

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
ELECTION PETITION APPEAL NO.14 OF 2021
(ARISING FROM ELECTION PETITION NO.03 OF 2021)

NYAKECHO ANNET ::: APPELLANT

VERSUS-

1. ELECTORAL COMMISSION
2. EKANYA GEOFREY::: RESPONDENTS

JUDGMENT OF HON JUSTICE EVA.K. LUSWATA

A brief Background

- 1] The appellant, 2nd respondent and 5 others were candidates for the position of Member of Parliament for Tororo North County Constituency in Tororo District for Parliamentary elections which were conducted by the 2nd respondent on 14/01/2021. The appellant polled 9,563 votes while the 2nd respondent polled 9,674 votes respectively and as a result, the Returning Officer of the 1st respondent declared the 1st respondent as the duly elected member of Parliament of the Constituency. The appellant filed a petition in the High Court to challenge the election results.
- 2] At the commencement of the hearing on the 10/09/2021, Mr. Ekirapa Isaac counsel for the 2nd respondent raised a preliminary objection to the effect that the petition was incompetent on grounds that the petitioner's sole affidavit in support of the petition was commissioned by an Advocate, Mr. Owakukiroru Raymond who at the relevant time, did not possess a valid practicing certificate. Counsel referred to a letter written by the Chief Registrar of the Courts of Judicature (hereinafter CR) dated 6/09/2021 addressed to the lawyers of the 2nd respondent, stating

that advocate Owakukiroru Raymond was issued with a practicing certificate on 19/03/2021 and that the said advocate commissioned the affidavit in issue on 10/03/2021. Counsel then cited Rule 4 (8) of the Parliamentary Elections (Interim Provisions) Rules, SI 141-2 (hereinafter PE Interim Rules) to argue that the affidavit commissioned by an advocate who did not have a valid practicing certificate is invalid, leaving the petition unsupported and thus, null and *void ab initio*. Hon. Justice Bashaija K. Andrew upheld the preliminary objection and dismissed the petition with costs.

3] The appellant being dissatisfied with the ruling and orders of the High Court dated 14/09/2021, appealed to this court on the following grounds:

- i. The learned trial judge erred in law and fact when he allowed the 2nd respondent to introduce a new matter of fact, being an allegation that the affidavit in support of Election Petition No.03/2021 was commissioned by an Advocate who did not possess a valid practicing Certificate at the time, when filing of 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.**
- ii. The learned trial judge erred in fact and in law 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.**
- iii. The learned trial judge erred in fact and in law when he relied on submissions from the Bar and an unsigned letter of counsel for the 2nd respondent and photocopy of 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.

- iv. The learned trial judge erred in fact and in law when he failed to hear the commissioner for oaths who commissioned the affidavit in support of the petition and 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 of whether the affidavit in support of the petition was commissioned by an Advocate who did not possess a valid practicing Certificate at the time
- v. The learned trial judge erred in fact and in law when he relied on a photocopy of a letter purportedly written by the Chief Registrar of the courts of Judicature to hold that a letter 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
- vi. 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 a letter written by the Chief Registrar 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.
- vii. The learned trial judge erred in law and fact when, after finding that the affidavit in support of Election Petition No. 03 of 2021 was commissioned by a Commissioner without a practicing Certificate, he failed to apply the provisions of section 14 A 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

- viii. **The learned trial judge erred in law and fact when he rejected the affidavit in support of Election Petition No.03 of 2021 and held that there was no petition before him because Election Petition No. 03 of 2021 was incompetent**
- ix. **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.**
- x. **The learned trial judge erred in law and fact when he penalized the petitioner in costs in the circumstances**

4] The appellant PROPOSED to ask this honourable court:

- a) To allow the appeal and set aside the ruling and orders of the High Court in Election Petition No. 03 of 2021
- b) In the alternative, order the affidavit in support of Election Petition NO. 03 of 2021 to be re-commissioned by another commissioner for Oaths and filed to correct the record of the trial court.
- c) To order that **Election Petition No. 03 of 2021** be heard and determined on its merits.

5] **Representation**

- The appellant was represented by counsel Okello Oryem.
- The 1st respondent was represented by counsel, Jude Muwasa.
- The 2nd respondent was represented by counsel Nyafwono Irene.

Both parties opted to file written submissions, a summary of which will be given here. Counsel for the appellant argued the grounds in clusters; with grounds 1, 2, 3 and 9 as the first cluster, followed by grounds 4, 5, 6 and 9, and lastly, grounds 7 and 8. On the other hand, respondent's counsel opted to argue grounds 1,

2, 3, 4, 5 and 6 together. Followed by grounds 7, 8 and 10. However, before delving into the grounds, I find it necessary to make some comments on the memorandum and its effect on the appeal in general.

Court's finding on the memorandum of appeal

6] I consider the memorandum of appeal to have been badly drafted, and in contravention of Rule 86(1) of the Judicature (Court of Appeal) Rules Directions SI 13-10 (hereinafter The Court of Appeal Rules), which provides as follows:

"A memorandum 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."

Proper drafting of a memorandum of appeal being a matter of law should be taken seriously. It serves to show professionalism, gives proper direction to the court and litigants of the matters in issue, and in general, saves Court's time. It is a mandatory requirement and could result into a ground been struck down.

7] In my view, the grounds of this memorandum were not precise and the points of objection unnecessarily repeated and verbose. For example, grounds 1 and 2 could have been better phrased and reduced into one ground. The same applies to grounds 3, 4, 5 and 6 as well as grounds 7 and 8. The result was for the petitioner's advocates preparing two sets of elaborate submissions which were equally repetitive in succeeding grounds and at times confusing. Indeed, respondents' counsel found it suitable to respond to the first six grounds together because those substantially addressed the preliminary objection and the manner in which it was raised.

8] Appellate courts have over the years rejected grounds of appeal that lack specificity. A short summary of what this and the

Supreme Court have said about the correct drafting of a memorandum of appeal are as follows:

- i. Grounds of appeal that are couched in general terms offend the law
- ii. A simple narrative of what the trial court stated in their judgment is not permissible. The points alleged to have been wrongly decided must be specified.
- iii. In a memorandum of appeal, the appellate Court should be able to ascertain the trial Court's error in law or fact. The appellate court should be able to ascertain how the trial court misdirected herself and how they failed to properly evaluate the evidence
- iv. The ground should be drafted in order to show how the error and misdirection affected the judgment or led to a wrong conclusion
- v. It is not enough to state that a trial court was wrong to make a certain statement. A ground of appeal must challenge a holding; a *ratio decidendi* and must specify points that were wrongly decided. According to **Black's Law Dictionary, 10th Ed, Page 1452**, the *ratio decidendi* is "*the principle or rule of law on which a court's decision is founded, or a general rule without which a case must have been decided otherwise*".

