

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
ELECTION PETITION NO 0008 OF 2021

KAHOMBO MIDRED KAKUSYA.....PETITIONER

VERSUS

1. DR. ASIIMWE FLORENCE AKIIKI

2. ELECTORAL COMMISSION.....RESPONDENTS

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

This is an election petition arising out of the Parliamentary election of the Woman Member of Parliament for Masindi district. In that election, the petitioner was a nominated candidate for the position alongside the 1st respondent and others who contested in the said elections wherein the 1st respondent was declared winner by the 2nd respondent of the 14.1.2021 with 44,680 votes while the Petitioner was pronounced the 1st runner with 27,950 votes and duly gazette on 17th February, 2021.

The petitioner contested the election results and filed this petition alleging that the 1st respondent at the time of nomination and election was not qualified on account of being a cultural leader. The petitioner also alleged that the first Respondent committed an electoral offence of voter bribery.

The petitioner alleges that the first Respondent offered herself for nomination and was not validly nominated without retiring from her position to date as Social Services (Education and Health) in Bunyoro Kitara Kingdom; in effect, breaching the Parliamentary Elections Act, The Institution of Traditional or Cultural Leaders Act, 2011 and the 1995 Constitution of the Republic of Uganda as amended.

That the 1st respondent was not validly nominated for elections and she used her position and Kingdom contacts and resources as a Minister in Bunyoro Kitara

Kingdom to cause undue influence and solicit votes for herself. It was the petitioner's case that the election was not an expression of the free will and consent of the people through a free and fair election but an election through confusion and manipulation and without any freedom, fairness, transparency and or values of democracy.

The 1st respondent pleaded that she was duly qualified for nomination and election as a Woman Member of Parliament for Masindi District and contended that; her voluntary service to Bunyoro-Kingdom as a Minister is not public service that required her to resign at least 90 days prior to her nomination by the 2nd respondent on 15th October 2020 as a cultural leader.

The 1st respondent contended that she was validly nominated and was later duly elected as the Woman Member of Parliament Masindi District.

The parties made a joint scheduling conference and agreed on the following facts and issue for courts determination.

Agreed Facts

1. The parties agreed that the 1st respondent in the parliamentary election held on the 14th January 2021 in Masindi district;
2. In the said election, Asiimwe Florence Akiiki (NRM)(1st Respondent) and Kahombo Mildred Kakusya (Independent)(Petitioner), and a one Kasangaki Lilian(Independent) contested in the race for woman member of Parliament for Masindi District. The petitioner polled 27,950 votes, the first respondent polled 44,680 votes and Kasangaki Lilian polled 10,686 votes.
3. The Returning officer of the 2nd respondent returned the 1st respondent as the candidate who had polled the highest number of votes was declared as the validly elected candidate, was published in the gazette and has since been sworn in as the Woman Member of Parliament for Masindi district.
4. The 1st respondent on a voluntary basis was and still serves as the Minister of Social Services (Education and Health) in Bunyoro Kitara Kingdom that

she was nominated and elected as such. That it was the first respondent's contention that her voluntary service to Bunyoro Kitara Kingdom is not in the category of jobs or public service that required her to resign at least 90 days prior to the election.

5. The petitioner sought to set aside the election of the 1st respondent and a declaration that the petitioner was the validly elected woman member of Parliament for Masindi district and in the alternative a new election be held.

Agreed Issues

The following issues were agreed upon for determination by this court:

1. *Whether the 1st respondent was not qualified for nomination and election as a woman member of Parliament for Masindi district.*
2. *Whether any illegal practice and/or electoral offences were committed in connection with the said election by the 1st respondent personally or by other person with her knowledge and consent of approval.*
3. *What remedies are available to the parties?*

At the trial, Counsel Zemei Susan represented the petitioner. Counsel Kasangaki Simon, Byaruhanga Daniel and Kyazze Joseph were for the 1st respondent whereas the 2nd respondent was represented by Counsel Kanyiginya Angella.

The matter was heard and the parties were directed by court to file written submissions which have been considered by the court.

In their submissions, the petitioner abandoned issues no. 2 as seen above and submitted on issues 1 & 3. The respondents' submissions on the other hand were similar in content and substance.

