THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: EGONDA NTENDE, MADRAMA AND LUSWATA JJA)

ELECTION PETITION APPEAL NO 30 OF 2021

(ARISING FROM ELECTION PETITION NO 14 OF 2021)

KAYANJA VINCENT DE PAUL} ..... APPELLANT

VERSUS

1. **RULINDA FABRICE BRAD}**
2. **THE ELECTORAL COMMISSION .....RESPONDENTS**

JUDGMENT OF CHRISTOPHER MADRAMA, JA

The appellant petitioned the High Court for nullification of the election of the first respondent as chairperson of Entebbe municipality in elections held on 25th of January 2021. The second respondent returned and declared the first respondent as the validly elected chairperson with 6,703 votes as opposed to the petitioner's 5576 votes. The appellant was aggrieved by the outcome of the elections and declaration of the first respondent and challenged the election. When the petition came for hearing, the respondents objected to the petition on the ground that the affidavits in support of the petition offended the law governing affidavit evidence and were incurably defective and ought to be expunged from the record. Particularly the objections were that:

1. The affidavit of the petitioner is based entirely on hearsay and Annexure thereto are forged.

2. The affidavits with jurats standing alone are fatally defective as they offend the Oaths Act.

3. That affidavits are couched in similar words, deferring names of deponents which offend the law on affidavits.

4. That the additional affidavits filed on 2nd September 2021 introducing new matters not pleaded.

The trial court was addressed the written submissions on the grounds of objection.

The learned trial judge sustained the objection and *inter alia* found the impugned affidavits of the petitioner in support of the petition contained hearsay evidence and was inadmissible, further, the affidavits which has jurats standing alone from the main body of the affidavit were defective as they offended the Oaths Act. Further, a group of affidavits of the petitioners purported agents had paragraphs couched in similar words and the affidavits also violated the law. The court found that in election petitions, evidence is by way of affidavit which should be properly taken with the seriousness it deserves. The court found *inter alia* that the affidavits of the petitioner's purported agents contained falsehoods which went to the root of the appointment of the agents which were fatal. It followed that the basis of the petitioner's information in his own affidavit was rendered hearsay. The court ventured to state that it went into the question of whether it could sever parts of the affidavit to see whether the affidavits could be saved on the basis of the parts thereof which had no issue. However, the court found that the remaining paragraphs cannot sustain the required standard of proof in election petitions. Secondly, when an affidavit fails for non-compliance with statutory requirements, even the petition it supports must fail because it remains unsupported by affidavit evidence. In the premises, the court struck out the petition with costs to the respondents.

The appellant being aggrieved by the determination of the election petition as stated above, appealed to this court on 5 grounds of appeal that:

1. The learned trial judge erred in law and fact when he dismissed the petition on trivial, presumptive grounds and on mere suspicions of the Appellants evidence and thereby occasioning a miscarriage of justice.

2. The learned trial judge erred in law and fact in his finding that the appellant's affidavits accompanying and in support of the petition failed the admissibility test thereby occasioning a miscarriage of justice.

3. The learned trial judge erred in law and fact when he misdirected himself in holding that the appellant's affidavits were based on hearsay and that if parts of the same were severed, the remaining parts could not sustain the standard of proof in election petitions hence occasioning a miscarriage of justice.

4. The learned trial judge erred in law and fact in his holding that the petition remained unsupported and failed for non-compliance with statutory requirements of affidavit evidence and thereby occasioning a miscarriage of justice.

5. The learned trial judge erred in law, when he penalised the appellant in costs in the circumstances of the case.

Representation.

When the petition came for hearing, learned counsel Mr. Samuel Mwizzi Mulindwa appearing jointly with learned counsel Mr. Kenneth Paul Kakande represented the appellant. Learned Counsel Mr. Isaac Ssali Mugerwa assisted by learned Counsel Ms Gukiina Proscovia represented the first respondent. Further learned counsel Mr. Eric Sabiti appeared for the second respondent. The appellant and the first respondent attended court in person while Mr. Tolbert Musinguzi, returning officer for Wakiso district attended court on behalf of the second respondent.

The lawyers of the parties adopted their written submissions/conferencing notes as their address to this court and Judgment was reserved on notice.

Submissions of counsel.

On ground one, the appellants counsel submitted that the finding of the learned trial judge that the practice of separating the jurat from the main body of the affidavit is unlawful and irregular rendering the affidavit defective and therefore offending the Oaths Act is not backed by the provisions of the law. On the issue of whether the affidavits were presumptive and based on mere suspicions, fraud and forgery, the same cannot be proved or confirmed without a hearing and having the evidence tested.

Secondly, the appellants counsel submitted that the finding of the learned trial judge that the evidences of the agents are couched in similar words that they were variously appointed by the petitioner to act as a polling agent on 25th of January 2021 and the appointment letter indicating that it was written on 2nd January 2021 was a contradiction showing that the affidavits contained falsehoods making them suspect and therefore incompetent. Counsel relied on the sample letters which were couched in similar words showing that it was a letter written on 22nd January 2021 but as an illustration Nakyajja Sarah's affidavit shows that her appointment took effect on 25th of January 2021, the date of the election indicated in the letter.