See for example: **National Insurance Corporation Vrs Pelican Air Services CACA No. 13/2003** following **Sietco Vrs Noble Builders (U) Ltd SCCA No. 31/1995** and **Attorney General Vrs Florence Baliraine CACA No. 79/2003** following **Katumba Byaruhanga Vrs Edward Kyewalabye Musoke CACA No. 2 /1998**.

- 9] As stated before, the first eight grounds could have been better drafted to avoid repetition. The Court will thus consider them in clusters representing the gist of the objection. On the other hand, ground 9 clearly offends the law. It is too general, and clearly an attempt by counsel to have this court make a finding on all the evidence, which is not her duty. Owing to the elaborate content in the other grounds, it was not necessary to raise ground 9. It is accordingly struck off the memorandum of appeal and shall not

be considered. I shall thus now turn my attention to the other nine grounds.

Grounds 1, 2 and 3

Submissions of counsel for the appellant

- 10] Counsel for the appellant/petitioner submitted that the learned trial judge framed one issue on the point raised; namely; whether the objection raised by counsel for the 2nd respondent was a point of law, which he resolved in the affirmative. He then interpreted the objection as one based on illegality and not competence of the petition, which in counsel's view was a misdirection.
- 11] Appellant's counsel then contended that the issue for determination was not whether the petition was competent or illegal. Instead that the issue was whether the affidavit accompanying the petition was commissioned by a certified advocate at the time he commissioned it, and the proceedings of 10/09/2021 at pages 47-49 of the record clearly demonstrate as much.
- 12] Counsel continued that incompetence and illegality of the petition were presented as prayers founded on the issue of invalidity of the affidavit supporting the petition. He argued then that illegality, incompetence and invalidity of the affidavit in support of the petition, are different concepts and principles of the law. Specifically, that incompetence and illegality are purely questions of law that do not require factual evidence and thus can be raised at any time during a trial, even orally. Likewise, the Court would be enjoined to deal with them, at any time. Citing authority, he argued that where an objection requires factual evidence for proof, such objection is not purely a question of law. Thus, when the learned trial judge held that the objection raised by the respondent was a question of law, his decision was an error of law and thus a misdirection on his part.

- 13] Again citing this court's decision in **Kamba Saleh Moses Vs Hon Namuyangu Jennifer EPA No. 27/2011** and the Supreme Court decision of **Sitenda Sebalu Vs Sam K. Njuba EPA No. 26/2007**, counsel argued that the petition which was filed in accordance with Section 60 of the Parliamentary Election Act (hereinafter PE Act) and Rule 5 of the Parliamentary Election (Election Petitions) Rules (hereinafter PE Rules) was validly filed, and save for a fundamental defect, it could not be struck down.
- 14] In that respect, counsel raised issue that after making a finding that the objection was a matter of law, the trial judge went to great lengths to evaluate a letter he claimed was evidence to support a finding on a question of law, and held that the point of law was proved by a letter attributed to the learned Chief Registrar . That it was a ruling made in error because a point of law does not require evidence to determine. He then argued in addition that the decision was erroneous on two fronts:
- i. The letter in question which was attributed to the Chief Registrar and upon which the learned trial judge placed heavy reliance was never adduced into evidence contrary to Rule 15 PE Interim Rules.
 - ii. The finding of the Judge that it matters not how evidence of illegality or incompetence of an election petition is brought to the court; which was an error because any allegation which requires factual evidence, is not purely a matter of law, and cannot be handled as a preliminary point of law.
- 15] It was submitted further that the findings of the Judge were also erroneous on the facts, because the allegation that the affidavit supporting the petition was invalid, was brought to the attention of the Court by an oral application of respondent's counsel. Counsel then insisted that the letter attributed to the learned Chief Registrar, and upon which the learned trial Judge heavily relied, was only smuggled onto the record by an unsigned letter purported to have been written by counsel for the 2nd respondent. Counsel further emphasized that no oral application was ever

made to adduce the letter attributed to the learned Chief Registrar, and likewise, no application was heard and determined, and an order made to admit the letter in question on the record. Counsel then drew the court's attention to the proceedings of 23/8/2021 and 2/9/2021 (page 31-37) to show that by the time the offending letter was addressed by the Court in an oral application by respondent's counsel on 10/9/2021, evidence in the petition was long closed. In effect therefore that, the letter was not evidence in the petition, prompting the the Judge to reopen evidence in the matter, which was an error of law.

- 16] Counsel further contested the court's findings which were based on submissions by counsel from the Bar, and failure of the Judge to summon the Chief Registrar as a witness. That as a result, the Judge engaged in conjecture and fanciful theories on the question of authenticity and effect of a copy of the letter attributed to the learned Chief Registrar, her powers, and the question whether the advocate and commissioner who commissioned the affidavit were the same. That since the letter was introduced into the proceedings without an affidavit, the appellant who was never served with it had no opportunity of rebuttal. In his view, this was a classic case of a violation of the right to be heard. It was counsel's view that the learned trial judge erred in law and fact when he failed to summon the learned Chief Registrar as a witness to testify to the letter attributed to her. Counsel then drew this court's attention to the decision in **Kamba Saleh Moses Vs Hon Namuyangu Jennifer (supra)** which followed the decision in **De Souza Vs Tanga Town Council, (1961) EA 377** that:

"If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. That decision must be declared to be no decision."

Submissions of appellant's Counsel for on grounds 4, 5, and 6

17] In my view, the submissions relating to these three grounds were no different from what counsel stated above. I shall not repeat them. The only addition would be the objection raised against the decision of the Judge that the commissioner for oaths who had commissioned the affidavits in two other petitions was the same as that involved in the present petition. Counsel considered that decision erroneous because as a finding of fact, it required that evidence is adduced to support it. That it was incumbent upon the Judge to have directed that the learned Chief Registrar and Advocate who commissioned the affidavit, file affidavits and had them summoned together with the 2nd respondent, to testify on the matter. That only then could he have fairly determined the issue on merit.

Submissions of counsel for the respondent on grounds 1, 2, 3, 4, 5, and 6

18] In response to the above grounds, respondents' counsel submitted that the preliminary objection as raised by counsel for the 2nd respondent was a matter of law for it sought to challenge the validity of the sole affidavit in support of the petition. In his view, the learned trial judge rightly found that the objection was one of law and thereby noted that the determination of the validity of an election, requires an examination of the relevant laws pertaining to the filing of election petitions. Likewise that, since Section 16 of the Advocates Act recognises Advocates as officers of court, it is important that in the discharge of their duties, Advocates alert court of any illegality committed, even by their fellow advocates

19] Counsel then contended that the requirement for an Advocate to hold a valid practicing certificate is a statutory requirement and is therefore a matter of law. Specifically, that a commissioner for oaths can only act lawfully if he has a valid practicing certificate issued under section 11 of the Advocates Act, without which, the Advocate acts illegally. Citing authority, counsel asserted that any

counsel who purports to practice without a licence after February in any year, commits an offence. In his estimation, any document prepared or filed by such an advocate whose practice is illegal, are invalid and of no legal effect, and in principle, Courts should and will not condone or perpetuate illegalities. In short, the renewal of a practicing certificate is a condition precedent to an advocate's right to commission documents.

