

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
ELECTION PETITION APPEAL NO. 75 OF 2021

AND

5 **CONSOLIDATED APPLICATIONS NO. 20 OF 2021 AND NO. 45 OF 2022**

(Appeal from the decision of the Hon. Lady Justice Jeanne Rwakakooko in High Court Election Petition No. 13 of 2021)

MUTEGEKI RONALD ::: APPELLANT

VERSUS

10
1. TIBAKUNIRWA ROBERT }
2. ELECTORAL COMMISSION } ::: **RESPONDENTS**

15 **CORAM:**

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

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

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

20



JUDGMENT OF THE COURT

INTRODUCTION

This is a Local Government Election Appeal against the decision of Hon. Lady Justice Jeanne Rwakakooko delivered on 18th October, 2021, at the High Court
5 at Fort Portal in High Court Election Petition No. 13 of 2021

BACKGROUND

The Appellant and the first Respondent were candidates for the post of Local Council 5 District Chairperson, Bundibugyo District (hereinafter referred to as “LC5”) during an election held on 30th January 2021. The first Respondent was
10 declared the winner of the election after having polled 36,385 votes against the Appellant’s 32, 510 votes. The second Respondent then gazetted the first Respondent as the winner. The Appellant was aggrieved by the results of the election and filed a Petition in the High Court vide Election Petition No. 13 of
15 2021 alleging that the election was marred by several illegal practices. The Appellant sought an order cancelling the elections and annulment of the results. Judgment was entered in favour of the Respondents. The trial Judge found that the first Respondent was the duly elected LC5 Chairperson for Bundibugyo District, dismissed the Petition, and awarded costs of the Petition to the first and second Respondents.

20 The Appellant, being dissatisfied with the findings of the trial Judge, filed this Appeal.

GROUND OF APPEAL

The memorandum of Appeal filed by the Appellant raises 8 grounds of Appeal which are as follows: -



“

1. The learned trial Judge erred in law and fact when she omitted to consider the Appellant's submissions in rejoinder thereby arriving at an erroneous decision.
- 5 2. The learned trial Judge erred in law and in fact when she held that the Petitioner/ Appellant was estopped from bringing to Court issues of nomination after the election.
3. The learned trial Judge erred in law and in fact when she ignored all evidence of other anomalies in the nomination papers submitted by the 1st Respondent and only considered anomalies relating to improper signatures and National IDs.
- 10 4. The learned trial Judge erred in law and fact when she ignored all the uncontroverted evidence of the unfavorable circumstances under which the Petitioner/Appellant's agents signed the DR Forms and arrived at an erroneous conclusion that the election was held in accordance with the law.
- 15 5. The learned trial Judge erred in law and in fact when she only considered the quantitative aspect of the substantiality test and ignored all evidence of the irregularities which affected the quality of the election.
- 20 6. The learned trial Judge erred in law and fact when she relied on the provisions of the Parliamentary Elections Act to determine whether electoral offences were committed in the election of the LCV Chairperson of Bundibugyo District.



7. The learned trial Judge erred in law and fact when she failed to consider whether the electoral offences were committed with the knowledge, consent and approval of the 1st Respondent.

8. The Learned trial Judge erred in law and fact when she held that the Petitioner had failed to discharge the evidential burden and dismissed the Petition with costs to both Respondents.”

REPRESENTATION

The Appellant was represented by Mr. Stephen Galabuzi, while the first Respondent was represented by Mr. Alex Luganda together with Mr. Caesar Mateka and the second Respondent was represented by Mr. Samuel Kiriaghe.

CONSIDERATION OF THE APPLICATIONS

This is a matter where upon consent of the parties to the Appeal, two Applications No. 20 of 2021 and No. 45 of 2022 all arising out of Election Petition Appeal No. 75 of 2021 were consolidated. The backgrounds to these Applications are as hereunder.

Election Petition Application No. 45 of 2022, which was filed by the second Respondent, was brought under Section 33 of the Judicature Act, Cap 13, Section 98 of the Civil Procedure Act, Cap 71 and Rules 4, 43, 44, 76 and 82 of the Judicature (Court of Appeal Rules) Directions SI 13-10 for orders that: -

- a) The Notice of Appeal and the Appeal (Election Petition Appeal No. 75 of 2021) filed by the Respondent be struck out on the grounds that some essential step in the proceedings had not been taken within the prescribed time.
- b) The costs of this Application be provided for.

