THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NUMBER 81 OF 2016

[CONSOLIDATED APPLICATIONS No. 12 OF 2017, No. 21 OF 2017 and No. 23 OF 2017 ALL ARISING OUT OF APPEAL No. 81 OF 2016]

BEN MARTIN WANDA :::::::::::::::::::::::::::: APPLICANT/ APPELLLANT

VERSUS

1. **THE ELECTORAL COMMISSION**
2. **MICHEAL WERIKHE KAFABUSA ::::::::::::::::::::::: RESPONDENTS**

CORAM: HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

HON. LADY JUSTICE ELIZABETH MUSOKE, JA

HON. MR. JUSTICE PAUL KAHAIBALE MUGAMBA, JA

JUDGMENT

This is a matter where upon consent of the parties to the appeal, three applications No. 12 of 2017, No. 21 of 2017 and No. 23 of 2017 all arising out of Appeal No. 81 of 2016 were consolidated.

The background to this appeal however is that the appellant and the Second respondent contested with four other candidates to wit, Mauso Andrew, Watiti W. Stephen, Woshale David and Wamagale Tonny for the post of Member of Parliament, Bungokho South constituency, Mbale District held on the 18th day of February, 2016. After the polling and vote counting exercise, the Electoral Commission declared the second respondent as the winner having polled the highest number of 24,046 votes against the appellant's 18,083 votes. The said results were published in the Uganda Gazette dated Third March 2016.

The appellant being aggrieved with the outcome of that election petitioned the High Court seeking declarations that the election was not conducted in compliance with the law and that the failure to do so, affected the overall results in a substantial manner. The appellant also alleged that the Second respondent had committed acts of bribery personally and through his agents and that the election was marred by violence and intimidation. The appellant also sought that the election be annulled, a fresh election be conducted and costs of the petition be awarded.

The following issues were agreed to by the parties for determination by this Court:

1. Whether this is a proper case for grant of leave to extend time for filing the record of appeal or one that merits striking out of the appeal.

2. Whether the learned Judge erred in law and fact when she refused to admit declaration of results forms of the constituency, the subject of the challenged election as supplied by the Electoral Commission and thereby denied the petitioner valuable evidence.

3. Whether the learned Judge erred in law and fact when she refused to allow into evidence the electronic register of the constituency the subject of the electorate as supplied by the Electoral Commission and thereby denying the petitioner crucial evidence.

4. That the learned Judge erred in law and fact when she ruled that the appellant had not pleaded illegal use of Government resources.

5. The learned Judge erred in law and fact when she failed to properly evaluate the evidence on record and thereby arrived at a wrong conclusion

Representation

Mr. Alex Luganda from M/s Luganda, Ojok & Co. Advocates appeared for the appellant at the hearing while Mr. Joseph Kyazze from M/s Magna Advocates represented the 1st respondent. The Second respondent was represented by four advocates; Mr. Ambrose Tebyasa from M/s Ambrose Tebyasa & Co. Advocates; Mr. Evans Ochieng, Mr. Geoffrey Odur and Mr. Luyimbazi Nalukola from M/s Ochieng & Co. Advocates.

We shall now proceed to consider submissions of the parties and determine the grounds of appeal.

Ground 1:

Whether this is a proper case for grant of leave to extend time for filing the record of appeal or one that merits striking out of the appeal.

Arguments for the Appellant

Counsel for the appellant, submitted that this is a proper case for grant of leave to extend time for filing the record of appeal. Counsel relied on the affidavit deponed by appellant and submitted that the 30 days under Rule 31 of the **Parliamentary Elections (Election Petition) Rules S. I 141-2** from the date of filing the memorandum of appeal and within which the record ought to have been filed started running on the 30th August 2016 and expired on the 30th September 2016.

Counsel argued that from 30th August 2016, when the appellant was by law supposed to have filed the record of appeal in Election Petition Appeal No. 81 of 2016, he exercised vigilance and diligence to obtain the record of proceedings and certified judgment but was unsuccessful because court had not yet availed the same.

Counsel further submitted that the **Parliamentary Elections Petition (Production of the Record of Appeal) Rules SI 141-4** places the duty of the preparation of the record of appeal on the Court and not the intending appellant. Counsel emphasized that the appellant did what was plausible in the circumstances as seen by the correspondences and that the Registrar equally notified him that the court was not ready with the record.

