

UGANDA / JUDGMENT

Electoral Commission v Lubega (Election Petition Appeal 17 of 2022) [2022] UGCA 316 (19 May 2022) [2022] UGCA 316

COURT

Court of Appeal of Uganda

BEFORE

Musoke, JA, Kibeedi Mutangula, JA, Monica K.
Mugenyi, JA

CASE / FILE NUMBER

Election Petition Appeal 17 of 2022

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THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: MUSOKE, KIBEEDI AND MUGENYI, JJA

**ELECTION PETITION APPLICATION NO. 17 OF 2022 (Arising from Election Petition
Appeal No. 36 of 2021)**

ELECTORAL COMMISSION APPLICANT

VERSUS

GEORGE WILLY LUBEGA RESPONDENT

Election Petition Application No. 17 of 2022

RULING OF THE COURT**A. Introduction**

- 1. Messrs. George Willy Lubega ('the Respondent'), Josephat Tumwesigye and Leonard Mbazira contested in parliamentary elections held on 14th January, 2021 in respect of Bugangaizi South Constituency, Kakumiro District in Uganda. The elections were organized by the Electoral Commission ('the Applicant'), the body that is constitutionally mandated to conduct parliamentary elections in Uganda.

- 2. At the conclusion of the election, the Applicant declared Mr. Josephat Tumwesigye the duly elected Member of Parliament (MP) for Bugangaizi South Constituency, having garnered 12,801 votes as against the Respondent's 12,331 votes. That election result was subsequently published in the Uganda Gazette of 17th February 2021, whereupon the Respondent filed **Election Petition No. 4 of 2021** at the High Court of Uganda sitting at Masindi ('the Trial Court') challenging Mr. Tumwesigye's academic qualifications, as well as the validity of the election result. The election petition was dismissed with costs.
- 3. Aggrieved by the Trial Court's decision, the Respondent lodged **Election Petition Appeal No. 36 of 2021** in this Court challenging the judgment and decree of the Trial Court (Ajiji, J) dated 28th September 2021. The Appeal is opposed by the Applicant and Mr. Tumwesigye. The Applicant has since filed the present Application seeking to strike out the Appeal on account of the Respondent not having taken an essential step in respect thereof. We consider it necessary to dispose of this Application prior to our determination of the Appeal on its merits.
- 4. The Application is brought under Rules 43(1) and (2), 78 and 82 of the Judicature (Court of Appeal Rules) Directions, SI 13-10 ('Court of Appeal Rules'), and Rules 31 and 36 of the Parliamentary Elections (Interim Provisions) Rules, SI 141-2. It is rooted in the following grounds:
 - I. There is no valid Appeal on record by the Respondent.
 - II. The Respondent failed to take an essential step of serving the Applicant with a Notice of Appeal within the prescribed time.
- 5. It is supported by an affidavit deposed by Mr. Jude Mwassa that was lodged in the Court on 9th February 2022. The deponent, a Legal Officer in the electoral body, that attests to the judgment in **Election Petition No. 4 of 2021** having been delivered on 28th September 2021, whereupon the Respondent filed a Notice of Appeal in respect thereof on 4th October 2021 but the said Notice of Appeal was only served upon the Applicant on 13th October 2021. It is averred that in so far as the Notice of Appeal was filed beyond the seven-day period by law prescribed, the Respondent had not exercised diligence in the prosecution of his Appeal. To that extent, it is proposed that there is no valid Appeal on record.
- 6. The Respondent did not file any affidavit in reply, his advocate contending that the evidence that had been appended to the Application was sufficient for the determination thereof. In the event, both parties adopted their respective written submissions on record. The Applicant was represented at the hearing by Mr. Alfred Okello Oryem, while Mr. Honest Baguma appeared for the Second Respondent.