This Application is supported by the Affidavit of Eric Sabiiti.

Election Petition Application No. 20 of 2021, which was filed by the first Respondent, was brought under Section 98 of the Civil Procedure Act, Cap 71, Rules 43 and 82 of the Judicature (Court of Appeal Rules) Directions SI 13-10, Rules 30 and 31 of the Parliamentary Elections (Interim Provisions) (Election Petition) Rules SI 141-2, Order 52 Rule 1 and 2 of the Civil Procedure Rules, SI 71-1 for Orders that: -

- a) Court strikes out the Respondent's Notice of Appeal dated 25th October 2021.
- b) Costs of this Application be provided for.

The Application is supported by the Affidavit of Tibakunirwa Robert.

Issues for consideration

The following issues were framed by the first Respondent in EPA No. 20 of 2021 to help with the determination of the Applications: -

- 1) Whether the Respondent served his Notice of Appeal and letter requesting for typed proceedings within the prescribed time?
- 2) Whether the Respondent failed to take an essential step in prosecuting the Appeal?
- 3) What are the remedies available to the parties?

These issues have been adopted by this Court to facilitate the resolution of the consolidated Applications. At the hearing, the written submissions filed in the main Appeal and Election Petition Applications No. 20 of 2021 and No. 45 of 2022 were, with leave of Court, adopted as legal arguments of the parties.



In their submissions, the parties did not follow a harmonized approach in resolving the above issues. The first Respondent and the Appellant resolved issues 1 and 2 concurrently, whereas the second Respondent made a general response to the issues raised in the Applications. Therefore, this Court will
5 handle issues 1 and 2 concurrently, followed by issue 3.

Issues 1 and 2:

1. Whether the Respondent served his Notice of Appeal and letter requesting for typed proceedings within the prescribed time?

and

10 **2. Whether the Respondent failed to take an essential step in prosecuting the Appeal?**

First Respondent's submissions on the Applications

The first Respondent filed Election Petition Application No. 20 of 2021. Counsel for the first Respondent submitted that the Appellant failed to take an
15 essential step in prosecuting the Appeal when he neglected to serve the Notice of Appeal and letter requesting for typed proceedings on the first Respondent. The Notice of Appeal and the letter requesting for typed proceedings was lodged in the High Court at Fort Portal Registry on 25th October, 2021 and later served upon the first Respondent on 30th November 2021.

20 Counsel relied on the provisions of Rule 82 of the Judicature (Court of Appeal Rules) Directions SI 13-10 (herein after referred to as the "Rules of this Court") which entitles a person to apply to the court to strike out a Notice or an Appeal, on grounds that an essential step in the proceedings has not been taken within the prescribed time.



It was further submitted for the first Respondent that failure of the Appellant to serve the first Respondent with a copy of the Notice of Appeal within seven (7) days after lodging the Notice of Appeal was a contravention of Rule 78 of the Rules of this Court.

5 Rule 83(2) and (3) of the Rules of this Court requires an Appellant to apply to the High Court for a certified copy of the record of proceedings and serve the intended Respondent with a copy of the Application. Counsel relied on the cases of **Utex Industries Ltd v. Attorney General**, Supreme Court Civil Application No. 52 of 1995 and **Nyendwoha Bigirwa Norah v. the Returning**
10 **Officer, Bulisa District and Anor**, Civil Application No. 23 of 2011.

Counsel for the first Respondent prayed that this Court finds that no valid Appeal exists in law, and accordingly strikes out the Notice of Appeal.

Second Respondent's submissions on the Applications

The second Respondent filed Election Petition Application No. 45 of 2022.
15 Counsel for the second Respondent submitted that the Notice of Appeal was filed in the High Court on 25th October 2021 and served upon the second Respondent on 30th November 2021. That this was a contravention of Rule 78(1) of the Rules of this Court which requires an Appellant to effect service of the Notice of Appeal on all affected persons within seven (7) days after
20 lodging the Notice of Appeal.

