

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
ELECTION PETITION APPEAL NO.0034 OF 2021
(Arising from Masaka Election Petition No.05 of 2021)

5 **NANDAGIRE CHRISTINE NDIWALANA::::::::::::::::::::: APPELLANT**

VERSUS

KATUSHABE RUTH::::::::::::::::::::: RESPONDENT

CORAM: HON. MR. JUSTICE KIRYABWIRE, JA

10 **HON. MR. JUSTICE STEPHEN MUSOTA, JA**

HON. MR. JUSTICE GASHIRABAKE CHRISTOPHER, JA

JUDGMENT OF THE COURT

15 This is an appeal against the decision of the Hon. Lady Justice Ketra
Kitarisibwa Katunguka delivered on 28th September, 2021 at the
High Court of Uganda at Masaka.

Background of the Appeal

20 During the General Parliamentary elections conducted by the
Electoral Commission on the 14th January, 2021; the Appellant
Nandagire Christine Ndiwalana and the Respondent Katushabe Ruth
together with Lubyayi Kisiki, Kateregga, Mohamed Kawooya Yasiin,
Namakula Racheal and Ssebugwawo Yusuf contested for the seat of

Member of Parliament of Bukomansimbi North Constituency in Bukomansimbi.

The Appellant won the election and was returned as the duly elected Member of Parliament for the Bukomansimbi North Constituency.

5 The Appellant got 9617 votes cast in her favour while 6599 votes were cast in favour of the Respondent. The winning margin was a total of 3018 votes. Subsequently the Appellant was gazetted as the duly elected member of Parliament for Bukomansimbi North Constituency in the Uganda Gazette of 17th February, 2021.

10 On 18th March, 2021 the Respondent as an aggrieved candidate Petitioned the High Court of Uganda at Masaka challenging the election results on the ground that the Appellant who was the 2nd Respondent to the Petition was at the time of nomination not qualified to be nominated a candidate in the elections. The Electoral
15 Commission was the 2nd Respondent.

The Appellant filed an Answer to the Petition challenging the competence of the Petition and contending that she was duly qualified to be a candidate in the election. She further denied the
20 allegations of lacking the required academic qualifications for a member of Parliament.

Only three issues were framed by the trial Court vide;

1. Whether the 2nd Respondent was validly nominated and elected as Member of Parliament for Bukomansimbi North Constituency as required by law?

2. Whether the 2nd Respondent made a false statement to the Returning Officer of Bukomansimbi District to gain nomination?

3. What remedies are available to the Parties?

5 The trial Judge answered all issues in favor of the Respondent in this appeal. The trial Judge held that the Appellant was not validly nominated and did not have the minimum academic qualifications. She then nullified the election and ordered for fresh elections.

The Appellant was dissatisfied with the Judgment and Orders of the
10 court and lodged this appeal.

The Appeal

The Memorandum of Appeal raises the following grounds of appeal;

1. The Learned trial Judge erred in law and fact when she found that the Respondent's Petition disclosed a cause of action
- 15 2. The Learned trial Judge erred in law and fact when she held that the Appellant had lied on Oath by stating that she had a Uganda Advanced Certificate of Education (UACE)
3. The Learned trial Judge erred in law and fact when she held that the appellant lacked the relevant qualifications upon which
20 the National Council for Higher Education could have validly equated
4. The Learned trial Judge erred in law and fact when she shifted the burden of proof of academic qualifications to the Appellant.

5. The Learned trial Judge erred in law and fact when she failed to consider the Appellant's Certificate from Uganda Matyr's University on the basis that it was not presented to the Returning Officer thereby occasioning a miscarriage of Justice.

5 6. The Learned Trial Judge erred in law and fact when she failed to evaluate the evidence on record hence coming to a wrong conclusion that the Appellant lacked the relevant academic qualifications of Uganda Advanced Certificate of Education or its equivalent to stand as a member of Parliament.

10 The Appellant proposes that court grants the following orders;

i. That this Appeal be allowed by this court.

ii. The Judgment and Decree entered against the Appellant by the Learned trial Judge be set aside.

15 iii. The costs be awarded to the Appellant in this court and in the court below.