B. Parties' Submissions

- 7. In a nutshell, it is the Applicant's contention that the Appeal should be struck out under Rule 82 of the Court of Appeal Rules given the Respondent's failure to serve the Notice of Appeal in accordance with Rule 78 of the same Rules. It is argued that a written Notice of Appeal having been filed on 4th October 2021, it should have been served upon the Applicant by 11th October 2021 and not 13th October 2021 as transpired in this case. The Court is referred to **Kasibante Moses v Electoral Commission, Election Petition Application No. 7 of 2012**, where a Notice of Appeal that had been filed a day late was held to offend Rule 78(1) of the Court of Appeal Rules and, on that basis, the Appeal was struck out.
- 8. The Applicant does also cite the following decision in **Kubeketerya James v Waira Kyewalabye & Another, Election Petition Appeal No. 97 of 2016** in support of its case:

It is now settled as the law that it is the duty of the intending appellant to actively take steps to prosecute his/ her intended appeal. It is not the duty of the court or any other person to carry out this duty for the intending appellant. Once judgment is delivered, the intending appellant has to take all the necessary steps to ensure the appeal is being

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in time. See: **UTEX INDUSTRIES LTD VS ATTORNEY GENERAL: CIVIL APPLICATION NO. 52 OF 1995 (SC)** and **S. B. KENYATTA & ANOTHER VS SUBRAMANIAN & ANOTHER: CIVIL APPLICATION NO. 108 OF 2003 (COURT OF APPEAL)**. 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 Petition) Rules enjoin this court to hear and 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 grounds. Time is thus of the essence in election petition appeals. Election petitions have to be handled expeditiously. The rules and timelines set for filing proceedings are couched in mandatory terms. They must be strictly interpreted and adhered to.

- 9. Conversely, it is argued for the Respondent that having lodged the Appeal in accordance with Rules 29, 30 and 31 of the Parliamentary Elections (Interim Provisions) Rules, he did take all the essential steps to file and prosecute his Appeal. Learned Counsel for the Respondent contends that the Notice of Appeal was served on the 13th October 2021, within seven days after it was signed and sealed by the registrar of the Trial Court on 6th October 2021, asserting that it could not have been served before its endorsement by the registrar. In his view, not only has the Applicant demonstrated no prejudice on account of the allegedly late service of the Notice of Appeal but the Memorandum and Record of Appeal having been filed and served within the legally prescribed time, the fundamental actions that should ensue after the filing of a Notice of Appeal were duly undertaken. Furthermore, unlike **Kasibante Moses v Electoral Commission** (supra) where there was no proof as to when the

Notice of Appeal had been collected from the court registry, in this case the evidence in proof thereof was on record.

- 10. No submissions in rejoinder were forthcoming from the Applicant.

C. Court's Determination

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11. The striking out of appeals lodged before this Court is governed by Rule 82 of the Court of Appeal Rules. It reads as follows:

A person on whom a notice of appeal has been served may at any time, either before or after the institution of the appeal, apply to the court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

12. That legal provision allows the striking out of appeals on two grounds: where no appeal lies, or where an essential step in the proceedings has either not been taken at all or was not taken within the time prescribed therefor. In the instant case, the Applicant seeks to have the Appeal struck out for failure to take an essential step, that is service of the Notice of Appeal, within the prescribed time. The Application is substantially brought under Rules 31 and Rule 36 of the Parliamentary Elections (Interim Provisions) Rules, and Rule 78 of the Court of Appeal Rules. For ease of reference, the cited legal provisions are reproduced below.

The Parliamentary Elections (Interim Provisions) (Election Petitions) Rules

Rule 31

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.

Rule 36

Subject to such modifications as the court may direct in the interests of justice and expedition of court proceedings, any rules regulating the procedure and practice on appeal from decisions of the High Court to the Court of Appeal in civil matters shall apply to appeals under this Part of these Rules.

