THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Musoke, Mulyagonja & Mugenyi, JJA

ELECTION PETITION APPEAL NO. 16 OF 2021

BETWEEN

OCHWA DAVID ::APPELLANT

AND

1. OGWARI POLYCARP
2. ELECTORAL COMMISSION ::::::::::::::::::::::::::RESPONDENTS

[Appeal from the decision of the High Court, Hon. Justice Andrew K. Bashaija, J, in Mbale Election Petition No. 04 of 2021]

JUDGMENT OF THE COURT

Introduction

This is an appeal from the decision of the High Court in which the trial judge dismissed the appellant's election petition after he found that it was incompetent and awarded costs to the respondents.

Background

The appellant, the 1st respondent and 4 others contested for the position of Member of Parliament for Agule County Constituency, Pallisa District in the general elections that were held on 14th January 2021. The 2nd respondent declared the 1st Respondent as the candidate with the highest number of votes after he garnered 7,190 votes, while the appellant was the runner up with 6,908 votes. The 1st respondent was subsequently gazetted as the duly elected Member of Parliament for Agule County Constituency.

Being dissatisfied with the results, the appellant petitioned the High Court in Mbale Election Petition No. 4 of 2021. He contended that the election was not conducted in accordance with the principles laid down in the Constitution and other electoral laws.

When the hearing commenced, counsel for the 1st respondent first of all raised a Preliminary Objection. He then made an oral application under Section 98 of the Civil Procedure Act, for leave to validate a supplementary affidavit of the 1st respondent as part of the response to the petition. Attached to the affidavit was a letter from the Chief Registrar of the Courts of Judicature to the respondent's advocates, indicating that the Commissioner for Oaths before whom the petitioner swore to his affidavit in support of the petition did not possess a valid Practicing Certificate at the time. That the said advocate only obtained the certificate 10 days after commissioning the Affidavit. He thus asserted that affidavit in support of the petition was defective and the petition a nullity.

Counsel for the petitioner opposed the filing of the supplementary affidavit, and challenged the veracity of its contents. He prayed that the trial Judge applies the same level of fairness that he had earlier applied in rejecting the affidavit of No. 37048 DC, Nadhongha James, which the petitioner sought to bring onto the record, because it was served on the respondents 3 hours after the time that the court had assigned for the service of affidavits in rejoinder.

The trial Judge found that the affidavit in support of the Petition was invalid for the reason advanced by the 1st respondent. He accordingly dismissed the petition for being incompetent. He further ruled that the affidavit could not be rectified under section 14A of the Advocates Act, as amended in 2002.

The Petitioner then filed this appeal preferring the following grounds:

1. The learned trial Judge erred in law and fact when he allowed the 1st respondent to file a supplementary affidavit introducing a new matter of fact, being an allegation that the affidavit in support of Election Petition No. 04 of 2021 was commissioned by an advocate who did not possess a valid Practicing Certificate at the time, without

affidavit evidence and when affidavit evidence was closed, when the parties had both filed their final rejoinders and when the trial Court had issued orders that no further affidavit evidence would be allowed.

2. The learned trial judge erred in fact and in law when he acted biasedly in striking out and expunging the affidavit of No. 37048 DC Nadhongha James filed on time on 1st September, 2021 for having been served out of the time allowed by the court and turned around weeks later to accept and rely on the affidavit of the 1st respondent filed out of time on 9th September, 2021, without leave of court, after the Petitioner's rejoinder affidavits and not served on the Petitioner at all, to enable the 1st respondent to introduce a new factual allegation that the affidavit in support of the Petition was commissioned by an Advocate who did not possess a valid Practicing Certificate at the time.

3. The learned trial Judge erred in law and in fact when he held that the allegation that the affidavit in support of the petition was commissioned by an Advocate who did not possess a valid Practicing Certificate at the time, was a matter of law and not fact and could be raised at any time of the trial process.

4. The learned trial Judge erred in fact and in law when he relied on submissions from the Bar and a letter purportedly written by the Chief Registrar of the Courts of Judicature whose authenticity and content was contested, and not affidavit evidence, to find that the affidavit in support of the Petition was commissioned by an advocate who did not possess a valid Practicing Certificate at the time.

5. The learned trial Judge erred in law and fact when he failed to hear the commissioner for oaths who commissioned the affidavit in support of the Petition, when he failed to hear the Chief Registrar of the Courts of Judicature on the authenticity of the letter purported to have been written by her and when he failed to hear the petitioner on the factual question whether the affidavit in support of the Petition was commissioned by an Advocate who did not possess a valid practicing Certificate at the time.

6. The learned trial Judge erred in fact and in law when he held that a photocopy of the letter purportedly written by the Chief Registrar of the Courts of Judicature is sufficient proof on the status of an advocate unless the authenticity of such letter is assailed, without affording the petitioner an opportunity to assail the authenticity and contents of the letter, in an election petition.

7. The learned trial Judge erred in fact and in law when he held that the photocopy of the letter purportedly written by the Chief Registrar of the Courts of Judicature was about the status of the same Commissioner for Oaths who commissioned the affidavit in support of Election Petition No. 02 of 2021, on the basis of conjecture and not evidence on record.

8. The learned trial Judge erred in law and fact when, after finding that the affidavit in support of Election Petition No.04 of 2021 was commissioned by a Commissioner without a Practicing Certificate, he failed to apply the provisions of section 14A of the Advocates Act as amended in 2002 and the provisions of Article 126(2)(e) of the Constitution, and to therefore order the affidavit to be commissioned by another Commissioner for Oaths.

9. The learned trial Judge erred in law and fact when he rejected the affidavit in support of Election Petition No. 04 of 2021 and held that there was no petition before him because Election Petition No. 04 of 2021 was incompetent.

10. The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record relevant to the issue and engaged in conjecture thereby coming to the wrong conclusion.

11. The learned trial Judge erred in law and fact when he penalized the Petitioner in costs in the circumstances.

The appellant prayed that the appeal be allowed and that the ruling and orders of the trial court be set aside. In the alternative, he prayed for an order that the affidavit in support of Election Petition No. 04 of 2021 be commissioned by another Commissioner for Oaths and filed to correct the record of the trial court. Further, that the Petition be heard and determined on its merit. The respondents opposed the appeal.

Representation

At the hearing of the appeal, the appellant was represented by Mr. Alfred Okello Oryem, learned counsel who represented him in the trial court. The 1st Respondent was not represented at the hearing, but had filed written arguments, while the 2nd respondent was represented by Mr Jude Mwasa.

Counsel for all parties filed their written submissions in the appeal before the hearing date, as directed by court. The appellant filed written submissions on 25th February 2022, while the 1st and 2nd respondents filed their joint submissions in reply on 10th March 2022. The appellant filed a rejoinder on 21st March 2022. The appeal was therefore disposed of wholly on the basis of written arguments.

Submissions of counsel

Counsel for the appellant addressed grounds 1, 2, 3 and 10 of the appeal first. He next addressed grounds 4, 5, 6, 7 and 10 together. He finally addressed ground 11 of the appeal on its own.

Counsel for the 1st and 2nd respondents who filed their submissions jointly began by raising a preliminary objection that grounds, 1, 2, 4 and 5 of the appeal contravened rule 86 of the Rules of this court and that for that reason they ought to be struck out. Nonetheless, they went on to address the substance of grounds 1, 2 and 3, each separately. They next addressed grounds 4, 5, 6, 7 and 10 together and finally, ground 11 on its own.

We did not think it expedient to reproduce the submissions of counsel at this point. However, we will review them as they relate to each of the grounds of appeal as we dispose of the questions raised for determination by this court.

Duty of the Court

The duty of this court, as a first appellate court, is stated in rule 30 (1) of the Judicature (Court of Appeal Rules) Directions, SI 13-10. It is to re-appraise the whole of the evidence adduced before the trial court in order for it to reach its own conclusions, both on the facts and the law. But in doing so the court should be mindful of the fact that it did not observe and hear the testimonies of the witnesses **(See Kifamunte Henry v. Uganda, SCCA 10 of 1997).**

Determination of the appeal

The Preliminary Objection

Counsel for the respondents raised a preliminary objection about the propriety of grounds 1, 2, 3, and 4 of the appeal vis-à-vis the Rules of

this court. As is the established practice of the courts, we will address that objection before we proceed to dispose of the rest of the complaints in the appeal.

The gist of the objection was that because the 4 grounds stated were argumentative and contained narrative, they ought to be struck out, as it was held by this Court in **Attorney General v Florence Baliraine, Court of Appeal Civil Appeal No. 78 of 2003**. They offered no further submissions on the point.

In reply, counsel for the appellant distinguished the situation and the decision in **Florence Baliraine's** case (supra) from the case now before court. He submitted that in that case, the grounds complained of did not concisely state the points alleged to have been wrongly decided by the trial judge. That as a result, they did not comply with rule 86 (1) of the Court of Appeal Rules. He further submitted that grounds 1, 2, 3 and 4 of this appeal clearly and concisely stated the points which were alleged to have been wrongly decided. That in addition, counsel filed submissions that addressed each of them. He asserted that counsel for the respondents understood them and it was for that reason that they could respond to them in their submissions. He prayed that the objection be rejected.

