

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT**  
**KAMPALA**  
**MISCELLANEOUS APPLICATION NO.10 OF 2021**  
**ELECTION PETITION APPEAL NO.20 OF 2021**

*(Arising from two Rulings of the High Court (Civil Division) in Election Petition No.002 of 2021 one dated 13<sup>th</sup> September, 2021 delivered by the Hon. Lady Justice Margaret Apiny, another dated 12<sup>th</sup> April 2020 delivered by Hon. Mr. Justice Philip Odoki)*

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10 **NYANZI FRED SENTAMU=====APPELLANT**

**V**

- 1) **THE ELECTORAL COMMISSION**  
2) **THE RETURNING OFFICER KAMPALA CENTRAL**  
3) **NSEREKO MOHAMMAD=====RESPONDENTS**

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**HON. MR. JUSTICE GEOFFREY KIRYABWIRE, J.A.**

**HON. MR. JUSTICE STEPHEN MUSOTA, J.A.**

**HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, J.A.**

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**JUDGMENT OF THE COURT**

## INTRODUCTION

The Appellant appealed against two Rulings of the High Court (Civil Division in Election Petition No. 002 of 2021 one dated 13<sup>th</sup> September, 2021 delivered by the Hon. Lady Justice Margaret Apiny, another dated 12<sup>th</sup> April 2020 delivered by Hon. Mr. Justice Philip Odoki)). In the first one Election Petition No. 02 of 2021 the Appellant's Election Petition was struck out because he had not served the third Respondent personally with the Notice of Presentation of the Petition and the Petition (hereinafter referred to as the Petition). While in the second one, Miscellaneous Application No. 192 of 2021 an Application for substituted service was denied by the court.

## BACKGROUND

The Appellant was among the contestants for the vacancy of Member of Parliament for Kampala Central Constituency. The Elections were conducted by the first and second Respondents on 14<sup>th</sup> January, 2021. At the conclusion of the polling the third Respondent was returned as the duly elected Member of Parliament having polled 16,998 votes while the Appellant polled 15,975 votes. The Appellant was dissatisfied with the results of the Election.

He Petitioned the High court (Civil Division) challenging the Election results and seeking nullification of the results of the Elections. He complained that the Election was not conducted in accordance with the Electoral laws and this non-compliance affected the results of the election in a substantial manner.

At the hearing of the Petition, the Appellant filed an Application (Misc. Application No. 192 of 2021) seeking Orders that the time within which to serve the third Respondent be enlarged and that service of the Petition on the

third Respondent be effected through substituted service as personal service had failed. The court declined to grant the prayer for substituted service but granted the prayer for enlargement of time within which to serve the third Respondent. This Application was heard and determined by Philip Odoki J.

5 When the main Appeal came up for hearing before another Judge the Hon. Margaret Apiny J, a preliminary objection was raised with regard to the competence of the Appeal since the third Respondent had not been served with a copy of the Petition. The court found that the Petition was incompetent and struck it out. The Appellant being dissatisfied with both Rulings of the  
10 court lodged this Appeal.

The Appellant also lodged an Application (Misc. Application No. 2 of 2021] seeking leave of Court to effect service of the Notice of Appeal on the third Respondent through substituted service out of time.

### **REPRESENTATION**

15 The Appellant was represented by Mr. Ssemuyaba Justine, while the first and second Respondents were represented by Mr. Erick Sabiiti.

### **DUTY OF THE COURT**

This is a final appellate Court in parliamentary election matters. Section 66 (3) of the Parliamentary Elections Act provides that: -

20 *“(3) Notwithstanding S. 6 of The Judicature Act, the decisions  
of the Court of Appeal pertaining to parliamentary elections  
petitions shall be final”*

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The role of this court as a last appellate court in regards to appeals from the High Court is laid down under **Rule 30(1) of the Judicature (Court of Appeal Rules) Directions** which provides that: -

*"30. Power to reappraise evidence and to take additional evidence.*

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

*(a) Reappraise the evidence and draw inferences of fact; and*

*(b)..."*

10 This Court is therefore obliged to reappraise the inferences of fact drawn by the trial court.

Furthermore, this Court has variously held in a number of cases that in carrying out its duty in election appeals, the Court has to caution itself on the nature of evidence adduced at the trial Court by affidavit where cross examination may not have taken place to test the veracity of testimony.