The appellants counsel submitted that the facts and the letter of the petitioner were analysed by the trial judge before hearing the parties, the scheduling conference had not been concluded and documents had been admitted record and no laws were cited that had been breached. Further that the contradictions were matters of fact that would not be entertained at that stage without a hearing. He submitted that the conduct of the case occasioned a miscarriage of justice. In the premises the learned trial judge erred in law and fact when it struck out the petition on trivial, presumptive grounds and on mere suspicions of the appellant's evidence thereby

occasioning a miscarriage of justice. He prayed that ground 1 of the appeal is allowed.

In reply, the respondents filed joint submissions in which they state that the position of the appellant is that the trial judge ought to have at least tried the petition but he erroneously struck it out on a preliminary objection. They contend that the appellant does not subscribe to the practice that the rules for affidavit evidence in election petitions must be followed. They noted that the appellant's case which is erroneous is that the trial judge had been justified to determine the hearsay evidence in the principal affidavit was not permissible and contends that the petition had other evidence that could have sustained the petition on the balance of probabilities.

In reply, the respondents contend that evidence in election petitions is by way of affidavit and it is not mandatory that the deponents thereto must be cross examined. The affidavit speaks for itself and the evidence must be cogent and verifiable. In the premises, the trial judge was justified in not hearing the petition after expunging the principal affidavit and the defective affidavits of the purported agents of the appellant. After all, the respondents contend that the matter in controversy did not involve all results from all polling stations in the election. It was agreed that the contest was limited to the results from 10 polling stations at the scheduling conference before the trial judge.

The respondents submitted that the appellant's case in the petition was that what was declared at those stations as disclosed by his agents is different from what was actually returned and declared by the Electoral Commission. He could only present the evidence himself if he had been present at the 10 polling stations which was an impossibility or he could prove it through his agents. It was established that his evidence in respect of the 10 polling stations was hearsay because he was not there anyway and he did not disclose the source of his information. Further the appellant did not disclose his agents and never tendered evidence to the satisfaction of court. There was therefore no cogent evidence of what transpired at the 10 polling

stations. The other evidence could not corroborate without the principal evidence.

The respondents also pointed out that the appellant was represented by four advocates from two law firms and it was inconceivable how they could make such glaring mistakes. In the premises counsel contended that the real problem was that the appellant had no evidence to present to court and the petition was a fishing expedition.

In specific reply to ground 1 of the appeal, the respondents contend that it offends Rule 86 (1) of the Rules of this court because it does not specify exactly the point which is alleged to have been wrongly decided. The respondents rely on **Attorney General vs Florence Baliraine; Civil Appeal No 79 of 2003** and prayed that the memorandum of appeal is struck out for offending the rules of court.

Grounds 2, 3, and 4 of the appeal.

I will set out the three grounds for purposes of considering whether to handle the issue on a point of law.

Ground 2

> **The learned trial judge erred in law and fact in his finding that the appellant's affidavit accompanying and in support of the petition failed the admissibility test thereby occasioning a miscarriage of justice.**

Ground 3:

> **The learned trial judge erred in law and fact when he misdirected himself in holding that the appellant's affidavits were based on hearsay and that if parts of the same were severed, the remaining parts could not sustain the standard of proof in election petitions hence occasioning a miscarriage of justice.**

Ground 4:

The learned trial judge erred in law and fact in holding that the petition remained unsupported and failed for non-compliance with statutory requirements of affidavit evidence thereby occasioning a miscarriage of justice.

Clearly, the question of affidavit evidence is at the centre of the appeal and in the decision of the trial judge to reject the petition for want of evidence. In ground 2, the appellants counsel dealt with the issue of the admissibility of the affidavits for containing hearsay evidence. Secondly, in grounds 3 and 4 the question was whether if the offending parts of the affidavits were severed, the remaining parts could sustain the petition and prove the grounds to the standard of proof required in election petitions. In ground 4, there is a consequential argument relating to the finding of the trial judge striking out the affidavits that the remaining parts of the evidence in the affidavit could not support the petition.

On the other hand, and in relation to grounds 2, 3 and 4, the respondents submitted that those grounds could be resolved if the following questions are answered namely:

1. Did the appellant's affidavit accompanying and in support of the petition pass the admissibility test? Were the appellant's affidavits based on hearsay and inadmissible?
2. If parts of the same were severed, could the remaining parts sustain the standard of proof in election petitions? If his affidavit were to be expunged, did it leave the petition unsupported and flawed for non-compliance with statutory requirements of affidavit evidence?

I have carefully considered the decision of the trial court, the above grounds of appeal and the submissions of both counsel and I am of the considered opinion that the entire appeal is based on the finding of the learned trial judge in relation to the admissibility and competence of the affidavits filed in support of the petition and that filed as evidence and whether the remaining evidence after striking out parts and disallowing other affidavits in support of the petition could sustain the petition. The court found that the

petition was unsupported by evidence based on the decision on the competence of the affidavits in support of the petition and inadmissibility of hearsay evidence. It follows that there is a point of law as to whether evidence in petitions shall be adduced by affidavit evidence and any cross examination. In any case, the petition was not tried and the point of law can be considered as an overarching issue touching on all grounds of the appeal.