Resolution of the objection

Rule 86 (1) of the Rules of this court provides that:

> **(1) A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongfully decided, and the nature of the order which it is proposed to ask the court to make.**

The respondent's complaint was not that the grounds did not specify the points that were wrongly decided; rather it was that the grounds contained narrative and were argumentative. In **Baliraine's case** (supra), this court (per Kakuru, JA) held that:

> *"The grounds of appeal must therefore concisely specify the points which are alleged to have been wrongly decided. General grounds such as grounds 1 & 2 which do not concisely specify the points of objection offend the provisions of* ***Rule 86 (1)*** *of the rules of this court, above cited*
>
> *This practice of advocates setting out general grounds such as grounds 1 & 2 in this appeal that allow them to go on a general fishing expedition at the hearing of the appeal hoping to get something they themselves do not know, must end.*
>
> *On that account I would strike out both grounds 1 and 2."*

In the case now before us, we will refer to one of the grounds to examine whether it did fall in the category of cases that were considered by the court in that case. Ground 2, for instance, was as follows:

> *"2. The learned trial judge erred in fact and in law when he acted biasedly in striking out and expunging the affidavit of No. 37048 DC Nadhongha James filed on (sic) time on 1st September, 2021 for having been served out of the time allowed by the court* ***and turned around weeks later to accept and rely on the affidavit of the 1st respondent filed out of time on 9th September, 2021, without leave of court, after the Petitioner's rejoinder affidavits and not served on the Petitioner at all, to enable the 1st respondent to introduce a new factual allegation that the affidavit in support of the Petition was commissioned by an Advocate who did not possess a valid Practicing Certificate at the time."*** ***{Emphasis of court}***

It was observed that the complaint is contained in one long winded sentence whose aim is quite difficult to understand. It appears that the appellant's actual grievance expressed in this ground of appeal was the alleged bias of the trial judge against the appellant which is shown in his two decisions admitting the two affidavits compared by counsel for the appellant. If that be the case, then the larger part of the text that we have emphasized above would not be necessary to make the concise complaint

to this court as is required by rule 86 (1) of the Rules of this court. That part of the complaint includes narrative and arguments which are best reserved for the submissions of counsel to the court at the hearing. Instead, it is our view that in order to frame the grievance concisely, counsel ought to have couched the ground in terms similar to the following:

> ***The learned trial judge erred in law and acted with bias when he struck out the affidavit of No. 37048, DC Nadhongha James, which was filed in time on 1st September 2021 but allowed and relied on the 1st respondent's supplementary affidavit which was filed out of time and without leave of court.***

The rest of the contents of ground 2, which are really the facts that counsel would rely upon in his arguments, would then be explained during his submissions. Counsel made the same error in grounds 1 and 4 where he again stated the facts and advanced arguments about the complaints made therein. Unfortunately, in a bid to state as many complaints as he could for the court to resolve, grounds 1 and 2 contradict each other. While it was stated in ground 1 that the trial judge disposed of the point that the advocate that commissioned the affidavit in support of the petition without affidavit evidence, in ground 2 counsel asserted that the trial judge wrongly admitted the affidavit that brought that fact onto the record of the court.

For those reasons, we accept the appellants counsel's submission that the decision of this court in **Baliraine's case** (supra) cannot be applied to the situation at hand. The objection therefore cannot be sustained and we reject it.

However, in relation to the decision of this court in **Baliraine's case** (supra), ground 10 of the appeal was as follows:

> *"The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record relevant to the issue and engaged in conjecture thereby coming to the wrong conclusion."*

This ground of appeal clearly does not specify any point that was wrongfully decided by the judge as is required by rule 86 (1) of the Rules of this court. Neither did counsel try to explain in which respect the trial judge failed to evaluate the evidence on record nor how he engaged in conjecture. Instead in his submissions, he purports to argue ground 10 together with all the other grounds, except ground 11 which is a specific complaint about the costs that the trial judge awarded to the respondents.

This leads us to the conclusion that there was nothing to show that the learned trial judge failed to evaluate the evidence on record, as asserted in ground 10. Annexing it to the other grounds of appeal during the submissions confirmed that counsel for the appellant was on a *"fishing expedition"* when he included ground 10 in the memorandum of appeal. It therefore falls in the category of grounds that were discussed by this court in **Baliraine's case** (supra) and struck out.

In the end result, we hereby strike out ground 10 of the appeal for contravening rule 86 (1) of the Rules of this court.

Grounds 1, 2, 3, 4, 6 and 6

The 6 grounds above all relate to whether or not the trial judge required evidence to be on the record, and whether or not such evidence was properly before him when he made the finding that the advocate who commissioned the affidavit in support of the petition did not possess a valid practicing certificate at the time that he did so.

In ground 2, the appellant raises the interesting complaint that the trial judge acted in a biased manner when he allowed the 1st respondent's supplementary affidavit onto the record when he had earlier rejected an affidavit in support that was filed outside the time that he had allotted for filing affidavits. Ground 5 raises the complaint that the trial judge did not take any evidence from the appellant and the Chief Registrar

about the authenticity of the letter that that the 1st respondent purported she wrote. While ground 6 is a complaint that the trial judge relied on a Photostat copy of the same letter, as well as his decision that it was sufficient proof to establish the status of the advocate's practicing certificate when he put his hand upon the impugned affidavit, because it was never assailed.

We deemed it prudent to address these 6 grounds of appeal together in order to avoid repetitions in this judgment. It was also convenient because the documents and/or evidence that is in contention in these grounds of appeal are: (i) the 2nd supplementary affidavit dated 7th September 2021, filed by the 1st respondent to usher in the letter from the Chief Registrar dated the 6th September 2021; (ii) the affidavit of Mr Raymond Owokukiroru in Mbale Election Petition No 4 of 2021; and (iii) the rest of the annexure to the affidavit. We will for those reasons consider these 6 grounds of the appeal together.

However, it is pertinent to point out from the onset that there appears to have been some confusion when Mr Okello framed grounds 1 and 2 of the appeal. At the risk of repetition, but for clarity, we reproduce the two grounds here before we make a decision about how to resolve them. They were as follows:

> *"1. The learned trial Judge erred in law and fact when he allowed the 1st respondent to file a supplementary affidavit introducing a new matter of fact,* ***being an allegation that the affidavit in support of Election Petition No. 04 of 2021 was commissioned by an advocate who did not possess a valid Practicing Certificate at the time, without affidavit evidence and when affidavit evidence was closed****, when the parties had both filed their final rejoinders and when the trial Court had issued orders that no further affidavit evidence would be allowed.*
>
> *2. The learned trial judge erred in fact and in law when he acted biasedly in striking out and expunging the affidavit of No. 37048 DC Nadhongha James filed on time on 1st September, 2021 for having been served out of the time allowed by the court and turned around weeks later* ***to***

accept and rely on the affidavit of the 1st respondent filed out of time on 9th September, 2021, without leave of court, after the Petitioner's rejoinder affidavits and not served on the Petitioner at all, to enable the 1st respondent to introduce a new factual allegation that the affidavit in support of the Petition was commissioned by an Advocate who did not possess a valid Practicing Certificate at the time."

{Our Emphasis}

In ground 1, the appellant's grievance is clearly that the trial judge acted without affidavit evidence when he considered the preliminary objection. However, in ground 2, counsel turns round and complains that the trial judge was biased when he admitted the 1st respondent's affidavit that was filed on 9th September 2021 to introduce the allegations about the affidavit accompanying the petition.

We perused the record of appeal carefully and we found no affidavit filed by the 1st respondent on the 9th of September 2021. Instead, at page 163 of the record, there was a supplementary affidavit that was sworn by the 1st respondent, Ogwari Polycarp, on the 7th of September 2021 and filed in court on the 8th September 2021. This must be the controversial affidavit in dispute which ushered in the allegation that resulted in the dismissal of the appeal.

That aside, ground 2 of the appeal clearly contradicted the contents of ground 1. In ground 2, the appellant's counsel admitted that the trial judge admitted the contested affidavit evidence onto the record, though he complains that he did so in a manner that was biased. In view of the complaints in ground 2, we would hold that ground 1 fell by the wayside. It was overtaken when counsel preferred the complaint in ground 2 of the appeal.

In conclusion, we find and hold that the effect of including ground 2 in the memorandum of appeal was to abandon ground 1. It will therefore not be necessary to dispose of ground 1 of the appeal and it is hereby struck out.

That then leaves us with grounds 2, 3, 4, 5 and 6 in this batch and we will now consider the submissions of counsel on each of them.

Submissions of Counsel

Mr Okello Oryem for the appellant submitted that the learned trial judge misdirected himself when he held that the legality or competence of an election petition is a question of law and not fact and proceeded to determine it accordingly. He contended that the issue that was raised was not whether the petition was competent, rather it was whether the affidavit accompanying the petition was commissioned by an advocate who was certified at the time that he commissioned it. That the learned trial judge had to determine that issue in order to determine what to do with the petition. He further submitted that the issue raised questions of mixed law and fact. That therefore it would not be determined purely as a point of law. Further that Election Petition No 4 of 2021 was validly filed in accordance with section 60 of the Parliamentary Elections Act and rule 5 of the Parliamentary Elections (Election Petitions) Rules.

Counsel relied upon the decisions of the Supreme Court in **Sitenda Sebalu v. Sam K. Njuba, Supreme Court Election Petition Appeal No. 26 of 2007** and **Kamba Saleh v. Hon Namuyangu Jennifer**, **Court of Appeal Election Petition Appeal No. 27 of 2011** and submitted that an election petition is presented in accordance with the law cited and according to that law, it is validly filed. It cannot be struck out except where there is a fundamental defect. That as a result the learned trial judge misdirected himself on the question that he had to decide.

Counsel went on to submit that the question before the trial judge was one of mixed law and fact because it required proof of the fact that the petition was accompanied by an affidavit that was commissioned by a Commissioner who had not renewed his practising certificate. He referred us to the decision in **Pontrilas Investments Ltd v. Central Bank of**

Kenya & Another, East Africa Court of Justice Ref No. 8 of 2018, where the court reiterated the principle that a preliminary objection was purely a point of law which had to be disposed of on the assumption that all facts pleaded by the other side were correct.

Mr Okello Oryem went on to submit that the learned trial judge erred in law and fact when he allowed the 1st respondent to file a supplementary affidavit introducing a new matter of fact when affidavit evidence was closed. He emphasised that both respondents had filed their final replies and closed the evidence. That it is an instructive principle of law that where pleadings in an election petition close, the scope of evidence is also closed. He further submitted that a party cannot thereafter adduce evidence in respect of a matter that is not pleaded. That affidavits after pleadings are closed are considered purely as evidence and as such they can only contain what has already been pleaded. That evidence in reply and rejoinders cannot raise new matters and that affidavits in rejoinder can only be sworn to clarify or file a rejoinder on specific issues raised by the respondent in affidavits in reply.

