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THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
ELECTION PETITION APPEAL NO.13 OF 2021

*(Arising from the decision of the High Court at Kampala by Isaac Muwata, J
in Election Petition No.15 of 2021)*

10 **MPANGA FAROUQ:.....:APPELLANT**

VERSUS

15 **1. SSENKUBUGE ISAAC**
2. ELECTORAL COMMISSION:.....:RESPONDENTS

AND

20 **ELECTION PETITION APPLICATION NO. 40 OF 2022**

(Arising from Election Petition Appeal No.13 of 2021)

ELECTORAL COMMISSION:.....:APPLICANT

25 **VERSUS**

MPANGA FAROUQ:.....:RESPONDENT

30 **CORAM: HON. JUSTICE RICHARD BUTEERA, DCJ**
HON. JUSTICE HELLEN OBURA, JA
HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA

35 **JUDGMENT OF COURT**

Background

40 The appellant, Mpanga Farouq and the 1st respondent, Senkubuge Isaac, with five others participated in the election of the Chairperson for Bweyogere Division, Kira Municipality, Wakiso District. The 2nd respondent returned, declared and published the 1st respondent as the winner of the election with 6879 votes. The appellant was the 2nd runner up with 5683 votes.

45 Dissatisfied with the election results, the appellant filed a Petition in the High Court at Kampala challenging the validity of the 1st respondent's election on the grounds that there was non-compliance with the electoral laws which affected the result of the election in a substantial manner.



5 When the matter came up for scheduling in the High Court, counsel for the respondents raised several preliminary objections which raised the following issues:-

- 1) **Whether the affidavit in support of the Petition cannot support the Petition having been based on information from third parties.**
- 10 2) **Whether the annexures to the affidavit in support of the Petition should be struck out for non-certification as required by law.**
- 3) **Whether the commissioning of the affidavit in support of the Petition by a one Nampeera Juliet, who practices in the firm representing the petitioner renders it fatally defective.**
- 15 4) **Whether the 25 affidavits in support of the Petition should be expunged from the record having been filed after the Petition had been long filed.**

The learned trial Judge considered the submissions from counsel from both parties and dismissed issues 1, 2 and 4, but allowed issue 3. The trial Judge issued orders that the affidavit in Support of the Petition was incurably defective having been
20 sworn before a commissioner for oaths who was an advocate practicing in the same law firm that was representing the petitioner. He noted that the Petition was, therefore, not accompanied by any affidavit in support. The trial Judge, accordingly struck out the Petition with costs to the respondents on 8th September 2021.

Being aggrieved by the decision of the learned trial Judge, the petitioner/Appellant,
25 filed a Notice of Appeal on 8th September 2021 and a Memorandum of Appeal for **Election Petition Appeal No.13 of 2021** was filed on 16th September 2021.

The appellant's/petitioner's sole ground of appeal stated:-

- 30 1. **The learned trial Judge erred in law and in fact when he held that the Appellant's affidavit in support of Election Petition No.15 of 2021 is incurably defective and struck out the Petition with costs to the respondents.**

He prayed that the appeal be allowed and the decision of the trial Judge striking out the Petition be set aside and Court orders for a re-trial of the Petition on merits before the High Court.

35 On 11th October 2021, the 2nd respondent filed a Notice of Cross-Appeal challenging the decision of the trial Judge on the following grounds:-

- 40 1. **"The learned trial Judge erred in law and fact when he held that a Petition can be supported by an affidavit whose averments are based on information.**
2. **The learned trial Judge erred in law and fact when he held that the preliminary objection in regard to the appellant's uncertified Declaration of Results Forms was premature.**

3. **The learned trial Judge erred in law and fact when he held that the 25 affidavits filed without leave of Court were properly filed in Court.” [Sic]**

The 2nd respondent sought for orders that:-

- a) That the appellant’s affidavit in support is fatally defective since he deposed on matters that were not in his personal knowledge.
- b) The preliminary objection in regard to the uncertified Declaration of results forms could be entertained before scheduling.
- c) The 25 affidavits ought to have been expunged off the record.
- d) Costs of the Cross-appeal.

15 On 1st March 2022, the 2nd respondent filed **Election Petition Application No.40 of 2022, Electoral Commission vs. Mpanga Farouq** vide Notice of Motion, seeking for orders that the respondents’ appeal vide Election Petition Appeal No.13 of 2021 be struck out for being filed out of the time prescribed by the electoral laws.

Legal Representation

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At the hearing of the appeal and the application, the parties were represented as follows:-

The appellant was represented by Mr. Chrysostom Katumba and Mr. Kabuye Lawrence.

25 Mr. Asuman Nyonyintono and Mr. Mwigo James Allan appeared for the 1st respondent.

Mr. John Paul Baigana and Mr. Edward Ahumuza appeared for the 2nd respondent.

30 With leave of Court, all counsel for the parties filed and adopted their written submissions in respect of both the appeal, the application and the cross-appeal.

We find it appropriate to first consider and dispose of **Election Petition Application No.40 of 2022, Electoral Commission vs. Mpanga Farouq**.

35 In this application, the applicant seeks for orders that Election Petition Appeal No.13 of 2021 be struck out for being filed outside the time prescribed by the electoral laws.

The grounds of the application were contained in the affidavit of Baguma John Baptist, an advocate in the applicant’s legal department.

40 The application was opposed by the respondent, Mpanga Farouq, who filed an affidavit in reply to the Petition dated 21st March 2022.

Submissions of counsel on the application

Counsel for the applicant submitted that there are no specific rules that provide for the filing of appeals for Local Councils in the Local Governments Act. He stated that, however, from the manner and practice adopted, they follow the timelines provided by the **Parliamentary Elections (Interim Provisions) Rules SI 142-1**.

Counsel submitted that the ruling in the High Court was delivered on 8th September 2021 and the Notice of Appeal was filed by the respondent on 9th September 2021. Subsequently, the Memorandum of Appeal was purportedly filed on 16th September 2021. He noted that the said documents were all filed in compliance with the timelines provided by Rule 29 and 30 (b) of the **Parliamentary Elections (Interim Provisions) Rules**.

Counsel contended that, this would presuppose that the Record of Appeal ought to have followed the same path and be filed within 30 days from the date of filing the Memorandum of Appeal but the same was filed on 14th February 2022. He argued that the same should have been filed by the 16th of October 2021.

He submitted that **section 145 of the Local Governments Act** provides that Local Council Election Petitions be heard and determined within (3) three months. According to counsel, if this provision is adhered to, the respondent has no appeal since the 3 months would have elapsed in December 2021.

Counsel contended that the respondent never acted diligently to follow up on his matter when the record of proceedings was ready for collection on 28th October 2021. He argued that the respondent sat on his rights and waited until 14th February 2022, over 3 months, to file his record.

According to counsel, **Rule 83 of the Rules of this Court** cannot save the respondent because he is guilty of dilatory conduct. Counsel relied on the case of ***Kasibante Moses vs. Electoral Commission, Election Petition Application No.7 of 2012; Abiriga vs. Musema Mudathir, Election Petition Application No.24 of 2016 and Muliro Wanga vs. Wakalawo Sam Paul, Election Application No.9 of 2017***, to support his arguments.

In addition, counsel submitted on the controversy of the dates of filing on the Memorandum of Appeal. He noted that the Memorandum of Appeal shows a Court of Appeal Registry stamp dated 16th September 2021 whereas the stamp for filing fees shows 17th September 2021. Counsel argued that the date on the registry's stamp appears to have been backdated so that it reflects that the same was filed in time whereas not.

5 Counsel submitted that the standard practice and procedure for filing is that the cash office is visited first for payment and endorsement of filing fees, then the documents taken to the registry and not vice versa.

Counsel contended that election matters ought to be handled expeditiously. He relied on the case of ***Kubeketerya James vs. Waira Kyewalabye and Electoral***
10 ***Commissson, Election Petition Appeal No.97 of 2016.***

He prayed that Court finds that the Memorandum of Appeal was illegally placed on record, filed out of time and the same be struck out.