Resolution of appeal.

I have carefully considered the Appellant's appeal, the written submissions of Counsel, the precedents referred to and the applicable law generally.

The appellant's appeal is a first appeal from the judgment of the High Court acting in the exercise of its original jurisdiction in an election petition brought under the provisions of section 60 of the Parliamentary Elections Act, 2005. Secondly, an appeal was filed pursuant to section 66 (1) of the Parliamentary Elections Act, 2005 which provides that a person aggrieved by the determination of the High Court on the hearing of an election petition may appeal to the Court of Appeal against the decision.

As a final court of appeal under the provisions of section 66 (3) of the Parliamentary Elections Act, 2005, our duty inter alia includes ensuring that matters of law are thoroughly considered for the guidance of the trial courts in other election petitions in future. The above notwithstanding, the Court of Appeal has powers as a first appellate court in matters of factual controversy to reappraise the evidence contained in the printed record of proceedings by subjecting that evidence to fresh scrutiny and making its own inferences on matters of fact. In reappraisal of evidence, a first and final appellate court should caution itself regarding the shortcoming of not having had the advantage of seeing and hearing the witnesses testify by reason of the fact that the evidence is contained in a printed record of proceedings while that of the trial judge is based on and has the advantage of having seen and heard the witnesses testify. Except on justifiable grounds, the court should defer to the conclusions of the trial judge on

matters of credibility of witnesses whenever it is in issue (See **Pandya v R [1957] EA 336, Selle and Another V Associated Motor Boat Company [1968] EA 123,** as well as **Kifamunte Henry v Uganda; SCCA No. 10 of 1997**). The duty of this court in reappraisal of evidence is enabled by rule 30(1)(a) of the **Judicature (Court of Appeal Rules) Directions, S.I No. 13-10**, which provides that on appeal from the decision of the High Court in the exercise of its original jurisdiction, the court may reappraise the evidence and draw inferences of fact.

The above notwithstanding, trial of the petition in the trial court was set to proceed by affidavit evidence but there was no trial as there was a preliminary objection in which the respondents to the petition objected to some affidavits in support of the petition and the objections were sustained whereupon the trial judge found that the affidavits could not be relied on and there was no evidence in support of the petition sufficient to sustain it on the balance of probabilities. The petition was not heard on the merits of the grounds in the petition and the entire matter was resolved on the question of whether the affidavit evidence could sustain the petition.

This appeal arises from the ruling of the trial judge on preliminary objections raised by the respondents that the affidavit of the petitioner is based entirely on hearsay and the annexure thereto are forged. Secondly, that the affidavits with jurats standing alone are fatally defective as the offended the Oaths Act. Thirdly, that the affidavits are couched in similar words, save for the names of the deponents which offend the law on affidavits. Finally, that the additional affidavits filed on 2nd September introducing new matters not pleaded should be struck out.

The learned trial judge considered objections 1 and 2 concurrently and found upon examination of the jurats objected to by the respondents that they were indeed separate from the main body of the affidavits. The learned trial judge held that: *"the practice of separating the jurat from the main body of the affidavit is unlawful and/or irregular rendering the affidavit defective*". However, with regard to the different words used in different affidavits, the

differences in spelling were mere lapses and errors that cannot vitiate the affidavit and were not a major breach of the law on affidavit evidence.

On the additional affidavit of a forensic expert, the court found that it would be improper to disregard the evidence and found that it introduced forensic evidence to support the petitioner's allegation in the petition. Further that time is of the essence when it comes to filing election petitions and a subsequent affidavit evidence can be adduced to prove an allegation already made by the petitioner.

The court relied on Rule 15 of the Parliamentary Elections (Interim Provisions) Rules for the proposition that all evidence at the trial of an election petition is required to be adduced by affidavit. He considered the submission of the respondents that paragraphs 4 (i) a - j, 5, 6, 14, 15, 19, 20 and 21 of the petitioner's affidavit in support are based on hearsay because the petitioner failed to disclose the source of the information. He found that the paragraphs show that the petitioner seeks to rely on declaration forms whose source had not been disclosed. The learned trial judge held as follows:

> Evidence set out in an affidavit should be confined to the particular facts within the personal knowledge of the deponent, except where the hearsay exception rule applies. I am alive to the fact that the evidence by affidavit may constitute one of the exceptions to the hearsay rule, but where the fact in issue needs to be proved, the evidence of the witness who is alleged to have witnessed the fact needs to be called to prove the fact in issue. The impugned paragraphs which the respondent is seeking to expunge raise issues of falsification of results contrary to the electoral laws. Given the fact that the petitioner cannot be everywhere and is ably represented by his agents it normally follows that he relies on information that is given by the agents..... It is well settled that where an affidavit is made on information it should not be acted upon by the court unless the sources of information are specified.
>
> ... much as the petitioner attached the declaration of results forms on his affidavit in support, he attributed no particular paragraph to a particular person as the source of information in his affidavit in support. There is a high likelihood of the petitioner putting words into the mouths of those named and or manufacturing both evidence and their signatures to the jurat.

