THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION APPEAL No. 03 OF 2017

(ARISING FROM CIVIL APPEAL NO. 86 OF 2016)

NAKALYANGO MILLY ..... APPELLANT

VERSUS

NAKASOLYA JANE LUBEGA ..... RESPONDENT

CORAM: OWINY - DOLLO, DCJ; MUSOKE, & CHEBORION BARISHAKI, JJA.

JUDGMENT OF THE COURT

**Introduction**

This second Appeal lies from the decision of the High Court of Uganda (***Basaza- Wasswa, J.***), sitting as the first appellate Court with regard to the decision of the Chief Magistrate's Court of Makindye, which was the Court of first instance in the matter.

## Background

The appellant herein, who was also the appellant at the High Court, and the respondent herein, contested for the seat of Woman Councillor Kibuye 1, Makindye West Constituency, Kampala District; and at the end of the vote count, the Electoral Commission (E.C.) returned the appellant as the duly elected candidate for the contested seat. The respondent filed a Petition, against the Electoral Commission and the appellant, in the Chief Magistrates Court of Makindye, in which she challenged the outcome of the election; and particularly so with regard to the results of two out of twenty three

polling stations wherein the appellant was recorded as having obtained more votes than her.

The learned Chief Magistrate allowed the Petition; and set aside the return of the election as was declared by the Electoral Commission. He then declared the petitioner therein (respondent herein) the duly elected Woman Councillor for Kibuye 1. He also ordered the respondent therein (appellant herein) to pay the costs of the Petition.

On appeal to the High Court, the learned Judge upheld the learned Magistrate's finding that the appellant was not validly elected as the LC III Woman Councillor for the contested seat. She however set aside the decision of the trial Chief Magistrate by which he had instead declared the petitioner (respondent herein) the validly elected Woman Councillor for the said seat. In the event, she set aside the election return, declared the seat vacant, and ordered the Electoral Commission to hold fresh elections. She varied the trial Court's order for costs; and instead condemned the appellant herein to pay 50% of the costs of the petition. As for the costs of the Appeal, she ordered each party thereto to bear their own costs.

**Grounds of Appeal**

The two grounds of Appeal, as are stated in the Amended Memorandum of Appeal, are that:

1. The learned Judge erred in law when she ordered the appellant to pay 50% of the costs in the lower Court, and denied her costs in the High Court.
2. The learned Judge erred in law when she nullified the election results, and declared the seat vacant without justification for so doing.

**Issues**

The issues that arise from the said grounds therefore are:

1. Whether the learned trial Judge erred in law and fact when she ordered the appellant to pay 50% of the costs in the lower Court; and also denied her costs in the High Court.
2. Whether the learned first appellate Judge erred in law, when she nullified the election results without justification.
3. What are the remedies available, if any?

**Representation**

Mr. Mwebesa Obed represented the appellant; while Mr. Hamuzah Kyamanywa, who was holding brief for Mr. Mohammed Mbabazi, represented the respondent.

**The case for the appellant**

**Issue No. 1:**

Counsel for the appellant argued that the learned Judge did not give reasons for merely varying the award of costs made by the trial Court, by condemning the appellant to pay half the costs in the lower Court. Counsel submitted that the learned Judge did not blame the appellant for any wrongdoing; hence, she wrongly condemned her to pay costs of the Petition. It was his contention that the learned Judge did not exercise her discretion judiciously as she did not give any reason for ordering the appellant to pay costs at all. He thus prayed that the judgment of the High Court be set aside; and this Appeal be allowed with costs to the appellant.

**Issue No. 2:**

Counsel pointed out that the major issue of contention here was the two DR Forms, respectively for *'Under Mango Tree M-NAM'* and *'Under Mango Tree N-NAM'* polling stations. It was alleged that the

DR Form for *M-NAM*, which showed that the appellant got 300 votes and the respondent 83, was a forgery. To this, the learned trial Judge found as follows:

> *"After careful analysis of the above evidence as a whole, I am not satisfied that it was proved by the Petitioner (Respondent in this appeal) that there was an alteration of votes in the certified DR Form X from 69 to 300 votes for the appellant, as alleged. The evidence was the word of one candidate; the Respondent (the Petitioner) and her agent with another, against the word of the other candidate; the Appellant (the 2nd Respondent) and her agent. This evidence cannot be relied upon."*

In reaching this decision, the learned Judge relied on an authority of this Court and observed:

> *"Taking a leaf from* ***Achieng Sarah Opendi & Anor Versus Ochwo Nyakecho Keziah: Election Petition Appeal No. 39 of 2011****, unless there is other cogent evidence, it is impossible to tell which witnesses were telling the truth. I did not find such cogent evidence. The petitioner failed to prove that there was alteration of results from 69 to 300 votes for the Appellant. She did not even register her complaint anywhere."*

Accordingly then, Counsel faulted the learned Judge for setting aside the election; and for applying the substantiality test, since she had found that there had not been any forgery. Hence, it was wrong for the judge to order the appellant to vacate her seat.

