

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

**ELECTION PETITION APPEAL NO.08 OF 2021**

5     *(Arising from the Ruling of the High Court sitting at Mbarara in Election Petition No.003 of 2021 dated 18<sup>th</sup> August, 2021 delivered by the Hon. Mr. Justice Moses Kazibwe Kawumi)*

**HON.TUMURAMYE GENENSIO=====APPELLANT**

**VS**

10     **1) TAYEBWA HERBERT MUSASIZI**  
       **2) THE ELECTORAL COMMISSION=====RESPONDENTS**

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**CORAM**

**HON. MR. JUSTICE GEOFFREY KIRYABWIRE, J.A.**

**HON. MR. JUSTICE STEPHEN MUSOTA, J.A.**

**HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, J.A.**

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## JUDGMENT OF THE COURT

### INTRODUCTION

Hon. Tumuramyé Genensio, (hereinafter referred to as the Appellant), filed this Appeal against the Ruling of the High Court (Mbarara) delivered on 31<sup>st</sup> August 2021 whereby the Appellant's Petition was struck out because he did not have *locus standi* to bring the Petition.

### BACKGROUND

The Appellant, the first Respondent and one other candidate, Mr. Asimwe Joseph contested for the position of Member of Parliament for Kashongi County Constituency on 14<sup>th</sup> January 2021. The second Respondent declared the first Respondent as the winner having polled 7,790 votes against the Appellant's 7,500 votes.

The Appellant being aggrieved with the outcome of that Election petitioned the High Court seeking a declaration that the Election was not conducted in compliance with electoral laws and principles and that he should have been declared as the winner. In the alternative the Petitioner sought an order that the second Respondent holds fresh elections for Kashongi County Constituency, Kiruhura District.

When the case came up for trial at the High Court, counsel for the first and second Respondent raised a Preliminary Objection to the effect that the Petition was incompetent because the Petitioner was not a 'candidate' within the meaning of Section 60 of the Parliamentary Elections Act. Counsel for the Respondents argued that Petitioner's Nomination was invalid because only



nine people had signed on his Nomination forms instead of ten people as required under the law.

Counsel for the Appellant in response submitted that a different nomination form which had ten signatures was delivered to the second Respondent and this form could be produced in court. The trial court in its Ruling held that there was no evidence to show that the Appellant was validly nominated and struck out the Petition. The Petitioner was dissatisfied with the decision of the trial Judge hence this Appeal.

The following grounds of Appeal were raised for determination;

- 1) The learned trial Judge erred in law when he held that the Appellant had not been validly nominated.
- 2) The learned trial Judge erred in law and fact when he dismissed the Appellant's Petition without trial.

The parties formulated this issue for determination during conferencing that is :-

*"Whether the learned trial Judge erred in law when he held that the Petitioner was not validly nominated and therefore struck out as incompetent?"*

### **Representation**

The Appellant was represented by Mr. John Matovu (SC), Mr. Emmanuel Kakenga and Mr. Joel Kidandaire while the first and second Respondents were represented by Mr. Geoffrey Ntambirweki Kandebe.



## Duty of the Court

This is a last Appeal. Rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions S.I. 13-10 (hereinafter referred to as “the Rules of this Court”) provides;

5 “... (1) 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; and in its discretion, for sufficient reason, take additional evidence.....”

This provision was further amplified in the Election Petition Appeal of  
10 **Mugema Peter V Mudiobole Abedi Nasser** Election Petition Appeal No. 30 of 2011 where it was held that;

“...on appeal, an 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 appellate court has a duty to re-hear the case and to consider the materials  
15 before the trial Judge. The appellate court must then make up its mind by carefully weighing and considering the evidence that was adduced at trial.....”

