THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

EPP

CIVIL APPEAL NO 001 OF 2021

(CORAM: CHEBORION, MUSOTA AND MADRAMA, JJA)

HASHIM SULAIMAN} ..... APPELLANT

VERSUS

ONEGA ROBERT} ..... RESPONDENT

(Appeal from the judgment of Hon. Justice Oyuko Anthony Ojok in High Court of Uganda Holden at Arua Election Petition No. 001 of 2018 delivered on the 2nd of May, 2019)

JUDGMENT OF CHRISTOPHER MADRAMA, JA

The brief facts of this appeal are that the respondent petitioned the High Court for a declaration that the appellant was not at the time of his nomination and election qualified for election as a member of Parliament. Secondly, for a declaration that the 1st respondent was not validly elected as member of Parliament for Nebbi Municipality. Thirdly, for declaration that the petitioner was the validly elected member of Parliament for Nebbi Municipality. The petitioner/respondent also sought an order directing the recount of ballot papers, an order that the elections of the appellant be annulled and set aside and the petitioner/respondent be declared the duly elected member of Parliament for Nebbi Municipality and for costs of the petition. The learned trial judge allowed the petition and held that the appellant does not have the requisite academic qualifications of a minimum formal education of advance level standard to be eligible to stand for election as a member of Parliament. The court further directed fresh elections for Nebbi Municipality to be held and for costs to be granted to the petitioner.

The appellant was aggrieved and lodged this appeal on 4 grounds of appeal namely:

1. The learned trial judge of the High Court erred in law and in fact when he failed to properly evaluate the evidence on record thereby reaching a wrong conclusion.
2. The learned trial judge erred in law and fact when he held that because the appellant used different names during his academic life therefore he did not possess the requisite minimum formal education.
3. The learned trial judge erred in law and in fact when he failed to subject the evidence before him to the standard of proof required in parliamentary election petitions thereby reaching a wrong conclusion.
4. The learned trial judge erred in law and in fact when he annulled the election of the appellant as a member of Parliament of Nebbi Municipality.

At the hearing of the appeal the appellant was represented by learned counsel Mr Steven Kiyaga while the respondent was represented by learned counsel Mr Sekaggya Abu Bakar holding brief for learned counsel Mr Erias Lukwago. The appellant's counsel addressed the court by way of written submissions.

The appellant was required to serve written submissions on the respondent on 26th of April 2021. The respondent was then supposed to file and serve his reply by 4th of May 2021. The appellant filed and served submissions but the respondent failed to comply with the courts directives. By 21st of May 2021, there were no submissions on record from the respondent. Counsel had informed court that another petition had been filed in the High Court between the same parties following the 2021 Parliamentary elections. Obviously the question of whether the appellant is a qualified person for election as a member of Parliament would be a relevant factor in the new election petition filed in the High Court. In the premises, the matter proceeded on the basis of the submissions of the appellant only because

the respondent did not file any reply when the file was forwarded for preparation of judgment.

Ground 1 of appeal

The learned trial judge of the High Court erred in law and in fact when he failed to properly evaluate the evidence on record thereby reaching a wrong conclusion.

In addressing the above ground the appellant's counsel formulated an issue of whether the learned trial judge was right to state that it was a requirement for the appellant to swear a deed poll when he adopted the names Hashim Suleiman from Okethwengu Achim in 1992. He submitted that the learned trial judge held that the appellant required a deed poll or a statutory declaration to explain that Hashim Suleiman, Hashim Sulaiman and Okethwengu Achim were one and the same person or a deed poll in case of a name change by the appellant. He submitted that the appellant never needed to swear a deed poll when he adopted the names Hashim Suleiman/Sulaiman from Okethwengu Achim in 1991. He submitted that the legal regime that governed change of names in 1991 was the Birth and Death Registration Act cap 309 which was enacted on 1st October, 1973 and which has been repealed and replaced by the Registration of Persons Act of 2015.

According to the appellant's counsel, the issue of the appellant's age was not a disputed fact as he was born in 1972 and secondly the appellant only changed names from Okethwengu Achim to Hashim Suleiman/Sulaiman in 1991. The appellant assumed that the name after joining Kaddugala Secondary School in Masaka for his senior 3 in 1991 to 1992. The appellant was 19 years old at the time he adopted his subsequent names and did not require a deed poll to changes names under the then prevailing legal regime. Counsel relied on section 13 of the Birth and Death Registration Act which deals with the change of name of a child under the age of 21 years who is not married, divorced or a widower. According to the court record, the appellant was 20 years old in 1992 and below the age of 21 years, was not married, divorced or a widower and there is no evidence of registration

of his birth. No evidence was led to prove that at one time he sat his O' Level in 1992 and a did not comply with the law on change of names. In conclusion learned that counsel submitted that the appellant was not mandated to swear a deed poll or a statutory declaration when he decided to change his names.

