THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

ELECTION PETITION APPLICATION No. 039 OF 2022

(ARISING OUT OF ELECTION PETITION APPEAL No. 077 OF 2021)

MUJUNGU JENNIFER K.....APPLICANT

VERUS

TUMWINE ANNE MARY.....1ST RESPONDENT

ELECTORAL COMMISSION.....2ND RESPONDENT

CORAM

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

HON. MR. JUSTICE STEPHEN MUSOTA, JA

HON. MR. CHRISTOPHER GASHRIBAKE, JA

RULING OF THE COURT

INTRODUCTION

This is an application by way of Notice of Motion made under Section 11 of the Judicature Act, Rule 36 of the Parliamentary Elections (Interim Provisions) Rules, Rule 2 (2), 43 and 44 of the Judicature (Court of Appeal Rules) Directions (SI 13-10 hereinafter referred to as the "Rules of this Court").

The Application seeks orders that:

"1. That the applicant be granted leave to adduce additional evidence during the hearing of the Election Petition Appeal No. 77 of 2021.

2. That the additional evidence to be adduced and relied on be that contained in the affidavit of Catherine Namuwoya attached to this application.

3. Costs of this Application abide the outcome of the Appeal...."

It is the case of the Applicant in this Application that the evidence to be relied upon consists of a handwriting expert's report and a National Identification and Registration Authority (NIRA) document all of which will show the true authors are of signatures used on the nomination form of the second Respondent.

It is further the case of the Applicant that the additional evidence even with all due diligence was not available at trial. The said evidence also will have an important influence on the outcome of the Appeal.

BACKGROUND

The Applicant and the first Respondent contested in the Parliamentary elections for Women Representative of Ntoroko District; held on the 14th January 2021. The first Respondent won that election which election is now contested by the Applicant. The Applicant then filed an election petition against the first Respondent but the Judgment went against her hence this appeal. It is the case for the Applicant in this Appeal that at the time of nominations of the

parliamentary hopefuls, there were anomalies in the nomination of the first Respondent in that the nomination form had crosses against the names Kahuma James and Bonabana Vicky which we replaced by Muthahinga Bahamwithi Ben and Asiimwe Patrick; thus creating a wrong impression as to who actually signed the said nomination forms. It is the case for the Applicant that the Trial Judge erred when he found that the said adjustments on the first Respondent's nomination form was just a mistake which the Presiding Officer corrected whereas not. The trial Judge further erred when he held that the Applicant did not adduce evidence to prove that the signatures on the first Respondent's belonged to different people that is Kahuma James and Bonabana Vicky and not Muthahinga Bahamwithi Ben and Asiimwe Patrick.

REPRESENTATION

Mr. James Byamukama, Mr. Severino Twinobusingye, and Jude Byamukama appeared for the Applicant. Mr. Thomas Ochaya and Mr. Esawo Isingoma appeared for the first Respondent. Mr Eric Sabiiti appeared for the Second Respondent.

ARGUMENTS OF THE APPLICANT

Counsel for the Applicant submitted that the Applicant has deponed an affidavit which states that prior to filing of this petition, on the 24th of February 2021, she wrote to the Executive Director of the NIRA for certified copies of the biodata. photos, and signatures for Muthahinga Bahamwithi Ben, Asiimwe Patrick, Kahuma James and

Bonabana Vicky for use in the intended petition against the first Respondent.

However, NIRA did not respond even on the further prompting from the former lawyers of the Applicant. The Trial Judge then rendered his decision on the 20th October, 2021 before the said information from NIRA had been obtained. It is the case for the Applicant that Counsel in conduct of the case at the time let her down in this regard and that is why a new set of Counsel were instructed on Appeal. The said information from NIRA was eventually obtained on the 3rd March 2022 long after the trial Court had rendered its Judgment. It is only then that the Applicant was able to get The Directorate of the Government Analytic Laboratory to prepare a favourable report authored by Namuwoya Catherine on the said signatures which supported the Applicant's position in the Petition. So this information is now available for the Court to see on appeal hence the application for admission of additional evidence.

