

UGANDA / JUDGMENT

Electoral Commission v Abala & Others (Consolidated Election Petition Application No. 5 & 21 of 2021 & 36 of 2022) [2022] UGCA 1 (3 May 2022)

[2022] UGCA 1

COURT

Court of Appeal of Uganda

BEFORE

Musota, JA, Gashirabake, JA, Barishaki, JA

CASE / FILE NUMBER

Consolidated Election Petition Application No. 5 & 21 of 2021 & 36 of 2022

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CONSOLIDATED ELECTION PETITION APPLICATIONS NO. 5 of 2021; NO. 21 OF 2021 & NO. 36 OF 2022

(Arising out of Election Petition Appeal No. 54 of 2021) (Arising out of Election Petition No. 4 of 2021)

1. ELECTORAL COMMISSION VS. ABALA DAVID

2. ABALA DAVID VS ACHAYO JULIET LODOU & ELECTORAL COMMISSION

3. ACHAYO JULIET LODOU VS ABALA DAVID 10

CORAM: HON. JUSTICE CHEBORION BARISHAKI, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. JUSTICE CHRISTOPHER GASHIRABAKE, JA

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RULING OF COURT

This ruling is from consolidated Election Petition Applications No 5 of 2021, No. 21 of 2021, and No. 36 of 2022. Election Petition Application No. 05 of 2022 was filed by the Electoral Commission seeking to strike out Election Petition Appeal No. 54 of 2021 for having been filed out of time. Election Petition Application No. 36 of 20 2022 was filed by Achayo Juliet Lodou against Abala David also seeking to strike out Election Petition Appeal No. 54 of 2021 for having been filed out of time. The appellant, Abala David, filed Misc.

Application No. 21 of 2021 against Achayo Juliet Lodou seeking for orders that the time within which to lodge the Record of Appeal in Election Petition Appeal No. 54 of 2021 be extended and/or enlarged and that the Record of Appeal in Election Petition Appeal No. 54 of 2021 be validated

For clarity, we shall resolve Misc. Application No. 21 of 2021 first, seeking for validation of Election Petition Appeal No. 54 of 2021. The application is supported by the affidavit of the applicant, Abala David, in which he states the grounds in support of his application for validation.

The deponent avers that on 12th October 2021, Hon. Lady Justice Jane Okuo Kajuga delivered judgment in favour of the respondents at the High Court of Uganda at Soroti and he immediately instructed his lawyers of M/s Engulu & Co. Advocates to appeal against the same at the Court of Appeal. On 18th October 2021, the lawyers applied to the Deputy Registrar of the High Court for a certified copy of the record of proceedings and judgment in Election Petition No. 4 of 2021. The record of proceedings and certified copy of the judgment was availed on the 15th of November 2021 and after receipt of the same, the lawyers embarked on the process of assembling the Record of Appeal.

On 26th November 2021, the applicant inquired from his lawyer whether the record had been filed and he was informed that the record has to be filed and served within 30 days from the date of

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receipt of the record of proceedings. That the delay was a mistake of counsel that should not be visited on the litigant.

At the hearing of the application, Mr. Ssekanjako Abubakar appeared for the applicant while Mr. Okello Alfred Oryem appeared for the 1st respondent and Mr. Wetaka Patrick and Ms. Gilda Katutu appeared for the 2nd respondent.

Applicant's submissions on Application for validation

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Counsel for the applicant submitted that the applicant has established sufficient reasons for the court to extend the time within which to lodge the appeal. Counsel referred to the applicant's affidavit 10 and submitted that the applicant instructed his lawyers to appeal against the said judgment and decree of court. Counsel submitted that mistake of counsel who inadvertently believed that a record of appeal in an election petition can be filed within 30 days after receipt of the certified copy of the record of proceedings, should not be visited 15 on the innocent litigant.

Counsel relied on the Supreme Court decision in *Sabiiti Kachope and 3 others Vs Margaret Kamuje*, Supreme Court Civil **Application No. 31 of 1997** in which it was held that the mistake or negligence of the applicant's counsel maybe accepted as a proper 20 ground for granting relief such as leave to appeal out of time. Counsel submitted that the applicant established sufficient reasons for the court to extend the time in which to lodge the appeal.

1st respondent's submissions to strike out Election Petition Appeal No. 54 of 2021

Counsel for the 1st Respondent submitted that the respondent filed the Record of Appeal in Election Appeal No. 54 of 2021, 40 days after the period of 30 days prescribed by law. That no appeal lies at law from the judgment and Decree of the High Court in Election Petition No. 04 of 2021. Counsel relied on the decision in *Kasibante Moses vs. Electoral Commission* Election Petition Appeal No. 7 of 2012 and submitted that unless leave is granted to validate the belated filing, the appeal remains incompetent. Counsel submitted that in this case the applicant filed the Record of Appeal on 6th December 2021. 40 days after the expiry of the mandatory 30 days within which to lodge a Record of Appeal. That the applicant has not demonstrated any sufficient cause that impeded him from filling the record of Appeal in time provided for by law.