Counsel then emphasised the fact that the matter that was raised about the affidavit in support of the petition was a completely new matter not part of the pleadings before the trial judge. That the affidavit offended the principal in the case of **Mutembuli Yusuf v. Nagwomu Moses Musamba & Electoral Commission**, **Court of Appeal Election Petition Appeal No. 43 of 2016**. That as a result, the trial judge ought to have struck the affidavit out and expunged from the record. But instead he referred to the provisions of section 60 (3) of the Parliamentary Elections Act and Rules 3 (a) and 9 of the Parliamentary Elections (Interim Provisions) Rules, and the decision in **Makula International Ltd v. His Eminence Cardinal Nsubuga & Another, Court of Appeal Civil Appeal No 4 of 1981,** often cited from the Digest as **HCB [1981] 11,** and held that court was vested with power under the law to grant leave to validate a supplementary

affidavit in support of the answer to the petition after pleadings and evidence have closed.

Regarding the complaint that the trial judge was biased in favour of the 1st respondent, counsel referred to two events to demonstrate this. The 1st was that after issuing the order closing evidence in the matter on 23 August, 2021 except rejoinders to be filed by the appellant by 9.30 am on 2 September, 2021, and striking out an affidavit filed by the appellant because it was served 3 hours late, the trial judge allowed the 1st respondent's 2nd supplementary affidavit onto the record. That he did this when the affidavit was filed 6 days after all evidence by affidavit had closed.

The 2nd event or instance was that the learned trial judge did not take the appellant's complaint into account that the supplementary affidavit which introduced a new allegation of mixed fact and law for determination by the court was not served on the appellant. That the trial judge simply proceeded to allow the affidavit onto the record and then based his entire ruling on it. That as a result The appellant was never given an opportunity to rebut the contents of the affidavit.

Counsel went on to submit that in this case there is no doubt that the learned trial judge required evidence to prove the allegations raised by the 1st respondent in the 2nd supplementary affidavit, and by his lawyers from the bar, about the contents of the affidavit accompanying the election petition. He further submitted that the decision of the learned trial judge to treat this as a point of law affected his evaluation of evidence in the letter attributed to the learned Chief Registrar, alleged to be the basis of the objection.

Counsel went on to submit that the 2nd supplementary affidavit of the 1st respondent simply conveyed the letter attributed to the learned Chief Registrar. That there was no affidavit evidence by the learned Chief Registrar who purportedly authored the letter. Further, that there was no

affidavit evidence on record proving the authenticity and correctness of the contents of the letter. And that by relying heavily on the letter in question as he did, the learned trial judge relied on the evidence of a non-existent witness. He submitted that this was a grave error that occasioned a miscarriage of justice

Still with regard to the complaint in ground 4 counsel for the appellant went on to submit that the decision of the learned trial judge was erroneous on the facts as well as the law. That in the first place the authenticity of the letter attributed to the learned Chief Registrar as well as its correctness where vehemently contested. Secondly, that rather than require affidavit evidence regarding the authenticity of the letter and the correctness of its contents, the learned trial judge engaged in conjecture and fanciful theories about the powers of the Chief Registrar.

With regard to the complaint in ground 5 that the learned trial judge ought to have called for the evidence of the Commissioner for Oaths and the Chief Registrar, to prove the fact that the former did not hold a valid practicing certificate when he commissioned the affidavit in support of the petition, Mr Okello Oryem submitted that the letter of the Chief Registrar was not credible because the court was not shown the original thereof. That the trial judge's reliance upon the letter was therefore an error of fact and law. Further that the learned Chief Registrar was not called as a witness. Counsel went on to submit that it was an error for the trial judge to attach any probative value to the letter introduced by a biased witness whose affidavit was not subjected to cross examination.

Mr Okello Oryem further submitted that the trial judge's finding that the advocate who commissioned the affidavit in support of the petition in **Ossiya Solomon v Koluo Andrew & Electoral Commission (supra)** was based on nothing more than a submission from the bar. That his finding was based on conjecture and fanciful theories and not evidence because the Registrar was not summoned to testify about the letter attributed to

her, at the very least. He referred us to the decision in **Mutembuli Yusuf v Nagwomu Moses & Electoral Commission, Court of Appeal Election Petition Appeal No 43 of 2016,** where it was held that a stranger to the petition may validly file an affidavit in reply if the facts or issues that call for the rejoinder are within that person's knowledge. He asserted that the Chief Registrar was a stranger who knowingly or unknowingly became a witness in the case. That the reason for the trial judge's error in relying upon this letter resulted from his decision that the question before the court was purely one of law. He prayed that the grounds of appeal stated above be allowed.

In reply counsel for the respondents submitted that the affidavit of No. 37048 DC Nadonga James was struck out by the trial judge because it was filed out of time and without leave of court to so file it. That the 1st respondent's supplementary affidavit on the other hand was allowed upon obtaining the necessary leave of court. That this did not portray any bias on the part of the trial judge who in either instance offered the rationale for his ruling. Counsel went on to submit that for reasons best known to the appellant's counsel he waited until court was convened to serve the affidavit which was struck out, very well knowing that the respondent would not have any time to study the allegations therein.

With regard to the complaint that the 1st respondent's 2nd supplementary affidavit in support of the answer to the petition was not served on him, so contravening the appellant's right to a fair hearing, the respondent's counsel submitted that this was a pure lie perpetrated by counsel for the appellant. They asserted that the appellant rejected service of the said affidavit before appearing for the hearing that day. And that if the appellant had deemed it fit to make any response to the supplementary affidavit, it was within his rights to seek the leave of court to do so, but he opted not to. That the appellant therefore elected not to exercise or enforce his right to a hearing in as far as the respondents 2nd supplementary affidavit was

concerned. That as a result the appellant's complaint in this regard was misplaced.

Counsel went on to submit that the matter raised in the contested supplementary affidavit was a matter of law based on an illegality which was ably responded to by the appellant's counsel in his submissions before the trial court. That as a result the appellant did not suffer any prejudice arising from the court denying him of his right to a fair hearing.

Regarding the complaint that the learned trial judge erred when he concluded that the commissioning of the affidavit by an advocate without a valid practising certificate is a matter of law, counsel for the respondent submitted that the trial judge correctly dealt with this at pages 22 and 24 of the record of proceedings. He went on to submit on section 1 (4) of the Commissioner for Oaths (Advocates) Act and section 11 of the Advocates Act. He explained that as a result of these two provisions, the commissioning of an affidavit by an advocate who does not have a valid practising certificate is a matter of law and it was properly brought to the attention of the court as a preliminary objection.

The respondent's counsel went on to submit that there is no prescribed manner through which an illegality once detected is to be brought to the attention of court. That in this case, the act constituting the illegality was brought to the attention of court for its determination as a point of law through the submissions of counsel for the 1st respondent, premised on a letter of the Chief Registrar of the courts of judicature and the decision in the case **Solomon Ossiya v Koluo Joseph Andrew & Electoral Commission, Soroti Election Petition No. 2 of 2021**. He concluded that the illegality could be proved by the submissions of counsel, premised on the contents of the said letter and the court decision.

Specifically, with regard to the Chief Registrar's letter on which the trial judge based his decision, the respondents' counsel submitted that the

copy that was brought before the court was an original copy. Secondly, that the 1st respondent's 2nd supplementary affidavit was admitted onto the record of the court on 9 September, 2021. That annexed to this affidavit was the letter of the Chief Registrar confirming that she issued a practising certificate for the year 2021 to Raymond Owokukiroru on 19 March, 2021. That this was 9 days after he commissioned the affidavit in support of the petition.

The respondents' counsel further contended that this piece of evidence was properly evaluated by the trial judge who found that there was no doubt in his mind when he concluded that the advocate in the case of **Solomon Ossiya** (supra) was the same advocate who commissioned the affidavit in support of the appellant's petition. That since the supplementary affidavit was admitted in evidence and came onto the record of the court, it was evidence on which the existence of an illegality was conveyed to the court.

Counsel then contended that it was not necessary for the Chief Registrar to swear an affidavit in this regard, because her letter was addressed to the 1st respondent's lawyers who were his recognised agents under Order 3 rule 4 of the Civil Procedure Rules (CPR). Further that the original letter of the Chief Registrar bore a seal and signature which are judicially noticed. That there was no need for further proof according to sections 55, 56 (1) (f) and 56 (1) (k) of the Evidence Act. He emphasised that the appellant did not raise any objection to challenge the authenticity of the letter in the lower court. That as a result the grounds of appeal about the registrar's letter have no merit at all and should be dismissed.

Counsel for the appellant filed submissions in rejoinder on 21 March, 2022 in which he reiterated the contents of his submissions filed on 25 February, 2022 in respect of the 6 grounds of appeal. We therefore will not repeat them here.

Resolution of Grounds 2, 3, 4, 5, 6 and 7

We have carefully considered the submissions of counsel for all the parties to this appeal and the authorities that they referred to and presented to court. The questions that arise for the determination of this court in order to comprehensively dispose of these 6 grounds of appeal are as follows:

i) Whether the preliminary objection raised by the 1st respondent was purely a point of law.

ii) Whether the trial judge erred when he allowed the 1st respondent to file a second supplementary affidavit after the time that he had allotted for the filing of affidavits in rejoinder.

iii) Whether the said affidavit introduced a new fact that was not pleaded in the petition, and if so, whether the affidavit ought to have been struck out.

iv) Whether the trial judge was biased when he allowed the 1st respondent's second supplementary affidavit onto the record.

v) Whether the appellant was denied the right to a fair hearing when he did not get the opportunity to respond to the facts stated in the 2nd supplementary affidavit filed by the 1st respondent to oppose his petition.

vi) Whether the trial judge ought to have called for the affidavit evidence of the Chief Registrar and the Commissioner for Oaths in issue to prove the facts contained in the Regitrar's letter and its authenticity, and if so, whether he engaged in conjecture and fanciful theories about the powers of the Registrar.

We shall dispose of these questions in the same order that they appear above.