On 14th October, 2021 the Respondent filed a Cross Appeal and on 24th February, 2022 the Respondent filed an Amended Notice of Cross Appeal stating three grounds as follows;

20 1. Having found that the Statutory Declaration of the Appellant dated 30th January, 2019 was false, the Learned trial Judge erred in law and in fact when she held that the O" level Certificate in the names of the "Nandagire Chriss" belonged to the 2nd Respondent

25 2. Having found that the Nomination Paper of the Appellant was void, the learned trial Judge erred in law and fact when she

failed to follow a binding Decision of this Honourable Court of Appeal of Uganda in **Wakayima N. Musoke & EC vs Kasule Robert Ssebunya EPA No.50 and 102 of 2016** which was binding on her to declare the Cross Appellant, winner of the Election held on the 14th January, 2021.

3. That having found that the 1st Cross Respondent did not comply with Section 4(5) of the Parliamentary Elections Act, the learned trial Judge, erred in law and fact when she held that the provision could on its own invalidate the election of the Cross Respondent

The Cross Appellant proposes that Court grants the following orders;

1. The Cross-Appeal be allowed with costs here and in the court below
2. A declaration that the Cross Appellant was the candidate at the Election held on 14th January 2021, who scored the highest number of 6,599 valid votes and the runner up was Lubyayi Iddi Kisiki who obtained 4,238 votes
3. A declaration that the Cross Appellant won the Election for Member of Parliament held on 14th January, 2021 in Bukomansimbi North County Constituency
4. Costs of the Cross-Appeal be paid to the Cross Appellant.

Representations/appearances

At the hearing of the appeal, Mr. Katumba, Mr. Kyazze and Mr. Jude Mbabali appeared for the Appellant. Mr. Kandebe Appeared for the

Respondent. Mr, Sabiiti Eric appeared for the 2nd Respondent (Electoral Commission).

All parties filed conferencing notes which they prayed court adopts as their written submissions. Court adopted them for use and will
5 consider them in determination of the grounds of this appeal.

Duty of First Appellate Court

This being a first appeal it is important that we state the duty of this Court as a first appellate court. The role of this court as a first appellate court is laid down under **Rule 30(1) of the Judicature
10 (Court of Appeal Rules) Directions** which provides that;

“30. Power to reappraise evidence and to take additional evidence.

***(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the
15 court may—***

(a) Reappraise the evidence and draw inferences of fact; and

(b).....

This Court is therefore obliged to reappraise the inferences of fact
20 drawn by the trial court.

In the case of **Kifamunte Henry v. Uganda Criminal Appeal No. 10 of 1997** the Supreme Court had this to say on the duty of a first appellate court;

5 *“We agree that on a first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court’s own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses. However there may be other circumstances quite apart from the manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen. See *Pandya v. R* [1957] EA 336, *Okeno v. Republic* [1972] EA 32 and *Charles Bitwire v. Uganda Supreme Court Criminal Appeal No. 23 of 1985* at page 5.*

10

15

20

25

Furthermore, even where a trial Court has erred, the appellate Court will interfere where the error has occasioned a miscarriage of justice...

In Banco Arabe Espanol Vs. Bank of Uganda Supreme Court

5 ***Civil Appeal No.8 of 1998*** the Supreme Court of Uganda applied the Kifamunte standard in a civil matter. Therefore, the duty of a first appellate court is to review the evidence of the case and to reconsider the materials before the trial Judge then make its own conclusion.

10 These principles were further stated in the case of **Father Nasensio Begumisa & 3 Others V. Eric Tibebaga, Supreme Court Civil Appeal No. 17 of 2002**, is to subject the evidence adduced at the trial to a fresh and exhaustive reappraisal, scrutiny and then decide whether or not the learned trial judge came to correct conclusions, and if not then this court is entitled to reach its own conclusions. We
15 shall consider the above principles in determining this appeal.

Burden and Standard of Proof in Election Petition Cases

20 The burden of proof is cast on the petitioner to prove the assertions to the satisfaction of the court that the irregularities or malpractices or non-compliance with the provisions and principles laid down in the relevant laws were or is committed and that they or it affected the results of the election in a substantive manner in the election petition. The evidence must be cogent, strong, and credible. The standard of proof is on a balance of probabilities. In a recent decision

of **Paul Mwiru v. Hon. Igeme Nabeta & Others-Election Petition Appeal No. 06 of 2011** this court said:

5 ***“Section 61(3) of the PEA sets the standard of proof in parliamentary election petitions. The burden of proof lies on the petitioner to prove the allegations in the petition and the standard of proof required is proof on a balance of probabilities. The provision of this subsection was settled by the Supreme Court in 35 the case of Mukasa Harris v Dr Lulume Bayiga (supra) when it upheld the interpretation given to the subsection by this court and the High Court.”***

10

Consideration of the Appeal

We shall deal with the grounds of appeal in the order in which they have been raised, then after deal with the Cross-Appeal in the same way.

