

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPLA
MISCELLANEOUS APPLICATION NO. 11 OF 2021

(ARISING FROM ELECTION PETITION APPEAL NO. 63 OF 2021)
(ARISING FROM ELECTION PETITION NO.002 OF 2021 FROM
THE HIGH COURT HOLDEN AT MBALE)

WANYOTO LYDIA MUTENDE:..... APPLICANT

VERSUS

1. THE ELECTORAL COMMISSION

2. NAKAYENZE CONNIE GALIWANGO:.....RESPONDENTS

CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA

HON, JUSTICE CHRISTOPHER MADRAMA, JA

HON. JUSTICE EVA K. LUSWATA, JA

RULING OF THE COURT

Introduction and Background

1] The applicant Wanyoto Lydia Mutende, presented this application by motion under Rules 19 & 36 of the Parliamentary Elections (Interim Provisions) SI 141-2 Rules Directions (hereinafter PE Interim Provisions Rules), and Rules 5, 43, 44, 76, 78, 83 and 88 of the Judicature (Court of Appeal Rules) Directions (hereinafter Court Rules). She is seeking an order that court admits and validates her memorandum of appeal and record of appeal against the judgment and orders of the High Court holden in Mbale in Election Petition No. 002 of 2021,

though the period of limitation prescribed for filing a memorandum and record of appeal may have lapsed, leave be granted to the applicant to file a memorandum and record of appeal out of time, and court to extend time within which to file a memorandum and record of appeal and costs.

- 2] The applicant was represented by Peter A. Musoke jointly with Swarbur Marzuq, Silas Mugabi and Andrew Wameli. On the other hand, Natukunda Jacqueline represented the 1st respondent and, Katumba Chrysostom and Joseph Elotu, represented the 2nd respondent. The 2nd respondent Nakayenze Connie Galiwango filed no response to the application. At the hearing of 31/3/2022, her counsel submitted that although no response was filed, Galiwango opposed the application. He indicated that Galiwango had also filed Election Petition Application No. 03/2021 to move court to strike out the appeal. For that reason, only the applicant and the 2nd respondent filed written submissions as directed by Court.
- 3] **Ms. Wanyoto Lydia Mutende** filed an affidavit in support of the application. She stated that she was nominated to contest in the Mbale City Woman Representative to Parliament elections held on 14/1/2021, against Luwungule Shadia, Masibo Robinah Nadunga, Nambuya Mimuna, Nansubuga Racheal Kakungulu and Galiwango. That the Electoral Commission, (hereinafter EC) declared Galiwango as the winner of the election and caused her publication in the Uganda Gazette as the duly elected member of Parliament (Woman) for Mbale City. Wanyoto contended that the election was carried out in violation of the Constitution of the Republic of Uganda, the Parliamentary Elections Act (hereinafter the PE Act), the Electoral Commission Act (hereinafter EC Act) and the rules regulating the conduct of free and fair elections in the Republic of Uganda. That being aggrieved by the illegality that marred the election and declaration process of Galiwango, on 3/3/2021, she instituted Election Petition No. 002/2021 at the High Court in Mbale for



ELIC

(*inter alia*), the nullification of the election of Galiwango, and an order for the conduct of a re-election.

- 4] Wanyoto added that on 30/9/2021, the learned Hon. Judge Bashaija Andrew dismissed her petition with costs to the respondents. Being aggrieved by that decision, she lodged a notice of appeal against the said judgment and orders. That the notice of appeal was served upon Galiwango and the EC on 30/9/2021 and 1/10/2021 respectively. That on 30/9/2021, her lawyers lodged a request for certified copies of the judgment of the court and of the record of proceedings to facilitate the preparation of a memorandum and record of appeal with a view to prosecute an appeal before this court.
- 5] Wanyoto then asserted that it was only after vigilance of her advocates that a certified copy of the judgment was obtained on 8/10/2021, and that by the time of filing this application, her lawyers were yet to receive the certified copy of the transcribed record of proceedings and a typed set of the trial judge's notes. She contended that her advocates on several occasions visited the High Court registry at Mbale to ascertain if typing of the record of proceedings was completed, but were at all times told that it was still being prepared by registry staff.
- 6] Wanyoto continued that on 25/10/2021, when her advocates visited the court registry, they discovered that the record that was available, as typed, lacked some parts of the proceedings. None the less, she paid the certification fees and the file was placed before the Deputy Registrar. She the contended that the delay in the filing of the memorandum of appeal and the record of proceedings was not due to dilatory conduct on her part, or oversight of her legal counsel, but on account of possible bottlenecks and delays by the High Court Registry at Mbale in availing to her counsel the necessary documentation in time. Wanyoto further deposed that despite her counsel's advise to forestall filing a memorandum of appeal and its record until after receiving both the judgment and record of proceedings, she

Eme

ELC

pressed them to draw a memorandum of appeal relying on the judgment and available part of the proceedings.