It is also necessary to bear in mind that in an Election petition, the bulk of the evidence is adduced by affidavit. In this regard the Justices in **Mugema Peter case** (supra) further held:

20 “...The duty of an appellate court to re-appraise or re-evaluate the evidence applies to both oral testimony of a witness as well as to affidavit evidence where the deponent is not cross-examined on the evidence in court, the issue of demeanor of a witness does not arise....the court ought to have cautioned itself



that in re-appraising and re-evaluation the evidence adduced at trial, regard must be had to the fact that witnesses, though not necessarily always, tend to be partisan in supporting their candidates against the rivals in the election contest. This may result in the deliberate false testimonies or exaggerations and to make the evidence adduced to be subjective. This calls upon court to have authenticity of such evidence to be tested from an independent and neutral source by way of collaboration....”

### **Burden and Standard of proof**

The burden of proof is cast on the petitioner to prove the assertions to the satisfaction of the court that the alleged irregularities or malpractices or non-compliance with the provisions and principles laid down in the relevant electoral laws were or is committed and that this affected the results of the election in a substantive manner in the election petition. Furthermore, the evidence must be cogent, strong, and credible. The standard of proof is on a balance of probabilities. In the matter of **Paul Mwiru v. Hon. Igeme Nabeta & Others**-Election Petition No. 06 of 2011 this court held: -

“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 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”

With the above position of the law in mind, we shall proceed to resolve the grounds of Appeal in this Election Petition Appeal. Since Ground one and two are similar we will resolve them together.



## **Grounds 1 and 2**

**The learned trial Judge erred in law and fact when he held that the Appellant had not been validly elected.**

**AND**

5 **The learned trial Judge erred in law and fact when he dismissed the Appellant's Petition without trial.**

### **Appellant's submissions**

Counsel for the Appellant submitted that the finding of the trial Judge was erroneous because it was made without Jurisdiction.

10 He argued that the trial Judge is only empowered to determine whether or not the Petitioner is a "losing candidate" but not determine who is a "candidate". He submitted that it was only a Returning Officer who can determine who a "candidate" is. This is because it is the Returning Officer who receives complaints about nominations and then takes decisions thereon. He argued  
15 that matters concerning complaints or disputes before or during polling are matters which can only be determined by the Electoral Commission.

Counsel for the Appellant further submitted that the trial court was an election court which did not have the usual unlimited original jurisdiction but rather had only statutory jurisdiction. He argued that the court could only  
20 determine the complaint of nomination signatures only if it had been raised by way of Appeal from the decision of the Electoral Commission.

Secondly, counsel for the Appellant submitted that the Respondents could not raise the said objection because of the principle of Estoppel.



He submitted that the Respondents in their Pleadings had conceded that the Election was conducted regularly and there were no breaches. He further submitted that there was nowhere in the Record of Proceedings where the first Respondent or any of his agents had raised a complaint that the  
5 Petitioner was not validly nominated. Counsel argued that even the Returning Officer had on the basis of the Petitioner's (now Appellant) nomination papers had declared him a candidate in the elections. Therefore, the Returning Officer was estopped from bringing up a query about the Appellant's nomination. In this regard counsel relied on Section 15 of the Evidence Act  
10 and the case of **Charles Lubowa V Makerere University** C.A. No. 2 of 2011 (SC) for this proposition.

Thirdly, counsel for the Appellant further submitted that the Respondent could not bring up an issue on nomination because of the law of illegality because a party relying on an illegal transaction could not benefit from it. He  
15 submitted that the trial Judge ought to have found that the whole conduct of the election was irregular and ought to have been set aside. He further submitted that the trial Judge had a duty to inquire into the election as provided for in Section 63 (4) of the Parliamentary Elections Act, 2005 which duty he did not fulfill.

20 Under Ground two, counsel for the Appellant submitted that an election court cannot terminate an election petition on the basis of preliminary Objection as a Petition must be heard on its merits on all occasions in accordance with Section 63 (6) of the Parliamentary Act.

He submitted that under Section 63(6) (of the same Act) Provides, that at the  
25 "conclusion" of the hearing of a Petition, a Judge must be able to determine



whether “any” party was duly “elected”. He submitted that the wording “duly elected” means that the trial must be in respect of the election process itself and not anything else.

