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THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: MUSOKE, OBURA AND MADRAMA JJA)

ELECTION PETITION APPLICATION NO 046 OF 2022

ARISING FROM ELECTION PETITION APPEAL NO 65 OF 2021

10 **ALL ARISING FROM HIGH COURT ELECTION PETITION NO 001 OF 2021
JINJA HIGH COURT**

IGEME NATHAN SAMSON NABETA}APPLICANT

VERSUS

MWIRU PAUL}RESPONDENT

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RULING OF CHRISTOPHER MADRAMA, JA

The Applicant filed this application under rule 2 (2), 43 (1), (2) and (3), 44 (1), 76 (3), 78 (1) and 82 of the Judicature (Court of Appeal Rules) Directions and rules 29 and 31 of the Parliamentary Elections (Election Petitions) Rules for orders that the respondent's appeal be struck out for failing to take
20 essential steps in proceedings within the time prescribed without any justifiable cause. Secondly for costs of the application to be provided for.

The grounds averred in the notice of motion are that:

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(a) No valid oral notice of appeal was given by the Respondent upon delivery of the judgment of the lower court on the 18th of October, 2021.

(b) The respondent accordingly, filed a written notice of appeal on 22nd October, 2021 which was signed and sealed by the lower court on the same day.

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(c) The notice of appeal not served on the applicant and/or his lawyers within seven days as required by law or at all.

- 5 (d) Furthermore, the respondent filed the record of appeal in this court outside the time prescribed by the law.
- (e) The respondent accordingly, failed to take essential steps in the proceedings within time without sufficient or justifiable cause.
- 10 (f) The applicant shall be prejudiced by having to defend an appeal that is incompetent within the law.
- (g) The interest of justice demand that this application is allowed.

The application is further supported by the affidavit of Igeme Nathan Samson Nabeta, the applicant herein, which particularly, as far as is relevant to this ruling, states that the respondent filed the record of appeal
15 in this court outside the prescribed time without justifiable cause. The memorandum of appeal was filed in court on 29th October 2021. The 30 days within which to file the record of appeal lapsed on 28th November, 2021 yet the record was filed on 6th December 2021 after the expiry of the time prescribed by the law.

20 In the premises, he asserts that the respondent failed to take essential steps in the proceedings within the prescribed time without sufficient or justifiable cause.

In reply the respondent stated as far as is relevant to my ruling that:

25 A valid oral notice of was properly made to the trial court. Secondly the *applicant stated that his lawyers filed Civil Application No. 39 of 2022 to cure procedural lapses in serving the written notice of appeal which was subsequently given after the oral notice of appeal.*

30 With regard to the record of appeal, the record of proceedings was applied for by his lawyers by a letter dated 22nd October 2021 four days after the judgment was delivered and reminder was written on 18th of November 2021. The respondent deposed that the trial court first certified and compiled an incomplete record of proceedings on 11th November 2021 and the complete record of proceedings was furnished on 28th of November 2021. The lower court issued a registrar's certificate authenticating the record and

5 confirmed that the complete set of proceedings was collected on 26th of November 2021.

The respondent asserted that the 30 days within which to file the record of appeal can only start running from 26th November 2021 when the completed judges notes on record of proceedings and the lower court was ready and
10 obtained. Further the rules of the Court of Appeal provide that the contents of the record of appeal shall include the judges notes and/or record of proceedings and upon obtaining the proceedings on 26th November 2021, the record of appeal was filed on 6th December 2021 which is 10 days after receipt of the proceedings of the lower court. In the premises he deposed
15 that the respondents record of appeal was filed within the statutory 30 days that began to run on 26th November 2021. Further that the claim that the record of appeal was filed out of time is misconceived and lacks merit.

The applicant deposed to an affidavit in rejoinder in which he states that the written notice of appeal was never served on him or his counsel. Secondly
20 on the basis of the advice of his lawyers Messieurs Crane Associated Advocates and Messieurs Arcadia advocates, the electoral law is strict in timelines and if not followed, only the respondent would have himself to blame.

Further the record of proceedings was collected from court on 26th of
25 November 2021, within time for the filing of the record of appeal which the respondent neglected or refused to do and only did so following the lapse of time prescribed by the law. On the basis of advice of his lawyers, he further deposed that the 30 days within which to file the record of appeal began to run not at the time when the record of proceedings was collected
30 from the lower court but from the time of the filing of the memorandum of appeal in accordance with the rule 31 of the Parliamentary Elections (Election Petitions) Rules.

When the application came for hearing, learned counsel Mr Peter Mukidi Walubiri appearing with Hannington Mutebe and Francis Obbo represented

5 the respondent. On the other hand, learned counsel Mr. Kalule Ahmed Mukasa, Isaac Bakayana and Kassim Kigongo appeared for the applicant.

