

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
ELECTION PETITION APPEAL NO. 018 OF 2021**

MUSISI KIBUGUJU MUHAMMED:::::::::::::::::::::::::::::APPELLANT

VERSUS

1. ASHRAF NASSER

2. ELECTORAL COMMISSION:::::::::::::::::::::::::::::RESPONDENTS

(Appeal from the decision of the High Court of Uganda at Jinja before Murangira, J. dated 27th August, 2021 in Election Petition No. 016 of 2021)

**CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA
HON. LADY JUSTICE MONICA K. MUGENYI, JA**

JUDGMENT OF THE COURT

This appeal is from the decision of the High Court (Murangira, J.) dismissing a Petition filed by the appellant to challenge the return of the 1st respondent as the duly elected Mayor for Jinja South Division in Jinja City following elections conducted by the 2nd respondent on 25th January, 2021.

Background

The 1st respondent won the election for Mayor Jinja South Division with 6,910 votes, according to the results published by the 2nd respondent in the Gazette of 22nd April, 2021. The appellant came second with 4,973 votes. The appellant was dissatisfied and lodged a Petition in the High Court seeking to have the election of the 1st respondent set aside. The appellant alleged in his Petition that the election of the 1st respondent was invalid on grounds that it was not conducted in accordance with the principles laid down in the 1995 Constitution, the Local Governments Act, Cap. 243, the Electoral Commission Act, Cap. 140 and several other relevant laws. The incidents of non-compliance pleaded by the appellant related to failure of the 2nd respondent to ascertain and declare the correct results at several polling stations in the area. The appellant contended that the highlighted incidents of non-compliance had affected the election result in a substantial manner

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in that the 1st respondent who had obtained lesser votes than him was declared winner of the election. The appellant prayed the High Court to set aside the election of the 1st respondent and instead declare him the duly elected Mayor of Jinja South Division.

The 1st respondent filed an Answer to the appellant's Petition in which he refuted the appellant's claims. The 1st respondent stated that the relevant elections were free and fair and were conducted in accordance with the law and the principles laid down in the 1995 Constitution, the Local Governments Act, Cap. 243 and the Electoral Commission Act, Cap. 140. He further stated in the alternative, that if there were any incidents of non-compliance as alleged by the appellant, that non-compliance did not affect the outcome of the election in a substantial manner. The 1st respondent stated specifically that the 2nd respondent declared the correct results from all the polling stations, contrary to the appellant's allegations.

The 2nd respondent stated in its Answer that the electoral officials declared the correct results as per the votes counted from the various polling stations. The 2nd respondent thus contended that the entire electoral process for Mayor Jinja South Division was conducted in a free and fair manner and in accordance with all relevant governing laws.

The learned High Court Judge conducted a trial at which he considered the evidence and thereafter rendered judgment. In his judgment, the learned trial Judge found, for various reasons, that all the affidavits accompanying the Petition were irregular and he struck them out. He then considered that striking out the supporting affidavits deprived the Petition of evidence and left the averments in the respondents' Answers unchallenged. Basing on the respondents' averments, the learned trial Judge found that the election for Mayor Jinja South Division was conducted in accordance with all relevant governing laws. The learned trial Judge accordingly dismissed the appellant's Petition with costs to the respondents.

The appellant was dissatisfied and filed this appeal. The grounds of appeal are as follows:

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1. The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record and as a result reached an erroneous decision that the 1st respondent was validly elected and declared winner of the election held on the 25th day of January 2021 by the 2nd respondent which in the result occasioned an injustice to the appellant.
2. The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record and as a result reached an erroneous decision that the 2nd respondent conducted the election in compliance with the provisions and principles laid down in the Local Government Act, Cap. 243, Electoral Commission Act, Cap. 140 and the Constitution of the Republic of Uganda as amended which in the result occasioned an injustice to the appellant.
3. The learned trial Judge erred in law and fact when he held that failure of the petitioner to plead fraud affected the competence and validity of the petitioner's petition which in the result occasioned an injustice to the appellant.
4. The learned trial Judge erred in law and fact when he struck out the 40 affidavits in support of the petition for reasons that there were inconsistencies in the signatures, names, jurat and source of information which in the result occasioned an injustice to the appellant.
5. The learned trial Judge erred in law and fact when he held that the proprietor of the affidavits sworn by the polling agents are questionable and struck them out which occasioned a miscarriage of justice.
6. The learned trial Judge erred in law and fact when he held that the affidavit evidence of the 35 affidavits and averments therein are not confined to the facts in their knowledge and that they do not disclose source of information which occasioned a miscarriage of justice.
7. The learned trial Judge erred in law and fact when he held that the petition was not accompanied by a valid petitioner's affidavit and that the petition was incompetent before court which occasioned a miscarriage of justice.

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8. **The learned trial Judge erred in law and fact when he held that the person who was nominated is different from the person who brought the petition in total disregard of the evidence on record which occasioned a miscarriage of justice.**
9. **The learned trial Judge erred in law and fact when he handled the petitioner's petition with manifest partiality which in the result occasioned an injustice to the appellant.**
10. **The learned trial Judge erred in law and fact when he awarded costs to the respondents."**

The appellant prayed this Court to allow the appeal, set aside the judgment and orders of the High Court, proceeds to re-evaluate the evidence and grant all the orders that he sought in his Petition. In the alternative, the appellant prayed that this Court orders for a retrial before another Judge. The appellant also prayed that the Court grants him the costs of the appeal and in the lower Court.