5 Counsel for the Appellant further submitted that even the Rules of Procedure showed that court cannot terminate an election Petition simply based on formal objections. He argued that procedural technicalities like mistakes in affidavits, that would ordinarily lead to striking off documents from the court record in ordinary suits cannot be applied to defeat an election petition.

10 He referred us to Regulation 26 of the Parliamentary Elections (Elections Petitions) Rules which provides that no proceedings upon a petition shall be defeated by any formal objections or by the miscarriage of any notice or any other documents sent by the Registrar to any party to the petition. He also referred us to Regulation 22 of the Parliamentary Election (Elections Petitions) Rules which provides that a party has to apply for leave to  
15 withdraw a Petition.

### **Arguments for the Respondent**

Counsel for the Respondent submitted that the trial Judge correctly held that the Petitioner was not validly nominated.

20 He submitted that the Parliamentary Election Act provides that a person seeking nomination as a candidate has to have a minimum of ten names and signatures supporting the said nomination but in this case, this requirement was not met by the Appellant.





He further submitted that counsel for the Appellant had conceded in Court that his nomination paper had nine signatures instead of the ten required under the law.

5 Counsel for the Respondent referred us to the case of **Wanambwa Milton v Wanjusi Wasieba & EC** EPA No. 1 of 2005 where this Court held that; failure to raise 31 signatures out of the required 500 signatures of voters in the constituency supporting the nomination of a candidate invalidated the Petition.

10 With regard to ground two, counsel for the Respondent submitted that the trial Judge did not err in law and fact when he dismissed the Appellant's Petition without a full trial.

15 He argued that the Appellant could not file a petition because his nomination was void. In the alternative, counsel further submitted that the Appellant, could not lodge the Petition as a registered voter because he had not collected the 500 supporting signatures required by the Parliamentary Elections Act.

Counsel for the Respondents concluded by submitting that the actions of the Appellant were void and therefore nullity under the law. He cited the case of **Macfoy v United Africa Co. Ltd [1961]3 ALL ER 1169** for the proposition that if an act is void, then it is, in law a nullity.

## 20 **Decision of the Court**

We have carefully considered the submissions from all counsel and the authorities relied upon for which we are grateful. The main issue here is whether the trial Judge was correct to find that the Appellant did not have the

*locus standi* to challenge the results of the parliamentary elections of Kashongi Constituency since he had not been validly nominated in the first place.

The Appellant lost the Parliamentary elections for Kashongi County within Kiruhura District. He filed the present Petition challenging the election of the  
5 first Respondent on the grounds of non-compliance of the provisions for election under the Constitution of Uganda, the Electoral Commissions Act and the Parliamentary Elections Act. The Appellant alleges that during the impugned elections illegal practices and offences were committed by the first Respondent and or with his knowledge and consent or approval. Some of the  
10 offences cited included ballot stuffing; proxy voting; intimidation and obstruction of his polling agents.

The first Respondent on the other hand at the start of the hearing of the Petition at the trial Court raised a preliminary objection contesting the original nomination of the Appellant as a candidate in the impugned elections  
15 and thereby *ipso facto* challenging his *locus standi* as a Petitioner. The gravamen of the objection is that the Appellant's candidature was based on the documents attached to the Petition that showed that he was not properly nominated in the impugned elections. The Appellant's nomination form (form NP pages 40 and 41 Record of Appeal) was signed by nine supporters instead  
20 of ten supporters. The signature against the name Akankwasa Samoi Nelson was missing.

This objection was first raised in paragraph 4 (b) of the first Respondent's answer to the Petition where it was averred that "...the Petitioner was not a  
25 lawful candidate at the election and cannot bring a Petition...". On the other hand, the second Respondent in their Answer to the Petition contends that the

alleged malpractices, irregularities or illegalities are based on fabrications and that the Petition *inter alia* is vexatious and frivolous.

In respect to the preliminary objection of the first Respondent, the Appellant contends that the trial Court did not have jurisdiction to determine who was a candidate during the impugned elections and that the Court could only determine who won or lost on the Election Day. That the legal duty to determine who is a candidate lay with the Returning Officer. Counsel for the Appellant further submitted that the second Respondent Commission was estopped from denying that the Appellant was a candidate during the impugned elections.

This objection raises issues related to pre-election issues and which is the correct forum to deal with them. We have had the opportunity to address this issue in the matter of **Nandagire Christine Ndiwalana V Katushabe Ruth** EPP No. 05 of 2021. For ease of reference we shall restate our position on the matter as here under: -

*“That this court should make a distinction between Article 61 (1) (f) and 64 (1) of the Constitution and Section 1 of the Electoral Commission Act and Section 15(a) and (b) of the Parliamentary Elections Act 2005 which governs the forum and determination of pre-elections complaints. 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...”*

We therefore found that the issue of eligibility of a candidate for nomination should be resolved before elections and any aggrieved party who fails to do so, should be estopped. This principle of estoppel is grounded in equity. It is



also what the law provides which should be followed to allow for a more efficient and early management of the electoral process; before the electorate make their choice of leader.

5 In **Nandagire Christine** (Supra) the Appellant was the successful candidate at the elections and the first Respondent was the runner up. The trial Court in that matter found that the Appellant was not properly nominated and her election was set aside. This situation on Appeal was set aside on the principle of estoppel as explained earlier. In this matter however, it is the Appellant who was the unsuccessful candidate at the elections and it is the first  
10 Respondent who is the successful candidate and raised the preliminary objection. In this matter the reverse is true in that the successful candidate is objecting to the unsuccessful contesting the election on the grounds that the unsuccessful candidate should not have been nominated in the first place.

15 The question therefore is, should the rule in equity espoused in the **Nandagire Christine** matter (Supra) be cross-cutting and apply to both the successful and unsuccessful candidate?

We find not and for the reason that follow hereinafter. Counsel for the Petitioner (at page 353 of the Record of Appeal) on the issue of the missing signature submitted as follows: -

20 "Mr. Musasire :

*My lord when you look at the form as attached on page 33 of volume 1, the law that creates this form requires it to be in triplicate. One copy is given to the electoral commission, the 2<sup>nd</sup> copy is given to the District Returning Officer and another copy to the Petitioner. It is true that what is attached to the Petitioner's*



*Affidavit in Support is a copy that was not signed but our most serious contention is [---] a matter of evidence because this was not a form in isolation. It is possible that at nomination when the Electoral commission received what was duly signed said it is okay”.*

5 The trial Judge observing that Petitioner’s (now Appellant) nomination was challenged in the Answer to the Petition found as follows in this matter: -

10 *“...the Petitioner was thus put on notice about what was to be raised and had all the time since 29<sup>th</sup> March 2021 to introduce what he claims to be a nomination form with all the ten signatures of persons supporting his nomination. Counsel for the Petitioner did not use the time to request for a certified copy from the 2<sup>nd</sup> respondent and/or issue a Notice to produce the same document from the 2<sup>nd</sup> Respondent...”*

15 The trial Judge noted that there was no signature against the name Akankwasa Samoi Nelson on the nomination paper attached to the affidavit of the Petitioner which is evidence, was directly contrary to Section 11 (1) (c) of the Parliamentary Elections Act. He further noted that if the absence of the signature was an oversight then the Petitioner had enough time to cure this by obtaining another copy of the nomination. The trial Judge then concluded as follows: -

20 *“...The Petitioner lacks the locus standi to challenge the results of the election held on 14<sup>th</sup> January 2021 since he was not a validly nominated candidate for Kashongi County Constituency...”*

We are unable to fault the trial Judge in his finding. The onus to establish *locus standi* falls squarely on the Petitioner and he or she should be able to defend it.



The court cannot insert the signature for the Appellant. Even though the trial Judge did not address the matter of equity it is well established that “he who comes to equity must come with clean hands”. In this equity cannot come to the aid of the Petitioner here.