With regard to the nature of the objection raised in this case, at page 71 of the record of proceedings (page 42 in print), it is shown that Mr Daniel Okalebo raised a point of law about an illegality which, in his view,

would dispose of the entire petition without hearing. He referred to the 1st respondent's supplementary affidavit, at page 163 of the record, which described the illegality and its source. In paragraph 13 of that affidavit the 1st respondent stated that his advocates informed him that they would raise a point of law to the effect that when Mr Owokukiroru commissioned the affidavit in issue when he had no valid practicing certificate, he acted illegally and therefore the affidavit was incurably defective.

Counsel for the appellant then sought to have the court determine whether the objection raised was a point of law, or mixed law and fact, the contention being that if it raised questions of mixed law and fact, it could not be determined purely as a point of law. The trial judge dealt with it as the first issue in his ruling. He then ruled on it at page 23 and 24 of the record as follows:

> *"The illegality in the present case is a matter of law because, in addition, it calls for examination of section 11(2) of the Advocates Act Cap 267 which provides that a practicing certificate shall be valid until the 31st day of December next after its issue, and shall be renewable on application being made on such form and payment of fees as the Law Council may by regulations prescribe. A grace period of up to 1st March is granted for renewal.*
>
> ...
>
> *Based on the forgone, (sic) the legality or competence of an election petition is a question of law and not of fact. The third issue is answered in the affirmative."*

There is no doubt in this case that the trial judge accepted the second supplementary affidavit filed by the 1st respondent onto the record in order to raise the objection based on an illegality the he wished to raise before the court. And though the appellant admitted this in ground one of the appeal, which we deemed fit to strike out, the appellant now challenges that decision in this appeal for alleged bias in favour of the respondent. That being the case, section 17 of the Parliamentary Elections Act provides that the hearing of petitions shall be regulated

as nearly as may be, in accordance with the Civil Procedure Act and Rules made under the Act relating to trials in the High Court. The Civil Procedure Rules are therefore applicable to this issue.

Order 6 rule 28 of the CPR provides as follows:

> **"28. Points of law may be raised by pleading.**
>
> **Any party shall be entitled to raise by his or her pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing."**

By implication therefore, a point of law can be disposed of as a preliminary matter at the onset of or before a hearing, or after the hearing.

The nature of a preliminary objection and how it may be handled by courts was addressed in **Pontrilas Investments Ltd** (supra) which was based on the decision in **Mukisa Biscuits Manufacturing Co. Ltd. v. West End Distributors Ltd [1969] EA 69**. In that case, the East Africa Court of Appeal defined a *"preliminary objection"* as follows:

> *"A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of a suit. Examples are an objection to jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."*

The interpretation of what consists of a preliminary objection which was rendered in the ***Pontrilas Investments case*** (supra), cited by counsel for the appellant is that:

> *"A preliminary objection was in the nature of what used to be a demurrer.* ***It raised a pure point of law, which was argued on the assumption that all facts pleaded by the other side were correct.*** *It could not be raised if any fact had to be ascertained or what was sought was the exercise of discretion. A preliminary objection could only be properly taken where what*

*was involved was a pure point of law, but where there was any issue involving the clash of fact, the production of evidence and assessment of testimony it should not be treated as a preliminary point." {**Emphasis supplied**}*

We are guided by this definition of what amounts to a preliminary objection. The objection on a point of law may be raised where uncontested facts are contained in the pleadings. Where the determination of a point of law raised by preliminary objection requires the evaluation of evidence (over and above the uncontested facts in the pleadings), the preliminary objection is improperly raised and the point of law in contention therein should be determined after consideration of the evidence. Indeed, in **Mukisa Biscuits Manufacturing Co. Ltd. v. West End Distributors Ltd** (supra), the East Africa Court of Appeal observed that "the improper raising of points (of law) by way of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuses the issues."

We draw further instruction on this from the decision of the Supreme Court in **Major General D. Tinyefuza v Attorney General, Constitutional Appeal No 1 of 1997,** where the preliminary objection that was the subject of the discussion was whether the petition before the Constitutional Court raised a cause of action. Their Lordships of the Supreme Court rendered almost similar interpretations of how a point of law may be disposed of by the courts, based on the provisions of Order 6 rule 26, 27 and 28 CPR, at the time. At page 16 of his judgment, Wambuzi, CJ (as he then was) had this to say:

"I agree in principle that a preliminary objection should be disposed of as a preliminary matter, (sic) in the case before us, the record of learned Manyindo DCJ, quite clearly indicates the decision on the course adopted by the court,

'We will proceed to hear the case on merits and we will rule on the objection in the judgment.'

It has not been shown that this course was wrong in law. True, time and costs should have been saved but only if the objection had been upheld and the case did not proceed to trial. There may be several reasons why the court defers a ruling. ***Sometimes a decision on a preliminary matter may depend on the evidence****. I am unable to find fault with the course adopted by the Constitutional Court particularly, as the objections were overruled."*

After laying down the provisions of Order 6 rules 26, 27 and 28 of the CPR verbatim, Oder, JSC dealt with the issue in the following manner:

"In my view, the effect of the rules under Order 6 referred to appears to be this: ***the defendant in a suit or the respondent in a petition may raise a preliminary objection before or at the commencement of the hearing of the suit or petition that the plaint or petition discloses no cause of action. After hearing arguments (if any) from both parties the court may make a ruling at that stage upholding or rejecting the preliminary objection. The court may also defer the ruling on the objection until after the hearing of the suit or petition. Such a deferment may be made where it is necessary to hear some or the entire evidence to enable the court to decide whether a cause of action is disclosed or not****. I think it is a matter of discretion of the court as regards when to make a ruling on the objection. No hard and fast rule can and should be laid to fetter the court's discretion. The exercise of the discretion must, in my view depend on the facts and circumstances of each case."*

{Emphasis supplied}

It then becomes clear that what remains in contention here is whether there were facts pleaded before the court on which the trial judge could have relied to make a decision on the point of law raised by the 1st respondent. In this case, the trial court admitted the 1st respondent's second supplementary affidavit onto the record, which attested to the illegality raised as a point of law, then disposed of the point of law as a preliminary matter and determined the appeal on that basis.

The record of appeal shows that Mr Okalebo made an application for the admission of his client's second supplementary affidavit that bore the contested facts in submissions that appear at pages 71-79 of the

record. The application also raised the point of law that he sought to make through the said affidavit. Counsel for the appellant did not challenge the contents of the affidavit. Instead, in his reply to the application he complained about the absence of service on him of the contested affidavit. He went on to submit, at page 82 of the record, that the facts in the affidavit had to be proved by other evidence, including publications in the gazette, not from the bar. He did not apply for leave to file an affidavit to rebut the facts in the second supplementary affidavit. By implication therefore, when he made the application to validate the oath under section 14A of the Advocates Act, Mr Okello Oryem admitted that the oath for the affidavit accompanying the petition was taken before an advocate without a valid practicing certificate.

The sum total of all this was that the preliminary objection that was raised was based on facts that were adduced in the 1st respondent's second supplementary affidavit. The facts were admitted by counsel for the petitioner and needed no further proof. To that extent therefore, the finding of the trial judge that the point of law raised by the 1st respondent was purely based on the law was correct, because it was based on the uncontested facts in the supplementary affidavit that had been admitted on record, and we find so. Having so found, it follows that the trial court rightly disposed of the point of law as a preliminary matter.

As to whether the trial judge admitted the second supplementary evidence onto the record under the law, this was the first issue that was framed for determination of the trial court. The trial judge dealt with it at pages 18-21. He discussed the various provisions under the Parliamentary Elections Act and the Election Petition Rules. He distinguished between the affidavit accompanying the petition and the affidavits in answer to it. He pointed out that the former is provided for

by the Rules and not the Act. Relying on rule 9 of the Parliamentary Elections (Interim Provisions) Rules, SI 141-2, he then ruled, at page 21 of the record, that court had the power to allow the second supplementary affidavit onto the record.

We therefore find that the trial judge made no error under the law and we cannot fault him for admitting the said affidavit onto the record for the reasons that he gave.

Going onto the question whether the affidavit introduced a new fact that was not pleaded in the answer to the petition, there is no doubt that the challenge to the affidavit accompanying the petition was a new matter that was not pleaded in the 1st respondent's answer. However, it was stated that by filing the 2nd supplementary affidavit, he sought to bring an illegality in the pleadings to the attention of the court.

The general rule regarding new matters in pleadings in the High Court in civil matters is expressed in Order 6 rule 6 CPR, also applicable to elections petitions, as we already stated above, which provides that:

> **"6. New fact must be specially pleaded.**
>
> **The defendant or plaintiff, as the case may be, shall raise by his or her pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, limitation act, release, payment, performance, or facts, showing illegality either by statute or common law."**

Under normal circumstances, the 1st respondent ought to have applied to amend his answer to the petition under the rule above, before filing an affidavit in support of the new facts pleaded. This is because, under Order 6 rule 19 CPR, the court may allow an amendment of the pleadings at any time, subject to costs. However, in the face of an

illegality, the general rule was stated by the former Court of Appeal in **Makula International Ltd v. His Eminence Cardinal Nsubuga & Another (supra).** It is that a court of law cannot sanction that which is illegal; illegality once brought to the attention of court overrides all questions of pleading, including any admission made thereon.

Consequently, we cannot fault the trial judge for having entertained the new matter raised by the 1st respondent, though it was not pleaded in his answer. As a consequence, the second supplementary affidavit would not be struck out because we find that it was properly admitted onto the record of the court.

We now turn to the complaint that the trial judge was biased when he allowed the impugned affidavit onto the record after he rejected and expunged the affidavit of DC Nadhongha, which was filed by the petitioner.

The trial judge admitted the impugned affidavit onto the record in his ruling that is the subject of this appeal. He then proceeded to rely upon it, in the same ruling, to dismiss the appeal. The reasons for admitting or validating the affidavit are given at pages 18-21 of the record and we found no reason to upset his decision.