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\$2nd\$ respondent's submissions on Application for validation

Counsel submitted that Election Appeals have a specialized procedure set out in Rules 29, 30 and 31 of the Parliamentary Election (Election Petitions) Rules SI 141-2. For election petitions, a Notice of Appeal has to be filed within 7 days from the date of the judgment and the Memorandum of Appeal is filed within 7 days from the date of filing of the Notice of Appeal and the record of appeal ought to be filed within 30 days of filing the memorandum of appeal. By the respondent filing the record of appeal 42 days after the filing of the memorandum of appeal contravened the above rule. Counsel

prayed that the appeal be struck out for having been filed out of time. Counsel relied on this court's decision in *Abiriga Ibrahim Y. A vs Musema Mudathir Bruce Election Petition Application No. 24 of 2016* and *Kasibante Moses V Electoral Commission Court of Appeal Election Petition Application No. 7 of 2012* in which court

struck out an appeal because the Memorandum of Appeal had been filed one day out of time.

Counsel further submitted that in case of Election Petition Appeal, the intending appellant has even a higher duty to expeditiously pursue every step in the appeal so that it is disposed of quickly. 10 Counsel relied on the decision in *Utex Industries V Attorney General S. C. C. A No. 52 of 1995* in which the Supreme Court held that taking an essential step is the performance of an act by a party whose duty is to perform that fundamentally necessary action demanded by the legal process. 15

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Determination by court

We reiterate that this ruling arises out of three consolidated Election Petition Applications to strike out the appeal and validate and/or extend time within which to file the appeal. This court in *David Kabunga Vs Leonia Karyeija and 2 others Misc. Application No. 54 of 1998*, held that if there is an existing application to extend time the court does not normally strike out the appeal but would prefer to allow the application for extension of time to be heard first before striking out the motion. We shall thus determine the

application for validation first. 25

Rule 29 of the Parliamentary Elections (Interim Provisions) (Election Petition) Rules SI 141-2 states that; a notice of appeal may be given either orally at the time judgment is given or in writing within 7 days after the judgment of the High Court against which the appeal is being made.

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Rule 30 provides that the Memorandum of Appeal shall be filed with the Registrar in a case where oral Notice of Appeal has been given within the 14 days after the notice was given.

The applicant herein, Abala David, received judgment on the \$12/10/2021\$ and on \$18/10/2021\$, his lawyers wrote to court 10 requesting for a certified record of proceedings and judgment, which were availed on the 15/11/2021. The applicant filed the Memorandum of Appeal on 25th October 2021 and the record of Appeal on \$6/12/2021\$. Counsel averred that the filing of his appeal 42 days after filing the Memorandum of Appeal was a mistake of 15 counsel that should not be visited on the innocent litigant. We do not agree with this plea. The applicant is simply abusing Court process. From annexures A, B and C referred to in para. 6 of the affidavit of Baguma Honest and attached, it is evident that the applicant's counsel has been participating

in the Applicant's Election Petition 20 jointly and not severally. Therefore, it is untenable for the applicant to allege that it is Mr. Engulu of M/S Engulu & Co. Advocates who was responsible for the delay in filling the record of Appeal

Being an election petition appeal, all parties ought to have known that it is a matter of great public importance which has to be decided 25

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expeditiously and in accordance with specific rules. The applicant counsel's allegation is that the blame of late filing ought to be borne by his counsel from M/s Engulu & Co. Advocates. We find this an excuse that has rampantly been adopted by all parties that fall victim of late filing. The applicant has been represented by the same firm together with M/s Lukwago & Co. Advocates and it is quite unacceptable that counsel was unaware of the time frames that guide litigation in Election Petitions. It would be erroneous to rely on Article 126 (2) (e) of the Constitution as a shield to failure to comply with the rules of procedure. In *George Omara Vs Charles Andiro Abacacon Election Appeal No. 106 of 2016*, it was held that it is now settled law that it is the duty of the intending appellant to actively take necessary steps to prosecute his/her intended appeal.

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We are of the view that allowing an intending appellant to take his or her time to file the record of appeal outside the time set by the law 15 without exceptional circumstances would defeat the purpose of the time frame under the Parliamentary Elections Act. Further, **Section 66 (2)** of the Parliamentary Elections Act and Rule 33 of the Parliamentary Elections (Election Petitions) Rules enjoin this court to hear and determine an appeal expeditiously. In electoral 20 matters, time is of essence right from the date of registration of voters, display of voter's register, nomination of candidates, voting, declaration of results and so on. All electoral activities follow a strict timeline. A participant in the electoral process cannot be heard to say that he was unaware of the strict time frame set by the law for hearing 25

and determining an Appeal. He ought to have known and he ought to have been more diligent and vigilant.

As already stated above, the applicant was being represented by 2 law firms and cannot successfully argue that all his counsel did not have an idea on the rules of procedure in election cases.

We do not find this a proper case to validate an appeal filed inordinately out of time.

Consequently, Misc. Application No. 21 of 2021 seeking to validate and/or extend time within which to file an appeal is disallowed with costs to the respondents.

Misc. Application No. 36 of 2021 by Achayo Juliet and Election Petition Application No. 05 of 2022 filed by the Electoral Commission respectively to strike out the applicant's Appeal No. 54 of 2022 for having been filed out of time are accordingly allowed with costs to the applicants.

In the final result, Election Petition Appeal No. 54 of 2021 is struck out for the reasons given above. Each party to bear its costs.

Dated this $\frac{2}{3}$ day of _____ 2022 were

Hon. Justice Cheborion Barishaki, JA

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Hon. Justice Stephen Musota, JA

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Hon. Justice Christopher Gashirabake, JA S

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