Counsel for the respondent, on the other hand, submitted that there are no specific rules providing for timelines on filing appeals from decisions governed by the Local
15 Governments Act. Counsel submitted that Court has pronounced itself on how to file such appeals. He relied on the case of ***Kwoba Herbert vs. Ssebugwawo Tadeo, Election Petition Appeal No.108 of 2016,*** where Court held that the Parliamentary Elections Act and the Rules therein made thereunder are not applicable to Local Council elections and that the Rules applicable are the
20 **Judicature (Court of Appeal Rules) Directions.**

Counsel argued that all the cases cited by counsel for the applicant are distinguishable from the instant case as they were in regard to Parliamentary elections, whereas the present case is in regards to Local Council elections.

Counsel contended that the Record of Appeal was filed in time as **Rule 83 (2) of**
25 **this Courts Rules** provides that the computation of time within which the appeal is to be filed should exclude such time as may be required for preparation and delivery of the record. He noted that the letter requesting for the typed record was filed on 9th September 2021 and the same was delivered on 12th January 2022. The Record of Appeal was filed on 14th February, within 32 days after receiving the same.

30 Counsel submitted that Rule 83 (2) applies to the respondent as he wrote to Court for the typed record of proceedings on 9th September 2021 and the same was served onto the applicant's lawyers on 10th September 2021.

He prayed that Court finds that the Memorandum of Appeal and the Record of Appeal were filed in time and dismisses the application with costs to the respondent.

35 **Court's determination of the application**

Election Petition Application No.40 of 2022, arises from an appeal in regard to the election of the Chairperson for Bweyogere Division, Wakiso District, which elections are governed by the Local Governments Act.

The **Local Governments Act** does not provide for the time lines for filing when
40 instituting an appeal arising from Local Council elections.

5 This Court has on several occasions emphasised its position on this matter. In *Makatu Augustus vs. Weswa David, Election Petition Appeal No.13 of 2016*, Court held:-

10 *“In the absence of specific rules of procedure for filing election Petition appeals arising from Local Council elections, it was and is still our considered view that the applicable law would be the Judicature (Court of Appeal Rules) Directions. It was therefore our finding that the respondent who is the appellant in the appeal was required to comply with the timelines provided under the Judicature (Court of Appeal Rules) Directions and not rules 28 and 3C (b) of Parliamentary Elections (Interim Provision) Rules...”*

15 Similarly, in *Election Petition Appeal No.108 of 2016, Kwoba Herbert vs. Ssebugwawo Tadeo*, this Court held;

20 *“First of all, we wish to point out that the Local Governments Act is silent about the timeframe for filing Local Council election appeals. Counsel for the applicant relied on the timeframe for filing election Petition appeals provided under the Parliamentary Elections (Interim Provisions) Rules made under the Parliamentary Elections Act. This Court held that the Parliamentary Elections Act and Rules made thereunder are not applicable to Local Council elections.....*

25 *In the absence of specific rules governing the filing of Local Council election appeals, the applicable rules would be the Judicature (Court of Appeal Rules) Directions...” This position of the law is also decided in Election Petition Appeal No.110 of 2016, Bandikubi Boniface Musisi and 3 Ors vs. Sserwangwa William Tom and Anor.”*

30 From the above quoted precedents, we find that the appellant was required to comply with the filing timelines provided under the **Judicature (Court of Appeal Rules) Directions**.

Rule 83 (1) of the Court of Appeal Rules provides:-

“83. Institution of appeals.

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

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

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

(c) the prescribed fee; and

(d) security for the costs of the appeal.” (Emphasis is ours)

40 In the instant case, the ruling in High Court Election Petition No.15 of 2021 was delivered on 8th September 2021. The respondent filed the Notice of Appeal on 9th September 2021. He filed the Memorandum of Appeal on 16th September 2021, 7



5 days after filing the Notice of Appeal. This was well within the 60 days prescribed under **Rule 83 (1) of the Rules of this Court.**

The typed record of proceedings was delivered onto the respondents on 12th January 2022 and the same was filed on 14th February 2022. **Rule 83 (2) and (3) of the Rules of this Court** provide:-

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

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

20 In the instant case, it is evident that the delay in filing the record of proceedings was caused by the High Court’s delay in delivering the said record to the respondent.

The respondent was entitled to rely on **Rule 83 (2) of this Court’s Rules** since he complied with **Rule 83 (3)** of this Court’s Rules. He wrote a letter requesting for the typed record of proceedings which was filed on 8th September 2021 and served on the applicants on 10th September 2021.

25 We find that the appeal was properly brought before this Court as the respondent rightly adhered to the prescribed timelines set out in the **Judicature (Court of Appeal Rules) Directions.**

30 **ELECTION PETITION APPEAL NO.13 OF 2021**

In **Election Petition Appeal No.13 of 2021, Mpanga Farouq vs. Ssenkubuge Isaac & the Electoral Commission**, the appellant raised one ground of appeal which stated:-

35 “The learned trial Judge erred in law and in fact when he held that the Appellant’s affidavit in support of Election Petition No.15 of 2021 is incurably defective and struck out the Petition with costs to the respondents.”

40 **Submissions of counsel on the main appeal**

5 **The appellants case**

Counsel for the appellant submitted that the appellant's/petitioner's affidavit in support was erroneously struck out for having been commissioned by Ms. Nampeera Juliet who practices from M/s Lukwago & Co. Advocates, the same law firm that drew and filed the said document.

10 Counsel submitted that **section 4(1) of the Commissioner for Oaths (Advocates) Act Cap 5** provides that:-

15 **“A commissioner for oaths may, by virtue of his or her commission, in any part of Uganda, administer any oath or take any affidavit for the purpose of any Court or matter in Uganda, including matters ecclesiastical, matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognisance in or for the purpose of any civil proceeding in the High Court or any magistrate’s Court; except that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he or she is the advocate for any of the parties to the proceeding or concerned in the matter or clerk to any such advocate or in which he or she is interested.”**

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According to counsel, Ms. Nampeera Juliet was never an advocate for the petitioner/appellant and the Court record does not indicate anywhere that she ever
25 appeared in Court to represent the petitioner. He emphasized that Ms. Nampeera was never concerned in the Petition before the lower Court and as such was never interested in the same.

Counsel contended that the power to commission oaths is personal to holder and is not issued to a law firm. He relied on the case of **Markly Vincent Okidi & 4 others vs. Peter Odok W’oceng & Electoral Commission, Election Petition No. 09 of 2011**; and **Clare S. Kaweesa vs. Uganda Free Zones Authority and Fredrick Kiwanuka, Misc. Application No.454 of 2021**.
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Counsel emphasized that the power to commission is given to an individual advocate but not a law firm. He noted that even when the chamber/firm is closed, the
35 advocate remains with that power to commission documents provided he or she has a valid practicing certificate. His or her power to commission cannot be waived by reason of closure of the firm.

Counsel submitted that there is no evidence on Court record to show that Ms. Nampeera Juliet was an advocate for the petitioner or concerned and/or interested
40 with the matter in the lower Court. He argued that the advocates take individual instructions even if they are partners in the law firm as opposed to clerks who take instructions from the firm. There was no evidence that Ms. Nampeera had not renewed her practicing certificate by the time she commissioned the petitioner's affidavit in support of the Petition.

5 Counsel further submitted that even if the advocate who commissioned the document did not have a valid practicing certificate, which is not the case before Court, **section 14A of the Advocates (Amendment) Act 2002**, brings to an effect that pleadings illegally handled by any advocate shall not be invalidated, in order to accord justice to an innocent litigant.

10 He contended that, in the interest of justice, if the trial Court found out any defect with the affidavit of the petitioner which defect came as a result of the actions of the advocate, Court should have ordered that the petitioner appears before another commissioner for oaths, to re-administer the oath. See **Suubi Juliet Kinyamatama vs. Ssentongo Robinah Nakasirye, Election Petition Appeal No.92 of 2016**.

15 Counsel emphasized that **section 4(1) of the Commissioner for Oaths (Advocates) Act** does not provide that the offending affidavit should be struck out. He submitted that the said affidavit did not offend any of the provisions in section 4 above and as such, the trial judge erred when it struck out the affidavit.

20 Counsel added that whereas a commissioner for oaths cannot commission his or her own documents, the law does not prevent her from commissioning documents from the firm where he/she works.