It was also submitted for the appellant that the appellant's inability to meet the timelines set by the law was occasioned by the failure of the trial court to avail the record of proceedings in time and that since the averments were not challenged or controverted by the respondents to prove that the record was ready by the 30th September 2016 when the time expired, this Court should extend time/ validate the late filing of the record of appeal. Counsel also prayed that the costs abide the outcome of the appeal.

Arguments for the Second & Third Respondents

It was the respondents' case that the appellant failed to exercise due diligence in the prosecution of this appeal, was negligent, reckless and is guilty of dilatory conduct which is inexcusable. q

The respondents contend that the last action taken by the appellant through his lawyer was the letter filed on 20th September 2016 and no explanation has been given for the lack of action between 20th September and February 2017 (more than 3 months) when the appellant retained new lawyers. Counsel submitted that this constitutes gross negligence and a complete lack of interest in the case on the part of the appellant. Counsel further submitted that the appellant sat on his rights even after

ascertaining the threat paused by his counsel's alleged inactivity or disinterest in his appeal.

It was also the respondents' case that much as the appellant claims he was let down by his former lawyer who advised him to withdraw the appeal, he does not indicate that he ever acted promptly thereafter in filing the record. Rather, counsel contended that the appellant only filed the record as late as 8th June 2017 at the prompting of the respondents' applications to strike out the appeal.

Counsel rebutted the appellant's arguments by submitting that it is now settled law that it is the duty of the intending appellant to actively take the necessary steps to prosecute his/her intended appeal. In this respect counsel relied on the case, **Kakembo Mansur Jamir v Bogere Susan Nsensebuse EP Application No. 75 of 2016** which was cited in **Kasibante Moses v Katongole Singh, Court of Appeal Election Application No. 07 of 2012.**

The respondents' counsel further submitted that any contention by the appellant that the default did not cause any prejudice to the respondents is untenable as the rules require expeditious disposal of election appeals. He added that the rules must be complied with. Counsel cited the case of **Abiriga Ibrahim vs Musema Mudathir Bruce EPA No. 24/ 2016 (COA)**

Counsel prayed that this Court be pleased to dismiss the application for extension of time and allow the applications to strike out the appeal with costs.

Decision of Court

We have carefully considered the submissions from all counsel and the critical issue here is whether the facts of this application satisfy the conditions for grant of leave for extension of time within which to file the record of appeal or grant of an order to strike out the appeal.

The application for extension of time was brought under the provisions of Rules 5, 42(2), 43(1) & (2), 44 and 83(3) of the **Judicature (Court of Appeal Rules) Directions, SI 13-10. Rule 5** of the Rules of this Court provides that:

"5. Extension of time

The Court may, for sufficient reason extend the time limited by these rules or by any decision of the Court or of the High Court for the doing of any act authorized or required by these rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these rules to any such time shall be construed as a reference to the time as so extended."

The application is supported by an affidavit of Mr. Ben Martin Wanda, the appellant herein dated 14th March 2017. Briefly, the grounds of his application are that:

"

1) On the 19th August 2016, judgment was passed in Election Petition No. 15 of 2016 at Mbale against the appellant in open court by Justice Margaret Oumo Oguli but the parties were not availed a typed copy of the judgment.

2) The appellant filed a Notice of Appeal with the High Court registry on the 2Third August 2016 and the same filed in Court of Appeal on the 30th August 2016.

3) The appellant filed a letter requesting for typed proceedings and certified judgment through his lawyers M/s Rwakafuuzi & Co. Advocates on the 2Third August 2016 and follow up letters were written to the court registrar on the 26th August 2016 and 20th September 2016 for the typed copy of proceedings to enable the appellant take necessary steps to prosecute his appeal in vain.

4) On the 21st September 2016, the D/Registrar Mbale High Court responded to the appellants lawyers indicting that the typed proceedings was not ready as the trial Judge had gone with the court file.

5) The applicant has been making several visits and phone calls to his lawyers, M/s Rwakafuuzi & Co. Advocates to inquire about the progress of the record of proceedings from court but has been informed that the same is not yet ready..."

On the other hand, the respondents seek to have this appeal struck out for non-compliance with the timeline under Rule 31 of SI 141-2.

Rule 31 of the **Parliamentary Elections (Interim Provisions)(Election Petition) Rules, S. I 141-2** provides:

"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."

The respondents pray that the appeal be struck out and further rely on Rule 82 of the Rules of this Court which provides that:

" 82. Application to strike out notice of appeal or appeal

A person on whom a notice of appeal has been served may at anytime, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time."

