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**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**ELECTION PETITION APPLICATION NO. 0017 AND 21 OF 2017**

*(Arising from election petition appeal no. 83 of 2016)*

**HON. EBIL FRED:.....:APPLICANT**

10

**VERSUS**

**OCEN PETER:.....:RESPONDENT**

**BEFORE: HON. JUSTICE S.B.K KAVUMA, DCJ** ✓

**HON. JUSTICE ELIZABETH MUSOKE, JA**

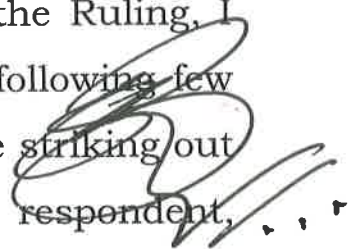
**HON. JUSTICE CHEBORION BARISHAKI, JA**

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**RULING OF S.B.K KAVUMA, DCJ (E) (DISSENTING)**

I have read, in draft, the Ruling in this consolidated Application prepared by my sister *Lady Justice Elizabeth Musoke, JA*.

20 I agree with the background to the Application, the representation of the parties, the issue framed, evidence on record and the submissions of counsel for the respective parties as stated in that Ruling.

25 As to the reasoning and the conclusions reached in the Ruling, I hold a somewhat different view as I elaborate in the following few paragraphs of this Ruling, especially with regard to the striking out of the Memorandum of Appeal filed on behalf of the respondent, 

5 first in the High Court at Lira on the 19<sup>th</sup> August 2016 and subsequently transmitted to this Court on the 1<sup>st</sup> September 2016.

The said Memorandum of Appeal found its way into this Court outside the time frame provided for in the law.

10 As agreed by the parties to the Application, the respondent filed a Notice of Appeal at the High Court at Lira on the 15<sup>th</sup> August 2016 within the time stipulated by law. Thereafter, a Memorandum of Appeal was filed in the same Court on the 19<sup>th</sup> August 2016, still within the time stipulated by law.

15 The said Notice of Appeal and the Memorandum of Appeal were availed to this Court as part of the Record of Proceedings filed into it on the 1<sup>st</sup> September 2016. The Memorandum of Appeal was, therefore, clearly filed outside the timelines set by law.

20 The justification for the respondent herein to have the time within which to file his Memorandum of Appeal extended and to have the one on Record validated is "*misinterpretation*" of Rule 30(b) of the Parliamentary Elections Rules by the former counsel of the respondent.

25 Both the former and the present counsel for the respondent concede that there was such a *misinterpretation* of the law. Further justification of the Application is based on the ~~fact~~ that the respondent had instructed two counsel to represent him and that after doing that, he did not have to bother following up the conduct of his Appeal.

5 The conceded *misinterpretation* of the law by counsel for the  
respondent is most unfortunate as, in my view, it borders close to a  
plea of a defence of a mistake of law in which the said former  
counsel and the respondent himself seek refuge. The former  
counsel for the respondent are very well grounded in law, with an  
10 impressive record of practicing law, including representing litigants  
in Election Petition matters, prior to their taking instructions from  
the respondent in the instant Application. This fact is one I take  
judicial notice of. To my mind, the fact that the applicant instructed  
two counsel to handle his intended appeal should not be cause for  
15 his relaxation from the vigilant pursuit or monitoring of the  
progress of his Appeal.

Further, the respondent himself is no stranger or new comer to the  
noble quest for elective leadership positions at both the District and  
the National levels as a District Chairperson and as an aspiring  
20 Member of Parliament. This is a another fact I take judicial notice  
of. For both positions, the respondent has always been found well  
qualified by possessing, *inter alia*, qualifications of an advanced  
level standard of education or its equivalent. He is, therefore, not a  
man one would put in the category of unknowledgeable people or  
25 novices in politics that may not be acquainted with the law and  
practice of elections in this Country.

Election litigation is a unique type of litigation governed by a special  
legal regime characterized by, *inter alia*, the necessity for strict  
observance and adherence to the law applicable to them by all

5 concerned. The timelines stipulated in the said law are to be strictly  
observed and followed by all, the applicant and his former counsel  
inclusive. That law imposes a very high duty, not only to his  
counsel, former counsel inclusive, but also on the respondent as an  
active player and stakeholder in the elections in which he chose to  
10 participant.

See ***Kasibante Moses Vs Electoral Commission, Election Petition  
Application No. 07 of 2011*** where this Court held:

15 ***“In case of an election petition appeal, the intending  
appellant has even a higher duty to expeditiously  
pursue every step in the appeal so that the appeal  
is disposed of quickly. This is so because Section  
66 (2) of the Parliamentary Elections Act and Rule  
33 of the Parliamentary Elections (Election  
Petitions) Rules enjoin this court to hear and  
20 determine an appeal expeditiously and may, for  
that purpose, suspend any other matter pending  
before it. Rule 34 requires this court to complete  
the appeal within thirty (30) days from lodging  
the record of appeal, unless there are exceptional  
25 grounds. Time is thus of the essence in election  
petition appeals.”***

5 See also *The Electoral Commission & Hon. Moses Ali versus Piro Santos Eruga Civil Application No. 22 of 2011*, where this Court cited with approval and quoted from the *Kenya High Court case of Muiya Vs Nyagah and others [2003]2 EA 616 (HCK)* at page 621 as below

10 “.....Elections are serious matters of a state with its citizens. As elections are held, the outcome announced, the electorate must know their political leader quickly and assuredly. There must be limited or no uncertainty about  
15 this. Roles of elected representatives are many and diverse vis-a-avis their electors. To perform the roles well the elected must be sure of his post and the elector of his leader. And the sooner the better to give that certainty. So either the election  
20 is accepted at once or if challenged, that challenge must be move along to the end swiftly enough to restore certainty. And for that, election petitions are governed by this Act with its rules in a very strict manner. Election petition law and  
25 the regime in general, is a unique one and only intended for elections. It does not admit other laws and procedures governing other types of

5        ***disputes, unless it says to itself. Here it spells out***  
***family and clearly that a petition must be***  
***presented and served within 28 days of the***  
***publication of election results. Anything outside***  
***that time is invalid and this one here is thus***  
10        ***invalid.***”(Sic)

I find these authorities most pertinent and relevant to the situation before us in the instant Application.