- 20] Respondents' counsel further submitted the appellant cannot be shielded from negligent drafting of pleadings or incompetence for they are always bound by their Advocate's actions. Citing authority, he insisted that matters of law are not mere mistakes of legal counsel, the type from which a client is protected. He concluded then that, a preliminary objection is an error on the face of the pleadings which rises by clear implication of the pleadings and which, if argued can dispose of the petition.
- 21] Respondents' counsel argued further that the stamp of the commissioner of oaths that appeared on the face of the petitioner's affidavit in support of the petition, belonged to Owakukiroru Raymond. Therefore that, once the issue of Owakukiroru's practicing certificate arose, the appellant was under a duty to produce it. He reasoned that no evidence was necessary in that respect and only presentation of a valid practicing certificate would establish the right of Owakukiroru to commission the affidavit. He invited this Court to note that the appellant did admit in her submissions (at page 19) that the Commissioner Owakukukiroru Raymond did not have a valid practicing certificate which may explain the numerous grounds of appeal that she raised.
- 22] Respondent's counsel considered as misconceived, the argument that the letter from the 2nd respondent's lawyers to the Registrar was unsigned, or that the Chief Registrar's letter was a photocopy. He argued that the copy sent to court was signed by the 2nd respondent's Advocates and attached to it, was the original copy of the Chief Registrar's letter. Therefore that, the Judge rightly

relied on the Chief Registrar's letter, That even without a letter from the Chief Registrar, the appellant was still under a duty to show that the affidavit in support of the petition was properly commissioned by producing the commissioner's practicing certificate when the matter was raised, an issue that did not require any hearing.

Submission in rejoinder of counsel for the appellant

- 23] In rejoinder, it was submitted for the appellant that no affidavit evidence was filed to prove that the advocate who commissioned the affidavit in support of the petition had no valid practicing certificate Counsel reiterated his earlier arguments that the objection against the affidavit was a question of fact and not law, and as such, required documentary evidence. Further that the Judge erred when he determined that objection on the basis of a non-existent witness. Counsel invited the court to reprimand or penalize respondent's for importing documents onto the record from the Bar, an action he deemed to be fraudulent.
- 24] Counsel continued that his colleague made a submission under the mistaken assumption that the appellant conceded that her counsel was negligent, or made mistakes when drafting the petition. Counsel instead clarified that the issue before court was that the commissioner for oaths involved in the case was not certified, which was not proved and as such, the appellant could seek protection under section 14 A of the Advocates Act as amended. He also reiterated that the fact whether counsel Owakukiroru was licenced to practice as an advocate and as a commissioner for oath, required investigation through evidence by his attendance, and the attendance of the Chief Registrar in Court.

Submissions of appellant's counsel on grounds 7 and 8

- 25] Counsel for the appellant submitted that the Judge misdirected himself on the letter and spirit of the law, its purpose and effect, the principles of a free and fair election, the principles of

substantial justice and the tenets of a fair trial, and invariably arrived at the wrong conclusion that the petition falls with the invalid affidavit. He continued that the law and authorities available support the proposition that once a petition is validly filed, it can only be struck down for reason of a fundamental defect. Citing authority, counsel further argued that whereas an affidavit accompanying an election petition which is commissioned by an advocate without a valid practicing certificate may be found to be invalid, an election petition accompanied by such an affidavit, is itself not incompetent. Again citing authority, counsel gave a distinction between a defective affidavit and one that offends particular laws. He concluded then that the Judge misdirected himself when he failed to rectify the petition in accordance with Article 126(2) (e) of the Constitution and section 14 A (1) (b) of the Advocates (Amendment) Act 2002, especially when during the trial, the petitioner's counsel made an application to apply that law. Counsel's arguments on this point hinged principally on the decisions of this court in ***Suubi Kinyamatama Juliet Vs Sentongo Robinah Nakisirye & Anor EPA No. 92/2016***, ***Gadaffi Nassur Vs Ssekabira EP NO. 16/2021***, ***Samuel Sidoru & Maiku Didi Paul Vs Abibu Buga Khemis Awadi EP 5 & 6/2020 (Consolidated)*** ***Essaji Vs Solanki (1968) EA 218*** and ***Sitenda Sebulu Vs Sam K. Njuba & Anor EPA 26/2007***.

- 26] Appellant's counsel reiterated his earlier arguments by stating that the second affidavit filed by the 2nd respondent which introduced the allegation and the issue was no evidence on the substance of the matter at all. That in that affidavit, the 2nd respondent simply conveyed the letter attributed to the learned Chief Registrar, but did not depose to its authenticity, or the correctness of its contents, which were in fact not in his knowledge. Further that the Judge based his decision both on the letter and the decision of another Judge in her decision of ***Ossiya Solomon Vs Koluo Joseph Andrew & EC EP No. 2/2021***, but not the 2nd respondent's dispositions. Counsel considered the evidence in the ***Ossiya Solomon case*** to be inconclusive because

the evidence given to explain the late issuance of a practicing certificate was never rebutted or challenged. Citing authority, he argued in the alternative that even if it were found that the advocate or Chief Registrar had made mistakes in the application and issuance of the certificate, such mistake should not and cannot at a law be visited on the appellant who was an innocent litigant and witness in the circumstances.

Submissions of counsel for the respondent

- 27] In reply, it was reiterated that the preliminary objection was a matter of law as it sought to challenge the validity of the sole affidavit in support of the petition. Respondents' counsel contended then that a commissioner for oaths can only act lawfully when he has a valid practicing certificate issued under Section 11 of the Advocates Act, without which they do so illegally. For emphasis, that the requirement for an Advocate to hold a valid practicing certificate is a statutory requirement and is therefore a matter of law. It was also counsel's view that negligent drafting of pleadings or incompetence in doing so, is not an excuse for a client to escape being bound by his or her Advocate's actions. In conclusion that an affidavit commissioned by an Advocate without a valid practicing Certificate is invalid and the settled position in **Suubi's case** is that such an affidavit is not curable at all.
- 28] Respondent's counsel argued further that Section 14 A Advocates Act [as amended] was intended to protect clients of Advocates. That since Section 14 (1) Commissioner for Oaths (Advocates) Act prohibits advocates from acting as commissioners with respect to their clients' matters, powers of commissioners of oaths fall outside the scope of that section. In the same vein that the Commissioner for Oath (Advocates) Act is a separate Act that does not apply unilaterally to all Advocates, and therefore a universal application of section 14 A of the Advocates Act to the Commissioner for Oaths (Advocates) Act [Cap5] is undesirable.

Citing Section 8(2) of the Advocates Act, counsel outlined the statutory duties of advocates which do not include commissioning of documents, which is the preserve of commissioners of oaths (who apart from advocates, include Judicial officers like Magistrates and Registrars). He concluded then that the law did not contemplate commissioners to fall under the Advocate's Act and thus, its safeguards for clients.

- 29] Citing substantial authority, respondents' counsel contended in the alternative that even if section 14 A of the Advocates Act was available to remedy the affidavit in support of the petition, it was incumbent upon the petitioner to make good the defect, which she was deemed to have been well aware of, but failed to rectify until when the 2nd respondent raised his preliminary objection on 10/9/2021. See for example

Submissions of counsel for the appellant in rejoinder

- 30] In rejoinder, counsel for the appellant reiterated his submission that the objection raised by the 2nd respondent's counsel was a point of law that required proof by evidence. That such proof needed to be evidence properly adduced and not "*smuggled*" onto the record, and to date, the letter attributed to the Chief Registrar has never actually be seen by anyone. Counsel continued that only qualified advocates can be commissioned and certified as commissioners for oaths, and in this case, there was nothing on record to suggest that the commissioner who commissioned the affidavit in support of the petition was the appellant's lawyer. In their view, this Court had in their decision of **Suubi Kinyamatama Juliet Vs Sentongo Robina Nakasirye & Anor (supra)** settled the law in respect of Section 14 A of the Advocates Act (as amended), when it held that a court faced with an affidavit not properly commissioned should ensure it is properly commissioned and then proceed to determine the matter on merit, but not to dismiss it. In counsel's view, the objection which could have been communicated to them earlier, or properly adduced, was an ambush, but even then, with or without an application by the

appellant's counsel, the law places a duty on the court to rectify the error, by ordering that the affidavit be re-commissioned by another commissioner for oaths.

Submissions of both counsel on ground 10

- 31] It was submitted for the appellant that the emerging jurisprudence of this court on the issue of costs is to consider election litigation as a matter of great national importance. Thus, Courts are enjoined to make awards in costs so as not to unjustifiably deter aggrieved parties from seeking court redress. Counsel then argued that the facts of this case demonstrated that the appellant was a victim of circumstances. One who was not given a hearing, and where no proof was furnished to show that his impugned affidavit was invalid at law, and in circumstances where the defect was curable by re-administration of the oath.
- 32] Counsel concluded that in the circumstances, it was an error for the trial court to condemn her to costs of the petition. In her counsel's view, the proper and fair finding should have been an order for each party to bear their own costs. Counsel then prayed for this court to find that the respondent who raised the objection and who benefited from the decision of the High Court, should meet the costs.
- 33] Respondents' counsel disagreed. They considered it any respondents' duty to raise that type of objection, in order to preserve the sanctity of Court. That after doing so, it was the appellant's duty to remedy the defect. They then argued that the correct legal position is that, costs abide the outcome, unless for good reason, the Judge decides otherwise. In addition that, under Section 14 A (3) of the Advocates Act [as amended], costs arising from actions by an Advocate without a valid practicing certificate, must be paid by the affected party who may in turn seek a refund from the offending advocate.

34] Counsel also found offence that the appellant raised ten grounds of appeal, eight of which lacked any relevancy. Also given that this appeal arose due to the negligence of the appellant and her advocates, which they failed to rectify, costs of the appeal should be granted to the respondents.

Resolution by the court

35] I have considered the record of appeal, the judgement of the lower court, submissions of counsel for all parties and the authorities, which I found quite useful and therefore, well appreciated.

36] I have indicated the faults in the memorandum of appeal, and shall not repeat them here. For that reason, I find it necessary to resolve grounds 1 and 2 followed by 3, 4, 5, 6, concurrently since they all relate to the preliminary objection that the commissioner for oaths who commissioned the principle affidavit in support of the petition had no practicing certificate, and questions raised on what should be the proper procedure for adducing evidence in election petitions. Likewise, I shall deal with grounds 7 and 8 in one cluster.

37] Being a first appellant court in the matter, Under Rule 30(1) of the Judicature (Court of Appeal Rules) Directions (hereinafter COA Rules) this Court has the mandate to re-appraise the evidence and come up her own conclusions. That mandate was well stated by the Supreme Court in **Kifamunte Vs Uganda SCCA No. 10/1997** that:

“The first appellate court has the 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”

38] The record indicates that the matter was called to hearing on 10/9/2021, to allow for cross examination of witnesses on their respective affidavits. Mr. Ekirapa Isaac counsel for the 2nd

respondent raised a preliminary objection that the petition was incompetent on grounds that the petitioner's sole affidavit in support of the petition was commissioned by an Advocate, Mr. Owakukiroru Raymond, who at the relevant time did not possess a valid practicing certificate. He in particular referred to a letter written by the Chief Registrar dated 6/9/2021 addressed to the lawyers of the 2nd respondent stating that the said commissioner was issued with a practicing certificate on 19/03/2021, and had commissioned the affidavit in issue on 10/03/2021. Citing Rule 4 (8) of the PE Interim Rules, counsel Ekirapa argued that it is a mandatory requirement for a petition to be supported by an affidavit. Counsel then argued that the affidavit which was commissioned by an advocate who does not have a valid practicing certificate was incurably defective, which rendered the petition void.

- 39] The Judge addressed the objection on pages 8 and 9 of his ruling. He found specifically that the validity of an affidavit supporting a petition is a question of law. That for a petition to be valid, it must be filed in accordance with the provisions of Section 60 PE Act and the Rules there under. He agreed with counsel Ekirapa that it is a mandatory requirement under the cited law for the petition to be accompanied by an affidavit setting out the facts on which the petitioner intends to rely. That since it is the affidavit accompanying the petition that was under contest for being incurably defective, and incapable of supporting the petition, the objection is an issue of law and an illegality. In his view therefore, it was not necessary for the objection to be pleaded or presented through affidavit evidence before the pleadings closed, and could be brought to the attention of the Court at any time during the proceedings. Out of the many authorities he cited, the Judge gave much attention to the decision in **Ossiya Solomon Vs Koluo Joseph Andrew & Electoral Commission (supra)**, which was decided in the same electoral cycle.