**The case for the respondent**

**Issue No. 1:**

For his part, counsel for the respondent argued that the appellant only succeeded in part; meaning that the appeal in fact failed in

part; which would have led to an award of 50% costs to each party to the Petition in the 1st appellate Court. It was counsel's contention that the first appellate Court in its discretion made the necessary judicial decision to order that both parties should bear their costs to avoid making Court orders in vain; namely, that each party pays the other the same amount in costs. He submitted that since the Appeal had failed, the appellant could not get any remedy. He therefore prayed that this Appeal be dismissed with costs; and the orders of the first appellate Court be upheld.

**Issue No. 2:**

Counsel submitted that the first appellate Court properly evaluated and analysed the evidence on record, and supported that analysis with the relevant authorities. He contended that the learned Judge rightly found that there was non-compliance with the electoral laws; which affected the results of the election as well as the will of the people substantially. He contended further that the Judge exhaustively analysed the '*Certified DR Form X*' which the Electoral Commission had relied on to declare the appellant the validly elected Woman Councillor; following which she arrived at the right decision. He prayed that this Court finds that the first appellate Court properly evaluated the evidence, and correctly applied the law, and so it justifiably nullified the election results.

**Duty of Court**

This being a second appeal, the duty of this Court is well established. In ***Kifamunte Henry v Uganda Criminal Appeal No. 10 of 2007 and Banco Arabe Espanol v Bank of Uganda SCCA No. 8 of 1998***, Court held:

> *"The first appellate Court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding*

*the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses. However there may be other circumstances quite apart from manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen.* ***See Pandya vs. R. (1957) E.A. 336, and Okeno vs. Republic (1972) E.A. 32.***

The Court further stated as follows:

*"On second appeal the Court of Appeal is precluded from questioning the findings of fact of the trial Court, provided that there was evidence to support those findings, though it may think it possible, or even probable, that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law:* ***R. vs. Hassan bin Said (1942) 9 E.A.C.A. 62."***

We shall thus proceed to consider this appeal guided by the principles enunciated in the authority cited herein above. We shall consider the second issue framed in the appeal - that on substantiality - first; and then conclude with consideration of the issue of costs.

**Substantiality test:**

For this, we refer to and rely on the case of ***Kiiza Besigye v Yoweri Kaguta Museveni; Presidential Election Petition No. 1 of 2016***, where the Supreme Court stated that:

*"Court has to evaluate the whole process of the election to determine how it affected the result and then assess the degree of the effect.*

*There must be cogent evidence, direct or circumstantial to establish not only the effect of non - compliance or irregularities but to satisfy Court that the effect was substantial." (sic)*

This being a second appeal, and thus it is not for this Court to re-evaluate the evidence on record, we will consider how the learned Judge arrived at the decision she did. We note that the learned Judge found that there was no proof that the DR Forms for the only polling station in contention - to wit, '*Under Mango Tree M-NAM*', were forged. She had this to say:

"*(a) I fault the learned trial Magistrate for his finding that the certified DR Form X was a forgery. There was no evidence of any alteration or falsification of the Appellant's results on the certified DR Form X.*

*(b) As stated earlier in paragraphs (22) and (23) of this judgment, since the number of 300 votes recorded as garnered by the Appellant exceeded the number of 257 voters who voted that day, Sec. 130(1) and (2) of the Act that requires that only one vote is cast per voter, was flouted.*

*(c) In view of (a) and (b) above, the integrity of the results was diminished and the votes were rendered doubtful. An inference can be drawn that tghere was an election irregularity of either multiple voting, ballot stuffing or vote pre-ticking.*

*(d) The Electoral Commission did not conduct the elections at the contested polling station in accordance with the law. (Art. 68*

*(4) (d) of the Constitution and Sec. 12(1)(i) of the Electoral Commission Act)."*

We are in agreement with the learned judge on her finding that while there is evidence of fraud, nonetheless there was clear evidence of an irregularity in the conduct of the elections in issue, rendering the integrity of the results of a diminished value. The learned judge thus proceeded to determine the effect of the irregularity on the outcome of the election. She had this to say:

*"Guided by and applying the decision in the Joy Kabatsi case (supra), in the present matter, the Appellant (Respondent in the lower Court) was runner up with 2,032 votes as per the tally sheet of the Constituency. The margin between them was 248 votes. If deductions are made by deducting the votes recorded for each candidate from the certified DR Form X, that is by deducting 300 votes from the Appellant and 83 votes from the Respondent, their scores will be 1980 and 1949 respectively. This is magnified by the backdrop of the doubtful results also recorded at Seguya (A-3) Polling Station.*

*On the basis of the above [the] above, I hold that there was failure by the Electoral Commission to conduct the election of this Constituency for L.C. III Women Councillor in accordance with the law; and the non compliance affected the result of the election in a substantial manner. The will of the people was not established."*

Based on the above finding and reasoning, the learned judge made two decisions. First, she upheld the decision of the trial Court that the Appellant was not validly elected as the Councillor for the Constituency in issue, in the election under contest. Second, she reversed the trial Court's order substituting the Respondent therein as the duly elected Councillor; and instead nullified the elections

altogether, and and declared the seat vacant, with the consequence that she ordered for fresh elections for the seat. These are findings and a decision based on reasons, which we are unable to fault the learned judge on.

**Costs**

With regard to the issue of costs, the learned Judge made the following orders:

> *"5. Each party to this appeal shall bear her own costs considering that this Appeal is successful only in part. I set aside the order for costs in the lower court and substitute it with an order that the 2nd respondent: Nakalyango Milly (Appellant in this appeal) shall pay 50% of the costs in the lower court to the Petitioner: Nakasolya Jane Lubega (Respondent in this Appeal).*

From the above, it is evident that the learned Judge did not give a reason for ordering the appellant herein, to pay 50% of the costs in the lower Court. In this, we are guided by Section 27 (1) of the Civil Procedure Act, Cap 71, Laws of Uganda and the other relevant authorities. S. 27 (1) provides:

> *"Subject to any such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purpose aforesaid."*

In ***Impressa Infortunato Federic v Irene Nabwire (suing through her next friend Dr. Julius Wabwire) SCCA No. 3 of 2000,*** Kanyeihamba, JSC, stated thus:

*"In the instant case the Court of Appeal as the first appellate court considered and reevaluated the evidence before it and decided that the award of general damages should be reduced and held, rightly in my view, that the appeal was thereby partially successful. For that reason it ordered that each party should bear its own costs. This was an exercise of its discretion on the matter. It gave reasons for doing so. In the circumstances, I am unable to say that the discretion was exercised on wrong principles or was not based on good reason."*

In the case of ***Serunjogi James Mukubi v Lule Umar Mayiwa; Election Petition Appeal No. 15 of 2016,*** Court held that:

*"Determining as to who should bear costs is a discretionary matter which, like any discretion, must be exercised judiciously and ought not to be exercised against a successful party, except for good reason connected to the case. An appellate court will not, in normal circumstances interfere with the exercise of discretion by a trial court unless it is shown clearly that the exercise was unjudicial or wrong principles were followed. Where a trial court gives reasons which do not constitute good cause within the meaning of the section, the appellate court will interfere; and if no reasons are given, the appellate court will interfere if the order made was wrong."* (sic)

It is trite that the award of costs is a discretionary function of Court; but, as has now been settled, that discretion must be judiciously exercised, and reasons given for the award made. In the instant case, no reason was given by the first appellate Court for the award under contention. We note that no electoral offence was committed by the Appellant; and indeed, the irregularities that took place are attributable to the Electoral Commission. As such, we find

it unfair and also unjustifiable to condemn the Appellant to pay 50% of the costs in the trial Court as the learned Judge did. We must therefore interfere with the exercise of the discretion of the first appellate Court; as we indeed hereby do.

We are fortified in our decision by the position in ***Hon. George Patrick Kassaja v Fredrick Ngobi Gume; Election Petition Appeal No. 0068 of 2016,*** where this Court ordered each party to meet their own costs. Our ground for arriving at this decision is that no evidence was shown that, but for the appellant's conduct, this matter would not have been filed or even have been necessary.

In the result, we allow the Appeal and make the following orders:

1. The order of the learned judge of the first appellate Court nullifying the election for the Woman Councillor for Kibuye 1 in Makindye Division, Kampala District is hereby upheld.
2. The parties to this appeal shall meet their respective costs here, and in the Courts below.

Dated at Kampala this ..25th.. day of ..March,.. 2019

Alfonse C. Owiny - Dollo

**Deputy Chief Justice**

Elizabeth Musoke

**Justice of Appeal**

Cheborion Barishaki

**Justice of Appeal**