We have established the following timelines in this matter:-

a) On the 19th August 2016, judgment was delivered in Election Petition No. 15 of 2016 at Mbale High Court.

b) On the 23rd August 2016, the appellant's lawyers filed the Notice of Appeal in the High Court at Mbale and subsequently served it on the respondents' lawyers.

c) On the same day, 23rd August 2016, the appellant through his lawyers filed a letter to the D/Registrar Mbale requesting for a typed copy of the proceedings and certified judgment.

d) On the 26th August 2016, the appellant through his lawyers filed a further follow up letter requesting for the record of proceedings.

e) On the 30th August 2016, the appellant filed a Memorandum of Appeal even before obtaining the typed copy of proceedings or judgment and the same was served on the respondents' advocates.

f) The 30 days as by law required for filing the record of appeal started running on the 30th August 2016 and expired on 30th September 2016.

g) The appellant later obtained the record personally through his advocates in February 2017.

h) The record (Volume 1 & 2) was finally filed in this Court on 8th June 2017 after about 4- 5 months of obtaining the record. It appears the record had been prepared by the High Court and that it was ready by 16th December 2016 since the applicant deponed in para. 13 of his affidavit in support of the application to extend time that the record had a stamped date of 16th December 2016.

In paras. 8-10 of his affidavit, the appellant deponed that in February 2017, he personally decided to go to Mbale High Court where upon inquiry he was told that the record was ready but that he had to inform his lawyers to pick it. The appellant also deponed that after contacting his lawyer Mr. Kwemara Kafuuzi to inform him about the same, his lawyer instead advised him to withdraw the appeal which made him feel betrayed

as he had all along been getting feedback that the record was not yet ready.

On that basis, the appellant further deponed that he had to hire the services of new counsel, M/s Luganda, Ojok & Co. Advocates who then obtained the record. The appellant therefore faults his former counsel for letting him down. These facts are not contradicted.

The case of **NICHOLAS ROUSSOS V GULAM HUSSEIN HABIB VIRANI & ANOR CIVIL APPEAL NO.9 OF 1993** laid down the grounds which may amount to sufficient cause and these are:

I. A mistake by an advocate though negligent may amount to sufficient cause

II. Ignorance of procedure by an unrepresented defendant may amount to sufficient cause

III. Illness by a party may also constitute sufficient cause

IV. But failure to instruct an advocate is not sufficient cause.

The authority above shows that mistake of an advocate though negligence amounts to sufficient cause. Counsel for the respondents argued that notwithstanding that the appellant claims he was let down by his former lawyer who advised him to withdraw the appeal, he does not indicate that he ever acted promptly thereafter in filing the record. We disagree. We find that it would be unfair to conclude that the appellant sat on his rights as he personally went to inquire about the availability of the record from Mbale High Court. The applicant also later hired the services of new counsel who filed the record on 8th June 2017.

Unfortunately, by February 2017 the time to file the record (30th September 2016) had run out yet the certified copy of the record was ready by 16th December 2016. We believe this is a mistake of counsel which should not be visited on the Applicant.

In the premises, we grant the order extending time within which to file the record and order that the late filing be validated. Given our findings above, we shall now proceed to address the appeal.

Having dealt with the above interlocutory matter, we shall now address the substantive appeal. In this regard we start restating our duty in such an appeal.

Duty of the Court

This is a first appeal. Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions (S.I. 13-10 hereinafter referred to as "the Rules of this Court") provides:

> "*... (1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—*
>
> (a) *reappraise the evidence and draw inferences of fact; and in its discretion, for sufficient reason, take additional evidence...*"

This provision was further interpreted in the case of **Mugema Peter V Mudiobole Abedi Nasser** Election Petition Appeal No. 30 of 2011 where it was held that:

> *"... on first appeal, an appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to re-hear the case and to consider the materials before the trial judge. The appellate court must then make up its mind by carefully weighing and considering the evidence that was adduced at trial..."*

It is also necessary to bear in mind that in an election petition, the bulk of the evidence is adduced by affidavit. In this regard the Justices in the **Mugema Peter case** (supra) further held:

"...The duty of a first appellate court to re-appraise or re-evaluate the evidence applies to both oral testimony of a witness as well as to affidavit evidence where the deponent is not cross-examined on the evidence in court, the issue of demeanor of a witness does not arise...the court ought to have cautioned itself that in re-appraising and re-evaluation the evidence adduced at trial, regard must be had to the fact that witnesses, though not necessarily always, tend to be partisan in supporting their candidates against the rivals in the election contest. This may result in deliberate false testimonies or exaggerations and to make the evidence adduced to be subjective. This calls upon court to have the authenticity of such evidence to be tested from an independent and neutral source by way of collaboration..."

Burden and Standard of proof

The **Mugema Peter case** (supra) also sets out what the burden and standard of proof is in election petitions as follows

"...the burden of proof lies on the petitioner to prove the assertions in the election petition and the standard of proof required is proof on a balance of probabilities according to Section 61 (1) and (3) of the Parliamentary Elections Act...Though the standard of proof is set by the statue to be on a balance of probabilities, because of the public importance of an election petition, the facts in the petition must be proved to the satisfaction of the court. A petitioner has a duty to adduce credible and/or cogent evidence to prove the allegations to the stated standard of proof..."

With the above position of the law in mind, we shall now proceed to resolve the grounds in this election appeal.

Grounds 2 & 3:

Whether the learned Judge erred in law and fact when she refused to admit declaration of results forms of the constituency,

the subject of the challenged election as supplied by the Electoral Commission and hereby denied the petitioner valuable evidence.

Whether the learned Judge erred in law and fact when she refused to allow into evidence the electronic register of the constituency the subject of the electorate as supplied by the Electoral Commission and thereby denying the petitioner crucial evidence.

Arguments for the Appellant

Counsel for the appellant contended that the trial Judge erred in refusing the appellant's prayer to admit the certified copies of the Declaration of Results Forms (DRFs) for Bungokho South constituency as well as the electronic voters register.

He submitted that this denial greatly prejudiced the appellant's case because very vital evidence central to the determination of the issues in the petition was not put on record and could not form part of what the trial Judge evaluated thus breaching the appellant's right to a fair hearing. Counsel buttressed his argument with the case of **Kakooza John Baptist vs Electoral Commission & Another, SC Election Petition No. 11 of 2007** which emphasizes that DRFs are a crucial part of the record of elections because they contain data as to the votes cast at each polling station. Counsel also relied on the case of **Nuru Kaaya vs Crescent Transportation Limited, SCCA No. 6 of 2002** where it was held that the essence of a trial was that both parties should be heard and unless a party was deliberately dragging the proceedings in a trial, such a party ought not to be denied an opportunity to present its case. (see also: **Kikulukunyu Faisal v Muwanga Kivumbi, CA EPA No. 44 of 2011, Osuna v The State (2010)** and **Masiko Winfred Komuhangi v Babihuga J. Winnie, Court of Appeal Election Petition Appeal No. 9 of 2002**)

Counsel submitted that in view of the authorities cited, the trial Judge erred in rejecting the appellant's application to tender in the said evidence and that had she allowed the appellant to tender in the electronic voters register and DR Forms, her concern that the petitioners' witnesses had not proved they were voters, would have been addressed.

Counsel prayed that this ground be allowed.

Arguments for the Second & Third respondents

Counsel for the respondents agreed with the appellant's interpretation of the law regarding the purpose and importance of certified Declaration of Results Forms (DRFs) copies as well as on the principles of a right to be heard and evaluation of all evidence before the court. However, counsel contended that the pertinent question for determination is whether there was a proper application under the law to admit such evidence in the circumstances.

Counsel argued that counsel for the petitioner does not make mention of any formal application made to adduce this evidence, any grounds made in support of such application, the response in opposition to the application or the Judge's decision. Counsel further argued that counsel for the appellant does not demonstrate how the decision of the Judge in rejecting such evidence was erroneous so as to constitute prejudice to the appellant.

Instead, counsel submitted that the learned Judge acted within the confines of the law to reject the impugned evidence since the known modes of adducing evidence under the **Parliamentary Elections (Interim Provisions) (Election Petition) Rules, SI No. 142-2** were not followed by the appellant.

Counsel prayed that this ground be dismissed for lack of merit.

Decision of Court

In resolving this ground, we have carefully studied the record and the proceedings at the High Court.