The court was addressed in written submissions.

I will refer to the submissions of the parties only on the question of the alleged late filing of the record of appeal contrary to rule 31 of the
10 Parliamentary Elections (Election Petitions) Rules for the reasons I give in the ruling hereunder.

The applicant's submissions

The applicant's counsel submitted that the respondent failed to take two essential steps in the proceedings in time without any justifiable cause.
15 Firstly, he did not serve the notice of appeal in the prescribed time or at all and secondly he filed the record of appeal outside the prescribed time.

With regard to the service of the notice of appeal, I note that matter was resolved in Election Petition Appeal Application No. 39 of 2022 wherein the oral notice of appeal was the only notice of appeal that was accepted as
20 valid in the ruling of the court. I do not therefore have to refer to the submissions of the parties with regard to any notice of appeal except where it is relevant on the 2nd point of whether the record of appeal was filed outside the prescribed time and the effect of such late filing.

The applicant's counsel on the issue of the late filing of the record of appeal
25 relied on rule 31 of the Parliamentary Elections (Election Petitions) Rules which provide that the appellant shall lodge with the registrar the record of appeal within 30 days after the filing by him or her of the memorandum of appeal. Counsel submitted that the memorandum of appeal was filed on 29th October 2021 and the 30 days within which to file the record of appeal lapsed
30 on 28th November 2021. However, the record was filed on 6th December 2021 after the expiration of the time prescribed by the law. In the premises, and on the question of fact he submitted that the record of appeal was filed out of time.

5 The applicant's counsel further submitted that the taking of an essential
step in the performance of an act by a party whose duty it is to perform the
necessary action renders anything done in disregard of the necessary act,
a nullity. The applicant's counsel relied on **Moses Kasibante Vs the Electoral
Commission; Court of Appeal Election Petition Application No 7 of 2012** for
10 the proposition that the intending appellant has the duty to take the
necessary steps to prosecute his or her intended appeal and that duty is not
on the court or on any other person. Further in election petition appeals, the
duty is higher than that in other appeals because under section 66 (2) of the
Parliamentary Elections Act and rule 33 of the Parliamentary Elections
15 (Election Petitions) Rules, appeals are supposed to be handled
expeditiously and under rule 34, the court is supposed to complete the
appeal within 30 days from the lodging of the record of appeal. The
applicant's counsel submitted that in the above case, the notice of appeal
was served one day late and similarly the memorandum of appeal was
20 served one day later than the time prescribed in the rules. The Court of
Appeal struck out the appeal for failure to take essential steps in the
proceedings within the prescribed time.

The applicant's counsel also relied on **Paul Omara Vs Acon Julius Bua, The
Electoral Commission and Uganda National Examinations Board & National
25 Council for Higher Education; Court of Appeal Election Petition
Miscellaneous Application No 346 of 2016** for the proposition that the record
of appeal must be filed within the prescribed time. In that case it was held
that no consequential extension of time is provided for in the rules for the
filing of the memorandum of appeal and the record of appeal and each of
30 these documents must be prepared and filed within the time prescribed by
the electoral law.

Further in **Abiriga Ibrahim Vs Musema Mudathir Bruce; Court of Appeal
Election Application No. 24 of 2016**, the memorandum of appeal was filed
four days later than the prescribed time. The Court of Appeal refused to
35 exercise its discretion to enlarge time in the respondent's favour and struck
out the appeal.

5 The applicant's counsel submitted that in this case, the respondent filed the
record of appeal out of time. In the premises the respondent is not a litigant
that this court should exercise its discretion in favour of.

He prayed that the application is allowed and the respondent's appeal be
struck out with costs to the applicant.

10 **Respondent's submissions**

In reply, the respondent's counsel submitted *inter alia* that Civil Application
No. 39 of 2022 ought to be heard first. I do not need to refer to this part of
the submissions because this court has already delivered the ruling
concerning the question of notice of appeal with the outcome that the
15 application was struck out having found that the oral notice of appeal was
a valid notice and adequate.

I have further carefully considered the written submissions of the
respondent in reply and there is no mention or reply to the fact of late filing
of the record of appeal. Nonetheless as far as may be relevant, the
20 respondent's counsel relied on the decision of the Supreme Court in
Christine Namatovu Tebajukira Vs Noel Grace Shalita [1992 - 1993] HCB 85
at 87 for the proposition that the administration of justice normally requires
that the substance of disputes should be investigated and decided on the
merits and errors and lapses should not necessarily debar a litigant from
25 the pursuit of his right.