It was further submitted for the second Respondent that the Notice of Appeal and the Appeal filed by the Appellant is incompetent and should be struck out for failure by the Appellant to take an essential step in the proceedings within the time stipulated by law. Counsel relied on the provisions of Rule 82 of the



Rules of this Court, and the decisions in **Nyendwoha Bigirwa Norah v. the Returning Officer, Buliisa District and Another** (supra) and **Kasibante Moses v. Electoral Commission**, Court of Appeal Civil Application No. 7 of 2012.

5 **Appellant's submissions on the Applications**

Counsel for the Appellant raised a preliminary objection to Election Petition Application No. 20 of 2021 which seeks to strike out the Notice of Appeal. The preliminary objection is based on the premise that all matters regarding the competence of the Appeal should have been raised and determined through
10 Applications before the hearing of the substantive Appeal commences. That the Applicant (the first Respondent) did not seek leave of Court to bring this Application at the hearing of the Appeal. It was further submitted for the Appellant that he was not aware of this Application until he came to Court: -

"to proceed with his Appeal, only to learn of this Application."

15 Counsel for the Appellant relied on the provisions of Rule 102(b) of the Rules of this Court to support his objection.

In response to the Issues raised in the Application, Counsel for the Appellant submitted that the first Respondent was notified about the Appeal earlier on 1st November 2021. That the Notice of Appeal was intended to be served
20 upon the first Respondent's lawyers but when he was contacted, he expressed his desire to be served personally. That the second Respondent then personally went to Court and collected the Notice of Appeal and did not inform his lawyers about it. Reference was made to the Appellant's Affidavit in Reply to the first Respondent's Application No. 20 of 2021.



Counsel for the Appellant prayed that this Court finds that effective service of the Notice of Appeal was attained in time when the first Applicant was put on notice of the existence of the Appeal.

Court's findings

5 We have considered the submissions from all parties with regard to the Applications and the supporting authorities.

We shall commence by addressing the preliminary objection to Election Petition Appeal No. 20 of 2021, as raised by counsel for the Appellant.

Rule 102(b) of the Rules of this Court provides:

10 *"At the hearing of an appeal in the Court –*

(a) ...

(b) a respondent shall not, without the leave of the court, raise any objection to the competence of the appeal which might have been raised by application under rule 82 of these Rules; ..."

15

The above provision expressly prohibits objections which could have been raised through filing an Application to determine the issue under contention. In the instant Appeal, Application No. 20 of 2021 was brought under Rule 82 of the Rules of this Court, among other provisions of the law. Therefore, the
20 first Respondent already had complied with Rule 102 (b) of the Rules of this Court. We find no merit in this preliminary objection and it is hereby overruled.

We now turn to the resolution of issues 1 and 2.



Rule 82 of the Rules of this Court provides that: -

5 *“A person on whom a notice of appeal has been served may at any time, either before or after the institution of the appeal, apply to the court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.”*

10 In the case of **Geoffrey Omara v. Charles Angiro Gutomoi & Anor**, Election Petition Appeal No. 106 of 2016, this Court addressed itself to Rule 82 (above) and held that: -

15 *“This rule provides for two instances where a person served with a Notice of Appeal can move court to strike out the Notice of Appeal or the Appeal itself. The first, is where, according to the one served with the Notice of Appeal, no appeal lies. The second is where the person served claims that the intending Appellant has not taken an essential step at all in the proceedings or has taken the same but outside the time prescribed by the Rules.”*

20 In the instant Appeal, the Appellant filed the Notice of Appeal accompanied by a letter requesting for certified copies of the typed proceedings, were filed in the High Court on 25th October 2021. The record reflects that this Notice of Appeal and the letter requesting for typed proceedings were served upon the first and second Respondents on 30th November 2021.

25 Rule 78 (1) of the Rules of this Court provides for service of the Notice of Appeal and it reads: -



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

10 The above provision expressly requires the Appellant to serve the Notice of Appeal on all persons directly affected by the Appeal. Such service must be done within seven days from the date of filing the Notice of Appeal in the High Court. The Notice of Appeal in this case, was served upon the first and second Respondents thirty six (36) days from the date of filing the Notice of Appeal. The seven (7) days prescribed by law therefore lapsed on 1st November 2021. It follows that the Appellant did not comply with the time prescribed by law.

