

5 **THE REPUBLIC OF UGANDA**
IN THE SUPREME COURT OF UGANDA AT
KAMPALA

10 **(Coram: Owiny-Dollo CJ, Kisaakye, Arach-Amoko, Opio-**
Aweri, Mwondha, Mugamba, Muhanguzi, Tuhaise,
Chibita, J.J.S.C).

MISC. APPLICATION NO.04 OF 2021
(Arising from Presidential Election Petition No. 1 of 2021)

15 **BETWEEN**

KYAGULANYI SSENTAMU ROBERT::::::::::::: APPLICANT

20 **AND**

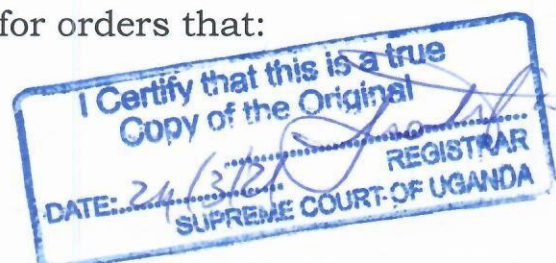
1. YOWERI KAGUTA MUSEVENI
TIBUHABURWA
2. ELECTORAL COMMISSION
25 **3. ATTORNEY GENERAL** **:::::::::RESPONDENTS**

*(Being an application for extension of time to file additional affidavits in
Presidential Election Petition No.1 of 2021)*

REASONS FOR THE RULING

30 **Introduction**

This was an application by the applicant, Kyagulanyi
Ssentamu Robert, brought by Notice of Motion under Sections
98 and 100 of the CPR; Rules 15 and 17 of the Presidential
Elections (Election Petitions) Rules and Rule 2(2) of the
35 Supreme Court Rules. He sought for orders that:



- 5 1. The time granted to the applicant for filing additional evidence in support of the petition be enlarged by one extra day to enable him file and serve all his compiled affidavits.
2. The respondents be given some extra days to file responses.
3. Costs of the application be provided for.

10 **Grounds**

The grounds of the application were that:

- 1. The applicant filed the Presidential Petition on the 1st February 2021 and served the respondents.***
- 2. Filing of pleadings were still ongoing.***
- 15 ***3. The filing of additional affidavits in the Petition were necessary to enable the Court to effectively inquire into and determine all questions involved in the Petition.***
- 4. There were prevailing special circumstances that***
- 20 ***warranted the grant of the application.***
- 5. The applicant brought the application without any delay.***
- 6. The respondents shall not be prejudiced by the extra time being granted to the Petitioner to file and serve***
- 25 ***additional evidence in the Petition.***
- 7. That it is in the interest of justice, equity and fairness that the applicant be granted extra time to file and serve the additional evidence in the Petition.***

Affidavit evidence

5 The application was supported by two affidavits, both dated 17th February, 2021. One was sworn by the applicant and the other by his lawyer, Anthony Yeboah Wameli. The affidavits amplified the grounds.

The respondents strenuously opposed the application and set
10 out their reasons in affidavits in reply dated 18th February, 2021, sworn by Esau Isingoma, an advocate from Ms K&K Advocates retained by the 1st respondent; Stephen Tashobya, a Commissioner of the 2nd respondent; Bahige David Mutume one of the lawyers from Ms Kampala Associated Advocates
15 representing the 2nd respondent; and, Allan Mukama, a State Attorney in the Directorate of Civil Litigation, on behalf of the 3rd respondent. The record contains also the affidavit of the Registrar of the Supreme Court, Her Worship Harriet Ssali dated 19th February, 2021, explaining the events surrounding
20 the circumstances which gave rise to the instant application.

We heard the application and dismissed it by a majority of 8 to 1 on the 19th of February, 2021. We intimated that we would give our reasons in the judgment. However, the applicant withdrew the petition before judgment.
25 Nonetheless, since it was a matter of public importance, we felt obliged to go ahead and give the reasons for our ruling. The withdrawal notwithstanding. We now do so.

Representation

At the hearing of this application, the applicant was
30 represented by Hon. Medad Ssegona, Hon. Asuman Basalirwa, Mr. Sulaiman Kakeire, Mr. Sekanjako Abubaker,

- 5 Ms. Shamim Malende, Mr. Fredrick Kalule and Mr. Muwada Nkuningi.

The 1st respondent was represented by Mr. Ebert Byenkya, Mr. Kiryowa Kiwanuka, Mr. Edwin Karugire and Mr. Usama Sebuwufu.

- 10 The 2nd respondent was represented by Mr. Joseph Matsiko, Mr. Ellison Karuhanga, Mr. Alfred Okello Oryem, Mr. Eric Sabiiti and Mr. John Jet Mwebaze.