The admission of evidence in election petitions is regulated principally by the **Parliamentary Elections (Interim Provisions) (Election Petition) Rules, SI No. 141-2** which provide for two modes of adducing evidence in an election petition. Rule 15(1) provides:

> ***"15. Evidence at trial.***
>
> *(1) Subject to this rule, all evidence at the trial, in favour of or against the petition shall be by way of affidavit read in open court.*
>
> *(2) With the leave of the court, any person swearing an affidavit which is before the court may be cross-examined by the opposite party and re-examined by the party on behalf of whom the affidavit is sworn.*
>
> *(3) The court may, of its own motion, examine any witness or call and examine or recall any witness if the court is of the opinion that the evidence of the witness is likely to assist the court to arrive at a just decision.*
>
> *(4) A person summoned as a witness by the court under sub rule (3) of this rule may be cross-examined by the parties to the petition."* ***(Emphasis added)***

The case of **Mugema Peter (Supra)** defines an affidavit as a statement/ declaration in writing made on oath/affirmation before one having authority to administer an oath/ affirmation. It is made exparte, unlike evidence given orally in open court in the personal direction and superintendence of a judge.

It was further held therein that unless it is by agreement of the concerned parties or by some legislation, evidence in a cause shall be by affidavit alone, a party may supplement affidavit evidence by viva voce evidence in court. Also, where court finds affidavit evidence to be unsatisfactory, it has discretion to exclude the affidavits and direct the witnesses to be examined orally notwithstanding any agreement to the contrary.

In the instant case, the appellant claims to have pleaded the documents in their petition but that the trial Judge did not consider it. Page 1 of the record reads:

"...The documents were pleaded but submitted late

With reference to paragraph 7 of the petition together with paragraph 16 of the affidavit in support, it was anticipated that documents would come.

Court should look at each Declaration of Results form during evaluation"

In paragraph 7 of the petition together with paragraph 16 of the affidavit in support, the documents were pleaded in anticipation that they would be availed by the Electoral Commission (Second respondent) according to 'Annexture H' (a letter by the appellant to the Second respondent requesting a list of documents to be relied on at the trial).

Counsel for the appellant did not specify which Declaration of Results Forms the trial Judge rejected and how relevant these were to the appellant's case. The only other document mentioned is a voter's register which does not appear in the record of appeal. We believe that the DRFs which the appellant sought to tender in were Annextures "D" (Return form for Transmission of Results), "E" (DRF for Makhumbo SDA Church Polling Station) and "F" (DRF for Green Pastures SS Polling Station).

The said DRFs were neither attached to the affidavit in support nor was a supplementary affidavit sworn to introduce the same. The appellant did not bring any other witness to introduce the said documents. In this regard we agree with the submissions of counsel for the respondents that counsel for the appellant attempted to turn himself into a witness by tendering the said documents himself which offends **Rule 15** of the **Parliamentary Elections (Interim Provisions) Rules, SI No. 141-2** on the procedure of adducing evidence in election matters.

Furthermore, much as counsel for the appellant claims to have obtained the evidence after filing the petition, the record shows that the certified copies were availed on the Second May 2016 and that on Third May 2016 counsel for the appellant filed an affidavit in rejoinder but opted not to attach and/ or include this impugned evidence; which was already in his possession.

The dilemma the trial Judge faced, as we do now, is the timing of tendering in these documents. This was done during re-examination which offends the known rules of civil procedure. We see this at page 16 of the record where the trial Judge said:

> *"Court: This is very absurd, you don't introduce new documents in re-examination"*

According to **Rule 17 of SI 141-2,** the practice and procedure in respect of a petition shall be regulated, as nearly as may be, in accordance with the Civil Procedure Act and the Rules made under that Act relating to the trial of a suit in the High Court, with such modifications as the court may consider necessary in the interests of justice and expedition of the proceedings.

In any event, the court allowed the appellant to rely on the DRFs pleaded and attached to the petition and supporting affidavits. None seems to have been rejected on account of being uncertified thus in our finding, no prejudice was suffered by the appellant.

In the premises, this ground fails.

Ground 4

That the learned Judge erred in law and fact when she ruled that the appellant had not pleaded illegal use of Government resources

Arguments for the Appellant

Counsel submitted that the appellant in para. 12 of his petition had pleaded illegal use of Government resources by the second respondent to further his campaign by using motor vehicle Reg. No. UG 0427T which is contrary to Section 25 of the Parliamentary Elections Act. Counsel also submitted that this allegation was supported by evidence of the appellant's witnesses namely Mayeku Simon's affidavit (para 4) and Busiima Peter's affidavit (para 5) which were to the effect that on 14th January 2016, the Second respondent held a rally at Lukhongo subcounty and came in a Government vehicle Reg. No. UG 0427T.