The appellants counsel relied on **Dr Kizito Deo Lukyamuzi v Kasamba Mathias and Another; Election Petition No 3 of 2011** for the holding that neither the Act not the Regulations made under it give the definition of the phrase "change of name" therefore, it is not clear whether variation in name by merely adding or adopting another name, without losing or abandoning the use of the original one, amounts to change. It was further held that Parliament intended the registration of change of name to apply to persons who have been registered in accordance with the Act but a person whose name was never registered is at liberty to change his or her name at will and without recourse to the provisions of the Act.

Ground 2

The learned trial judge erred in law and fact when he held that because the appellant used different names during his academic life therefore he did not possess the requisite minimum formal education.

On issue 2 the appellant's counsel submitted that the trial judge observed that the issue was whether the 1st respondent had the necessary qualifications at the time of his nomination and election and the contention of the petitioner was that he used academic documents that did not belong to him hence making the issue to be that of the name of the appellant.

A trial judge further resolved the question as to who owns the documents in the names of Hashim Suleiman as being immaterial and what is material is the proof that the 1st respondent does not own the document. It was contended that the appellant used academic documents of a different person during the verification of results. The appellant's schools recommended the appellant to get letters of verification from UNEB. No

forgery was alleged against the appellant and there is no proof that the appellant impersonated someone else as far as the academic qualifications are concerned. The respondent only proved that the appellant first sat for his O' level at Nebbi senior secondary school which explains the need by the appellant to sit again in Kadduggala senior secondary school. It was incumbent under sections 101 and 102 of the Evidence Act cap 6 for a person making an allegation to prove the allegation. Counsel relied on **Col (Rtd) Dr. Kizza Besigye versus Museveni Yoweri Kaguta and another Election Petition No 1 of 2001** for the holding that the burden of proof in an election petition, just like in other civil cases, lies on the petitioner (see also **Birekeraawo Mathias Nsubuga v Muyanja Mbabaali Election Petition No. 06 of 2011**).

The appellant's counsel submitted that the evidence of the respondent in the lower court was that the academic documents presented for nomination by the appellants do not belong to him but to someone else and the burden was on the petitioner to prove that allegation. The appellant in the reply attached his O' level and A' level pass slips and the diploma and decree transcripts from the University. Thereafter the burden of proof shifted back to the petitioner/the respondent in this appeal to prove whether the adduced documents belonged to someone else. In the supplementary affidavit of the petitioner/the respondent to this appeal, the petitioner stated that his lawyers availed him with certified copies of the certificate of primary living education, the certificate of education and the Uganda advance certificate of education of Okethwengu Achim.

After considering all the evidence adduced on record, the appellants counsel submitted that it was a misconceived assertion of the respondent to rely on curriculum vitae to prove that the appellant sat for his primary living education in 1998 as this could only be proved upon inquiry from the Uganda national examinations board. The appellant sat for his primary living examination in 1984 and adopted the use of the current names when he joined Kaddugala senior secondary school for his senior 3 in 1991 and 1992. The learned trial judge ought to have made an inquiry according to section 63 (4) of the Parliamentary Elections Act into whether the appellant actually

studied from Kaddugala Senior Secondary School under his current names before reaching a conclusion that he does not have the requisite academic qualifications. Counsel submitted that there is no iota of evidence from the two schools to prove that the appellant was not their former student. In the premises that the respondent did not discharge the burden of proving that the appellant did not possess the minimum academic documents to be nominated as a candidate for election as a member of Parliament.

Ground 3

The learned trial judge erred in law and in fact when he failed to subject the evidence before him to the standard of proof required in parliamentary election petitions thereby reaching a wrong conclusion.

As far as ground 3 is concerned, the appellant's counsel submitted that the standard of proof in parliamentary election petitions is provided for under section 61 (3) of the Parliamentary Elections Act (Number 17 of 2005) which provides that it shall be on the balance of probabilities. He relied on **Masiko Winfred Komuhangi v Babihunga J Winnie; Court of Appeal Election Petition Appeal Number 9 of 2002**. Further in **Besigye Kizza v Museveni Kaguta and Another** (supra) Odoki, CJ set out with approval the observations of Lord Denning in **Blyth versus Blyth [1966] AC 643** for the proposition that the word "satisfied" in relation to the satisfaction of court *inter alia* means *"no one whether he be a judge or jury would in fact be "satisfied if he was in a state of reasonable doubt"*. The standard of proof required is proved to the satisfaction of the court. If the court entertains a reasonable doubt, ... The standard of proof required in an election petition is very high because the subject matter of the petition is of critical importance to the welfare of the people of Uganda and democratic government. Counsel also relied on **Arumadri John Drazu v Etuka Isaac Joakino & Electoral Commission; Election Appeal Number 37 of 2016** for the proposition that the standard of proof is of a higher degree than that of the balance of probabilities in ordinary civil cases.

