

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPLICATION NO.24 OF 2016

ABIRIGA IBRAHIM Y.A.:.....:APPLICANT

VERSUS

10 MUSEMA MUDATHIR BRUCE:.....:RESPONDENT

CORAM: HON. MR. JUSTICE S.B.K. KAVUMA, DCJ

HON. MR. JUSTICE CHEBORION BARISHAKI, JA ✓

HON. MR. JUSTICE ALFONSE OWINY DOLLO, JA

RULING

15 The applicant and the respondent participated in the General National  
Parliamentary Elections held on the 18<sup>th</sup> of February 2016, where they  
contested for the position of Member of Parliament for Arua Municipality. The  
applicant was declared as the validly elected Member of Parliament. The  
respondent challenged the outcome of the election and lodged a petition in the  
20 High Court of Uganda at Arua contending that at the time of the elections, the  
applicant had been disqualified for election as a Member of Parliament on the  
premise that he lacked academic qualifications of advanced level standard or  
its equivalent. He prayed for a declaration that the applicant was wrongly and



5 unlawfully elected as Member of Parliament, a declaration that the petitioner (now respondent) was the duly elected Member of Parliament for Arua Municipality and any other remedy as the Court deemed fit.

On the 24<sup>th</sup> day of June 2016, John Eudes Keitirima J dismissed the Petition and upheld the election of the applicant. It is common ground that the  
10 respondent filed a Notice of Appeal on the same day and the same was served upon the applicant.

This application is brought under the provisions of Rules 43(1) & (2) and 82 of the Rules of this Court and Rule 31 & 36 of the Parliamentary Election (Election Petitions) Rules SI 141-2 for orders that Election Petition Appeal  
15 No.25 of 2016 be struck out and the respondent be ordered to pay the costs of this application and the Appeal. It is premised on several grounds which are contained in the Notice of Motion and in the affidavit in support deponed on the 16<sup>th</sup> day of August 2016 by the applicant. Briefly the grounds are that:-

1. There is no valid Appeal on record by the respondent.
- 20 2. The respondent failed to take an essential step in the proceedings.
3. The respondent did not file a Memorandum of Appeal within the prescribed time.

In reply, the Respondent opposed the Application through an affidavit in reply, which he deponed on the 24<sup>th</sup> day of November 2016 wherein he avers *inter-alia*  
25 that:-

- 5 a. the Memorandum of Appeal was lodged with the Court of Appeal on the  
5<sup>th</sup> day of July 2016 and the same was served on the applicant on the  
11<sup>th</sup> day of July 2016,
- b. the time within which he was required to file a Memorandum of Appeal in  
Election Petition No.25 of 2016 had not lapsed,
- 10 c. he did not fail, ignore or neglect to file the Memorandum of Appeal as  
required by law and therefore he took all essential steps in filing the  
appeal,
- d. there is a valid appeal before this Court and the same ought not to be  
struck out with costs.
- 15 The applicant filed an affidavit in rejoinder to the respondent's reply and stated  
that:-
- i. the respondent did not file a Memorandum of Appeal within seven (7)  
days from the filing or giving of a Notice of Appeal as required by law.
- 20 ii. this application to strike out the appeal was filed on the 17<sup>th</sup> of August  
2016.
- iii. by the letter dated 18<sup>th</sup> August 2016, Counsel for the respondent were  
duly notified of the filing of this application and served with copies of this  
application.
- 25 iv. to date no application has been filed to extend time and/or validate the  
late filing of the Memorandum of Appeal as required by law.

- 5 v. the respondent has not exercised due diligence in the prosecution of the intended appeal
- vi. there is not a valid appeal on Court record and the same ought to be struck off the record with costs.

At the hearing of the application, Mr. Kiryowa Kiwanuka assisted by Mr. Osama Sebuufu, appeared for the applicant while the respondent was represented by Mr. Ronald Munyani.

Counsel for the applicant submitted that on the 5<sup>th</sup> day of September 2016, the main appeal was called for conferencing and counsel for the respondent was present. During the scheduling, it was brought to the attention of the respondent's counsel that an application to strike out the Appeal for failure to file a Memorandum of Appeal within the time stipulated by the law had been filed but to date no application for extension of time within which to file a Memorandum of Appeal or validation of the same has been filed. Counsel argued that Election appeals have got a specialized procedure and the same is set out in Rules 29, 30 and 31 of the Parliamentary Election (Election Petitions) Rules SI 141-2.