The respondents opposed the appeal.

Representation

At the hearing, Mr. Emmanuel Kigenyi and Mr. Francis Muganga, both learned counsel jointly appeared for the appellant. Mr. Duncan Kagimu and Mr. Shaban Nkuutu, both learned counsel, jointly appeared for the 1st respondent. Mr. Martin Kalemera, learned counsel appeared for the 2nd respondent.

The respective written submissions filed by the parties and adopted by the Court at the hearing are on record and have been considered in this Judgment.

Appellant's submissions

Counsel for the appellant argued grounds 1 and 2 jointly; ground 3 independently; grounds 4, 5, 6 and 7 jointly; and each of grounds 8, 9 and 10 independently, in that order.

Grounds 1 and 2

Counsel submitted that the learned trial Judge erred when he found that the 1st respondent was validly elected as Mayor for Jinja South Division, and also

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erred when he found that the relevant elections were conducted in compliance with the provisions and principles laid down in the Local Governments Act, Cap. 243, Electoral Commission Act, Cap. 140 and the 1995 Constitution. Counsel contended that the 2nd respondent returned the 1st respondent as winner of the elections basing on falsified Declaration of Results (DR) forms. The true and correct DR forms were those that were tendered in evidence by the appellant. Those DR forms were obtained by polling agents of the appellant that were present at all the 97 polling stations in Jinja South Division. Counsel further submitted that a comparison of the true and correct DR forms tendered in evidence by the appellant and the falsified DR forms that the respondent relied on to declare the 1st respondent as winner, shows that the 1st respondent benefited from 2552 votes that were fraudulently awarded to him.

Counsel further contended that the results in the DR forms tendered in evidence by the appellant were consistent with the results in the certified tally sheet availed to the appellant by the 2nd respondent.

Counsel further submitted that the results contained in the certified DR forms availed to the appellant were, in respect of 9 polling stations, were inconsistent with the results in the certified tally sheet.

Furthermore, counsel submitted that in some cases, the DR forms certified by the 2nd respondent showed that there were more votes cast than the ballot papers counted. These cases emerged from the DR forms of 4 polling stations, namely: Loco A-L Uganda Railways Primary School, Elim Church Nursery School, Walukuba East Primary School N-Z and Mvule A-J PMM Primary school. In counsel's view, the highlighted cases proved that the 2nd respondent manipulated votes cast by irregularly adding votes to the 1st respondent. Counsel submitted that the falsified votes highlighted above, proved that the 2nd respondent obtained lesser votes than he was credited with.

Further still, counsel contended that the learned trial Judge did not evaluate the evidence of the DR forms, and hence reached the erroneous conclusion

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that all the DR forms that were tendered in evidence tallied when as shown earlier, there were discrepancies in some of the DR forms.

Counsel also faulted the learned trial Judge for holding that the appellant had no validly appointed polling agents for the reason that the appointment letters for the said agents did not contain their valid signatures. Counsel contended that the DR Forms tendered by the respondents that were believed by the learned trial Judge, were signed by the same appellant's polling agents. In counsel's view, the learned trial Judge applied double standards and this called into question his fairness and transparency while conducting the trial. To counsel, if the appellant had no valid appointed polling agents, then the learned trial Judge ought to have declared the entire election as a sham. Moreover, counsel submitted that the learned trial Judge erroneously considered that one can only be validly appointed as a polling agent if he has an appointment letter, because there is no such requirement under the Local Government Act or any other relevant law. Counsel cited **Odo vs. Tayebwa and Another, Election Petition Appeal No. 13 of 2011 (unreported)** where it was held that agency may be inferred from the conduct of the person in question, and that it is enough to show that a person is furthering the election of a candidate and trying to get him votes with the candidate's knowledge. Counsel further cited Section 1 (1) of the Parliamentary Elections Act, 2005 which defines a polling agent to mean a person appointed by a candidate as a polling agent. In the present case, according to counsel, all the appellant's polling agents had appointment letters and none of them ever denied being an agent of the appellant. Further, the 2nd respondent relied on the very appointment letters to confirm them as polling agents on polling day.

Counsel concluded by submitting that grounds 1 and 2 ought to succeed.

Ground 3

Counsel submitted that the learned trial Judge erred when he found that the failure of the appellant to plead fraud rendered his Petition incompetent and invalid. Counsel contended that the grounds for setting aside Local Government Election are set out under **Section 139** of the **Local**

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Governments Act, Cap. 243, and those grounds do not extend to fraud. Further still, that in the present case, the appellant did not base his Petition on fraud but rather on non-compliance with the relevant electoral laws as manifested by the 2nd respondent's acts of false, incorrect, arbitrary and wrongful vote counting and tallying. Counsel submitted that the learned trial Judge's findings on fraud were per incuriam and that ground 3 ought to succeed.

Ground 4, 5, 6 and 7

Counsel submitted that the learned trial Judge erred when he struck out all the affidavits sworn in support of the appellant's Petition, basing on minor and curable defects in the affidavits. Counsel contended that several binding authorities mandated the learned trial Judge to overlook the minor issues with the affidavits and focus on their substance. Such authorities included **Mbayo Robert vs. Electoral Commission and Another, Election Petition Appeal No. 07 of 2006; Saggu vs. Roadmaster Cycles (U) Ltd [2002] EA 25** cited with approval in **Nabukeera vs. Kibuule Ronald and Another, Election Petition Appeal No. 017 of 2011**.

