

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBALE
ELECTION PETITION NO.004 OF 2021

OCHWA DAVID

PETITIONER

VERSUS

1. OGWARI POLYCARP

2. ELECTORAL COMMISSION

RESPONDENTS

BEFORE HON. JUSTICE MOSES KAZIBWE KAWUMI
JUDGMENT

Introduction.

The Petitioner together with the 1st Respondent and four other candidates competed for the position of Member of Parliament for Agule County Constituency in an election organized by the 2nd Respondent on 14th January 2021. The 1st Respondent was declared the winner and he was subsequently sworn in as the Member of Parliament.

The Petition was heard and dismissed on a preliminary objection by the court on 14th September 2021. The Petitioner filed Election Petition Appeal No.16 of 2021. The dismissal was set aside and a retrial was ordered. This judgment therefore results from the fresh hearing ordered by the Court of Appeal.

Background.

The Petitioner was aggrieved by the declaration of the 1st Respondent as the winner of the election and contends that he was not validly elected and enumerated several illegalities attributed to both Respondents.

Reliefs sought by the Petitioner are for the elections for Agule County Constituency held on 14th January 2021 to be annulled and fresh elections be conducted in accordance with the law with costs to be paid to the Petitioner.

The 1st Respondent's Answer to the Petition.

The 1st Respondent contends that he was validly elected and that the elections were conducted in a secure and tranquil environment, within the relevant laws and the results reflected the true will of the majority voters in the Constituency.

It is contended in the alternative, that if there were any irregularities committed in the conduct of the election by the 2nd Respondent, such did not affect the outcome of the election in a substantial manner.

The 2nd Respondent's Answer to the Petition.

On her part the 2nd Respondent asserts that the election was conducted in compliance with the provisions and principles laid down in the electoral laws of Uganda. It is further averred that all allegations in the Petition are baseless and born out of misconception of the electoral processes by the Petitioner.

The 2nd Respondent seeks the dismissal of the Petition with costs.

Legal Representation and submissions.

The Petitioner was represented by Mr. Alfred Okello Oryem with Mr. Mwonde Davis and Mr. Okello Arthur all of Okello Oryem & Co. Advocates. The 1st Respondent was represented by Mr. Kato. Ms. Ameyo Jennifer appeared for the 2nd Respondent.

Counsel for the Petitioner cross examined the 1st Respondent. Counsel for the Respondents opted not to cross examine any witness. The court guided counsel on a schedule for filing submissions which have been considered in the preparation of this judgment.

Burden and standard of proof.

Section 61(1) and (3) of the Parliamentary Elections Act, Act 17 of 2005, provides for the grounds for setting aside an election. The burden of proof is carried by the Petitioner who must prove to the satisfaction of the court that the irregularities or malpractices or non-compliance with the provisions and principles laid down were indeed committed, and that they affected the results of the elections in a substantial manner.

The standard of proof is stated to be on a balance of probabilities in section 61(3) of the same Act. The Petitioner is required to adduce credible or cogent evidence to prove the allegations to the stated standard of proof.

Chebrot Stephen Chemoiko v Soyekwo Kenneth & Another. EPA No.56/2016; Mukasa Anthony Harris V Dr. Bayiga Michael Phillip SC.EPA No.18/2007.

Evidence in support of or in Answer to the Petition is furnished through Affidavits read in open Court the deponents of which may with leave of Court be subjected to cross examination by the opposite party. The Court of Appeal has further guided that oral evidence can be taken followed with cross examination as in normal suits.

Othieno Okoth Richard V Ochai Maximus & EC.EPA No.70 of 2021.

Court then evaluates the evidence to make a determination as to whether the particular allegations have been proved to the required standard by the parties.

Counsel agreed on the following issues for the court's determination:

1. Whether there was non-compliance with the electoral Laws and principles laid down in the electoral law during the conduct of elections for Member of Parliament for Agule County Constituency in the 2021 general elections.
2. If so, whether the non-compliance affected the results of the election in a substantial manner.
3. Whether the 1st Respondent in connection with the election committed the alleged illegal practices and/or electoral offenses in connivance with the 1st Respondent's officials or personally or through his agents, with his knowledge and consent or approval.
4. Whether the Petitioner is entitled to the remedies sought.

Validity of the nomination of the 1st Respondent.