He submitted that the learned trial Judge erred when he stated that **section 4(1) of the Commissioner for Oaths (Advocates) Act** is couched in mandatory terms. According to counsel, the said provision is only directory but not mandatory. It only
25 directs what ought to be done but does not state the consequences if the law is not complied with. See **Mukasa Anthony Harris vs. Dr. Bayiga Micheal Philip Lulume, Election Petition Appeal No.18 of 2007**.

30 Counsel submitted that there is nothing on record to show that the respondents were prejudiced by Ms. Nampeera's commission of the appellant's/petitioner's affidavit in support of the Petition.

He prayed that the appeal be allowed with costs in this Court and the Court below.

The 1st respondent's case

35 Counsel for the 1st respondent submitted that the learned trial Judge rightly struck out the appellant's/petitioner's affidavit in support of the Petition under **section 4(1) of the Commissioner of Oaths Act**. He noted that the said section has three major tests which are considered to establish whether the commissioner had the power to commission the affidavit and these are;

- 40 1) Whether the Commissioner is an advocate for any of the parties? or,
- 2) Whether the commissioner is concerned in the matter? or,
- 3) Whether the commissioner is interested in the matter?

5 Counsel submitted that whereas the Appellant submits that the powers to commission oaths are personal and are not given to the firm, it is trite law that for any advocate to practice in Uganda, he or she must be attached to a specific chamber duly approved by the law Council pursuant to **section 12(1) (j) of the Advocates Act CAP 267 (as Amended)**.

10 He added that it is also trite law that for one to be granted the powers to commission oaths for a year, he/she must be qualified to practice law for that year pursuant to **section 1(1) and Rule 2 of the Schedule of Commissioner for Oaths (Advocates) Act**.

15 Counsel contended that all Chambers in Uganda except Government and legal departments of some entities are governed by the **Partnerships Act**. He submitted that **section 5(2) of the Partnership Act 2010** is very instructive that a partners actions bind the firm and all persons under the firm. Counsel averred that the advocate who received instructions in the Petition although he/she may have received them personally, his acceptance of instructions binds the whole firm and
20 whoever practices under the same firm although may not be the advocate in personal conduct is a concerned and interested party.

He emphasized that an advocate in a firm prosecuting a Petition ordinarily relates to the pleadings prepared by the firm and he/she is interested in the same, considering that in a scenario where the advocate in personal conduct is absent,
25 there is a possibility of any other advocate appearing for the same. It is common practice that most advocates discuss cases in the chambers, hence there in no way the advocate cannot be interested or concerned.

Counsel further submitted that clients instruct law firms and not individuals. Therefore, the filing of the Notice of Instructions or pleadings containing the address
30 of the firm without inclusion of the individual advocate and without the Client-advocate agreement being adduced in Court, any ordinary person cannot tell which advocate was individually instructed but rather the named law firm and all the advocates therein.

He submitted that the above position was held in a persuasive precedent of **Arthur Busingye & Busingye Properties Limited vs. Gianluigi Grassi & Doreen Ruyondo HCT-00-CC-MA-203-2013**, where Court stated:-

40 *"On the alleged failure to disclose the source of information, I hold the view that where a law firm is instructed to handle a matter all information regarding progress of that matter would be within the knowledge of the lawyers in that firm because of the common practice of discussing and consulting among lawyers. This means that any lawyer in that law firm can swear an affidavit on the non-contentious aspect of any matter that the law firm is handling. I therefore believe that as colleagues in the same law firm Mr. Njoki would ordinarily know that Mr. Nangumya left for Court in the morning based on their schedule of duties which would be an open secret within the*



5 law firm. It therefore follows that the information was within Mr. Njoki's knowledge
and so he did not have to state its source. This view is fortified by the fact that
instructions are usually given to a law firm but not an individual lawyer in the firm
and that is why notice of instruction and/or change of instruction filed in Court clearly
10 indicate so. Finally on this point, regulation 9 of the Advocates (Professional Conduct)
Regulations S.I. 267-2 only prohibits an advocate in personal conduct of the case from
deposing an affidavit in contentious matter. For the above reasons, I find that Mr. Njoki
was competent to swear the affidavit and the information was within his knowledge."

On counsel for the appellant's argument that Court ought to have allowed the
Appellant to rectify the issue by taking oath before another commissioner for oaths
15 based on the authority of **Suubi Kinyamatama Juliet vs. Sentongo Robinah**
Nakasirye, Election Petition Appeal No.92 of 2016, counsel for the 1st
respondent argued that the decision was cited in part, leaving out the part where
this Court held that:-

20 "We are fortified in this view by *Musoke Emmanuel Vs Kyabaggu Richard and Electoral*
Commission COA Election Petition Appeal No.67 of 2016 where it was held that;

Article 126(2) (e) of the Constitution is to the effect that substantive justice is to be
administered without undue regard to technicalities by litigants at Courts. What is
being addressed here are not technicalities in the meaning of Article 126(2) (e).
(Emphasis Ours) A major requirement of the law was not fulfilled. This Article was not
25 created to defeat the law"

Counsel argued that when the preliminary objection was raised, the
petitioner/appellant herein never applied to rectify the error but rather chose to
hold onto the wrong position of the law. Therefore, **section 14(A) of the Advocates**
Act of 2002 cannot save his defective affidavit.

30 Counsel contended that the commissioning of an affidavit by an advocate who is in
conduct or concerned or interested in the matter is not a technicality but
substantive law which cannot be cured by **Article 126(2) (e) of the Constitution**.

Counsel relied on the case of **Lee Njiru vs. J. K Lokorio & Anor Cause No.64 of**
2019 [Formerly Nakuru HCC NO.23 of 2018] where Court relied on **Kenya**
35 **Federation of Labour and Anor Versus Attorney General & 2 others, Cause**
No. 735 of 2012 and held:

40 ".....it would be against the provisions of the Oaths and Statutory Declarations Act. A
lawyer cannot commission a document drawn by his/her firm. Indeed, the further
affidavit by the claimants was defective in form as Jurat was not in conformity with
the oaths and statutory declarations Act".

He submitted that the same position was held in **Stephen M. Mogoka vs.**
Independent Electoral & Boundaries Commission & Ors, Election Petition H.C
Kenya No.02 of 2017 and **Fatuma Nakatudde and another vs. Makerere**
University, Misc. Cause No.175 of 2019, where Justice Ssekana when faced with

5 the same problem of a lawyer commissioning the documents drafted by his own firm considered it illegal and pleasing to strike out the offending affidavit.

Counsel contended that the fact that Ms. Nampeera Juliet was an advocate in the law firm representing the petitioner/appellant, clearly means that she has an interest in all the business of the firm and any revenues collected from this client in this Petition or instructions given by the appellant/petitioner.

Counsel prayed that this Court upholds the decision of the trial Court and dismiss this appeal with costs to the 1st respondent in this Court and below.

The 2nd respondent's case

15 Counsel for the 2nd respondent submitted that the ground of appeal offends **Rule 86(1) of the Rules of this Court**, in so far as it does not particularize what the appellant alleges as "incurably defective". He argued that it ought to be struck out.

Counsel submitted that it is not in dispute that the said Nampeera Juliet is a Commissioner for Oaths/advocate and Associate with M/s Lukwago & Co. Advocates.

Counsel contended that Ms. Nampeera Juliet commissioned the petitioner's/appellant's affidavit in support contrary to **section 4(1) of the Commissioner for Oaths (Advocates) Act**.

Counsel submitted that, generally, instructions are given to the law firm not an individual, as such, Nampeera Juliet was an advocate of the petitioner in the instant case. Counsel relied on the case of **Sudhir Ruparelia vs. MMAKS Advocates, Misc. Appl. No. 1063 of 2017** to support his argument.

Counsel further relied on the cases of **Stephen M. Mogaka vs. Independent Electoral & Boundaries Commission (IEBC) & 3 others, Election Petition No.oo2 of 2017**; and **Fatuma Nakarudde and anor vs. Makerere University; Misc. Cause No.175 of 2019**, in which Court struck out affidavits commissioned contrary to **section 4(1) of the Commissioner for Oaths (Advocates) Act**.

He contended that there is no doubt that the said Nampeera Juliet is not only an advocate in the matter but also had interest in the proceedings and as such could not commission the said affidavit.

Counsel agreed with the learned trial Judge that Ms. Nampeera Juliet being an advocate practicing in the firm that is acting for the petitioner is concerned and/or interested in the matter by virtue of her employment with the said law firm.