Counsel further argued that the procedure as set out in the law must be followed. He submitted that for Election Petitions, a Notice of Appeal is filed within 7 days from the date of judgment and the Memorandum of Appeal is filed within 7 days from the date of filing of the Notice of Appeal. The Record of Appeal is then filed 30 days after the filing of the Memorandum of Appeal.

5 However, in the instant case; judgment was delivered on 24<sup>th</sup> June 2016 and  
the respondent filed the Notice of Appeal on the same day. The Memorandum of  
Appeal was filed on 5<sup>th</sup> July 2016 which was out of time as it should have been  
filed on the 1<sup>st</sup> of July 2016. Counsel relied on the case of **Kasibante Moses V**  
10 **Electoral Commission Court Of Appeal Election Petition Application No.7**  
**of 2012** to support his submission. In that case Court struck out an appeal  
because the Memorandum of Appeal had been filed one day out of time.

Counsel submitted that the respondent had not exercised due diligence in the  
prosecution of the intended appeal because the notice of this application was  
given to the respondent on the 18<sup>th</sup> of August 2016 before it was fixed and  
15 when the same was filed a copy of a letter was sent to counsel for the  
respondent who acknowledged receipt of the same. To date the respondent has  
not found it necessary to file an application for extension of time within which  
to file a Memorandum of Appeal for validation of the same. He relied on the  
case of **Kirya Grace Wazala V Daudi Migereko & Anor Electoral Reference**  
20 **Appeal No.39 of 2012** to support his submission.

Counsel prayed that Court finds that the Memorandum of Appeal was filed out  
of the time provided for by law and strike out the Appeal with costs.

In reply, counsel for the respondent submitted that Rule 3(k) of the Rules of  
this Court is to the effect that a Notice of Appeal in relation to a criminal appeal  
25 means a notice lodged in accordance with Rules 59, 60 and 61 of the rules of  
this Court and in relation to Civil appeals, a notice lodged in accordance with

5 Rule 76 of these rules. He further argued that Election Petition Appeal No.25 of 2016 is a civil appeal hence the Notice of Appeal must be lodged in accordance with Rule 76 of the rules of this Court. He relied on the case of **Bahinguza & Anor V Attorney General Miscellaneous Application No.269 of 2013** to support his submission.

10 Counsel further submitted that the Notice of Appeal was lodged on the 28<sup>th</sup> of June 2016 and the 7 days started running on the 29<sup>th</sup> of June 2016 until 5<sup>th</sup> of July when the Memorandum of Appeal was filed and the same was filed within time. He submitted that the respondent had taken all the essential steps in prosecuting Election Petition Appeal No.25 of 2016. He invited Court to find  
15 that if the Memorandum of Appeal had been filed out of time, then it was excusable under **Article 126(2) (e)** of the Constitution and that the same principle was followed in the case of **Tegras Byeitima & Others V Asaba Jaiden Court Of Appeal Civil Application No.248 of 2013**. In that case, the Memorandum of Appeal was filed out of time but Court went ahead to hear the  
20 appeal on the basis of **Article 126(2) (e)** of the Constitution.

Counsel prayed that Court dismisses the Application with costs and allows Election Petition Appeal No.25 of 2016 to proceed.

In rejoinder, counsel for the applicant submitted that where there is a specific procedure provided for by the law, then Courts should be guided by that law  
25 but where there is no such procedure, then this Court should be guided by the Rules of this Court. In the instant Application, Court ought to be guided by the

5 Parliamentary Elections (Election Petitions) Rules SI 141-2. Counsel further submitted that in Election Petitions, a document is effective at the time it is filed. Since the Notice of Appeal was given on the 24<sup>th</sup> of June 2016, the 7 days expired on the 1<sup>st</sup> of July 2016 and the respondent should have filed the Memorandum of Appeal within that time.

10 We have read and considered the pleadings as well as the submissions of both counsel for and against this Application. The issue for resolution is whether, on the facts of the case as stated above, the respondent failed to take an essential step to prosecute Election Petition Appeal No.25 of 2016.

Rule 36 of the Parliamentary Elections (Election Petitions) Rules provides for  
15 application of Civil Procedure Rules to apply to Election Petitions with such modifications as the Court may direct in the interests of justice.

Rule 82 of the Judicature (Court of Appeal Rules) Directions allows a person on whom a Notice of Appeal has been served to apply to Court to strike it out on  
the ground that no Appeal lies or that some essential step in the proceedings  
20 has not been taken or has not been taken within the prescribed time.