I find it pertinent to bring out the lingering question about the validity of the nomination and subsequent election of the 1st respondent raised by the Petitioner at this stage. It is a matter of Law that has the potential to dispose of the Petition without having to delve into the issues framed by Counsel.

The Petitioner pleaded that he is aggrieved by the election and declaration of the 1st Respondent as the elected candidate for Agule County Constituency and states that the 1st Respondent was not validly elected.

On 2nd September 2021 filing of Affidavit evidence was closed and on 21st September 2021 Counsel for the Petitioner sought leave to cross examine the 1st Respondent and other witnesses. Counsel for the Respondents too indicated the witnesses they sought to cross examine. A preliminary objection that resulted into the dismissal of the suit was raised. The Petition was dismissed but the order was set aside by the Court of Appeal.

At the fresh hearing, Counsel for the Petitioner sought leave to cross examine the 1st Respondent specifically on matters to do with the documents he submitted to the 2nd Respondent for nomination. Counsel for the Respondents expressed no need to cross examine any witness and opted not to re-examine the 1st Respondent.

In cross examination the 1st Respondent stated that he is aware of the legal requirement for one to have Advanced Level qualifications or a Certificate of Equivalence in order to be nominated. He stated that he submitted a Certificate of Equivalence to the 2nd Respondent and neither filed one with the Petition nor carried a copy to the Court. It was also his evidence that he knows that failure to submit a Certificate of equivalence to the 2nd Respondent makes the nomination illegal.

Counsel for the Respondents did not object to the cross examination of the 1st Respondent on the matter of his qualifications. Counsel did not apply for leave to produce copies of the Certificate of Equivalence allegedly submitted to the 2nd Respondent. The 2nd Respondent did not admit that the 1st Respondent submitted the Certificate during nomination.

Petitioner's submissions.

In the filed submissions counsel for the Petitioner contends that certified copies of the documents submitted by the 1st Respondent during nomination were obtained after the Petition had been filed. Evidence acquired did not include a Certificate of Equivalence.



It is contended that the nomination and subsequent election were illegal since the 1st Respondent did not prove that he had A level qualifications or submitted a Certificate of Equivalence pursuant to Article 80(1) and Sections 4,5,6,7,8 and 9 of the Parliamentary Elections Act.

Counsel for the Petitioner argues that the failure to submit the Certificate is an illegality. That an illegality is a question of Law which may not be pleaded but can be raised at any stage of the proceedings. Counsel noted that illegality does not have to be proved by Affidavit evidence except to demonstrate it since it overrides all questions of pleadings and evidence.

Affidavits sworn by Omurwon Robert and the Petitioner were relied on by Counsel. It was also noted that Kimbowa Erasmus the 2nd Respondent's Returning Officer merely stated in his Affidavits that the 1st Respondent was nominated after fulfilling the requirements but produced no evidence of the Certificate of Equivalence.

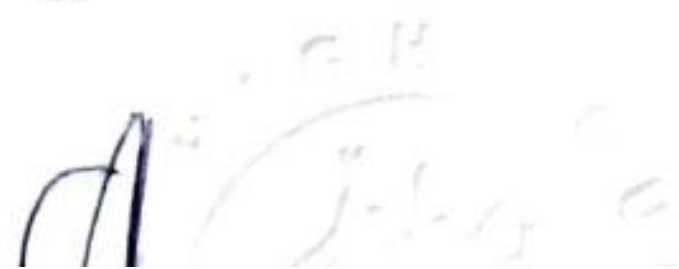
Counsel invited the court to declare the nomination and subsequent election of the 1st Respondent illegal citing **Ongole James Michael V EC & Another. EP No.8 of 2006** as the supporting authority.

Respondents' submissions.

For the 1st Respondent it was submitted that issues to do with his nomination were *res judicata* since an Application the Petitioner had earlier filed was dismissed by court. It was further argued that the Petition raised grounds of illegalities under section 61(1)(c) yet the ground regarding the 1st Respondent's qualifications would call for a different set of evidence distinct from what is envisaged in Section 61(1)(c).

Counsel argued that the Petitioner became aware of the documents submitted by the 1st Respondent during the nomination exercise. He should have at the time lodged a complaint with the 2nd Respondent pursuant to Article 61(1)(f) and 64(1) of the Constitution and Section 15 of the PEA. It was submitted that pre-election matters cannot be raised in a Petition to challenge the elections.