15 Equally, when evaluating the evidence at the trial Court, regard must be had to the fact that in elections contests evidence may be partisan with witnesses having a tendency towards supporting their candidates. This may result in false or exaggerated evidence which may be subjective. Therefore, this situation calls upon the Court to ensure that the veracity of the evidence is

20 tested against independent and neutral sources as well.

## **BURDEN AND STANDARD OF PROOF**

The burden of proof is cast on the petitioner to prove the assertions to the satisfaction of the court that the alleged irregularities or malpractices or non-compliance with the provisions and principles laid down in the relevant electoral laws were or is committed and that this affected the results of the election in a substantive manner in the election petition. Furthermore, the evidence must be cogent, strong, and credible. The standard of proof is that of a balance of probabilities. In the matter of **Paul Mwiru v. Hon. Igeme Nabeta & Others**-Election Petition No. 06 of 2011 this court held: -

*"Section 61(3) of the PEA sets the standard of proof in parliamentary election petitions. The burden of proof lies on the petitioner to prove the allegations in the petition and the standard of proof required is proof on a balance of probabilities. The provision of this subsection was settled by the Supreme Court in the case of **Mukasa Harris v Dr. Lulume Bayiga** (supra) when it upheld the interpretation given to the subsection by this court and the High Court"*

Furthermore, in the **Masiko Winifred Komuhangi and Babihuga J. Winnie** Election Petition Appeal No. 09 of 2006 L. E. M. Mukasa Kikonyogo (Deputy Chief Justice as she then was) held: -

*"...It is now well settled that the present legislative formulation of section 62 (3) Parliamentary Elections Act requires that **the court trying an election petition under the Act will be satisfied if the allegation/ground in the petition is proved on a balance of probabilities. Although higher than in ordinary civil cases. This is because an election petition is of great importance both to the individuals concerned and the nation at large. An authority for that observation is the case of **Bater vs Bater** (1950) 2 All ER 458. See also **Sarah Bireete and Another vs Bernadette Bigirwa** and Electoral***

*Commission, Election Petition Appeal No. 13 of 2002 (unreported). A petitioner has a duty to adduce credible or cogent evidence to prove his allegation at the required standard of proof.” (emphasis Ours)*

5 With the above position of the law in mind, we shall proceed to resolve the grounds of Appeal in this Election Petition Appeal.

### **Grounds of Appeal**

The Memorandum of Appeal contained six grounds of Appeal which were framed as follows: -

- 10 **1. Whether counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who had been duly served with the Petition had “*locus standi*” to raise a Preliminary Objection for and on behalf of the 3<sup>rd</sup> Respondent about non- service of the Election Petition and Notice of Presentation of the Petition when they themselves had been served and had filed their Response to this Petition.**
- 15 **2. Whether the 3<sup>rd</sup> Respondent had ever been served with the Petition and Notice of Presentation of the Petition when *de facto* the 3<sup>rd</sup> Respondent was in Possession of the Petition and the Notice of Presentation of the petition which had been delivered to his residence of Bugolobi and via WhatsApp Message electronically.**
- 20 **3. In Alternative and without prejudice to the foregoing, whether it was impossible for he Appellant /Petitioner to get the 3<sup>rd</sup> Respondent to receive and sign the Petition personally and whether it was sufficient to leave a copy of the document to be served at his place of residence at Bugolobi in a conspicuous place**



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and via transmission on his WhatsApp number which amounted to personal service.