Counsel faulted the trial Judge for failing to make a finding on this allegation on the basis that the illegal use of Government resources was not pleaded yet it was. He argued that the Second respondent did not even deny using the said Government vehicle but states that he was at Lukhongo on the said day on invitation by a local NGO but did not hold a rally.

Counsel submitted that it is important to note that the Second respondent was not the line minister and he did not adduce evidence to prove that he was on official duties as a minister moreover during a period when campaigns were prohibited.

He prayed that this ground be allowed.

Arguments for the Second and Third respondents

Counsel for the respondents supported the learned Judge's finding and submitted that counsel for the petitioner first sought to adduce evidence of illegal use of Government resources in the affidavits of Mayeku Simon and Busiima Peter yet the issue had neither been mentioned in the petition nor in the supporting affidavit.

Counsel further argued that even when the appellant himself was cross-examined, he conceded that the issue of illegal use of Government vehicles had not been pleaded. Counsel relied on **Rule 4(2)** of the **Parliamentary Elections (Interim Provisions) Rules, SI No. 141-2** which requires a petition to contain a statement of grounds relied upon to sustain a prayer of a petition.

Counsel faulted appellant's counsel for instead attempting to adduce evidence of illegal use of Government resources in para. 3 of his 'Rejoinder to the second Respondent's Answer to the Petition' however it was held in the case of **Hon. Otada Sam Amooti Owor vs Taban Iddi Amin & Anor, EPA No. 93 of 2016,** a rejoinder can only be confined to clarifying and responding to fresh matters raised in the reply but not to introduce new and fresh causes as the appellant sought to do in this matter.

Counsel invited this Court to dismiss this ground of appeal.

Decision

We have also considered the submissions of both parties on this point. The relevant legal provision on use of state resources which the trial Judge rightly considered, is **Section 25(2)** of the **Parliamentary Elections Act** is to the effect that where a candidate is a minister or holds any other political office, he or she shall during the campaign period restrict the use of the official facilities ordinarily attached to his or her office to the execution of his or her official duties.

Counsel for the appellant faulted the trial Judge for finding that the illegal act of using Government resources had not been pleaded and referred to Para. 12 of the petition which states that:

"Your petitioner shall aver and contend that the Second respondent used the levers of his office and state resources to his advantage at the expense of the petitioner when during campaigns and even on the eve of elections he purported to be executing a rural electrification program of the

Government of Uganda including but not limited to delivering and erecting electricity transmission and distribution posts and transformers"

The trial Judge on this point held that:

"However the use of water and a motor vehicle was never pleaded.

That allegation therefore being a new allegation led to a new cause of action which was brought out of time and time and it could not be introduced through the rejoinder to the response to the answer to the petition but could only be introduced in the original pleadings by way of amendment within 30 days after gazetting as required by section 60(3)of the PEA

In view of the above, court is of the considered opinion that since the issue of the use of a motor vehicle and the water project was introduced after the filing of the original pleadings, Court cannot entertain that allegation as this is a new cause of action being brought out of the stipulated time. I am fortified in my finding by the case ***Mathina Bwambale vs The Electoral Commission and Cryspus Kiyonga, Election Petition No. 7 of 2006***"

We agree with the trial Judge's finding that the two issues of use of public resources particularly launching a water project and Government vehicle was pleaded through a rejoinder hence the Court could not consider them. These are totally different particulars from those to do with a rural electrification program.

It was therefore proper for the trial Judge not to consider the affidavits of Busima Peter (para 5) and Mayeku Simon (paras. 4, 6 & 7) which were meant to be the evidence on the use of Government vehicle and launch of a water project.

We accordingly dismiss this ground of appeal.

Ground 5

The learned Judge erred in law and fact when she failed to properly evaluate the evidence on record and thereby arrived at a wrong conclusion

Arguments for the Appellant

Counsel for the appellant faulted the trial Judge for failing to properly evaluate evidence on record. He contended that the Judge erred in finding that there was no evidence that the people who lined up and received a bribe were voters.

Counsel submitted that since the evidence in election matters is by way of affidavit and since the Second respondent did not in his affidavit in reply dispute the status of Mutenyo Richard as a voter at Angalia social centre, Musese parish, Busiu subcounty in Bungokho South constituency, it was highly speculative of the trial Judge since the respondents or their witnesses had not rebutted that fact.