The Judicature (Court of Appeal) Rules

Rule 78(1)

- (1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies of it on all persons directly affected by the appeal; but the court may, on application, which may be made ex parte, direct that service need not be effected on any person who took no part in the proceedings of the High Court.
- 13. Rule 31 of the Parliamentary Elections (Interim Provisions) Rules is not applicable to the present Application given that the lodging of the record of appeal is not in

contention. What is in contention is the late service of the Notice of Appeal upon the Applicant. A notice of appeal in respect of an election petition appeal is lodged under Rule 29 of the Parliamentary Elections (Interim Provisions) Rules. That Rule provides as follows:

Rule 29

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.

- 14. Rule 29 is silent on the time within which a written notice of appeal may be served upon an intended respondent therefore, by dint of Rule 36 of the same Rules, recourse would be made to Rule 78(1) of the Court of Appeal Rules. That Rule provides for the service of a written notice of appeal within seven days of its having been lodged.
- 15. In the instant case, the evidence on record is that the Respondent presented a Notice of Appeal in the High Court of Uganda at Masindi on 4th October 2021, but it was endorsed by the registrar of that court as having been lodged on the 6th October 2021. This is depicted in Annexure A to the affidavit in support of the Application, the operative words therein being that the Notice was *'lodged in the Registry of the High Court of Uganda at Masindi this 6th day of October, 2021.'** A stamp of receipt on the same Annexure indicates that the Notice of Appeal was thereafter served upon the Applicant on 13th October 2021. Although the Notice of Appeal (like any other document) might thus have spoken for itself on the date it was lodged in the High Court, the nature of this Application is that the question as to when the Notice may be deemed to have been duly lodged remains in contention between the parties and begs determination by this Court.
- 16. The applicable rules of procedure are instructive on the procedure to be followed in lodging documents in general and notices of appeal in particular. Rule 76(1) of the Court of Appeal Rules, provides for notices of appeal to be lodged **'in duplicate with the registrar of the High Court.'** Meanwhile, Rule 104(1) of the same Rules provides for the payment of the applicable fees **'at the time when the document is lodged.'** Therefore, the payment of filing fees in respect of a notice of appeal

would ensue at the time it is lodged. In addition, Rule 11 of the Rules provides for documents so lodged to immediately be endorsed showing the date and time they were lodged. That provision reads as follows:

- > Whenever any document is lodged in the registry ... or in the registry of the High Court under or in accordance with rule 10 of these Rules, the registrar or deputy registrar of the High Court, as the case may be, shall immediately cause it to be endorsed showing the date and time when it was lodged.
- 17. We pause here to observe that Rule 10(3) that is cross referenced in Rule 11 above simply provides for every civil appeal to be given a serial number in the (Court of Appeal) registry, such number to be allotted '**as soon as the memorandum of appeal is received.**' To the extent that the filing of a memorandum of appeal is incidental to the prior filing of a notice of appeal, Rule 10(3) and in turn Rule 11 of the Court of Appeal Rules would be applicable to notices of appeal. This is underscored by the reference in Rule 11 to documents lodged in the registry of the High Court. Whereas under Rule 83(1) of the Court of Appeal Rules a memorandum of appeal would be filed in the Court of Appeal Registry, under Rule 76(1) of the same Rules notices of appeal are lodged in a registry of the High Court. Therefore, Rule 11 of the Court of Appeal Rules would be applicable to notices of appeal that are lodged in the High Court registry.
- 18. The import of Rules 11, 76(1) and 104(1) of the Court of Appeal Rules is that when a notice of appeal is lodged, the requisite filing fees should immediately be paid, whereupon the registrar of the High Court would endorse it with the date and time when it was lodged. That is not to say that the payment of filing fees and the endorsement of the notice are part of the process of its lodging; rather, they are actions that would ensue from its lodging. Rule 11 draws a clear distinction between the lodging of a document, on the one hand, and its endorsement by the registrar, such that the endorsement ensues after the document has been lodged. The registrar's duty in that regard is simply to endorse the date and time the document was lodged.
- 19. This interpretation of Rule 11 resonates with the legislative intent of Rule 76(1) of the Court of Appeal Rules, which provides for notices of appeal to be **lodged** in **duplicate**, as well as Rule 13 that provides for the acceptance of documents **lodged** out of time. It would be absurd to propose that such notices would only stand duly lodged upon their endorsement **in duplicate** by the registrar or, for that matter, that the acceptance of documents **lodged** out of time under Rule 13 of the same Rules would arise in respect of documents that the registrar delays to endorse.
- 20. When then may a document be deemed to have been duly lodged under this Court's Rules of Procedure? We take the view that the more purposive interpretation of Rule 11 would be to construe the lodging of a document synonymously with its presentation. Thus, a notice of appeal would stand duly lodged in this Court upon its **presentation** in duplicate under Rule 76(1) of the Court of Appeal Rules. As indeed transpired in the instant case, the