Furthermore, counsel submitted that the learned trial Judge also committed an error of fact when he found that the affidavits in support of the appellant's Petition were sworn at Jinja yet the stamp for the Commissioner for Oaths indicated on the affidavits shows that the deponents appeared before the Commissioner for Oaths in Kampala. Counsel contended that the affidavits in question were sworn at Kampala as the appellant clarified while testifying and that the indication that they were sworn at Jinja was an error.

It was further submitted that the learned trial Judge erred when he found that, for some affidavits sworn in support of the appellant's Petition, there were inconsistencies between the signatures of the deponents contained on the affidavits and the signatures of the same deponents contained on their polling agents' appointment letters and their National ID cards. Counsel contended that in reaching the highlighted finding the learned trial Judge erroneously assumed the duty of a handwriting expert without the deponents of the impugned affidavits being called for cross-examination. In

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addition, counsel contended that the question surrounding the impugned signatures was one of fact and not one of law, and could not be decided as a preliminary point of law. Counsel further contended that the respondents' counsel, in raising the issues surrounding the impugned signatures were guilty of giving evidence from the bar.

Counsel also submitted that the learned trial Judge erred when he found that 35 of the affidavits sworn in support of the appellant's Petition offended **Order 19 Rule 3 (1)** of the **Civil Procedure Rules, S.I 71-1**, in that although those affidavits contained information not based on the deponent's personal knowledge, the deponents of those affidavits did not disclose the source of that information. According to counsel, the highlighted finding was incorrect considering that all the deponents disclosed the sources of their information in parts of their affidavit.

For the above submissions, counsel urged this Court to allow grounds 4, 5, 6 and 7.

Ground 8

Counsel submitted that the learned trial Judge erred when he found that the appellant who lodged a Petition to challenge the election of the 1st respondent was not the same person who contested the election for Mayor Jinja South Division. In counsel's view, the learned trial Judge's finding was uncalled for in the absence of a Cross-Petition filed by any of the respondents to bring the issue of identity of the appellant in issue. Counsel submitted that the appellant goes by the name Musisi Kibugujju Muhammed and it is the same name that appears on his Petition, Notice of Presentation of Petition, and National ID Card. The same name also appears on the appellant's Nomination Papers and other official documents. Counsel pointed out that the Form for Declaration of Nominated Candidate showed the appellant's name as Musisi Kibugujju Muhammed Badman, but counsel submitted that the said document was not authored by the appellant and that inclusion of the name Badman was done by officials of the Electoral Commission. Further still, counsel submitted that it was erroneous for the learned trial Judge to look at the latter document in isolation from some of the earlier documents

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which all confirmed the appellant's true name. Counsel concluded that the same appellant who was nominated and stood for election for Jinja South Division Mayor was the same person who filed a petition to challenge his defeat in that election.

Counsel submitted that ground 8 should also succeed.

Ground 9

Counsel submitted that the learned trial Judge handled the matter with bias in favour of the respondents contrary to the expectation under **Articles 28 and 44** of the **1995 Constitution** and **Principle 2** of the **Uganda Code of Judicial Conduct**, that the learned trial Judge would handle the case with fairness and without fear or favour. Counsel contended that bias can be inferred from a judicial officer's judgment if a rational reader, would, on reading that judgment hold the view that the judicial officer is biased. In support of his submissions, counsel cited the following authorities: **R v. Sheppard [2002] 1 SCR 869; Flanery vs. Halifax Estate Agencies Ltd [2000] 1 ALLER 373; and GM Combined (U) Ltd vs. AK Detergents Ltd and 4 Others, Supreme Court Civil Appeal No. 7 of 1998 (unreported)**. Counsel submitted that in the present case, the learned trial Judge acted with bias in favour of the respondents, for several reasons: 1) ignoring the evidence and submissions of the appellant and framing technicalities that were never pleaded; 2) failing to follow the law governing affidavit evidence; 3) looking out for minor defects in the affidavit evidence so as to defeat the appellant's Petition; 4) rejecting the evidence of Kirunda Mubarak without giving good reasons.; 5) fishing for evidence to base on to find that the appellant was not the person who was nominated to contest the relevant elections, and ignoring similar inconsistencies in the name of the 1st respondent.

Counsel concluded by submitting that ground 9 ought to also succeed.

Ground 10

Counsel submitted that pursuant to **Section 27** of the **Civil Procedure Act, Cap. 71**, the general rule is that costs follow the event. However, in counsel's view, in the present case, there was no event from which costs

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would follow considering that the trial Court did not make any specific fault other than imaginary inferences. Thus, to counsel, the costs order made by the learned trial Judge was erroneous and is liable to be set aside.

1st respondent's submissions

In reply, counsel for the 1st respondent argued grounds 4, 5 and 6 jointly; grounds 7 and 8 jointly; and lastly grounds 1, 2 and 3 jointly.

