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**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE  
HCT- 04-CV- EP -033 OF 2021**

**OKIRIA BEN ::: PETITIONER**

**VERSUS**

10 **ZOMU YUSUF :::1<sup>ST</sup> RESPONDENT**

**THE ELECTORAL COMMISSION::::::::::::::::::::::::::::::::::::: 2<sup>ND</sup> RESPONDENT**

**BEFORE: HON. JUSTICE DR. BASHAIJA K. ANDREW**

**RULING**

Okiria Ben (*hereinafter referred to as the “Petitioner”*) filed this petition against Zomu Yusuf and  
15 the Electoral Commission (*hereinafter referred to as the “1<sup>st</sup> and “2<sup>nd</sup>” Respondent, respectively*)  
seeking a declaration that the 1<sup>st</sup> Respondent was not validly elected as Chairperson LCIII, Pallisa  
Town Council, that the election of the 1<sup>st</sup> Respondent be annulled and set aside and the Petitioner  
be declared the winner, that the votes of Kalaki Primary School polling station be included in the  
final tally of the results and that the Respondents pay costs of this petition.

20 At the scheduling, Mr. Kyazze Joseph, counsel for the 2<sup>nd</sup> Respondent, raised a preliminary  
objection on a point of law which he maintained would wholly dispose of the petition. Counsel  
submitted that in paragraph 4 of his petition, the Petitioner avers that the elections were held on  
03/02/2021 and that he filed the petition in court on 18/05/2021. That given the time prescribed by  
law for filing election petitions in respect elections of Chairperson LCIII, the instant petition is  
25 incompetent for having been filed out of time. Citing S. 138(4) LGA which provides that an  
election petition in respect of Chairperson LCIII shall be filed within 14 days after the results are  
notified in the *Gazette*, Mr. Kyazze submitted that time in the instant petition started running from  
04/05/2021 and expired on 17/05/2021. That since the petition was filed on 18/05/2021, it was  
filed outside time stipulated by law. Counsel relied on the case of *Bandikubi Boniface Musisi &*  
30 *3 Others v. Sserwanga William & Electoral Commission Court of Appeal EPA No. 110 of 2016*,  
where court held that the applicable law in respect of Local Government Councils election  
petitions is only the Local Government Act Cap 243 (LGA). Further, that filing a petition late  
even by one day is just as fatal and it cannot be cured. For this proposition, counsel relied on the  
cases of *Kibalama John Paul v. Salulu Sebastian & Electoral Commission HCT – 00 – CV – EP*  
35 *007 – 2012*; and *Ikiror Kevin v. Oriot Ismael, Court of Appeal, EPA No. 105 of 2016*.

5 Mr. Kyazze argued that the failure to file within timelines stipulated by law is an illegality and not a technicality that can be cured pursuant to Article 126(2)(e) of the Constitution. Counsel relied on the case of *Ndaula Ronald v. Hajji Nadduli Abdul Court of Appeal EPA No.20 Of 2006*, where it was held that noncompliance with both substantive law and procedural rules on illegality cannot be overlooked as mere technicalities. Further, that in the Malawi High Court case of *Bonny*  
10 *Edward Sauti v. The Electoral Commission, Electoral Matter No.33 of 2019*, where the issue of computation of time for filing election petition came up, the court held that the Legislature in its wisdom established deadlines for commencement of election petitions and court cannot extend the period unless the statute provides for such authority. Counsel maintained that provisions of S.138 (4) LGA are statutory and hence substantive law, and that all the court is required do is to read and  
15 apply the law as it is. That once a case is barred by law, court would not inquire into merits but must dismiss the case. That this petition should accordingly be dismissed with costs to the 1<sup>st</sup> Respondent.

Mr. Musana Simon Peter, counsel for the 1<sup>st</sup> Respondent also raised a preliminary objection. He submitted that the Petitioner is different from the person who is alleged to have participated in the  
20 elections as a candidate. Relying on the case of *Wakayima Musoke Nsereko & Electoral Commission v. Kasule Robert Court of Appeal EPA Nos. 50 and 102 of 2016*, counsel argued that whereas in his affidavit in support of the petition the Petitioner attached his National Identity Card with names “Okiria Ben Ojulo”, there is no evidence that the person by those names has ever been nominated for election. Counsel argued that under Section 66(2)(b) of the Registration of  
25 Persons Act, the only identification for purposes of voting is the National Identity Card which, in this case, bears different names from those of the person who filed this petition. Counsel cited Section 138(2) LGA and argued that the *locus* to file a petition is either by a candidate or registered voter. That in this case, the Petitioner is actually “Okiria Ben Ojulo” who is disguising himself as “Okiria Ben”. That as such, the Petitioner is a ghost petitioner and court cannot grant prayers to a  
30 ghost. Counsel submitted that the petition be struck out with cost.

