THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ.
HON. JUSTICE G. M. ENGWAU, J.A.
HON. JUSTICE C.K. BYAMUGISHA, J.A.

ELECTION PETITION APPEAL NO. 15 OF 2002

BETWEEN

OCHIENG PETER PATRICK ::::::::::::::::::::::::::::APPELLANT

VERSUS

ADEYA STEPHEN BWIRE ::::::::::::::::::::::::::::::1ST RESPONDENT
RETURNING OFFICER BUGIRI ::::::::::::::::::::::::::::::2ND RESPONDENT
ELECTORAL COMMISSION ::::::::::::::::::::::::::.::::::::::::::3RDRESPONDENT

(An appeal from the Judgment and Orders of the High Court of Uganda at Jinja (Magezi J.) dated 11th January, 2002 in Election Petition No. 1/2001)

JUDGMENT OF BYAMUGISHA. J.A. ***(dissenting)***

I had the opportunity of reading in draft the judgment prepared by Engwau JA and with the greatest respect, I am unable to agree with him that the provisions of the law cited to us by both counsel are directory and not mandatory.

The appellant contested for the Parliamentary seat for Bukholi South in Bugiri District. The third respondent declared him the winner of the elections that were held on the 26th June 2001.
The first respondent, a registered voter, filed a petition in the High Court of Uganda, Jinja Registry contesting the outcome alleging that the appellant at the time of his election did not possess the required academic qualifications to be a member of Parliament.

At the trial, two issues were framed for court's determination namely:

1. Whether the first appellant was a person qualified to be nominated for election as a Member of Parliament, and

2. Whether the appellant was nominated in accordance with the law.

After the trial, the learned trial Judge found that the appellant was not duly nominated as his nomination paper were void for noncompliance with the provisions of section 5 of the Parliamentary Elections Act (hereinafter called the Act). She ordered him to vacate his seat - hence this appeal.

1. The learned trial Judge erred in law when she held that the appellant was not qualified to stand as a Member of Parliament and was not duly nominated under section 5 (1) (c) and (4) of the Parliamentary Elections Act No. 8 of 2001.
2. In the alternative, the learned trial Judge erred in law when she held that non-compliance with section 5 (4) of Act 8 of 2001 was fatal and that the appellant was not qualified within the meaning of section 5 (1) (c).

3. The learned trial Judge erred in law by awarding costs against the appellant in a matter of public interest which costs the appellant should have been exonerated from.

When the matter came before us for final disposal, Mr. Matovu, learned counsel for the appellant, argued grounds 1 and 2 together while Ms Maureen Owor made submission on third ground. Mr. Matovu in his submission contended that the learned trial Judge erred in law when she held that non-compliance with the provisions of section 5(4) of the Act was fatal. Counsel pointed out that the Judge's interpretation that the appellant's academic documents did not amount to a certificate under the above section was erroneous. It was counsel 's submission that the appellant satisfied the conditions under section 5(4) (supra) when he tendered a letter to the second respondent from UNEB. Counsel relied on the affidavits of Mr. Nyende, the Returning Officer Bugiri, the affidavit of the then Chairperson of the third respondent Mr. Azziz Kasujja which was to the effect that the appellant was allowed to be nominated on the strength of the letter from UNEB (exhibit D.6). Learned counsel further submitted that the certificate which UNEB was supposed to issue had no prescribed form and therefore the certificate appearing on page 129 of the record of the proceedings was confirmation that the appellant's academic document were equivalent to A. Level standard of education.

In support of his argument counsel relied on the case of Mabosi Stephen vs Uganda

Revenue Authority S.C.C.A No. 16/95 unreported where the court held that where there is no prescribed format which a person has to follow, substituted compliance with the provision of the law will suffice. On the issue of ***gazetting,*** counsel contended that it was not mandatory that the certificate must be ***gazetted*** and if it was mandatory, its non-publication was not fatal to the nomination of the appellant.

Mr. Wandera learned counsel for the first respondent in his submission, contended that the appellant did not possess "A" level certificate or its equivalent. In his view the provisions of section 5(4) (supra) are mandatory in that the section requires the issuance of a certificate which must be gazetted. It was his contention that the use of the word "only" in the section means "exclusive". He relied on the interpretation given to the words by the Supreme Court in Dr. Kizza- Besigye vs Museveni Kaguta Election Petition No. 1/2001. Counsel further submitted that the letter issued by UNEB (exhibit P.5) dated 19th May 2001 was not sufficient for purposes of the section. He argued that a certificate is a legal requirement in order to minimise a flaw in respect qualifications by candidates. He concluded his submissions by stating that the appellant did not qualify for nomination under the section and his nomination was void under section 15(e) of the Act for non-compliance with the mandatory provisions of the law.

