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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION APPLICATION NO. 9 OF 2017

MULIRO WANGA KARIM.....APPLICANT

10

VERSUS

WAKALAWO SAM PAULRESPONDENT

CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA

(Single Justice)

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RULING OF THE COURT

The applicant brought this application by way of notice of motion under *Rules 2 (1), 5, 43 and 44(1)* of the Rules of this Court seeking the following orders.

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1. *Time within which to file and serve the Memorandum of Appeal be extended.*

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2. *The Costs of and incidental to this application abide the result of the intended appeal.*

The grounds for the application set out in the motion as follows:-

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a)The Applicant dissatisfied with the Judgment of the HON. MR.JUSTICE HENRY I. KAWESA, delivered on the 14th day of December 2016 instructed his lawyers at the time Musamali & Co Advocates to Appeal against his Judgment.

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b) **The Applicant through his lawyers Eric-Kiingi & Co Advocates lodged and filed the Notice of Appeal in the High Court on the 21st day of December 2016 and 22nd day of December 2016 in the Court of Appeal.**

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c) **Consequently the Applicant served the Notice of Appeal on to the Respondent's Advocates Nabende Advocates. Consequently the Applicant served the Notice of Appeal on to the Respondent's Advocates Nabende Advocates.**

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d) **As a matter of procedure the Applicant was met to file and serve the Memorandum of Appeal within Seven (7) day after service of the Notice something that never materialized for want of a Certified Copy of the Judgment.**

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e) **Without the Certified Copy of the Judgment, the Applicant's new lawyers could not formulate the grounds of Appeal to Constitute the Memorandum of Appeal.**

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f) **The record of proceedings of the High Court was also not ready the Applicant's new Advocates to prepare the intended Appeal.**

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g) **The Respondent will not be prejudiced by the grant of this Application for extension of time within which to file and serve the Memorandum Appeal.**

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h) **That it will be just and equitable if this Application is granted.**

5 **i) This Honourable Court is vested with wide and unfettered discretion to extend time within which a Memorandum of Appeal can be filed and served.**

10 **j) It is in the interest of justice that this Superior Court grants this application for the ends of justice to be met.**

15 The motion is accompanied by an affidavit deposed to by the applicant expounding on the grounds set out therein. The respondent in reply to the application filed an affidavit, the relevant parts of which state as follows:-

20 **3. THAT the Applicant being dissatisfied with the Judgment instructed his lawyers at the time Musamali & Co Advocates to Appeal against the said Judgment.**

25 **4. THAT the aforementioned lawyers dragging their feet in regard to the Applicant's instructions, the Applicant instructed Eric-Kiingi & Co Advocates to take charge of the Appeal.**

30 **5. THAT through his lawyers Eric-Kiingi & Co Advocates the Applicant lodged and filed a Notice of Appeal in the High Court on the 22nd day of December 2016 and 22nd day of December 2016 in the Court of Appeal. [A Copy of the Notice of Appeal is hereto attached marked "A"]**

35 **6. THAT consequently the Applicant served the Notice of Appeal on to the Respondent's Advocates Nabende Advocates.**

7. THAT as a matter of procedure the Applicant was met to file and serve the Memorandum of Appeal within

5 ***Seven (7) day after service of the Notice something that never materialized for want of a Certified Copy of the Judgment and record of proceedings from Court.***

10 When this application came up for hearing learned counsel **Mr. Arthur Kirumira** appeared for the applicant while **Mr. Nabende Isaac** appeared for the respondent. Both parties were present.

15 It was submitted for the respondent that under *Rules 2 and 5* of the Rules of this Court, this Court has a power to extend time where sufficient reason is shown. Counsel submitted that in this particular case the applicant was prevented from filing and serving a memorandum of appeal herein within time for sufficient reason. He relied on the grounds in the motion and its
20 accompanying affidavit to argue that the appellant's counsel who had represented him at the High Court had failed to exercise due diligence in prosecuting the appeal having been duly instructed.

25 Further, that upon the applicant realising that the time for filing a notice of appeal was about to expire he instructed the present Advocates M/S Eric -Kiingi & Company Advocates to pursue the appeal. Upon instructions the said law firm filed a notice of appeal on 21st day of November 2016 and lodged a copy thereof at the registry of this Court on 22nd day of December 2016.

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5 Having filed the notice of appeal within the prescribed time, counsel went head to have it served upon the respondent within the prescribed seven days.

10 Counsel submitted that the applicants' advocates were thereafter unable to file a memorandum of appeal within the prescribed time, because the High Court had failed to avail them with certified copy of the Judgment and a record of proceeding. In absence of a copy of the Judgment counsel argued, the lawyers could not formulate the grounds of appeal. Further that the
15 record of proceedings were also not ready. He asked Court to find that it was just and equitable to allow this application and that the respondent would not be prejudiced by the granting of the orders sought.

20 Mr. Nabende learned counsel for the respondent opposed the application. He relied on the affidavit in reply to argue that the application had no merit. He contended that the applicant was not being truthful when he stated that he failed to get a certified copy of Judgment from which this appeal arises.

25 Counsel pointed out that a certified copy of the Judgment was available on 28th February 2017 and by that time the record of the High Court proceedings was also ready and available at the High Court. Counsel argued that the reason for the respondent
30 and his counsel's failure to file the memorandum of appeal

5 within the prescribed time could only be attributed to their own
dilatory conduct. He asked Court to dismiss this application.

I have listened to both counsel carefully and perused the Court
record.

10 In an application of this nature it is incumbent upon the
applicant to satisfy Court that sufficient reasons exist for grant of
extension of time. I must point out that for the onset that, this is
an electoral matter and is therefore subject, first and foremost to
15 Electoral Laws. The Court of Appeal Rules only apply with
necessary modifications. While applying the Rules of this Court
to a matter such as this, Court must always keep in mind the
provisions and the spirit of the Parliamentary Elections Act and
the Rules made thereunder. Paragraph 7, 8 and 9 of the
20 applicant's affidavit in support of the motion states as follows:-

25 **7. THAT as a matter of procedure the Applicant was met to
file and serve the Memorandum of Appeal within Seven (7)
days after service of the Notice something that never
materialized for want of a Certified Copy of the Judgment
and record of proceedings from Court.**

30 **8. THAT I am reliably informed by my lawyers Eric-Kiingi &
Co Advocates that without the Certified Copy of the
Judgment and record of proceedings of the High Court,
the said new lawyers could not formulate the grounds of
Appeal to Constitute the Memorandum of Appeal.**

5 **9. THAT I am further informed by my said lawyers that
without a record of proceedings of the High Court they
could not proficiently prepare my intended Appeal.**

10 The applicant does not appear to be telling the truth in
paragraph 7 above, because a certified copy of the Judgment
dated 14th December 2016 and certified on 28th February 2017
is attached to the affidavit in reply.

15 Therefore a copy of the Judgment was available as early as 28th
February 2017. Had the applicant been vigilant he would have
obtained it and would have filed the memorandum of appeal
immediately thereafter.

20 Up to date neither the memorandum of appeal nor the record of
appeal has been filed in Court. Counsel for the applicant
contends he could not have filed the same without an order of
this Court extending the time. I find no merit in this argument as
Rule 13 of the Rules of this Court provides as follows;-

25 **13. Acceptance of documents lodged out of time.**

30 **(1) The registrar or the registrar of the High Court,
as the case may be, shall not refuse to accept
any document on the ground that it is lodged out
of time but shall mark the document with the
words "lodged out of time" and inform the person
lodging it accordingly.**

35 **(2) When a document is accepted out of time by the
registrar of the High Court, he or she shall inform
the registrar.**

5 The applicant would upon lodging at the registry of this Court
the memorandum and record of appeal applied for consequential
extension of time and regularizing the late filing of those
documents. He did not do this. Had he done so, he would have
provided this Court with an opportunity to peruse the
10 memorandum of appeal in order to ascertain whether or not it
raised any valid issues for determination on appeal, especially
since this is second appeal which must only relate to issues of
law. Again had the memorandum and record of appeal been filed
already, this Court would have had the assurance that the grant
15 of the orders sought would not delay the hearing of the appeal
any further.

Counsel for the applicant has not indicated how much more time
the he requires to file the memorandum of appeal. Apparently he
20 does not seem to have prepared a draft.

Be that as it may, *Section 83* of the Court of Appeal Rules
provided a procedure for filing appeals at this Court in ordinary
civil appeal. It stipulates as :-

25 **"83.**

(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—

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(a) a memorandum of appeal, in six copies, or as the registrar shall direct;

- 5 **(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.