- 40] Similarly, in that case, the issue concerned the validity of the affidavit in support of the petition commissioned by an Advocate who did not possess a valid practicing certificate. The Judge's decision here was in tandem with the findings of that Court. The Judge in addition considered the decisions in **Kamurali Jeremiah Vs. Nathan Byanyima & EC EP No. 002/2021 (Mbarara High Court)** and **Ochwa David Vs. Ogwari Polycarp & Electoral Commission (Supra)** in which it was held that the competency of an election petition, is a question of law.
- 41] A well followed definition of what a preliminary objection should entail is found in Sir Charles Newbold's decision of **Mukisa Biscuit Manufacturing Co. Ltd vrs West End Distributors Ltd [1969] EA** . The Court held:
- "... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion".*
- 42] I do agree with the submission that the form and presentation of an election petition to a Court is a matter of law. Under Rule 4(8) PE Interim Rules, the petition shall be accompanied by an affidavit setting out the facts and incorporating the documents on which the petitioner intends to rely. Similarly, under Section 4 Commissioner for Oaths (Advocates) Act, a commissioner for oaths by virtue of his/her commission may administer oaths in any part of Uganda. Thus any objections raised to question the validity of an affidavit for the reason that the commissioning officer was not at the material time he/she acted, properly licensed to take oaths, would be a question of law.
- 43] In this case, the objection was that counsel Owakukiroru did not possess a valid practicing certificate when he purported to commission the petitioner's impugned affidavit. Counsel Owakukiroru's stamp was evident on the face of the affidavit, and

it must be assumed that he held out as one who could act as a commissioner of oaths at the time he administered the oath. The 2nd respondent needed to look no further than the stamp on the affidavit. No law bound him to present his objection with leave of court or through a formal application with evidence. It was purely a point of law, and it was then left for the Court to ascertain whether the commissioner in question had a valid practicing certificate. Under those circumstances, that investigation would not require that the Court delves into the merits of the petition.

- 44] The trial court was therefore right to conclude that the objection raised by the 2nd respondent's counsel was a matter of law that could be disposed of through a preliminary objection.
- 45] Accordingly ground two fails.
- 46] As pointed out for the appellant, the Judge entertained the objection after filing of affidavit evidence was closed, and when he had issued an order closing filing of any additional evidence. That notwithstanding, the objection being a matter of law, it could be raised at any point of the proceedings. Such matters that do not necessarily require proof by secondary evidence, can so be raised. I note in fact that on 10/9/2021, when the objection was raised, the court was still open to hear evidence from cross examination of witnesses.
- 47] I accordingly find no merit in the appellant's submissions on this point and ground one fails as well.

Decision on Grounds 3, 4, 5 and 6

- 48] Appellant's counsel generally objected to the manner through which the CR's letter was admitted into evidence, and failure to permit a rebuttal from the appellant. At page 11 of his ruling, the Judge was of the view that since the objection raised issues of illegality, the manner in which that evidence was introduced into the proceedings was only secondary. In his view, even where that evidence came through affidavit evidence, it still would invariably

be superseded by the inherent illegality being brought to the attention of court. Relying on the decision in **Ochwa David Case (Supra)** he opined that there is no particular or single prescribed manner or format of bringing illegality to the attention of court. It could be by formal application or summarily raised by counsel before court at any time, or by a court itself taking the matter and making a finding on the record or taking judicial notice of relevant material bearing on the issue.

49] The admission of evidence in election petitions is regulated principally by Section 64(1) PE Act and Rule 15 of the PE Interim Rules. As has been the common practice, in most election litigation, the parties opted and the court allowed affidavit evidence under Rule 15. That regulation allows two modes of adducing evidence and I quote:

(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.

(3) The court may, of its own motion, examine any witness or call 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 to arrive at a just decision.

For affidavits, cross and re-examination, if sought by any party, must be permitted, and likewise, parties may cross examine any court summoned witness. That position was related in this Court's decision of **Kiiza V. Kabakumba Masiko (EP No. 44/2016)** where this court held that all evidence at the trial of an election petition was required to be adduced by affidavits. See also **Winifred Komuhangi Masiko V. Bamukwatsa Betty aka Muzanira Betty & Anor .**

50] At page 47 of the record, counsel Ekirapa for the 2nd respondent submitted that his objection was based on a letter from the CR to the effect that one Mr. Owakukiroru Raymond an advocate had renewed his practicing certificate on 19/3/2021. That

Owakukiroru commissioned the petitioner's sole affidavit in support of the petition on 10/3/2021, when he did not have a practicing certificate as confirmed by the Chief Registrar. After hearing that objection, the Judge allowed the petitioner's counsel to make an oral response. In his decision he believed the contents of the letter and gave reasons for that decision in page 11 and 12 of his judgment, excerpts of which are repeated here:

*"In the present case, the illegality was brought home to the attention of court through an oral application by counsel for the 1st respondent premised on the Chief Registrar's letter. As was held in the case of **Musoke Mike and Mubiru Vincent Vs. Kulumba James HC Rev. Appl. NO.09 of 2019** that courts ordinarily take cognizance of official documents from the Chief Registrar of the courts of Judicature under his or her hand/signature authored in the official course of business, to be authentic official documents. The Chief Registrar is a senior Judicial Officer appointed under Article 145 of the Constitution and functions spelt out under section 15 of the Judiciary Administration Act, No. 8 of 2020. He or she is the chief custodian of the Roll of Advocates and is the authority responsible for the issuance of the Roll of Advocates and is the authority responsible for the issuance of practicing certificates to eligible Advocates in Uganda in any given year pursuant to section 11 (1) of the Advocates Act".*

- 51] My understanding of the Judge's decision above is that, after considering the objection one that was purely a question of law, he was aware to the fact that any further evidence to adduce it (i.e. the Chief Registrar's letter) would require to be adduced through a witness through the normal channels. It was his decision that such a step was not necessary because the Court took judicial notice of the office of the Chief Registrar as a senior judicial officer whose documents, if made under seal, and during the normal course of business, are considered authentic. In my view, that is the correct position of the law. It is provided under

section 55(k) Evidence Act, that the Court may take judicial notice of the following:

“The names of the members and officers of the court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates and other persons authorised by law to appear or act before it”

Going by the above provision, which is read in conjunction with the Constitution and other statutes followed by the Judge, he was correct to recognize the office of the Chief Registrar and her powers with regard to issuance of practicing certificates, and guarding of the Advocate’s Roll (hereinafter Roll). Thus it was not necessary to summon the Chief Registrar to be led on her authenticity of the letter.

52] Accordingly ground 4 fails.