Consideration of application.

In the Election Petition Application No. 39 of 2022, the respondent sought
extension of time to serve a written notice of appeal or to validate the late
service thereof.

30 In the ruling, the court struck out the application on the ground that there
was an oral notice of appeal which was valid and that a party who has opted
to give an oral notice of appeal at the time the judgment is given, cannot
thereafter file a written notice of appeal because he has waived his or her
right to do so.

5 The import of the ruling was that the question of whether there was an oral notice of appeal and whether the same was a valid notice of appeal under the law was resolved in that application with the outcome that there is a valid oral notice of appeal which was given on 18th October 2021. Thereafter, the applicant filed his memorandum of appeal within the prescribed time.
10 What is left is to resolve whether the record of appeal was filed out of time contrary to rule 31 of the Parliamentary Elections (Election Petitions) Rules which provides that the record of appeal shall be lodged by the appellant with the registrar within 30 days after the filing by him or her of the memorandum of appeal.

15 The record shows that the record of appeal was filed on 6th December 2021. On the other hand, the memorandum of appeal was filed on 29th of October 2021. Prima facie, the record of appeal was filed more than 30 days after the memorandum of appeal was filed contrary to rule 31 of the Parliamentary Elections (Election Petitions) Rules which provides that:

20 31. Record of appeal.

The appellant shall lodge with the registrar the record of appeal within thirty days after the filing by him or her of the memorandum of appeal.

An attempt was made by the respondent in his affidavit in reply to respond to this ground of the application. This is what the respondent deposed to in
25 his affidavit in reply:

5. That in reply to paragraphs 8, and 9 of the applicant's supporting affidavit, I wish to state that I have been advised by my lawyers KBW Advocates that;

30 a) The record of proceedings was applied for by my lawyers of M/S KBW Advocates vide a letter dated 22nd of October 2022, four days after the judgment was delivered and another reminder written on 18th of November 2021. Copies of the letters are respectively attached as "BR1" and "BR2".

35 b) The trial court certified and compiled an incomplete record of proceedings on 11th of November 2021 and the complete record of proceedings was furnished on 28th of November 2021. Copies of the certified proceedings are attached as Annexure "CR1" and "CR2".

5 c) The lower court issued a registered certificate authenticating the record and confirmed that a complete set of proceedings was collected on 26th November 2021. A copy of the registrar certificate is attached as ANNEXTURE "DR".

10 d) The thirty (30) days within which to file a Record of Appeal can only start running from 26th November 2022 when the complete judge's notes and record of proceedings of the lower court were ready and obtained.

15 e) The rules of this court provide that the contents of the record of appeal shall include the judges notes and/or record of proceedings and upon obtaining the proceedings on 26th of November 2021, the record of appeal was filed on 6 December 2021 which is precisely ten (10) days after receipt of the proceedings of the lower court.

f) The respondent's record of appeal was filed within the statutory 30 days that began to run on 26 November 2021.

g) The applicants claim that the record of appeal was filed out of time is misconceived and lacks merit.

20 I have carefully considered the above response which is the only response in relation to the late filing of the record of appeal. There is nothing in the written submissions of the respondent's counsel addressing the law concerning the record of appeal in election petition appeals. As noted above, rule 31 is quite clear that the appellant shall lodge with the registrar of the
25 court of appeal within 30 days after the filing by him or her of the memorandum of appeal, the record of appeal. The rule does not provide for the filing of the record of appeal within 30 days after receipt of the certified and typed record of trial proceedings and judgment.

30 To further elaborate on the law, even if the Parliamentary Elections (Election Petitions) Rules is to be read in harmony with the Judicature (Court of Appeal Rules) Directions, the rules of the Court of Appeal do not support the respondent's answer to the application. An intending appellant can only rely on the rule to reckon time from the time the record of appeal is availed if the conditions stipulated in rule 83 of the Rules of this court are
35 fulfilled. Rule 83 (2) and (3) of the Judicature (Court of Appeal Rules) Directions provides that the time taken in preparation of the record shall

5 not be counted in reckoning the period of 60 days within which an appeal shall be lodged. Secondly, an appellant who intends to rely on rule 83 (2) must show that he applied for the record of proceedings within 30 days from the delivery of judgment and served the respondent with the letter of application requesting for the record of proceedings and retained proof of
10 that service. Rule 83 (1) – (3) provides as follows:

83. Institution of appeals.

(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—

- 15 (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.

20 (2) Where an application for 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 copy.

25 (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.