The court considered the possibility that the petitioner could have obtained information from the agents whose affidavits evidence were filed in support of the petition. The learned trial judge noted that the affidavits of Nakyajja Sarah, Nambwese Betty, Abiyuwa Farooq, Kasule Brenda, Katalemwa John Baptist Ssenyonjo, Nansubuga Doreen Janet, Sseruga Ibrahim, Bainomugisha Faridah, Kawuki Athens Lwanga, Apio Faith Catherine, Katushabe Caroline, Sserumaga Zainab and Nanteza Sharifar all have a quoted paragraph 3 couched in the same or similar words in their various affidavits. He found that the affidavits contain false statements and are couched in similar words which renders them suspect. He found that the affidavits were incompetent in as far as they contain falsehoods and lapses. He found that the falsehoods go to the root of the appointment of the agents and lapses that are fatal to the reliability of the evidence of the petitioner in his affidavit in support which fails the admissibility tests. He found that there was a high likelihood of the petitioner putting words into the mouths of the deponents. Therefore, the basis of the petitioner's information is rendered hearsay as far as the affidavits of his purported agents have falsehoods apparent on the record.

Following the above findings, the learned trial judge held that the remaining paragraphs of the affidavits cannot sustain the standard required for proof in election petitions under section 61 (3) of the Parliamentary Elections Act. It follows that the petition supported by those affidavits remained unsupported with evidence and therefore failed for reasons of non-compliance with the requirement of trial by affidavit evidence.

I have carefully considered the central issue of whether a petition has to be supported by affidavit evidence as stipulated in the rules. If the law does not require a petition to be supported by affidavit evidence, the question is whether the petition could have proceeded for hearing and the evidence of witnesses taken in the ordinary course and it was erroneous to strike out the petition on a preliminary point of law.

I further note that ground 1 of the appeal deals with the striking out of the petition on trivial, presumptive grounds or mere suspicion of the appellant's

evidence thereby occasioning a miscarriage of justice. Indeed, the striking out of the petition for whatever reason was a consequential order based on the treatment of the affidavits by the trial court. The point of law of whether evidence at a trial of the petition should be taken in the ordinary course by swearing in the witnesses would resolve all the grounds of appeal and I would deal with this point of law first. Consideration of the grounds of appeal should abide the outcome of the issue. Ground 1 and 5 are consequential to the point of law and will be considered last.

The Parliamentary Elections (Interim Provisions) Rules which govern the procedure in election petitions were issued by the Chief Justice under the Parliamentary Elections (Interim Provisions) Statute, Statute No. 4 of 1996. By the time the rules were promulgated, section 94 of the Parent Act provided the procedure for taking evidence from witnesses as follows:

> 94. (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 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.
>
> (2) A witness who, in the course of the trial of an election petition, wilfully makes a statement of fact material to the proceedings which he or she knows to be false or does not know or believe to be true, commits an offence and is liable on conviction to a fine not exceeding two hundred thousand shillings or imprisonment not exceeding two years or both.

When the rules were promulgated under section 121 of the Parent Act in 1996, the provided *inter alia* under rule 4 (8) 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.

Secondly, Rule 15 (1) provides for the mode of taking evidence at the trial as follows:

> 15.Evidence at trial.
>
> (1) Subject to this rule, all evidence at the trial, in favour of or against the petition shall be by way of affidavit read in open court.

The Parliamentary Elections (Interim Provisions) Statute, 1996 was repealed by the Parliamentary Elections Act, 2001, Act 8 under section 100 (1) thereof and further under section 65 thereof it retained the gist of section 94 of the repealed Act by providing that:

> 65. (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 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.
>
> (2) A witness who, in the course of the trial of an election petition, wilfully makes a statement of fact material to the proceedings which he or she knows to be false or does not know or believe to be true, or in respect of which he or she is reckless whether it is true or false, commits an offence and is liable on conviction to a fine not exceeding twenty currency points or imprisonment not exceeding two months or both.

Last but not least, the Parliamentary Elections Act, Act 17 of 2005 also substantially retained the provisions on witnesses in election petitions under section 64 of the Parliamentary Elections Act which provides that:

> 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 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.

(2) A witness who, in the course of the trial of an election petition, wilfully makes a statement of fact material to the proceedings which he or she knows to be false or does not know or believe to be true, or in respect of which he or she is reckless whether it is true or false, commits an offence and is liable on conviction to a fine not exceeding twenty – four currency points or imprisonment not exceeding one year or both.

The Parliamentary Elections Act (Interim Provisions) Statute, Statute No 4 of 1996 and section 121 thereof enabled the making of rules by the Chief Justice. Section 121 of the Parliamentary Elections (Interim Provisions) Statute 1996 (repealed) provided that:

121.(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 Statute is exercisable by the High Court and also in respect of any appeals from the exercise of such jurisdiction.