4. Whether the learned Trial Judge erred in law and in fact when she wrongly ruled that O.5 r15 CPR is not applicable together with Rule 6(3) of the Parliamentary Elections (Election Petitions) Rules S.I 141-2 to the facts of this case.
5. Whether the 3<sup>rd</sup> Respondent dully instructed three law Firms M/S Arcadia & Co. Advocates, M/s Maldes Advocates and M/s Nsereko - Mukalazi & Co. Advocates who dully filed a Notice of Instructions and appeared in Court for and on his behalf thereby waiving the right to be served.
6. Whether the trial Judge Hon. Justice Phillip Odoki in his Ruling in Misc. Appln No. 192 of 2021 dated 12<sup>th</sup> April 2021 rightly denied the Appellant an Order of substituted Service when there was all evidence that it was practically impossible to get the 3<sup>rd</sup> Respondent to acknowledge Personal Service of the Petition and Notice of Presentation of the Petition.

Ground No. 1: Whether counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who had been duly served with the Petition had "*locus standi*" to raise a Preliminary Objection for and on behalf of the 3<sup>rd</sup> Respondent about non- service of the Election Petition and Notice of Presentation of the Petition when they themselves had been served and had filed their Response to this Petition.

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## Appellant's Submissions

Counsel for the Appellant raised a preliminary objection that the third Respondent had no "*locus standi*" in the matter.

5 He submitted that the third Respondent having been duly served and having failed to file a defence had put himself "out of court" and had no "*locus standi*" in the matter and could not be heard. He relied on the case of **Sengendo v Attorney General** [1972] 1 EA 140 for this proposition.

10 Counsel for the Appellant further submitted that the third Respondent was required to first seek leave of the court to file a response out of time which he did not do. He in this regard referred us to Rule 19 of the Election Petition Rules and the Case of **Ikiror Kevin v Orot Ismael** Election Petition No. 08 of 2016.

15 It was submitted by counsel for the Appellant that the first and second Respondent erred when they made arguments on behalf of the third Respondent.

20 His argument was that the Electoral Commission is supposed to be independent in the performance of its functions and should not be subject to the direction or control of any person or authority. He submitted that by the first Respondent raising a Preliminary Objection on behalf of the third Respondent this indicated that the Commission were under direction of the Third Respondent. He relied on Article 62 of the Constitution and Section 13 of the Electoral Commission Act. He also referred us to the case of **Dr. Runumi Mwesigye v Returning Officer, The Electoral Commission and Adson Kakuru** EC No.2 of 2002.



Furthermore, counsel for the Appellant submitted that counsel for the first and second Respondent could only make arguments on behalf of the third Respondent if they had been given instructions to do so. He relied on Regulation 2 of the Advocates (Professional Regulations) which provides that  
5 no Advocate shall act for any person unless he/she has received instructions from that person or authorized Agent.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents' Submissions**

Counsel for the Respondent submitted that the trial court was correct to find that the first and second Respondent had the "*locus standi*" to raise a  
10 Preliminary Objection for the third Respondent about non service of the Petition on the third Respondent.

He argued that the Third Respondent was a necessary party for the section 61(1) (c) of the Parliamentary Elections Act and the failure to serve the third Respondent rendered the entire Election Petition incompetent. He submitted  
15 that a winning candidate is a statutory Respondent to the Petition and thus must be served with the Petition. He relied on the case of **Mbabali Jude v Electoral Commission** Election Petition Appeal No. 3 of 2006 for the proposition that Electoral Commission as a party to the Petition, had "*locus Standi*" to apply to court to hear and determine the question, whether the  
20 winning candidate was served as that could dispose of the whole Petition.

It was submitted by counsel for the Respondent that the Appellant's contestation that the conduct of the first Respondent raising a preliminary point of law on behalf the third Respondent was unsubstantiated and unfounded.

He also argued that there was nothing in Article 61 and 62 of the 1995 Constitution which barred the first and second Respondent from raising a preliminary point of law in an action where they are parties.

5 Counsel for the Respondent submitted that the Appellant's contention that the Respondents adduced evidence from the bar was erroneous.