BURDEN AND STANDARD OF PROOF

S.61 (1) of the Parliamentary Elections Act provides that:

The Election of a Member of Parliament can only be set aside on any of the following grounds if proved to the satisfaction of the Court

Odoki CJ(as he then was) in his elaborate reasons for the Supreme Court Judgment in the **Col. (RTD) Dr. Besigye Kizza v Museveni Yoweri Kaguta and the Electoral Commission Election Petition No. 1 of 2001** Supreme Court has the following to say on this important point;

"In my view, the burden of proof in an Election Petition as in other Civil Cases is settled. It lies on the Petitioner to prove to the satisfaction of Court" at Pg 16 of the Reasons.

The same principles have been reiterated in the case of **Col. (RTD) Dr. Besigye Kizza v Museveni Yoweri Kaguta and the Electoral Commission Election Petition No. 1 of 2006** citing **Election Petition No.1 of 2001**

Odoki, CJ(as he then was) in his Judgment cited with approval the following observation of Lord Denning in the English case of *Blyth -vs- Blyth* [1966] AC 643:

"My Lords, the word "satisfied" is a clear and simple one and one that is well understood. I would hope that interpretation or explanation of the word would be unnecessary. It needs no addition. From it there should be no subtraction. The courts must not strengthen it; nor must they weaken it. Nor would I think it desirable that any kind of gloss should be put upon it. When parliament has ordained that a court must be satisfied only parliament can prescribe a lesser requirement. No one whether he be a judge or juror would in fact be "satisfied" if he was in a state of reasonable doubt....."

Having quoted the above, Odoki, C.J. goes on to state:

"I entirely agree with those observations by Lord Denning. The standard of proof required in this petition is proof to the satisfaction of the court. It is true court may not be satisfied if it entertains a reasonable doubt but the decision will depend on the gravity of the matter to be proved....since the legislature chose to use the words "proved to the satisfaction of the court", it is my view that that is the standard of proof required in an election petition of this kind. It is a standard of proof that is very high because the

subject matter of the petition is of critical importance to the welfare of the people of Uganda and their democratic governance."

In this petition, therefore like in all Election Petitions, it is the petitioner who bears the burden of proving his allegations to the satisfaction of Court. It is only after the Court is duly satisfied that the grounds raised have been proved to its satisfaction that it will invoke its powers under Subsection (1) of Section 61, read together with Subsection 4 (c) of S. 63 of the Parliamentary Election Act of 2005

S.62 (3) of the Parliamentary Elections Act *provides that any ground specified in Subsection (1) should be proved on the basis of a balance of probabilities.*

The only crucial aspect of this issue which this Court must emphasize and bear in mind throughout the trial of an Election Petition, is the degree of a probability which must be attained before the Court can regard itself as satisfied that the ground or allegation is proved under S. 61 (1) and S. 61 (3) of the Parliamentary Election Act of 2005.

In the Case of **Karokora Katono Zedekia vs Electoral Commission Kagonyera Mondo HC-05-CV-EP 002 – 2001** Justice V.F. Musoke-Kibuuka (RIP) noted at Pg 6;

"It is quite critical to emphasize and bear in mind the crucial fact that, setting aside an election of a Member of Parliament is, indeed, a very grave subject matter. The decision carries with it much weight and serious implications. It is a matter of both individual and national importance. The removal of the elected Member of Parliament renders the affected Constituency to remain without a voice in Parliament for some time.

Parliament will continue to carry out its legislative function on matters of public national importance without any representation of the Constituency affected. When the election is set aside, the Member of Parliament affected suffers both serious personal remorse as well as adverse financial effects..... Thus, the crucial need for Courts to act in matters of this nature only in instances where the grounds of the Petition are proved at a very high degree of probability".[Emphasis mine]

In order to merit an order setting aside the election of a Member of Parliament the evidence produced by the Petitioner must be such as would, in the circumstances, compel the Court to act upon it.

Although the standard of proof is on the balance of probability, it must be slightly higher than in ordinary cases. The authority for this observation is **Election Petition No. 9 of 2002 Masiko Winfred Komuhangi vs Babihuga J. Winnie**. This is because an election is of a great importance both to the individuals concerned and the nation at large.

