officer Mbale and Hon. Wanjusi Wasieba Silvester; Election Petition Appeal No. 17 of 1997**, this Court while  
20           dismissing an appeal for being exceptionally tardy as rule 34 of the then Parliamentary Election (Election Petitions) S.I No. 27 of 1996 had not been complied with held as follows:

*"Similarly Rule 34 dealing with electoral appeals stipulates for the appeal to be disposed of within thirty days from the lodging of the record of appeal unless the court extends the time on exceptional grounds. The compelling reason for prompt action in disposing of election contests to the end is that a decision may be reached before the term has wholly or in great part expired as pointed out above. This seems to be the spirit of the law. This is why electoral proceedings are special proceedings and summary in nature. The questions involved are political. Hence the special rules of procedure to facilitate the expeditious disposal. This particular appeal*  
25           *has been exceptionally tardy."* [Emphasis added].  
30

Similarly, in **Electoral Commission and another vs Piro Santos; Civil Application No. 022 of 2011**, this Court quoted with approval the decision in the Kenyan case of **Muiya vs Nyangah and others, (2003) 2 EA 616 C.H.C.K** that;

35           *"On this strictness...Elections are serious matters between the state and its citizens (sic). As elections are held, the outcome announced, the electorate must know their political leader quickly and assuredly. There must be limited or no uncertainty about this. The roles of elected*

5            *representatives are many and diverse vis-a vis their electors. To perform the roles well, the elected must be sure of his post and the elector of his leader. And the sooner the better to give that certainty. So either the election is accepted at once or when challenged, that challenge must be moved along to the end swiftly enough to restore certainty. And for that, election petitions are governed by this act with its rules in a very strict manner. Election petition law and the regime in general, is a unique one and only intended for elections...*

10

To that end, this Court has adopted a very strict approach in most of its decisions on compliance with election petitions and appeals statutory timelines.

In ***Ikiror Kevin vs Orot Ismael, Court of Appeal Election Petition Appeal No. 105 of 2011*** it was held that timelines for filing election petitions are strict and the strictness is deliberate.

15 Any petition filed outside the prescribed timelines is bad in law and ought to be dismissed.

With the above position of the law and samples of authorities of this Court that interpreted the law in mind, we now turn to consider whether the applicant has shown any sufficient reasons for his failure to file the record of appeal in time that merit grant of the orders sought in this application.

20 The reasons advanced by the applicant in paragraphs (g)-(h) of the Notice of Motion and paragraphs (5)-(9) of the affidavit in support is that the delay to avail him the record of proceedings in the lower court prevented him from filing the record of appeal in time. The applicant relied on rule 5 of the Rules of this Court and a number of authorities to contend that this constitutes sufficient reasons that justifies grant of extension of time.

25 In ***Katumba vs Waheed Karim SCCA No. 27 of 2007, Mulenga JSC*** stated as follows in regard to what constitutes sufficient reason;

30            *"Under rule 5 of the Supreme Court Rules, the court may, for sufficient reason extend the time prescribed by the rules. What constitutes sufficient reason is left to the court's unfettered discretion. In this context, the court will accept either a reason that prevented an applicant from taking the essential step in time, or other reasons why the intended appeal should be allowed to proceed though out of time. For example, an application that is brought promptly will be considered more sympathetically than one that is brought after unexplained inordinate delay. But even where the application is unduly delayed, the court may grant the extension if shutting out the appeal may appear to cause injustice."*

35 It is the duty of the applicant to satisfy this Court that he was prevented by sufficient reasons from filing the record of appeal in time. This Court has had opportunity to consider a number

5 of appeals and applications where documents in election appeals were filed out of time and in most of them arguments were advanced for extension of time. We will refer to the decisions in some of those cases.