Counsel submitted that the trial Judge should not have considered the bribery as the usual bribery of an individual but bribery of a group and relied on the case of **Bakaluba Peter Mukasa v Nambooze Betty Bakileke (SC EPA No. 04 of 2009)** which is to the effect that it is trite that such a group of people in a village will have voters and non voters. He thus argued that it was inconceivable that the appellant had to prove that each person who lined up as a group and from the respective villages was a voter.

Regarding the finding by the trial Judge that the appellant's witness Nenkambi George could not have witnessed all the three activities on the same day at different locations, counsel submitted that there was no evidence adduced to prove that the said witness could not be in three places in a single day and witness all the incidents. He argued that counsel for the respondent submitted from the bar and the trial judge made a finding based on evidence from the bar which is erroneous.

Counsel prayed that this ground be allowed.

Arguments for the Second and Third Respondents

Counsel rejected the arguments by appellant's counsel based on the authority of **Mukasa Anthony Harris vs Dr. Bayiga Michael Philip Luluwe, SC EPA No. 18/2007** that in the absence of an affidavit disputing the status of Mutenyo and other persons allegedly bribed, it is not necessary to prove that the alleged recipients of the alleged bribe are voters.

Counsel instead submitted that the appellant's counsel has not appreciated the law on burden and standard of proof of allegations of bribery, let alone, the essential ingredients thereof. Counsel relied on the case of ***Kamba Saleh Moses v Hon Namuyangu Jennifer EPA No. 0027/ 2011*** which puts the burden of proof upon the petitioner alleging acts of bribery.

Regarding Nenkambi George, counsel submitted that the witness was simply a partisan witness who was doing his best to favour his preferred candidate. Counsel further submitted that the trial judge was right in taking a cautious approach in dealing with the evidence of the said witness.

Counsel prayed that this ground, being devoid of merit should be dismissed by this Court.

Decision

Regarding this ground, we find that the arguments of counsel for the appellant simply do not hold. We agree with counsel for the respondent based on the authority of ***Kamba Saleh Moses v Hon Namuyangu Jennifer (supra)*** that the burden of proof lies on the petitioner invoking bribery to prove that the money or gift was given to a voter. We find that it is absolutely necessary to prove to the satisfaction of court by those alleging acts of bribery that the people bribed were registered voters. As held by the trial Judge, Mutenyo Richard and others alleging bribery

should have attached a voter's card or produce a voter's register to the affidavits they swore in support of the petition.

We find that the appellant did not adduce any cogent evidence to prove that Mutenyo Richard and others alleging bribery were registered voters. Court cannot merely presume them to be registered voters considering that none of them swore an affidavit to corroborate the allegations and there was no independent evidence that court could rely on.

The trial Judge was further faulted for finding that Nenkambi George could not have witnessed all the three activities on the same day at different locations. We find that in election matters such as this, it is necessary to exercise caution while examining each allegation of bribery and to subject it to high level of scrutiny as well as being alive to the fact that in election petitions in which the prize is political power, witnesses may easily resort to lies in their evidence in order to secure judicial victory for their preferred candidate. The trial Judge therefore had to be cautious in relying on the evidence of Nenkambi George.

In this case, we agree with the trial Judge's finding because having evaluated the evidence, it was unlikely that one individual could have witnessed all the three activities on the same day at different locations, in the absence of any other evidence in corroboration.

This ground also fails.

Accordingly, this appeal stands dismissed. We uphold the trial Judge's decision and order that the Second respondent is confirmed as the validly and lawfully elected Member of Parliament for Bungokho South constituency. Costs in this Court and in the High Court are to be borne by the appellant.

We so order

Dated at Kampala, this ..... 18th day of ..... December 2017.

HON. JUSTICE GEOFFREY KIRYABWIRE

Justice of Appeal

HON. LADY JUSTICE ELIZABETH MUSOKE

Justice of Appeal

HON. JUSTICE PAUL KAHAIBALE MUGAMBA

Justice of Appeal

27/12/17

Alex ~~Rugaanda~~ Luganda for the Appellant

Appellant is in court

Ochiengh Evans Rogeri Tibagase

Ambrose & Ojok Geoffrey [illegible] der

for 2nd Respt

2nd Respt is in court

Joseph Kyazze for the 1st Respt

C/a Melissa Mutsamale

Luganda Intpt.

cond

cond.

22/12/17.