Mr. Philip Mwaka, learned counsel for the second and third respondents, in his submissions fully associated himself with the submissions of counsel for the appellant. He claimed that a certificate was granted to the appellant. He also stated that the certificate had no prescribed format under the Act.

In order to resolve the matter in dispute regard must be had to the various provisions of the law which the learned trial Judge relied on, and then determine whether her interpretation of the law was correct or not.

Section 5(1) of the Act provides that:

"A person is qualified to be a Member of Parliament if that person-

(a) is a citizen of Uganda;

(b) is a registered voter; and

(c) has completed a minimum formal education of Advanced Level standard or its equivalent."

For purposes of the matter now before court, it is clause (c), which is the subject of contention. It is common ground that the appellant did not possess an "A" Level certificate issued to him by UNEB. In order to qualify to stand as a candidate he had to have some other qualifications that UNEB would vet and equate them as being equivalent to A level standard

. Section 5(4) (supra) provides as follows:

> "For purposes of paragraph (c) of sub-section 1 of this section a person shall qualify as having the equivalent of the Advanced Level Formal Education only if he or she holds a certificate issued to him by the Uganda National Examination Board notice of which has been published in the ***Gazette".*** (emphasis added).

The provisions of this section seem to be clear in themselves. To this extent I agree with my brother Engwau JA at page 6 of his judgment wherein he said that:

"My understanding of the above section is that for a candidate intending to contest a parliamentary election, he or she must be in possession of a minimum formal education of either Advanced Level Certificate or its equivalent notice of which must be published in the gazette by UNEB".

A person can only qualify as having the equivalent of Advanced Level only if he holds a certificate issued by UNEB notice of which has been published in the ***Gazette.*** The appellant in the matter now before us, obtained a letter dated 19th May 2001 (exhibit P.5). It was addressed to the Chief Administrative Officer Bugiri. The letter stated among other things that the appellant had the equivalent of Advanced Level standard of Education. The letter was not published in the ***gazette***.

Apart from this letter, section 5(5) of the Act gave power to UNEB to periodically publish in the ***Gazette*** notice of the list of qualifications it considered to be equivalent to advanced level of formal education. This notice was duly published in the ***Gazette*** of 4th May 2001.

At the trial evidence was led by the appellant that he attended a two year course at Busitema National College of Agricultural Mechanisation leading to the award of a

certificate in Electricity and Electrical Installation Works. There was also evidence from Mr. Bukenya, the Ag. Secretary UNEB to the effect that the General Notice of 4th May 2001 equated the appellant's qualifications to that of A Level standard. This witness told court that UNEB did not issue individual certificates to all persons with equivalent to A Level as long as their academic qualifications fell within the General Notice of 4th May. He did not explain why.

In dealing with the issue of qualifications the learned trial Judge had this to say:

"It is my considered opinion that the minimum formal education must either be Advanced Level standard or its equivalent which

is evidenced by holding a certificate issue by UNEB. My interpretation of the section emphasises that a certificate must be issued by UNEB. That a Notice must exhibit this certificate published in the Gazette. Section 5(4) P.E.A is explicit and clear. This is notwithstanding section 5(5) P.E.A. that empowers UNEB to periodically publish in the Gazette notice of the list of qualifications considered to be equivalent to advanced level of formal education. Whereas section 5 (4) P.E.A. is for purposes of individual verification of the person's qualification section 5(5) is in my opinion a publication of the qualifications considered to be equated to A Level standard. Section 5(5) does not appear to displace section 5(4). If it did it would have made section 5(4) redundant."

I am in broad agreement with the interpretation given to the two subsections by learned trial Judge that they serve different purposes and one was not supposed to displace the other. On perusal of the court record I have found contradictions in the testimony given by Mr Bukenya. Whereas he claimed that the General Notice issued under sub-section 5 and published in the ***Gazette*** was sufficient for purposes of sub-section 5 and published in the Gazette was sufficient for purposes of sub-section 4, a copy of the ***Gazette*** which was published on the 18th May 2001 is full of names of individual candidates whose qualifications were equated and issued with individual certificates. Therefore it is not true as Mr. Bukenya testified, that candidates whose qualifications fell within the General Notice of 4th May were not required to be issued with individual certificates. It was the legal duty of UNEB under the Act to issue individual certificates and have them ***gazetted*** on payment of the requisite fee by each candidate.