Regarding the affidavit of DC Nadhonga, when the parties appeared before court on 2nd September 2021 for scheduling of the petition for hearing, Mr Okalebo for the 1st respondent drew it to the attention of court that in spite of the fact that the court ordered the appellant to file all affidavits in rejoinder by 9.30 am on that day, the petitioner served the affidavit in rejoinder, sworn by DC Nadhongha, on counsel for the 1st respondent that afternoon. Counsel for the 1st respondent then complained that he was not given an opportunity to peruse it and that therefore, it would prejudice his client in his defence. The trial judge ruled on the matter at page 42-43 of the record. He observed that the

affidavit was served on the opposite party in court; he did not have time to read though it and formulate ideas to include in the scheduling memorandum. Further that no reason was given for late service of the affidavit on the 1st respondent. For those reasons, the trial judge expunged the affidavit from the record.

The Commentary on the Bangalore Principles of Judicial Conduct[1], at page 59, adopted the definition of the term *"bias"* in **R v. Bertram [1989] OJ No. 2133 (QL),** as it was quoted by Justice Cory in **R v. S, Supreme Court of Canada, [1997] 3 SCR 484**, as follows:

> *"Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction.* ***Bias is a condition or state of mind, an attitude or point of view, which sways or colours judgment and renders a judge unable to exercise his or her functions impartially in a particular case."*** *{Emphasis of this court }*

The application of the principle in the courts in Uganda was discussed by the Supreme Court in, among others, **Theodore Ssekikubo & 4 Others v. Attorney General & 4 Others, Constitutional Appeal No 1 of 2015**. The court accepted the position that was expounded in Halsbury's Laws of England, Volume 61 (2010) at paragraph 633 about apparent bias as follows:

> *"It is generally unnecessary to establish the presence of actual bias although the courts are not precluded from entertaining such an allegation. It is enough to establish the appearance of bias. It is now established that a uniform test applies which requires the court to inform itself about all the circumstances which relate to the suggestion that the decision-maker is biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the decision-maker was biased."*

The court then found and held that in the circumstances of that case, they found no indication of bias, because all parties were given the

[1] United Nations Office on Drugs and Crime, September 2007

opportunity to present their case. That moreover, the justices of the Court of Appeal were not related to any of parties and no reason was given as to why they would have been biased in favour of any of the parties. Further that the court might have made an error of law by giving a ruling which had the effect of disposing of the petition. That notwithstanding they delivered judgment.

In the case now before us, the appellant gives no reason as to why the trial judge would have been biased in favour of the 1st respondent against the appellant. He made two decisions, one in favour of the 1st respondent and the other against the appellant based on two different sets of facts. He laid out the law that was the basis of his decision, though with the error pointed out above. However, that could not be construed as bias against the appellant, for it is possible for judges to make errors in judgment, and we find so. Ground 2 of the appeal therefore fails.

As to whether the appellant was denied the right to a fair hearing when he was not given an opportunity to respond by affidavit to the allegations in the second supplementary affidavit of the 1st respondent, we have already observed that counsel for the appellant did not apply to file a response to that affidavit anywhere in his submissions. Instead he admitted that Mr Owokukiroru who commissioned the impugned affidavit did not have a valid practicing certificate at the time that he did so. He went on to apply to the court to direct that the defect be rectified under section 14A of the Advocates Act.

In the circumstances, we find that through his advocate, the appellant gave up his right to respond to the contested affidavit. We therefore cannot fault the trial judge for the mistake, if at all it was, of his advocate when he did not call for an affidavit of the appellant to rebut the 1st respondent's allegations.

We now turn to the argument that the trial judge ought to have called for the affidavit of the learned Chief Registrar to prove the date on which Mr Owokukiroru's practicing certificate for the year 2021 was issued to him. And that when he did not do so, he relied on submissions from the bar.

We have already established that the trial judge admitted the second supplementary affidavit of the 1st respondent in which the allegations about Mr Owokukiroru's right to practice as an advocate and a Commissioner for Oaths was brought before the court. Further that the facts in that affidavit were based on a letter from the Chief Registrar of the Courts of Judicature dated 6th September 2021.

In this regard, the trial judge found and held in his ruling at page 8 thereof (at page 19 of the record) that:

> *"The Chief Registrar of the Courts of Judicature is a senior judicial officer appointed under Article 145 of the Constitution, and whose functions are spelt out under Section 15 of the Judiciary Administration Act, No. 8 of 2020. The Chief Registrar is the chief custodian of the Roll of Advocates in Uganda and is the authority that issues practicing certificates to Advocates in any given year. Therefore, a letter under the hand and signature of the Chief Registrar written in the course of official business is sufficient proof on the status of any practicing certificate of an Advocate unless the authenticity of such a letter is assailed; which was not the case in this matter."*

The basis of the trial judge's decision to rely on the Registrar's letter was section 15 of the Administration of Judiciary Act which provides for the appointment of and the functions of the Chief Registrar. It may not be applicable to the question at hand, but by dint of section 7 of the Advocates Act, the Registrar is under the statutory duty to keep the Roll of Advocates in Uganda.

Regulation 12 of the Advocates (Enrolment and Certification) Regulations, S1 267-1 provides for the procedure to apply for a practicing certificate. The format is given in Form 4 of the Second Schedule to the Rules. The application

is to be addressed to the Registrar, High Court of Uganda. *"Registrar"* is defined by section 1 (l) of the Advocates Act to mean *"Registrar of the High Court."* It is this same Chief Registrar that is charged with the role of keeping the Roll of Advocates in Uganda.

The letter of the Registrar was produced annexed to the affidavit as secondary evidence because it was a Photostat copy of the original which was not certified by the Registrar. We observed that neither was the original produced for the inspection of the court. However, the 2nd supplementary affidavit of the 1st respondent did not only rely on the Chief Registrar's letter. Annexed to it was a certified copy of the practicing certificate issued on the 19th March 2021, as Certificate No 14812. The document is at page 78 of the Supplementary Record of Appeal that was filed in this court on 17th February 2022.

In further support of the 1st respondent's contention was an affidavit sworn by Mr Raymond Owokukiroru on the 21st August 2021 in the case of **Solomon Ossiya Alemu v Kuluo Joseph Andrew & the Electoral Commission, Soroti Election Petition No. 2 of 2021,** Annexure "F" to the second supplementary affidavit of the 1st respondent. In the said affidavit, Mr Owokukiroru admitted that his practicing certificate for the year 2021 was indeed issued on 19th March 2021. He also clarified why it was so and stated that the affidavit was to clarify the status of his Commission as a Commissioner for Oaths when he commissioned the contested affidavits of the witnesses in that case.

Mr Okello Oryem for the petitioner, now the appellant, did not object to a Photostat copy being the basis of the arguments of the 1st respondent's counsel in the lower court. However, in addition and in further evidence, Mr Okalebo referred court to a ruling of the High Court on the same issue in the case of **Ossiya Solomon (supra)**, in which the court found and held that indeed the contested practicing certificate was issued on the 19th March 2021.

In view of the evidence above adduced before the trial court, it is not true that the trial judge relied on submissions from the bar in order to come to his decision in this matter. We also find that there was sufficient evidence before him to make the decision and there was no need for the trial judge to call for the affidavit of the Chief Registrar. This is especially so because the appellant did not insist on it in the lower court. He only brought it up in this court because the decision turned against his client. Ground 4 of the appeal therefore also must fail.

The complaint in ground 6 about the authenticity of the Photostat copy of the letter of the Registrar that was annexed to the 1st respondent's 2nd supplementary affidavit has already been addressed above. The appellant's advocate did not request for time to present evidence to assail the contents of the letter. There was also sufficient evidence on the record to remove any doubts about the source and contents of the impugned letter.

In ground 7, the complaint was that trial judge relied on conjecture and not evidence when he came to the conclusion that the Commissioner for Oaths who attested to the affidavit in support of the petition in this case was the same person who attested to a similar document in the case of **Solomon Ossiya** (supra). We find that there was sufficient evidence from that case to prove that Mr Owokukiroru Raymond was indeed the same advocate who commissioned the contested affidavit in that case. There could have been no better evidence than the affidavit on Mr Raymond Owokukiroru himself, in the case of **Solomon Ossiya** (supra) admitting that indeed his practicing certificate for 2021 was issued by the Chief Registrar on the 19th March 2021.

In conclusion, grounds 2, 4, 5, 6 and 7 of the appeal must fail.

Grounds 8 and 9

In ground 8, the appellant's complaint was that after he found that the affidavit in support of the petition was commissioned by an advocate without a valid practicing certificate, the trial judge ought to have allowed it to be rectified before another Commissioner for Oaths pursuant to section 14A of the Advocates Act and Article 126 (2) (e) of the Constitution, but he did not. Ground 9 relates to ground 8 as it is a complaint that the learned trial judge erred in law and fact when he rejected the impugned affidavit and held that there was no election petition before him because Election Petition No 04 of 2021 was incompetent. The two grounds will therefore be considered together.

Submissions of Counsel

Mr Okello Oryem for the appellant submitted that the election petition was validly filed according to section 60 of the Parliamentary Elections Act and rule 5 of the Election Petition Rules. He referred us to the decisions in **Kamba Saleh Moses v Namuyangu Jennifer, Election Petition Appeal No 27 of 2011 and Sitenda Sebalu v Sam K. Njuba, Supreme Court Election Petition Appeal No 26 of 2007,** to support his submission that it cannot be struck down except where there is a fundamental defect. He asserted that in this case there is no doubt that the election petition was filed and accompanied by an affidavit.

Counsel further submitted that it is the law that an affidavit accompanying an election petition which is commissioned by an advocate without a practising certificate is invalid. He referred to the decisions in **Bakunda Darlington v. Dr Kinyatta Stanley & Another Supreme Court Civil Appeal No. 27 of 1996, Returning Officer Iganga District v. Haji Muluya MustapharCourt of Appeal Civil Appeal No 13 of 1997** and **Professor Syed Huq v. Islami University in Uganda, Supreme court Civil Appeal No. 47 of 1995.** He contended

that an election petition accompanied by such an affidavit is itself not incompetent for the reason that the affidavit was commissioned by an advocate without a valid practising certificate. He referred us to the decision of this court in **Suubi Kinyamatama Juliet v Sentongo Robinah Nakasirye & Another, Election Petition Appeal No 92 of 2016.**

Counsel then submitted that the learned trial judge misdirected himself when he held that the petition could not be cured under the provisions of Article 126 (2) (e) of the Constitution and section 14A of the Advocates Act as amended in 2002, because those provisions would not apply where the petition is found to be incompetent since in effect there is no petition before court. He submitted that the trial judge failed to apply the principles in the case of **Kinyamatama** (supra) in which this court explained the purpose of section 14A of the Advocates Act. He went on to explain that in that case this court clarified that in scenarios such as the one in this case an election petition does not collapse because of the invalid affidavit because such an affidavit can be validated under section 14A (1) (b) of the Advocates Act.