Similarly in the case of **Sarah Bireete and Another vs Bernadette Bigirwa and Electoral Commission. Election Petition Appeal No. 13 of 2002** (unreported) it was noted by the court of Appeal *"A Petitioner has a duty to adduce credible evidence or cogent evidence to prove his/her allegation at the required standard of proof"*

The respondent carries no burden to discharge as long as the petitioner has not produced sufficient evidence required to show the truth of the allegations is highly probable. In other words the burden of proof on the petitioner is high and it does not shift. See **Akurut Violet Adome v Emurut Simon Peter EPA No. 40 of 2016**

This court has a duty to look at the affidavits in support of the Petition and evaluate the same against the respondents answer and supporting affidavits in order to satisfy itself of the allegations made in the petition.

With regard to numerical strength, the general rule is that no number of witnesses shall be required for proof of any act. Evidence is to be weighed but not counted. The direct evidence of one witness if believed by the Court is sufficient proof of a fact but a line of hearsay evidence cannot be sufficient to prove any fact.

Sarkars' Law of Evidence 14th Edition 1993 Reprint 1997 at pg. 87. States according to Wigmore, the common law in repudiating the numerical system lays down 4 general principles;

1. *Credibility, does not depend on number of witnesses.*
2. *In general, the testimony of a single witness, no matter what the issue or who the person may legally suffice as evidence upon which the Jury may find a verdict.*

3. *The mere assertion of any witness does not of itself need not be believed even though he is unimpeached in any manner, because to require such belief would be to give qualitative and impersonal measure to testimony.*
4. *All rules requiring two witnesses or combination of one witness are exceptions to the general rule.*

It is trite law that the decision of Court should be based on the cogency of evidence adduced by a party who seeks judgment in his/her favour. It must be that kind of evidence that is free from contradictions, truthful so as to convince reasonable tribunal to give judgment in a party's favour. ***Paul Mwiru v Hon Igeme Nathan Samson Nabeta & 2 others EPA No. 6 of 2011***

In addition, it is incumbent upon the petitioner to prove or to produce cogent evidence to prove the allegations and not to rely on the weakness of the respondent's case. Therefore, an election petition cannot be permitted to derive strength from the weakness, if any, of the other side. See ***Odo Tayebwa v Bassajjabalaba Nasser & Electoral Commission Election Petition Appeal No.013 of 2021; Jeet Mohinder Singh v Harminder Singh Jassi, AIR [2000]AIR SC 256***

Determination of Issues

Whether the 1st respondent was not qualified for nomination and election as a woman member of Parliament for Masindi district.

Counsel Zemei for the petitioner submitted it was not in dispute that the 1st respondent is serving as a minister in Bunyoro kingdom but what was in dispute was whether she was required to resign before nomination.

Counsel cited **Article 246 of The Constitution of The Republic of Uganda 1995 as amended** submitting that that the wording of this article establishes or recognizes the institution of traditional or cultural leaders and only headed by the traditional or cultural leader as the supreme head. **Article 246 (6)** which puts "the omukama of bunyoro" within the ambit of the definition under article 246(6) as being the **supreme leader of Bunyoro kingdom**. This is corroborated by **Annexure F** to the 1st respondent's answer to the petition which is admitted and proves that the king governs his kingdom of Bunyoro by appointing ministers to oversee or implement the administrative roles of the king and such is the role of the 1st respondent.

That the 1st Respondent's appointment letter by the kingdom partly (annexture F) dated 20th/October/2018 reads as follows;

".....you are hereby appointed to serve Bunyoro-Kitara kingdom as the minister of social services (Education and Health) on voluntary terms for a period of five(5) years".

Counsel submitted that as a leader in Bunyoro Kitara Kingdom, to wit; Minister of Social Services (Education and Health), the 1st respondent was legally barred from participating in Partisan Politics as provided for Under Section 13 of the Institution of Traditional or Cultural Leaders Act 2011, Supplement No: 4 Part V which is to the effect that a leader wishing to take part and seeking elective office shall abdicate his position in the institution not less than ninety days before nomination day in respect of that election.

Counsel further submitted that the King 'Omukama wa Bunyoro-Kitara Kingdom' being the supreme leader of Bunyoro Kitara Kigndom; a cultural Institution that embraces and promotes all customs and cultural aspects of Bunyoro Kingdom appoints his agents who owe loyalty and pay allegiance to Bunyoro Kitara Kingdom; The Institution of a traditional or cultural leaders is a corporation sole with perpetual succession and with capacity to sue and be sued and to hold assets or properties in trust for itself.

