

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO 40 OF 2012

1. NATIONAL RESISTANCE MOVEMENT (NRM)
2. JOEL MUGISHA
3. ROSEMARY NYAKIKONGORO

} ...APPELLANTS
}

VERSUS

NAOME KIBAAJU.....RESPONDENT

(An Appeal arising from the Judgment and Decree of the High Court of Uganda at Mbarara presided over by *Hon. Justice Dr. Andrew Bashaija J*, in HCSS No. HCT-05-CV 0096 of 2010)

CORAM: **HON. MR. JUSTICE S.B.K. KAVUMA, DCJ**
 HON. MR. JUSTICE RICHARD BUTEERA, JA
 HON. MR. JUSTICE KENNETH KAKURU, JA

JUDGMENT OF THE COURT

This appeal arises from the Judgment of Andrew Bashaija J, in **HIGH COURT CIVIL SUIT NO. 0096** of 2010 dated 24th November 2010.

Facts

The brief facts of the suit giving raises to this appeal as far as we could ascertain from the court record are as follows;-

The National Resistance Movement Party (NRM) in preparation for 2011 National General Elections, conducted party primary elections between 4th to 7th September 2010.

The appellant, the 3rd respondent and three others, who are not party to this appeal, contested for the position of the NRM party flag bearer for woman member of Parliament for Sheema District.

The second appellant was the returning officer, and he declared the 3rd respondent winner of the election having polled the highest number of votes totaling 29,555.

The respondent, being dissatisfied with results, filed a suit at the High Court of Uganda at Mbarara challenging the validity of the election. That there was illegal voting, ballot stealing and tempering with ballot boxes. She also alleged bribery, bias, intimidation and favoritism.

She contended further that the second appellant failed to carry out his duty as a returning officer and had allowed voters to use illegal voting materials and had gone ahead to announce and declare partial results which he knew were not the correct results.

The respondent sought the following orders of redress;-

- a. A declaration that the election conducted on the 5th day of September 2010 at Sheema District for woman Member of Parliament National Resistance Movement Party Primaries whereupon the 3rd defendant was declared winner was flawed with material irregularities, rigging, intimidation and hence null and void.*
- b. A declaration that the 3rd defendant was not validly elected.*
- c. An order of specific performance that the 1st defendant conducts fresh elections in the District of Sheema for the woman Member of Parliament flag bearer for the 1st defendant.*
- d. Exemplary damages*
- e. General damages*
- f. Costs of the suit (sic)*

The appellants filed a joint Written Statement of Defence in which they denied all the allegations set out in the plaint. They prayed for the dismissal of the suit.

The learned trial Judge found for the respondents and made the following orders and declarations.

- (a) Court declares that the election conducted on the 5th September, 2010 in Sheema District for Woman Member of Parliament NRM party primaries was flawed with material irregularities, rigging and hence null and void.*
- (b) Court declares that the 3rd defendant was not validly elected.*
- (c) Court directs that new elections be organised and conducted by electoral officials other than those who were in-charge of the previous election, who did not live up to the task of overseeing a democratic elections.*
- (d) No exemplary damages are awarded as prayed because the circumstances of the case do not merit the same.*

(e) Court awards general damages of shs. 30,000,000/= (Thirty million shillings) to the plaintiff to be borne by the 1st and 2nd defendants. The 3rd defendant was a mere beneficiary under the machinery of the 1st and 2nd defendants.

(f) Court awards costs of the suit to the plaintiff.(sic)

THE APPEAL

The appellants being dissatisfied with Judgment of the High Court appealed to this court on the following grounds;-

- 1. That the learned Judge erred in law and in fact when he issued a decree without a final judgment and later on issued a judgment that was at variance with the decree.*
- 2. The learned trial Judge erred in law and in fact, having found that the 2nd appellant was at all material times acting in his official capacity, to hold that he could be sued in his personal capacity as Joel Mugisha and even condemned him to pay general damages and costs.*
- 3. The learned trial Judge erred in law and in fact when he failed to properly evaluate the evidence and held that there were numerous malpractices which affected the elections in a substantial manner and therefore concluded that the elections were null and void in absence of evidence to support those findings.*
- 4. The Learned trial Judge erred in law and in fact and clearly misdirected himself when he held that it would require 15 hours for 135 voters to cast their votes in those elections and came to a wrong conclusion that casting 135 votes or more in less time, meant ballot stuffing.*
- 5. The Learned trial Judge erred in law and in fact and occasioned miscarriage of justice when he held that the Returning Officer (2nd Appellant herein) could not confirm whether duplicated names in the voters Register were taken advantage of hence wrongly shifted the burden of proof.*
- 6. The learned trial Judge erred in law and in fact and occasioned miscarriage of justice when he awarded general damages in an election matter to the plaintiff which was not proved.*

WHEREFORE IT IS PROPOSED to ask this Honourable Court to make the following orders.