Ground 4, 5 and 6

Counsel submitted that the learned trial Judge correctly found that the signatures of the deponents of over 40 affidavits sworn in support of the appellant's Petition were inconsistent with the signatures on other documents belonging to the same deponents including their National ID Cards and DR forms. According to counsel, the learned trial Judge was competent to examine the signatures as he did, and that if this Court scrutinized the same affidavits, it would reach the same conclusions. Counsel relied on the authority of **Muyanja Simon Lutaaya vs. Kenneth Lubogo and Another, Election Petition Appeal No. 82 of 2016 (unreported)** for the proposition that a Court may scrutinize signatures for inconsistencies without expert evidence, and submitted that the argument of counsel for the appellant that the trial Judge did not have authority to examine the impugned affidavits is untenable. Furthermore, counsel submitted that the discrepancies in signatures rendered the affidavits unreliable and the trial Court was right to strike them out.

It was further submitted that the burden to prove that the expunged affidavits were deposed by the persons they were attributed to lay with the Petitioner but he failed to discharge it. For this submission, counsel relied on the authority of **Besigye vs. Museveni and Others [2001-2005] HCB 4**.

Grounds 7 and 8

Counsel submitted that the learned trial Judge was right to find that the person nominated to contest the elections for Mayor Jinja City named "Musisi Kibugujju Muhammed Badman" was different from the appellant who filed the Petition in the High Court whose name is "Musisi Kibugujju Muhammed".

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Counsel contended that as per the authority of **Hon. Otada Sam Amooti Owor vs. Tabani Idi Amin and Another, Court of Appeal Election Petition Appeal No. 93 of 2016 (unreported)**, a discrepancy in names connotes that there are two different persons being referred to, and that thus in the present case the Petitioner was not the person who contested the relevant elections. Furthermore, counsel contended that the appellant could not change his names without following the procedure laid down under **Section 36** of the **Registration of Persons Act, 2015**, as he attempted to do in the present case. For this proposition, counsel referred to the authority of **Wakayima Musoke vs. Kasule Sebunya, Court of Appeal Election Petition Appeal No. 60 of 2016 (unreported)**.

Grounds 1 and 2

Counsel submitted that the learned trial Judge properly evaluated the evidence and reached the correct conclusions. According to counsel, whereas the appellant filed a Petition within the time envisaged under the law, the learned trial Judge rightly found fault with the identity of the appellant. Further, the affidavit evidence tendered to support the Petition was illegal and was rightly struck out, and thus there was no evidence for the appellant to prove the grounds for setting aside an election. Thus, the appellant as petitioner did not satisfy the Court of the existence of any grounds for setting aside the relevant elections.

Furthermore, according to counsel, the evidence showed that the appellant was different from the person who contested the relevant elections, and thus the appellant was not an aggrieved candidate for purposes of **Section 138 of the Local Government Act, Cap. 243**, as he was not the person who was nominated to contest the relevant elections.

Counsel contended that on the other hand, the evidence of the 1st respondent showed he was duly nominated and lawfully contested the relevant election for Mayor Jinja South Division. The respondents also tendered evidence of duly certified DR Forms and tally sheets which indicated that the 1st respondent obtained the highest number of votes from

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the relevant elections. The evidence of the respondents was not challenged by the appellant.

Counsel concluded by submitting that grounds 1 and 2 be disallowed.

Ground 3

Counsel submitted that the learned trial Judge correctly held that the appellant's failure to appropriately plead fraud was fatal to the validity and competence of his Petition. Counsel contended that whereas the appellant mentioned fraud in his Petition, he did not appropriately plead it by particularizing the fraud neither did he specifically prove it with evidence, as per the requirements laid down in several cases including **Kampala Bottlers Ltd vs. Damanico (U) Ltd, Supreme Court Civil Appeal No. 22 of 1992** and **Okello Charles Engola and Another vs. Ayena Odongo, Court of Appeal Election Petition Appeal No. 26 of 2016 (unreported)**

With regard to failure to specifically prove the fraud, counsel contended that the appellant chose to drop the expert witness he had lined up to prove the fraud which affected his case against the respondents.

Counsel contended that failure to prove fraud rendered the Petition incompetent and liable for dismissal, and urged this Court to disallow ground 3.

Grounds 9 and 10

Counsel submitted that in view of the earlier submissions, the learned trial Judge handled the Petition in accordance with the law and the claims of bias levelled against him by the appellant are unfounded. Counsel also submitted that the learned trial Judge was right to award costs to the respondents.

2nd respondent's submissions

Counsel for the 2nd respondent argued the grounds of appeal in the following order: grounds 4, 5 and 6 jointly, grounds 7 and 8 jointly, grounds 1, 2 and 3 jointly, and lastly, grounds 9 and 10 jointly.

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Grounds 4, 5 and 6

Counsel submitted that the learned trial Judge correctly found that the signatures of the deponents of over 40 affidavits supporting the appellant's Petition were inconsistent with the signatures contained on other documents belonging to the same deponents. The signatures on the affidavits were different from those on the deponents' National ID Card and Declaration of Results Forms. Counsel also submitted that the signatures on the affidavits of Ebusa William Omaria and Kirunda Mubarak were different from those on their National ID Cards and their nomination papers.

In addition, counsel submitted that the affidavits of several persons claiming to be the appellant's polling agents were rightly expunged considering that there was no evidence to prove their status as polling agents. Counsel contended that the said polling agents did not sign their appointment letters issued by the appellant. Moreover, the appointment letters were issued by another person called Musisi Muhammed who was not the appellant.