Counsel for the appellant went on to submit that in such situations the provisions of Article 126 (2) (e) of the Constitution should also come into play. He referred us to the decisions in **Essaji v Solanki [1968] EA 218** and **Sitenda Sebalu** (supra) and submitted that the provisions of the Constitution and the Advocates Act referred to above complement each other, as this court found in the case of **Kinyamatama** (supra).

In reply, counsel for the respondents submitted that it is indeed true that there is a window of opportunity for a litigant to take steps to salvage the situation presented in this case by having another affidavit properly commissioned and filed, as it was held in the case of **Kinyamatama** (supra). That however, the option is only available where such a party applies to the court for leave to take such steps before the

issue is brought before the court for its consideration. He pointed out that in the case now before us, the option was not available since the application to have the affidavit rectified was only made after the respondent's lawyers raised the issue as a point of law during the hearing.

The respondents' counsel went on to submit that Mr Okello Oryem was well aware of the defect in the affidavit supporting the petition even before this was raised by the respondents. That however, he did not bother to rectify the defect and only purported to do so after the same was raised by the respondent's counsel at the hearing. Counsel clarified that rectification of such a situation can only be effected if it is within the time for filing the petition. That otherwise rectifying a petition after the time provided under the law for bringing it would amount to bringing a completely new petition. They contended that this is not admissible under the provisions of section 60 of the Parliamentary Elections Act and rules 3(c) and 4(8) of the Election Petition Rules.

Counsel went on to submit that the trial judge had no residual inherent power to extend the time within which to file a fresh election petition because the time within which to file such petitions is fixed by an Act of Parliament. And that the only option that the appellant had would have been to file a fresh affidavit together with a fresh petition because the previous one would collapse due to the affidavit which was found to be defective. Counsel referred us to the decision in **Makula International** (supra) to support their submission.

The respondents' counsel went on to submit that for the reasons above, the trial judge correctly interpreted the provisions of section 14A of the Advocates Act and Article 126 (2) (e) of the Constitution and found that they did not apply to the circumstances of this case. That this position was fortified by the fact that the appellant's counsel, Mr Okello Oryem was also counsel for the petitioner in the case **Solomon Ossiya** (supra).

They charged that this should have put him on notice that an objection similar to that raised in **Ossiya's case** would be raised in this case as well since it involved the same Raymond Owokukiroru, as the advocate who commissioned the affidavits in support of both petitions.

The respondents' counsel went on to submit that section 16 of the Advocates Act and rule 17 of the Advocates (Professional Conduct) Regulations provide that as an officer of court, an advocate has a duty to advise the court about matters in his special knowledge. They further submitted that both the advocate and his client were guilty of dilatory conduct which could not be excused on the basis of Article 126 (2) (e) of the Constitution. That in addition, the principle that the mistakes of counsel cannot be visited on his client is not absolute. They relied on the decision in **Kananura Andrew Kansiime v Richard Henry Kajjura, Supreme Court Civil Reference No 15 of 2016** to support this submission.

The respondents' advocates added that the appellant should take the consequences of the affidavit being invalid as he would benefit if the affidavit that was assailed was valid because he and his advocate were guilty of negligence when they did not carry out due diligence to ensure that Commissioner for Oaths was properly licensed to carry out his commission. They emphasised that this lapse was not just a mistake but negligence from which the appellant should not be allowed to escape.

In rejoinder, counsel for the appellant submitted that it was not his duty to apply to rectify the affidavit in support of the petition but instead the duty of the court to call for its rectification. That the trial judge had the duty to ensure that the error on the record was rectified in order for him to hear the petition on its merits.

Regarding the submission that the trial judge did not have the inherent power to extend time to allow the appellant to file a fresh petition, he stated that this argument was already considered and rejected by this court in the case of **Kinyamatama** (supra). That it was for that reason that he submitted that the decision in that case conclusively settled the point and was therefore instructive.

In rejoinder to the argument that the appellant's counsel was aware that the affidavit in support of the petition was invalid because he was also counsel for the petitioner in **Solomon Ossiya** (supra), Mr Okello Oryem submitted that he did not agree that there was evidence in that case to prove that the affidavit in support of the petition was invalid. Neither was there evidence in the instant case to prove that fact. He invited us to ignore that argument and find that the trial judge misdirected himself on the application of the law and the decision of this court in the case of **Kinyamatama** (supra) and therefore came to a wrong conclusion when he dismissed the appeal.

Resolution of grounds 8 and 9

The appellant's complaint under grounds 8 and 9 is basically that when he found that the affidavit in support of the petition was invalid, the trial judge ought to have allowed the petitioner to have his sole affidavit rectified under section 14A (1) (c) of the Advocates Act but he did not do so. He instead held that because there was no valid affidavit to support the petition, the petition was incompetent. He therefore dismissed it when he held at page 17 of his ruling as follows:

> *"The above provisions would not apply where a petition is found to be incompetent since in effect, there is no petition before court. No amendment or rectification can be made to a non-existent petition. Therefore, the option to rectify the defects and cure the petition under section 14A (supra) is not available. Similarly, the petitioner cannot bring a fresh petition given the provisions of section 60 (3) (supra) where court has no residual power to extend the time lines set by the Act. The petition is dismissed with costs to 1st and 2nd respondent."*

The questions that should guide us in the determination of these two grounds of appeal are the following:

i) Whether the petition was incompetent for want of a valid affidavit to accompany it.

ii) Whether the trial judge ought to have allowed the petitioner to have the affidavit accompanying the petition rectified by swearing another one before a properly certified Commissioner.

iii) Whether allowing the petitioner to file a fresh affidavit in support of the petition would amount to extending time within which to file a new petition.

Competence of the Petition

Elections Petitions arising out of Parliamentary Elections are brought to the High Court pursuant to provisions contained in Part X of the Parliamentary Elections Act (No 17 of 2005) and the Parliamentary Elections (Interim Provisions) Rules (SI 141-2) herein sometimes referred to as the "Election Petition Rules."

Section 60 of the Parliamentary Elections Act ("the Act") provides that election petitions under the Act shall be filed in the High Court. It specifies the categories of persons that can bring such petitions and the grounds are specifically provided for in section 61 of the Act. Section 62 provides that notice of the petition shall be served upon the respondent in writing, with a copy of the petition, within 7 days after filing the petition.

The form of the petition is then provided for by the Election Petitions Rules. The contents of the petition are specified in regulation 4 (1), and its format is specified in Form A in a Schedule to the Rules. Rule 4 (8) then provides for the matter in contest in this appeal as follows:

"(8) The petition shall be accompanied by an affidavit setting out the facts on which the petition is based together with a list of any documents on which the petitioner intends to rely.

In the appeal now before us, it was contended that the petitioner's affidavit under this rule was commissioned by an advocate who had not renewed his practicing certificate for the year 2021. The trial judge found that as a result, the petition was incompetent. At page 15 of his ruling he held as follows:

> *"The position of the law is that such an affidavit is invalid. The effect of the invalidity of the affidavit on the petition is that there is in fact no petition before court. A petition cannot be competent unless it is filed in accordance with the provisions of the Parliamentary Elections Act and the Rules thereunder. This is the position of the Court of Appeal in the* ***Suubi Kinyamatama Juliet*** *case (supra)."*

After reviewing the laws under which petitions under the Act are filed, it is clear that the petition filed in the High Court under the Parliamentary Elections Act must comply with the provisions laid out in Part 10 of the Act. And it has oftentimes been held by the courts that it *must* also comply with the form provided for in the Election Petitions Rules, in as far as the affidavit accompanying the petition is concerned. This flows from rule 4 (8) of the Rules which states that the petition *"shall be accompanied by an affidavit setting out the facts on which the petition is based."* This seems to be fortified by the provisions of rule 3 (c) of the Elections Petition Rules which defines a petition under the Act as follows:

> *"... 'petition' means an election petition and includes the affidavit required by these Rules to accompany the petition;"*

In respect of an affidavit commissioned by an advocate without a valid practicing certificate, where the error had not been rectified under section 14A of the Advocates Act, this court in **Suubi Kinyamatama** (supra) stated and held thus at page 15 of its judgment:

"We therefore hold that the purported commissioning of the Affidavit in Support of the Petition under review is not an irregularity that can be cured under Article 126 (2) (e) of the Constitution in the particular circumstances of the instant Appeal. This ground is, therefore, resolved in the affirmative. The effect of such resolution of the ground is that the Petition from which this Appeal arises, was illegally filed in Court in contravention of Section 60 of the Parliamentary Elections Act and Rules 3(c) and 4(8) of the Parliamentary Elections (Interim Provisions) Rules and it therefore collapses with the collapse of the Affidavit in Support that was filed alongside the Petition. ***That Petition was not supported by any evidence as is required by law.*** *The Petition was, therefore fatally defective and as such there was no Petition in law before the court. By that finding alone, the Appeal succeeds, and in essence, there would be no need to resolve the other grounds of Appeal. However, for the sake of completeness in this appeal, we shall proceed to resolve the other grounds of appeal as hereunder."*

The court also found and held that the essence of section 14A of the Advocates Act, as amended in 2002, was to protect litigants from unscrupulous advocates. That pursuant to that provision, an affidavit in support of an election petition commissioned by an advocate without a valid practicing certificate ought to be cured. That the court should give the litigant time to make good any defects arising out of such an event and the court should not proceed with the case with the defective pleadings. The duty was cast upon the petitioner who realises that there is a defect to cure it.

That being the position of this court thus far, it ought to be considered whether a defect of the nature experienced in this petition before the lower court renders the particular petition *"incompetent"* as the trial judge found.