Under the Act, UNEB is the only body authorised to equate academic qualifications. The issue is whether failure to issue the appellant with a certificate and have the same ***gazetted*** was fatal to his nomination? It is the appellant's case that the provisions of section 5 (4) are directory and not mandatory. No authorities were cited to us for this proposition. However, in order to determine the effect of failure to ***gazette*** the appellant's certificate, the court has to consider the purpose and scope of the statute as a whole. In case of Edward Katumba vs Kiwalabye Civil Appeal No. 2/98 (unreported) this Court had occasion to consider the provisions of section 143(2) of the Local Governments Act which provided that the High Court or Chief Magistrate shall hear and determine an election petition within three months after the day of filing. The section did not state the legal consequences of failure by the court to determine an election petition within the prescribed time. In dealing with the issue at hand, this Court

quoted with approval a passage from a book-Smith's Judicial Review of Administrative Action 4th Edn. At page 142. The passage says:

"When Parliament prescribes the manner or form in which a duty is to be performed or power to be exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The court must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done (though in some been said that there must be "substantial compliance" with the statutory provision if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purpose of the enactment must be considered and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act.

In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Although nullification is the natural and usual consequences of disobedience, breach of procedural or formal rules is likely to be treated as a mere irregularity if the terms of the departure from the terms of the Act is of trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced or if serious public inconvenience would be caused by holding them to be mandatory or if the court is for any reason disinclined to interfere with the act or decision that is impugned."

In a nutshell, in order for the court to determine whether Parliament intended a particular provision to be mandatory or directory, it has to look at the legislation as a whole. In particular, the court has to be guided whether there is a penalty provided in the legislation for noncompliance with the provision that has been disregarded. This is my understanding of the law. Furthermore, it is my understanding of the law that when words used in a statute are clear and unambigous, the duty of the court is to give those

words their natural and ordinary meaning. Therefore the words "shall" and "only" as used in subsection (4) (supra) mean mandatory and exclusive respectively. In my view, no other evidence is required to prove the qualifications of a candidate except a certificate issued by UNEB notice of which has been published in the ***Gazette***. I do not think that there are other meanings that should be attached to the words. Such certificate or course has to be authentic and valid.

In the instant appeal, the importance of the section that was disregarded can be found in the provision of section 15 of the Act. This section sets out factors which may invalidate the nomination of a candidate. It says:

"A person shall not be regarded as duly nominated for a constituency and the nomination paper of any candidate of any person shall be regarded as void if-

(a) the person's nomination paper was not signed and countersigned in accordance with subsection (1) of the section 14; or

(b) the nomination fee referred to in subsection (2) of section 13 was not lodged with his or her nomination paper; or

(c) the person seeking nomination was not qualified for election under section 5 of this Act;

(d) the person seeking nomination has been duly nominated for election for another constituency for which the poll has not taken place;

(e) the person has not complied with the provisions of section 5."

This section makes the nomination of a candidate void for noncompliance with the whole of section 5. The word void means a nullity or of no legal consequences. The use of the word "only" in the section was not, in my view accidental. It was supposed to signify the importance of the section and the consequences that might follow by failure to comply with its requirement. In a recent decision of this court in the case of Matsiko Komuhangi vs Babihuga Election Petition Appeal No. 9/2002 it was held that the use of the word only in section 62 of the Act is exclusive. I accept the submission of counsel for the respondent that the word only as used in subsection 4 (supra) is exclusive. I

agree with counsel for the appellant that no format is provided under the Act for the certificate. But, first the certificates which UNEB published in the Gazette of 18th May 2001 have a format. Secondly, his own definition of a certificate, which he referred to, indicates that a letter cannot be equated to a certificate. The letter lacked authenticity in my view, since it disclaimed the identity of the person named in it. It seems to me that Parliament intended the certificate issued under the provision of the "A" Level certificate and other certificates issued by UNEB. There is also the provisions of sub-section 6 which states that: "A certificate issued by the Uganda National Examination Board under any other enactment, to the same effect as a certificate required to be obtained under sub-section 4 of this section and notice of which has been published in the ***Gazette*** shall be sufficient for the purposes of paragraph (c) of subsection (1) of this section".