Counsel submitted that the consequence of incurably defective affidavits is to strike them out. See: **Stephen M. Magaka (supra)**; **Re Bagley (supra)** and **Caltex Oil (Kenya) Ltd vs. New Stadium Services Station Ltd & anor [2002] e KLR**.



5 Counsel argued that the learned trial Judge rightly struck out the affidavit in support and consequently the Petition.

He prayed that the decision of the learned trial Judge be upheld on this ground alone with costs to the 2nd respondent.

10 **Rejoinder to the 1st and 2nd respondent's submissions on the main appeal.**

Counsel for the appellant submitted that whereas counsel for the respondents argued that it is a general rule that every advocate must belong to a particular firm to practice, the firm is merely used for address purposes to prevent lawyers from practicing on the streets.

15 On counsel for the 1st respondent's submission that the actions of one partner bind the firm all persons under the firm as stipulated by **section 5(2) of the Partnership Act 2010**, counsel for the appellant submitted that the said provisions only bind partners but not other advocates who are not partners. He argued that there was no evidence adduced at trial to prove that Ms. Nampeera Juliet was a partner of M/s
20 Lukwago & Co. Advocates.

Counsel contended that the power to commission is personal to holder, in case of professional misconduct against any client, the individual advocate rather than the entire law firm, is taken to the Law Council. He argued that, if all the actions of one individual advocate bind the entire firm, then all advocates in the firm would be held
25 liable in case of professional misconduct.

Counsel maintained that a certificate to practice law is issued by the Chief Registrar to an individual advocate and not the law firm. The law firm only provides address to that particular advocate. An advocate or partner can be removed from the roll of advocates and the law firm remains existing with other lawyers still practicing under
30 that law firm.

Counsel submitted that, whereas the respondents argued that Ms. Nampeera Juliet was in conduct, concerned and interested in the appeal, there is no evidence on record to prove that she appeared in Court. He emphasized that Ms. Nampeera was never concerned nor interested in the matter.

35 Counsel further submitted that from the High Court record, the petitioner prayed that if Court finds that the said error is defective, the error be cured under **section 14A of the Advocates Act**.

Counsel emphasized that the **Parliamentary Elections (Interim Provisions) Rules** were not applicable in this case.

40 He prayed that the appeal be allowed with costs in this Court and the Court below.



5 **Determination of the main appeal**

We have considered the evidence on record, the submissions of all counsel for the parties as well as the authorities cited therein.

10 The sole ground of appeal stated that the learned trial Judge erred in law and in fact when he held that the Appellant's affidavit in support of Election Petition No.15 of 2021 is incurably defective and struck out the Petition with costs to the respondents.

15 Counsel for the 2nd respondent raised a preliminary objection in his written submission alleging that the ground of appeal offends **Rule 86(1) of the Court of Appeal Rules**, in so far as it does not particularize what the appellant alleges as "incurably defective". According to counsel, the same ought to be struck out.

Rule 86 (1) of the Rules of this Court provides:-

"6. Contents of memorandum of appeal.

20 (1) **A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongfully decided, and the nature of the order which it is proposed to ask the Court to make."**

25 It is clear from the appellant's ground of appeal that the appellant specified that decision of the trial Judge being appealed against is that **"the learned trial Judge erred in law and in fact when he held that the Appellant's affidavit in support of Election Petition No.15 of 2021 is incurably defective"**. The ground is clear and concise as to what the learned trial Judge is alleged to have wrongly decided.

We find no merit in this argument.

We shall therefore proceed to resolve the appeal on its merits.

30 The issue arising from this appeal is whether an affidavit commissioned by a commissioner for oaths from the same law firm representing a litigant is fatally defective under **Section 4(1) of the Commissioner for Oaths (Advocates) Act**. The section provides:-

"4. Powers of a commissioner for oaths

35 (1) **A commissioner for oaths may, by virtue of his or her commission, in any part of Uganda, administer any oath or take any affidavit for the purpose of any Court or matter in Uganda, including matters ecclesiastical, matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognisance in or for the purpose of any civil proceeding in the High Court or any magistrate's Court; except that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he or she is the advocate for any of the parties to the**

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5 proceeding or concerned in the matter or clerk to any such advocate or in
which he or she is interested."(underlining is ours)

In the instant case, the learned trial Judge upon stating **section 4(1) of the Commissioner for Oaths (Advocates) Act**, held as follows:-

10 *"The gist of the above section is that a commissioner for oaths cannot commission his or her own documents or documents prepared by the firm where the commissioner works or where he/she is interested. This section is couched in mandatory terms.*

15 *From the letter of the Chief Registrar, it is not in doubt that that Nampeera Juliet is an advocate practicing with Lukwago & Co. Advocates the firm representing the petitioner and it's not denied by the petitioners. The argument by the petitioner's is counsel that the authority to commission oaths is personal to holder and is not issued to the firm does not apply in these circumstances because a client does not instruct an individual advocate, but instructs a law firm, that is why the documents herein do not bear the name of the individual advocate that drew them but that of the firm.*

25 *Similarly, no one can be a commissioner for oath without being an advocate and an advocate must have an address of belonging which is by way of law firm. Suffice it to note that a law firm is not a body corporate, it is a partnership and all actions of the partners and agents thereof bind each in their individual capacity. So the actions of the commissioner in this case are the actions of the law firm. See: Stephen M. Mogaka vs. Independent Electoral and Boundaries Commission & 2 others, (Election Petition No.2 of 2017) and Fatuma Nakatudde and Anor vs. Makerere University (Miscellaneous Cause No.175 of 2019 High Court at Civil Division).*

35 *It is clear from the facts before this Court that the petitioner is represented by the firm of M/s Lukwago & Co. Advocates, the firm which drew and filed the affidavit in support. The affidavit in Support was sworn before Ms. Nampeera Juliet, a Commissioner for Oaths who practices with the said firm, which is representing the Petitioner. Ms. Nampeera Juliet being an advocate practicing in the firm, that is acting for the petitioner is concerned and/or interested in the matter by virtue of her employment with the said law firm.*

45 *Counsel for the petitioner sought to rely on section 14A of the Advocates Act as amended and article 126(2) (e) of the constitution to cure that defect. The essence of Section 14A of the Advocates Act as amended is to protect innocent litigants from unscrupulous advocates, it is not meant to cure an illegality.*

50 *Similarly, in this case an affidavit sworn in violation of section 4(1) of the Commissioner for Oaths (Advocates) Act is for all intents and purposes not an affidavit as envisaged in law and is not capable of being cured under article 126 (2) (e) of the Constitution and section 14 A of the Advocates Act as amended as it offends a provision of an Act of Parliament and does not present as a mere irregularity but a matter that goes to the root of the legality of the affidavit in issue. This Court cannot shut its eyes as it is obligated to interpret and apply the law.*

55 *Article 126(2) (e) of the constitution cannot cure the defect in the affidavit in support filed in contravention of substantive law because the article was not*



5 **created or intended to defeat the law. See: Suubi Kinyamatama Juliet vs. Sentongo Robinah Nakasirye and anor (Election Petition Appeal No.92 of 2016). It therefore follows that the impugned affidavit in support of the Petition is incurably defective.”**

10 The High Court of Kenya was faced with a similar matter in **Election Petition No.2 of 2017, Stephen M. Mogaka vs. Independent Electoral and Boundaries Commission & 2 others**. The Court considered the provisions of **4(1) of the Oaths and Statutory Declarations Act** which is in *pari materia* with our **Section 4(1) of the Commissioner of Oaths Act**. Makau, J relied on the case of **James Francis Kariuki & Another vs. United Insurance Co. Ltd, Civil Appeal No. 1450 of 2000**, where Hon. Justice Onyango Otieno, as he then was; held as follows:-

20 **“That the verifying affidavit sworn by the plaintiffs is incurably defective as the Commissioner for Oaths while exercising the powers given, offended the mandatory proviso of Section 4(1) of the Oaths and Statutory Declarations Act....**

It will be clear from the above that Mr. Njenga Mwaura, being an Advocate in the firm that is acting for the plaintiff should not have allowed the verifying affidavit to be sworn before him as in any event, is an interested party.”

