THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITITON APPEAL NO.05 OF 2021

(Arising out of Jinja High Court Election Petition No.006 of 2021)

BETWEEN

WASIGE AKIM WAMUDANYA.....APPLICANT

AND

1. ADIDWA ABUDU
2. THE ELECTORAL COMMISSION.....RESPONDENTS

CORAM: HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

HON. MR. JUSTICE STEPHEN MUSOTA, JA

HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JA

JUDGMENT OF COURT

This is an appeal against the decision of the Hon. Justice Godfrey Namundi delivered on the 30th day of August 2021, at the High Court of Uganda at Jinja.

Background of the Appeal.

On the 14th day of January, 2021, the Appellant and the 1st Respondent among other candidates contested for the position of Member of Parliament for Bukooli South Constituency in Namayingo district. The 1st Respondent was declared winner and subsequently gazzeted as the duly elected Member of Parliament for Bukooli South Constituency.

The Appellant being dissatisfied lodged a petition in the High Court of Uganda at Jinja seeking *interalia* a declaration that the 1st Respondent lacks a minimum formal education that is the Uganda Advanced Certificate of Education (UACE) or its equivalent to contest as Member of Parliament, a declaration that the nomination of the 1st Respondent as a candidate for the seat of Member of Parliament for Bukooli South Constituency was erroneously, improperly , irregularly , illegally , negligently and or fraudulently procured , sanctioned , condoned and or abetted by the Respondents jointly and severally and was thus null and void. A declaration that the declaration and publication of the 1st Respondent by the 2nd Respondent as the duly elected Member of Parliament for Bukooli South Constituency was illegal, irregular , improper and thus null and void.

In the lower court **EP 04/2021, EP 06/2021** and **EP 12/2021** were consolidated by the Court under **Rule 18 of the Parliamentary Elections (interim) Provisions Rules – S1 141-2**. The Appellant under **EP 06/ 2021** was dissatisfied with the decision of court hence this Appeal.

The Appellant raised two grounds of Appeal for determination.

1. The learned Trial judge erred in law and in fact when he rejected the appellant's application to amend the petition.
2. The learned trial judge erred in law and in fact when he dismissed the appellant's petition on ground of having been filed under a wrong law.

Representation.

The Appellant was represented by Aggrey Mpora Mushagara. The first Respondent's counsel was not in court. While the second Respondent was represented by Mr. Allan Ogoi, Mr. Gregory Byamukama, Mr. Viany Ssewanyana and Mr. Philip Kasimbi.

Appellant's submissions

Counsel for the Appellant argued grounds 1 and 2 concurrently. He submitted that according to **Rule 17 of the Parliamentary Elections (Elections Petitions) Rules SI 141-2,** the procedure to be followed is relaxed to as nearly as may be in accordance with the Civil Procedure Act and Rules. He made reference to **Section 100 of the Civil Procedure Act Cap 71 and Order 6 rule 19 of the Civil Procedure Rules SI 71-1**, which empowers court to allow amendments whenever it is necessary. See **(Ntungamo District Council vs. John Karazarwe (1997)111KLR 52 and Mohan Musisi Kiwanuka v. Asha Chand, SCCA N0. 14 of 2002.**

He observed that the amendment was not intended to cause any injustice to the Respondent but rather to change the status in which the Petitioner brought his petition. (**See Mulowooza and Brothers Ltd V. N. Shah & Co. Ltd Civil Appeal No. 26 of 2010**.) Where it was held that amendments are allowed so that the real questions in issue are addressed. **(See also Amama Mbabazi v. Yoweri Kaguta Museveni and 3 others vide miscellaneous Application No1 of 2016.)**

The 1st Respondent's Counsel was not in court during the hearing neither did he file submissions in respect of this case.

2nd Respondents' submissions.