That Section 9 of the Institution of Traditional or Cultural Leaders Act emphasizes the role of cultural leaders as; to promote and preserve the cultural values, norms and practices which enhance the dignity and wellbeing of the people where he or she is recognized as such; and promote the development, preservation and enrichment of all the people in the community where he or she is recognized as such.

Counsel submitted that the 1st Respondent falls in **Article 246 (3) (e), Section 4 (2) (c) Parliamentary Elections Act, Sections 13, The Institute of Traditional or Cultural Leaders Act** (Relevant sections attached as highlighted as 1, 2, 3 respectively) as a leader working under the Leadership of the Omukama wa Bunyoro who was mandatorily required to resign her kingdom position before offering herself for participation in partisan politics. In continuous breach of the

law she continues to serve the kingdom of Bunyoro Kitara as well as a woman Member of Parliament for Masindi district.

Counsel submitted that the 1st respondent therefore acted with dishonesty and told lies on oath when she declared before the Commissioner for Oath that she was not disqualified by reason of holding any office...for any other reason under any law in force in Uganda.

Counsel concluded that the 1st respondent could not win an election that she never qualified to participate in, her nomination was a nullity and a court of law cannot be seen to condone an illegality. It was their humble prayer that Court be pleased to nullify and set aside Election of the 1st respondent and declare the Petitioner who was 1st runner in the Elections as a duly elected Woman Member of Parliament for Masindi district.

In response, the respondents' counsel submitted the only question for determination is whether the 1st respondent falls in the category of a traditional or cultural leader or is a public servant who under the law is disqualified from contesting in elective politics or one that must resign at least 90 days before nominations.

Counsel cited **Article 80(2) of the 1995 Constitution** as amended provides for disqualification of Members of Parliament. One of the disqualifications is that the Person must not be a traditional or cultural leader as defined in article **246(6) of this Constitution**; This was further re-enacted in **Sections 4(2) of the Parliamentary Election Act 2005**.

It is provided in **Article 246(6) of the 1995 Constitution** that: *“For the purposes of this article, **“traditional leader or cultural leader”** means a king or similar traditional leader or cultural leader by whatever name called, who derives allegiance from the fact of birth or descent in accordance with the customs, traditions, usage or consent of the people led by that traditional or cultural leader”*.

Further, **Section 2 of the Institution of Traditional or Cultural Leaders Act, 2011**, defines a **traditional leader or cultural leader** as “a king or similar traditional

leader or cultural leader by whatever name called who derives allegiance from the fact of **birth or descent in accordance with the customs, traditions, usage or consent of the people** led by that traditional or cultural leader”.

Counsel submitted that from the foregoing definitions, it was evident that not everybody can qualify to be a cultural or traditional leader. A cultural or traditional leader must derive their cultural or traditional leadership by fact of their birth or descent, not by mere appointment at the will of the King. *See Election Petition No. 007/2016 Mashate Magomu Peter vs the Electoral Commission & Anor pages 23 and 24 upheld on appeal in EPA No.047/2016 Mashate Magomu Peter vs the Electoral Commission & Anor at pages 17 & 18.* That the 1st Respondent as a Munyoro and like any other Ugandan citizen under **Article 37** of the Constitution of the Republic of Uganda 1995 had a right to enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others. She is not barred from providing voluntary service to her kingdom.

Counsel submitted that merely being a Minister for Education and Health in Bunyoro-Kitara Kingdom does not constitute the 1st Respondent as a cultural leader of Bunyoro-Kitara Kingdom within the definitions afore-cited. She is not a queen or similar traditional leader or cultural leader by whatever name called who derives allegiance from the fact of **birth or descent in accordance with the customs, traditions, usage or consent of the people**, neither is there evidence that she the traditional or cultural leader of Bunyoro-Kitara Kingdom.