In reply, Ms. Faith Luchivya, counsel for the Petitioner, submitted that the petition was filed in time because Section 143(1) LGA empowers court to apply rules applicable in ordinary civil suits. Counsel further submitted that court in the *Bandikubi Boniface Musisi & 3 Others v. Sserwanga William & Electoral Commission Bandikubi* case (supra) held that the LGA is silent on filing

5 fees and court applied the Court Fees Rules, hence it is not correct to argue that only the LGA is applicable law in respect of Local Government Council elections. Counsel further attempted to distinguish the Malawi case of *Bonny Edward Sauti v. The electoral Commission* (supra) and submitted that while the case emphasized the strict timelines, in computing time court applied the Interpretation Act and Civil Procedure Rules because, like in the instant case, the LGA does not  
10 provide for computation of time. For the case of *Ikiror Kevin v. Oriot Ismael* (supra) Ms. Luchivya submitted that the delay was by five months while in the instant petition the delay is by one day. That court has power under Order 51 r. 6 CPR, to enlarge time considering that the petition was filed late by just one day.

Counsel further submitted that court should invoke Article 126(2)(e) of the Constitution because  
15 the delay was not unreasonable. That the circumstances in which the Petitioner had to produce evidence within time; given the Covid-19 pandemic and the restrictions on movement due to lockdown are well known. That the petition is so important to the voters who would like to know the winner and as such it should be heard on merit. Further, citing *Sitenda Sebalu v. Sam K Njuba & Electoral Commission, SCEPA No. 26 of 2007*, Ms. Luchivya argued that the case relaxed the  
20 application of the strict timelines, and court can, in its own discretion, extend time for filing the petition. That even where the provision uses the mandatory term “shall”, it should be applied in a relaxed way. Counsel submitted that since the Respondents filed their answers to the petition, no injustice was occasioned and the petition should be heard on merit.

Regarding the objection on the variation of names of the Petitioner, Ms. Luchivya submitted that  
25 it does not constitute a preliminary objection by any standard as it would require evidence to prove. For this proposition, counsel relied on the case of *Lweza Clays Ltd & KIzito Lutwama Mause v. Tropical Bank Ltd & Fred Muwema S.C Misc. Appl. No. 31 of 2018* where it was held that a matter that requires evidence to prove cannot be brought as preliminary objection. Counsel argued that evidence of the Electoral Commission Website, which Mr. Musana referred to, will need to  
30 be furnished to prove the objection. Further, that whether or not the Electoral Commission knows “Okiria Ben Ojulo” and not “Okiria Ben” is a fact to be proved by evidence and hence it cannot constitute a preliminary objection. That the preliminary objection be dismissed and petition be heard on merit.

5 In rejoinder, Ms. Jackeline Natukunda, holding brief for Mr. Kyazze, reiterated their earlier submissions and maintained that even if court were to apply the Interpretation Act to compute time under Order 51r.2 CPR, that rule would only apply where the time limited for doing an act or taking a step is less than six days. That in the instant petition, the time stipulated by law is 14 days after the date of publication of election results in the *Gazette* and hence Order 51r.2 CPR is  
10 inapplicable.

Regarding the argument that the petition is so important to the voters and should be heard on merit, Ms. Natukunda submitted that it is the more reason the Petitioner should have filed the petition within time stipulated by law, but he did not. Further, that the LGA does not give court power to extend time set by statute. She fortified this argument with the case of *Makula International Ltd*  
15 *v. His Eminence Cardinal Nsubuga & A'nor [1982] HCB 11 (SC)*. Further, that Section 138(4) LGA is strict and the court lacks the jurisdiction to enlarge time for filing the petition.