25 His Lordship further relied on the case of **Kenya Federation of Labour & Another vs. Attorney General & 2 Others Industrial Court of Kenya at Nairobi, Case No. 735 of 2012**, where Hon. Justice Nzioki wa Makau held:-

30 **“The short answer to that is that it would be against the provisions of the Oaths and Statutory Declarations Act. A Lawyer cannot commission a document drawn by his/her firm. Indeed the further affidavit by the claimants was defective in form as the jurat was not in conformity with the Oaths and Statutory Declaration Act.”**

The case of **Caltex Oil (Kenya) Limited vs. New Stadium Services Station Limited & Another [2002] eKLR** was further relied on by Makau J. In this case, Hon Justice Onyango Otieno, as he then was, stated as follows:-

35 **“I do think that the courts have a duty to rightly interpret the laws and to ensure that they do not condone any breaches of the same laws under any pretenses whatsoever. I still stand by what I did say in the case of James Francis Kariuki & Another vs. United Insurance Co. Ltd HCCC No. 1450 at 2000, that such an affidavit sworn in violation of section 4 (1) of the Oaths and Statutory Declarations Act is for all intents and purposes not an affidavit as envisaged in law and is not capable of being received under Order 18 Rule 7 as it offends a provision of an Act of Parliament and does not represent a mere irregularity either in defect as to form or by misdirection of the parties, or in the title.”**

45 His Lordship, therefore concluded as follows:-

5 ***“In view of the above authorities and the provision of Section 4 (1) of the Oaths and Statutory Declarations Act, it is clear from the facts of this Petition, that the Petitioner in this Petition is represented by the firm of M/s. Musyoki Mogaka & Co. Advocates, the firm which drew and filed this Petition. The affidavits were sworn before Mercy Moragwa Mogusu, a Commissioner for Oaths who practices or works with the said firm, which is representing the***
10 ***petitioner. It was clear at the time of commissioning of the affidavits that M/s. Mercy Moragwa Mogusu, being an Advocate practicing law in the firm, that is acting for the petitioner should not have allowed the supportive affidavit of the petitioner as well as the six witnesses affidavits to be sworn before her as***
15 ***in the event she is an interested party.”***

We are persuaded by the above authorities.

In the instant case, the appellant’s/petitioner’s affidavit in support was commissioned by a one Ms. Nampeera Juliet who was a practicing advocate under M/s Lukwago & Co. Advocates, the same firm which represented the petitioner that
20 drew and filed his Petition. We agree with the learned trial Judge that Ms. Nampeera Juliet was concerned and/or interested in the petitioners/appellants Petition by virtue of her employment as an advocate at the same law firm that represents the appellant/petitioner. According to the law, she would be interested in the matter even if she was merely a clerk in the firm. Ms. Nampeera Juliet’s actions therefore
25 contravened **section 4(1) of the Commissioner of Oaths Act.**

The appellant argued that **section 14A of the Advocates (Amendment) Act 2002**, is to the effect that pleadings illegally handled by any advocates shall not be invalidated.

Section 14A of the Advocates (Amendment) Act 2002 provides:-

30 **“14A (1) Where-**

(a) an advocate practices as an advocate contrary to subsection (1) of section 14:- or

35 **(b) in any proceedings, for any reason, an advocate is lawfully denied audience or authority to represent a party by any Court or tribunal; then-**

40 **(i) no pleading or contract or other document made or action taken by the advocate on behalf of any client shall be invalidated by any such event; and in the case of any proceedings, the case of the client shall not be dismissed by reason of any such event;**

45 **(ii) the client who is a party in the proceedings shall, where necessary, be allowed time to engage another advocate or otherwise to make good any defects arising out of any such event.”**
(Emphasis added)

5

A reading of **section 14A of the Advocates (Amendment) Act 2002**, shows that the said section only applies to:-

- 10
1. An advocate who practices as an advocate when his/her practicing certificate was cancelled or suspended and/or;
 2. Where an advocate is lawfully denied audience or authority to represent a party by any Court or tribunal.

15 In the instant case, what renders the petitioner's affidavit in support defective, is the fact that it was sworn before Ms. Nampeera Juliet who was concerned and/or interested in the petitioners/appellants Petition by virtue of her employment as an advocate at the same law firm that represents the appellant/petitioner, contrary to **section 4(1) of the Commissioner of Oaths Act**.

20 The issue in contention is neither related to the validity of an advocate's practicing certificate nor is it related to an advocate who has been denied audience or authority to represent a party. Ms. Nampeera Juliet was not the advocate representing the petitioner/appellant but rather the Commissioner for oaths before whom the petitioner swore his affidavit in support of the Petition. There was no question as to
25 the validity of Ms. Nampeera Juliet's practicing certificate. Therefore, **section 14A of the Advocates (Amendment) Act 2002** would not apply to the instant case.

We agree with the learned trial Judge that in this case, an affidavit sworn in violation of **section 4(1) of the Commissioner for Oaths (Advocates) Act** is for all intents
30 and purposes not an affidavit as envisaged in law. As a result, we agree with the learned trial Judge that the appellant's/petitioner's affidavit in support of the Petition is incurably defective.

The question that arises, therefore, is whether an Election Petition is competent
35 without the principal affidavit in support of the Petition.

In the case of **Hon. Lokeris Samson vs. Komol and the Electoral Commission, Election Petition Appeal No.09 of 2021**, Kibeedi, JA, held:-

40 ***"The definition of "election petition" as set out in section (1) of the PEA read together with section 60 of the PEA leads to the conclusion that once the "petition" meets the components set out in section of the PEA, then it qualifies to be termed as an "Election Petition" for purposes of the PEA. The "Affidavit accompanying the Petition" (principal affidavit) is not one of the components set out in section 60 of the PEA.***

45 ***Second, the principal affidavit simply contains evidence in proof of the allegations and claims as et out in the Petition. However, the PEA in section 64 expressly provides, inter alia, the mode of proof of the***

5 **allegations and claims in election petitions to be in the same manner
as in any other civil proceedings. The section is couched as follows:**

“64 witnesses in election petitions

10 **(1) At the trial of an election petition-**

a) **Any witness shall be summoned and sworn in the same
manner as a witness may be summoned and sworn in civil
proceedings;**

15 b) **The court may summon and examine any person who, in the
opinion of the court is likely to assist the court to arrive at
an appropriate decision;**

20 c) **Any person summoned by the court under paragraph (b)
may be cross-examined by the parties to the petition if they
so wish.**

(2) ...Not applicable” [Emphasis added]

25 **The inference from the above section is that an election petition can
stand without the accompanying affidavit and the allegations in the
petition may be proved by other forms of evidence as usually happens
in ordinary civil proceedings.**

30 **Third, the requirement for an election petition to be accompanied by an
affidavit, the principal affidavit, was a creature of Rule 4(8) of the
election petition rules. Rule 4(8) of the election petition rules provides:**

**“the petition shall be accompanied by an affidavit setting out the
facts on which the petition is based together with a list of any
documents on which the petitioner intends to rely.”**

35 **My understanding of the above rule is that it was intended to expedite
the trial of election petitions. But in the absence of the principal
affidavit, the above rule cannot be said to have excluded recourse to
proof of the allegations in the election petition using the other modes
applicable in ordinary civil proceedings which are permissible by
40 section 64 of the PEA. So, Rule 4(8) of the election petition rules does
not form a valid legal basis for holding that the petition cannot stand
without the accompanying principal affidavit.**

45 **As for the definition of the term “petition” by Rule 3 of the election
petition rules, it is stated thus:**

“3) Interpretation

In these rules, unless the context otherwise requires-

a) **....not applicable**

b) **....not applicable**

Handwritten signatures and initials in blue ink. There are three distinct marks: a large, stylized signature at the top right, a smaller signature below it, and a circular stamp or signature at the bottom center.