- The 3rd respondent was represented by Hon. William Byaruhanga, the Attorney General, Solicitor General Mr. Francis Atoke, Ms. Christine Kaahwa, Ag. Director Civil Litigation, Mr. Martin Mwambutsya, Mr. George Kallemera, Commissioner, Mr. Richard Adrole, PSA, Mr. Geoffrey Madete, Senior State Attorney and Mr. Brian Musota, State Attorney.

Background

- 20 General elections were held in Uganda on the 14th January, 2021. The applicant and the 1st respondent were among the eleven candidates who participated in the said election. On the 16th January, 2021, the 2nd respondent declared the 1st respondent as the validly elected President of the Republic of Uganda. The applicant was aggrieved by the result and filed Presidential Election Petition No. 01 of 2021 on the 1st of February 2021, challenging the validity of the election of the 1st respondent. In the petition, he alleged that the election was not conducted in accordance with the provisions of the
- 25

5 relevant electoral laws and that the noncompliance affected the result in a substantial manner.

The appellant alleged also that the election was marred with electoral offences such as violence and intimidation that were committed by the 1st respondent personally or by his agents
10 with his knowledge, consent or approval. He prayed inter alia, that the election of the 1st respondent be annulled and set aside and fresh elections be conducted in accordance with the law.

Upon service of the petition on them, the respondents filed
15 their respective answers opposing the petition. Thereafter, on the 11th February 2021, the Court commenced the hearing of the petition with a scheduling conference during which Court issued guidelines/road map on the way forward. The Court in particular issued the following specific directives regarding
20 the filing of affidavits by the parties and the parties agreed to adhere by them. Such were:

- i. The applicant was directed to file all affidavits by Sunday 14th February, 2021.
- ii. The respondents were directed to file their affidavits in
25 reply by Saturday 20th February, 2021.
- iii. Thereafter, the applicant was directed to file any affidavits in rejoinder by Tuesday 23rd February, 2021.

An arrangement was put in place for instantaneous service to the opposite parties.

5 The applicant filed a total of 53 affidavits on the 14th February, 2021. Apparently, the applicant attempted to file more affidavits on the 15th February, 2021, but the Registrar rejected them because he was out of time. This prompted the applicant to lodge the instant application on Wednesday 17th
10 February, 2021 for extension of time to file the said affidavits. As indicated earlier, Court dismissed it and reserved the detailed reasons.

Submissions of counsel

Applicant's counsel:

15 It was submitted by counsel for the applicant that the applicant was required by the precedents of this Court to prove that special circumstances existed that justify the exercise of the Court's discretion in his favour. The special circumstances are contained in paragraphs 18 to 24 of the
20 applicant's affidavit in support where he stated that it is true that Court gave directions when the parties last appeared in Court, but that the applicant was unable to comply with the directive because of circumstances that he alluded to in those paragraphs, namely, that a number of his witnesses were not
25 released on bail by the General Court Martial and other places where they were being held in detention as anticipated earlier, that some of the evidence which was locked up in the offices of National Unity Platform (NUP) could not be accessed and that the military siege over the offices was only lifted on
30 Sunday, the 14th February, 2021, the same day he was supposed to have concluded with filing of the affidavits. The

5 applicant claimed that the said evidence could only be
accessed on Monday, the 15th February, 2021. It was claimed
by the applicant that he worked round the clock to get
evidence from alternative sources, but could not conclude in
time. The applicant claimed also that he was able to access
10 some of the witnesses in prison on Sunday, having been
cleared on Saturday to get evidence from the witnesses who
were incarcerated in prison. It was his further claim that a
number of witnesses were thrown by abductors who are also
state actors, into distant places from Kampala without money
15 and transport, and that this imposed an onerous obligation
unto the applicant and his team to access them in order to
collect their evidence. It was submitted that those
circumstances notwithstanding, by close of business as
indicated and directed by this Court, on Sunday 14th
20 February, 2021, when he was supposed to file his affidavits,
the applicant had been able to collect the evidence, but he
was unable to file the affidavits in time. According to the
affidavit of Wameli, the applicant's lawyers came with the
affidavits but found the gates closed. It was submitted that
25 those in his view were the special circumstances calling for
this Court's intervention.

According to the applicant, the additional evidence obtained
from 200 witnesses across the country that the applicant
sought to bring is necessary and would help this Court to
30 inquire into and effectively and conclusively determine the
questions involved in the petition.

5 Counsel for the applicant referred to the evidence filed in this application. He said the affidavit by the Registrar is unique in the sense that it was the first time in his practice to come across such an affidavit. Concerning the affidavits in reply by the respondents' witnesses, he stated that they are correct, in
10 some material facts to the extent where they reproduce the Court record. He hastened to add however that they do not answer the question of inability and how compromised the circumstances that the applicant was in to be able to comply with the Court's directive. He submitted that Tashobya's
15 affidavit does not attach any evidence of the applicant's conduct which formed the basis of his averment. He said that his evidence should be discarded.