He submitted that the learned trial judge failed to properly subject the standard of proof to the evidence adduced by the respondent thus coming to a wrong conclusion on the burden of proof and the standard of proof. Counsel submitted that the allegations made by the respondent in this petition were of criminal offences of impersonation, forgery and uttering of a false document against the appellant and attracted a higher standard of proof.

Ground 4

The learned trial judge erred in law and in fact when he annulled the election of the appellant as a member of Parliament of Nebbi Municipality.

On ground 4, the appellant's counsel submitted that it abides the outcome of the 3 grounds of appeal.

Resolution of Appeal

I have carefully considered the appellant's appeal, the submissions of counsel and the law. This is a first appeal from the decision of the High Court in the exercise of its original jurisdiction and our duty is to reappraise the evidence by subjecting it to fresh scrutiny and coming up with our own decision on the issues arising.

The respondent's counsel did not file any written submissions as directed by the court on 26th of April 2021. On the other hand, the appellant filed written submissions and on that basis only, the matter came for decision as directed by the court on notice. I have carefully considered the grounds of appeal. Ground 1 of the appeal requires a decision on whether the learned judge of the High Court erred in law and fact when he failed to properly evaluate evidence on record thereby reaching a wrong conclusion. I have carefully considered ground 1 of the appeal and it appears from the record that the issues were decided on the basis of interpretation of the law rather than of controversy of fact. This is because the learned trial judge reached the decision that the appellant was not qualified for nomination as a member of Parliament because he did not have the minimum qualification

of an A' level certificate of education as required by the law. On the other hand, and the appellant's evidence proves that in adducing his advanced level certificate of education, and decree certificate were not disputed. What was disputed was whether the names that appeared in the relevant certificates were that of the applicant.

The learned trial judge found that the respondent did not possess the minimum formal education of advanced level standard at the time of his nomination and election as a member of Parliament. He relied on Article 80 (1) (c) of the Constitution of the Republic of Uganda for the proposition that a person is qualified to be a member of Parliament if he has completed a minimum formal education of advanced level standard or its equivalent which the 1st respondent (the appellant to this appeal) did not possess. The finding of fact was that the advance level certificate of education in the names of Hashim Suleiman or Sulaiman was not that of Okethwengu Achim Hashim which are the names of the appellant in his primary living education certificate. The learned trial judge further found that there were inconsistencies in the names used by the appellant over the years and that even if the inconsistencies were to be condoned, there should have been a statutory declaration made to explain that Hashim Sulaiman, Hashim Suleiman and Okethwengu Achim were one and the same person. On that basis he found that the appellant did not have the requisite academic qualifications of a minimum formal education of advanced level standard to be nominated as a member of Parliament.

The conclusion is based on interpretation of the documents having the names of the person who claimed to be the appellant.

In the evaluation of evidence in the other grounds of appeal as to whether the learned trial judge erred in law and fact when he held that because the appellant used different names during his academic life, he did not possess the requisite minimum formal education (ground 2 of the appeal), or in ground 3 whether the learned trial judge erred in law and in fact when he failed to subject the evidence before him to the standard of proof required

in parliamentary election petitions thereby reaching a wrong conclusion, the entire appeal depends for its resolution on the above conclusion of the learned trial judge which interpreted the evidence that was not in dispute. What was in dispute is whether the certificates in the various names were that of the appellant. The question of the standard of proof required in parliamentary election petitions is further a question of law since it is governed by a statutory provision which can be interpreted. I would therefore handle ground 2 of the appeal first because to do so requires an evaluation of evidence as well as interpretation of the law and ground 1 of the appeal is superfluous but for purposes of ease of reference, I would set out grounds 1 and 2 of the appeal before resolution of the central issue that would substantially resolve this appeal.

1. **That the learned judge of the High Court erred in law and in fact when he failed to properly evaluate evidence on record thereby reaching a wrong conclusion.**

2. **That the learned judge erred in law and fact when he held that because the appellant used different names during his academic life therefore he did not possess the requisite minimum formal education.**

The appellant was the official candidate of the National Resistance Movement under the names Hashim Sulaiman. Evidence was by way of affidavits. In ground 3 of the petition of the respondent it is averred *inter alia* in paragraph 8 that the appellant to this appeal did not at the time of his nomination and election possess the minimum qualification of a formal advanced level of education and was therefore not qualified for election as a member of Parliament. Paragraphs 8, 9, 10, 11 and 12 of the affidavit of the petitioner who is now the respondent to this appeal, Mr Onega Robert, states as follows:

> 8. That the 1st respondent sat for his primary living examination in 1984 at Namthin primary school with the name Okethwengu Achim and not Hashim Sulaiman and later joined Nebbi Town Secondary School in 1985 where he sat his Uganda Certificate of Education Examination using the same name Okethwengu Achim in

1988. Photocopies of the relevant documents shall be produced at the time of hearing as "E".

9. That I know that the 1st respondent submitted UCE, UACE, Diploma and Degree certificates bearing the names of Hashim Sulaiman, a totally different person. Photocopies where of hereto attached as "F", "G", "H", "I", "J" and "K" respectively.