5 c) **“petition” means an election petition and includes the affidavit required by these rules to accompany the Petition.”**
Emphasis added]

10 ***My understanding of the use of the expression “in these rules” in rules 3 is that the definition of the term “petition” as set out in the Rule applies and/or is limited to the election petition rules only. To stretch the said definition to extend to the PEA which itself has its own definition of the same term has no basis.***

15 ***In the premises aforesaid, I would hold that an invalid or defective principal affidavit does not automatically render an election petition under section 60 of the PEA defective. The requirement by the Election Petition Rules for use of the affidavit accompanying the Petition and affidavit evidence generally in the trial of election petitions was intended to expedite the trial of election petitions in compliance with the spirit of the PEA. It should be encouraged and ought to be respected by litigants in election petitions. But it does not oust the other forms of evidence ordinarily used in civil proceedings which are permissible under section 64 of the PEA. Such forms of evidence include oral evidence and witness statements. Where the trial Court finds that the affidavit accompanying the petition (principal affidavit) is defective, the court still has the option of granting the affected party the option to proceed to prove the claims in the petition using the other options ordinarily available to litigants in ordinarily civil proceedings like the use of oral evidence, witness statements or any other form of adducing evidence.”***

20 We agree with the above position of the law. The absence of the appellant’s affidavit in support of the petition did not automatically render the Election Petition defective. We find that the learned trial Judge erred when he found that there was no valid
25 Petition in the absence of the appellant’s/petitioner’s affidavit in support of the
30 Petition.

35 We, however, urge counsel for all parties to comply with the Election Petition Rules to enable expeditious of Election Petitions.

40 In the result, the decision of the trial Judge, striking out the Petition is hereby set aside.

THE CROSS-APPEAL

45 The 2nd respondent filed a Notice of Cross-Appeal challenging the decision of the trial Judge on the following grounds:-

- 5 1. "The learned trial Judge erred in law and fact when he held that a
Petition can be supported by an affidavit whose averments are based on
information.
- 10 2. The learned trial Judge erred in law and fact when he held that the
preliminary objection in regard to the appellant's uncertified Declaration
of Results Forms was premature.
- 15 3. The learned trial Judge erred in law and fact when he held that the 25
affidavits filed without leave of Court were properly filed in Court." [Sic]

15 **Submissions of Counsel**

The 2nd Respondent's case on the cross-appeal

**Ground 1: The learned trial Judge erred in law and fact when he held that a
Petition can be supported by an affidavit whose averments are based on
information.**

20 Counsel for the cross-appellant submitted that the affidavit in support of the
Petition has no averment where the deponent claims personal knowledge. It is based
on information. He argued that a point of law was raised in the Lower Court that
the affidavit in support of the Petition must be based on personal knowledge not
information since a Petition is not an application where averments based on
25 information are entertained.

Counsel contended that the learned trial Judge instead misinterpreted **Rule 15 (1)
of the Parliamentary Election (Interim Provision) Rules** and stated;

*"I find that the disclosure of the sources of information by the petitioner is sufficient to
satisfy the requirements under rule 15 (1) as cited above."*

30 He submitted that **Rule 4 (8) of the Parliamentary Elections (Interim Provision)
Rules SI 141-2** provides: -

*"The Petition shall be accompanied by an affidavit setting out the facts on which the
Petition is based together with a list of any documents on which the Petition intends
to rely."*

35 Counsel contended that a Petition is a substantive suit and it commences trial
proceedings. He stated that, this Court in **Kasirye Zzimula Fred vs. Bazigatirawo
Kibuuka Francis Amooti and Electoral Commission, Election Petition Appeal
No. 001 of 2018**, relied on the authority of **Kizza Besigye vs. Yoweri Kaguta
Museveni and Another**, where Odoki CJ (as he then was) in his judgement stated:
40

*"An election Petition is not an interlocutory proceedings but a final proceeding which is
aimed at determining the merits of the case. Therefore, affidavits admissible in such*

5 *proceedings must be based on the deponent's own knowledge not information and belief."*

Counsel submitted that the above position is very consistent with the Provisions of **Order 19 Rule 1 of the Civil Procedure Rules** which gives Court the power to order any point to be proved by affidavit. He contended that the legislature in its wisdom decided to have electoral matters proved by facts in an affidavit. He noted that **Order 19 Rule 3 of the Civil Procedure Rules** provides thus:-

15 "(1) An affidavit shall be confined to such fact as the deponent is able of his or her own knowledge to prove, except an interlocutory application on which statement of his or her belief may be admitted provided that the grounds thereof are stated."

According to counsel, the above Rule is consistent with the requirement that Oral testimony be direct under **section 59 of the Evidence Act, Cap. 6**, which provides:-

20 "Oral evidence must in all cases whatever be direct, that is to say -

- 25 a) If it refers to a fact which could be seen it must be the evidence of a witness who say he or she saw it,
- b) If it refers to a fact which could be heard it must be the evidence of a witness who says he or she heard it.
- c) If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he or she perceived it by that sense or in that manner.
- 30 d) If it refers to an opinion or in grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

 Exception in about the expert opinion or existence of a condition."

35 Counsel submitted that the petitioner's affidavit is replete with averments that offend the requirement of oral testimony under paragraphs 5 (a), (b), (c), (d), (e), (f), (g), (h), (i), (f), (k), (L), (m), (n) and (o), which were not within his knowledge but third party. He relied on **Kasirye Zzimula Fred vs. Bazigatirawo Kibuuka Francis Amooti** (*supra*), where Court stated that relying on hearsay would be unsafe to be used to invalidate the nomination of a candidate.

He noted that, the case would be different if the Petition named other witnesses or potential witnesses but it is silent.

45 Counsel prayed that Court finds that the trial Judge ought to have also struck out the petitioner's affidavit for non-compliance with the law. He prayed that ground 1 of the Cross-appeal succeeds.

50 **Ground 2**

5 **The learned trial Judge erred in law and fact when he held that the preliminary objection in regard to the appellant's uncertified Declaration of Results Forms was premature.**

Counsel for the cross-appellant submitted that although the trial Judge struck off the uncertified Declaration of Results Forms together with the affidavit in support
10 commissioned by Nampeera Juliet, the trial Judge was wrong when he stated:-

"The question of admissibility of these uncertified declaration forms can only be determined after the matter has been scheduled and not in a preliminary objection. I find that the matter is premature."

15 Counsel contended that it is illegal to attach an uncertified public document to an affidavit. He averred that the Declaration of Results Forms are Forms issued by the Electoral Commission, which is a statutory public body. Therefore, the Declaration of Results Form is a public document within the meaning of **section 73 (a) (ii) of the Evidence Act. 6.**

20 He added that **section 76 of the Evidence Act** provides:-

"Such certified copies may be produced in proof of the contents of public document UNLESS prior to the agency or body having the document and has refused to do so."

25 Counsel contended that the provisions of **section 73 and 76 of the Evidence Act** were interpreted in the case of **Kakooza John Baptist vs. Electoral Commission and Yiga Anthony, Supreme Court Election Petition Appeal No. 011 of 2007**, where Court held:-

30 *"A non-certified DR form cannot be validated by the mere fact that is annexed to an affidavit. A DR form is a public document within the meaning of Section 73 (a) (ii) of the Evidence Act. It requires certification if it is to be presented as an authentic and valid document in evidence."*

35 Justice Kanyeihamba further stated:-

40 *"I agree with Okello J.A, where in his lead judgement he opines that Rule 15 of the Parliamentary Elections (Election Petition) Rules, 1996 does not prohibit or indeed conflict with Section 76 of the Evidence Act which provides that the contents of public documents or parts thereof are to be proved by certified copies..."*

Counsel submitted that the petitioner/appellant did not lay ground in the Petition to justify the use of uncertified public documents as an exception. He noted that an
45 illegality must be brought to the attention of Court at the earliest opportunity.

5 According to counsel, scheduling or no scheduling affidavit evidence once filed must be questioned as opposed to documents that are subject to formal tender during trial or scheduling. He averred that the preliminary points of law raised regarded the propriety of the affidavit and the affidavit cannot be separated from its annexures.

10 Counsel added that there has been general misconception about the decision of this Court in **Tamale Julius Konde vs. Senkubuge Isaac and another, Election Petition Appeal No. 075 of 2016**, where the Appellant had two (2) sets of Declaration of Results Forms attached to the affidavit in support of the Petition, one certified another was not certified. The High Court dismissed the Petition for non-compliance with **Section 76 of the Evidence Act, Cap. 6**.

He submitted that in that case, the Appellant had been given Declaration of Result Forms which were different from the ones certified by the Electoral Commission. The Appellant pleaded the discrepancy in the results and attached both Declaration Results Forms on the Affidavit in support of the Petition. The ones from the Electoral Commission had not been signed by his Agents yet, the uncertified ones had signatures of his Agents.