Counsel also submitted, like his counterparts for the 1st respondent, that the learned trial Judge on the principles articulated in the **Simon Muyanja case (supra)**, had the authority to examine the impugned affidavits for discrepancies in the signatures. Further still, like his counterparts for the 1st respondent, counsel submitted that several affidavits supporting the appellant's Petition offended **Order 19 Rule 3 (1) of the Civil Procedure Rules, S.I 71-1** in that the affidavits contained information obtained from other sources yet the same were not mentioned in the affidavits. Counsel cited the authority of **Uganda Journalists Safety Committee and Others vs. Bahemuka and Another, Constitutional Petition No. 7 of 1997 (unreported)** where it was held that a court should not act on an affidavit which does not distinguish between matters based on information and belief and matters which the deponent swears from his personal knowledge, and that failure to disclose the source of information renders the affidavit null and void. Counsel also relied on the following authorities for a similar principle – **Chemoiko vs. Soyekwo and Another, Court of Appeal Election Appeal No. 56 of 2016; Kasirye vs. Bazigatirawo, High Court Election Petition No. 008 of 2016; Pacific Summi Hotel**

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Ltd vs. DFCU Bank Ltd, High Court Civil Suit No. 09 of 2013 citing with approval Premchand vs. Quarry Services Ltd [1969] EA 514; and Eseza Namirembe vs. Musa Kizito (1972) ULR 88. Further still, counsel contended that most of the contents of the supporting affidavits were hearsay evidence and were rightly expunged.

Counsel urged this Court to uphold the findings of the learned trial Judge especially considering that the appellant failed to adduce evidence to prove that the expunged affidavits were deposed by the persons they were attributed to.

Grounds 7 and 8

On ground 7, counsel reiterated his earlier submission that the appellant's affidavit was incompetent because it contravened **Order 19 Rule 3 (1) of the Civil Procedure Rules** in that whereas the affidavit contained averments based on information the appellant received from other persons, the sources of the information were not named in the affidavit. Counsel contended that for that reason, the appellant's affidavit was unreliable and was rightly struck out.

On ground 8, counsel agreed with the submissions of counsel for the 1st respondent that the person who was nominated for the relevant elections and the appellant who lodged a Petition to challenge the election result were two different persons. Counsel made the same arguments on ground 8 as those of counsel for the 1st appellant and we have not found it necessary to repeat them here.

Grounds 1 and 2

The submissions of counsel on these grounds were similar to those made by counsel for the 1st respondent and we shall not repeat them here.

Ground 3

Counsel's submissions on ground 3 were also similar to the submissions of the 1st respondent and we have found it unnecessary to repeat them.

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Grounds 9 and 10

The submissions of counsel for the 1st respondent on these grounds are similar to those of the 1st respondent and we shall not repeat them here.

Appellant's submissions in rejoinder

Counsel for the appellant made submissions in rejoinder but he merely reiterated his earlier submissions.

Resolution of the Appeal

We have carefully studied the Court record, and considered the submissions of counsel for both sides and the law and authorities cited in support thereof. Other relevant law and authorities have also been considered.

On a first appeal, this Court is, pursuant to **Rule 30 (1) (a)** of the **Judicature (Court of Appeal Rules) Directions, S.I 13-10**, expected to reappraise the evidence and make inferences of fact. Furthermore, in **Kifamunte vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997 (unreported)**, the Supreme Court articulated the principle that a first appellate Court has a duty to review the evidence of the case and to reconsider the materials before the trial judge and then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. We shall bear these principles in mind as we resolve the grounds of appeal.

We shall consider the grounds of appeal in the following order: ground 8 independently; ground 3 independently; grounds 4, 5, 6 and 7 jointly; grounds 1 and 2 jointly; ground 9 independently; and lastly ground 10 independently.

Ground 8

We have found it necessary to begin by considering ground 8 which alleges that the learned trial Judge erred in law and fact when he held that the person who was nominated is different from the appellant who brought the petition in the trial Court. The learned trial Judge's findings on this point arose from an issue raised in the 1st respondent's submissions that the appellant was neither duly nominated nor did he contest in the Mayoral

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elections for Jinja South Division in Jinja City. Counsel for the 1st appellant alluded to the fact that, as per several nomination documents including the Nomination Paper for City Division Elections for Chairpersons, the Oath Authenticating Statement, and the Declaration of a Person seeking nomination as a Candidate in City Division Chairperson Elections, the person who was validly nominated to stand in the relevant Mayoral elections was called "**Musisi Kibugujju Badman**". Counsel for the 1st appellant thus contended that the appellant whose name was named in the Petition as "**Musisi Kibugujju Muhammed**" was different from the person who was nominated and contested the relevant elections.

We observe that the question of identity of the appellant was vital in determining whether he had the locus to file a Local Government Election Petition under Section **138 (4)** of the **Local Governments Act, Cap. 243**, which provides:

"(3) An election petition may be filed by any of the following persons—

(a) a candidate who loses an election; or

(b) a registered voter in the constituency concerned supported by the signatures of not less than five hundred voters registered in the constituency."

Thus, it was crucial for the identity of the appellant to match that of a losing candidate in the relevant mayoral elections or that of a registered voter in the relevant constituency.