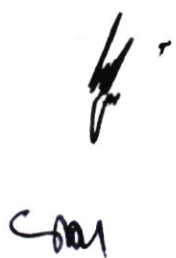
He argued that Appellant filed four affidavits of service which were availed to the first and second Respondents and which showed that the Petition was not served on the third Respondent in accordance with the law.

### **COURTS FINDINGS**

10 The issue for determination in this ground is whether the Electoral Commission could raise a preliminary objection on behalf of the winning candidate that is the third Respondent.

15 Counsel for the Appellant submitted that by the Electoral Commission raising an objection on behalf of the third Respondent it showed that it was acting under the direction of the third Respondent yet it is meant to be independent in the performance of their duties. Conversely, counsel for the Respondent submitted that the Electoral commission had *locus standi* to raise a preliminary Objection about the non-service of the Petition on the third Respondent.

20 Section 62 of the Parliamentary Elections Act and Rule 6 of the Parliamentary Elections (Election Petitions) Rules enjoins the Petitioner to serve each Respondent within seven days after filing of the Petition a notice in writing of the presentation of the petition accompanied by copy of the Petition.



In the case of **Mbabali Jude v Electoral Commission** Election Appeal No. 3 of 2006 the notice of Presentation of the Petition was served on the Electoral Commission as required by law. There however arose a dispute as to whether a similar service was effected on the winning candidate. While the Petition was awaiting fixture for hearing, the Electoral commission filed an Application seeking the dismissal of the Election Petition. The major ground of the Application was that service of the notice of Presentation of Petition was not served on the winning candidate. It was argued that the failure of service of the Petition rendered the Petition a nullity. This court held that the Electoral Commission as a party to the Petition had "*locus standi*" to apply to court to hear and determine the question of whether the winning candidate was served as that could dispose of the whole Petition.

The Court relied on the case of **Besweri Lubuye v Electoral Commission** EPA No. 2 of 1999. In that case Daniel Kikoola who was the winning candidate was not served with the copy of the petition as required by law. Having learnt of the petition somehow, he filed his answer to the Petition under protest.

The High court dismissed the Petition on ground that it was not served on the winning candidate. On appeal, this court while dismissing the Appeal held: -

*"By reason of non-service of the petition on the second respondent, no action was in existence."*

In the instant case counsel for the Appellant criticized the trial Judge for hearing and determining a preliminary objection raised by the first and second Respondent on behalf of the third Respondent. We find that this criticism on the trial Court is misplaced. It is wrong to suggest that only the third Respondent and no one else could raise an issue of service especially

considering that there were even affidavits of service on the Court file that pointed to non- service of the third Respondent. In any case it was the legal duty of the Appellant as Petitioner to serve the Petition on all the parties. This court therefore agrees with the Respondents that the first and second  
5 Appellant had "*locus standi*" to bring a preliminary objection about non service of the petition on behalf of the third Respondent.

This ground therefore fails.

### **GROUND 2, 3 AND 4**

**Whether the 3<sup>rd</sup> Respondent had ever been served with the Petition and  
10 Notice of Presentation of the Petition when de facto the third Respondent was in Possession of the Petition and the Notice of Presentation of the petition which had been delivered to his residence of Bugolobi and via whatsapp Message electronically.**

**And**

**15 In Alternative and without prejudice to the foregoing, whether it was impossible for he Appellant /Petitioner to get the 3<sup>rd</sup> Respondent to receive and sign the Petition personally and whether it was sufficient to leave a copy of the document to be served at his place of residence at Bugolobi in a conspicuous place and via transmission on his WhatsApp  
20 number which amounted to personal service.**

**And**

**Whether the learned Trial Judge erred in law and in fact when she wrongly ruled that 0.5 r 15 CPR is not applicable together with Rule 6(3)**

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**of the Parliamentary Elections (Election Petitions) Rules S.I. 141-2 to the facts of this case.**

### **APPELLANT'S SUBMISSIONS**

Counsel for the Appellant submitted that the third Respondent was an Advocate and a member of Parliament therefore he ought to have filed a response or filed an Application to enlarge time.