On appeal, the Court of Appeal stated;

25 *“The instant case being an election matter, the above contentions by the appellant raise very serious allegations that go to the root of the election itself as they cast doubt in the vote tallying process. Given the peculiar nature of the appellant’s complaint, it would defeat logic to expect the appellant to get certified copies of the unsigned DR forms from the 2nd respondent whom he is accusing of altering the results in collusion with the 1st respondent.”*

Counsel argued that the above facts are different from those in the instant case.

35 **Ground 3**

The Learned Trial Judge erred in law and fact when he held that the 25 affidavits filed without leave of Court were properly filed in Court.

40 Counsel for the 2nd respondent submitted that the said 25 affidavits in support of the Petition, were filed on 18th August 2021, whereas the election of the Chairperson of the Division was held on the 3rd February 2021.

45 He argued that any serious, diligent, reasonable, aggrieved petitioner is expected to start compiling evidence immediately the election results are declared, than await the gazettelement and file.



5 Counsel contended that the said affidavits were filed over 90 days after the Petition was filed. He relied on the case of **Mutembuli Yusuf vs. Nagwomu Moses and Electoral Commission, EPA No.043 of 2016.**

10 Counsel submitted that **Rule 4 of the Parliamentary Election (Interim Provision) Rules SI 141** provides that:-

Rule 4 (8):

“The Petition shall be accompanied by an affidavit setting out facts on which the Petition is based together with a list of any documents on which the petitioner intends to rely”

15 He contended that all affidavits in support of the Petition should accompany the Petition. Counsel noted that with leave of Court the petitioner may be allowed to file “additional” or “supplementary” affidavits not “affidavits in support”.

20 He prayed that ground 3 of the Cross-appeal succeeds.

In conclusion, counsel prayed that the Cross-appeal be allowed with costs to the 2nd respondent.

25 **The appellant’s response to the Cross-appeal**

Ground 1

30 Counsel for the appellant pointed out that this Court has already pronounced itself on the issue of applicability of the **Parliamentary Election Petitions (interim provisions) Rules** to disputes arising from Local Council Elections. **Kwoba Herbert vs. Ssebugwawo Tadeo Election Petition Appeal** (supra).

35 Counsel submitted that the petitioner’s affidavit disclosed his source of information from various witnesses who equally swore affidavits confirming what they had told the petitioner.

40 He argued that it is settled law that even omission to disclose source of information contained in the affidavit is not fatal and in any case the petitioner can rely on information from witnesses. See: **Betty Muzanira Bamukwatsa vs. Matsiko Winfred Komuhangi, The Returning Officer and Electoral Commission, Election Petition Appeal No.65 Of 2016.**

45 Counsel contended that, as opposed to the case of Zimula Fred, where the petitioner had not disclosed the source of her information, in this case, the petitioner/appellant disclosed his source of information in the affidavit and equally his witnesses also swore affidavits confirming what they had told the petitioner.

5

Counsel further submitted that, in elections like the recently concluded ones, the candidate like the petitioner is not everywhere, he has to rely on evidence of witnesses like his agents who were physically present at various polling stations.

10 **Ground 2**

Counsel for the appellant submitted that the learned trial Judge was right to state that the issue was premature since the matter had not been scheduled yet.

15 He submitted that whereas it is true that proof of public documents is by production of certified copies in line with **sections 74 and 75 of the Evidence Act**, uncertified documents of this nature can be relied on if notice to have them certified had been given to the Electoral Commission and the same was not honoured.

20 Counsel stated that, during trial the appellant's counsel produced to Court two copies of the letters dated 18th February 2021 and 16th August 2021 which were written to the Electoral commission and the commission did not avail the said documents.

25 According to counsel, in light of **sections 64(1)(a) and 65 of the Evidence Act**, Notice to Electoral Commission allows the petitioner to rely on uncertified DR forms provided he requested for them and they were not availed. See: **Julius Tamale Konde vs. Ssenkubuge Isaac and The Electoral Commission, Election Petition Appeal No. 75 Of 2016.**

30 Counsel contended that the complaints in the Petition stem from DR Forms and the petitioner/appellant casts doubt in the vote tallying process, it would defeat logic to expect the petitioner to get certified copies of the DR Forms from the 2nd respondent whom he is accusing of altering results.

35 He prayed that Court upholds the above decision and confirm the decision of the trial Court on this ground.

Ground 3

40 Counsel for the appellant submitted that the 25 affidavits complained of were filed with leave of Court. He contended that, when parties appeared in Court on the 16th day of August 2021, each of the parties before Court including the Electoral Commission applied to file affidavits on Court record and Court held:- *"....Let the said documents be filed and served as indicated by counsel....."*

45



5 Counsel prayed that this Court dismisses the Cross-Appeal with costs in this Court and the Court below.

Determination of the Cross-Appeal

Resolution of Ground 1

The issue arising from this ground is whether the affidavit in support of the Petition could not support the Petition having been based on information from third parties.

15 **Order 19, Rule 3 of the Civil Procedure Rules** provides:-

“3. Matters to which affidavits shall be confined.

20 (1) Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated.

25 (2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall, unless the Court otherwise directs, be paid by the party filing the affidavit.”

In the instant case, the trial Judge resolved this issue as follows:-

30 *“The impugned paragraphs which the respondent is seeking to expunge raise issues of non-compliance with electoral laws, the petitioner has clearly disclosed the source of his information. Given the fact that the petitioner cannot be everywhere and is ably represented by his agents it normally follows that he relies on information that he is given by the agents. See the cases of*
35 *Dr. Kizza Besigye v Yoweri Kaguta Museveni (Presidential Election Petition No.01 of 2001) and Chenoiko v Soyekwo & EC (Election Appeal No.56 of 2016) where it was emphasised that proper full disclosure by the deponent in an affidavit of the particulars of his sources of information is a crucial requirement in election matters. In view of the foregoing, I find that the*
40 *disclosure of the sources of information by the petitioner is sufficient to satisfy the requirements under rule 15 (1) as cited above.”*

The supreme Court, while faced with a similar matter, in **COL (RTD) Besigye Kizza vs. Museveni Yoweri Kaguta & Electoral Commission, Presidential Election**
45 **Petition No.01 of 2001**, Odoki, CJ (as he then was) held:-

“Affidavits based on information and belief should be restricted to interlocutory matters. In proceedings which finally determine the matter only affidavits based on the deponent’s knowledge should be acted upon. See Paulo K. Ssemogerere and Z Olum v Attorney General, Constitutional Petition No.3

5 of 1999, and Charles Mubiru v Attorney General, Constitutional Appeal No.1 of 2001.

10 An election petition is not an interlocutory proceedings but a final proceedings, which is aimed at determining the merits of the case. Therefore, affidavits admissible in such proceedings must be based on the deponent's knowledge, not on his information and belief.

15 The issue for determination is what should be the fate of affidavits filed by either party, which do not strictly comply with the law as stated above. Specifically, should all the affidavits which do not contain matters deposed from the deponents knowledge as well as those based on information and belief be acted upon whether they distinguish which facts are deposed from own knowledge and those based on information and belief?

20 There are two types of affidavits. The first is one, which distinguishes the facts based on knowledge and those on information and belief. The second category are those affidavits which contain matters based on knowledge, information and belief without distinguishing which facts are based on knowledge. A common formula for ending the second category of affidavits is "That all that is herein stated is true and correct to the best of my knowledge and belief" as most of the affidavits in Vol. 2 of the Petitioner's affidavits. Facts based on belief are inadmissible in an election petition.

30 It was submitted for the Petitioner that the Court has discretion to sever the defective parts of affidavit, and act on the rest of the affidavit. There is some authority for the proposition that in proper cases, a court may sever parts of the affidavit, which are defective or superstitious instead of rejecting the whole affidavit.....

35 From the authorities I have cited there is a general trend towards taking a liberal approach in dealing with defective affidavits. This is in line with the constitutional directive enacted in article 126 of the Constitution that the courts should administer substantive justice without undue regard to technicalities. Rules of procedure should be used as handmaidens of justice but not to defeat it.