53] However, under the circumstances of this case, the Judge was wrong to conclude that the letter in issue was one that could be introduced into evidence from the Bar as an authentic official document from the chambers of the Chief Registrar, that required no further investigation. Indeed at page 12 of the judgment, he gave a rider to his conclusions and I quote:

“Therefore a letter authored by the Chief Registrar in the official course of business regarding the status of a practicing certificate issued to an Advocate, is authoritative on the issue, unless its authenticity is put in question; which was not the case in this matter. The Chief Registrar thus needs not to swear an affidavit verifying content of the letter authored in an official capacity. Emphasis of this Court.

54] It is evident on pages 54-55 of the record that the authenticity of the CR’s letter was strongly contested by appellant’s counsel. Counsel stated that:

“In the matter before you.....the letter purported to be of the Registrar, there is no original of it, it just came by another letter which is not even signed.....even if you are interested in considering the letter, the law forbids it”

He then prayed at page 51 that *“...I pray that you expunge the letter from your record because all it does is to make your record look ugly my lord”*.

- 55] I have confirmed from the record, as argued for the appellant that, the letter dated 9/9/2021, written by the 2nd respondent’s counsel (through which they sought to introduce the Chief Registrar’s letter dated 6/9/2021) was not signed by them. If indeed a signed copy was allegedly adduced at the trial, no reasons were advanced to explain why it was not made part of the record of appeal. Further, it was not in dispute that the Chief Registrar’s letter was only a copy, with no evident stamp or seal of her office. Under Sections 62 (c) Evidence Act it is considered secondary evidence, only admissible in restricted circumstances. Being a document allegedly originating from a judicial body, under Section 73(iii) it is considered a public document.
- 56] According to Section 64 (4), 75 and 76 Evidence Act, only a certified copy of a public document and not a mere copy can be allowed into evidence. Therefore, the Chief Registrar’s letter on which the court based its decision offended all those provisions and was of no evidential value. In such a state, its authenticity was or should have been put into question but not taken wholesale by the court. Since it was evidence pivotal to the validity of the affidavit supporting the petition, the Court should have directed for its formal and proper introduction onto the record, and then allowed the appellant to rebut it. Failure to follow the procedure made the authenticity of the letter from the Chief Registrar doubtful. There was no evidence on record which court would have used to reach a fair decision on it. The decision then offended the rules of natural justice and according to the decision in **Ridge V Baldwin [1964] AC 40**, a decision reached in violation

of the principles of natural justice especially one relating to the right to be heard is void and unlawful.

- 57] It is my decision then that the letter purportedly issued by the office of the Chief Registrar, with regards to counsel Owakukiroru's right to practice as a commissioner for oaths, was wrongly admitted into evidence and the appellant was given no opportunity to rebut it. It is accordingly declared void.
- 58] Accordingly, grounds 3, 5 and 6 succeed.
- 59] In my view, my decision above rests the main dispute in the appeal. Once this Court finds that the CR's letter was wrongly allowed into evidence, then the matter would go for re-trial as if no objection was ever raised against the appellant's affidavit commissioned by counsel Owakukiroru. However in order to fully address all the disputes raised on appeal, and for the benefit of the appellant who raised them, I shall proceed to consider grounds 7 and 8 as well.

Court's decision on Ground 7

- 60] At page 13 of his ruling, the learned trial judge found that a competent petition is one that is filed in accordance with the law. He then found the petition to be incompetent because the principal affidavit filed in support, was invalid for the reason that it was commissioned by one Raymond Owakukiroru, an advocate who did not hold a valid practicing certificate. I note that at page 14 of his ruling, the Judge keenly considered the dates mentioned by the Chief Registrar in her letter. Citing previous High Court authorities on the matter, the Judge found that counsel Owakukiroru commissioned the impugned affidavit on 10/03/2021 after the grace period for renewing practicing certificates had lapsed, and prior to the issuance to him of a practicing certificate for the year 2021. Court then considered Section 11(2) of the Advocates Act and the Supreme Court decisions of **Prof. Syed Huq Vs. Islamic University in Uganda**

SCCA No. 47/1995, and **Kabogere Coffee Factory Vs Haji Twalib Kigongo SCCA No. 10/1993**, to find that the petitioner's affidavit was invalid. He then proceeded to adopt the decision of this Court in **Suubi Kinyamatama Juliet & Ors (supra)** to find that a petition cannot stand without an affidavit in support and as such, there could be no competent petition before the Court.

- 61] Similar to this petition, the decision in **Suubi Kinyamatama Juliet & Ors (supra)** has been well followed by this and the High Court and there are several decisions to the effect that if an advocate fails to renew his/her practicing certificate, his power to commission ceases. See for example: the decisions in **Otim Nape George William Vs. Ebil Fred & Electoral Commission, HC EP NO.17 of 2011** and **Returning Officer Iganga District Vrs Hajji Muluya Mustapha EPA No. 13/1997**. In most of those decisions, the provisions of the Advocate's Act and its amendment as well as the Commissioner for Oath (Advocate's) Act were under scrutiny. Both counsel extensively submitted on their applicability here with the appellant's counsel contending that there was remedy through the amendment to the Advocate's Act, which the court should have invoked to permit correction of the defect on her affidavit. I shall accordingly investigate that law.
- 62] Section 14 Advocates Act makes provision for cancellation of practicing certificates for those advocates who have been struck off the roll, or suspended from practice by the Law Council. An amendment to that law was made in 2002 by inclusion of Section 14A to the Act; I shall reproduce the relevant parts here:

Where—

- (a) *an advocate practices as an advocate contrary to subsection (1) of section 14; 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.*
- (2) *Any advocate not in possession of a valid practising certificate or whose certificate has been suspended or cancelled and who practises as an advocate, commits professional misconduct; and the Law Council or any person may make a complaint to the Disciplinary Committee in respect of the misconduct; and paragraphs (b)(i) and (b)(ii) of subsection (1) shall apply with necessary modifications.*
- (3) *In addition to any punishment prescribed under any provision of this Act, the client of an advocate to whom subsection (1) or (2) relates, is entitled to a refund by the advocate concerned of any fees paid to that advocate by the client and also to compensation in respect of any costs or loss incurred by the client as a result of the conduct of the advocate.*

63] It is apparent that the amendment was a remedial law. One meant to protect innocent litigants from errant or negligent advocates. Citing this court's decision in **Kinyamatama Vs. Sentongo (supra)**, the appellant argued that the Judge should have allowed her time to correct the affidavit under Section **14A (1) (b) (2)** above. It was argued in defence that such remedy is allowed only after definite leave is sought from the Court, and before an objection is raised to contest an affidavit sworn before a commissioner who has no practicing certificate.