Rule 29 of the Parliamentary Elections (Election Petitions) Rules provides that a notice of appeal may be given either orally at the time judgment is given or in writing within seven days after the judgment of the High Court against which  
the Appeal is being made.

5 Rule 30 of the Parliamentary Elections (Election Petitions) Rules requires that a Memorandum of Appeal in Election Appeals has to be filed within seven (7) days after the Notice of Appeal has been given.

The case of the applicant is that the respondent had not exercised due diligence in the prosecution of the intended Appeal because the notice of this application was given to the respondent on the 18<sup>th</sup> of August 2016 before it was fixed and when the same was filed, a copy of a letter was sent to counsel for the respondent who acknowledged receipt of the same. To date the respondent has not found it necessary to file an application for extension of time within which to file a Memorandum of Appeal and/ or validation of the same. This contention is made out in paragraphs 6 and 7 of the applicant's affidavit in rejoinder. Annexure L1 is a letter by the applicant's lawyers informing the respondent's counsel of the application to strike out Election Petition No. 25 of 2016 and a copy is enclosed therein. A receipt stamp shows that the letter was received by the respondent's counsel on the same day.

20 In the case of **Kirya Grace Wazala V Daudi Migereko & Anor Electoral Reference Appeal No.39 of 2012**, Court stated that *"surely in this case, a vigilant applicant gets to know that he has filed a record of appeal on the 15<sup>th</sup>/2/2012 and that an application for striking out his appeal has been filed on the 23<sup>rd</sup> /2/2012 as well as a supplementary affidavit and the applicant is put on notice to strike out his appeal on the ground that the letter requesting for proceedings has not been served on them but he does not act until 18 days later*



5 when he files an application for extending time to serve the letter requesting for  
proceedings onto the respondent and this was even after court has served  
conferencing directions on the striking out application.” (Sic) Court further  
stated that “I do not take this simply as the mistake or tardiness of the counsel  
but, I must say that the applicant himself contributed to this mistake and he was  
10 negligent, not serious and is therefore guilty of dilatory conduct. You cannot sit  
on your rights even when you see a real threat at your nose. I see no where in  
his affidavit where he put pressure on his counsel upon learning of the striking  
out application or even the conferencing directions for striking out his application.  
If he never got to know about them then surely he was negligent and he slept  
15 and was leaving everything to his counsel. He has not demonstrated that he was  
on toe with his advocate in ensuring that everything was being done diligently. I  
shall therefore want to distinguish this applicant from one who is vigilant.”

The applicant contended that the procedure and timelines for filing a  
Memorandum of Appeal as set out in the law must be followed. That for  
20 Election Petitions, a Notice of Appeal is filed within 7 days from the date of  
judgment and the Memorandum of Appeal is filed within 7 days from the date  
of the filing of the Notice of Appeal. The Record of Appeal is then filed 30 days  
after the filing of the Memorandum of Appeal. However, in the instant case;  
judgment was delivered on 24<sup>th</sup> June 2016; the respondent filed the Notice of  
25 Appeal on the same day. The Memorandum of Appeal was filed on 5<sup>th</sup> July  
2016 which was out of time as it should have been filed on the 1<sup>st</sup> of July 2016.

5 In the instant case, the respondent failed to take an essential step in the proceedings by filing a Memorandum of Appeal out of time prescribed by the law. In the case of **Utex Industries Ltd V Attorney General SCCA No.52 of 1995**, Court stated that *“taking an essential step is the performance of an act by a party whose duty is to perform that fundamentally necessary action*  
10 *demanding by the legal process, so that subject to permission by court, if the action is not performed by law prescribed, then whatever legal process has been done before becomes a nullity, as against the party who has the duty to perform that act”.*

In the case of an Election Petition, the intending appellant has even a higher  
15 duty to promptly take all the necessary steps so that the appeal is heard and determined as quickly as possible because matters regarding Election Petitions are supposed to be heard expeditiously as required by **Article 140(1) and (2)** of the Constitution which requirement and wording are reproduced in similar terms in Sections 63(2) and 66(2) and (4) of the Parliamentary Elections Act  
20 and Rule 33 of the Parliamentary Elections (Election Petitions) Rules. Section 66 specifically enjoins this Court to hear and determine an appeal expeditiously and may, for that purpose suspend any other matter pending  
66 before it.

Rule 4(a) of the Judicature (Court of Appeal Rules) Directions provides that;  
25 *“Any period of time fixed by these Rules or by any decision of the Court for doing any act shall be reckoned in accordance with the following provisions:-*

5 (a) *A period of days from the happening of an event or the doing of any act or thing shall be taken to be exclusive of the day on which the event happens or that act or thing is done*

The position is therefore that the date of filing of the Notice of Appeal is excluded when computing the seven (7) days within which a Memorandum of  
10 Appeal has to be filed in Court.

The respondent argued that the Notice of Appeal was lodged on the 28<sup>th</sup> of June 2016 and the 7 days started running on the 29<sup>th</sup> of June 2016 until 5<sup>th</sup> of July 2016 when the Memorandum of Appeal was filed and the same was filed within time. He maintained that he had taken all the essential steps in the  
15 prosecution of Election Petition Appeal No.25 of 2016.

**Rule 30** of the of the Parliamentary Elections Rules requires the respondent to file the Memorandum of Appeal with the registrar of this Court in case where a written notice of appeal had been given within seven days after notice had been given.

20 In paragraph 5 of the affidavit of the applicant in support of the application, he attaches as Annexure "C" a copy of the notice of appeal dated 24<sup>th</sup> June 2016 which was filed in Court on the same date. The notice states that judgment was delivered on the 24<sup>th</sup> day of June 2016 at Arua High Court. The notice was lodged with the Registrar on the 28<sup>th</sup> June 2016. The applicant submits that  
25 computation of time for filing the memorandum ought to have started running from the date of filing i.e 24/6/2016 while the respondent argued that it starts

5 from the date it was lodged i.e date when the registrar signed it that is 28/6/2016.

This Court in ***Election Petition Application No.7 of 2012 Kasibante Moses Vs Electoral Commission*** had occasion to deal with a similar situation which required to determine when to start counting the seven days for purposes of  
10 **Rule 30.** In that case, judgment was delivered on 24/10/2011 and the respondent filed the Notice of appeal on the 31/10/2011. In allowing the application to strike out the appeal, the Court said;

*“taking the 31.10.2011 as the date when the notice of appeal was filed in Court, thus when the notice of appeal was given, the seven days (7) days, excluding  
15 31.10.2011 expired on 7.11.2011. This is the last date when the memorandum of appeal ought to have been filed in Court. Its being filed in Court on 8.11.2011 was therefore out of time by one day contrary to Rule 30 of the Parliamentary Elections (Election Petitions) Rules”.*

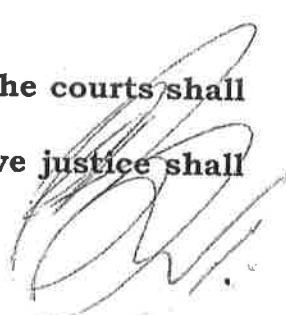
We find that the Notice of Appeal in this case having been filed on the 24<sup>th</sup> day  
20 of June 2016; thus the date when it was given, the seven (7) days excluding 24<sup>th</sup> June 2016 expired on 1<sup>st</sup> of July 2016. This is the last date when the Memorandum of Appeal ought to have been filed in Court. In this case it was filed on the 5<sup>th</sup> of July 2016 and was therefore out of time by four (4) days contrary to **Rule 30 of the Parliamentary Elections (Election Petitions)**  
25 **Rules.**

5 **In Kasibante Moses v Katongole Singh Murwaha Election Application No.8 of 2012**, where the respondent had failed to file a memorandum of appeal within seven days after the notice of appeal had been filed, this Court held that; to allow an intending appellant to take his or her time to file the record of appeal outside the time set by the rules without exceptional circumstances  
10 being shown would defeat the purpose of the time frame provided in the Constitution, the Parliamentary Elections Act and the rules made there under for expeditious disposal of election matters.

Counsel for the respondent submitted that if Court were to find that the Memorandum of Appeal had been filed out of time, then it was excusable under  
15 **Article 126(2) (e)** of the Constitution. The same principle having been followed in the case of **Tegras Byeitima & Others V Asaba Jaiden Court Of Appeal Civil Application No.248 of 2013**, where the Memorandum of Appeal was filed out of time but Court went ahead to hear the Appeal on the basis of **Article 126(2) (e)** of the Constitution.