Counsel for the Applicant submitted that the said Report by Namuwoya Catherine (a forensic expert) concluded that the specimen signatures Bahamwithi Muthahinga Ben and Asiimwe Patrick had no resemblance whatsoever to the contested signatures against the entries of 07 and O8 of the nomination form (exhibit "Q1") with distinct differences in appearance and complexity of the signatures. She further demonstrated this disparity with a standard chart which laid the distinct differences (pages 3-4 of annexure B to the affidavit of Namuwoya Catherine). The forensic expert concluded that the was

conclusive evidence to show that the contested signatures against entries 07 and 08 were authored by Kahuma James and Bonabana Vicky whose names had been crossed out.

Counsel then argued that the additional evidence if admitted would elucidate on the evidence already on record.

ARGUMENTS FOR THE FIRST RESPONDENTS

Counsel for the first Respondent opposed the Application. He argued that the said Application does not state that the evidence to be adduced is new or was within her knowledge or was of such a nature that it could not have been produced at the time of filing the main Petition at the trial Court.

Counsel further argued that whereas the Applicant knew that the information she wanted was with NIRA and was delayed, the Applicant did not take steps seek a Court Order to enforce its production. Counsel argued that the Applicant did not show that she exercised the necessary due diligence to qualify for this Court to grant the Order for additional evidence. In this regard Counsel referred us to the case of **Kanyike V Electoral Commission & 2 Ors** Civil Application No 13 of 2006.

Counsel also argued that the Applicant could not blame her former counsel for failure to obtain the required information from NIRA because both of them were aware of what needed to be done and so could not therefore rely on the argument of mistake of counsel should not be visited upon the client. In this regard, Counsel relied on the

decision of **Electoral Commission V Ssekikubo** Civil Application No 14 of 2009.

Counsel for the first Respondent in addition argued that the evidence sought to be adduced was not credible because the proper procedure to obtain the evidence was not proper as it was protected data and required the consent of the persons concerned. In this regard we were referred to Section 7 (1) of the **Data Protection and Privacy Act**.

Counsel further submitted that this application was laced with dilatory conduct as the Applicant did not demonstrate that this application was filed expeditiously without unreasonable delay. Counsel argued that the applicant was aware of the said nomination form from the 16th October, 2021, she did not take steps to acquire this evidence. That it was only after the first Respondent filed an application in this Court to strike out this Appeal that the Applicant then countered with the filing of this application.

Counsel further challenged the proposed addition as it could not be verified as it was not clear how the said information which is held privately with NIRA, could be obtained without a court order.

Finally, Counsel for the first Respondent submitted that the admission of the additional evidence would be prejudicial to the first Respondent as she has already set up her defence without the prior opportunity to contest the said forensic report.

ARGUMENTS OF THE SECOND RESPONDENT.

Counsel for the second Respondent also opposed the Application.

Counsel argued that the evidence in question was readily available but the Applicant did not exercise due diligence to obtain it. Furthermore, the Applicant did not raise this grievance in relation to the impugned nomination form in her pleadings or at the trial Court.

Counsel further submitted that, the evidence sought to be adduced and relied on by the Applicant can be subject to a pre-polling complaint mechanism which ought to have been raised to the Electoral Commission immediately after the nominations were completed. Counsel argued that nominations for the Parliamentary Elections were conducted on the 15th and 16th of October 2020. Elections for the same position were held on the 14th day of January 2021 and the election results published in the official gazette on the 17th day of February 2021.

In this regard, Counsel relied on Section 15 of the **Electoral Commission Act** which mandates the Commission to hear and determine any complaints arising out of the electoral process before the polling process is done. He argued that all candidates are given an opportunity as a matter of law under the said Section 1 5 of the **Parliamentary Elections Act** to inspect nomination papers in the bid of identifying and raising complaints arising therefrom for determination before the polling process is completed.