64] With respect I would beg to depart from the argument that such an application can only be made before, and not after an objection has been raised against such an affidavit. I see nothing in the

relevant section to suggest such a precondition. The law only makes provision for time to be allowed for rectifications to be made, where the court deems it necessary to the case, and nothing more. The converse would act to defeat the spirit in which that remedial section was enacted. Further, although in the decision of **Kinyamatama** the court held that the remedial provision above could be invoked to cure defects in pleadings, the same court held that an affidavit commissioned by an advocate without a practicing certificate was an illegality that could not be cured under Article 126 2)(e) of the Constitution.

- 65] With respect, I beg to depart from the **Kinyamatama** decision on that aspect. As pointed out for the respondents, Section 14A (1)(i)&(iii) of the Advocate's Amendment Act is not necessarily applicable to the facts here. By its nature and title, the Advocate's Act 1970 is an Act that consolidates the law relating to advocates and all matters connected with the legal profession. That would include acts of advocates in legal practice and their legal duty to clients under whose instructions they act. Under section 1(a) Advocate's Act, a client includes:

“any person who, as principle or on behalf of another, or as a trustee or personal representative, or in any other capacity or as trustee or personal representative, or in any other capacity, has powers express or implied to retain or employ and retains or employs, or is about to retain or employ an advocate and any person who may be liable to pay an advocate any costs”:

Further, under Section 27(c) of the amendment (2002), legal practice includes:

“..... the carrying out work of a nature normally performed by an advocate, such as receiving instructions to sue or defend a client in contentious matters, carrying out any form of representation in non-contentious matters such as drawing of documents of conveyancing, agreements, mortgages, floating of companies, registration of trademarks and patents, negotiations, writing legal

opinions, legal correspondence, witnessing and certifying and notarising miscellaneous legal documents;"

66] The above duties do not include duties of an advocate acting as a commissioner for oaths, which is the preserve of another law, the Commissioner for Oaths (Advocate's) Act. Indeed, since Owakukiroru only commissioned the impugned affidavit and nothing more, the court would not assume that an advocate-client relationship existed between him and the petitioner. In that case, the remedial provision could not be invoked to allow the appellant time to correct the defect. That said, the Judge did not err when he failed to apply the provisions of Section 14(A) Advocate's Act or Article 126(2)(e) of the Constitution to order that the affidavit be commissioned by another Commissioner for Oaths.

67] Accordingly ground 7 fails.

Court's decision on Ground 8

68] At page 15-16 of his judgment, the learned Judge found that the affidavit in support of the petition was invalid for having been commissioned by an advocate whose commission had expired at the time. He then considered that without an affidavit, there was no petition before court, because it would be a petition filed not in accordance with Rule 4(8) PE Interim Rules. Indeed the contention by respondents' counsel was that a commissioner for oaths can only act lawfully if he/she has a valid practicing certificate issued under section 11 Advocates Act, and without it, acts illegally. I do agree that it is only practicing advocates who can be appointed as commissioners for oaths. However, there is demarcation in the law of the role and mandate of an advocate *per se*, and the powers an advocate attains when appointed as a commissioner for oaths. Excerpts from the two laws can aid this court. The right to practice law as an advocate is permitted only to those entered on the Advocate's Roll of Uganda, and have been so licenced by the Chief Registrar. It is provided in Section 11 Advocates Act that:

- (1) *The registrar shall issue a practicing certificate to every advocate whose name is on the roll and who applies for such a certificate on such form and on payment of such fee as the Law Council may, by regulations, prescribe; and different fees may be prescribed for different categories of advocates.*
- (2) *A practicing certificate shall be valid until the thirty-first day of December next after its issue, and it shall be renewable on application being made on such form and on payment of such fee as the Law Council may, by regulations, prescribe; and different fees may be prescribed for different categories of advocates.*
- (3) *Subject to any regulations made under subsection (4), or under section 77(1)(f), every advocate who has in force a practising certificate may practise as such in the High Court or in any court subordinate to the High Court.*

69] On the other hand, the power to practice as a commissioner for oaths is granted on application to the Chief Justice as provided under the Commissioner for Oaths (Advocates) Act Cap 5 Section 1 provides:

The Chief Justice may, from time to time, by commission signed by him or her appoint persons being practising advocates who have practised as such for not less than two years in Uganda immediately prior to making any application for appointment and who are certified to be fit and proper persons by two other practising advocates to be commissioners for oaths, and may revoke any such appointment; but the power to revoke a commission shall not be exercised till the commissioner in question has been given an opportunity of being heard against any such order of revocation

(4) *Each commission shall immediately terminate on the holder ceasing to practise as an advocate.*

70] Any practicing advocate, Registrar (including the Chief Registrar) and Magistrate can on authority of the Chief Justice act as a commissioner for oaths. Once the appointment is made, such a

commissioner obtains authority to administer oaths (including affidavits) under Section 11 Oaths Act. Advocates who are appointed as commissioners for oaths sign a Roll quite separate from the Advocate's Roll. Further, only the Chief Justice can with reason, and after hearing such Advocate, revoke the appointment. On the other hand, a commission will immediately terminate when a commissioner ceases to practice as an advocate.

71] By no stretch of imagination and in practice, an advocate does not cease to practice simply because they have not obtained a practicing certificate for a new term/year. Indeed, the grace period of two months after December, was meant to allow time for Advocates to fulfil all requirements pre requisite to renewal of their certificates. I do take judicial notice that some of those requirements involve inspections of chambers by the Law Council, and unavoidable delays by the Chief Registrar, and thus, out of any advocate's control

72] I still consider the decision of the Supreme Court in her decision of **Prof. Syed Huq Vs Islamic University of Uganda SCCA No. 47/1995** as good law on that point. The objection raised against the appellant in that case was that two advocates who had not renewed their practicing certificates, purported to extract a decree on behalf of a successful client. Although the decision of the Court was that they could not do so after the grace period for renewing practicing certificates had expired, Justice Wambuzi took time to consider and then make a finding on powers of a commissioner for oaths who acted at a time when their practicing certificate was deemed to be expired. He held at page 7 of the judgment that:

"...I think there was some misconstruction of the provisions of section 2 of the Commissioners for Oaths (Advocates') Act. It is quite correct that a commission granted under section 2 lasts until it is revoked or until the grantee ceases to practice as an advocate, "Ceasing to practice" in sub—section (4) does not mean expiry of the advocates practising certificate. It is common knowledge that a practising certificate is issued for a particular year and expires on

the 31st December of that year irrespective of the date of issue. If therefore an advocate gave up his legal practice in April to do other business or is suspended from practice, his commission to practice as Commissioner for Oaths would be terminated in April when he gives up the practice or when he is suspended and not on 31st December when his practising certificate expires. This interpretation would tally with the court's own interpretation in relation to registrars and magistrates who are ex—officio Commissioners for Oaths when they leave the office of Registrar or Magistrate, they cease to be Commissioners for Oaths but not when they are on leave or are sick. Otherwise the authority suggests that the work of an advocate who practices without a valid practising certificate after 1st March is invalid and of no legal effect” Emphasis of this Court.