Counsel for the Appellant submitted that the Appellant even made an Application for extension of time when he could not find the third Respondent. He submitted that when this Application was granted by the court, the third Respondent frustrated the process of personal service because of his security Personnel.

He also submitted that a court process server also served a copy of the Petition electronically by sending a WhatsApp message to his known mobile phone and it indicated that he had received the message. He submitted that the Constitution (Integration of ICT into the Adjudication Processes for Courts of Judicature) Practice Directions, 2019) allows for more efficient and effective process of service of court documents through instant emails, instant messaging applications or any other electronic communication service. He relied on case of **Abela and others v Baadarani**, Trinity Term (2013) UKSC 44 for the proposition that courts should take a proactive stand and adopt modern and new technology for communication and dispense antiquated court processes and procedures in relation to service of court process.

Counsel for the Appellant also prayed that the court considers the fact that the service was being carried out during the period of the global pandemic (Covid

19) where social distancing was required and it was necessary to embrace technology in as far as communication was concerned.

Under Ground four, Counsel for the Appellant submitted that the trial Judge erred when she found that there was no personal service of the Petition.

5 He submitted that the Appellant took all due diligence to ensure that the third Respondent was personally served. He submitted that it was after the process server failed to find the third Respondent that he resorted to fixing a copy of the Petition at his well known address. He submitted that the Petitioner even went ahead to invite area local council chairman to accompany him to show  
10 the process server the location of the third Respondent. He submitted that the Appellant also accompanied the process server. He cited the case of **Eliakanah Omuchilo v Ayub Machiwa** (1966) EA 229 for this proposition.

Counsel for the Appellant further submitted that the Third Respondent knew about the Petition since while he was attending the hearing in Misc.  
15 Application No 14 of 2021 at the Chief Magistrates court of Mengo in which the third Respondent informed court that there was a pending election petition against him. He argued that the third Respondent therefore knew about the petition.

### **FIRST AND SECOND RESPONDENTS' SUBMISSIONS**

20 Counsel for the Respondent submitted that the trial Judge rightly held that the service that was required to be effected was personal service and not the one of placing it in a conspicuous place as was done in this case.

He fortified his argument by relying on Rule 6(3) of the Parliamentary Elections (Interim Provisions) Rules, (S I 141-2) that provides for personal

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service. He submitted that the Parliamentary elections (interim Provisions) did not provide for any other means of serving the Appellant.

5 Counsel for the Respondent further submitted that where the intended Respondent cannot be found within three days the Appellant was required to make an application to the court stating that all reasonable efforts had been made to effect personal service on the Respondent but without success.

10 With regard to the submission that the Petition was also served on the third Respondent electronically, counsel for the Respondent submitted that the court reserves the right to direct the parties to use information technology in appropriate cases. He argued that service via *WhatsApp* is not ordinary service and an order of substituted service must first be obtained for it to be deemed effective.

### **COURT'S FINDINGS**

15 In these grounds the complaint is that the service of the Petition was actually effected upon the third Respondent by placing it on his gate at home and also electronically but the third Respondent opted not to file an answer to the Petition. On the other hand, counsel for the Respondent has submitted that the service that was expected of the Appellant was by effecting it personally on the third Respondent and not by depositing the notice of Presentation of the petition at the third Respondent's gate or electronically.

20 The trial Judge found that the attempts to serve the third Respondent at Parliament, Chief Magistrates Courts of Mengo, his Bugolobi residence without success as pointed out in the affidavits of service and the transmission of the documents on WhatsApp did not amount to personal service envisioned

under Rule 6(3) of the Parliamentary Elections (Election Petitions) Rules. The trial Judge later found that the Petition was incompetent because it had not been personally served on the third respondent and thus struck it out.

5 In view of the trial Judge's findings it is important to determine whether the service on the Third Respondent even if it was not personal, whether it was effective or non-effective.

The Supreme Court has dealt with the notion of effective service of summons in the case of **Geoffrey Gatete and Anor v William Kyobe** SCCA No. 7 of 2005 as follows: -

10 *The Oxford Advanced Learners Dictionary defines the word "effective" to mean having the desired effect; producing the intended result; producing the intended result". In that context, effective service of summons that produces the desired or intended result. Conversely, non-effective service of summons means service of*  
15 *summons means service that does not produce such result. There can be no doubt that the desired and intended result of serving summons on the defendant in a civil suit is to make the defendant aware of the suit brought against him so that he has the opportunity to respond to it by either defending the suit or admitting liability and*  
20 *submitting to Judgment. The surest mode of achieving that result is serving the defendant in person. Rules of procedure, however, provide for such diverse modes of serving summons that the possibility of service failing to produce the intended result cannot be ruled out in every case.*

25 The court further held that: -



5                   *"...Although the service on the agent or the substituted service would be "deemed good service" on the defendant entitling the plaintiff to a decree under 0.36 r 3, if it is shown that the service did not lead to the defendant becoming aware of the summons, the service is "not effective" within the meaning of 0.36 r.11..."*

What this court has to determine is whether service can be deemed to be effective.

In **St. Aubyn (LM) v A.G** (1951) 2 ALL ER 473 at P.498 Lord Radcliffe describes the various purposes for which the word is used where, he says: -

10                   *"The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what*  
15                   *is uncertain and what is in the ordinary sense, impossible.*

In our view, in the instant case there is enough evidence to show that the service could be deemed to be effective. As seen in the **Gatete case** (Supra) the intended result of serving summons on a defendant in a civil suit is to make the defendant aware of the suit brought against him. We find that the  
20                   third defendant was aware of the summons for the following reasons.

First of all service was made by the court process server by the names of Mirembe Jackie on the 12<sup>th</sup> day of April 2021 on the following places; first at the third Respondent's home in Bugolobi, then he also left the petition at the parliament where the third Respondent works. Furthermore he also sent him

a WhatsApp message to his personal phone number which showed that he had received it.

Secondly, there was an affidavit of service made by Tumushabe Mary, the LC1 Chairperson of Bugolobi III on 14<sup>th</sup> April 2021. Her evidence is to the effect  
5 that she met a police officer at the residence of the third Respondent who chased her away with a gun. This police officer followed her to her home and told her that Hon. Nsereko had told him to inform her to stay away from those matters. We donot think the police officer could have followed the Chairman to her home without the express permission of the third Respondent. This  
10 evidence is corroborated by the affidavit of Benson Kato a process server of the High Court.

In regard to the evidence of the process servers and the chairman, the trial Judge found as follows: -

*"In my considered view, the attempts to serve the third respondent at  
15 parliament, chief magistrates court of Mengo, his Bugolobi residence without success as pointed out in the affidavits of service and the transmission of the documents on WhatsApp did not amount to personal service envisioned under Rule 6(3) of the Parliamentary Election( Election Petitions) Rules, SI 141-2. It is therefore my finding that personal service was not effected upon the third  
20 respondent as was directed by the court order..."*

We disagree with this finding. We find that service on the third Respondent was effective because he was made aware of the case in court. It may not have been personal as envisaged in the law but it was effective. He chose not to file in a defence at his own volition. We therefore also find that it was enough for

the Appellant to leave a copy of the Petition in a conspicuous place at his residence. This ground is allowed.

**GROUND NO. 5 Whether the 3<sup>rd</sup> Respondent dully instructed three law Firms M/S Arcadia & Co. Advocates, M/s Maldes Advocates and M/s Nsereko-Mukalazi & Co. Advocates who dully filed a Notice of Instructions and appeared in Court for and on his behalf thereby waiving the right to be served.**

### **APPELLANT'S SUBMISSIONS**

Counsel for the Appellant submitted the third Respondent waived the right to have summons served on him when he sent three Advocates to Court to file a Notice of Instructions.

He submitted that if a party appears before court it must be deemed that the said party has waived the right to have summons served on him. He submitted that such a waiver can be determined from the record and also from the subsequent conduct of that party. He relied on the case of **Ejab Family Investments and trading Company Ltd v Centenary Rural Development Bank Ltd** H.C.C.S 44/2017.

### **FIRST AND SECOND RESPONDENT'S SUBMISSIONS**

Counsel for the Respondent submitted that in an Election Petition the civil Procedure Rules can be applied only at the trial /hearing of the case.

He implored us to invoke Order 9 Rule 2 of the Civil Procedure Rules. It provides that the filing of a defence by a defendant shall not be treated as a waiver by him or her of any irregularity in the summons. He argued that the

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purpose of this provision in the Rules was to give a party to the suit the privilege of appearing without submitting to the Jurisdiction of court by protesting any irregularity in a court process.

Secondly, counsel for the Respondent submitted that the courts can only  
5 overlook the rules of procedure for substantive justice where the adverse party has waived his or her right to formal service by entering appearance within time prescribed by the Rules which was not the case in the instant petition.

### COURTS FINDINGS

10 The issue for determination in this ground is whether the filing of the notice joint instructions by the third Respondent's Advocates waived their rights to be served with the Petition. Counsel for the Appellant has submitted that it did. On the other hand counsel for the Respondent has argued that the court could only apply the civil Procedure Rules only at the trial or hearing of the  
15 case.

The trial Judge distinguished the case of **Mukasa Anthony Hariss v Dr. Bayiga Michael Philip Lulume** SC EP No. 017 of 2007 where the court held that non service is an irregularity which does not vitiate the proceedings especially where there is no injustice caused upon them from this case. Her  
20 finding was that the distinction in those cases with the current case was that the respondents in the **Mukasa Anthony Hariss case** (Supra) had filed an answer to the petition which is not the case here.

On page 369 of the Record of Proceedings there is a notice of Joint Instructions filed jointly by M/s Nsereko Mukalazi Advocate, M/s Maldes

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Advocates and M/s Arcadia Advocates on 19<sup>th</sup> August 2021. However, when the process server Eunice Nabwire swore that she tried to serve the three firms they all claimed that they did not have instructions to handle the matter.

We shall address the issue of service in this matter in some detail because of the difficulties that arose from it. This court has recently noted with concern in the case of **Waira James Kyewalabye Majegere Sitingo v Kubeketerya James** Election Application No. 38 of 2022 that there has been a challenge of service of court documents because Advocates and their staff refuse to accept service because they allege that they do not have instructions from the client to accept service.

This court then interpreted Rule 80 of the Rules of this court which provides for service and transmission of documents as follows: -

“

*Rule 80 of the Rules of this court requires every person upon whom the Notice of Appeal has been served with to serve on the intended Appellant and a notice of address of service within 14 days of being served on the notice of Appeal. Our understanding of the Rule is that, among other things, it gives an opportunity to the advocate who has received service of the notice of Appeal “without the client’s specific instructions” to look up his/her (former) client and agree on the course of his/her future representation without stalling the wheels of the appellate process. And if no Notice of address of service is filled in court at that stage and served upon the intending appellant, then the future service of the court documents upon the address for service used by the intended respondent*

during the proceedings in the High court is proper service in connection with the appeal proceedings..."

This court further held that: -

5 "...To permit advocates to refuse service of court documents under the guise of "I have received no instructions" is bound to frustrate the operations of this court. It is bound to contribute to the increase of the case workload currently being experienced by this court through the filing of unwarranted or otherwise avoidable applications related to service of documents of the appellate process. The fact that we have had  
10 to first deal with two applications about the subject of service of court documents before proceeding to deal with two applications about this subject of service of court documents before proceedings to deal with the substantive appeal is clear testimony of this..."

Needless to say that in this matter it is on all fours with the above Ruling. The  
15 three law firms having filed their notice of joint instructions at the High Court on 19<sup>th</sup> August 2021 ought to have received service and then inform their client of the pending suit.

We once again reiterate the position of this Court when pronounced itself in the **Waira James Kyewalabye case** (Supra) the practice at the Bar to say that  
20 a Counsel who is on record to simply say or write on a court document that "I have received no instructions" does nothing more than frustrate the operations and hearings of court; and which practice we have now rejected. The correct practice for advocates as officers of the court, in order to be changed from representing a client, is to give notice to all parties concerned  
25 and then obtain the leave of Court to withdraw from representation. In this



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regard some guidance can be obtained from the practice in Kenya as set out in the case of **Eunice Wairimu Muturi & anor V Ruth Nyambura Chuchu & 2 Ors** [2013] eKLR which we find quite instructive. Once the Court has satisfied itself that notice of withdrawal had been served on all the other parties in a matter, then it would generally grant the leave to the said advocate to withdraw from representation and order an alternative form of service.

On the other hand, if third Respondent had withdrawn instructions from his lawyers, then it would be up to him to see that a "change of Advocate Notice" had been filed on Court record by his new lawyers and served on all the other concerned parties in the matter. However, in this matter when a process server tried to serve the advocates on record on the 22nd September 2021 they denied having instructions which position we find untenable. We are fortified in this finding given that one of the three law firms on record which rejected service is a law firm in which the third Respondent practices law.

In any event, there is even enough evidence on record upon which the trial Court could have deemed service of court process to be effective. We say so because of the following reasons.

First, as stated before the Counsel on record unreasonably refused service of court process.

Secondly, when all attempts on serving the third Respondent through his lawyers on record had been frustrated, no doubt deliberately, the process Server left the court process at the gate of the third Respondent's home and deponed an Affidavit of Service, the material averments of which are as follows: -



3. That having received the above mentioned court papers on the 11<sup>th</sup> Day of March 2021 I proceeded to the offices of the Returning officer Kampala and Electoral commission the first and second respondents located at plot 53/56 Jinja and I served the above mentioned Petition and notice of presentation of the petition.

4. That I later embarked on the task of searching for the third Respondent and I went to Parliament where he works and I did not find him there and I later went to his private offices located at William Street but again I did not find him there.

5. That having gone to his home, Personal office at William street and parliament he was not there I confirm that within three days of effecting personal service on the third Respondent but without success...”.

Order 5 rule 15 of the Civil Procedure Rules provides;

“Where the serving officer, after using all **due and reasonable diligence**, cannot find the defendant, or any person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued with a report endorsed on it or annexed to it stating that he or she has so affixed the copy, the circumstances in which he or she did so, **and the name and address of the person, if any, by whom the house was identified and in whose presence the copy was affixed.**”



This is an exceptional mode of service but taking the circumstances of this case as a whole we believe that due and reasonable steps of service were taken.

For the above reason this ground is also allowed.

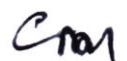
- 5 **GROUND 6: Whether the trial Judge Hon. Justice Phillip Odoki in his Ruling in Misc. Application No. 192 of 2021 dated 12<sup>th</sup> April 2021 rightly denied the Appellant an Order of substituted Service when there was all evidence that it was practically impossible to get the 3<sup>rd</sup> Respondent to acknowledge Personal Service of the Petition and Notice of Presentation**
- 10 **of the Petition.**

Given our findings in issue No. 5 where we have deemed effective service it is unnecessary to resolve this issue in further detail.

This ground is also allowed.

### **FINAL RESULT**

- 15 This Appeal is allowed and we further make the following additional Orders: -
1. The hearing at the trial Court proceed but before another Judge.
  2. That any further Court process be effected on Counsel on court record namely M/s Nsereko Mukalazi Advocate, M/s Maldas Advocates and M/s Arcadia Advocates.
  - 20 3. Costs to the Appellant.




We so Order.

Dated at Kampala this 24th day of June 2022.



.....  
**GEOFFREY KIRYABWIRE**

**JUSTICE OF APPEAL**



.....  
**STEPHEN MUSOTA**

**JUSTICE OF APPEAL**



.....  
**CHRISTOPHER GASHIRABAKE**

**JUSTICE OF APPEAL**