According to Counsel, recourse may only be made to a Petition lodged under section 61(1)(d) of the Parliamentary Elections Act where the intending Petitioner could not have with reasonable diligence known of the defects in the qualifications of the candidate and where such is specifically pleaded.



Counsel cited **Kasirye Zzimula Fred V Bazigatirawo Kibuuka Francis Amooti & Another.EPA No.01/2018; Grace Nalubega V Juliet Kinyamatama & EC.EPA No.27/2021** to support the contention.

The 2nd Respondent corroborated the 1st Respondent only emphasizing that parties are bound by their pleadings. The lack of qualifications by the 1st Respondent had not been pleaded and the court dismissed the application to amend the Petition thus imputing that the matter was *res judicata*.

Decision.

Counsel for the Petitioner correctly argued that an illegality is a matter of law that may not be pleaded and that cannot be ignored by any court once it is raised. The Petitioner therefore need not have pleaded Section 61(1)(d) to qualify to raise issues to do with the competence of the 1st Respondent to be elected as a Member of Parliament.

I had the opportunity to peruse the Affidavits filed by Lokaki Onoria, Arikod Joseph Enyongo and Omurwon Robert which raise the contention of the 1st Respondent's failure to submit a certificate of equivalence. The Affidavits were not rebutted by evidence to show that the Certificate was submitted to the 2nd Respondent during the nomination exercise.

The court noted that Kimbowa Erasmus the 2nd Respondent's Returning Officer merely stated in his Affidavits that the 1st Respondent was nominated after fulfilling the requirements but produced no evidence of the Certificate of Equivalence.

I perused the ruling of this court in Miscellaneous Application No.086 of 2021 filed by the Petitioner for leave to amend the Petition. The grounds were that there was a pending Petition and filing of pleadings had not yet closed. That the amendment was necessary to enable the court determine all questions and that no distinct cause of action was being introduced by the amendment.

The Petitioner pleaded that at the time he filed the Petition he had not obtained certified copies of the nomination papers submitted by the 1st Respondent and did not know that the former had skipped the requirement for a Certificate of Equivalence.

The Respondents opposed the application contending that the Petitioner filed no formal complaint with the 2nd Respondent to challenge the nomination and that the court had no powers to grant leave to amend the Petition.

The court correctly ruled that the sought amendment required a distinct and different set of evidence, has its own regulatory regime and cannot be disguised as an illegality or an illegal practice under section 61(1)(C). That allowing the amendment would be tantamount to filing a new petition outside the prescribed time frames without even asking for extension of time.

The Court did not canvass and rule on the Petitioner's failure to submit a Certificate of Equivalence and its ramification on the subsequent election. It is thus erroneous for Counsel for the Respondent to plead res judicata. The ruling was strictly limited to the competence of the application to amend the Petition and no what is raised by the Petitioner.

The second limb of the arguments by Counsel for the Respondents is that the Petitioner could only have raised the issue of the 1st Respondent's competence before elections and is now estopped from raising it in the Petition.

I am alive to Article 64(1),(4) and 80 (1)(c) of the Constitution, Sections 15(1)(2) and (4) of the Electoral Commission Act coupled with Sections 4(1)(c),5(a),8, 9 and 61(1)(d) of the Parliamentary Elections Act.

I am also alive to the decision of the courts to the effect that pre-election matters are not maintainable in law by the Petitioner after conclusion of the elections and after expression of the will of the electorate.

Kasirye Zzimula Fred V Bazigatirawo Kibuuka Amooti & Another.EPA No.01 of 2018; Akol Hellen Odeke vs Okodel Umar.EPA No.6 of 2020.

My appreciation of the above provisions however is that section 15 of the Electoral Commission Act does not oust the jurisdiction of the High Court to inquire into the validity of the nomination of a candidate declared elected under the Parliamentary Elections Act

If the Legislature had intended that pre-election matters cannot be handled in post-election petitions, it should have expressly so stated. Section 15 of the Electoral Commission Act is not mandatory as can be discerned from the way it was couched.