10. That the 1st respondent did not at any time changes name from Okethwengu Achim to Hashim Sulaiman or Suleiman.

11. That the 1st respondent having set his primary living examinations using the name Okethwengu Achim could not lawfully and validly sit the UCE and UACE in the name of Hashim Sulaiman without having legally changed his name from Okethwengu Achim to Hashim Sulaiman"

12. That I verily believe that the Uganda Advanced Certificate of Education and the Uganda Certificate of Education presented by the 1st respondent to the 2nd respondent at the time of his nomination and which formed the basis of his nomination do not belong to him but to someone else.

The academic documents attached to the affidavit of the petitioner in the High Court include the Uganda certificate of education for the year 1992 in the names of Hashim Sulaiman Annexure "F". Also Annexure "G" which is Uganda Advanced Certificate of Education for the year 1995 in the names of Hashim Suleiman. Thirdly, Annexure "I" is a bachelor's degree of business studies of the Islamic University of Uganda for the year 2014. Also attached is Annexure "H" which is a Uganda diploma in business studies from Makerere University Business School of the year 2004.

The appellant in the answer to the petition in the High Court in paragraph 17 of his affidavit, states that throughout his academic career, he used the names Hashim Sulaiman and the academic documents are his and bear those names. In the paragraphs 9 and 10 of the affidavit of Francis Wedunga also filed in reply to the petitioners petition it is stated as follows:

9. That in reply to paragraph 8, 10 and 11 of the affidavit in support, I have known the 1st respondent since 1997 as a relative and he has always been identified as Hashim Sulaiman and to my knowledge he has never been known as Okethwengu Achim as alleged by the Petitioner.

10. That in reply to paragraph 9, 12 and 13 the academic documents submitted to the 2nd respondent by the 1st respondent belong to him as I was present when the same were certified to be true copies of the original in his presence.

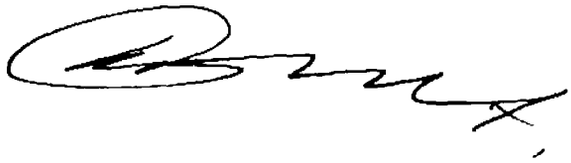
Further to the affidavit in support of the answer to the petition Mr Abdul Aziz Asuman give specific answers to the issue of the names of the appellant in paragraphs 3, 4, 5 and 6 as follows:

3.That the 1st respondent is known to me as he is my first cousin and I have grown up with him as neighbours too since childhood.
4. That the 1st respondent and I went to school together since early primary school wherein he used the name Hashim Sulaiman which name he used until he finished his primary living exams in 1984.
5. That the only name I have ever known the 1st respondent by is HASHIM SULAIMAN and it is his name to date and I truly verify that his name is HASHIM SULAIMAN.
6. That I dismiss the allegations that the 1st respondent has ever had any other name except HASHIM SULAIMAN false, biased, lacking merit, merely hearsay actuated by malice and ill motive.

In an additional affidavit in support of the petition by Justine Lwong Pithuwa states that the 1st respondent who is the appellant to this appeal is known to him by the names Okethwengu Achim and not Hashim Sulaiman and that he is a son of his biological brother Silimani Odubire Pithuwa. He states *inter alia* that he is a founder and former proprietor of Nebbi town secondary school where the 1st respondent was registered in the names of Okethwengu Achim and completed his primary living examinations under the same names. As a proprietor of Nebbi town secondary school, the 1st respondent being related to him, he took it upon himself to sponsor the 1st respondent in the school from the time he enrolled in 1985 and duly completed his Uganda certificate of education in 1988 and it is not true that the 1st respondent completed his Uganda certificate of education in 1992. He deposed that when Nebbi town secondary school became a Government aided school, he handed it over to the Government and left the school in 1995 together with all relevant documents with the school authorities.

In a reply to the additional affidavits in support of the petition, the appellant who was the 1st respondent to the petition deposed to an additional affidavit in reply in which he comments about the additional evidence adduced by the petitioner in paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 of the affidavit as follows:

> 2.That Aweko Milton. Justine Lwong Pithuwa and Odagiu Muzamil are well known to me as they are my relatives and I swear this affidavit denying the allegations as stated in the affidavits.
>
> 3. That I swear this affidavit confirming my name is Hashim Sulaiman as I stated in my earlier affidavits.
>
> 4. That all my documents are in my name as stated starting right from my 'O' level and 'A' level per sleeps to the diplomas and universities transcripts which documents have been attached to the petition marked Annexure's...
>
> 5. That I believe that the coming up with these allegations because of land wrangles back in the village where the try to take away my father and late uncle Yukino Uthuma's land from my family and the late uncle's widow Masiana Uthuma which I defended.
>
> 6. That I have never changed my name and I also know the procedure one has to follow to change their name and have never undergone that procedure to change my name, little wonder they don't attach any document to show the same on the contrary it is I who has attached documents to show the consistency.
>
> 7. That in specific reply to paragraph 2 of the affidavit sworn by Odagi Muzamil, it is not true that his father is late as he alleges in affidavit. This amounts to a falsehood and have been advised by my lawyers of Messieurs Okecha Baranyanga & company advocates will advise I believe to be true that his affidavit can be struck out on the basis of falsehoods.
>
> 8. That in specific reply to paragraph 5 of the affidavit sworn by Justine Lwong Pithuwa contains falsehoods because he did not sponsor my education at any one point. We had land wrangles and I never saw eye to eye and as such he couldn't sponsor my education. Little wonder he has sworn a false affidavit to try and make his wishes come true.
>
> 9. That in specific reply to paragraph 2 of the affidavit sworn by Aweko Milton, I believe it must be an educational problem because Achim has never been my name and I don't know where he got the Okethwengu from. My name Hashim is a Muslim name and just because he failed to pronounce Hashim correctly does not make Achim my name."



I have carefully considered the evidence. Particularly, I have considered the cross examination evidence. PW1 who is the respondent was cross examined on the issue of the names of the appellant. He however never attended primary school with the appellant and did not know what names were used in primary school. He further testified that the names in the academic documents indicated that the appellant was known by different names, it was not the names of the same person. In re-examination he testified that there was no legal document of change of name.

From the assessment of the testimony about the names of the appellant, this was a crucial point to be taken. The next important witness PW7 Mr. Justine Lwong Pithua revealed that the appellant was his nephew being a brother's son. The name of his brother is Suleiman Pithua. Further he did not follow up the appellant after he completed his senior four. The evaluation of evidence in total clearly shows that the appellant used different names before he assumed the names of Sulaiman Hashim. The name Achim seems to be phonetically similar to the name Hashim and was only very probably misspelt. There was no explanation for the name Okethwungu but the names Suleiman is clearly attributed to his father and he adopted it from his father's names. Further the appellant went to school in senior 3 in Kaddugala secondary school in Masaka. He subsequently used the names Hashim Sulaiman. In cross examination he confirmed that he got the name from his father who is called Sulaiman.

The inference from the evidence is that the appellant used the different names in primary and subsequently in secondary school. The inconsistencies were the difficulty of having first stated that he used the names Hashim Sulaiman throughout. Was this fatal to establishing the actual fact? I think not if there is evidence to establish the truth.

The learned trial judge considered 4 issues for resolution of the dispute. The 1st issue was whether or not at the time of nomination and subsequent election the 1st respondent lacked the requisite academic qualifications of minimum formal education of advance level standard or its equivalent to

stand as member of Parliament. The 2nd issue is whether the election for the position of member of Parliament for Nebbi municipality was conducted in compliance with the law. The 3rd issue is whether the non-compliance, if any, affected the results of the election in a substantial manner. The 4th question was whether the 1st respondent personally or with his knowledge, consent and or approval committed any illegal practices or electoral offences.

The 2nd issue was whether the elections were conducted in compliance with the 1995 Constitution, the parliamentary elections Act and the principles governing elections. The learned trial judge found the issue in the negative.

On issue number 3 of whether the non-compliance affected the results of the election in a substantial manner, he found that on qualitative test, the acts of non-compliance and illegalities were not proved and therefore it had no impact on the result of the election. He found that the non-compliance wouldn't have affected the results of the election in a substantial manner, if it was found to exist.

On the issue number 4 of whether the respondent personally or through the agents and with his knowledge, consent and approval committed any illegal practices or election offences, learned trial judge resolved the issue in the negative.

What remained was therefore the question of the different names used by the appellant as decided in the 1st issue considered by the learned trial judge.

The trial judge concluded that the 1st respondent did not have the requisite academic qualifications of a minimum formal education of advance level standard to stand as a member of Parliament. In arriving at his conclusion, he found that the appellant was inconsistent in the testimony that he had used the names Hashim Sulaiman throughout his academic career when in fact he had also used the names Okethwungu Achim. The learned trial judge found that the inconsistencies in the testimony of the appellant were grave.

This inconsistency was in the testimony of whether he used the said names throughout his academic career and in cross examination testimony when he told court that he had ever used other names.

The learned trial judge correctly directed his mind to the fact that the issue was whether the 1st respondent had the necessary qualification at the time of his nomination and election. He found that these inconsistencies were major inconsistencies that cannot be ignored and go to the root of the case. He found that attempts by the appellant to explain the inconsistencies only created more inconsistencies for instance the testimony of one of the witnesses that he had only used the names Hashim Suleiman throughout his academic career. He found that the appellant was lying. Further the learned trial judge found that there was a departure from the pleadings which was fatal.

The answer of the appellant in the answer to the petition in paragraph 5 thereof was that he possesses the required academic documents and was duly nominated and elected as a member of Parliament.

The question of whether the appellant is known as Hashim Sulaiman and possesses the academic qualifications attached to the petition is a question of fact that can be established by having the appellant identified for purposes of those qualifications or admitting any relevant material evidence. The evidence clearly shows that the appellant could have used the names Achim Okethwengu. The evidence of the petitioner places him in schools in Nebbi district before 1988. Subsequently the evidence of the petitioner and the appellant puts the appellant in other schools thereafter under the names Hashim Sulaiman. The appellant had been known by these names as an adult. In support of the petition, the petitioner attached the Uganda certificate of education for the year 1992 in the names of Hashim Suleiman of Kaddugala senior secondary school. Subsequently in 1995 Hashim Suleiman obtained the Uganda advanced certificate of education at Gombe Secondary School. This was followed by a diploma in business studies of Makerere University in August 2004 in the names of Hashim

Sulaiman. There was a subtle change in that the names Suleiman became Sulaiman. Finally, another certificate is the bachelor of business studies degree of 2014 in the names Hashim Sulaiman.

The academic transcript of Makerere University for the diploma in business studies has the photo of the appellant. The learned trial judge found that the 1st respondent in his submissions stated that he had four names from birth namely Okethwengu Achim Hashim Sulaiman. This was a misdirection because written submissions were relied upon and the written submissions are not evidence. The trial judge found that there was a need for a statutory declaration to be made to explain that the names Hashim Sulaiman, Hashim Suleiman and Achim Okethwengu were one and the same person or a deed poll in case of a name change by the 1st respondent but none was tendered in court. On the basis of the evidence he found that the respondent did not have the requisite academic qualifications of a minimum formal education of advance level standard.

The conclusion is very drastic in that the real question of fact is whether the person named in the advanced level certificate of education is the same as the appellant. The evidence clearly demonstrates that the appellant's father is named Suleiman Pithuwa and the appellant adopted his father's names. Secondly, the name Achim is phonetically close to the name Hashim. This also came out in the evidence as a likely failure to pronounce the name properly and the misspelling of the name. Thirdly, the diploma in business studies transcript document has the photo of the appellant in the names Hashim Sulaiman. Therefore, the conclusion is that the appellant could only have used different names at different times but mostly used the same name after his O level exams in Kaddugala SSS under the names Hashim Sulaiman. The misspelling of Sulaiman or spelling it as Suleiman is a spelling mistake. The clear evidence is that the appellant used other names.

I have further considered the holding that the appellant ought to have made and gazetted a deed poll. The first matter for consideration is whether the learned trial judge was not satisfied that the appellant is the person as

stated to be as named in the requisite academic qualifications. This is a question of fact which can be proved to the satisfaction of the trial judge who had opportunity to question the appellant as well as to listen to the testimony of the various witnesses. The glaring photo in the academic transcript should have led to the conclusion that the appellant used different names but he is the same person. This also appears in the cross examination testimony of PW1, the petitioner who is now the respondent to this appeal. He stated that there was no deed poll to explain the various names used by the appellant. He could not disprove that the appellant was the same person.

Deed polls are made under the Births and Deaths Registration Act, Cap 309. The Births and Dates Registration Act provides for the keeping of a births and deaths register book. Particularly section 6 thereof provides for a births register book and stipulates that:

> 6. Births register book.
>
> Every registrar shall cause to be kept in his or her office a births register book in the prescribed form (in this Part called "the register").

The register is a public document which can be inspected for purposes of census and any other requirement for private and public purposes. Secondly, section 7 requires all births to be registered and particulars of the child given. The particulars of the child would include the names given to the child. Section 7 provides as follows:

> 7. Registration of births.
>
> (1) Within three months of the date of birth of a live child, the father or mother of the child shall register such particulars concerning the birth as may be prescribed with the registrar of the births and deaths registration district in which the child was born.
>
> (2) If the father and mother of the child are dead or unable to register particulars concerning the birth, the occupier of the house in which the child was, to the knowledge of the occupier, born, or any person present at the birth, or any person having charge of the child, shall register particulars concerning the birth; but the

registration of the particulars by one of those persons shall relieve the others of their duty to do so.