1. *To allow the appeal and set aside the judgment and decree of the High Court in Civil Suit No 096 of 2010.*
2. *Order the Respondent to pay the costs of the appeal and in the Court below.*

REPRESENTATIONS

When this appeal came up for hearing, Mr. **Gabriel Byamugisha** appeared for the appellants while **Mr. Geoffrey Nangumya** appeared for the respondent. Counsel for the parties made submissions for their respective clients for court's consideration.

RESOLUTION OF ISSUES

We have carefully considered the submissions of both counsel. We however, take judicial notice of the fact that, following the party primary elections preceding the 2011 General elections, the 3rd respondent contested successfully for the Sheema District woman Member of Parliament seat. She has held the seat for the last four and a half years.

We also take judicial notice that the term of this parliament, (the 9th parliament 2011-2015) is about to come to an end. We further take judicial notice of the fact that the NRM party has already held its party primary elections, in preparation for 2016 general elections.

We find, therefore, that a lot of water has passed under the bridge since this appeal was filed. By operation of time the appeal has been rendered largely moot. Grounds 1,2,3,4 and 5 of the appeal have overtaken by events. A court of law cannot act in vain.

Taking into account all the peculiar circumstances of this appeal regarding those grounds, therefore, we decline to pronounce ourselves thereon beyond what we have just stated above. However, as for, grounds 2 and 6 of the appeal, these remain live and we shall now proceed to consider them.

Ground 2

It was contended for the appellants that the learned trial Judge erred in law and in fact when he found that at all material times the 2nd appellant, who was acting in his official capacity as a party Returning Officer could be sued in personal capacity. That he erred further when he ordered the 2nd appellant to pay the respondent general damages and costs in person.

The respondent, on the other hand, contended that the learned trial Judge correctly held that the 2nd respondent could be sued in his personal capacity. That he had exceeded his authority and had involved himself in irregularities. That an agent is held responsible for actions which are not within the scope of his /her agency.

A close look at the plaint reveals that the 1st respondent was sued as a body corporate. It was not sued vicariously for the actions of its agent. The 2nd respondent also was not sued in his capacity as a returning officer for NRM, Sheema District, he was sued in person.

In the body of the plaint, no attempt is made to link the 2nd respondent to the 1st respondent. The only paragraphs in the plaint that refers to the 2nd respondent are paragraphs 6(b),(c),(d),(e) and (n).

In those paragraphs the appellant clearly acknowledges that the 2nd respondent was acting in his official capacity as the returning officer of the 1st respondent. Nowhere in the plaint is it alleged that the 2nd respondent was acting in his personal capacity or had exceeded his authority in such a manner as to render him personally liable. The plaint did not even seek, in its prayers, a declaration that the 2nd respondent was found to have been personally liable.

Since the issue of agency and exceeding authority had not been pleaded, the evidence in that regard, if any, ought to have been disregarded by the trial Judge.

In the result we find that this ground has merit and we find in the affirmative regarding the same.

Ground 6

It was submitted for the appellants that the learned trial Judge erred in law and in fact when he awarded general damages to the respondent without proof.

This ground was not canvassed by the parties at the hearing of this appeal. We, therefore regard it as abandoned and for the reason we shall not consider it or make any orders in respect thereof.

In the final result, this appeal abates in respect of grounds 1, 3, 4 and 5 but succeeds in respect of ground 2.

For the reasons given above the Judgment of the High Court is hereby varied as indicated above.

We make no order as to costs.

Dated at Kampala this 13th day of January 2015.

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HON. MR. JUSTICE S.B.K. KAVUMA, DCJ
JUSTICE OF APPEAL

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HON. MR. JUSTICE RICHARD BUTEERA
JUSTICE OF APPEAL

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HON. MR. JUSTICE KENNETH KAKURU
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