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

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

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

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

Pursuant to section 121 of the repealed Statute of 1996 (supra), the Chief Justice made the **Parliamentary Elections (Election Petitions) Rules, 1996** which provided for proceedings in the High Court. These rules continued in force as they were imported under the Parliamentary Elections Act, 2001. Section 100 (3) of the Parliamentary Elections Act provided that:

100. Repeal and savings

(1) The Parliamentary Elections (Interim Provisions) Statute, 1996 is repealed.

(2) ...

(3) Without prejudice to the provisions of the Interpretation Decree, 1976, any statutory instrument, form or other document made under the Parliamentary Elections (Interim Provisions) Statute, 1996 shall continue in force until revoked or replaced under this Act.

Further the Parliamentary Elections (Election Petitions) Rules, 1996, were imported under section 101 (3) of the of the Parliamentary Elections Act, 17 of 2005 which provides that:

101. Repeal and savings

(1) The Parliamentary Elections Act, 2001 is repealed.

(2) ...

(3) Without prejudice to the provisions of the Interpretation Act, any statutory instrument, form or other document made or existing under the Parliamentary Elections Act, 2001, shall, with the necessary modifications, continue in force until revoked or replaced under this Act.

The Parliamentary Elections (Interim Provisions) Rules which were issued under section 121 of the Parliamentary Elections (Interim Provisions) Statute 1996 and which were imported into the subsequent Rules does not provide for the taking of witness evidence in court. Instead it provides for the procedure for trial in open court and evidence at the trial by affidavit. Under the Parliamentary Elections (Election Petitions), Rules, 1996 S.I. No. 27 of 1996 which is reproduced in Parliamentary Elections (Interim Provisions) Rules, rule 12 provides that:

12. Trial in open court.

(1) A petition shall be tried in open court by a single judge.

(2) After the trial is concluded, if the judge before whom it was held has prepared his or her decision on the trial but is prevented through illness or otherwise from delivering it, the decision may be delivered by another judge and the last mentioned judge shall certify to the commission the termination of the petition.

The rule provides for the hearing of the petition to be in open court, and is consistent with section 64 of the Parliamentary Elections Act. I further take note of the fact that the rules provide that the petition shall be accompanied by an affidavit. Rule 4 (8) of the Parliamentary Elections (Interim Provisions) Rules provides for the form of a petition and *inter alia* states that:

> 4.Form of petition.
> (1) The form of a petition shall be as specified in Form A in the Schedule to these Rules.....
> (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.

It suffices to state that rule 4 (8) does not prescribe many affidavits but states that the petition shall be accompanied by an affidavit setting out the facts on which the petition is based together with the list of documents on which the petitioner intends to rely. It suggests that the rule envisages another method for proof of documents on which the petitioner intends to rely.

Further, at this point of the rules, it is not stated that the grounds in the Petition or the documents relied on shall be proved by affidavit evidence or that the petition shall further be accompanied by other affidavit evidence or that the trial shall be by affidavit evidence. However, the mode of taking evidence is found in a subsequent rule 15 (1) (2), (3) (4) which provides for how evidence is adduced at the trial. It provides that:

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

(4) A person summoned as a witness by the court under sub rule (3) of this rule may be cross examined by the parties to the petition.

Rule 15 of the Parliamentary Elections (Interim Provisions) Rules purports to enforce section 64 of the Parliamentary Elections Act though Rule 15 (1) is clearly inconsistent with section 64 (1) (a) of the Parliamentary Elections Act. The only consistency of the rule is in so far as it provides that any person swearing an affidavit may be cross examined by the opposite party. Secondly, the court may on its own motion examine any witness or recall and examine or recall any witness if the court is of the opinion that the evidence of the witness is likely to assist the court arrive at a just decision. A person summoned by the court may be cross examined. In so far as it provides under rule 15 (1) that "*all evidence at the trial in favour of or against the petition shall be by way of affidavit read in open court*", the provision is inconsistent with section 64 (1) (a) which provides that any witness shall be summoned and sworn in the same manner as a witness may be summoned and sworn in civil proceedings.

Clearly, section 64 sets out the correct procedure to be followed at the trial of an election petition and stipulates that at the trial of an election petition, any witness shall be summoned and sworn in the same manner as a witness may be summoned and sworn in civil proceedings. Particularly section 64 (1) (a) of the Parliamentary Elections Act, 2005 requires any witness to be summoned and sworn in the same manner as a witness in civil proceedings. Civil proceedings in the High Court are governed by the Civil Procedure Act and Civil Procedure Rules. Order 16 of the Civil Procedure Rules gives the procedure for the summoning of witnesses. Secondly, Order 17 of the Civil Procedure Rules gives *inter alia* the procedure for the prosecution of suits and for adjournments. But specific to the matter in issue is the fact that the court under Order 17 rule 1 (2) provides that witnesses shall be examined from day to day suggesting that their evidence is taken *viva voce* in that they have to be examined one by one until the last witness is examined. Order 17 (1) (2) of the Civil Procedure Rules provides that:

1. Court may grant time, adjourn hearing and make an order with respect to costs of adjournment.

(1) The court may, if sufficient cause is shown, at any stage of the suit grant time to the parties, or to any of them, and may from time to time adjourn the hearing of the suit.