Counsel therefore submitted that the Applicant did not utilize the window of inspection to raise the alleged nomination anomaly on the first Respondent's nomination papers before the Electoral Commission for redress. The Applicant had approximately three

months from the Nomination date prior to polling to raise the complaint before the Electoral Commission, which window of opportunity she did not take advantage of.

Counsel further agreed with the arguments of the first Respondent that this particular issue of the nomination papers was not raised in the Applicant's pleadings and during the trial. Furthermore, Counsel also agreed with the first Respondent that the Applicant could not rely on the Rule of mistake of counsel as it chose by letter on the 24th February, 2021 which was four months after said nominations. He therefore argued that that the Applicant could not benefit from the exercise of the Court's inherent powers.

REJOINDER OF THE APPLICANT.

Counsel for the Applicant in rejoinder insisted that the Applicant had met the legal test for the grant of an order for additional evidence.

Counsel argued that Section 15 of the **Electoral Commission Act** could not limit the inherent powers and jurisdiction of the High Court to resolve all complaints of electoral irregularities where those same matters had not been raised with the Electoral Commission.

On the matter of Section 7 (1) of the **Data Protection and Privacy Act** 2019, Counsel submitted that when NIRA did not respond to their letter the Applicant decided to take the matter to court. This was done under Miscellaneous Cause No. 02 0f 2022 at the Chief Magistrate's Court of Wakiso at Nansana where a court order was issued compelling NIRA to issue the National Identification details for

said four persons referred to on the nomination form. On receipt of the documents from NIRA following the Court Order these documents together with specimen signatures were sent to the Government Analytic Laboratory for forensic examination.

Counsel submitted that whereas the information was available at the time of the trial they could not be used at the trial because it could not be obtained from NIRA and the Applicant's former lawyers also failed the Applicant so these were exceptional circumstances.

Finally, Counsel for the Applicant submitted that the Respondents did not dispute the fact that the additional evidence would influence the outcome of the Appeal or that the said evidence was relevant to the issues on appeal.

FINDINGS AND DETERMINATION OF THE COURT

We have had the opportunity to peruse the Motion and the affidavits and submissions for and against it. We have also had the opportunity to read the authorities relied upon for which we thank the parties.

The legal position and test for grant of additional evidence on appeal is well settled and both parties were able to refer to it. Section 30 of 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 or

(b) direct that additional evidence be taken by the trial court or by a commissioner.

(2) *When additional evidence is taken by the court, it may be oral or by affidavit and the court may allow the cross-examination of any deponent..."*

The operative words in Rule 30 of the Rules of the Court of Appeal are to the effect that this Court ***"may"*** and for ***"sufficient reason"*** take or direct that additional evidence be taken by a trial court. It follows therefore that the legal basis for the grant of an order for additional evidence to be taken on appeal is not automatic but rather is one of judicial discretion.

Furthermore, Rule 2 (2) of the Rules of this Court further states that: -

"...Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent abuse of the process of any court caused by delay..."

This Court in **Omunyokol Johnson V Attorney General** CA No. 071 of 2010 held that the exercise of discretion should be done with care and on principles that have been laid down.

The principles with regard to admitting additional evidence on appeal were stated by the Supreme Court in the case of **Hon. Anifa**

Bangirana Kawooya Vs National Council for Higher Education (SC) Misc. App. No. 8 of 2013 where the Court relied on the decision in **Attorney General V Paulo Ssemwogerere & Ors** (SC) No. 02 of 2004 in which the Supreme Court, held: -

"A summary of these authorities is that an appellate court may exercise its discretion to admit additional evidence only in exceptional circumstances, which include:

a) Discovery of new and important matters of evidence which, after the exercise of due diligence, was not within the knowledge of, or could not have been produced at the time of the suit or petition by, the party seeking to adduce the additional evidence;

b) lt must be evidence relevant to the issues;

c) lt must be evidence which is credible in the sense that it is capable of belief;

d) The evidence must be such that, if given, it would probably have influence on the result of the case, although it need not be decisive;

e) The affidavit in support of an application to admit additional evidence should have attached to it, proof of the evidence sought to be given;

f) The application to admit additional evidence must be brought without undue delay..."