20 **Article 126 (2) (e)** of the Constitution of the Republic of Uganda provides as follows:

**"In adjudicating cases both of a criminal and civil nature, the courts shall subject to law, apply the following principles: (e) substantive justice shall be administered without undue regard to technicalities."**



25 The Supreme Court interpreted **Article 126 (2) (e)** of the Constitution in the case of **Utex Industries V Attorney General S.C.C.A. No. 52 of 1995**, where

5 there was no certificate indicating the time that had been taken to prepare the  
record of proceedings under the Rules of this Court. The respondent had not  
applied for leave to extend time since the appeal had been filed after the  
stipulated 60 days. The court referring to **article 126 (2) (e)** of the Constitution  
on which the appellant sought to rely to save the appeal from a plea of time bar  
10 stated:

*“We think that the article seems to be a reflection of the saying that  
rules of procedure are handmaidens of justice- meaning that they should  
be applied with due regard to the circumstances of each case. We cannot  
see how in this case article 126 (2) (e) or the Mabosi case can assist  
15 respondent who sat on his rights since 18/8/1995 without seeking leave  
to appeal out of time.”*

The Court held that they were not persuaded that the legislature intended to do  
away with the rules of procedure by enacting **Article 126 (2) (e)** of the  
Constitution. The Court further interpreted **Article 126 (2) (e)** to mean that the  
20 principles to be followed are *“Subject to law”*.

The same Court in dealing with the same Article in ***Kasirye Byaruhanga &  
Co. Advocates V Uganda Development Bank S.C.C.A. No.2 of 1997*** stated  
that:

*“We adopt the same reasoning here and say that a litigant who relies on  
25 the provisions of article 126 (2) (e) must satisfy the court that in the  
circumstances of the particular case before the court it was not*

5 *desirable to have undue regard to a relevant technicality. Article 126 (2) (e) is not a magical wand in the hands of defaulting litigants.” (sic)*

We agree with the conclusion of the Supreme Court in the two cases that **Article 126(2) (e)** is not a magical wand in the hands of defaulting litigants.

10 This Court holds that computation of time follows the specific legislation in election matters and that is Rule 30 of the Parliamentary Elections (Interim Provisions) Rules SI 141-2. This Rule provides that; a Memorandum of Appeal shall be filed with the Registrar in a case where a written notice of appeal has been given within seven (7) days after the notice was given.

15 In the instant application, since the Notice of Appeal was given on the 24<sup>th</sup> of June 2016, the 7 days expired on the 1<sup>st</sup> of July 2016 and the respondent should have filed the Memorandum of Appeal within that time.

We accept the contention of counsel for the applicant that an intending appellant ought to actively take the necessary steps to prosecute his/her intended appeal.

20 We therefore hold that the respondent was not diligent as the law requires of an intending appellant in an Election Petition Appeal. We are unable to exercise our discretion otherwise in view of the clear provisions of the law relating to time within which to file the memorandum of appeal.



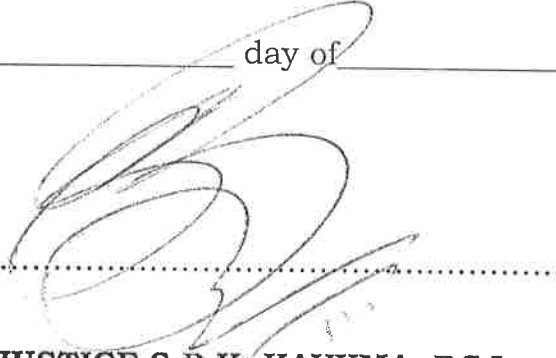
5 In conclusion and for the reasons given above, we allow the Application and find that the appeal as filed is incompetent. It is accordingly struck out.

Costs of this Application and in the Court below shall go to the applicant.

We so hold and order.

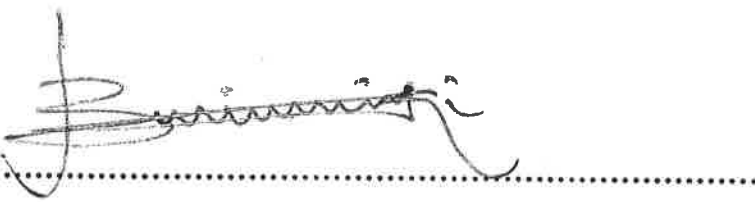
Dated this \_\_\_\_\_ day of \_\_\_\_\_ 2017

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HON. MR. JUSTICE S.B.K. KAVUMA, DCJ

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HON. MR. JUSTICE CHEBORION BARISHAKI, JA

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HON. MR. JUSTICE ALFONSE OWINY DOLLO, JA

5/1/17

Ruling read in open court.

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