Counsel however conceded that according to Court's directive the closing time was 5 pm on the last day and that the
20 affidavit of the Registrar was correct that the applicant's lawyers came with volume 2 only on the last day but even those were not in sufficient numbers. He conceded also that the Registrar was right when she stated that the first time the applicant's lawyers came with the rest of the affidavits was
25 Monday, 15th February, 2021.

Counsel supported his submissions with the authorities of, ***Joseph Initiative Ltd v Akugizibwe Joselyne, Miscellaneous Application No. 51 of 2018 (HC); Molly Kyalikunda Turinawe and 4 Ors vs Engineer Ephraim Turinawe and Anor, Civil Application No. 27 of 2010 (SC);***
30 ***and Uganda vs Ntambi, Criminal Application No.08 of***

5 **2019 (SC)** for the principle that a party seeking extension of time must show that (i) he has sufficient reasons for extension of time; (ii) he was not guilty of dilatory conduct; and (iii) whether any injustice would be caused if the application is not granted.

10 He submitted that the injustice that would be occasioned to the applicant if the application is not granted is that in a Presidential election petition which is a matter of grave importance, evidence that has the capacity to set aside the election and which emphasizes the democratic path of the
15 country would be left out.

He further submitted that there was no inordinate delay in the instant case, as evidenced by the affidavit of Mr. Wameli who deponed that he wrote to Court on Monday morning for guidance and sought permission to file the additional
20 affidavits but did not receive any answer until the evening. He stated that they were preoccupied with gathering affidavit evidence which was trickling in and had hoped that they would be able to beat the deadline. He stated that that was the reason why they did not apply for extension of time earlier.

25 He added that they were also aware that the Registrar had power to receive late affidavits under Rule 13 of the Rules of the Court and stamp them accordingly. He said that they would then only apply for validation of their late filing to the Court. Counsel observed that Tuesday was a public holiday
30 and as such they could not file the application until Wednesday. The delay was for only one day, he insisted.

5 Finally counsel submitted that he was aware that the granting
of the application sought would impact on the timelines
reserved for the rest of the proceedings to be taken including
the time of Court. He contended however that they would, if
the application is granted, concede part of the time for
10 rejoinder to the respondents, in order to keep within the time
frame.

He prayed that Court grants the application and adjusts the
timeline accordingly.

1st Respondent's counsel:

15 Counsel for the 1st respondent submitted that the dictates of
the Constitution must be followed. He noted that the petition
was filed on 1st February, 2021 and must be concluded within
45 days, that is by 18th February, 2021.

Counsel went on to say that Court orders are not mere
20 technicalities and that they must be followed. He recalled that
the Court issued directions on 11th February, 2020, in the
presence of the applicant's counsel and that they had agreed
to follow them.

Counsel submitted that great prejudice would be occasioned
25 to the 1st respondent if the application is allowed, noting that
the 200 affidavits are from witnesses scattered all over the
country and that if the application is allowed, the 1st
respondent will not have enough time to respond to all of
them.

5 Counsel went on to observe that the applicant's affidavit in support is speculative since the alleged incidents happened before the 11th February, 2021. Counsel suggested that Court should look at what created the applicant's difficulty after that date and not before. He contended that all the evidence before
10 that date is irrelevant saying that disability deals with inability to file pleadings in time. He noted that in any case, the applicant did file his petition in time.

Counsel observed that the applicant's affidavit did not indicate who the witnesses allegedly in prison are; whether all
15 the 200 affidavits were sworn by the said witnesses; the witnesses who are not in prison such as the Secretary General; and why he never explained these difficulties to Court before.

Counsel submitted that when the petition was filed, the
20 applicant was expected to have some evidence arguing that one does not file pleadings when one has no evidence, then look for evidence.

He stated that the timelines are very important and that since the applicant had stated in his affidavit in support of his
25 application for amendment on the 4th February 2021, that he and his party officials had by that time gone and interviewed their witnesses and had discussed the evidence all over the country, there is no justification why on the 14th February, 2021, that evidence was not presented to Court. Besides there
30 were affidavits/ evidence he purportedly had or he attempted to file on the 15th February, 2021.

5 Counsel argued that when Court in its Ruling of 9th February 2021, stated that the applicant was free to file affidavits, Counsel for the applicant made it clear that he would file 50 affidavits but he waited until the last day to file. Counsel saw no justification why the applicant did not file the 200
10 affidavits earlier on.

It was counsel's submission that some of the affidavits filed so far are dated as far back as the 9th February, 2021. While others were dated 11th February, 2021. Counsel wondered why the applicant had not filed them. He argued that the
15 applicant was therefore guilty of dilatory conduct.