The duty on the parties and their counsel is, for this country, in accordance with both the letter and the spirit of the Constitution,  
15        the Parliamentary Elections Act and the Rules applicable to elections which call for expeditious prosecution of all election and election related litigation.

Given that the filing of the Memorandum of Appeal was, as admitted by counsel for the respondent, done in the wrong court,  
20        the High Court at Lira, which had no jurisdiction in the matter, that Memorandum of Appeal is void and with no legal consequence. It is illegal and a nullity, which, in my view, cannot be turned into a legality. Logically therefore, even when the same Memorandum of Appeal was transmitted to this Court from the High Court at Lira, it  
25        remained tainted with that illegality and nullity. Nothing legal, in my view, can be built on or around such an illegality and a nullity. There is, therefore, in my view, nothing to validate. See ***Sanjay***

5 ***Tanna & Another Vs Ofwono Yeri Apollo, Court of Appeal  
Election Application No. 08 of 2006.***

As for the extension of the time within which to file a proper Memorandum of Appeal, I find no evidence on record, in the particular circumstance of the instant Application, to support a  
10 finding of a sufficient reason to explain the applicant's failure to take the necessary steps relevant to this Application and his Appeal within the time stipulated by law. Such reason must be convincing and supported by cogent evidence. See ***Kasibante Moses vs Electoral Commission*** (supra). I find none, of such, in the instant  
15 Application.

It is not enough for the respondent to argue that if the Application to extend the time within which to file the Memorandum of Appeal and to validate the one on Record is granted, the respondent would not suffer any prejudice. Such lack of prejudice should not,  
20 necessarily, be an excuse for the lapse of a defaulting party or his/her counsel especially where he/she has exhibited dilatory conduct or inordinate delay.

Such dilatory conduct and inordinate delay by, or on, behalf of the respondent, despite his having filed in Court an Application to have  
25 the time within which to file a Memorandum of Appeal, distinguishes this Application from ***Sanjay Tanna*** (Supra). 

According to the undisputed evidence on record, when counsel for the applicant was served with the impugned Memorandum of

5 Appeal, such service was accepted under protest on account of the  
same having been filed and served out of time. By that fact alone,  
the respondent was put on Notice that all was not well with his  
Memorandum of Appeal. Interestingly, it took the respondent and  
his counsel eight, (8) months to file his Application for extension of  
10 the time within which to file the Memorandum of Appeal and to  
validate that which is now on Record. Even then, this was after the  
respondent had filed his own Application to have the Appeal, struck  
out on account of the respondent's failure to take an essential step  
in the prosecution of the same. I am persuaded by the contention  
15 by counsel for the applicant that such, is clear evidence of dilatory  
conduct by the respondent and the filing of the Memorandum of  
Appeal in issue, belatedly, was an afterthought on his part.

Unlike in ***Sembatya Edward Ndawula Vs Alfred Muwanga,  
Election Petition Application No. 0022 of 2016***, I am unable to  
20 say that the respondent herein did all that he could, to have his  
Appeal properly prosecuted and that he was a serious and vigilant  
litigant.

In the particular circumstances of this Application, I am unable to  
discharge the applicant from the high duty he shared with his  
25 former counsel to see that all the necessary steps to ensure a  
proper and expeditious prosecution of his Appeal are taken in a  
timely manner and that all the necessary documents are prepared  
and filed in the proper court seized with jurisdiction.



5 Before I take leave of this matter, I wish to observe, as I indeed  
hereby do, that there appears to be some difference in approach to  
the interpretation of some of the provisions governing election and  
election related matters, as revealed by the authorities considered  
in the instant Application, especially with regard to the extension of  
10 time for taking essential steps in the prosecution of such matters.  
This may result into some uncertainty in court's approach in that  
area. It may, in my view, be worthwhile for the Court, constituted  
by at least five (5) Justices, in an appropriate case in the near  
future, to consider possible harmonization of its differing  
15 approaches, of course subject to law, for better guidance to  
litigating parties in this important area of election and election  
related litigation.

As for the instant Application, as a result, of what is stated  
hereinabove, I would disallow the respondent's Application to  
20 extend the time within which to file a Memorandum of Appeal and  
to validate the one on Record. I would allow the Applicant's  
Application to have the respondent's Appeal No. 83 of 2016 struck  
out with costs to the applicant.

**I would so order.**

25 Since, however, my sister Lady Justice Elizabeth Musoke, JA and  
my brother His Lordship Cheberion Barishaki, JA are of a contrary  
view and are in the majority, the respondents' Application succeeds  
and is hereby allowed in the terms proposed in the Majority Ruling.

**It is so ordered.**

Dated at Kampala this 29<sup>th</sup> day of Nov 2017

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.....  
S.B.K Kavuma,  
**DCJ (E)**