Last but not least the mode of registration requires the parents, at the time of registration of the birth of the child, to certify the correctness of the particulars of the birth by signing the register which shall be dated by the registrar. Section 8 is reproduced for ease of reference:

> 8. Mode of registration.
>
> Every person registering the birth of a child shall, at the time of registration, certify as to the correctness of the particulars concerning the birth by signing the register, and the registrar shall sign and date the register after the entry of the particulars.

The intention of the Births and Deaths register is to ensure that all persons who are born in the country are registered and their particulars given. At any one time, this can be compared to the register of deaths to provide useful statistics to the government. These statistics can be used for various purposes. Identities of persons can also be traced and it has an effect on the contention of being a citizen by birth among other uses. The register can be inspected by any interested person on payment of a prescribed fee. The change of names formality should therefore be considered as necessary for amendment to the register and is necessary to avoid confusion as to the particulars of persons registered. Section 12 of the Births and Deaths Registration Act (supra) specifically provides for change of name so as to amend the register to reflect the true names used by the child whose name was registered under section 7 of the Act. Section 12 provides that:

> 12. Change of name of adult.
>
> (1) Any person, being over the age of twenty-one years or a widower, widow, divorced person or a married person, who wishes to change his or her name shall cause to be published in the Gazette a notice in the prescribed form of his or her intention to do so.
>
> (2) Not less than seven days after the publication of the notice, the person intending to change his or her name may apply in the prescribed form to the

registrar of the births and deaths registration district in which his or her birth is registered.

(3) The registrar shall, upon being satisfied that the requirements of this section have been carried out and upon payment of the prescribed fee, amend the register accordingly and shall sign and date the amendment.

After a change of name has been published as prescribed by section 12, another application has to be made in the prescribed form to the registrar of the births and deaths registration district in which the birth is registered for purposes of amending the register. The intention of such an amendment is clearly to ensure that there is no confusion between the changed name particulars and that of the birth particulars. A Deed poll giving the assumed names can be made by an adult leading to the amendment of the register. On the other hand, a form giving the changed name of a child can be made by a parent with the same result. Instead of a deed poll, the parents or guardian of a child under the age of 21 years who is not married, divorced or a widower or widow may apply in the prescribed form to the registrar indicating the change of name of the child and the registrar shall upon payment of the prescribed fee, amend the register accordingly. Section 13 of the Births and Deaths Registration Act provides that:

13. Change of name of child.

(1) The parents or guardian of any child under the age of twenty-one years who is not married, divorced, a widower or a widow may apply in the prescribed form to the registrar of the births and deaths registration district in which the birth of the child is registered to change the name of the child.

(2) The registrar shall, upon payment of the prescribed fee, amend the register accordingly and shall sign and date the amendment.

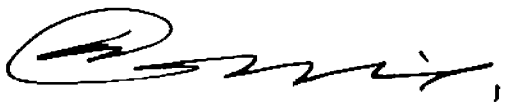
The clear intention that emerges from the above provisions is that the intention is to amend the register to be in line with the assumed names of the change in the names of the child or an adult. The law does not forbid the change of names. Change of names is part of culture especially for married women whose maiden names in their academic papers may vary depending on when they got married. If they get married after senior 4 and go back to

school, it is likely that their academic papers for advanced level certificate, diploma or degree certificates may have another name and not maiden names.

Failure to do a deed poll and subsequently have the register amended would not change the identity of the person. Using different names in different academic papers does not change the identity of anybody but only causes doubt as to whether the person who presents the papers is the same person named in the academic papers. Evidence can be led to prove that such a person is the same person as named in the academic papers or otherwise. Failure to do a deed poll would not nullify the academic papers or qualifications, as this can be established as a question of fact. The evidence of a deed poll or statutory declaration is therefore not the only evidence that can be used to prove that the person who sat for the academic qualification of A-level and whose names are stated in the certificate of education for the advanced standard is the same person who is nominated. It is simply a question of fact. There is documentary evidence of an academic transcript with the photo of the appellant from Makerere University Business School. This documentary proof resolves the doubt of the court as to the identity of Hashim Sulaiman, the appellant. This is the same person who qualified and had the advanced level certificate of education admitted in evidence. In the premises, grounds 1 and 2 of the appeal succeed and are hereby allowed.

The 3rd ground of appeal is that the learned trial judge erred in law and in fact when he failed to subject the evidence before him to the standard of proof required in parliamentary election petitions thereby reaching a wrong conclusion.

The 3rd ground of appeal deals with a point of law as to the standard of proof. In relation to the evidence, ground 1 of appeal is sufficiently answered in consideration of ground 2 of the appeal as to whether the learned trial judge erred in fact when he failed to properly evaluate evidence on record thereby



reaching a wrong conclusion. I would therefore only deal with the question of the law on the standard of proof in election petition.