- 7] She deposed further that it is in the interest of justice to hear the appeal on its merits because in her view and as confirmed to her by her legal counsel, it elicits a novel question of law which will greatly add to and direct future election related jurisprudence in the polity. She contended that the respondents have suffered no injustice or prejudice and will suffer none, if the court were to grant the prayers sought. In her view, hers is a strong and plausible appeal with high chances of success especially when this application was presented without unreasonable delay.
- 8] Naloda Crispus Caesor, an advocate, attached to Nangulu & Mugoda Advocates, filed a supplementary affidavit in support of the application. He deposed that upon dismissal of the petition, Wanyoto instructed his firm to institute appellate proceedings in the Court of Appeal of Uganda at Kampala. They proceeded by lodging a notice of appeal and a request for certified copies of the transcribed and the handwritten record of proceedings. He contended that on several occasions, he visited the High Court registry to ascertain if the record of proceedings had been duly prepared but was told by the Office Supervisor that the same was being prepared by the registry staff. That due to the urgent need to prepare the grounds of appeal, he sought to obtain an uncertified copy of the judgment and record of proceedings but was told by the clerk of the Judge, that His Lordship had issued specific instructions against issuance of uncertified copies of both the judgment and proceedings. That after persistence, he was able to obtain a certified copy of the judgment on 8/10/2021.
- 9] Naloda added that due to the complexity of the appeal and the nature of the Judge's decision, the record of proceedings was necessary to enable his firm properly raise appropriate and relevant grounds of appeal. That the record of proceedings was important because several rulings had been made during the

Done

ELIC

trial which they intended to contest on appeal but could not appropriately raise without a copy of the record of proceedings.

- 10] Naloda continued that owing to time constraints, his firm again wrote to the court to make another request for a copy of the proceedings but the same were still not availed. That when his firm obtained the record of proceedings on the 25/10/2021, he discovered that key elements of evidence had been excluded from the record. In particular, the omitted parts included the evidence of the EC as the 1st respondent, Galiwango's testimony as well as Hassan Galiwango's testimony. That they then duly informed Wanyoto of the necessity of a certified copy of both the judgment and the transcribed record of proceedings from which it was crafted in order to professionally criticize the court through drawing a memorandum of appeal and ultimately prepare a record of proceedings. However, in the interest of time, they were compelled to rely only on the judgment and the available part of the record of proceedings to prepare a memorandum of appeal. Naloda contended that the delay in preparing the record of proceedings was an omission on the part of the court, and to date no reasonable explanation has been given to explain why the record of proceedings is incomplete.
- 11] Naloda continued that Wanyoto could not be condemned since the delay was occasioned by the court. He contended that it is a grave and fundamental error for the record of proceedings to miss out key elements of evidence and a compelling ground for this court to admit the appeal and hear it on its merits. He concluded that the interest of justice requires that the application be granted and the appeal be determined on its merits because it elicits novel questions of law which will add to, and direct future related jurisprudence in the polity.
- 12] Eric Sabiiti, the head litigation of the 1st respondent, filed an affidavit in reply. In brief, he deposed that the application lacks merit, is frivolous and vexatious as it does not disclose sufficient cause or any valid grounds justifying the grant of the orders sought. That the affidavits in support of the application are

Time
ELR

tainted with deliberate and material falsehoods, rendering them incurably defective and liable to be struck out. He contended in particular that the failure by Wanyoto and her counsel to file and serve the memorandum and record of appeal was entirely due to their own dilatory conduct and inexcusable failure to take necessary steps to prosecute the appeal. He argued that copies of the judgment were available at Court on the 1/10/2021 and it was up to the applicant to pay the requisite fees and obtain a certified copy as of 1/10/2021 to enable her file her memorandum of appeal within seven days with effect from 30/9/2021. Instead, she chose to file the appeal out of time.

- 13] Sabiiti reasoned that since the judgment was read in open court, Wanyoto did not have to first obtain a certified copy in order to file her memorandum of appeal. That duly typed and signed copies of the judgment which were available to the parties on 1/10/2021, contained all material upon which a memorandum of appeal could be prepared. He contended that Wanyoto's allegation that she or her lawyers had pursued but were not availed with those documents is speculative and an afterthought. He also considered it a falsehood that Wanyoto had received an incomplete record from the Court on 25/10/2021. He contended further that the stamp signifying payment of fees for a certified copy of the record is a forgery and that the purported payment registration slip had expired. It was his evidence then that the failure to obtain the record of proceedings was due to Wanyoto's own dilatory conduct and failure to comply with the law and the timelines for filing an appeal. Sabiiti contended further that in an election appeal, the memorandum of appeal is filed separately from the record, with each having different time frames set by the law, that have to be adhered to.
- 14] Sabiiti continued that since Wanyoto filed her notice of appeal on 30/9/2021, she was required by law to lodge her memorandum of appeal within seven days with effect from

1/10/2021, but instead filed the appeal on 28/10/2021 and the record on 11/11/2021 which was also out of time. In his view, Wanyoto had by this application not demonstrated any good cause or grounds for failure to comply with the laws governing filing of election petition appeals. Also that having failed to pay for the record of proceedings, she has no locus to complain about its contents. Also that given the forgeries and material falsehoods in Wanyoto's application, she has approached this court with unclean hands and as such, undeserving of the remedies she seeks. In conclusion, he sought for the application to be dismissed with costs.