Counsel submitted that the special circumstances being presented to Court, that is, the time the lawyers arrived at the Supreme Court and the time the affidavits were presented, are clear blatant falsehoods. He added that that evidence is
20 controverted by the evidence of the three respondents and the Registrar. Counsel said that there is nothing unique about the Registrar's affidavit since she is the best person to swear an affidavit about what transpired in Court. Referring to the fact that Wameli wrote a letter to Court indicating that the rest of
25 the affidavits in volumes 3, 4, 5 and 6 arrived late, counsel contended that Wameli had no justification to write that letter and thereafter tell a lie since the Court's directive was clear. It was therefore preposterous for Wameli to state in his affidavit that Court ordered that service should be effected on
30 Monday. Counsel noted that Court directed that desks be put and service be effected at Court upon filing. He said that it is

5 not truthful for Wameli to say that he understood that to mean a day later. He contended that the time of closure was clearly indicated as 5 pm and Court clearly stated that no documents would be received after 5 pm.

Concerning Rule 13 of the Supreme Court Rules counsel
10 argued that the provision cannot be used to circumvent a clear Court directive. He said it is inapplicable in the circumstances of this case.

Counsel went on to argue that the affidavits are false and should be struck out. He referred to **Sirasi Bitaitana & 4**
15 **Ors vs Emanuel Kananura, Civil Appeal No.47 of 1976(HC)** and **Anthony Okello v Ojok B. Leo & Ors Miscellaneous Application No. 261 of 2006 (HC)**) He insisted that severance cannot assist, arguing that Wameli had told lies in paragraphs 2, 3, 4, 5, 6, and 7, and if those
20 were severed, only paragraphs 8, 9, and 10 would remain. He stated that in the circumstances, the application be struck out.

Counsel submitted that the authorities relied on by counsel for the applicant do not assist the applicant's case. He
25 observed that in **Uganda v Ntambi (Supra)**, the Court stated that the issue of prejudice can only be considered after establishing sufficient cause. He said that since the applicant had not rendered any explanation as to why they acted the way they did they had resorted in telling falsehoods. He
30 concluded that no sufficient cause had been shown.

- 5 Counsel submitted that ***Molly Kyalikunda Turinawe v Engineer Ephraim Turinawe & Anor*** (*Supra*), relates to mistake of counsel saying the instant case is not based on mistake of counsel but rather on mistake of Court, since Court is being faulted for rejecting the applicant's affidavits.
- 10 He said that the applicant's argument was that they came with their affidavits but Court refused to receive them. He added that fortunately, counsel for the applicant conceded in his submission that the statement by Wameli was not correct and that the statement of the Registrar was the correct one.
- 15 Regarding the case of ***Joseph Initiative vs Akugizibwe Joselyne*** (*Supra*), counsel observed that it discussed failure to take the necessary steps in lodging an appeal and said that the instant application did not relate to that.

Counsel concluded that none of the cases discussed the effect
20 of tendering falsehood.

He prayed that the application be dismissed with costs.

2nd Respondent's counsel:

- Counsel for the 2nd respondent associated himself with the submission of counsel for the 1st respondent. He too
25 submitted that for this application to succeed, there ought to be special circumstances. He submitted that this application does not disclose any special circumstances but that on the contrary, it depicts dilatory conduct, inconsistencies and falsehoods. He said it is therefore incompetent.

5 He further submitted that the contention that the pleadings were still going on was wrong saying that the 2nd respondent filed its answer to the petition on the 4th February, 2021 and the pleadings closed on the 6th February when the 1st respondent filed his answer.

10 Counsel recalled that the parties appeared before the Court for a scheduling conference on the 11th February, 2021 when applicant's counsel informed Court that he was not ready to proceed because he was held up by preparing affidavits that he wanted to file that day. He added that applicant's counsel

15 had informed Court that he would be filing 50 affidavits that day, stating that those were substantially the gist of his case, and in a bid to save time, he would generate their skeleton arguments. Counsel submitted that that meant that he was actually ready to file his affidavits that day and proceed

20 shortly to file written submissions, meaning that he actually had everything he needed to file in terms of affidavits. He submitted that the applicant cannot come to Court on the basis of falsehoods and inconsistencies to seek extension of time.

25 He added that counsel for the applicant is also on record as having said that they would be more prepared, going forward. He went on to observe that Court had granted the applicant the adjournment to enable him to file his affidavits and continue with the scheduling conference on another day. He

30 said the applicant did the exact opposite. Not only did he fail to file and serve the 50 or so affidavits on the 11th February,

5 2021, but even when the time was enlarged by 3 more days to the 14th February, 2021, his counsel filed the affidavits at the last hour at 5pm.

Counsel contended that if the affidavits were ready as early as the 9th and 11th February, 2021, then their filing and
10 serving at the last hour on the 14th February, 2021, indicates bad faith and fits into dilatory conduct. He submitted that both the applicant and Wameli alleged in their affidavits that filing of their affidavits was not possible because Court shut them out at 5pm, yet there is abundant evidence that they did
15 not have the affidavits. He added that Annexure C to the applicant's affidavit brings out the falsehood.