5 We shall now consider the question as to whether the trial Judge erred in determining the petition on a preliminary Objection in view of Rule 26 of the Parliamentary Elections (Interim Provisions) Rules (herein after referred to as “EC Interim Rules”). It provides thus: -

10 *“No proceedings upon a petition shall be defeated by any formal objection or by the miscarriage of any notice or any other document sent by the registrars to any party to the petition.*

15 Rule 26 of the EC Interim Rules provides that no formal objection or miscarriage of any notice or other document sent by the Registrars shall defeat the proceedings upon a petition. Rule 3 (d) of the EC Interim Rules defines the term “Registrar” to mean “... the registrar of the court”.

In the case of **Wanambwa Milton V Wanjusi Wasieba and Electoral Commission** (Supra), the Appellant, an aggrieved registered voter, filed a Petition challenging the results of an election. At the commencement of the hearing of the Petition the Respondents raised an objection that the number of  
20 signatures required to support the Petition were not filed in the petition. The court first considered a provision which is in *pari materia* with Rule 26 the Parliamentary Elections (Interim Provisions) Rules and held as follows: -

*An Objection alleging lack of right to bring the Petition is so fundamental that it must be entertained without delay. In any case, such an objection cannot be*



disposed off without consideration of evidence since whether a Petitioner is either a loser candidate in an election or a registered voter in the constituency, to have a right to bring a petition under section 61(2) (now section 60 (2), are matters of fact that can only be established by evidence. Determination of such a  
5 fundamental Objection does not have to wait until the merits of the petition are considered. That would be an exercise in waste of time.”

We find that the trial Judge was justified in determining the preliminary objection since it was a fundamental point of law that involved a cause of action, namely whether the Petitioner (now appellant) had been validly  
10 nominated for him to have a right to bring the petition as such before court.

On the issue of the second Respondent Commission being estopped from denying that it confirmed the Appellant as a candidate because the Commission was responsible for the registration in the first place, we find that the argument is misplaced. The Answer to the Petition for the second  
15 Petitioner (at page 236) para 3 does not deny that the Appellant was a candidate so estoppel cannot apply to them.

This Court has always been firm on Petitioners to show that they are in compliance with the law when they launch a petition.

In the case of **Namujju Dionizia Cissy and the Electoral Commission V  
20 Martin Kizito Sserwanga** Election Appeal No. 62 of 2016, the Respondent a voter challenging the election did not bring the required five hundred voters' signatures and instead brought 469 signatures to support his election Petition. This court held that failure to comply with the Parliamentary Elections Act should not be taken lightly because election petitions are not  
25 ordinary suits where a party is enforcing a right accruing to him as a person.



Rather that it was an exercise which involves the determination of Constitutional rights of many people. The procedures set down to be followed are therefore, special and must be followed strictly. Failure by a party to comply should not be taken lightly.

5 Even though in the matter of **Namujju Dionizia Cissy** (Supra) involved a Petition lodged by aggrieved voters whereas in the instant case the Petition is lodged by a candidate; we find the rationale equally applicable to this situation as well. It is the duty of a Petitioner to ensure that his or her paper work is in order and in a timely manner if he or she seeks the time of the court  
10 but not the court to correct clearly latent errors on the face of the pleadings or record,

#### **FINAL RESULT**

Accordingly, this Appeal stands dismissed. We uphold the trial Judge's decision and order that the first Respondent is confirmed as the validly and  
15 lawfully elected Member of Parliament for Kashongi County Constituency. Costs in this court and in the High Court are to be borne by the Appellant.

We so Order.

Dated at Kampala, this 20<sup>th</sup> day of June 2022.

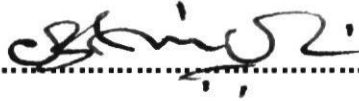
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**HON. MR. JUSTICE KIRYABWIRE GEOFFREY, J.A.**





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