15] In rejoinder, Wanyoto, recounted the dates on which she made crucial filings and her inability to obtain a copy of the record until 25/10/2021, when one was availed but found to be incomplete. That nevertheless her counsel obtained an assessment of the certification fees for that record in the sum of Shs. 549,000/= that she paid after which certification of the record was carried out and a certified copy availed to her on 27/10/2021. That to allay contrived accusations by the EC, she instructed and her counsel obtained from the Registrar of the High Court at Mbale, a certified copy of the receipt for which certification fees was paid. Wanyoto repeated that after receiving the record, her counsel noted that salient parts concerning the respondents' evidence were omitted including information that:

- i. **RW1** conceded that he supplied to the Wanyoto Declaration of Result Forms (DRFs) on 16/1/2021. The stated DRFs did not bear similar alterations as the certified DRFs dated 15/03/2021. He denied knowledge/participation in the alterations and maintained that the copies he supplied had no alterations and were the actual true copies
- ii. **RW2** admitted actual malpractice, tampering and interference with the unsealed electoral results at Northern Division Collection Centre. He also confirmed Galiwango's actual involvement.




- iii. During cross examination, RW3 Galiwango confirmed actual malpractice at several polling stations and at the collection center. She admitted directly accosting electoral officials at polling stations and the collection center.
- 16] In addition that the delay in supplying her with the record frustrated Wanyoto's efforts to file the appeal on time since most of the grounds were being drawn from rulings and orders made during the trial, which were not captured in the judgment but were in the record of proceedings including:
- i. The prohibition/refusal by the trial Judge to summon the Secretary of the EC for cross examination, which formed the basis for framing ground 2 of the appeal
 - ii. The trial judge prohibited cross-examination of witnesses on electronic evidence presented by Galiwango during proceedings, which formed the basis for framing ground 13 of the appeal
 - iii. The trial Judge prohibited Wanyoto from supplying annexures that were inadvertently omitted from the court record due to human error of her counsel which formed the basis of framing ground 11 of the appeal.

The Applicant's Submissions

- 17] Counsel for the applicant submitted that after reading of the judgment on 30/9/2021, the applicant instructed her lawyers to commence the process of appeal contesting the judgment. That acting upon those instructions, a notice of appeal was filed the same day and a request made for certified copies of both the judgment and full record of proceedings. Counsel served the notice of appeal on both respondents on 1/10/2021. He continued that although his firm incessantly continued to pursue the certified copies of the judgment and record of proceedings, the court only availed a certified copy of the judgment on the 8/10/2021, after the time for lodging the memorandum of appeal had lapsed. That being mindful of the

constraint on time regarding filing of the appeal and the necessity of both the judgment and record of appeal in drawing up the memorandum of appeal, counsel went a mile further and sought that the court at least avails an uncertified record of the proceedings, a request which was denied.

18] Counsel further submitted that the record of proceedings was made available to counsel on 27/10/2021, three days shy of a month since the judgment had been delivered. That upon perusal, it was discovered that the record availed was incomplete. It lacked vital components of the cross examination of some of the respondents' witnesses during the hearing. That counsel notified the court in writing of their discovery and requested for either the missing part of the record, or a certified copy of the trial Judge's hand written notes. That the Registrar of the Court has to date not responded to those requests, which left them no option than to belatedly file a memorandum of appeal based on the judgment and the incomplete record of proceedings. He submitted further that the memorandum of appeal was lodged on 28/10/2021, twenty days after Wanyoto was availed with a copy of the judgment, and the record was also filed 14 days following lodgment of the memorandum of appeal.

19] Counsel insisted that the delays above cannot be blamed on Wanyoto or her lawyer but on the High Court Registry which failed to avail those records as sought by counsel. That without a judgment and record, Wanyoto had no basis on which to base her criticism of the trial court. In his view, the respondents who were served in good time, will not suffer any prejudice when this court allows and validates the filing of the memorandum and record of appeal filed out of time.

20] Counsel then argued that Rule 36 of the Rules of Court, when read together with Rules 5, 42 (2), 83 (2) & (3) and 86, not only lend credence to the applicant's motion, but also empower this Court with justification to enlarge or abridge the time appointed by the Rules for regularizing and validating the applicant's

Emo
ECC

appeal. That the circumstances as borne out in the affidavits in support of the motion, show that while Wanyoto took all the necessary steps to ensure that she files her memorandum of appeal within time, she was let down by the delays of the registry of the court where in spite of several written requests and reminders, neither a copy of the judgment, nor a copy of the record of proceedings, let alone in its complete form, were availed in time.

- 21] Counsel argued in addition that the appeal raises novel questions of law that require adjudication, in particular the question whether electoral officials cannot testify in an election petition. Another novel point of contention raised was the judgment of a trial court based on an incomplete record and without the trial court taking down notes of vital evidence. That this makes it a fit and proper case where this court should exercise its powers and enlarge time by granting the application.

Submissions for counsel of the 2nd respondent

- 22] In reply, counsel for the EC submitted that the judgment was delivered in the presence of all the parties and their lawyers on the 30/9/2021, and copies were made available to all the parties on 1/10/2021. He conceded to all the other filing dates and then contended that Wanyoto having filed her notice of Appeal on 30/9/2021, she was mandated under Rule 30 and 31 of the PE Interim Rules to lodge the memorandum of appeal within 7 days that stretched to 7/10/2021, and thereafter the record of appeal within 30 days, which lapsed on 8/11/2021. That Wanyoto instead filed the two documents on 28/10/2021 and 11/11/2021 respectively, which was well out of time. Again citing ample authority, of this and other courts, counsel argued that Wanyoto had the duty to actively take the necessary steps to prosecute her intended appeal on time. Counsel contended then that Wanyoto delayed in taking the necessary steps in pursuit of her appeal and has not in this application demonstrated any exceptional circumstances or good cause that would persuade court to extend the time set by statute.

- 23] Counsel continued that without proof, the allegations that Wanyoto and her lawyer did prior to 25/10/2021, send reminders to or visited the court registry or office of the office supervisor to pursue the record of proceedings (which were not availed to her) would be false or a material misrepresentation. After drawing the attention of the court to Annexure D attached to Wanyoto's affidavit, she contended that Wanyoto did not pay for the certified record of proceedings and the copy of the receipt in proof of payment is forged and cannot be located on the URA portal. That that being so, in line with sections **75** and **76** of the Evidence Act, Wanyoto was not entitled to be supplied with certified copies of the judgment and record. That even if the contents of the receipt were to be believed, payment for the record was made after the statutory period had expired. It was also counsel's view that Wanyoto's actions were that of a litigant who approached the court with dirty hands, and therefore, one undeserving of the remedies sought.
- 24] Counsel further denied the argument advanced for Wanyoto that the record of proceedings furnished by the court was incomplete. She argued in the alternative that if true, the correct procedure would have been to seek leave of court to extend the time for filing the record of appeal, with reason that part of the record was missing. However, that it was a futile exercise in this case, since Wanyoto failed to comply with the timelines for filing the memorandum and record of appeal.

Rejoinder by applicant

- 25] In rejoinder, Wanyoto's counsel cited the decision of **James Bwogi & Sons Enterprises Ltd Vs Kampala City Council SCCA NO. 9/2017** and Rule 5 of the Court Rules, to argue that reasons were advanced in the evidence for their client failing to take the necessary steps in time. For that reason, the court should exercise her discretion in Wanyoto's favour. He argued that obtaining the record before drafting the memorandum was an absolute necessity because during the trial, the Judge made certain orders which were not reproduced in his judgment.

Eme
ELC

Further that certain evidence that could only be retrieved from the record, was required when formulating the grounds of appeal.

- 26] Counsel further explained that considering the importance of the appeal, it was impossible for them to craft grounds of appeal from imagination without a copy of the judgment or detailed record. Further that without a complete and certified record, vital evidence could be omitted on appeal which would curtail this Court's power to make a full re-evaluation of evidence adduced in the lower court. Counsel further argued that the decisions presented for Galiwango were distinguishable because the appellants there showed no prudence in pursuing the certified copies of the judgment and record, and filed no applications to extend time.
- 27] In conclusion, counsel denied all allegations of fraud as mere conjecture. That following Wanyoto's instructions, they obtained a court assessment of certification fees on 25/10/2021 and paid the assessed fee indicated on the same day. That they subsequently obtained a certified copy of that receipt on 17/3/2022, and those documents were adduced in evidence as Annexure "A" & "B" of Wanyoto's affidavit in rejoinder. Counsel reiterated his prayer that the application be granted.

Decision of court

- 28] We have carefully studied the application and the accompanying affidavits, as well as the affidavits sworn to oppose the application. The submissions of the respective counsel, the law and authorities cited have also been considered.
- 29] The applicant proceeded under a catalogue of legislation to seek an order of this Court to validate her memorandum of appeal and record of appeal filed out of time and for leave to be granted to file her memorandum of appeal and record of appeal out of time. Rule 36 of the PE (Interim Provisions Act) S.1 141 -2, has

with some reservations extended the provisions of the Court Rules to election petition appeals. It provides:

Subject to such modifications as the court may direct in the interests of justice and expedition of the proceedings, any rules regulating the procedure and practice of appeal from decision of the High Court to the Court of Appeal in civil matters shall apply to appeals under this part of these Rules.

- 30] The applicant then relied on, Rule 5 Court Rules) to seek court's leave to entertain her late appeal. It is provided that:

Extension of time.

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 authorized 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.

- 31] There is ample authority that an extension of time will be permitted under that law if the applicant has presented sufficient reason. Both the Supreme Court and this Court have illustrated what would entail sufficient reasons. In **James Bwogi Vs Kampala City Council and Anor, Civil Application NO. 09 of 2017 (Unreported)** that followed **Boney Katatumba Vs. Waheed Karim, Supreme Court Civil Appn NO. 27/ 2007**. The Supreme Court held that such would include whether the applicant gave sufficient reason for failing to take the required steps of which the law mandated, whether the application for extension of time was brought promptly without inordinate delay, and whether it was extremely important or as a way to avoid injustice to hear the appeal, in spite of the mistake(s). This Court in **Muliro Vs Wakalawo, EP Appn NO. 9/2017 (unreported)**, and **Omara V. Alcon & 3 Ors Election Petition Appeal Mis Appn No. 346 of 2016** decided that the Court will only consider more sympathetically applications filed promptly,

Time
SUC

because Article 126(e) of the Constitution was not to be disabused by defaulting litigants

32] The law applicable for filing election petition to this court is clear. It is provided in Rule 30 of the PE Interim Provisions Rules that:

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 the notice was given.*

On the other hand, Rule 31 provides that:

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.

- 33] The uncontested evidence is that the judgment in the petition was delivered on 30/9/2021 and on the same day, Wanyoto filed a notice of appeal and a letter requesting for the certified copy of the judgment and record of proceedings. Under the above provisions, she was mandated to have filed the memorandum of appeal by 7/10/2021; she instead filed it on 28/10/2021 which was 20 days late. She was also mandated to have filed the record of appeal by 8/11/2021 but instead filed it on 11/11/2021, three days late. Both Wanyoto and her counsel conceded to that double default.
- 34] Wanyoto and her counsel advanced several reasons for their default. It was stated in general that much effort was made to apply and then retrieve from the High Court Registry the certified copies of the two documents. That it was only after much persistence from counsel that a certified copy of the judgment of the High Court was provided to them on 8/10/2021.
- 35] Wanyoto's counsel insisted that it was impossible for them to craft grounds of appeal without first perusing the judgment,

which was in fact, a detailed one. That a proper or comprehensive memorandum could only be drawn after making a comparison between the evidence in the proceedings, and the findings in the judgment. It was argued in addition that Wanyoto intended to appeal against certain orders of the Court made during hearing of the petition and not incorporated in the judgment. Her counsel singled out the order to decline cross examination of the EC's Secretary and of Galiwango's witnesses on the electronic evidence. Yet another to decline a prayer by Wanyoto to adduce evidence that had inadvertently been left out of the petition, and lastly, the trial Court's refusal to strike out the affidavit evidence of Galiwango Hassan. Indeed, those decisions came to form the basis of grounds 2, 11, 12 and 13 of the memorandum of appeal. It was argued that those orders could realistically only be retrieved from the record and not the judgment.

36] It was also contended that a certified record of appeal was necessary before an impactful memorandum could be drafted. Counsel argued that some facts vital to the appeal could only be retrieved from the record. They singled out evidence by which RWI conceded that he supplied DR forms on 16/1/2021 which subsequently was not found to tally with a subsequent batch certified on 15/3/2021. Secondly an admission by RW2 and Galiwango of electoral malpractice, including interference with unsealed electoral results at Northern Division Collection Centre. In the same vein, counsel submitted that some of that evidence was contained in Galiwango's evidence.

37] Much of those reasons were strongly countered by the EC, who in addition contended that Wanyoto who was present when the judgment was delivered was mandated to take the necessary step of filing the appeal on time which she failed to do. It was contended in addition that Wanyoto who furnished what appeared to be a forged receipt, approached this court with "unclean hands".


EUC

- 38] We would perhaps need to first investigate the contest against Annexure D to Wanyoto's affidavit which is the payment registration slip. It indicates that a payment of Shs. 551,300 was made by one Lydia Wanyoto Mutende and received by an Equity Bank Agent on 25/10/2021. As pointed out for the EC, it would be a suspicious receipt if payment was made before an assessment was made. However, what appeared to be an extract from the URA portal (attached to counsel Sabiiti's affidavit in Reply as "Annexure A"), was not a certified copy and cannot be considered by the Court. Thus, there is no evidence to back up the allegations that the payment was not reflected in the URA portal. Conversely, Wanyoto who claimed to have made the payment on 25/10/2021, attached to her affidavit in rejoinder, a certified copy of a general receipt that indicated that it is for "*fees for certifying proceedings in EP 002/2021*". Although the payment date is unclear, the PRN number on the receipt matches the number on the URA payment registration slip. The difference in the sum of figures on the two documents would probably be bank fees. The Court takes judicial notice that bank fees are always charged on top of any payment made through any bank. The Court would accordingly reject the objection by the EC.
- 39] The above notwithstanding, we have found for a fact that beyond their letter dated 30/9/2021, there is no other evidence to support the allegation that Wanyoto's lawyers made frequent visits to the Court to follow up on their request for a certified copy of the judgment. Infact according to the record filed by Wanyoto, the judgment was certified on 6/10/2021, one day before the statutory period to file the memorandum of appeal lapsed. Had her lawyers been vigilant as they claim, they should have been able to access a copy on that date.
- 40] Even so, there is nothing to indicate that Wanyoto was not aware of the contents of the judgment. It is indicated on page 3111 of the record that Wanyoto and her counsel Mugabi Silas Kahuma, Wambi Andrew and Nangulu Eddie were present in

Court on 30/9/2021, the date the judgment was read in open court. There is authority to indicate that an appeal is crafted out of a judgment. According to Rule 86 Court Rules, a memorandum which is concise and brief, must be restricted only to points that are alleged to have been wrongfully decided and the nature of the orders sought. In our view, seven days after receiving the judgment was sufficient time for Wanyoto and her counsel to have crafted such a memorandum.