45 In the present case, the only method of adducing evidence is by affidavits. Many of them have been drawn up in a hurry to comply with the time limits for filing pleading and determining the petition. It would cause great injustice to the parties if the affidavits which did not strictly conform to the rules of procedure were rejected. This is an exceptional case their all the relevant evidence that is admissible should be received in court. I shall accept affidavits, which contain both admissible and hearsay evidence, and only parts which are based on knowledge will be relied upon. As order 17r 3 (2) provides the costs of affidavits which contain hearsay matters should be borne by the party filing such affidavits."

Tsekooko, JSC held:-

“I think that an election Petition like a plaint is likely initially to make allegations¹ which are subject to proof or disproof. In a Petition, like the present, which is presented expeditiously under special rules as those set out in S.1. 2001 No. 13, a petitioner will inevitably including hearsay matters in the main affidavit accompanying his Petition- I am not saying that hearsay should be included deliberately. What I believe happens is that grounds in the Petition would most likely be based on information provided, in all probability by his agents or supporters from various parts of the country. The proper course to take during the inquiry, in such circumstances, is to consider the Petition and the accompanying affidavit and, unless the affidavit contains obviously scandalous or frivolous matter, finally reject any matters contained in such affidavit as appear not to have been satisfactorily proved unless perhaps the Petition does not disclose a cause of action. Alternatively, where time is still available the petitioner should seek leave to correct errors by way of supplementary affidavit. It would be unjust to reject the petitioner’s whole affidavit at the beginning of the inquiry. In the result, I do not agree, and in any event, I am not persuaded that the accompanying affidavit of the petitioner violated 0.17 Rule 3.”

Karokoora, JSC on his part observed and held as follows:-

“The Petition appears to have complied with these provisions. On the face of it, a Petition like a plaint would initially make allegations which are subject to proof or disproof. Without in any way appearing to give license to any petitioner to institute any Petition containing all manner of wild allegations. I cannot appreciate how, given the short time constraint, a petitioner can avoid to include hearsay matters in the affidavit accompanying his Petition. He will actually base his claim on information provided by other people. I think the proper thing to do is to consider the Petition and the accompanying affidavit and finally reject any matters contained in such affidavit as appear not to have been satisfactorily proved. It would be imprudent to reject the whole affidavit at once. In the result I do not agree and I am not persuaded that the accompanying affidavit of the petitioner violated 0.1 7 Rule 3 if indeed that Rule applies to this Petition. Rule 1 5 which makes the Civil Procedure Rules applicable in these proceedings states as follows:

“Subject to the provisions of these Rules, the practice and procedure in respect of the Petition shall be regulated, as nearly as may be, in accordance with the Civil Procedure Act and the Rules made under that Act relating to the trial of a suit in the High Court with such modifications as the court may consider necessary in the interests of justice and expedition of the proceedings.”

5 ***The import of this rule is that in whatever we do as Justices, we must conduct the proceedings expeditiously and also do justice to the parties. And that is why the trial of the Petition is by way of affidavits.***

10 ***I do not believe that the interests of justice and parties in this Petition would be served by scrupulous observance of the requirements of 0.17 Rule 3 which applied in ordinary suits in the High Court. Without making a dogmatic statement, I suspect that because of the scheme of 0.17, the Rules would appear most relevant when a Court orders for hearing to proceed on affidavit.***

15 Further, Mulenga, JSC held as follows:-

20 ***“I should however comment especially on affidavits required under rr.4 (7) and 8(3) (a) of the Election Petition Rules to accompany the Petition and the answers thereto. The said rules require that those affidavits shall set out facts on which the Petition is based, and the Respondent will rely on, as the case may be. Invariably however the parties have to rely heavily on factual information they receive from their agents and other witnesses, in order to comply with that requirement. In my view therefore in relation to those affidavits, 0.17 r.3 of the Civil Procedure Rules has to be applied with such modification as permits the petitioner and the Respondent to include in those affidavits facts which they depone on such information.”***

We are persuaded by the majority decision of Tsekoko, Karokora and Mulenga, JJSC.

30 In the instant case, a reading of paragraph 5 (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (L), (m) and (n) of the petitioner’s affidavit in support of the Petition, shows that what was stated therein was information based on what was provided his polling agents and supporters. The petitioner/appellant clearly disclosed the sources of his information, who also swore affidavits in support of the said allegations, based on
35 their knowledge.

We find that the learned trial Judge correctly found that the disclosure of the sources of information by the petitioner was sufficient following the majority decision of Court in ***COL (RTD) Besigye Kizza vs. Museveni Yoweri Kaguta & Electoral Commission***, (*Supra*). We, however, find that the learned trial Judge erred when he relied on **Rule 15 (1) of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules**, which Rules do not apply to Local Council Elections.

45 In the result, ground 1 of the cross-appeal fails.

Resolution of Ground 2



5 The issue arising on this ground is whether the learned trial Judge erred in law and fact when he held that the preliminary objection in regard to the appellant's uncertified Declaration of Results Forms was premature.

The learned trial Judge in resolution of this Preliminary objection held as follows:-

10 **“Section 76 of the Evidence Act provides for proof of public documents by production of the original or certified copies. A declaration of results form is a public document within the meaning of section 73(a) (ii) of the Evidence Act. It requires certification if it is to be presented as an authentic and valid document in evidence.**

15 **In this case, it was counsel for the petitioner's contention that they had written two letters dated 18th February 2021 and 19th August 2021 to the 1st respondent requesting to be availed certified copies of the declaration of results forms but the same has since been denied.**

20 **That notwithstanding, this matter of evidence which requires the Court to have a through scrutiny of the declaration forms. The question of admissibility of these uncertified declaration forms can only be determined after the matter has been scheduled and not in a preliminary objection. I therefore, find that the objection in this matter is premature.”**

25 The appellant's/petitioners main issue in his Petition was based on the results as contained on the contested DR Form's. Had the learned trial Judge proceeded to resolve this Preliminary objection, this would have required him to thoroughly examine the said DR Form's which would go into the merits of the petition. The resolution of the matter would require evidence and the matter was not yet fixed for hearing. We agree with the learned trial Judge that the objection on this matter was indeed premature.

30 Ground 2 of the Cross-appeal fails.

Resolution of Ground 3

35 The issue arising from this ground of the cross-appeal is whether the Learned Trial Judge erred in law and fact when he held that the 25 affidavits that were filed after the petition had been filed, were properly filed before Court.

40 The trial Judge in resolution of this Preliminary objection relied on **Rule 4(8), Rule 15** and **Rule 3 (c)** of the **Parliamentary Elections (Interim Provisions) Rules** and found that the said provisions do not stipulate that all affidavits intended to be relied upon by the petitioner have to be filed within the restricted time and neither does it prevent the petitioner from filing other affidavits. He noted that the statutory time frame for filing affidavits is quite short and evidence has to be gathered from a wide

- 5 spectrum of people, the evidence gathered has to be assessed for probative value before it is reduced into affidavits which are then commissioned and filed in Court.
- He added that, it is sometimes practically impossible to file all affidavits in support of the Petition at the same time with the Petition. Having found that the petitioner's affidavit in support of the petition was incurably defective, the trial Judge held that
10 the Petition was not accompanied by any affidavit as required by law.

First, we fault the learned trial Judge for relying on the provisions of the **Parliamentary Elections (Interim Provisions) Rules**, which only govern elections for Members of Parliament. The said rules do not apply to the instant case, being a
15 Local Council election, that is governed by the **Local Governments Act**. See **Makatu Augustus vs. Weswa David**, (*Supra*).

The law does not provide for the time-lines to be followed in filing and serving of affidavit evidence.

20 From the record, during the prescheduling meeting, the said affidavits were filed with leave of Court on 16th August 2021. They were filed with the leave of Court and we, therefore, find that they were properly before Court. We do not find fault in the trial Judge's findings on this ground.

Ground 3 of the cross appeal is dismissed.

25

Conclusion

1. The learned trial Judge's decision striking out Election Petition No.013 of 2021 is hereby set aside.
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2. The file should be remitted to the High Court for trial of the petition on its merits before another Judge.
- 35 3. Costs are awarded to the 1st and 2nd respondents.

Dated, signed and delivered at Kampala this ^{5th}..... day of ^{AUG}..... 2022.

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RICHARD BUTEERA
DEPUTY CHIEF JUSTICE

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HELLEN OBURA
JUSTICE OF APPEAL

10



.....
CATHERINE BAMUGEMEREIRE
JUSTICE OF APPEAL

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