Counsel for the 2nd Respondent argued that amending the provision under which the petition was brought went to the root of the matter. That it would mean changing the right of the Petitioner thus a new petition being filed and yet the same would be outside the time limit of 30 days from the date of the declaration of results in the National Gazette as provided under Section 60 (3) of the Parliamentary Elections Act. Counsel made reference to **Kyagulanyi Ssentamu Robert v. Yoweri Museveni Tibuhaburwa Kaguta Supreme Court MA No. 01 of 2921. and IKiroro Kevin v. Orot Ismail Court of Appeal Election petition No. 105 of 2016.**

He noted that the Petitioner presented the petition as a registered voter and he was bound to prosecute the petition as such but allowing him to amend and bring the petition as a former candidate would be changing the cause of action (the right of action). This would not fall under the prescribed time lines.

It was counsel for the 2nd Respondent's averment that there is nothing on record to show that the Petitioner was a candidate in the said race. The evidence provided is that he was a registered voter vide **No. 65946199**; therefore the petitioner was bound to prosecute the petition as a registered voter.

Submissions in rejoinder by the Appellant

Counsel for the Appellant submitted that Article 126(2)(e) of the 1995 Constitution and Sections 100 and 98 of the Civil Procedure Act empower this court to allow amendments. That according to **Alcon International vs. New vision publishing Co. Ltd and others SCCA No. 4 /2021**, and **Saggu v. Road Master Cycles (U) Ltd (2002_1 EA 258**, it was held that quoting a wrong law is a mere technicality. That it is not true that if the amendment is allowed it will bring a new cause of action. That the main cause of action was challenging the nomination of the 1st Respondent.

Consideration of the Appeal

It is the duty of this appellate court under **Rule 30 (1) of the Judicature Court of Appeals Rules) Directions S.I 13-10** , to re-appraise the evidence on record and come to its own conclusion bearing in mind, however , that it did not see the witness testify.

Rule 30 (1) , provides;

> On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—
> (a) reappraise the evidence and draw inferences of fact;

Rule 17 of the Parliamentary Elections (Interim Provisions) Rules, provides that;

> "subject to these Rules, the practice and procedure in respect of a petition shall be regulated, as nearly as may be, in accordance with the Civil Procedure Act and Rules made under that Act relating to the trial of a suit in the High Court,

with such modification as the court may consider necessary in interest of justice and expedition of the proceedings"

Counsel for the Respondent submitted that the above Rule 17, which is exactly similar in substance to Rule 15 of the Presidential Elections (Election Petition) Rules, was interpreted by the Supreme Court, in **Kyagulanyi Ssentamu Robert vs. Yoweri Museveni Tibuhaburwa Kaguta & others S.C Misc. Application No.01of 2021** which held that;

> "The first issue to consider from the reading of the above rule is that the rule **does not make it mandatory** for this court to apply the Civil Procedure Act and the rules made there under in the determination of a Presidential election petition given the use of the phrase, **"may"**. Secondly and the most relevant, is that if need arose to apply the Civil Procedure Act and rules, their use would be limited to the trial/hearing of the petition only"

We agree with the finding of court in the *Kyagulanyi case* above that the applicability of the Civil Procedure Rules is discretionary but only as far as it is to fill in the gaps in the electoral procedure. In other wards court exercise it's discretion in applying the said Rules as and when it is necessary to fill the gaps. Discretion means that court is at liberty to exercise its judgment based on the law and the rules to come to a just decision. In the persuasive case of **Martha Wangari Karua vs. Independent & Boundaries Commission &3 others Nyeri Election Petition Appeal No.1 of 2017[2018] Eklr** while discussing the exercise of discretion the Kenyan Court of Appeal held that;