15

Ground 1

The learned trial Judge erred in law and fact when she found that the Respondent’s Petition disclosed a cause of action

Appellant’s Submissions

20 In summary the appellant’s submissions on this ground of appeal is that the trial Judge wrongly upheld the respondent’s Petition grounded on a pre-election complaint and found that the petition disclosed a cause of action. That the trial court had the duty to

consider this matter of law whether parties had raised it or not, and it is the duty of the Court when asked to give a judgment which is contrary to a statute to take the point although the litigants may not take it. Counsel relied on **Ndawula Ronald versus Al Hajji Abdul Nadduli, Election Petition Appeal No. 20 of 2006.**

Further that the Petitioner only started challenging the appellant's nomination after losing the election yet the appellant's nomination papers were available for inspection after nominations of 15th and 16th October, 2020 within the confines of Section 15(a) and (b) of the Parliamentary Elections Act. The Respondent had the liberty to lodge complaints if any with the Electoral Commission.

After being heavily defeated by a margin of 3018 votes the Respondent belatedly raised the issue of alleged improper nomination which should not be allowed to happen. For this counsel relied on Court of Appeal **Kasirye Zimmula Fred vs Bazigatirawo Kibuuka Francis Amooti & Anor, Election Petition Appeal No. 01 of 2018.** As a matter of law and public policy, a cause of action based on account of alleged want of proper academic qualifications is not and should not be maintainable in law by the Petitioner after conclusion of the elections and after expression of the will of the electorate. That the jurisdiction to handle matters of qualifications is vested in the Electoral Commission as per **Akol Hellen Odeke versus Okodel Umar, Election Petition Appeal No.6 of 2020**

Further counsel submitted that in an election petition the cause of action in the context of Section 61 of the Parliamentary Elections Act

should relate to the election itself. That this court should make a distinction between Article 61 (1)(f) and 64 (1) of the Constitution and Section 15 of the Electoral Commission Act and Section 15(a) & (b) of the Parliamentary Elections Act 2005 which govern the forum and
5 determination of pre-elections complaint. After elections are held and results declared a reasonable complaint should be about conduct of the election not against an earlier segment of the process per **Ongole James Michael versus Electoral Commission & Another, Election Petition Appeal No. 08 of 2006.**

10 The issue of eligibility of candidate for nomination should be resolved before elections and any aggrieved party who fails to do so, should be estopped. The learned trial Judge ought to have found that in so far as the petition was grounded in pre-election/nomination complaints, the Petition disclosed no cause action. For this submission the
15 Appellant relies on **Kasirye Zzimula Fred vs Bazigatirawo Kibuuka Francis Amooti & Another, Election Petition Appeal No. 01 of 2018 (CA) at page 10.** The appellant invited court to so find.

Respondent's Submissions

20 In summary the respondent's submissions are that the learned trial Judge was right in finding that the Petition disclosed a cause of action. That this Court and the High Court are vested with jurisdiction to inquire into qualifications and nominations of a candidate that was declared elected under Section 60 and 61 of the Parliamentary Elections Act.

That section 15(b) of the Parliamentary Elections Act which the Appellant relies on is not mandatory and does not state any condition or prescribe any penalties where there is a failure to challenge the nomination of a candidate. It does not prohibit presentation of the complaint during the election petition at High Court. A cause of action is determined by looking at the Petition and annexures and nothing else and the learned trial Judge was right to hold that the matter of qualifications was a triable issue which meant that there was a cause of action.

Counsel cited the **Nakendo vs Mwendha Supreme Court Civil Appeal No.09 of 2007** where Katureebe JSC stated that the High court has power to hear and determine a Petition where it is alleged that a person is not qualified for an election. That it is an election matter and court has Jurisdiction to determine and hear it. That if the High Court finds on evidence that the decision of an administrative tribunal like National Council for Higher Education (NCHE) was irrationally made, or were not based on proper diligence, the court can and should so declare.

That Section 13 of the Parliamentary Elections Act provides that a person shall not be regarded as duly nominated for a constituency and the nomination paper of any person shall be regarded as void if the person has not complied with the provisions of Section 4 of the PEA. That the issue of qualifications therefore was an issue that had to be determined in the petition.

That the decision of **Kasirye vs Bazigatirawo (Supra)** referred to by the appellant was decided per in curium as it did not refer or analyse section 60 and 61 of the PEA nor did it refer to **Nakendo vs Mwondha (Supra)** which is a binding decision of the Supreme Court as opposed
5 to the Appellant's authority which is merely persuasive.