10 In ***Kubeketerya James vs Waira Kyewalabye and Electoral Commission Court of Appeal Election Petition Appeal No. 97 of 2016***, the respondent had raised a preliminary objection that the appeal was incompetent because both the Memorandum of Appeal and the Record of Appeal were filed out of time. Counsel for the appellant in that case had argued based on rule 83 of the Rules of this Court that the court should take into account the time between preparation of the Record of Appeal when computing time for filing the Memorandum of Appeal. He therefore submitted that there was no lapse of time in filing both the Memorandum  
15 of Appeal and the Record of Appeal.

This Court while upholding the preliminary objection held thus;

- 20 "1. Under rule 30 (b) of the Parliamentary Elections Act (Interim Provisions) Rules SI 142-2, the memorandum of appeal should be filed within 7 days after the notice is given. In the instant case, the appellant filed the memorandum of appeal 8 days out of time.
2. In terms of rule 31 of the Parliamentary Elections Act (Interim Provisions) Rules SI 142-2, the record of appeal should be filed within 30 days after filing the memorandum of appeal. The appellant did not comply with this either.
- 25 3. The rules of procedure were made to enable the expeditious disposal of election related matters. As such, the luxury provided by rule 83 of the Judicature (Court of Appeal Rules) Directions, SI 13-10, which permits the court to take into account the time taken in preparing record of proceedings, and availing a certified copy of the lower court judgment was not available to the appellant. Rule 83 was only applicable in respect of local council elections and not in parliamentary election petitions."
- 30 4. Election petitions have to be handled expeditiously. The rules and timelines for filing proceedings are couched in mandatory terms. They have to be strictly interpreted and adhered to."

35 In ***Kasibante Moses vs Katongole Singh Murwaha Election Petition Application No.7 of 2012***, where the respondent had failed to file a Memorandum of Appeal within seven days after the Notice of Appeal had been filed and also failed to file the record of appeal within the stipulated 30 days after the filing of the Memorandum of Appeal, this Court emphasized the



5 duty of the intending appellant to expeditiously pursue every step in the appeal by stating thus;

10 "It is now settled as the law that it is the duty of the intending appellant to actively take the necessary steps to prosecute his/her intended appeal. It is not the duty of the court or any other person to carry out 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. KINYATTA & ANOTHER VS SUBRAMANIAN & ANOTHER: CIVIL APPLICATION NO. 108 OF 2003 (COURT OF APPEAL).

15 In the 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 of the Parliamentary Elections Act and Rule 33 of the Parliamentary Elections (Election Petitions) 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  
20 grounds. Time is thus of the essence in election appeals."

The application to strike out the appeal was allowed in that case and the appeal was struck out for failure to comply with the timelines.

25 However, in ***Mugema Peter vs Mudiobole Abedi Nasser EPP No. 16 of 2016*** a more relaxed approach was adopted by this Court mainly because the appellant had proved that he had followed up his requests for a certified record of proceedings in the lower court and there was proof that the records were ready earlier but it was supplied to his counsel outside the time stipulated for filing the record of appeal. This made the appellant file the record of appeal out of time and it was argued for him that he had taken the necessary steps to prosecute the appeal and that failure to file the record of appeal within the time allowed was  
30 because of the failure of the court to provide the same within the time allowed to file it. This Court while accepting the appellant's argument held as follows:

1. ***While timelines in election litigation are 'very crucial', the court should take into account the unique circumstances of each case.***
  2. ***An appellant cannot be expected to do anything beyond making 'countless' requests for the record of proceedings, and the best way to do this is to write letters. Letters written in pursuance of a record of proceedings are proof of diligence of an appellant in pursuing their appeal. In this case, the appellant's counsel had written two letters respectively requesting***
- 35



5 *for and reminding the Registry about their request for a typed and certified record of proceedings.* [Emphasis added].

3. *The Court Registry's delay in furnishing the appellant and his counsel with a certified copy of the record of proceedings could not be used against them unless it was shown that the letter informing them that the record was ready had itself been written in and dated June 2016.*

10 *The letter so informing them had been written on 3<sup>rd</sup> August, although it mentioned that the record had been certified on 22<sup>nd</sup> June. Counsel for the appellant exercised sufficient diligence in the pursuit of the record of proceedings, and had no way of accessing this record without being informed or notified that it was ready. This notification was done in August.* [Emphasis added].

15 4. *The duty to transfer the record of proceedings to the appellant lies upon the Registrar referred to under rule 83 (2) of the Judicature (Court of Appeal Rules) Directions, Sl. 13-10 and lies emphasis upon the phrase "preparation and delivery". In practice, however, diligent litigants should not sit and wait for the registrar to deliver the record of proceedings to them; continued letters written to remind the Registrar and sometimes physical trips to the Registry to check on whether the record is ready, are therefore in order.*" [Emphasis added].

20 The above decisions and the highlighted parts of the decision in **Mugema Peter** (Supra) emphasize the need for an appellant/applicant and his counsel to be diligent in following up the request for the record of proceedings in the lower court. In the instant case, the appellant filed a Notice of Appeal on 30<sup>th</sup> September 2021 and on the same day his counsel wrote to the Registrar, High Court requesting for the record of proceedings. The applicant then filed a  
25 Memorandum of Appeal on 7<sup>th</sup> October 2021. He wrote a follow up letter for the record of proceedings on 5<sup>th</sup> November 2021 when the 30 days for filing the record of appeal was due to expire the following day. That was a day after the Registrar had written to notify counsel that the record of proceedings was ready. The applicant then filed the record of appeal on  
30 Monday 8<sup>th</sup> November 2021 which was two days late since the 30 days expired on Saturday 6<sup>th</sup> November 2021.

Under those circumstances, we find that the applicant and his counsel exercised sufficient diligence in the pursuit of the record of proceedings. Even though the filing was two days late, we find that sufficient reasons have been shown to merit extension of the time for filing the record of appeal. We are therefore inclined to exercise our discretion under rule 5 of the Rules  
35 of this Court to grant the orders for extension of time and validation of the record of appeal that was filed out of time.

We now turn to consider the aspect of the issue that relate to extension of the time within which to serve the record of appeal. The timeline for service of the record of appeal is also not provided for under the Election Petitions Rules so the fallback position is rule 88 (1) of the



5 Rules of this Court which stipulates that it should be served before or within 7 days after lodging it in the registry. The discretion to extend that time for sufficient reasons is provided for under rule 5 thereof.

10 The applicant averred in his affidavit in support of the application that he was prevented from filing the record of appeal in time by the sickness of the clerk of his counsel (Magawa Nelson) who picked the same but due to his illness he failed to effect service. Counsel for the applicant submitted that failure to serve the record of appeal within time on the respondents was caused by the sickness of their clerk who had picked the documents from the court registry but failed to effect service within the statutory 7 days because of his sickness. According to the applicant's counsel, this constitutes sufficient reason that merit grant of an order for extension  
15 of time within which to serve the record of appeal.

In response, counsel for the 1<sup>st</sup> respondent submitted that sickness of counsel's clerk cannot in itself justify the late service of court process as service could be effected by any other person by law authorized other than the purported sick clerk. For the 2<sup>nd</sup> respondent, it was submitted that the applicant's excuse for not serving the record of appeal is extremely flimsy and excessively casual in the sense that service of the same is not a monopoly of one  
20 individual.

We note that the applicant did not indicate the source of information that his counsel's clerk fell sick and failed to serve the record of appeal. In his affidavit in support of the Notice of  
25 Motion, the applicant averred in paragraph 10 as follows:

10) *"That the failure to serve the Record of Appeal on time to the Respondents was due to the sickness of my lawyer's clerk (Magawa Nelson) who picked the signed record of appeal from the court registry and could not proceed to effect service within the required statutory 7 days and were instead served after 2 days had lapsed."*

30 The source of that information was not disclosed in that paragraph of the affidavit or at all because paragraph 18 thereof clearly states;

18) *"That whatever is stated herein is true and correct to the best of my knowledge save for the contents of paragraphs whose source of information whereof is disclosed and which I verily believe."*

35 This implies that the content of paragraph 10 of the applicant's affidavit was within the applicant's knowledge. However, the applicant could not have had knowledge of the clerk's sickness and the fact that prior to his falling sick, he had picked the record of appeal and



5 failed to serve it without being informed either by the clerk himself or his (applicant's) counsel but there was no disclosure of the source of that information.