We observe that it is not uncommon for parties in election petitions to raise objections surrounding the identity of their opponents based solely on discrepancy in the latter's names. In the present case, the 1st respondent contended that the appellant was not the candidate in the relevant mayoral elections as highlighted above. We wish to stress however that questions on identity are questions of fact. In order for a party to successfully impeach the identity of a person, that party must tender evidence beyond mere difference in names to prove that the identity claimed belongs to another person and not the one before Court. This point was made in the case of **Mutembuli vs. Nagwomu and Another, Court of Appeal Election Petition Appeal No. 43 of 2014 (unreported)**, where the Court stated:

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"In our humble view, interchanging of names, that is, writing of the same name in a different order cannot affect one's qualifications. That in itself cannot be proof that because the order of names on one certificate differ from another certificate, therefore, that certificate is invalid or the holder must be a different person. That would be an absurdity that the law cannot permit."

The Court further stated:

"We do not agree with the proposition that the order of names would have any effect on the candidate's academic qualifications on their own. More evidence must be adduced to the satisfaction of the Court that a person who sat and obtained certain academic qualification is not the same person who was nominated for election. In this case, the only evidence presented was that of discrepancy in names. That discrepancy was ably explained away by the 1st respondent when he proved that he only added his father's names on to his own name."

We find the reasoning in the above case instructive although the case concerned differences in names on academic documents. In the present case, the 1st respondent contended that the person nominated to stand in the Jinja South Division Mayoral Elections, as per the nomination papers was a person called Musisi Kibugujju Badman. The relevant nomination paper at page 160 of the record indicates that the nominated person had a National ID Card with number "CM63082105076H". This National ID Card belongs to the appellant and bears his name Musisi Kibugujju Muhammed. In the circumstances, the logical inference is that the appellant was the person who was nominated and contested in the relevant elections. It may well have been that in filling some of his nomination papers the appellant included the name "Badman" as an alias as is common with persons who run for political office, but we do not find that this changed the fact that the nomination papers belonged to the appellant. The respondents ought to have adduced evidence to show that the person who was nominated and contested the relevant elections was not the appellant, but they did not. Instead, the evidence indicated that it was the appellant who contested the relevant elections after being duly nominated for the purpose.

As we stated earlier, the identity of a person is a question of fact, and the burden of proving that a person is wrongly assuming the identity of another lies on the person making the claim. In the present case, the burden lay on

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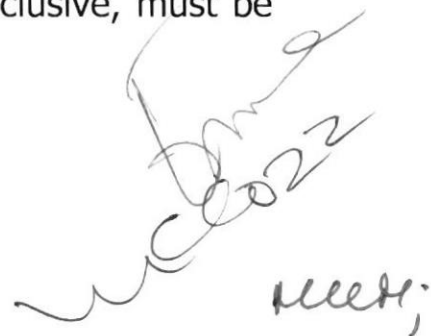
the 1st respondent to prove that there was another person called Musisi Kibugujju Badman not being the appellant who contested the relevant elections. In any case, all the Declaration of Results Forms that were tendered in evidence as well as the results published in the Gazette indicated that the person who contested the Mayoral Elections for Jinja South Division was called "Musisi Kibugujju Muhammed". This is the name of the appellant.

We are therefore unable to agree with the findings of the learned trial Judge that the person who contested the relevant mayoral elections was different from the appellant, because the evidence indicated otherwise. We are also with respect unable to go along with the learned trial Judge's view that the difference in the appellant's name amounted to illegally changing names contrary to **Section 36 (1) of the Registration of Persons Act, 2015**. We do not think that the procedure for change of names was in issue in the present petition. What was clearly in issue was the identity of the appellant in connection to whether he was a candidate or a registered voter in Jinja South Division constituency with the locus to institute a Petition under Section 138 (4) of the Local Governments Act, Cap. 243.

In view of the above analysis, ground 8 ought to succeed.

Ground 3

Ground 3 states that the learned trial Judge erred in law and fact when he held that failure of the petitioner to plead fraud affected the competence and validity of the petitioner's petition. The learned trial Judge found, in agreement with a preliminary objection raised by the 1st respondent, that the appellant's Petition was incompetent because it contravened the provisions of **Order 6 Rule 3 of the Civil Procedure Rules**. The learned trial Judge considered that under the highlighted provision, where a party bases his/her case on fraud as the appellant did with his Petition, the party was expected to give particulars of the fraud. He also relied on the authorities of **Kampala Bottlers Ltd vs. Damanico (U) Ltd, Supreme Court Civil Appeal No. 22 of 1992 (unreported)** and **Okello Charles Engola vs. Electoral Commission and Another, Court of Appeal Election Petition Appeal No. 26 and 94 of 2016 (unreported)** for the principle that particulars of fraud in civil cases, election petitions inclusive, must be specifically pleaded and strictly proved.



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technical legal sense. In any case, we do not think that it is a requirement under Section 139 of the Local Governments, to prove fraud in the technical sense for setting aside an election. The appellant was only required to prove one of the grounds enumerated under Section 139 and nothing more. We agree with the submission of counsel for the appellant that the appellant's Petition was not based on fraud in the technical legal sense, but rather on failure of the Electoral Commission to declare correct results or falsification of results by the Electoral Commission. The learned trial Judge therefore erred when he found otherwise.