First and foremost, it is important to recall that the requirement that an election petition ***shall*** be accompanied by an affidavit stating the facts upon which it is based is a creature of the Election Petition Rules, not the Parliamentary Elections Act. The Act provides for election petitions, time of filing them, the grounds for setting an election aside; notice of the petition to the respondent; and the trial and or withdrawal thereof.

Rule 5 (1) of the Election Petition Rules provides for the time within which to lodge the petition when it provides that:

> **"(1) Presentation of a petition shall be made by the petitioner leaving it in person or by or through his or her advocate, if any, named at the foot of the petition, at the office of the registrar within thirty days after the declaration of the result of the election."**

By necessary implication from the definition of the word *"petition"* in the Rules, the petition must be lodged with the accompanying affidavit at the same time. We note that although rule 4 (8) of the Election Petition Rules introduces the affidavit accompanying the petition in mandatory terms, it is observed that the purpose of that affidavit was to state the facts upon which the petition is based. It was not meant to be the evidence upon which the petition would be disposed of, as will be explained later in this judgement.

In the case now before us, although section 61 of the Parliamentary Elections Act specifies the grounds for setting an election aside succinctly in subsection 1 thereof, the petition in issue did not set out the grounds stated in that provision only, as is required by the Act and Form A, under rule 4, of the Election Petition Rules. Instead, counsel for the appellant set out both the grounds and the facts upon which the petition was based. For example, in paragraph 5 thereof it was stated thus:

> *"5. The petitioner further avers and contends that the election was invalid on grounds that offences and illegal practices under the Parliamentary Elections Act were committed by the 1st respondent personally or with his knowledge and consent or approval when: -*
>
> *a) Contrary to Article 61(1) (a) of the Constitution, s.12 of the Electoral Commission Act and s.80(1) of the Parliamentary Elections Act, the 1st respondent personally or through his agents, with his knowledge and consent or approval variously directly and indirectly unduly influenced and threatened registered voters in order to impede or prevail upon them or in order to induce or compel them to vote for him and or refrain from voting for the Petitioner.*

b) *Contrary to Article 61 (1) (a) of the Constitution, s.12 of the Electoral Commission Act and s.8 (1) of the Parliamentary Elections Act, the 1st respondent personally or through his agents, with his knowledge and consent or approval variously directly and indirectly unduly influenced and threatened registered voters in order to impede or prevail upon them in order to induce or compel them to vote for him and or refrain from voting for the petitioner at Kobuin PAG Church P/S, Omongole's Mango Tree P/S, Orikosio Trading Centre P/S, Angule Primary School, Omuroka Trading Centre, Universal P/S, Okisiran PAG P/S, Kwakwa P/S, Agule High School, Akisim Pasia Universal Church P/S, Ometai Bore Hole P/S, Ometai Church and many areas.*

The petitioner named further illegal practices alleged against the 1st respondent, specifying where they took place in the next 5 sub-paragraphs of his petition. He repeated the very same allegations as the facts in his affidavit in support of the petition. For example, in paragraph 12 and 13 of the affidavit he repeated the allegations under paragraph 5 (a) and (b) of his petition as follows:

"12. That I know from my polling agents and affidavit evidence obtained from voters in Agulle County Constituency that the 1st respondent personally or through his agents, with his knowledge and consent or approval variously directly and indirectly unduly influenced and threatened registered voters in order to impede or prevail upon them or in order to induce or compel them to vote for him and or refrain from voting for the Petitioner.

13. That I know from my polling agents and affidavit evidence obtained from voters in Agule County Constituency that the 1st respondent personally or through his agents, with his knowledge and consent or approval variously directly and indirectly unduly influenced and threatened registered voters in order to impede or prevail upon them or in order to induce or compel them to vote for him and or refrain from voting for the petitioner at Kobuin PAG Church P/S, Omongole's Mango Tree P/S, Orikosio Trading Centre P/S, Agule Primary School, Omuroka Trading Centre, Universal P/S, Okisiran PAG P/S, Kwakwa P/S, Agule High School, Akisim Pasia Universal Church P/S, Ometai Bore Hole P/S, Ometai Church and many areas."

The petitioner did the same for all the other grounds stated in his petition, except that in the affidavit in support he prefaced each of the contents in the petition with the statement, *"That I know from my polling agents and*

affidavit evidence obtained from voters." This shows that there was really no substantial difference between the contents of the petition and the impugned affidavit accompanying the petition, as would have been the intention of the framers of the Election Petition Rules. We say so because the facts upon which the petition was based in this case were already detailed in the petition and only replicated in the affidavit in support thereof. All that was missing from the petition was an oath before a competent person under the Oaths Act, that the facts in the petition were true from his knowledge or from information from sources named.

We therefore find that though the reason for including rule 4(8) in the Election Petition Rules was to ensure that the facts, together with a list of any documents to be relied upon is provided both to the court and the respondents, in this case, even in the absence of the affidavit accompanying the petition, the facts were stated in the petition. Save for supplying the documents required for the hearing, which could be provided by other means, the accompanying affidavit became superfluous and only a question of form, not substance.

We are also aware of the contents of rule 15(1) of the Election Petition Rules which provides that *"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."* However, we note that this provision of the Election Petition Rules appears to be contrary to section 64 (1) of the Act which provides for witnesses in election petitions as follows:

> **"64. Witnesses in election petitions**
>
> **(1) At the trial of an election petition—**
>
> **(a) any witness shall be summoned and sworn in the same manner as a witness may be summoned and sworn in civil proceedings;**
>
> **(b) the court may summon and examine any person who, in the opinion of the court is likely to assist the court to arrive at an appropriate decision;**

(c) any person summoned by the court under paragraph (b) may be cross-examined by the parties to the petition if they so wish."

We observed that the Election Petition (Interim Provisions) Rules (SI 141-2) were made under the Parliamentary Elections (Interim Provisions) Statute of 1996 (4/1996). Section 94 of the Statute employed exactly the same wording as section 64 of the Parliamentary Elections Act (2005). It therefore cannot be said that rule 15 (1) of the Election Petition Rules was framed to meet requirements of the Statute at the time.

With regard to the relationship between rule 15 (1) and section 64 above, section 18 (4) of the Interpretation Act provides as follows:

"(4) Any provision of a statutory instrument which is inconsistent with any provision of the Act under which the instrument was made shall be void to the extent of the inconsistency."

We have also considered the significance of section 93 of the Parliamentary Elections Act which empowers the Chief Justice to make Rules of Court for purposes of the Act in the following terms:

"93. Rules of court

(1) The Chief Justice, in consultation with the Attorney-General, may make rules as to the practice and procedure to be observed in respect of any jurisdiction which under this Act is exercisable by the High Court and also in respect of any appeals from the exercise of that jurisdiction.

(2) Without prejudice to subsection (1) any rules made under that subsection may make provision for—

(a) regulating the practice and procedure of the High Court, the Court of Appeal and the Supreme Court for the purposes of hearing and determining petitions under section 85 or as the case may be, for hearing and determining appeals from decisions of the High Court under that section;

(b) the practice and procedure to be observed in the hearing and determining of election petitions;

(c) service of an election petition on the respondent;

(d) priority to be given to the hearing of election petitions and other matters coming before the courts under this Act.

(2) Rules made under this section may, in the case of the High Court, the Court of Appeal and the Supreme Court, apply to the proceedings the rules of practice and procedure applicable to civil proceedings in the High Court, the Court of Appeal or the Supreme Court as the case may be, *subject to such modifications as may be specified in the rules*."

Although the Election Petition Rules made modifications to the practice in the High Court in that rule 15(1) provides for the disposal of petitions by affidavit evidence only, the rule could not supersede the provisions of section 64 of the Parliamentary Elections Act. Section 64 specifically maintained the practice and procedure for summoning and examining witnesses under the Civil Procedure Rules. As a result, within the meaning of the Civil Procedure Act and the Rules, the petitioner is also a witness because the word *"witness"* is defined by Black's Law Dictionary (9th Edition by West) as *"one who sees, knows, or vouches for something"* or *"one who gives testimony under oath or affirmation in person."*

There being no distinction between the petitioner and other witnesses, the petitioner can, under section 64 of the Act, be required to give evidence orally as is the usual practice in civil proceedings. Adducing evidence by affidavit then becomes an option that may be exercised by the court or a party under Order 19 rule 1 of the CPR, and not the mandatory procedure as is stated in rule 15 (1) of the Election Petition Rules.

Consequently, where the affidavit accompanying the petition is found to be incompetent or defective, the provisions of section 64 of the Act would apply. Evidence can then be adduced by the petitioner *viva voce* pursuant to the provisions of section 64 of the Parliamentary Elections Act, the Civil Procedure Act and Rules and the Evidence Act.

With regard to the expression *"incompetent"* employed by the trial judge to describe the petition, the word *"incompetent"* is defined by Merriam-

Webster's online dictionary[2] to mean *"lacking the qualities for effective action; unable to function properly; not legally qualified, or inadequate to or unsuitable for a particular purpose."*

In the instant case, as is shown above, the petition on its own without the accompanying affidavit met the need that the framers of the Election Petition Rules intended the accompanying affidavit to satisfy. We therefore cannot say that the petition lacked the qualities for effective action, was inadequate or unsuitable for the purpose of holding a trial of the matters raised in it.

We therefore find that the petition, though filed without a valid accompanying affidavit was a competent pleading. The absence of the accompanying affidavit in this case then became a mere irregularity that could have been cured under the provisions of Article 126 (2) (e) of the Constitution. The trial judge therefore misdirected himself when he held that the petition was incompetent and there was no petition before the court.

Enlargement of time and its effect on the Petition

The second and third issues that we identified above relate to enlargement of time and its impact on the petition in the absence of a valid accompanying affidavit. We shall therefore address them together because they are intertwined.

Rule 19 of the Election Petitions Rules provides for the enlargement or abridgment of time for meeting the requirements under the Rules in the following terms:

> **"The court may of its own motion or on application by any party to the proceedings, and upon such terms as the justice of the case may require, enlarge or abridge the time appointed by the Rules for doing**

[2] https://www.merriam-webster.com/dictionary/incompetent#other-words

any act if, in the opinion of the court, there exists such special circumstances as make it expedient to do so."