payment of the prescribed fees would thus be made upon presentation and receipt of the notice of appeal by the High Court registry. Thereafter, the duty upon the registrar would be to endorse upon the notice of appeal the date and time when it was so lodged or presented. In the instant case, therefore, the registrar should have endorsed the date of 4th October 2021 as the date the document had been lodged. According to Annexure A, that was the date the Notice of Appeal had been presented to and received by the registry at Masindi High Court.

- 21. We were referred to the decision in **Kasibante Moses v Electoral Commission** (supra) in support of the proposition that the Notice of Appeal having been signed and sealed by the Trial Court on 6th October 2021, it was collected and served by the Respondent on 13th October 2021, within the seven-day time frame prescribed by the Rules. The decision in that case was as follows:

As to the service of the Notice of Appeal by the respondent upon the applicant, the evidence that there is, according to annexure "A" of the applicant's affidavit in support of the motion, is that the applicant's lawyers acknowledged receipt of the Notice of Appeal on 08.11.2011. The respondent has not adduced specific evidence as to when, earlier than 08.11.2011, the Notice of Appeal was served upon the applicant's lawyers, or when the same was collected from the Court Registry for service upon the applicant. The burden is upon the respondent to satisfy the court that the Notice of Appeal was served upon the applicant on time, **(party's emphasis)**

- 22. With the greatest respect, we are unable to abide learned Respondent Counsel's understanding of that decision. We do not find reference to when the Notice of Appeal in that case had been collected to necessarily impute collection of a notice of appeal as a factor to be considered in applications such as the present one. Whereas the court in that case did make that factual observation about the evidence on record, the **ratio decidendi** in that decision is to be found in the ensuing line, to wit, '**the burden is upon the respondent to satisfy court that the Notice of Appeal was served upon the applicant in time.**'
- 23. In the instant case, although the impugned endorsement by the Trial Court's registrar was made on 6th October 2021 within the seven-day period prescribed under Rule 78(1) of the Court of Appeal Rules; the Respondent only picked up the endorsed Notice of Appeal on 13th October 2021 after the prescribed time frame had lapsed. Whereas he was under a duty to satisfy the Court that the Notice of Appeal had been served upon the applicant in time, as was held in **Kasibante Moses v Electoral Commission** (supra), he did not bother to file an affidavit in reply to the Application. It was simply argued on his behalf that the reckoning of the time of service commenced after the registrar's endorsement of the Notice of Appeal. Having found this to be an erroneous interpretation of the law, we are disinclined to abide that position.
- 24. We draw apposite direction from the appellate courts' handling of similar applications. In **Kubeketerya James v Waira Kyewalabye & Another, Election Petition Appeal No. 97 of 2016** it was held:

It is now settled as the law that it is the duty of the intending appellant to actively take steps to prosecute his/ her intended appeal. It is not the duty of the court or any other person to carry out this duty for the intending appellant. Once judgment is delivered, the intending appellant has to take all the necessary steps to ensure the appeal is being in time. See: UTEX INDUSTRIES LTD VS ATTORNEY GENERAL: CIVIL APPLICATION NO. 52 OF 1995 (SC) and S. B. KENYATTA & ANOTHER VS SUBRAMANIAN & ANOTHER: CIVIL APPLICATION NO. 108 OF 2003 (COURT OF APPEAL). 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 Petition) Rules enjoin this court to hear and 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 grounds. Time is thus of the essence in election petition appeals Election petitions have to be handled expeditiously. The rules and timelines set for filing proceedings are couched in mandatory terms. They must be strictly interpreted and adhered to.