The court gave the rationale for these principles as follows: -

"...These have remained the stand taken by the courts, for obvious reasons that there would be no end to litigation unless a court can expect a party to put up its full case before the court."

In this matter the Applicant has argued that she tried to get information from NIRA in respect of the persons who signed the first Respondent's nomination form on or about the 16th October 2020. The Applicant having lost the election for Woman Member of Parliament for Ntoroko District held on the 14th January 2021 then sought to contest the said election by way of Petition at the trial Court. The Applicant in preparation for the Petition under her own hand wrote to NIRA to be furnished with the certified copies of Biodata, photographs and signatures of: -

a) Kahuma James
b) Muthahinga Bahamwithi Ben
c) Asiimwe Patrick
d) Bonabana Vicky

She then asked her former lawyers to follow up this letter which she states they did not. As it was, the Petition was determined without a response from NIRA and the trial Court found that the Petitioner (now Applicant) had not proved her case in respect of the impugned signatures. NIRA only responded following a Court Order from Nansana Chief Magistrates in Misc. Cause No 02 of 2022 after Judgment in the Petition had been rendered. The Order is dated 1st March 2022 and is exhibited for the first time in the Applicant's Affidavit in Rejoinder to the Motion dated 29th March 2022.

The prayer for an order for admission of additional evidence is granted where sufficient cause has been shown and also in exceptional circumstances. Has the test of sufficient cause and exceptional circumstances been discharged in this matter? We find not and for the reasons that follow.

First, as Counsel for the second Respondent has argued there had been an earlier opportunity to challenge the nomination form around mid-October, 2020 under Section 15 of the Parliamentary Elections Act before the Electoral Commission; which was not done. There is no explanation for that lapse save for reasoning that the Applicant could also do so at the time of the Petition before the High Court because the High Court has unlimited jurisdiction. We find that whereas it is true that the High Court has unlimited jurisdiction, it would not be judicious of us to exercise our discretion in this matter where an applicant for no apparent reasons passed on a clear opportunity for early resolution of a dispute.

Secondly this is a matter that could have been brought before the trial Court at the time of scheduling for court's directions but it was not. It further appears that the impugned signatures were was not even the main thurst of the Petition (see Annex A to the Affidavit in reply by the second Respondent) which pointed other grievances like minimum qualifications of the first Respondent; non-compliance with electoral law by allowing solders to vote who were not registered at the polling station; inclusion of dead people on the voting roll and multiple voting to mention but a few.

Thirdly, it is clear to the Applicant that a Court Order to obtain data that is protected by law was necessary, otherwise why did she obtain such an Order from a Magistrates Court in March 2022 when Judgment was rendered by the trial High Court in October 2021.

Fourthly, the Applicant having taken it upon herself to write directly for the information from NIRA on the 24th February, 2021 she did not copy in her lawyers. This weakens the argument that there was mistake of counsel.

Lastly, even a look at the forensic Report dated 14th March 2022 (Annex H to the affidavit in support of the Motion) that the Applicant wishes this Court to admit which she says would influence the result of the dispute, it clearly shows that the NIRA information was just one of a series of signature samples used to test the impugned nomination form (classified as "Questioned Document"). Other independent samples of signatures (classified as "Standard Documents" in the Report) were taken from CVs; signed letters; signed attendance lists and agreements of sale of land to mention but a few. So to our mind there were plenty of other standard documents, not being the NIRA information, that could have been used in evidence against the questioned document at trial but were not.

For these reason we find that this Application has not discharged the required legal test for the grant of an order for additional evidence.

FINAL RESULT

This Application is dismissed with costs.

Dated at Kampala this 04th day of April 2022

HON MR JUSTICE GEOFFREY KIRYABWIRE, JA

HON MR JUSTICE STEPHEN MUSOTA, JA

HON MR CHRISTOPHER GASHRIBAKE, JA