Counsel reiterated that Article 126(2)(e) cannot be resorted to given that Section 138(4) LGA is substantive law and not a mere procedural technicality. That filing late even by one day, as in this case, puts the petition out of time and that limitation surpasses merit or what the voters would want  
20 to hear. That if this petition were to be allowed, it would set a bad precedent as it would be creating advantage over other similar petitions that were dismissed; such as the *Kibalama John Paul v. Salulu Sebastian & Electoral Commission* case (supra) which was on “all fours” with the instant petition. Counsel also rejected arguments regarding Covid-19 lockdown restrictions as untenable, arguing that other petitions were filed within time and the lockdown cannot be the reason for late  
25 filing.

Mr. Musana, in rejoinder, submitted that the question of the National Identity card is an admitted fact which needs no evidence be proved. That the *Wakayima Musoke Nsereko & Electoral Commission v. Kasule Robert* case(supra) held that the differing identities of a person who was nominated and who describes himself as the registered voter were fatal to the petition. Counsel  
30 reiterated that the petition be struck out with costs.

### ***Opinion:***

Under paragraph 4 of his petition and 5 of the affidavit in support of the petition, the Petitioner avers that the elections for the Chairperson LCIII for Pallisa Town Council were held on

5 03/02/2021 and that he participated as candidate. This averment is also an agreed fact in the parties’  
Joint Scheduling Memorandum *Item 2.0 (i)*. Further, under paragraph 6 of his petition and  
paragraph 7 of the affidavit in support of the petition, the Petitioner avers that the results of the  
said election were published in the *Uganda Gazette* on 03/05/2021. This too is also an agreed fact  
10 according to the “*Received*” stamp of court.

The main law that court is mandated to consider as governing filing of election petitions arising  
out of Local Government Councils elections, specifically for the Chairperson LCIII, is the LGA.  
In *Bandikubi Boniface Musisi and 3 Others v. William Sserwanga and Electoral Commission*  
(supra) after considering S.138 (4) (supra) the Court of Appeal held, inter alia, that court looks  
15 only at the LGA in determining the Local Government Councils election petitions in respect of  
time for filing election petitions.

Section 138(4) LGA being referred to provides as follows;

***“(4) An election petition shall be filed within fourteen days after the day on which the  
results of the election have been notified by the Electoral Commission in the Gazette.”***

20 In *Ndaula Ronald v. Hajji Nadduli Abdul, CA EPA No. 20 of 2016*, the above provisions were  
discussed and the Court of Appeal held that a petition filed after the lapse of the time stipulated by  
law was time barred. Court further held that S.138 (4) (supra) is couched in mandatory terms and  
the 14 days are computed a day after publication of the election results in the *Gazette*.

In the instant petition, the 14 days started running on 04/05/2021 a day after election results were  
25 notified in the *Gazette* and lapsed on 17/05/2021. The petition was filed in court on 18/05/2021.  
To note is that S.138 (4) (supra) does not exclude any day whether it is weekend or public holiday  
from the computation of time for filing the election petition. The only exclusion is the day the  
results are *gazetted*. This position is well-fortified in *Kibalama John Paul v. Samalulu Sebastian  
& Electoral Commission* (supra) where Dr. Nabisinde J., while referring to S. 34(1) of the  
30 Interpretation Act Cap 3, held that in computing time for the purpose of any Act, the period shall  
be deemed to be exclusive of the day in which the event happened or act or thing is done. In that  
case, like in the instant petition, notification of election results in the *Gazette* was on 03/05/2021  
and the 14 days lapsed on 17/05/2021 when the petition ought to have been filed. The Petitioner,

5 however, filed his petition on 18/05/2021 out of time limited by law and it was dismissed as being  
barred by law. This court finds the case authoritative as well as persuasive regarding time for filing  
petitions for Chairperson LCIII and therefore applies it *mutatis mutandis* to the instant petition  
which is on “all fours”.

Counsel for the Petitioner strenuously argued that the petition was filed late by just one day and  
10 that court should exercise its discretion and ignore the lapse as a technicality under Article  
126(2)(e) of the Constitution and entertain the petition on merit. However, that argument runs  
contrary to the law. The *Kibalama John Paul* case (supra) is good authority that filing late even  
by one day is fatal. In addition, as was held in *Ikiror Kevin v. Olot Ismael* case (supra) timelines  
for filing election petitions are strict and the strictness is deliberate. Any petition filed outside the  
15 prescribed timelines is bad in law and ought to be dismissed.

S. 143(1) LGA, which Ms. Luchivya relied on empowers court to apply rules applicable in civil  
suits. It states as follows:

***“(1) In the hearing of a petition, the powers of the court and the rules of procedure shall  
be those which apply to a civil action in a court of law.”***

20 However, court would only apply the rules if the Act is silent on the time within which to file the  
election petition or where the Act provides for the court to extend such time. As was held in  
*Makula International Ltd v. His Eminence Cardinal Nsubuga & Anor* case (supra) a court has  
no inherent or residual power to extend time set by a statute unless the statute provides so. As such,  
contrary to the argument of Ms. Luchivya, the *Sitenda Sebalu v. Sam K. Njuba and Another* case  
25 (supra) did not relax the strict time limitation set by statute in filing election petitions. The case, in  
fact cited *Makula International Ltd* case (supra) (at page 8) and held;

***“In our view the correct ratio decidendi of Makula International Ltd is that if there is no  
statutory provision or rule which gives the court discretion to extend or abridge the time  
set by statute or rule, then the court has no residual or inherent jurisdiction to enlarge a  
30 period of time laid down by the statute or rule.”***

Clearly, the extension or abridgment of time is the function of the statute and/or the rules. Court is  
not vested with the discretion to extend or abridge time set by the statute or rules where no

5 provision exists in the statute or rule stating so. More recently, the Supreme Court of Uganda in *Kyagulanyi Sentamu Robert v. Yoweri Kaguta Tibuhaburwa Museveni & Another, SC EP MA No. 1 of 2021*, held that even the amendment of an election petition outside the time limit prescribed by law for filing a petition would not be permissible, as it would have the effect of a court extending time set by law within which to file; which power the court is not vested with by  
10 law. The same reasoning was adopted by this court in *Lydia Wanyoto Mutende v. Connie Nakayenze Galiwango & Another HCMA No: 179 of 2021(Mbale High Court)* also citing the case of *Makula International Ltd* (supra).

Therefore, this court agrees with counsel for the 2<sup>nd</sup> Respondent that with limitation of time, once the axe falls, it falls and limitation supersedes even the merits of the case. The merits of the petition  
15 would not be inquired into once it is barred by law. Accordingly, the argument by Ms. Luchivya, that the petition was filed just one day late and that court should invoke Article 126(2)(e) (supra) and hear the merits, has no merit. Clearly, whether or not an election petition is barred by law is neither a mere technicality that can be ignored under Article 126(2)(e)(supra) nor where a court can invoke its discretion. One of the underlying principles in election petitions is the observance of  
20 procedural justice which has a critical impact on substantive justice. Parliament in its wisdom established deadlines for commencing election petitions and court cannot extend the time period unless the statute provides for such power.

The rationale of the prescription of strict timelines for election petitions is clearly to facilitate the commencement and timely resolution of election disputes. Democratic governance dictates that  
25 election disputes be resolved expeditiously and that there is finality in election outcomes. A party with a genuine valid complaint out of elections ought to pursue it with due diligence within the strict time limits which also permits the Respondents to know the nature of the complaints against them in similar timely manner and prepare their responses accordingly. Suffice it to note, that filing the petition out of time renders it barred by law and incompetent.

30 Regarding the objection by Mr. Musana, court finds that the issue of the varying identities of the Petitioner and the person whose names appear on the National Identity Card, are issues of fact that would ordinary require to be canvassed in evidence. As such, they cannot be a basis of a preliminary objection. It may be true that the names of the Petitioner and his National Identity Card are admitted facts. Nonetheless, other facts such as the Electoral Commission's knowledge

5 of the names of Petitioner which he presented at nomination, have to be proved by evidence. It does not matter whether there is a published Statutory Instrument about the matter. Information published on Electoral Commission's Website has to be proved in a court of law by the Electoral Commission if a party seeks to rely on it. It cannot be adduced from the Bar, as counsel did. Therefore, the particular preliminary objection lacks merit.

10 The net effect is that the preliminary, on a point of law that the petition is barred by law, succeeds and disposes of the entire petition; which is dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.

***BASHAIJA K. ANDREW***

***JUDGE***

15 ***09/09/2021.***

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Mr. Musana Simon Peter counsel for the 1<sup>st</sup> Respondent present.

25 Ms. Faith Luchivya counsel for the Petitioner present.

Ms. Jackline Natukunda, holding brief for Mr. Kyazze Joseph, counsel for the 2<sup>nd</sup> Respondent present.

5 Parties all present.

Ruling read in open court.

***BASHAIJA K. ANDREW***

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***JUDGE***

***09/09/2021***