25. That position is re-echoed in *Kasibante Moses v Electoral Commission* (supra) as follows:

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) Rules¹ enjoin this Court to hear and determine an appeal expeditiously and may, for that purpose suspend any other matter before it.

26. On the other hand, in *Hon. Ebil Fred v Ocen Peter*, Election Petition Applications No. 17 & 24 of 2017 (*Banco Arabe Espanol v Bank of Uganda* Supreme Court Civil Application No. 8 of 1998 cited with approval), the Notice and Memorandum of Appeal had been filed in the High Court of Uganda at Lira but the Memorandum of Appeal was lodged in the Court of Appeal out of time. Whereas *Application No. 17 of 2016* sought to strike out the Appeal, *Application No. 24 of 2016* sought to extend the time within which to appeal, as well as validate the belated Memorandum of Appeal. It was argued for the applicant in the latter application that learned Counsel had misinterpreted Rule 30(b) of the Parliamentary Elections (Interim Provisions) Rules and filed the Memorandum of Appeal in the High Court rather than the Court of Appeal. This Court held that an oversight, mistake, negligence or error on the part of counsel should not be visited on a party s/he represents, and validated the Memorandum of Appeal. The circumstances of that case were distinguished from those that pertained to *Sanjay Tanna & Another v Ofwono Yeri Apollo*, Court of Appeal Election Application

¹ Now referred to as the Parliamentary Elections (Interim Provisions) Rules.

No. 8 of 2006 on account of the appellant therein having applied for the extension of time within which to lodge his appeal, which was not done in the **Sanjay Tanna** case. The memorandum of appeal was thus validated by the Court.

27. In the earlier case of **Sitenda Sebalu v Sam K. Njuba & Another, Election Appeal No. 26 of 2007**, the Supreme Court was faced with an appeal from a trial court decision that had adjudged itself to have had no jurisdiction to extend a time line prescribed by an Act of Parliament. Addressing the question as to whether non-compliance with a provision of an Act of Parliament (section 62 of the Parliamentary Elections Act) would invalidate an election petition, the court cited with approval the following observation in **Regina v Soneji & Another (2005) UKHL 49** (per Lord Steyn):

> The emphasis ought to be on the consequences of non-compliance, and posing the question whether the Parliament can be fairly taken to have intended total invalidity.

- 28. The apex court thereupon held that the legislature could not have intended the exclusion of judicial discretion on enlargement of time yet in section 93 of the same Act it had sanctioned the formulation of procedural rules to guide the courts (including this Court) in their determination of electoral disputes. In so holding, the Supreme Court observed that **'the only way the two complimentary interests (of the timely disposal of electoral disputes and their fair trial on the merits) could be balanced was to reserve discretion for ensuring that one purpose is not achieved at the expense or to the prejudice of the other.'** Indeed, as was observed in that case, provision for the balancing of those two complimentary interests is to be found in rules of procedure. That decision thus empowered litigants caught by time limitations to apply for the enlargement of time within which to undertake late actions.
- 29. Accordingly, in the recent case of **Wilfred Nuwaqaba & Another v Protazio Begumisa, Election Petition Appeals No. 9 & 10 of 2022**, this Court acknowledged the applicability of the Court of Appeal Rules to pleadings in election petitions, observing that **'appropriate provision was made for the extension of time within which an overlooked act may be undertaken and/ or validation of**

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a pleading that run afoul of the procedural rules.' In so doing, it noted that rules of procedure are particularly pivotal to the expeditious determination of electoral disputes in as fair and judicious a manner as possible, enjoining courts in electoral disputes to **'judiciously balance the constitutional duty of fair trial on the merits of the case with due application of rules of procedure which, as handmaidens of justice, are designed to entrench the notion of equality of parties before courts.'**² In that case, the Respondent was adjudged to have been inept in so far as he failed to utilize the remedies available to him under the Court of Appeal Rules, making no effort to seek to extend the time within which the actions caught by limitation of time could be undertaken.