Counsel argued that under Article 104 of the Constitution and Section 59(3) of the Presidential Elections Act, the timeframe regarding the Presidential election petition is strict and cast
20 in stone. He added that the inquiry into the petition must be completed within 45 days from the day of filing. He submitted that on the 11th February, 2021, Court gave strict timelines with these provisions in mind and that the Court reminded the parties to abide by the timelines or end up in a crisis
25 which Court was trying to avoid when it gave the timelines. He added that the timelines that were set by Court should not therefore be extended due to inadvertencies, intransigence and total lack of diligence from the applicants. Counsel went on to say that ***Raila Odinga & 5 Ors v The Independent***
30 ***Electoral and Boundaries Commission & 3 Ors, Petition***

5 **No. 5, 3 & 4 of 2013 (Supreme Court of Kenya)** applies to this case.

He submitted that on the 11th February, 2021, Court extended time by 4 days and that the Court noted that this was in addition to the 11 days from the date of filing, that is,
10 1st February, 2021.

Counsel contended that the affidavit of the Registrar is consistent with the affidavits of the respondents' representatives Bahige David and Allan Mukama, who were stationed at the Court during that period.

15 He argued that Rule 13 of the Supreme Court Rules does not apply to a Presidential election petition because of Rule 2(1) which provides that the Rules relate to appeals to the Court from the Court of Appeal and Constitutional Court and that in the circumstances, the Registrar had no power to receive
20 documents outside the time that was set by Court.

He further argued that Rule 17 of the Presidential Election Rules does not apply because it applies to extension of time set by the Rules, not those set by the Court and that even then, there must be special circumstances. He was emphatic
25 there were no special circumstances that have been brought forth by the applicant in the instant application.

Counsel contended that the averments by the applicant and Mr. Wameli were full of falsehoods and that the effect would be to leave the application with no accompanying affidavit. He
30 said that even if the doctrine of severance were to be applied,

5 it would leave the application without sufficient evidence to prove special circumstances. He said that as such it ought to be dismissed. He referred to ***Sirasi Bitaitana & 4 Ors vs Emanuel Kananura***, (*Supra*)).

10 He submitted that the applicant sought to file 200 affidavits on the 18th day of the petition and that those affidavits would require sufficient time for the respondents to reply. He said that this would make it difficult for Court to make its decision within the prescribed time. He contended that it would be a matter of great prejudice to the respondents if the application
15 was allowed and they are served with 200 affidavits which would require consultations and looking for witnesses, interviewing them, recording their affidavits and filing them.

He contended that even if that would take just 6 to 7 days, as counsel for the applicant stated, this would in effect mean
20 that the time this Court has to make its decision would be reduced by that same number of days. He stated that this is a Presidential election petition and the Constitution and the Presidential Elections Act require that this Court comes up with a decision within 45 days with reasons. He submitted
25 that it is inconceivable that this can be done in a space of just 3 days. He said this would result into grave injustice and prejudice to the respondents and lead to the crisis that the Court warned of on the 11th February, 2021. He said this was because of an application that is based on falsehoods, dilatory
30 conduct and inconsistencies. He submitted that in ***Raila Odinga***, the Supreme Court of Kenya said that the other issue

5 the court must consider in exercising the discretion to allow further affidavits is the nature, context and extent of the new material to be provided and relied upon. He added that if it is small or limited, then court may allow, but if it is substantial and massive to make it difficult for the other party to respond, 10 then court must act with caution. He observed that in **Raila's case**, the court disallowed only 7 affidavits but noted that here we are dealing with 200 affidavits. He submitted that if the application is allowed, this would result into great prejudice to the respondents.

15 Counsel further argued that the application is an abuse of the process of the Court, which the Court must prevent when exercising its discretion. He stated that an abuse is where a party uses litigation for improper purposes. Counsel referred to the evidence of Tashobya who averred that shortly after the 20 applicant had instructed his lawyers to file the application, he called a press conference which Tashobya watched on TV in which he launched a scathing attack on the Supreme Court and even mentioned particular Justices by name. Counsel stated that Tashobya further averred that the applicant had 25 stated at the said press conference that he had filed the petition to expose the Court and that the Court had not waited to be exposed, but had instead exposed itself. Counsel submitted that this demonstrated that the applicant had come to Court in bad faith.

30 He contended that Article 128 (2) of the Constitution provides that no person shall interfere with the courts or judicial

5 officers in the exercise of their judicial functions. He added that the applicant cannot on the one hand instruct lawyers to file an application and on the other hand publicly attempt to blackmail this Court to grant this application. He said this is a classic case of abuse of the Court process.