73] It is clear in Section 2 Commissioner for Oaths (Advocates) Act and Section 11 Advocates Act, and indeed it is the practice that, an advocate present on the Roll does not acquire a new practicing certificate but only one from year to year. Such renewal is achieved after application to the Chief Registrar. It is evident then from the same law that an advocate is deemed not to have the right to practice only if they have been removed or struck off the Roll, where they are on suspension, or where they have applied to the Registrar for their name to be removed from the Roll under Section 10 Advocates Act. In all three instances, the Registrar proceeds to cancel the practising certificate and such Advocate must return it to the Registrar in line with Section 14(1) and (2) of the same Act. The first two scenarios are possible only if such advocate has been the subject of disciplinary proceedings before the Law Council. No such evidence was placed before the Court to suggest that Owakukiroru fell under any of those three categories. For that reason, he could at the time he did, commission affidavits, including the petitioner's affidavit in support of the petition.

74] My holding above is by no means a licence for commissioners for oaths to act wantonly in disregard of their commissions to knowingly commission documents when they know full well they have not renewed their practicing certificates. Since it is Advocates who are specifically appointed as commissioners, it is desirable, and even professional that a commissioner ensures that their practicing certificate is always valid. It is also the law that a

commissioner who errs in their duty, or holds out as one authorised to act as commissioner, is liable for prosecution under Section 6 Commissioner for Oaths (Advocates) Act, or Section 381 Penal Code Act for impersonation.

- 76] In conclusion, my decision is that the affidavit sworn before counsel/commissioner Owakikoru was valid. Accordingly, ground 8 succeeds.

Resolution of ground 10

- 77] **Section 27 of the Civil Procedure Act** provides that the costs of an action would follow the event unless the court, for good cause, ordered otherwise. On the other hand, **Rule 27 of the PE Interim Rules** is to the effect that costs of and incidental to the presentation of the petition shall be defrayed by the parties in such manner as and in such proportions as the court may determine.
- 78] This Court has interpreted those provisions to hold that an award of costs is a matter of judicial discretion which discretion has to be exercised judiciously and not arbitrary. **See Hon. George Patrick Kassaja V. Frederick Ngobi Gume & The EC EP Appeal No.68/2016**. This Court then went on to find that an appellate court will not interfere with the exercise of discretion by the trial court unless there has been a failure to exercise such discretion or failure to take into account a material consideration, or that an error in principle was made while exercising that discretion. See: **Freda Nanziri Kase Mubanda V Mary Babirye Kabanda & EC EPA No. 38/2016**. Further, in **Akuguzibwe Vs Muhumuza Mulimira & EC (Election Petition Appeal No. 22/2016)**, this court held that even if there was an error in principle, the court should interfere only on being satisfied that the error substantially affected the discretion on quantum and that upholding the amount allowed would cause an injustice to one of the parties.
- 79] On the other hand, this Court in **Apollo Kantinti Vs Sitenda Sebalu (supra)** held that the costs were not meant to punish, but

to indemnify or compensate the successful party for the expenses they incurred during litigation. A successful party might only be deprived of their costs in exceptional circumstances. In making its decision on costs, the courts had to balance the principles of compensating a successful litigant and thereby letting justice take its course, and the principles that poor litigants should not be discouraged from accessing justice through the award of exorbitant costs. **See: The Independent Electoral Commission and the Returning Officer, Col (Rtd). Dr Besigye Kizza V Museveni Yoweri Kaguta Supreme Court Presidential Election Petition No.1/2001.** I also agree with appellant's counsel that electoral litigation is a matter of great national importance in which courts have to carefully consider the question of awarding costs so as not to unjustifiably deter aggrieved parties with a cause from seeking court redress.

- 80] I have found that the trial Judge erred when he relied on the evidence wrongly adduced to allow the objection and to ultimately expunge the petition and its principle affidavit. There was no justification for the award of costs to the respondents. Accordingly, the award is set aside, and ground 10 succeeds.
- 81] On the other hand, I raised issue with the drafting of the memorandum of appeal. My reasons are well enumerated in paragraphs 6, 7, 8 and 9. For those reasons, the concerned advocates should forfeit all fees attached to the drafting of the memorandum, perusal of its attachments and costs attached to its service onto the other parties.
- 82] In the result, this appeal has substantially succeeded. I would order as follows:
- i. The orders of the trial Judge in Election Petition No. 14/2021 are set aside.

- ii. Election Petition No, 14/of 2021 shall be heard afresh before another Judge of the High Court
- iii. I will allow this appeal with costs here and below, but subject to paragraph [81] above.

DATED at Kampala this ^{15th}.....day of ^{June}.....2022


HON. EVA K. LUSWATA
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Cheborion Barishaki & Eva Luswata, JJA)

ELECTION PETITION APPEAL NO.14 OF 2021

(ARISING FROM ELECTION PETITION NO.03 OF 2021)

10 **NYAKECHO ANNET:.....APPELLANT**

VERSUS

1. ELECTORAL COMMISSION

2. EKANYA GEOFREY:.....RESPONDENTS

JUDGMENT OF CHEBORION BARISHAKI, JA

15 I have had the benefit of reading in draft the judgment of my learned sister
Hon. Lady Justice Eva Luswata, JA in the above Election Petition Appeal and
I agree with her that this appeal should succeed in part. I also agree with the
order on costs she has proposed and I have nothing useful to add.

Dated at Kampala this day of 2022.

Cheborion Barishaki

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Coram: Egonda-Ntende, Cheborion Barishaki & Luswata, JJA*)]

ELECTION PETITION APPEAL NO.14 OF 2021
(ARISING FROM ELECTION PETITION NO.03 OF 2021)

BETWEEN

NYAKECHO ANNET=====APPELLANT

AND

ELECTORAL COMMISSION=====RESPONDENT NO.1


EKANYA GEOFREY=====RESPONDENT NO. 2

*(On appeal from the judgment of the High Court of Uganda (Bashaija, J.) at
Mbale delivered on the 14th September 2021.)*

JUDGMENT OF FREDRICK EGONDA-NTENDE, JA

- [1] I have had the benefit of reading in draft the Judgment of my sister, Luswata, JA. I agree with it and have nothing useful to add.
- [2] As Cheborion Barishaki, JA also agrees this appeal is allowed with costs here and below with the orders proposed by Luswata, JA.

Dated, signed and delivered at Kampala this ^{10th} day of ^{July} 2022


Fredrick Egonda-Ntende
Justice of Appeal