(2) In every such case the court shall fix a day for the further hearing of the suit, or may adjourn the hearing generally and may make such order as it thinks fit with respect to the costs occasioned by that adjournment; except that—

(a) when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded; and

(b) where the hearing of the suit has been adjourned generally, either party may have liberty to apply to the court to restore the case to the list.

The mode of taking evidence is particularly specified under *inter alia* Order 18 rules, 2, 3, 4 and 5 of the Civil Procedure Rules which are reproduced for ease of reference. Suffice it to note that these rules have since been modified by the Civil Procedure (Amendment) Rules, 2019 Directions which enables evidence by witness statements to be filed as testimony subject to confirming them on oath in court and to cross examination at the option of the opposing party. The amendment also provides for the independent recording of proceedings through digital or electronic means. Order 18 rules, 2, 3, 4 and 6 of the Civil Procedure Rules provide that:

2. Statement and production of evidence.

(1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his or her case and produce his or her evidence in support of the issues which he or she is bound to prove.

(2) The other party shall then state his or her case and produce his or her evidence, if any, and may then address the court generally on the whole case.

(3) The party beginning may then reply generally on the whole case; except that in cases in which evidence is tendered by the party beginning only he or she shall have no right to reply.

3. Evidence where several issues.

Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his or her option, either produce his or her evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his or her evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

4. Witnesses to be examined in open court.

The evidence of the witnesses in attendance shall be taken orally in open court in the presence of and under the personal direction and superintendence of the judge.

5. How evidence to be recorded.

The evidence of each witness shall be taken down in writing by or in the presence and under the personal direction and superintendence of the judge, not ordinarily in the form of question and answer but in that of a narrative, and when completed shall be signed by the judge.

The amendments to the Civil Procedure Rules allow for witness statements to be taken and for witnesses to be cross examined on their statements in accordance with the rules. What is material being that rule 15 (supra) of the Parliamentary Elections (Interim Provision) Rules and particularly sub rule 1 thereof is inconsistent with section 64 (1) (a) of the Parliamentary Elections Act which requires evidence to be taken of witnesses after they are summoned and sworn in the same manner as in civil proceedings as I have set out above. Section 18 (4) of the Interpretation Act cap 3 laws of Uganda provides that where a statutory instrument is inconsistent with the Parent Act, it shall be null and void to the extent of the inconsistency in the following words:

18. General provisions relating to statutory instruments.

(1) Any reference in a statutory instrument to "the Act" shall be construed as a reference to the Act under which the instrument was made.

(2) Terms and expressions used in a statutory instrument shall have the same meaning as in the Act under which the instrument was made.

(3) A statutory instrument may at any time be amended by the authority by which it was made or, if that authority has been lawfully replaced by another authority, by that other authority.

(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.

(5) Any act done under or by virtue of or in pursuance of a statutory instrument shall be deemed to be done under or by virtue of or in pursuance of the Act conferring power to make the instrument.

(6) Every statutory instrument shall be deemed to be made under all powers enabling it, whether or not it purports to be made in exercise of a particular power or particular powers.

(7) Section 13(2) shall apply on the revocation of a statutory instrument as it applies on the repeal of any Act.

Suffice it to state that while rule 4 (8) provides that 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 which the petitioner intends to rely. This rule was considered in **Suubi Kinyamatama Juliet Vs Sentongo Robinah Nakasirye (Election Petition No. 92 of 2016) [2018] UGCA 240 (01 February 2018)**. As far as it relevant the respondents argued that the petition was not validly before court because it was not accompanied by a validly commissioned affidavit as required by rule 4 (8) of the Rules (supra). The affidavits had been commissioned by advocates who had not renewed their practising certificates. The Court of Appeal held that section 14A of the Advocates (Amendment) Act 2002 was enacted to protect innocent litigants against unscrupulous advocates so that the defect in affidavit is no visited on the litigant. The defect on commissioning by unlicensed advocates is

cured under section 14A (1) (b) (2) for the innocent victim to be given time to make good the affidavit. The court found that without rectifying the defect the affidavit remained invalid. On that basis and because the main affidavit was not cured by the innocent litigant it remained defective and the court held that:

> 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 a 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 said 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 trial court. By this finding alone, the appeal succeeds and in essence, there would be no need to resolve the other grounds of Appeal. However, ...

The main affidavit was the only affidavit in support of the petition.

The above decision of the Court of Appeal is clearly distinguishable on the ground that it dealt with a defective affidavit due to commissioning by an unlicensed advocate. In this appeal, the issue is whether the facts in the main affidavit in support of the petition are hearsay rendering the affidavit defective.