10 He argued that it is not permissible for a party to file pleadings and then go out on a fishing expedition to look for evidence. He said it should be the other way round. He referred to ***D.Venkata Reddy v R. Sultan & Ors, 1976 SCR (3) 445.*** He urged Court to find this application a fishing expedition
15 and disallow it.

Counsel submitted that counsel for the applicant mentioned that there were some missing witnesses but did not mention their names or supply the list containing their names with the pleadings. Counsel argued that the applicant cannot therefore
20 come to Court and say that there were some unknown witnesses that are missing. He said this is further evidence of a fishing expedition.

Lastly, counsel argued that the authorities cited by counsel for the applicant make one clear point which is that there
25 must be sufficient cause before extension of time can be granted. He said the cases also make the point that there should not be dilatory conduct. He submitted that the evidence before Court and submissions prove that there is a lot of dilatory conduct and falsehoods in the affidavits that
30 were filed to support the application and that there is no sufficient cause.

5 He urged Court to dismiss the application with costs.

3rd Respondent's counsel:

The 3rd respondent associated himself with the above submissions.

Rejoinder by Applicant's counsel:

10 Counsel for the applicant reiterated his earlier submissions and maintained his prayer.

Determination of the Application.

The basis of the Notice of motion was cited as:

- Sections 98 and 100 of the Civil Procedure Act;
- 15 • Rules 15 and 17 of the Presidential Elections (Election Petitions) Rules, 2001 ; and
- Rule 2(2) of the Supreme Court Rules.

Section 98 of the Civil Procedure Act saves the inherent powers of court to make orders while Section 100 of the Civil
20 Procedure Act deals with the general power of courts to amend defects or errors in proceedings. They are irrelevant to this application. The same applies to Rule 2(2) of the Supreme Court Rules, which governs appeals from the Court of Appeal and the Constitutional Court as per sub-Rule 1 of the said
25 Rule. Rule 15 of the Presidential Elections (Election Petitions) Rules is equally irrelevant on account of the existence of a specific Rule on extension of time, that is, Rule 17 of the Presidential Elections (Election Petitions) Rules which reads:

“17. Enlargement or abridgement of time.

5 **The Court may of its own motion or on oral
application by any party to the proceedings upon
such terms as the justice of the case may require,
enlarge or abridge the time appointed by the rules
for doing any act if, in the opinion of the court, there
10 exist such special circumstances as make it
expedient to do so; except that when considering
enlarging time, the court shall take into account the
provisions of subsection (3) of section 59 of the Act.”**

(The underlining is added for emphasis)

15 We have not laid our hands on any jurisprudence from this
Court interpreting the above Rule. It is clear, however, from
the plain language of Rule 17 that it confers a discretion on
the Court to extend time for doing any act under the Rules.
The Rules do not provide a blank cheque for extension of time.
20 Like any other judicial discretion, however, it must be
exercised judiciously, taking into account the circumstances
of the case and in accordance with reason and justice.
Therefore, it behoves the party asking for extension of time to
demonstrate to the satisfaction of the Court that special
25 circumstances exist to make it expedient for the Court to do
so.

Arising from the above, the issue for determination by this
Court was:

Whether the applicant had established that special
30 *circumstances existed to warrant the extension of time for filing*
additional evidence, given the 45 days prescribed under

5 *section 59(3) of the Presidential Elections Act for determining
the petition.*

We considered the application, the evidence adduced, the
submissions of counsel, the authorities relied on as well as
the law. We found the answer to the above issue in the
10 negative for the following reasons:

Firstly, Article 104 of the Constitution and Section 59(3) of
the Presidential Elections Act, give the timeframe for a
Presidential election petition as 45 days from the date of filing.
The Court has no power to extend the same. Pursuant to that,
15 the Court held a scheduling Conference on the 11th February,
2021 and gave parties very clear timelines within which to file
affidavits in the petition. Court went further to instruct the
Registry to reject any documents that would be filed out of
time. The applicant's counsel never complained about the
20 timelines. If anything, he undertook to file 50 affidavits that
day.

Secondly, according to **Black's Law Dictionary, 9th edition
at page 1270**; pleading is defined as:

25 **"A formal document in which a party to a legal
proceeding (especially a civil law suit) sets forth or
responds to allegations, claims, denials, or defences.
In a federal civil procedure, the main pleadings are
the plaintiff's complaint and the defendant's
answer"**

5 In the instant case, the pleadings included the petition and the answers thereto.

Rule 5 of the Presidential Elections (Election Petitions) Rules, 2001 provides that the Petition shall be filed at the office of the Registrar within 15 days after the declaration of results.

10 Rule 8 of the Presidential Elections (Election Petitions) Rules, 2001 provides that the respondent who wishes to oppose the petition shall, within 3 days after service of the petition on him or her, file an answer to the petition. Unless, the respondent requires further and better particulars, this would
15 technically mark the end of the pleadings. Thereafter, the Court shall fix the petition for trial within 5 days. Rule 14 of the Presidential Elections (Election Petitions) Rules, 2001 provides that evidence at the trial shall be by way of affidavit. **Black's Law Dictionary** (Supra) at page 635 defines evidence

20 as:

“Something including testimony, documents, intangible objects that tends to prove or disprove the existence of an alleged fact”

An affidavit is therefore not, technically, a pleading, it is
25 evidence.

The petition was filed on the 1st February, 2021 and then filing of pleadings was closed on the 6th February with the filing of the answer by the 1st respondent. What remained was the filing of affidavit evidence in support of the Petition. The issue
30 at hand, therefore, arose out of filing of affidavits, not pleadings. The pleadings were filed within the prescribed time

5 and there were no issues with them. The allegation in ground
2 of the application that pleadings were still going on is
therefore incorrect.

Thirdly, Court found that the reasons advanced by the
applicant as a basis for the inability to file his evidence from
10 the 1st to 14 February 2021 were not plausible. He deponed
in his supporting affidavit that his home was surrounded by
security personnel from the 15th to the 25th January, 2021
when they withdrew therefrom pursuant to a Court Order
dated 24th January, 2021. He deponed also that in the short
15 period of 5 days remaining to file the petition his lawyers
started conducting research and gathering evidence for the
intended petition, which they managed to file on the 1st
February, 2021.

It was his evidence that in the meantime, he and others
20 continued with further preparation and analysis of evidence
from all corners of the country and that he and his party
structures obtained more evidence to help in the
particularization and support of the grounds pleaded in the
petition. He averred that his lawyers advised him that the
25 newly established evidence could only be introduced by way
of an amended petition and that on Thursday 4th February,
2021, he paid the prescribed court fees for purposes of filing
the amended petition but that the Registrar declined to
receive the same and advised him to file a formal application.

30 It is the evidence of the applicant that he proceeded to file an
application for amendment, which the Court heard and

5 summarily disallowed on the 9th February, 2021, on the
ground that the further and better particulars and
information sought to be introduced therein could be
sufficiently catered for by way of additional evidence. The
applicant averred also that during the pre-hearing conference
10 session on 11th February, 2021, the Court set timelines for
filing additional affidavits and he was supposed to file his
additional affidavit by the 14th February, 2021.

He deponed that his belief was that, being an inquiry into the
election process which had been conducted over a long period
15 of time, the Court would permit him to produce evidence for
a substantial duration of the trial as was the case in the
previous petitions. He deponed further that contrary to his
belief the Court granted him only 3 days, and he worked with
his lawyers round the clock, day and night, so as to file
20 additional affidavits, including taking testimonies from across
the country, with some witnesses' evidence being procured
from prisons across the country where some of his members
are political prisoners. The applicant concluded that despite
all odds, they managed to gather over 200 affidavits across
25 the country.

The evidence above lacks credibility. Whilst it is demonstrated
that the applicant's movement was curtailed by security
officers who surrounded his home in Magere after the
elections of the 14th January, 2021, it is untrue that the
30 applicant was prevented from gathering evidence because he
was able to instruct his lawyers who successfully pursued an

5 application in the High Court on his behalf and obtained an order removing the restrictions imposed on his movement by security officers. Similarly, he could have, if he wished, instructed his said lawyers to collect affidavits in support of his petition since he did not have to do so personally.

10 In addition, the applicant's affidavit evidence was not convincing. For instance though he averred that the delay was partly because some of his witnesses were in prison and attached an index of his intended witnesses to the affidavit, he did not highlight or name those who were actually in
15 prison. Court could therefore not discern who was in prison and who was not.

Further, there is no cogent reason advanced by the applicant for failure to file in Court those affidavits which he purportedly started collecting, according to his affidavit, soon
20 after filing his petition on the 1st of February, 2021. It is on record that Court started a scheduling conference on the 11th February, 2021. On that day, counsel for the applicant in his address to Court stated as follows:

25 *"... we did indicate to counsel that we would be filing about 50 affidavits within the course of today and all conditions allowing we would be filing another 50 if you permit."*

Counsel for the applicant thereafter sought an adjournment to another convenient date when he undertook he would be more organized and prepared.

5 It is on record also that Court granted the applicant an additional period up to Sunday 14th February 2021, to file the additional evidence by 5 pm. Similarly, the respondents were directed to file theirs by Saturday 20th February 2021. The applicant was then directed to file his rejoinder by 23rd
10 February 2021. Further, and in a bid to ease and ensure effective service, Court directed the parties to designate representatives and availed them desks at the Court premises for that purpose. Court thereafter adjourned the petition to 24th February 2021, for conclusion of the scheduling
15 conference and further hearing.

We noted that the applicant's counsel never complained that they had any difficulty in meeting the above timeline. We also noted that Court had given the applicant three more days to gather evidence after he had already had 10 days from the date
20 of filing the petition. On the other hand, the respondents had only three days to answer the petition and were added only six days to reply to the applicant's evidence.

The record indicates that counsel for the applicant never filed a single affidavit pursuant to his undertaking of the 11th
25 February, 2021 or at all, until the last minute on Sunday 14th February at 5 pm.

According to the evidence of the respondents' witnesses in reply, corroborated by that of the Registrar, on 14th February, 2021, at exactly 4:30 pm, two of the applicant's lawyers
30 arrived at the Supreme Court with 7 copies of affidavits bound as volume 2 which contained 50 affidavits and 3 separate

5 affidavits in spiral binding. After consultation with the Chief Justice, time was extended to 6 pm to enable the applicant's counsel deliver the remaining 13 copies of volume 2. They were informed that if they failed to file the remaining copies by then, they would be allowed to complete the filing on
10 Monday 15th February, 2021 at 8 am. The Registrar waited until 7 pm that day, but the applicant's counsel never brought the remaining copies of the said affidavits. This fact was acknowledged by the applicant's counsel in his letter dated 14th February, 2021 where he stated that, "*On the said date*
15 *we were at Court by 5 pm with the said affidavits only that some volumes particularly volumes 3, 4, 5, and 6 got to Court late after the Court premises had been closed.*"

On Monday 15th February 2021, instead of filing the remaining 13 copies of volume 2 as expected, the applicant's
20 counsel also brought volumes 3, 4, 5, and 6 which they tried to file in the registry without leave of Court. The Registry received the remaining 13 copies of volume 2 but rightly rejected the rest of the affidavits.

According to the record, counsel for the applicant did not file
25 the instant application until Wednesday, 17th February, 2021 at 5pm in the evening. It is therefore not true that the application was filed without delay. The Court found that if it was indeed true that the applicant had difficulties in assembling his affidavits as alleged, he should have applied
30 for extension of time at the earliest opportunity after the Registrar had rejected them or at least by Tuesday 16th

5 February, 2021 because all parties were fully aware that the Registry remained open over weekends and public holidays throughout that period. The excuse that he could not file the application on Tuesday 16th February, 2021, because it was a public holiday is thus untenable.

10 Further, Rule 13 of the Supreme Court Rules does not apply to election petitions since Rule 2(1) of the Rules clearly limits the scope of the application of the Rules to appeals from the Court of Appeal and Constitutional Court.

Based on the foregoing, Court found that the applicant was
15 guilty of dilatory conduct.

In our judgment, granting the applicant's application would prejudice the respondents who would have only six days to answer allegations contained in over 200 affidavits from witnesses from all over the country. Justice must be for both
20 parties.

In the case of **Raila Odinga & 5 Ors v Independent Electoral and Boundaries Commission & 3 Ors** (Supra), the Supreme Court of Kenya stated:

25 ***"The period for the filing, prosecution and determination of a Presidential Election is only 14 days from the time the results are declared. This is a very tight, short and limited period. The background to the setting of the strict time – lines must be known to most Kenyans. There was a***

5 *purpose to this and the intention of the People of Kenya and of Parliament must be respected.*

The parties have a duty to ensure they comply with their respective time – lines, and the Court must adhere to its own. There must be a fair and level
10 *playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.*

15 *The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is*
20 *able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it*
25 *difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.....Wehold that if*
30 *we allow the 7 affidavits to remain on record, the same will be prejudicial to the Respondents. This*

5 ***will amount to a miscarriage of justice, and we
cannot allow it in the circumstances.”***

(Underlining was added for emphasis)

In that case, the applicants had applied for extension of time
to file seven additional affidavits. The court disallowed their
10 application for a reason similar to what is before us.

We found that authority persuasive and applied it to the
instant application since we were dealing with 200 additional
affidavits instead of only 7 as was in that case.

Lastly and most fundamentally, we found that granting the
15 extension would negatively impact on the timelines issued by
Court in that it would take away six out of the 11 days , and
would leave Court with barely five days to internalise,
evaluate the evidence and give a reasoned judgment within
the 45 days prescribed by the law.

20 As a result of the foregoing reasons, we declined the prayer to
exercise the Court’s discretion in favour of the applicant by a
majority of 8 to 1 and accordingly dismissed the application,
with costs in the cause.

Dated at Kampala this.....18th..... day of March, 2021

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Alfonse C. Owiny-Dollo,
Chief Justice

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Dr. Esther Kisaakye,
Justice of the Supreme Court

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Stella Arach-Amoko,
Justice of the Supreme Court

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Rubby Opio-Aweri,
Justice of the Supreme Court

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Faith Mwondha,
Justice of the Supreme Court

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Paul Mugamba,
Justice of the Supreme Court

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Ezekiel Muhanguzi,
Justice of the Supreme Court

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Percy Night Tuhaise,
Justice of the Supreme Court

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Mike Chibita,
Justice of the Supreme Court

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