Counsel prayed that court finds that the Petition disclosed a cause of action.

Determination of Ground 1

We have carefully considered the submissions of the parties and we
10 agree with the submission of the Respondent that a cause of action must be determined on the face of the pleadings including any annextures attached thereto. In the case of Election Petition, the Petition is the pleading of reference in determining whether there is a cause of action. Therefore, we find that the learned trial Judge
15 rightly found so in her Judgment.

The test as to whether pleadings disclose a cause of action was set out in the case of **AUTO GARAGE AND OTHERS -VS- MOTOKOV (NO. 3) [1971] I EA 514**, where it was held that there are three (3) essential elements to support a cause of action; that is: -

- 20 a) The plaintiff enjoyed the right.
- b) The right has been violated.
- c) The defendant is liable.

The court went on to hold that if any one of these essential elements is missing, the plaint is a nullity and ought to be dismissed with costs.

5 The question then is; did the petition disclose a cause of action? To answer this, we must first understand what an election petition is.

Section 1(1) of the PEA defines "Election Petition" as being a petition filed in accordance with section 60 of the Parliamentary Elections Act (PEA). This section is part X (Sections 60-67) of the PEA which provides for election petitions. The grounds for setting aside an
10 election are stated in Section 61 of the PEA.

On qualifications of a person to be nominated Article 80 of the Constitution sets out the qualifications. The Parliamentary Elections Act Part X (Sections 60-67) is an operationalization of Article 80.

15 Specifically, section 61(d) allows as one of the grounds for challenging an election the allegation that a person is not qualified or disqualified for election. Being not qualified or disqualified are the conditions envisaged under Article 80 of the Constitution.

20 However, reading the above stated provisions of the Constitution and Parliamentary Elections Act together with Section 15 of the PEA and the Electoral Commission Act shows that a Petitioner cannot as a matter of law and policy raise for the first time an issue on validity of a nomination after the election because these provisions were enacted for the purpose of ensuring that all disputes arising prior or during nominations before voting are resolved with finality before the

election date except where the law otherwise specifically provides. Pre election complaints have to be made to the Electoral Commission under S.15 ECA. Whoever is not satisfied can appeal to the High Court under S. 15 (2) ECA. The decision of the High Court is final.
5 This law is self-regulating and a final decision of the High Court cannot be reopened on appeal to the Court of Appeal.

Such timely complaints avoid undue expense and inconvenience to the parties inclusive of the electorate who do not have to vote where nomination is contested. Issues relating to nominations should be
10 resolved before election day.

Therefore, a Petitioner in an Election Petition who did not bring complaints within the stipulated time at the time of nomination under sections 15 of PEA and 15 of the Electoral Commission Act is estopped from doing so after the election because he/she is taken to
15 have waived his/her rights to complain within the stipulated period.

See Kasirye Zimula Fred v. Bazigatirawo Kibuuka Francis & Anor. (Supra)

We find that the Petitioner was estopped from raising matters of nomination after the election and accordingly the trial Judge erred in
20 entertaining them. Where a cause of action is caught by estoppel there cannot be said to be any cause of action in existence. We accordingly find that the Petition did not disclose a cause of action against the Appellant. The Respondent having abandoned other grounds of challenging the election and left the Petition to be solely

based on matters relating to nomination of the appellant as a candidate, this appeal fails.

Having found that the Petitioner was estopped from raising matters of nomination and the whole Petition having been a complaint
5 entirely based on matters of nomination, it follows that Grounds 2, 3, 4, 5 and 6 of the appeal need not be considered.

Final decision and orders on Appeal

For the reasons we have given we would allow this appeal with the following orders;

- 10 a. This appeal is allowed
- b. The Judgment and Decree entered against the Appellant by the High Court is set aside.
- c. Costs are awarded to the Appellant in this court and in the court below.

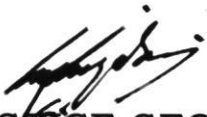
15 **Final decision and orders on the Cross-Appeal**

The cross appeal having arisen from the same Judgment and Decree which we have set aside is dismissed, we order that for reason of estoppel;

- a. The Cross-Appeal is dismissed.
- 20 b. Each party bears its own costs.

We so order.

Dated this 28th day of April 2022.



HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA.

5



HON. MR. JUSTICE STEPHEN MUSOTA, JA.

10



HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JA.

15