- 41] Again the arguments that some orders were made before judgment was made are equally weak. The three orders of the Court mentioned were delivered during hearing of the petition on 1/9/2021 and 7/9/2021 respectively (See pages 38 and 373 of the record). On all occasions, Wanyoto and her counsel were present. Indeed, it is Wanyoto's lawyers who initiated the motions or prayers which were for reason, denied. In the same vein it is taken that she and her counsel were fully aware of those interlocutory decisions, and a ground of appeal on each, could be crafted without first recourse to the judgment or record of appeal.
- 42] On the other hand, this Court is prepared to agree with Wanyoto that for some material, a certified copy of the record was necessary. It is also a strong point that her counsel did what was expected of them when they applied for the record in the first place. Indeed, according to the Parliamentary Elections (Election Petitions) (Production of Records of Appeal) Directions SI 141-4, (hereinafter PE Production of Records Directions), the High Court is mandated to expeditiously prepare and issue a record of appeal in election matters. It may require the court to begin typing the proceedings during hearing of the petition. The concerned staff are enjoined to work on it as a priority over every other matter. However, applying for the record alone is not sufficient. The requirement that the memorandum of appeal is filed within seven or 14 days immediately after filing of the notice of appeal is mandatory. Therefore, the applicant does not

Time
SUC

have the luxury of waiting to receive the certified copy of proceedings before filing their memorandum of appeal.

43] We have noted before that Wanyoto and her lawyers presented no documentary evidence to support their alleged frequent requests and visits to the Court registry to follow up the record. Nonetheless, they both admitted to have received a certified copy from the Court on 25/10/2021, nearly a fortnight before time for filing it would elapse. Their contention is that it was incomplete and they therefore made a written request for the Court to rectify it or at least release to them a certified copy of the Judge's written notes, which was never done. It is inexplicable that knowing that time was against them, counsel did not take the decision to file the available record and then seek recourse from this Court, a decision they eventually took when they sought to amend the memorandum of appeal to address that issue. We are in agreement that it is entirely the duty of the Court to prepare and issue the record. Where the High Court fails in its duty to do so, this Court would perhaps be persuaded to consider an extension, but bearing in mind the overall statutory scheme for hearing of election petitions and determining them in a very limited period. This in our view would only apply to a litigant whose appeal was filed on time, but not vice versa. Technically, without a proper appeal on record, any consideration relating to its record would be moot.

44] This Court has under similar circumstances previously rejected requests for extension. For example, in **Kasibante Moses Vs Katongole Singh Marwaha, PE Appeal No. 8/2012**, court stated at page 12-13 that:

"..... the rules of procedure dealing with election litigation have no provision with writing of letters requesting for record of proceedings 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 sat 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.”

- 45] The decision of the Courts to consider only deserving cases should also be understood within the context of the law governing election petitions. Under Article 140(1) and (2) of the Constitution and Rule 33 PE Interim Provisions Rules, this Court is mandated to hear and determine an appeal expeditiously, with a directive that all other matters are suspended to give such actions priority. That mandate is repeated in section 66 (2) of the Parliamentary Elections Act by which Parliament restricted hearing of appeals to a specified period. It is provided that:

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

- 46] This Court has in her recent decision of **Kasibo Joshua Omayende Vrs Mboizi A. Waako & Anor EPA No. 6/2021** held that where the provision for extension of time is enabled by regulations and the period of limitation is in the Rules, such period of time can be extended by powers for extension in the Rules. However, where the limitation period is an Act of Parliament, it cannot be extended in breach of the period in the Act for want of jurisdiction of the Courts. Indeed, questions of jurisdiction of the Court were reaffirmed in the Supreme Court decision of **Makula International Ltd Vs His Eminence Cardinal Emmanuel Nsubuga [1982] HCB 11**. It is clear then that, this Court has no mandate to change or circumvent that law because in this case, making an order of extension of time

*Jme
SUC*

would have the effect of extending the time beyond six months from the time the appeal is filed.

- 47] Once a litigant submits themselves to the jurisdiction of the Court, they are strictly bound to the time lines set in the parent Act. The Supreme Court gave good reason for this. In her decision of **Kyagulanyi Ssentamu Robert Vrs Yoweri Museveni Tibuhaburwa Kaguta & Anor Misc. Appl. No. 1/2021** the Court was considering Article 104 of the Constitution which is *pari materia* with Article 140 and the EP Act and Rules. It was held:

Every event geared towards the determination of a presidential election petition has fixed time frames that require strict compliance....The intention of the Legislature in providing time lines in determination of the petition is to prevent delay and ensure expeditious hearing and conclusion of election related disputes. It is to ensure that the country gets back to normalcy having gone through a stressful electoral process.

The same would apply for Parliamentary elections.

- 48] It is again for the same reason that this Court in her recent decision in **Tete Chelengat Everline Vs EC & Chemutai Everlyn EP Application No. 14/2022** declined to entertain a similar application. The Learned Justices stated that:

“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 six 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”.