That the 1st respondent's position is not public service, neither does it qualify her as a cultural leader or a member of a local government or public office within the meaning of Articles 80 (2) (c) and 246 (6) of the constitution of the Republic of Uganda 1995 as amended, Section 2 of the Institution of Traditional or Cultural Leaders Act, 2011, section 4 (1) (c) of the Parliamentary Elections Act 2005 as amended that should have required her to resign at least 90 days prior to her nomination by the 2nd Respondent on 15.10.2020.

It was their submission therefore that the 1st respondent was at the time of her nomination on 15th October 2020 and election on 14th January 2021 duly qualified

for nomination and election as Woman Member of Parliament for Masindi District since she was neither a public officer nor, cultural or traditional leader or a Member of a Local Government, the positions envisaged under the law **Article 80 (4) of the Constitution as amended by the Constitution Section 4(4) of the PEA. Section 4(4) (a) of the Parliamentary Election Act 2005**. She was not required to resign at least 90 days prior to her nomination by the 2nd Respondent on 15.10.2020 as alleged by the Petitioner.

In rejoinder, counsel for the petitioner submitted that the definition in Article 246(6) has to be read together with Article 246(3) and give a meaning which accommodates both. That it is a settled principle that when giving meaning to the provisions of the Constitution all provisions of the Constitution have to be read together. They have to be harmonized with no provision destroying the other. That is the rule of harmony, the rule of completeness. (See **Supreme Court Constitution Appeal No 4 of 2016 David Tusingwire vs. Attorney General at page 21**)

Counsel submitted that the definition in Article 246(6) has to be read together with Article 246(3) (a) and give a meaning, which accommodates both. Article 246(3) (a) provides:

*“the Institution of Traditional leader or a cultural leader shall be a corporation sole with perpetual succession and with capacity to sue and be sued and to hold assets or properties in trust **for itself** [emphasis ours] and the people concerned”*

Counsel submitted that this clearly shows that a traditional leader or a cultural leader is not limited to a King or queen but extends to the organization of a traditional or cultural leader. That it is not personal but rather institutional with perpetual succession with capacity to hold assets for itself. That cannot be referring to an individual.

Counsel submitted that the interpretation given by the first respondent was an absurdity and prayed that this court finds that both traditional leaders and office holders have to resign from office 90 days before nominations into national partisan politics.

ANALYSIS

The petitioner in this case queries the first respondent's nomination and subsequent election as woman Member of Parliament for Masindi district on grounds that she was/is a traditional/cultural leader that ought to have resigned from that office before being nominated or elected.

The first respondent holds the office of Minister of Social Services (Education and Health) in Bunyoro Kitara Kingdom a position that she was appointed to by the Omukama of Bunyoro Kitara Kingdom. It was her testimony that the King chose her to serve the kingdom on voluntary basis.

It is the petitioner's contention that the first respondent by virtue of her position was a traditional leader and ought to have been disqualified as a member of parliament under **Article 80(2) of the 1995 Constitution**.

Article 246 of the Constitution provides for traditional and cultural leaders. A traditional leader is defined under Article 246(6) to mean; ***"For the purposes of this article, "traditional leader or cultural leader" means a king or similar traditional leader or cultural leader by whatever name called, who derives allegiance from the fact of birth or descent in accordance with the customs, traditions, usage or consent of the people led by that traditional or cultural leader."***

The same definition was re-enacted under **Section 2 of the Institution of Traditional or Cultural Leaders Act, 2011**.

Article 246 (3) (e) further provides that the traditional leader while remaining a traditional leader or cultural leader shall not join or participate in partisan politics.

Therefore, the question to be answered is whether the first respondent's position as a Minister of Health and Education in the Bunyoro Kingdom government falls within the ambit of traditional leader as per the definition under the Constitution. The petitioner on one hand contends that the first respondent is a traditional leader as per Article 246 (6) by virtue of that traditional leader or cultural leader refers to both the human personality who runs it i.e. the Omukama of Bunyoro and the organization being the different organs of the Kingdom thus applies to

the Minister of Health and Education who is the 1st Respondent. On the other hand, the respondents contend that a mere Minister does not constitute the first respondent as a cultural leader of Bunyoro-Kitara Kingdom within the definitions since she is not a queen or similar traditional leader or cultural leader by whatever name called who derives allegiance from the fact of **birth or descent in accordance with the customs, traditions, usage or consent of the people.**

The requirements for one to become a cultural leader are enumerated under Sections 3 and 4 of the *Institution of Traditional or Cultural Leaders Act, 2011*;

Section 3

“Subject to the Constitution the institution of traditional or cultural leader may exist in any area of Uganda in accordance with the culture, customs and traditions or wishes and aspirations of the people to whom it applies.”