15 In the case of **Nyendwoha Bigirwa Norah v. the Returning Officer, Buliisa District & Anor** (supra), this Court held: -

20 *“Election related litigation must be handled expeditiously and the rules governing that litigation must be strictly construed and complied with.”*

In **Nyendwoha Bigirwa case** (Supra), this Court further held: -

25 *“Time is, therefore, of the essence in election matters. It is the duty of the intending Appellant to actively take the necessary steps within the time prescribed by law to prosecute his/her Appeal. This Court has held in*



Election Petition Application No. 24 of 2011: Bakaluba Mukasa Peter & Anor v. Nalugo Mary Margret Ssekiziyivu, that: -

5 ***'Delay in taking the right step in litigation at the right time hinders successful parties from enjoying the fruits of their judgment which was obtained in their favour. The Respondent has delayed in taking the right step at the right time with the result that the application would be allowed and the notice of appeal will be struck out ...'***

10 *In view of what has been stated above, we find that failure by the Respondent to serve the applicant with a copy of the letter requesting for the proceedings immediately it was written to the Court amounted to failure by the Respondent to take an essential step in prosecuting the*
15 *appeal. It was a fatal failure too"*

In light of the above authorities, we find that the Appellant neglected to take an essential step by delaying to effect service of the Notice of Appeal upon the first and second Respondents.

20 In his defence, it was submitted for the Appellant that the first Respondent was notified about the Appeal earlier on 1st November 2021 and he expressed his desire to be served personally and not through his lawyers. According to the Record of Appeal, paragraph 12 and 13 of the Appellant's Affidavit in
25 Reply to the first Respondent's Application No. 20 of 2021 it is reflected that the first Respondent received a phone call informing him about the Notice of



Appeal and that he mentioned that he wanted to receive the document at his office in Bundibugyo. This paragraph however does not show that the first Respondent expressly barred the Appellant from serving a copy of the Notice of Appeal on his lawyers.

5 Rule 78(2) of the Rules of this Court provides: -

“Where any person required to be served with a copy of a notice of appeal gave any address for service in or in connection with the proceedings in the High Court, and has not subsequently given any other address for service, the copy of the notice of appeal may be served on him or
10 *her at that address, notwithstanding that it may be that of an advocate who has not been retained for the purpose of an appeal.”*

Therefore, the Appellant was still under an obligation to comply with Rule 78(2) of the Rules of this Court and serve the Notice of Appeal at the address
15 mentioned in the first Respondent’s Address of service.

At page 303 of the Record of Appeal, the first Respondent’s address of service for purposes of the Petition in the High Court is indicated as M/S NewMark Advocates, Kampala. There is no written evidence on record to show that any changes were made regarding the first Respondent’s address of service for
20 purposes of the Election Petition.

Issue 3: What are the remedies available to the parties?

This Court finds merit in the consolidated Applications; **Election Petition Application No. 45 of 2022** and **Election Petition Application No. 20 of 2021**. The Appellant neglected to take an essential step in the Appeal by

failing to effect service of the Notice of Appeal and the letter requesting for typed proceedings upon the first and second Respondents within the time prescribed by law, this failure is fatal.

Final result

- 5 The Notice of Appeal is hereby struck out. Election Petition Appeal No. 75 of 2021 is hereby dismissed with costs of the Appeal to the first and second Respondents.

Furthermore, the costs of **Election Petition Application No.20 of 2021** and **Election Petition Application No. 45 of 2022** are awarded to the first and
10 second Respondents respectively.

The Judgment and Orders of the trial Court are hereby upheld, to the effect that:-

1. The first Respondent is the duly elected LC5 Chairperson for Bundibugyo District.
- 15 2. The first and second Respondents are awarded full costs of the Petition.

We so Order.



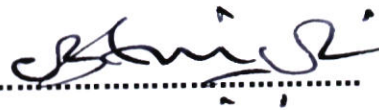
Dated at Kampala this 24th day of June 2022.



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GEOFFREY KIRYABWIRE
JUSTICE OF APPEAL



.....
STEPHEN MUSOTA
JUSTICE OF APPEAL



.....
CHRISTOPHER GASHIRABAKE
JUSTICE OF APPEAL