Ground 3 of the appeal must succeed.

Grounds 4, 5, 6, and 7

These grounds relate to objections raised by counsel for the 1st respondent to the affidavits filed in support of the appellant's Petition. The objections were based on several reasons and we shall consider them below. First the learned trial Judge upheld an objection that all the 40 affidavits filed in support of the appellant's Petition contained inconsistencies in signatures, names, jurat and source of information. The learned trial Judge considered that the signatures on the affidavits of 41 persons, namely: Kyarimpa Miriam, Kabali Fahad, Kaluya Shafik, Fatuma Mutesi, Nagawa Madinah, Nuwemujurizi Devine Develline, Isabirye Paul, Talyako Aaron, Mugume Desire, Sizomu Peter, Waweyo Ivan, Odoch David, Bagaga Ivan, Abakudi Shamim, Bakuza Alex, Namugambwe Mariam, Eremye Ramathan, Oloya Morris, Kukiriza Elvis, Mwesigwa Sharon, Kisubi Milton, Nawerya Racheal Batuwalana, Ebusa William Omaria, Okello Juma, Akumu Charity, Kasibe Tonny, Ddembe Ivan, Adreku Patrick, Kalenzi Joseph, Namasaba Caroline, Opedi Meric, Nsohya Godfrey, Ayigi Christine, Kirunda Mubarak, Mukisa Roonies, Namuganza Lilian, Lokiyor Francis, Kakaire Abed, Walusimbi Akimu, Nakayima Sarah Tebelowooza and Ibanda Isima differed from the signatures on other documents such as National ID Cards, and DR Forms that also belonged to those very witnesses.

The learned trial Judge's reasoning is based on a presumption that a person can only have one signature and thus that as a rule of law, where a signature on a person's affidavit differs from signatures on other documents said to belong to the same person, the credibility of the affidavits is affected and

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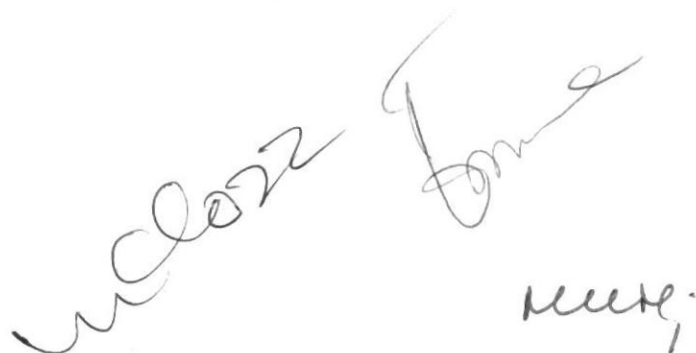
the same should be struck out. This principle is supported in the case of **Muyanja vs. Lubogo and Another, Court of Appeal Election Petition Appeal No. 82 of 2016 (unreported)**, where this Court considered a similar issue. In that case, the trial High Court struck out 23 affidavits supporting a Petition on grounds that the signatures of the respective deponents' affidavits differed from the signatures on their respective National ID Cards. The appellant had appealed against the learned trial Judge's decision to this Court. This Court held that differences in the signatures on a deponent's affidavit and that on his/her National ID Card is evidence that the affidavit is not credible and that such affidavits ought to be struck out. In any case, in the event that the appellant had multiple signatures, the onus of proof thereof would lie with him to prove that claim. No such proof was forthcoming in this matter.

Basing on the **Muyanja case (supra)**, therefore, the learned trial Judge was right to consider that the affidavits we referred to earlier, that contained differing signatures from the signatures on the National ID Card and other documents like the DR Forms were not credible and to strike them out. We also agree, as submitted for the respondents, that the trial Judge proceeded correctly when he examined the signatures on his own accord and come up with the right conclusions. This practice was endorsed in the **Muyanja case (supra)** where it was stated:

"We agree that courts should act with caution and call for handwriting evidence when handling issues of handwriting evidence.

In the case of Hon. Kipoi Tonny vs. Ronny Waluku Wataka and 2 Others, Court of Appeal Election Petition Appeal No. 07 of 2011 unreported, this Court held that it is not prohibited for a trial judge to compare signatures/handwritings in the absence of expert evidence, but Court has to exercise great caution because of the lack of expertise on the matter."

Our analysis on ground 4 renders it unnecessary to resolve grounds 5 and 6. In our view, having already held that the impugned affidavits were properly struck out for the reasons stated earlier, it then becomes unnecessary to consider the latter grounds which only raise additional grounds for striking out the affidavits.

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It also means that only the propriety of the appellant's affidavit, which is the subject of ground 7 remains to be considered. Ground 7 states that the learned trial Judge erred in law and fact when he held that the petition was not accompanied by a valid petitioner's affidavit which rendered the petition incompetent. The learned trial Judge found the appellant's affidavit to be invalid for two reasons – first, because the appellant's affidavit was commissioned by a commissioner of oath in Kampala yet it was signed by the appellant at Jinja. Secondly, that the appellant's affidavit contained averments setting out information obtained from other sources yet those sources were not named in the affidavit.

Trial of election petitions, as was the case with the appellant's petition, normally proceeds by way of affidavit evidence. According to the **Merriam-Webster Dictionary (2022)**, an affidavit is defined as:

"A sworn statement in writing made especially under oath or an affirmation before an authorized magistrate or officer."