As noted above, rule 4 (8) of the Parliamentary Elections (Interim Provisions) Rules provides that a petition shall be accompanied by an affidavit and this means it is one affidavit (the affidavit accompanying the pleadings). The purpose of the affidavit is to set out the facts on which the petition is based and the list of documents which the petitioner intends to rely on. As far as the documents are concerned, clearly the rules envisaged another method for the proof of documents and their contents since it caters for only a list of those documents. It follows that the documents do not have to be attached to the affidavit. A great deal of time was spent by

the respondents attacking the declaratory forms of the results of the election in relation to 10 polling stations. This was based on the issue of whether the facts were within the knowledge of the petitioner. Clearly rule 4 (8) does not envisage the accompanying affidavit to be the evidence to be relied upon but rather it sets out the facts on which the petition is based which have to be proved through adducing the material evidence. Further, rule 4 (8) does not deal with the proof of the facts but rather proof of facts are dealt with by rule 15 of the rules in election petitions. The main affidavit is part of the pleading which shall be filed within the time limited by section 60 (1) (3) for the filing of the petition.

Further, once the petition is served on the respondent, the respondent is required to furnish an address of service under rule 7. Secondly, under rule 8 he or she is required to file an answer to the petition. The answer to the petition is like a pleading akin to a written statement of defence which shall also be accompanied by an affidavit stating the facts upon which the respondent relies in support of his or her answer. Again, this pleading is to be supported by an affidavit stating the facts in support of the answer and evidence is adduced by witnesses under section 64 (1) (a) of the Act. For that reason, the answer to the petition need not be supported by more than one affidavit. Secondly, while rule 15 (1) (which I have found is inconsistent with the Parent Act is void to the extent of the inconsistency) provided that evidence at the trial shall be by way of affidavit read in open court, that evidence is not filed with the petition or the answer to the petition which only prescribe an affidavit in support. Last but not least, rule 17 imports the rules for the trial of civil suits under the Civil Procedure Act and the rules made there under for the trial of a suit in the High Court with the necessary modifications.

The conclusion is that it was erroneous to treat the affidavit in support of the petition as the only evidence since evidence was envisaged under rule 15. Secondly, the main affidavit is supposed to state all the facts that the petition is based on, even the facts supplied by other witnesses. Those witnesses are expected to adduce the material evidence in support of the

facts asserted in the petition. Thirdly, rule 15 (1) is inconsistent with section 64 (1) (a) of the Parliamentary Elections Act. It is inconsistent as stipulated under section 18 (4) of the Interpretation Act and the extent of the inconsistency is the provision that evidence at the trial shall be by way of affidavit. Evidence shall be by summoning witnesses who shall be sworn in the same manner as witnesses may be summoned and sworn in civil proceedings in terms of section 64 (1) (a) of the Parliamentary Elections Act, 2005. It further follows that the treatment of the main affidavit as the main evidence was erroneous as facts have to be proved because evidence at the trial shall be by witnesses who are sworn in court. The main affidavit is meant to attest to the facts in support of the petition at the pain of imprisonment for false information under section 64 (2) of the Act. Generally, an act done in violation of a penal statute is a nullity. It follows that a statement of fact which a witness or deponent of an affidavit knows to be false or does not know or believe to be true or in respect of which he or she is reckless whether it is true or false renders the contents of the affidavit or the witness testimony a nullity. This analogously falls within the general common law principle found under contract law that contracts are vitiated by illegality because they violate a penal statutory provision. In **Bostel Brothers, Ltd Vs Hurlock [1948] 2 All ER 312,** money for work done under a licence in contravention of a statutory provision could not be recovered by an action in court. Somervell L.J at page 312 stated the well know principle:

> "The principle of law relied on was stated concisely and in a form appropriate to the present issue by Ellenborough CJ in Langton v Hughes (1 M & S 593, 596): "*What is done in contravention of the provisions of an Act or Parliament, cannot be made the subject-matter of an action.*"

Clearly evidence taken or admitted in contravention of section 64 (1) (a) of the Parliamentary Elections Act ought not to be basis for striking out the petition. See also **Phoenix General Insurance Co of Greece SA Vs Administratia Asigurarilor de Stat [1987] 2 All ER 152** where the Court of Appeal of the UK held that any contract prohibited by statute, either expressly or by implication is illegal and void.

By analogy, if the contents of an affidavit are found to be in breach of section 64 (2) of the Parliamentary Elections Act, 2005 for falsehood because this section penalises falsehood with imprisonment not exceeding one year, such an affidavit can be struck out and it would render the petition a nullity after proof of the offence on the balance of probabilities. On that basis, the main affidavit may be struck out and the petition may fail. The requirement for support of the petition by affidavit is part of the rules and pleading and the issue should be left for decision as to whether if it is defective, or that it renders the petition defective and void.

Further election petitions are usually contested except where they are resolved by consent and it is highly imprudent to proceed by way of affidavit evidence. The striking out of any affidavit other than the main affidavit which is supposed to be an affidavit in support under an inconsistent rule is of no consequence to the competence of the petition since evidence can be adduced viva voce. The main affidavit is filed under a different rule from that dealing with evidence in support. It was therefore erroneous for the learned trial judge to strike out the petition on the ground that it was not supported by competent accompanying affidavit evidence. The learned trial judge had powers under section 64 (1) (a) of the Parliamentary Elections Act to summon all the witnesses who would be called to prove the material evidence inclusive of admitting any material documents and the rules of evidence for admissibility would be applied at the trial. In my judgment, an affidavit in support of the petition should state all the facts in support of the petition, even facts to be proved by other witnesses. This is the import of rule 4 (8) of the Parliamentary Elections (Election Petitions) Rules which provides that:

> (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.