10 **(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**
15 **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.**

20 **(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.”**

25 The above procedure is not applicable in election petition appeals. The law applicable to appeals to this Court from all matters arising from Parliamentary Elections Act (17 of 2005) PEA is the Parliamentary Elections Act Statutory Instrument No. 141- 2 Rules 28 to 36.

5 It provided as follows:-

“28. Applications

10 *This part applies to appeals to the Court of Appeal from decisions of the High Court on determination of election petitions.*

29. Notice of appeal

15 *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.*

20 **30. Memorandum of appeal**

A memorandum of appeal shall be filed with the Registrar-

25 *(a) in a case where oral notice of appeal has been given, within fourteen days after the notice was given;*

(b) in case where a written notice of appeal has been given, within seven days after notice was given.

30 **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.

35 **32. Chief Justice may give such directions of appeal**

40 *The Chief Justice may give such directions as may be necessary as to how the record of appeal shall be produced expeditiously.*

5 **33. Expeditious hearing by appellate court**

The Court shall proceed to hear and determine an appeal under these Rules expeditiously and may for that purpose, suspend any matter pending before the Court.

10 **34. Time limit for hearing appeals**

15 ***Unless the Court extends the time on exceptional grounds, the hearing of an appeal shall be completed within thirty days from the lodging of the record of appeal.***

20 **35. Service on commission and returning officer.**

25 ***Unless the Commission and the returning officer are parties in the appeal, the Registrar shall cause to be served on them all documents served on parties to the appeal.***

30 **36. Procedure generally**

35 ***Subject to such modifications as the Court may direct in the interest of justice and expedition of the 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 above Rules do not provide for an automatic extension of time upon a request for certified Judgment and Proceedings.

35 Even if *Rules 83(2)* of the Rules of this Court was applicable which is not the case, the applicant would not have been able to rely on it as the certified copies of the Judgment and proceedings

5 in this case were ready as early as 28th February 2017, and he still failed to appeal within the stipulated seven days from that date.

10 In a recent decision of the full bench of this Court ***Abiriga Ibrahim vs Musema Mudathir Bruce Court of Appeal (Election Application No. 24 of 2016)*** (Unreported), was faced with a similar matter. In that case the applicant had filed a memorandum of appeal on the 5th of July 2016. The last date for filing that appeal was 1st July 2016. The memorandum of appeal
15 in that case was filed only 4 days out of the time prescribed by the law. This Court held as follows in its unanimous decision at page 15-16 of the Judgment:-

20 ***“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
25 seven (7) days after the notice was given.***

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

30 ***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.***

5 **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
10 **relating to time within which to file the memorandum of**
appeal.

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.”

15 In the application before me, Judgment was delivered on the 14th
day of December 2016. The notice of appeal was filed at the High
Court on 21st December 2016 and lodged at the Court of Appeal
registry the next day. The memorandum of appeal ought to have
been lodged by the 28th day December 2016. Up to date it has not
20 been filed.

I find that the applicant and his counsel were guilty of dilatory
conduct and gross negligence that is inexcusable.

25 In ***Kirya Grace Wazala vs Daudi Migereko and another***
(Election Reference Appeal No 39 of 2012.) This Court stated
that:

30 **“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 negligent, not
serious and is therefore guilty of dilatory conduct. You
cannot sit on your rights even when you see a real threat

5 ***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
10 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
on who is vigilant.”***

15 I entirely agree with the above statement. Parties cannot just
hide behind the curtain and allege that it was the fault of
counsel. It may as well be so, in many instances, but it is not so
in electoral matters. In elections, time is of the essence right
20 from date of registration of voters, display of voter's registers,
nomination of candidates, voting, declaration of results and so
on. All electoral activities follow a strict timeline. A person, who
has participated in this whole process such as the applicant,
cannot be heard to say that he was unaware of strict time frame
25 set by the law for hearing and determination of his appeal. He
ought to have known and he ought to have been more diligent
and vigilant. His conduct was dilatory and grossly negligent.

30 I find no merit in this application whatsoever as it is frivolous
and vexatious and ought to be dismissed. I hereby dismiss it with

5 costs to the respondent. Having held so, I find that no appeal lies
and therefore I strike out the notice of appeal from the Court
record.

It is so ordered.

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Dated at Kampala this.....^{12th}.....day of ^{May}.....2017.

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HON. KENNETH KAKURU
JUSTICE OF APPEAL