The provisions of this sub-section appear to give some advantage for those who obtain certificates and have the same ***gazetted***. It is therefore not clear to me why the appellant chose to take a path that gave him temporary or no advantage at all. I am saying so because the letter (exhibit P.5) cannot be used in any other elections since it was not even addressed to him. I have already stated elsewhere in this judgement that the letter, which UNEB wrote to CAO Bugiri disclaimed the identity of the person in whose favour, it had been written. This contracts sharply with the certificate which UNEB issued in the names of Alfred Labongo (exhibit P.9) and other candidates. It is titled "Certificate Of Completion of Formal Education of Advanced Level Equivalent". It has no words of disclaimer about the identity of the holder. It has a seal of the Board and a serial number. These features are missing from the letter, which Peter Ochieng was given. Furthermore, on the 26th July 2001 UNEB wrote a letter (exhibit P. 11) that was attached to the affidavit of Thomas Ochaya. The letter was to the effect that UNEB has never issued a certificate to Ochieng Peter Patrick in accordance with the provisions of section 5(4). There are other pieces of evidence, which are quite disturbing in this case. The appellant claimed to have attended St. Philips Secondary School for his "O" Level Education. However, the "O" Level Certificate, which he presented to the Returning Officer during his nomination, was from Buwembo Senior Secondary School, Tororo. All the above discrepancies clearly show that the appellant did not have a single certificate in his names - Ochieng Peter Patrick.

It is therefore my finding that failure by the appellant to adduce evidence of a certificate issued to him by UNEB and gazetted was fatal to his nomination. The law required a certificate to be issued and the same to be gazetted. To hold otherwise would, in my view, defeat the intention of the legislation. The recent decisions of this court in the case of Kasiki vs Kagimu Election Petition Appeal No. 6/2001 (unreported) shows that the provision of section 5 is mandatory. the breach in the matter now before us was even worse. Secondly there was no evidence adduced to show how the appellant was granted exemption from the provisions of sub-section 4 (supra). In my view UNEB did not have any option in the matter. the law did not give exceptions otherwise Parliament would have stated so in no uncertain terms. The trial Judge was right in her interpretation of the law. The first and second grounds of appeal would therefore fail.

The third ground of appeal concerned costs. The appellant complained that the petition was a matter of public interest for which he should have been exonerated from paying costs. In submitting on this ground, Ms Owor learned counsel for the appellant contended that the trial Judge based her decision on conjecture while apportioning costs. It was her contention that the appellant was issued with a letter by UNEB and therefore did not flout the provisions of section 5 (supra) as the learned trial Judge found. She further submitted that the appellant was properly nominated.

Mr. Wandera, learned counsel for the first respondent submitted that the award of costs is a discretionary matter, and as such the court is empowered to apportion the way costs should be paid. He pointed out that the trial Judge did not believe that the appellant innocently could fail to get the requisite certificate.

Determining who should bear the costs of a civil litigation is a discretionary matter. An appellate court will not interfere with the exercise of discretion by a trial court unless it is shown that wrong principles were followed in arriving at the decision. A trial court ought not to exercise it against a successful party, except for some good reason connected with the case. In election petitions the provisions of rule 27 of the Parliamentary Elections (Elections Petition) Rules, 1996-S.I. No. 27/96 guide the court, when awarding costs.

In the matter now before us, the trial Judge in arriving at the decision gave reasons. The reasons were based on the facts of the case as presented before her by the parties. The appellant in his answer to the petition and the submissions filed in the case prayed for

the dismissal of the petition with costs. The issue of the petition being a matter of public interest was not raised before the trial Judge. To interfere with the exercise of discretion it has to be shown that the trial Judge ignored some matter connected with the case. I am aware that the Supreme Court in the case of Prince Mpungu Rukidi vs Prince Solomon Iguru & Others C.A. 18/94 (SC) set aside the orders of the lower court with regard to costs. In doing so the Supreme Court observed that in cases of significant political and constitutional nature each party should be ordered to bear its own costs. Since then, most cases which are perceived to be of political or constitutional significance, each party has been ordered to bear its own costs- see Attorney-General vs Major-General Tinyefuza Const. Appeal No. 1/97 (SC) and Dr Kiiza-Besigye vs Yoweri Museveni (supra). The matter before us was an election petition filed by a voter.

I am therefore persuaded by the submissions of counsel for the appellant that this petition was of public importance and for that reason the trial Judge should have taken this matter into consideration. I, would therefore, interfere with the orders made by the trial Judge regarding costs by ordering each part to bear its own costs.

In conclusion, the findings made by the trial Judge would be upheld. The appeal stands dismissed. Each party would bear its own costs.

- a, Kampala this.....14th.....day of.....January,.....2002.

C. K. Byamugisha

JUSTICE OF APPEAL