- 49] Our finding then is that no sufficient reason was advanced by Wanyoto to convince the Court to enlarge time or to validate the

memorandum and record of appeal that were filed out of time. Nevertheless we need to consider whether despite the above findings, it is extremely important to hear Wanyoto's intended appeal.

50] Wanyoto's counsel stated in his two affidavits that the interest of justice requires the appeal be determined on merit, because it elicits novel questions of law which will greatly add to and direct future election related jurisprudence in the polity. Further that the appeal is of fundamental importance to the electoral jurisprudence as the judgment was reached without an actual record of proceedings or evidence. In their view, the consequence of such a judgment undermines the judicial duty to properly record evidence which is at the core of a free and fair trial. Further that without a record, the appellate court will be unable to re-assess and re-evaluate the trial court's judgment regardless of its relevance or credibility to the interests of justice and good governance.

51] This court agrees with Wanyoto's lawyers that any Court that assumes jurisdiction to hear a matter should as a rule receive all attendant pleadings and record all evidence adduced at the trial. For election appeals, under Rule of 4 of the PE Production of Records Directions courts are called out to arrange for and then prioritize typing of the proceedings during the course of hearing the petition. Even so, the request by Wanyoto and her counsel is one that seeks to attract the discretion of Court to consider the petition as one which is novel and important to the polity. We repeat that the powers of this court are strictly confined in the law. A persuasive decision followed by the Supreme Court in the **Kyagulanyi** application (supra), which followed **Rao & Ors (1956)1 MLJ 40**, would be useful. It was held:

"...the general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely

statutory proceeding unknown in the common law, and that the court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law”

52] We hasten to add that, whether or not the record in this case is complete is a matter yet to be proved. It is for that reason that Wanyoto sought an amendment to her memorandum of appeal to add a ground that would resolve that issue. Being clearly a procedural matter, there would be no exceptional or novel matter as claimed. In the same vein, we see nothing novel about all the other fourteen grounds raised on appeal. We therefore conclude that the appeal is not of fundamental importance to the electoral jurisprudence and would have been decided like many others before it. In our view, there is nothing to persuade us to overlook the serious default of failing to file the appeal within the time prescribed by law.

53] However before we conclude we need to point out that when the matter came up for hearing on 31/3/2022, an oral application was made for Wanyoto to file an amended memorandum of appeal. The intention was to introduce a new ground drafted as follows:

“the learned trial judge erred in law and in fact in adjudicating over and determining Election Petition number 0002 of 2021 without a complete record of proceedings and evidence in cross examination of the respondent’s witnesses, thus leading to a miscarriage of justice”

54] Our decision to allow the application for amendment before hearing this application was purely grounded in the nature of the proceedings of this appeal. In addition to this application and the appeal, the respondents also filed individual applications (i.e. No. 25 of 2021 and No. 3 of 2022 filed on 16/12/2021 and 27/1/2022 respectively) to strike out the appeal. As is the custom, this application, the appeal and those

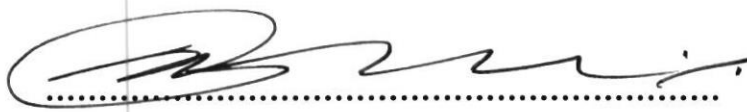
two actions had to be expeditiously handled in order to meet the requirements of election petition laws. This application having been filed first in time, it was given priority over the other two. As a matter of expediency, we allowed the amendment and adopted the memorandum of appeal and supplementary record of appeal on condition that our decision to hear the (the now amended) appeal, would abide our decision in this and the other two applications above. We emphasize that Wanyoto's application to amend the memorandum of appeal, and our decision to allow it, would not in any way validate an appeal that was at the outset, filed out of time.

- 55] In the result, we find no merit in the application, and it is dismissed with costs to the 2nd respondent.
- 56] In conclusion, we need to state that by filing this application, Wanyoto and her counsel conceded that both her memorandum and record of appeal were filed out of time. We have rejected her application to validate both proceedings or to allow an extension for them to be filed out of time. In essence, there is no valid appeal before this Court. Accordingly, Election Petition Appeal No. 63 of 2021 is struck off the record with no order as to costs.

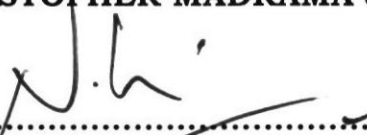
DATED at Kampala this...20th...day of...June.....2022.


.....

ELIZABETH MUSOKE JA


.....

CHRISTOPHER MADRAMA JA


.....