The timelines prescribed by rule 83 of the Judicature (Court of Appeal Rules) directions are clearly in discord with the timelines in the
30 Parliamentary Elections (Election Petitions) Rules. The Judicature (Court of Appeal Rules) Directions provides for 60 days within which to lodge a memorandum of appeal together with the record of appeal, the prescribed fee and security for costs of the appeal from the time the notice of appeal is lodged. The notice of appeal envisaged is a written notice of appeal. The
35 notice of appeal is lodged within 14 days under rule 76 (2). This gives roughly

5 a period of 74 days from the time the decision is delivered within which to
file the appeal. Further, where the intending appellant intends to formulate
the grounds of appeal in the memorandum of appeal after receiving the
record of proceedings, he or she shall first apply for a copy of the
proceedings in the High Court within 30 days after the date of the decision
10 against which it is desired to appeal. Thereafter, the time taken for
preparation of the record of proceedings shall not be reckoned in computing
the 60 days within which to file the appeal from the time of the notice of
appeal and thereafter time shall be reckoned from the time the record of
appeal is availed.

15 Another major difference for instance is that a notice of appeal may be given
orally in election petition appeals. Secondly where it is given orally, the
memorandum of appeal shall be filed within 14 days after the notice is given
under the Parliamentary Elections (Election Petitions) Rules. The
memorandum of appeal is filed before the record of appeal. Additionally, the
20 record of appeal is filed within 30 days after the filing of the memorandum
of appeal. This gives a period of roughly 44 days from the time the decision
of the High Court is delivered. Under section 66 (2) of the Parliamentary
Elections Act, 2005, an appeal shall be determined within 6 months from
the time of filing. An appeal is filed when a memorandum of appeal has been
25 filed with the registrar and is filed within about 14 days from the time the
decision of the High Court is delivered. The High Court decision in this
application was delivered on 18th of October 2021.

The respondent had no excuse whatsoever not to have applied for extension
of time since he was obviously out of time from the time the memorandum
30 of appeal was filed with the registrar. All the respondent had to do was to
apply for extension of time to file the record of appeal. However, because it
is not necessary to formulate the grounds of the memorandum of appeal
upon receipt of the record of appeal, it became absolutely necessary to file
the record of appeal as soon as it is received. The record of appeal was
35 collected on 26th November 2021. The memorandum of appeal had been filed
on 29th October 2021. Thirty days from 29th October 2021 would still be about

5 30th of November 2021 which is a Tuesday or 29th of November 2021 which is a Monday. Instead, the respondent purported to avoid rule 31 and instead reckoned time, not from the time of filing of the memorandum of appeal as prescribed in the rule but from the time the record is availed.

10 Firstly, rule 83 is not available to the respondent in an appeal from a judgment in an election petition. In the premises the respondent ought to have applied for extension of time to file the record of appeal. In Election Petition Application No. 39 of 2022, the Respondent's application only sought extension of time to serve a written notice of appeal.

15 If time was to be reckoned from 26th of November 2021, 30 days thereafter would be 26th of December 2021 which is a Sunday and a public holiday. However, Monday would have been 27th December 2021 when the registry would be open to receive files. However, this is a classic case where the respondent was out of time by 6th of December 2021 in terms of rule 31 of the Parliamentary Elections (Election Petitions) Rules and ought to have
20 filed an application for extension of time to file the record of appeal out of the prescribed time. The non-availability of the record was allegedly not within the power of the respondent and could have been made a ground of the application.


25 By not having filed any application for extension of time to file the record of appeal out of time for sufficient cause, the court has no basis to grant the respondent extension of time to do so or to validate the record of appeal on record. Further, the court ought not to move on its own motion to do so in light of the applicant's application to strike out the appeal.

30 In the premises, the applicant's application to strike out Election Petition Appeal No. 65 of 2021 has merit for failure to take the essential step of filing the record of appeal within 30 days from the time of filing of the memorandum of appeal with the registrar. To order otherwise would be in violation of rule 31 of the Parliamentary Elections (Election Petitions) Rules and in breach of fair hearing principles under article 28 (1) and 44 (c) of the
35 Constitution where the court would be involved in denying the applicant's

5 application based on valid grounds by a counter motion of court to validate
the record of appeal filed out of time. The respondent could have proceeded
under rule 36 to import the Judicature (Court of Appeal Rules) Directions
so that under rule 5 and rule 2 (2), this court could exercise its jurisdiction,
if it does not violate section 66 (2) of the Parliamentary Elections Act, 2005,
10 to extend the time prescribed by the rules. There being no such application
before this court, I would make an order that the applicant's application
succeeds and the respondent's appeal, Election Petition Appeal No. 65 of
2021 is struck out with costs.

Dated at Kampala the 9th day of May 2022

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Christopher Madrama

Justice of Appeal