Section 15(1) provides:-

*"Any complaint submitted in writing alleging any irregularity with any aspect of the electoral process **at any stage**, if not satisfactorily resolved at a lower level of authority, shall be examined and decided by the commission; and where the irregularity is confirmed, the commission shall take necessary action to correct the irregularity and any effects it may have caused."*

Any complaint lodged with the Commission however has to be handled through the prescribed channel with the High Court as the Appellate and final forum for its resolution.

Section 13(C) of the Parliamentary Elections Act points to the fact that pre-election matters can be raised in a Petition.

Section 13(C) of the Act provides:-

'A person shall not be regarded as duly nominated for a constituency and the nomination paper of any person shall be regarded as void if the person seeking nomination was not qualified for election under section 4.'

Only a person duly nominated qualifies to be elected to Parliament. The election can be set aside under section 61(1)(d) if he was not qualified. Only the High Court has the mandate to set aside the election based on her inherent powers and jurisdiction expressed in the Parliamentary Elections Act.

I find the decisions of the Court of Appeal on the same subject quite instructive. In **Namboowa Rashida V Bavekuno Kyeswa & Another. EPA No.69/2016** the court held:-

"We are of the view that the intention of Parliament in enacting section 15 of the Electoral Commission Act was not to limit the inherent powers and jurisdiction of the High Court to determine and resolve complaints of electoral irregularities where no such complaint has been lodged with the electoral commission. If the legislature intended for a person to qualify to file an election, he or she needed to have first lodged a complaint of election malpractices with the electoral commission, it would have expressly stated so."

The Supreme Court had earlier in ***Nakendo V Mwondha***.SC Civil Appeal No.09 of 2007 observed that;-

"Section 13 of the Parliamentary Elections Act provides that a person shall not be regarded as duly nominated for a constituency and the nomination paper of any person shall be regarded as void if the person had not complied with the provisions of Section 4 of the PEA. That the issue of qualifications therefore was an issue that had to be determined in the Petition."

The converse would in my view imply that a non- citizen or an O' level "graduate" can sit in Parliament as long as a Returning Officer nominated him for whatever reason and no voter raised the issue? I believe sections 13(C) and 61(1)(d) of the Parliamentary Elections Act were enacted to check such illegalities.

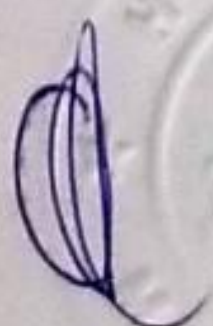
The 1st Respondent claims to have in his possession a Certificate of Equivalence. The 2nd Respondent contends that he had the qualifications to be nominated. A perusal of what he submitted shows an O' Level Certificate and verification of results for Parts 11 and 111 in Electrical Installation Craft Courses sat at Uganda Technical College, Elgon. The two Respondents failed and /or did not think it wise to avail the Certificate to the Court.

Only the National Council for Higher Education has the mandate to weigh the qualifications and issue a Certificate of Equivalence which must be submitted at the time of nomination. It is the finding of this court that failure to submit the Certificate of Equivalence was fatal and rendered the nomination invalid.

The 2nd Respondent purported to usurp that function by nominating the 1st Respondent without such a certificate if at all it existed. Even the Court cannot purport to exercise such powers which are explicitly set out in an Act of Parliament.

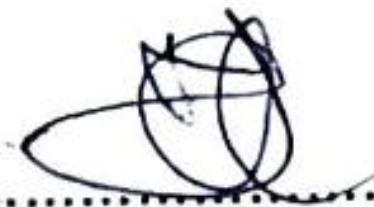
National Council for Higher Education V Anifa Kawooya Bangirana. Constitutional Appeal No.4 of 2011.

In conclusion the Petition is allowed. I find that the nomination and subsequent election of the 1st Respondent as a Member of Parliament for Agule County Constituency was illegal since he did not submit the requisite documents to be nominated.



The election is set aside. Costs shall be paid by the two Respondents to the Petitioner. A certificate of costs for two Counsel is granted to the Petitioner.

The 2nd Respondent shall organize fresh elections for the directly elected Member of Parliament for Agule County Constituency.



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Moses Kazibwe Kawumi

Judge

12th December 2022

OCHWA DAVID:::::::::::::::::: PETITIONER

VERSUS

ELECTORAL COMMISSION ::::::::::::::: RESPONDENTS

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