EVA K. LUSWATA JA

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPLA
ELECTION PETITION APPLICATION NO. 003 OF 2021
ARISING FROM ELECTION PETITION APPEAL NO. 63 OF 2021)
ARISING FROM HIGH COURT ELECTION PETITION NO.002 OF 2021
NAKAYENZE CONNIE GALIWANGO..... APPLICANT
VERSUS
WANYOTO LYDIA MUTENDE RESPONDENT

RULING OF THE COURT

- 1] The applicant filed this application under the provisions of **Rule 43(1) & (2), 44 and 82** of the **Judicature (Court of Appeal Rules) Directions and Rules 30** of the **Parliamentary Elections (Interim Provisions) (Election Petitions) Rules** for orders that the respondent's notice of appeal, memorandum of appeal and record of appeal in **Election Petition Appeal NO. 63 OF 21** be struck out and for costs of the application.
- 2] The grounds of the application are that the respondent failed to take the necessary steps to file her memorandum and the record of appeal within the time prescribed by law. Secondly, that it is just and equitable that the notice of appeal, memorandum of appeal and record of appeal filed in court be struck out.
- 3] The application is supported by the affidavit of Nakayenze Connie Galiwango, the applicant.
- 4] On 28/10/2021, the respondent Ms. Wanyoto Lydia Mutende filed Election Appeal Miscellaneous Application No. 11/2021 seeking several orders. Firstly, that court admits and validates her memorandum of appeal and record of appeal against the judgment and orders of the High Court holden in Mbale in Election Petition No. 002/2021, though the period prescribed for filing a memorandum and record of appeal may have lapsed. Secondly she sought leave of this Court to file her memorandum and record of appeal out of time. Thirdly, she sought an order for this Court to extend time within which to file a memorandum and record of appeal and costs. In our ruling in Election Miscellaneous Application No. 11/2021, the application was denied and the notice, memorandum and record of Appeal were struck out.

- 5] The effect of the ruling in that application is that Ms. Wanyoto Lydia Mutende has no valid appeal in this Court on the ground that the memorandum of appeal and the record of appeal were filed out of time.
- 6] Having dismissed the respondent's application for extension of time to file her memorandum of appeal and record of appeal out of time, or to validate the late filing of the memorandum of appeal and record of appeal, this application has been overtaken by events. It is accordingly dismissed with no order as to costs.
- 7] Dated at Kampala the 20th day of June 2022



.....

Elizabeth Musoke

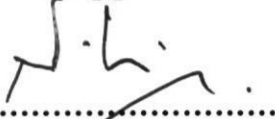
Justice of Appeal



.....

Christopher Madrama

Justice of Appeal



.....

Eva K. Luswata

Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPLA
ELECTION PETITION APPLICATION NO. 25 OF 2021
ARISING FROM ELECTION PETITION APPEAL NO. 63 OF 2021)
ARISING FROM HIGH COURT ELECTION PETITION NO.002 OF 2021
THE ELECTORAL COMMISSION APPLICANT
VERSUS
WANYOTO LYDIA MUTENDE RESPONDENT

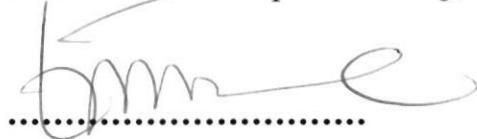
RULING OF THE COURT

- 1] The applicant filed this application under the provisions of **Rule 43(1) & (2) and 82** of the Judicature (Court of Appeal Rules) Directions and **Rules 29, 30 & 31** of the **Parliamentary Elections (Interim Provisions) (Election Petitions) Rules** for orders that **Election Petition Appeal No 63/2021** be struck out and for costs of the application and the appeal to be borne by the respondent.
- 2] The grounds of the application are that the appeal is incompetent as the respondent failed to file and serve the memorandum and record of appeal within the timelines prescribed by law. Secondly, the respondent did not exercise the necessary vigor and vigilance required of an election petition appeal in order to prosecute the appeal within time required by law. Thirdly, the respondent without leave of court filed and served an inherently incompetent appeal. Lastly, the respondent is guilty of dilatory conduct, rendering the appeal incompetent, barred by the law and liable to be struck out with costs.
- 3] The application is supported by the affidavit of Eric Sabiiti, the Head litigation of the applicant.
- 4] On 28/10/2021, the respondent Ms. Wanyoto Lydia Mutende filed Election Appeal Miscellaneous Application No. 11/2021 seeking several orders. Firstly, that court admits and validates her memorandum of appeal and record of appeal against the judgment and orders of the High Court holden in Mbale in Election Petition No. 002/2021, though the period of limitation prescribed for filing a

memorandum and record of appeal may have lapsed. Secondly she sought leave of this Court to file her memorandum and record of appeal out of time. Thirdly, she sought an order for this Court to extend time within which to file a memorandum and record of appeal and costs. In our ruling in Election Miscellaneous Application No. 11/2021, the application was disallowed with costs. The effect of the ruling in that application is that there is no valid appeal in this Court on the ground that the memorandum of appeal and the record of appeal were filed out of time.

- 5] Having dismissed the respondent's application for extension of time to file her memorandum of appeal and record of appeal out of time, or to validate the late filing of the memorandum of appeal and record of appeal, this application has been overtaken by events. It is accordingly dismissed with no order as to costs.

DATED at Kampala the 20th day of June.....2022



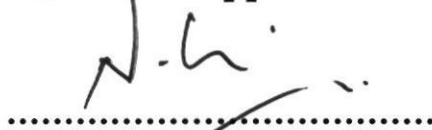
Elizabeth Musoke

Justice of Appeal



Christopher Madrama

Justice of Appeal



Eva K. Luswata

Justice of Appeal