- 30. Similarly, in the matter before us presently, it is quite apparent that Counsel for the Respondent was under the mistaken notion that the time of reckoning with regard to service of a notice of appeal would only accrue upon its endorsement by a registrar. It seems to us that without so much as endeavouring to inquire into the validity thereof, Counsel was dismissive of the Applicant's contestations and thus omitted to seek an extension of time within which to lodge the pleading that had been filed out of time. An application for the enlargement of time by the party in default was a mitigating factor in the **Hon, Ebil Fred** case, where pleadings that had otherwise been lodged out of time were validated. No such application was made either in this case or the **Wilfred Nuwagaba** case. We therefore find no reason to depart from this Court's position in **Wilfred Nuwagaba & Another v Protazio Bequmisa** (supra), whereby a similar application was allowed on that premise.
- 31. As we take leave of this Application, we would respectfully enjoin intending appellants to abide the now settled position in **Kasibante Moses v Electoral Commission** (supra) that they have an even higher duty in election petition appeals to expeditiously (and diligently, we might add) pursue every step in the appeal. This position in tandem with comparative global approaches to the timeliness of electoral dispute resolution to ensure that the outcome of elections is neither delayed nor drawn out and protracted for civic harmony. Thus, in **Petit,**

² **Principle 5* of the *Bangalore Principles of Judicial Conduct, 2002* states that 'ensuring equal treatment to all before the courts is essential to the due performance of the judicial office/'*

**Dennis, 'Resolving Election Disputes in the OSCE³ Area: Towards a Standard Election Dispute Monitoring System', OSCE & ODIHR4, 2000, p. 7* it was proposed:*

> The election law must guarantee the resolution of disputes within a period of time suited to the electoral process. It is crucial here to ensure that the outcome of elections is not delayed. This implies that the period between the filing of a complaint and when it is dealt with is very short.

- 32. In the result, we would allow the present Application and strike out **Election Petition Appeal No. 36 of 2021.**

D. Conclusion

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33. It is trite law that costs in civil matters should follow the event unless a court for good reason decides otherwise. **See section 27(2) of the Civil Procedure Act (CPA).** Rule 27 of the Parliamentary Elections (Interim Provisions) Rules does, however, give the High Court discretion in the determination of costs in election petitions without necessarily following the general rule in civil proceedings. It reads as follows:

> All costs of and incidental to the presentation of the petition and the proceedings consequent on the petition shall be defrayed by the parties to the petition in such manner and in such proportions as the court may determine.

34. That Rule is fairly instructive on how costs in election petition appeals may similarly be defrayed. In **Aisha Kabanda Nalule v Lydia Daphine Mirembe & 2 Others, Election Petition Appeal No. 90 of 2016**, where the vote margin between the parties to the appeal was only 67 votes, this Court considered it inappropriate to condemn either party to costs. Given a similarly slim vote margin of 470 votes in this Appeal, we would adopt the same approach and refrain from condemning the Respondent in costs. In so far as the present Application conclusively disposes of **Election Petition Appeal No. 36 of 2021**, we would address costs in both this Court and the Trial Court.

³ Organization for Security and Co-operation in Europe.

⁴ Office for Democratic Institutions and Human Rights.

35. In the final result, this Application is hereby allowed with the following orders:

- I. **Election Petition Appeal No. 36 of 2021** is hereby struck out for failure by the Respondent to take an essential step in its institution.
- II. Each party to bear its own costs in the Court of Appeal and the High Court.

It is so ordered.

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> 2022. day of Dated and delivered at Kampala this Lj.

Ji beth Musoke JUSTICE OF APPEAL

Muzamiru Mutangula Kibeedi JUSTICE OF APPEAL

Monica K. Mugenyi JUSTICE OF APPEAL

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