Under the Oaths Act, Cap. 19, a person who makes an affidavit is expected to take an oath or make an affirmation before an authorized officer. Such officers may include a commissioner for oath. **Section 6 of the Oaths Act, Cap. 19** provides for the place and date of oath:

"Place and date of oath.

Every commissioner for oaths or notary public before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

Furthermore, **Section 5 of the Commissioners for Oaths Act, Cap. 5** provides:

"5. Particulars to be stated in jurat or attestation clause.

Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

The various forms of jurats for affidavits are provided for under the Commissioners for Oaths Act and the Oaths Act.

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One of the essential features of an affidavit is that it must be made before a Commissioner for Oaths, and this fact must be stated in the jurat. The rationale is that an affidavit is a solemn piece of evidence and must be made on oath or after affirmation. In **Kakooza John Baptist vs. Electoral Commission and Another, Supreme Court Election Petition Appeal No. 11 of 2007 (unreported)**, Katureebe, JSC (as he then was) stressed that a valid affidavit has to be made before a Commissioner for Oaths. In that case, a person had written an affidavit, signed it and then sent it to a Commissioner for Oaths who was in a different place. Katureebe, JSC found that the affidavit had not been validly made and stated as follows:

"The appellant who testified that he is a lawyer and a commissioner for Oaths, swore an affidavit in rejoinder which was rejected by the court because apparently he had not appeared before the commissioner for oaths. He had signed the affidavit in Kampala and, in his own evidence, sent it to the commissioner for oaths for commissioning. It turned out that it was then commissioned in Masaka. In effect the commissioner for oath did not administer the oaths and see the deponent signing the affidavit. Section 6 of the Oaths Act states: -

"Every commissioner for oaths or notary public before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made." (emphasis added).

The practice where a deponent of an affidavit signs and forwards the affidavit to a commissioner for oaths without him being present is, in my view, a blatant violation of the law regarding making affidavits and must not condoned in anyway. The deponent of an affidavit must take oath and sign before the commissioner for oaths as required by law. A commissioner who commissions an affidavit without seeing the deponent cannot say that the affidavit was taken or made before him or her nor can he state truly in the jurat or attestation at what place or time the affidavit was taken or made. Equally the deponent cannot claim to have taken or made the affidavit before the commissioner for oaths. Surely the appellant as an advocate and commissioner for oaths ought to know better."

In the present case, the appellant's affidavit in support of his Petition indicates that the appellant made and signed the affidavit at Jinja on the 4th day of May, 2021. The affidavit also contains a stamp and signature of one



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Tusiime Isaac, alleged to be a Commissioner for Oaths. The affidavit, however, does not contain a jurat, the latter to show at what place he commissioned it or whether the appellant appeared before him. The appellant was cross examined as to the person and place he took the oath in support of his affidavit. The appellant stated that the affidavit was drafted on his behalf, although he had gone through it. Further, he stated that the affidavit was drafted in Kampala by a Commissioner for Oaths.

The appellant's assertion that his affidavit was drafted on his behalf by a Commissioner for Oaths in Kampala appears contradictory in that the affidavit on the face of it shows that the appellant drafted the affidavit himself. There was no jurat of the form provided for under the Oaths Act to indicate that the affidavit was drafted on the appellant's behalf. In our view, it appears most probable that the appellant did not appear before the Commissioner for Oaths who endorsed on his affidavit. As stated earlier, an affidavit made without appearing before a Commissioner for Oaths contravenes the provisions of Section 6 of the Commissioner for Oaths Act, Cap. 19 and Section 5 of the Oaths Act, Cap. 19, and is therefore invalid. The learned trial Judge was therefore correct when he reached the same conclusion.

Ground 7 of the appeal must therefore fail.

Grounds 1 and 2

We earlier found that all the supporting affidavits to the appellant's Petition were rightly struck out by the learned trial Judge for being invalid. Thus the Petition was deprived of evidence and could not succeed in proving the claims set out in it.

Grounds 1 and 2 must also fail.

Ground 9 must also fail. The learned trial Judge was justified in reaching some of the conclusions he reached as shown above. In other instances, the learned trial Judge may have committed legal errors, but we do not think that was sufficient evidence of bias.

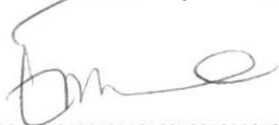
Ground 10 must also fail. The respondents were the successful parties in the lower Court and therefore they were entitled to costs.

W. G. 2022
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For the above reasons, this appeal substantially fails and is dismissed with costs to the respondents.

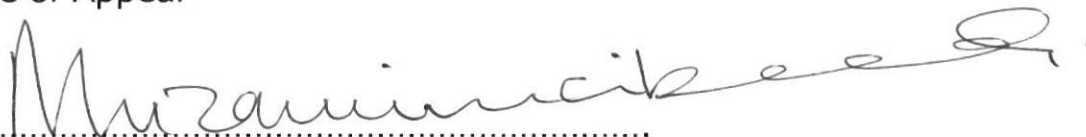
We so order.

Dated at Kampala this 20th day of June 2022.



Elizabeth Musoke

Justice of Appeal



Muzamiru Mutangula Kibeedi

Justice of Appeal



Monica K. Mugenyi

Justice of Appeal