The standard of proof in election petitions is fixed by statute. The question is how to interpret the statute since the Judicature Act is very clear that the common law is subject to the written law. Any case law on the standard of proof can only be persuasive or binding if it interprets the statutory provisions setting the standard of proof in election petitions. Section 61 of the Parliamentary Elections Act [17 of 2005] provides as follows:

> 61. The grounds for setting aside election.
>
> (1) The election of a candidate as a member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court –
>
> (a)...
>
> (b)... (c)
>
> (d)...
>
> (2)...
>
> (3) Any grounds specified in subsection (1) shall be proved on the basis of a balance of probabilities."

Clearly subsections 1 and subsection 3 of section 61 of the Parliamentary Elections Act have to be read in harmony. What is to be proved to the satisfaction of the court is stipulated in the grounds (a), (b), (c) and (d) which sets out the grounds for the annulment of elections. One of the grounds is section 61 (1) (d) which provides that the candidate was at the time of his or her election not qualified or was disqualified for election as a member of Parliament. To read the provisions together of section 61 (1) (d) the law reads as follows:

> "The election of a candidate as a member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court – (d) that the candidate was at the time of his or her

election not qualified or was disqualified for election as a member of Parliament."

This has to be proved to the satisfaction of the court. The word "satisfaction of the court" is qualified by section 61 (3) to be to the standard of the balance of probabilities. The word "to the satisfaction of the court" cannot be held to provide for a higher standard than that of the balance of probabilities as it is clearly qualified by subsection 3 of section 61 which provides that the standard of proof is that on the balance of probabilities. Section 14 (1) and (2) of the Judicature Act provides that the High Court shall subject to the Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution of the Judicature Act or any other law and subject to the Constitution shall be in conformity with the written law and subject to the written law in so far as the written law does not extend or apply in conformity to the common law and the doctrines of equity. Case law is ordinarily part of the common law since it is not the statute itself. I would therefore confine myself to the statutory law which is not ambiguous and expressly announces that the standard of proof is that on the balance of probabilities under section 61 (3) of the Parliamentary Elections Act.

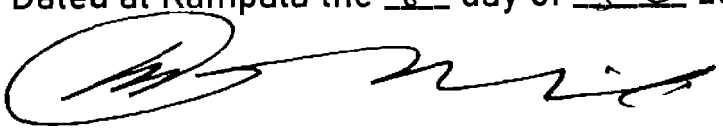
In the premises the appeal succeeds and the judgment and orders of the High Court are set aside with costs in this court and in the court below. It follows that the appellant was duly elected as a member of Parliament of Nebbi municipality for the elections that took place in the general elections of 2016.

It is to be regretted that this decision is coming after the term of office of the 10th Parliament elected in 2016 expired in January 2021. This matter came for hearing on the 26th of April 2021 and there is no explanation on record as to why the appeal delayed contrary to the law under section 66 of the Parliamentary Elections Act.

For emphasis the appellant was duly qualified for nomination for election as a member of Parliament as stipulated by article 80 (1) (c) of the

Constitution of the Republic of Uganda in that he had completed a minimum formal education of Advanced Level standard.

Dated at Kampala the 8th day of June 2021



Christopher Madrama

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

EPP

CIVIL APPEAL NO. 001 OF 2021

(Arising from the judgment of the High Court before Hon. Justice Oyuko Anthony Ojok Election Petition No. 001 of 2021)

HASHIM SULAIMAN :: APPELLANT

VERSUS

ONEGA ROBERT :: RESPONDENT

CORAM:

HON. JUSTICE BARISHAKI CHEBORION, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA

I had the benefit of reading in draft the judgment of my brother Christopher Madrama, JA. I agree that this appeal succeeds and the judgment and orders of the High Court are set aside with costs in this court and the court below.

The appellant was duly qualified for nomination for election as Member of Parliament having completed a minimum formal education of Advanced level standard. It is however regrettable that this decision is coming after the term of the 10th Parliament has expired.

Dated at Kampala this.....6th.....day of .....June.....2021

.....

Stephen Musota

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 001 OF 2021

CORAM: *Cheborion Barishaki, Stephen Musota, Christopher Madrama, JJA*

HASHIM SULAIMAN ::APPELLANT

VERSUS

ONEGA ROBERT:::RESPONDENT

(Appeal from the Judgment of Hon. Justice Oyuko Anthony Ojok in High Court of Uganda Holden at Arua Election Petition No. 001 of 2018 delivered on the 2nd of May 2019)

JUDGMENT OF CHEBORION BARISHAKI, JA

I have had the benefit of reading in draft the judgment of my brother Christopher Madrama, JA.

I agree that the appeal should succeed with the orders he has proposed. Since Musota JA also agrees, this appeal succeeds with costs to the appellant.

It is so ordered.

Dated at Kampala this.........8th..........day of.......June..........2021

Cheborion Barishaki

Justice of Appeal