What facts or documents does the petition intend to rely on? The facts are a statement of intended evidence and documents to be relied on when evidence is adduced through the appropriate witnesses including the

petitioner. Obviously the facts in the petition may be proved by various witnesses. That is what the main affidavit attests to.

The court is not excluded from receiving evidence by way of affidavit evidence provided it is the court which orders it under Order 19 of the Civil Procedure Rules. Order 19 rule 1 of the Civil Procedure Rules provides that:

> Any court may at any time for sufficient reason order that any particular fact may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable; except that where it appears to the court that either party bona fide desires the production of a witness for cross examination and that such witness can be produced, an order shall not be made authorising the evidence of that witness to be given by affidavit.

Clearly, cross examination of witnesses who have made affidavits only proceeds with the leave of the court under the Civil Procedure Rules. As noted above, by providing under rule 15 (1) of the Parliamentary Elections (Interim Provisions) Rules that evidence at the trial shall be by affidavit, the rules were made ultra vires the powers to promulgate rules under the Parent Act.

I further wish to point out that cross examination under rule 15 (2) of a person swearing an affidavit before the court is at the option of the party (the opposite party). However, because the rule 15 (1) of the Parliamentary Elections (Interim Provisions) Rules is inconsistent with the Parent Act and void to the extent of making a mandatory provision for trial to be by affidavit, rule 15 (2) should be confined to the instances where the court on its own motion examines any witness or recalls any witness. Even in such cases, such a witness will be sworn in by the court as envisaged under section 64 (1) (b) of the Parliamentary Elections Act which provides that *"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."* Secondly, it provides under section 64 (1) (c) that *"any person summoned by the court under paragraph (b) may be cross examined by the parties to the petition if they so wish."* The only other option for evidence to be by affidavit evidence is

with the leave of court under the Civil Procedure Rules as I have stated above.

In the premises, having found that affidavit evidence is not the primary or appropriate mode for proving the grounds in an election petition, this appeal succeeds and I would make an order that the order of the High Court striking out the appellant's petition is hereby set aside. Secondly I would make an order that the petition shall be remitted to the High Court for trial and evidence at the trial shall proceed by summoning witnesses of either side under the Civil Procedure Rules in the ordinary way. Such witness affidavits shall be treated as witness statements on condition that the witnesses are summoned, appear in court to be sworn in to confirm their statements whereupon they will be subject to cross-examination at the option of the opposite party and to re-examination.

Having found as above on a point of law, the striking out of the affidavits or the grounds for declaring the affidavits incompetent are of no consequence because the evidence can be adduced using the statutory mode under section 64 (1) (a) of the Parliamentary Elections Act, 2005, There is no need to consider specifically, grounds 1, 2, 3, 4, and 5 of the appeal as the decision of the trial judge ought to be set aside on a point of law arising from those grounds of appeal. I would in the circumstances make an order that the appeal be allowed with costs in this court and in the court below on a point of law arising from grounds of appeal.

Dated at Kampala the 6th day of May 2022

Christopher Madrama

Justice of Appeal

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: Egonda-Ntende, Madrama & Luswata, JJA)

ELECTION PETITION APPEAL NO 30 OF 2021

(ARISING FROM ELECTION PETITION NO 14 OF 2021)

BETWEEEN

KAYANJA VINCENT DE PAUL========== APPELLANT

AND

RULINDA FABRICE BRAD==========RESPONDENT NO.1

THE ELECTORAL COMMISSION==========RESPONDENT NO.2

(*Appeal from the Judgment of the High Court of Uganda (Muwata, J.), delivered on 24th September 2021*)

JUDGMENT OF LUSWATA KAWUMA, JA

[1] I have equally had the opportunity to read in draft the judgment of my brother, Madrama, JA. I agree with him and have nothing useful to add.

[2] As Fredrick Egonda Ntende, JA agrees, this appeal is allowed with costs and with the orders proposed by Madrama, JA.

Dated, signed and delivered at Kampala this 5 day of May 2022

EVA K. LUSWATA
Justice of Appeal

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: Egonda-Ntende, Madrama & Luswata, JJA)

ELECTION PETITION APPEAL NO 30 OF 2021

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THE ELECTORAL COMMISSION==========RESPONDENT NO.2

(*Appeal from the Judgment of the High Court of Uganda (Muwata, J.), delivered on 24th September 2021*)

JUDGMENT OF FREDRICK EGONDA-NTENDE, JA

[1] I have had the opportunity to read in draft the judgment of my brother, Madrama, JA. I agree with him and have nothing useful to add.

[2] As Kawuma Luswata, JA agrees this appeal is allowed with costs and with the orders proposed by Madrama, JA.

Dated, signed and delivered at Kampala this 6 day of May 2022

Fredrick Egonda-Ntende
Justice of Appeal