Section 4;

“A Traditional or Cultural leader may be instituted in the following ways:

- 1. In accordance with the culture, customs and traditions of the people to whom it applies***
- 2. In accordance with the wishes and aspirations of the people to whom it applies, through a resolution of not less than two thirds of all members of the district local government councils respectively in the area.***

(2) The institution under subsection (1) shall be communicated in writing to the Minister.”

The petitioner in this case stated attained her position through appointment by the King of Bunyoro Kitara Kingdom. She was not instituted to her position in the ways enunciated above.

Furthermore, the position held by the first respondent does not derive allegiance from the fact of birth or descent in accordance with the customs, traditions, usage or consent of the people led by that traditional or cultural leader but is an appointment on voluntary terms for a limited period. ***See Election Petition Appeal No. 047/2016 Mashate Magomu Peter vs the Electoral Commission & Anor***

The interpretation the petitioner has given to Article 246 is extremely wide and would if taken in that form bar not only those persons in voluntary employment but also those in employment for a benefit in the Bunyoro Kingdom and this would also have unintended consequences on the relatives of the Cultural leader/Traditional leader and yet the definition in the Constitution seems very restrictive to a person holding the title. Whereas it is true that constitutional provisions have to be construed broadly and liberally, having regard to the changed circumstances and the needs of the time and polity, the court should be cautious in importing broad application of provisions that would cause an absurdity without any justification.

The Court cannot re-write a constitutional provision. Constitutional implication should be based on considerations, which are compelling. The interpretation that is being given by the petitioner's counsel on who is a cultural or traditional leader barred from standing in elective politics has no basis in the constitution as well as the *Institution of Traditional or Cultural Leaders Act, 2011*.

In the ***Political Advertising Case (1992) 177 CLR 106***; Mason, C.J ruled that there can be structural implications which are "*logically or practically necessary for the preservation of the integrity of that structure*". Any preposition that is arrived at taking this route of interpretation must find some resting pillar of strength on the basis of certain words in the text or scheme of the text. In absence of that, it may not be permissible for a court to deduce any preposition as that would defeat the legitimacy of reasoning and the clear intentions of the framers of the Constitution.

The interpretation of who is a Cultural/Traditional leader has been defined in the Constitution and re-echoed in *Institution of Traditional or Cultural Leaders Act, 2011*. While interpreting a special statute, the court must consider the intention of the legislature. The reason for this fidelity towards the legislative intent is that the statute has been enacted with a specific purpose, which must be measured from the wording of the statute strictly construed. Therefore the meaning of a Cultural or Traditional leader must be strictly construed to avoid any absurdity it may introduce to the specific legislation and the Constitution.

It is to that end that I find that the first respondent does not fall within the ambit of Article 246 (6) to necessitate disqualification as Member of Parliament. This therefore means that there was no legal requirement for her to resign from the position before being nominated for the position of Woman Member of Parliament for Masindi District.

What remedies are available to the parties?

The petitioner sought to set aside the election of the first respondent and a declaration that the petitioner was the validly elected woman member of Parliament for Masindi district and in the alternative a new election be held.

The success of a winning candidate at an election cannot be lightly interfered with or taken away without any justification rooted in law.

The petitioner has no basis seeking to be declared a winning candidate in an election where she only polled 35.54% of the votes against the 1st respondent's 52.02%. She wants to impose herself on the electorate through the ventilator after failing through the door. She was rejected by more than half of the electorate and therefore cannot seek to be declared a winner.

The advocates or petitioners should desist from seeking to have runner-up candidates (losers) being declared winners without any basis. It is an exceptional remedy that should only be sought in rarest of the circumstances instead of being sought as an automatic remedy under the law.

With due regard to my findings above; the first respondent was validly nominated and elected as Woman Member of Parliament Masindi District, the remedies sought by the petitioner cannot be granted.

This petition is dismissed with costs to the respondents.

I so order.



SSEKAANA MUSA

JUDGE

28th September, 2021