In ***Muhindo Rehema vs Winfred Kiiza & Anor Electoral Petition Appeal No. 29 of 2011***, this Court observed that order 19 rule 3 of the Civil Procedure Rules provides that the affidavits can only include facts that the deponent is able on his own knowledge to prove, except in interlocutory applications. It was further observed that election petitions are not  
10 interlocutory applications and therefore hearsay evidence is not admissible.

Matters are further compound by the fact that the said clerk in this case did not even depose any affidavit to explain what had happened based on the facts within his knowledge.

15 In ***Eric Tibebaga vs Narsensio Begumisa and ors, Supreme Court Civil Application No. 18 of 2002***, on 21/10/2002 the applicant was ordered by the court to file his written submissions on or before 31/10/2002. The applicant did not adhere to that order. Counsel for the applicant, Mr. Makeera contended that his process server by the name of Silver  
20 Ahimbisibwe, who was supposed to file the submissions, left for Kabale to serve summons in another case HCCS No. 594 of 2002 but he delayed there and by the time he returned the time had expired. However, Mr. Ahimbisibwe did not swear an affidavit to that effect. In this regard, Hon. CM Kato, JSC (as he then was) had this to say in his ruling;

25 *"My understanding of the rule is that a person swearing an affidavit in support of an application of this nature must have knowledge of the facts involved. In the instant case the person who knew the reasons relating to the delay in filing the submissions is Silver Ahimbisibwe who, for reasons unknown to the court, did not swear any affidavit. In the absence of Ahimbisibwe's evidence in the form of an affidavit or otherwise, what Mr. Makeera stated regarding what Ahimbisibwe did or failed to do is mere hearsay and of no help to the applicant's application. The situation cannot be cured by*  
30 *merely stating the source of information, as Mr. Makeera would like the court to believe."*

Guided by the above authority, we find that the clerk's failure to swear an affidavit in this case was fatal and it renders the applicant's averment in paragraph 10 of the affidavit hearsay and inadmissible. In the absence of paragraph 10 of the applicant's affidavit, we find no sufficient reason for the applicant's failure to serve the record of appeal on the respondents in time.

35 We must however, observe that even if paragraph 10 of the affidavit was admissible, the alleged sickness of the clerk would, in our view, not amount to sufficient reason for extension of the time for service of the record of appeal given that service of court process is not a monopoly of one person. If indeed the applicant and his counsel were mindful of the strict



5 timelines in election matters they would have been vigilant in ensuring that service was done in time since the filing of the record of appeal was also out of time. We further observe that there was even no medical form attached to the applicant's affidavit as proof of the alleged sickness of the clerk.

10 In conclusion, we find no sufficient reason for the applicant's failure to serve the record of appeal on the respondents within the stipulated time. Accordingly, this application must fail and is dismissed with costs to the respondents. In the result, we find that the Election Petition Appeal No. 032 of 2021 is incompetent as there was no service of the record of appeal on the respondents within the stipulated time. We therefore strike it out with costs to the  
15 respondents. The applicant shall also bear the costs in the lower court.  
We so order.

Dated at Kampala this.....14<sup>th</sup>.....day of.....June.....2022

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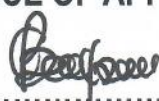
Richard Buteera  
**DEPUTY CHIEF JUSTICE**

25



Hellen Obura  
**JUSTICE OF APPEAL**

30



Catherine Bamugemereire  
**JUSTICE OF APPEAL**