We have already observed that the requirement to file an affidavit accompanying the petition is not a creature of the Parliamentary Elections Act but was a requirement introduced by the Rules. And that although the Rules describe *"petition"* for the purposes of the Parliamentary Elections Act to include the accompanying affidavit, the purpose for which it was required was satisfied within the petition itself. The situation at hand must therefore be construed to mean that any affidavit filed would not be for purposes of clarifying the grounds upon which the petition is based. It would be for purposes of providing evidence in the petition pursuant to rule 15 (1) of the Election Petition Rules.

The appellant's counsel applied to have the defect in the affidavit in support rectified under the provisions of section 14A of the Advocates Act, as amended in 2002. The application was denied for the reason given in the portion of the trial judge's decision which we have reproduced above.

This court in **Suubi Kinyamatama's** case (supra), in which a similar situation arose in the trial court, held that the defect ought to have been rectified before the trial could go on and that the trial judge erred when he proceeded to hear the petition without an accompanying affidavit. On that ground alone, the appeal succeeded.

We observe that the circumstances in this case can be distinguished from those in **Kinyamatama's case** (supra) in that the appellant applied to have the affidavit rectified before the trial could commence. The trial judge considered the provisions of section 14 A of the Advocates Act and rejected it as not suitable to address the needs of the petitioner. The contested provision provides as follows:

"(1) Where—

(a) an advocate practices as an advocate contrary to subsection (1) of section 14;

(b) or b) in any proceedings, for any reason, an advocate is lawfully denied audience or authority to represent a party by any court or tribunal; then—

(i) no pleading or contract or other document made or action taken by the advocate on behalf of any client shall be invalidated by any such event; and in the case of any proceedings, the case of the client shall not be dismissed by reason of any such event;

(ii) the client who is a party in the proceedings shall, where necessary, be allowed time to engage another advocate or otherwise to make good any defects arising out of any such event."

The purpose of amending the Advocates Act by inserting the provision above was to protect litigants from the consequences of actions of Advocates purporting to practice, contrary to the requirements of the Act. The respondents' counsel asserted that the appellant was equally guilty of the mistake of his advocate, Mr Okello Oryem, who did not apply to have the defect in the affidavit rectified before the proceedings commenced. This was because Mr Okello Oryem was also counsel for the petitioner in **Solomon Ossiya v. Koluo** (supra).

We cannot accept the respondents' counsels' attempt to make the appellant in this case an exception to the rule because section 14A (1) (b) (ii) gives no limit about the time within which such defects may be cured. We are of the view that it is sufficient if the application to correct the defect is made within a reasonable time.

We observed that the decision in **Solomon Ossiya's case** (supra) was delivered by Okuo Kajuga, J on 6th September 2021 as is evident from the decision filed in this court to support the respondents' joint submissions. The parties subsequently appeared before the trial judge for the hearing of the petition in this appeal on 9th September 2021. This was only 3 days after Okuo Kajuga, J. rendered her decision that is the basis of the submissions of the respondents' counsel in their attempt to disentitle the appellant of his right.

There is a long line of authorities of the courts that in such situations, an application must be made without delay. In view of the facts before us, we cannot accept the respondents' advocates' assertion that in the circumstances of this case, the appellant and his advocate are guilty of inordinate delay. We find that the advocate made the application as soon as he could. We shall therefore dispose of the point in contention according to the law.

In **Sitenda Sebalu v. Sam K. Njuba (supra),** the Supreme Court explored the import of extending time within which to serve the notice of the petition which is required by section 62 of the Parliamentary Elections Act and rule 6 of the Election Petition Rules. The court discussed the dilemma that courts face when confronted with the challenge to non-compliance with a mandatory requirement of a statute or the Regulations, within the context of considering election petitions. In a comprehensive statement on the subject, the court observed that:

> The courts have overtime endeavoured, not without difficulty, to develop some guidelines for ascertaining the intention of the legislature in legislation that is drawn in imperative terms. One such endeavour, from which the courts in Uganda have often derived guidance is in the case of ***The Secretary of State for Trade and Industry vs. Langridge*** (1991) 3 All ER 591, in which the English Court of Appeal approved a set of guidelines that are discussed in ***Smith's Judicial Review of Administrative Action*** 4th Ed.1980, where at p.142 the learned author opines that the court must formulate its criteria for determining whether the procedural rules are to be regarded as mandatory or as directory notwithstanding that judges often stress the impracticability of specifying exact rules for categorizing the provisions. The learned author then states –
>
> ***"The whole scope and purpose of enactment must be considered and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act.***
>
> ***In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Although nullification is the natural and usual consequence of disobedience, breach of procedural or formal rules is likely to be treated***

as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced or if serious public inconvenience would be caused by holding them to be mandatory or if the court is for any reason disinclined to interfere with the act or decision that is impugned." (Emphasis of the SC)

The court then found that failure to serve notice of the petition on the respondent, pursuant to section 62 of the Parliamentary Elections Act and the Election Petitions Rules, did not render the whole petition and the proceedings a nullity.

We respectfully accept the guidance given by the Supreme Court that the breach of procedural rules, such as the one in this case was, should be treated as a mere irregularity. It should not render the whole of the proceedings a nullity. In circumstances such as those brought about by an errant Advocate, the Advocates Act specifically provided so in section 14A (1)(b)(i) thereof. The errant advocate would then be guilty of professional misconduct as is provided for in subsection (2) and may be subjected to proceedings before the Law Council. Further, under subsection (3), any fees paid to him/her by the client and costs thrown away would be refunded to the client as compensation.

We also take cognizance of the direction that was given by the court in the same case that:

"... the purpose and intention of the legislature, was to ensure, in the public interest, that disputes concerning election of people's representatives are resolved without undue delay. In our view, however, that was not the only purpose and intention of the legislature. It cannot be gainsaid that the purpose and intention of the legislature in setting up an elaborate system for judicial inquiry into alleged electoral malpractices, and for setting aside election results found from such inquiry to be flawed on defined grounds, was to ensure, equally in the public interest, that such allegations are subjected to fair trial and determined on merit.

In our view, the only way the two complimentary interests could be balanced, was to reserve discretion for ensuring that one purpose is not achieved at the expense or to the prejudice of the other."

We therefore find that the trial judge erred when he disregarded the provisions of section 14A (1) (b) (i) of the Advocates Act. He also erred when he denied the application to rectify the affidavit in support of the petition under section 14A (1) (b) (ii) of the Advocates Act. He ought to have allowed the appellant's application and disposed of the petition on its merits. Grounds 8 and 9 of the Appeal therefore succeed.

Ground 11

In view of our decision on grounds 8 and 9, we see no need to consider ground 11 of the appeal in which the appellant complained against the award of costs against him because that order falls with the rest of the decision. The order is therefore hereby set aside.

We also have to and shall consider the costs for this appeal. The appellant prayed that costs for this appeal be awarded to him. He has been successful in the appeal and ordinarily, costs follow the event pursuant to section 27 of the Civil Procedure Act. In this case, the principle error in the proceedings was brought about by the failure of counsel for the appellant to ensure that the advocate who commissioned the affidavit in issue had a valid practicing certificate. The error was augmented by the court which failed to apply the correct legal principles in such situations and instead dismissed the appeal on a technicality.

We therefore view this appeal as the result of both the appellant and the court. We therefore shall not award costs to appellant. Instead, each party shall bear their own costs of the appeal.

But before we take leave of this matter, we would like to make further observations that in addition to what appears to be a contradiction between the Act and the Election Petitions Rules, there are other drawbacks to affidavit evidence in the trial of these important matters. For example, in this case, there were only two affidavits filed by the petitioner. The petitioner's affidavit was found to be invalid and resulted in the

dismissal of the petition altogether. The second affidavit in support of the petition deposed by one Nadhonga James was not admitted in evidence because it was served outside the time allotted by the trial judge for filing affidavits in rejoinder. The petitioner therefore remained with no affidavits at all which then, in the opinion of the judge made it impossible to hold the trial under rule 15 of the Election Petition Rules.

The Supreme Court considered the import of rule 14 of the Presidential Elections (Election Petitions) Rules which is similar to rule 15 of the Parliamentary Election Petition Rules and its effect on the proceedings in **Amama Mbabazi v. Yoweri Kaguta Museveni & 2 Others, Presidential Election Petition No. 1 of 2016**. After observing hindrances in the trial of the petition brought about by the nature of evidence, the court recommended thus, at page 315 of its judgment:

> *"2. **The nature of evidence**: Whilst the use of affidavit evidence in presidential election petitions is necessary due to the limited time within which the petition must be determined, it nevertheless has serious drawbacks mainly because the veracity of affidavit evidence cannot be tested through examination by the Court or cross-examination by the other party. Affidavit evidence on its own may be unreliable as many witnesses tend to be partisan. We recommend that the Rules be amended to provide for the use of oral evidence in addition to affidavit evidence, with leave of court."*

In addition to our own observations about the challenges of evidence in parliamentary election petitions, we respectfully associate ourselves with the recommendation above, save that in this case, we are of the view that the court could have proceeded by taking evidence *viva voce*. We therefore recommend that the Chief Justice and the Attorney General do consider the drawbacks in the Rules and amend the Election Petition Rules in order to remove what appears to be an inconsistency between section 64 of the Parliamentary Elections Act and Rule 15 (1) of the Election Petition Rules.

Conclusion

This appeal therefore succeeds and we make the following orders:

1. The decision of the trial judge dismissing Mbale Election Petition No. 4 of 2021 with costs to the respondents is hereby set aside.
2. The file should be remitted to the High Court for trial of the petition on its merits and the appellant be given time to rectify the defect in the accompanying affidavit, if the court deems it necessary to proceed by affidavit.
3. Each party shall bear their own costs for this appeal.

It is so ordered.

Dated at Kampala this 25th Day of April 2022.

Elizabeth Musoke

JUSICE OF APPEAL

Irene Mulyagonja

JUSTICE OF APPEAL

Monica K. Mugenyi

JUSTICE OF APPEAL