> "In our understanding, rules of procedure must be applied to the advancement of substantial justice, to enforce rights in a manner not injurious to the society, by enlarging the remedy, if necessary, in order to do justice, to prevent delay, reduce expenses and inconveniences. We must also state that many things especially in the domain of procedure are left to the discretion of trial judges and the best judge is the one who relies least on his/her own opinion. A trial judge has wider field for the exercise of his /her discretion and an appellate court to interfere with such exercise of discretion it will only interfere where the trial judge is shown to have been clearly wrong.
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> Again, where discretion is left to the trial judge, the court is to a great extent unfettered in its exercise. Discretion when properly applied means sound discretion grounded on the law, and rules; it must not be arbitrary, vague or fanciful; but judicious and regular. Discretion must not be exercised in a manner absolutely unreasonable and opposed to justice"

Looking at the ruling of the lower court, we conclude that the lower court Judge exercised his discretion judiciously. According to the ***Martha Wangari Karua case (supra)***, discretion must be exercised subject to the law and rules provided. We observe that while passing his ruling, the trial Judge subjected himself to the strictness in observing the provisions of the entire Part X (Section 60-67) of the Parliamentary Elections Act, which provides for the timelines within which to file petitions and the right under which one can bring a petition. In his ruling the trial Judge observed that;

> "I agree with the various authorities and especially *Ikiror vs. Orot* cited for the 2nd respondent, that the entire part x of the

> Parliamentary Election Act (Sections 60-67) is characterized by strictness both in filing and prosecution.....
>
> The petition has been on the court record for over 4 months and he could have rectified such errors if he thinks they are minor or obvious. For example, he could have withdrawn the petition before service and filed a fresh one within the 30 days' time limit. If it was a typing error, he could have also taken the right steps to correct it"

It is worth noting that Rule 17, relied on by the Appellant is applied subject to the provisions of the rules of **The Parliamentary Elections (Interim Provisions) Rules SI 141-2**. It must be observed that the uniqueness of the election petitions affects the usual procedure of conducting trial. A critical reading of SI 141-2 above indicates that there are time lines within which election petitions must be filed, heard and determined. The essence of these timelines is for parties to exercise prudence and diligence in preparing or prosecuting their matters and also gives notice to the other party. **Rule 13(1) of The Parliamentary Elections (Interim Provisions) Rules**, provides that the petitions shall be heard expeditiously;

> "The court shall, in accordance with Section 63(2) of the statute, hear and determine the petition expeditiously; and it shall declare its findings not later than thirty days from the date it commenced the hearing of the petition unless the court for sufficient reason extends the time"

The demand for timelines by the rules call for diligence by both counsel and the party to the petition. It was the trial Judge's observation that the Petition was on the court file for 4 months but

the petitioner did not take the initiative to rectify the anomaly in the given time lines. This is evidence of dilatory conduct. There is no doubt that the intention of the time lines in the election petitions is to avoid delays. Due to the uniqueness of the election petitions all other proceedings before court are put on hold in order to meet the set timelines. It would be unjust not to be mindful of time when other court users cannot be attended too in a timely way because of the election petitions. Such stringent approach to election petitions enables court get back to its routine duty without causing delay within the judicial system.

Additionally, if the amendment was allowed it would have been a new petition all together. The Petitioner who brings a petition under Section 60(1) (2)(a) is not subjected to the same conditions as the Petitioner under Section 60(2)(b). The latter is subject to providing evidence of not less than five hundred voters' registered in the constituency in a manner prescribed by the regulation. The difference in the conditions for the Petitioner would go to the root of the petition since the Appellant would not be able to meet the time lines for filing the petition. It would mean the Petitioner and the Respondent have to change their pleadings and submissions which would be injurious and greatly inconveniencing to the Respondents.

For the above reasons we find no merit in the appeal, it is therefore hereby dismissed with orders that;

1. The 1st Respondent was validly elected as a Member of Parliament for Bukooli South Constituency.

2. Costs are awarded to the Respondents both in the lower court and this court.

Dated at Kampala this.....20th..... day of .....May.....2022

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GEOFFREY KIRYABWIRE

JUSTICE OF APPEAL

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STEPHEN MUSOTA

JUSTICE OF APPEAL

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CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL