

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
(Coram: Egonda-Ntende, Muzamiru M. Kibeedi and Monica K. Mugenyi, JJA)

5 **ELECTION PETITION APPEAL NO. 009 OF 2021**

HON. LOKERIS SAMSON :::::::::::::::::::::::::::::: APPELLANT

VERSUS

1. KOMOL EMMANUEL

10 **2. THE ELECTORAL COMMISSION :::::::::::::::::::::::::::::: RESPONDENTS**

[Appeal from the Ruling and Orders of the High Court of Uganda at Soroti (Hon. Lady Justice Anna Mugenyi Bitature) delivered on the 31st day of August 2021 in Election Petition No.001 of 2021]

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA

Introduction

15 This appeal arises from the Ruling of Hon. Lady Justice Anna Mugenyi Bitature (trial judge) delivered on the 31st of August 2021 dismissing Soroti High Court Election Petition No.1 of 2021 (EP No. 1 of 2021) with costs to the two respondents on a preliminary point of law.

The background facts leading to the above Petition as established by the trial judge were that the appellant, the 1st respondent and two others contested for the seat of Member of
20 Parliament for Dodoth East County Constituency, Kaabong District during the General Elections that were held in Uganda on 14th January 2021. The 1st respondent was declared the successful candidate with a winning margin of 11 votes, having obtained 7,903 votes, while the appellant was the runner up having garnered 7,892 votes. The election results were published in the Uganda Gazette of the 17th day of February 2021 by the 2nd
25 Respondent.

The appellant was dissatisfied with the election results and filed Election Petition No. 1 of

2021 in Soroti High Court against the 1st and 2nd respondents seeking to set aside the said election results on the ground that there was noncompliance with the electoral laws and principles which affected the result of the election in a substantial manner. The appellant also alleged that illegal practices or other offences under the Parliamentary Elections Act (PEA) were committed in connection with the elections by the 1st respondent personally, or with his knowledge and consent or approval.

Each one of the respondents denied the claims in their respective Answers to the Petition.

At the hearing of the Petition, the respondents raised a Preliminary Objection to the effect that there was no valid and competent Petition before court as the appellant's Affidavit Accompanying the Petition (Principal Affidavit) was commissioned by a Commissioner for Oaths whose Practicing Certificate had, at the material time, expired.

In response, Counsel for the appellant prayed to the trial judge that instead of striking out the Petition, she should grant the appellant leave to cure the defect by filing fresh Affidavits to support the Petition.

In her Ruling, the trial judge rejected the appellant's pleas holding that to do so would be illegal since it would amount to allowing a Petitioner to file the Petition outside the 30 days stipulated in the PEA. Instead, she upheld the preliminary objection and, in her own words, "*dismissed [the Petition] with costs to the two respondents*".

The Appellant was dissatisfied with the Ruling and Orders of the trial court and appealed to this court on the three grounds set out in the Memorandum of Appeal as follows:

1. The Learned Trial Judge erred in law in rejecting the petitioner's affidavit in support of the petition and other accompanying affidavits for having been commissioned by a commissioner for Oaths who had not renewed his practicing certificate thereby occasioning the Petitioner, a miscarriage of Justice.



2. *The Learned Trial Judge erred in law when she misdirected herself in holding that the petitioner will be filing a fresh petition in the event that the petitioner's affidavits are recommissioned before a commissioner for oath with a valid practicing certificate.*

55 3. *The Learned Trial Judge erred in law when she penalized the Appellant with costs in the circumstances of the case.*

The appellant prayed that this Court does allow the appeal with costs and orders that:

a. *The appeal be allowed, and the Ruling and Orders of the Trial Judge be set aside.*

60 b. *The affidavits of the Appellant be commissioned before a Commissioner for Oaths with a valid practicing certificate and filed.*

c. *Election Petition No. 01 of 2021 be heard and determined on its merits.*

Representations

At the hearing of this appeal, the appellant was represented by Messrs. Caleb Alaka and Paul Kenneth Kakande. On the other hand, the 1st respondent was represented by Messrs. 65 Ambrose Tebyasa, Evans Ochieng and Ojok Odur and Ms. Sandra Namigadde, while the 2nd respondent was represented by Ms. Evelyn Tumuhare. Both the appellant and the 1st respondent were present during the hearing.

Appellant's Submissions

The appellant argued grounds 1 and 2 jointly, then ground 3 separately.

70 In their Written Submissions on grounds 1 and 2, Counsel for the appellant submitted that it was not in dispute that the Principal Affidavit was commissioned by an Advocate, a one Komakech Geoffrey, who had not renewed his Practicing Certificate at the time he commissioned the said affidavit. However, according to Counsel, this defect, by itself, was

not a sufficient ground to invalidate the Petition and/or entitle the trial judge to dismiss it.

75 That the proper course of action prescribed by the law was for the court give time to the appellant to make good the defect. For this position, Counsel referred to **Section 14A (1) (b) & (2) of the Advocates (Amendment) Act 2002** and the decision of this court in Suubi Kinyamatama Juliet Vs Sentongo Robinah Nakasirye & Anor, EPP No.0007 of 2016 (Unreported).

80 Counsel further submitted that from the trial court's record, upon the appellant's Counsel realizing the defect, they applied to court to allow them to rectify it by filing fresh Affidavits in Support commissioned by an authorized Commissioner for Oaths. That the reason given by the trial judge to deny the appellant the opportunity to rectify the defect namely, that allowing the Appellant to cure the defect of his affidavits would amount to filing a fresh
85 Petition outside the 30 days stipulated by the PEA, contradicted the binding decision of the Court of Appeal in Suubi Kinyamatama Juliet Vs Sentongo Robinah Nakasirye and Anor (ibid) where this Court is stated to have held that Section 14A (1) (b) and (2) of the Advocates Act 2002 makes provision for a victim of such an advocate to be given time to make good any defects arising out of such an event.

90 Counsel further submitted that as a result of the Appellant being denied the right to rectify the defect caused by the Commissioner for Oaths, the Appellant was denied the right to a fair trial. Counsel prayed that grounds one and two be resolved in favour of the appellant.

Regarding ground 3, Counsel submitted that whereas it is the law that costs follow the event, the circumstances of this case warranted a departure. That the party at fault was the
95 Commissioner for Oaths and not the appellant. That the appellant was simply a victim of the conduct of the Commissioner for Oaths. That in the circumstances of this case, the Learned Trial Judge erred in law to penalize the Appellant with costs.

Counsel concluded by praying that this Court allows the appeal and grants the orders as set



out in the Memorandum of Appeal.

100 **The 1st Respondent's Reply**

Counsel for the 1st respondent likewise argued grounds 1 and 2 together and ground 3 separately.

Regarding grounds 1 and 2, Counsel supported the decision of the trial judge. Counsel submitted that an affidavit commissioned by an advocate without a valid practicing certificate after the expiry of the "grace period" is fatally defective and invalid. This is because the validity of the commission is linked to the continued practice of the Commissioner for Oaths as an advocate. That without a valid Practicing Certificate, it is not only illegal for an advocate to continue administering oath after the expiry of grace period of two months on the 28th day of February every year, but all the documents purportedly commissioned by such a person whose commission has expired are invalid and with no legal effect whatsoever. For this submission, Counsel relied on the case of Professor Syed Huq Vs Islamic University in Uganda, Supreme Court Civil Appeal No. 47 of 1995 and Suubi Kinyamatama Juliet Vs Sentogo Robinah Nakasiryre, Election Petition Appeal No. 92 of 2016 (Court of Appeal).

115 As regards the effect of a defective Principal Affidavit on the Petition itself, Counsel submitted that the Principal Affidavit is part of the pleadings. For this submission Counsel referred to the case of Dr. Stephen Chebrot Chemoiko Vs Soyekwo Kenneth & Anor EPA No. 56/2016 and Rule 3 of the Parliamentary Elections (Interim Provisions) (Election Provisions) Rules (hereinafter referred to as the "**Election Petitions Rules**") which defines a Petition to mean "*an Election Petition and includes the affidavit required by these rules to accompany the petition*".

According to Counsel, a Petition cannot be said to have been filed validly without a valid

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Principal Affidavit. That such a Petition is fatally defective and, as such, there was no
Petition in law before the trial Court. For this submission, Counsel referred to the case of
125 Suubi Kinyamatama Juliet Vs Sentogo Robinah Nakasirye (Supra).

In reply to the argument of the appellant's Counsel that the invalidity of the Affidavit was
curable under S.14 A (1) (b)(i) of the Advocates (Amendment) Act 2002, the 1st
respondent's Counsel disagreed. They submitted that the provision envisages documents
drawn by advocates and not commissioned Affidavits. That the issue under consideration in
130 this matter is about "administering oaths" and not drawing documents. That the affidavits in
question were drawn by M/s. Alaka & Co. Advocates while the oath was purportedly
administered by Mr. Komakech Geoffrey who did not legally have authority to do so. That
the issue at this point became "**the art of administering oaths**" not drawing documents.

Counsel supported the holding by the trial judge that allowing the appellant to cure the
135 defect of his Principal Affidavit having been commissioned by a Commissioner for Oaths
whose Practicing Certificate had expired would amount to filing a fresh Petition outside the
30 days stipulated by law. Counsel submitted that the 30 days' period within which an
Election Petition must be filed is set by statute, namely: Section 60 (3) of the PEA. That
Rule 3 of the Election Petitions Rules defines a "Petition" to mean "*an Election Petition and
140 includes the affidavit required by these rules to accompany the petition*" while Rule 4 (8) of
the same Rules provides that "*the Petition shall be accompanied by an affidavit setting out
facts on which the petition is based together with a list of any document on which the
petitioner intends to rely*".

As such, argued Counsel, a Petition without an accompanying Principal Affidavit would not
145 meet the requirements of the law and is, in law, no Petition at all. That allowing the Principal
Affidavit accompanying such a Petition to be cured after the 30 days prescribed for its filing
have lapsed would amount to extending time fixed by Statute. That court cannot lawfully do



150 this. Time fixed by a Statute cannot be extended unless an amendment of the statute is done. Counsel submitted that if the Appellant were to take benefit of the remedial process of recommissioning the defective Principal Affidavit set out in S.14A of the Advocates Act, 2002, he had to do it before the expiry of the 30 days prescribed for filing the Petition.

As for the other affidavits filed in support of the Petition which can be filed at any time after filing the Petition, Counsel argued that the aggrieved party can take benefit of S.14A(1) of the Advocates Act, 2002 and rectify the defects in their commissioning at any time.

155 Regarding ground 3, the 1st Respondent's Counsel supported the order of the trial judge.

Counsel contended that whereas Komakech Geoffrey was at fault to have commissioned an Affidavit when his commission had already expired, he was not a party to the Petition to be ordered to pay costs as Counsel for the Appellant seems to suggest. The Appellant was under duty to entrust his Affidavit with a person he had verified to have had a valid authority
160 to administer oaths. The appellant himself looked for the Commissioner of Oaths to commission his Affidavits and he had a choice to go to another Commissioner for Oaths. That in any case, the appellant is at liberty to pursue Komakech Geoffrey for appropriate remedies for having purported to administer oaths when he had no valid commission to do so or, in the alternative, blame his lawyers for not doing due diligence to ascertain whether
165 Mr. Komakech had a valid practicing certificate at the time of commissioning his Affidavits.

The 1st respondent's Counsel concluded by submitting that the Appellant failed to prove any of the grounds raised in the appeal and prayed that the appeal be dismissed with costs.

2nd Respondent's Reply

The 2nd respondent submitted on each ground separately.

170 Regarding ground one, Counsel for the 2nd Respondent supported the findings, legal

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analysis, and conclusion of the learned Trial judge for the following reasons:

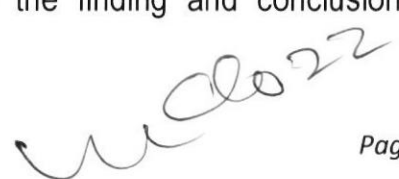
That by virtue of *Section 60 (3) of the Parliamentary Election Act*, a person challenging the seat of a Member of Parliament must do so by Petition. That it is a mandatory requirement that the Petition must be accompanied by a valid Affidavit in support. For this submission, Counsel relied on Rule 4 of the Election Petitions Rules and *Election Petition Appeal No. 92/2016 of Suubi Kinyamatama Juliet Vs Sentongo Robinah Nakasirye.*

That an advocate without a valid practicing certificate is not legally competent to commission an Affidavit and accordingly, the appellant's Petition was not supported by a valid Principal Affidavit. Counsel concluded that the trial judge's conclusion cannot therefore be faulted.

Counsel further contended that the Appellant cannot invoke the provisions of **Article 126(2) (e) of the Constitution** to cure the defect on the ground that the requirement for a Commissioner for Oaths who is an advocate to possess a valid practicing certificate is a requirement of substantive law. For this submission, Counsel relied on **Section 1 of the Commissioner for Oaths Rules and Section 11 of the Advocates Act**, all of which refer to a practicing advocate. And yet it is settled law that the provisions of *Article 126(2) (e) of the Constitution* are inapplicable to a substantive requirement of the law. For this submission Counsel referred to *Kasaala Growers Co-operative Society Vs Kakooza & Anor (Civil Application 19 of 2010) [2010] UGSC 29.*

Counsel concluded their submissions on ground one by stating that the learned trial Judge was alive to the relevant provisions of the law and precedents and ably applied them to the facts before her and arrived at the correct conclusion that the Petition was incurably defective and liable to be dismissed.

Regarding ground two, Counsel likewise supported the finding and conclusion of the



195 learned trial Judge to the effect that the Appellant would be filing a fresh Petition in the event that the Appellant's Principal Affidavit were to be allowed to be recommissioned before a Commissioner for Oaths with a valid practicing certificate.

Counsel submitted that an Affidavit commissioned by a Commissioner for Oaths who has no practicing certificate cannot be cured by recourse to Section **14A of the Advocates Act**.
200 And he advanced the following reasons to support the above position:

First, that an Affidavit is not a pleading. That the section cures pleadings drawn and signed by advocates without a valid practicing certificate and not commissioning of affidavits.

Counsel criticized the view expressed in the case of Suubi Kinyamatma Juliet Vs Sentongo Robinah Nakasirye (Supra) to the effect that the defect in an Affidavit may be cured by
205 recommissioning another affidavit on the ground of having been made per incurium. Counsel submitted that the Court in that case appears not to have drawn its attention to the clear wording of the section and the difference between a pleading signed by an advocate without a valid practicing certificate and administering an oath, which goes to the root of validity of the affidavit and is governed by both the **Advocates Act** and the **Commissioner
210 for Oaths (Advocates) Act**.

Second, Section 60 of the PEA requires that a Petition must be filed within 30 days from the date the results of the election are publicized in the Gazette. The timelines are very strict according to the decision of this court in Ikiror Kevin Vs Orot Ismael Election Appeal No. 105 of 2016. In the instant matter, at the time the objection was raised, the 30 days had since
215 lapsed.

Third, that according to Rule 4(8) of the Election Petitions Rules, the Principal Affidavit forms part of the Petition. As such, it must likewise be filed within the 30 days prescribed for filing the Petition. That the failure of the Petitioner to file a Petition with a valid supporting

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affidavit(s) collapses the Petition which cannot be cured. For this submission Counsel relied
220 on the case of Suubi Kinyamatama Juliet Vs Sentongo Robinah Kisakye (Supra).

Fourth, that **Rule 3 (c) of the Parliamentary (Election Petitions) Rules** defines "Petition"
to include an Affidavit in support required by the Rules to accompany the Petition.
Therefore, there is need to draw a distinction between the mandatory Affidavit supporting a
Petition (**envisaged under Rule 3 (c) and Rule 4(8) of the Rules**) which must be filed
225 together with the Petition within 30 days and the other affidavits supporting the Petition
which can be filed even after the expiry of the 30 days. For this position, Counsel relied on
EPA No. 22/2016 Akugizibwe Lawrence Vs Muhumuza David and EC.

Counsel argued that the implication of the above position is that if the Principal Affidavit of
the Petitioner is struck out, the Petition is rendered defective. It cannot stand. To allow a
230 Petitioner to file a fresh Principal Affidavit, at the time when pleadings had been closed and
the 30 days have lapsed, would amount to filing the Petition out of time. The exception
which the decision in Suubi Kinyamatama Juliet Vs Sentongo Robinah Nakasirye (op cit)
may apply is with reference to the other Affidavits in support but not with the Petitioner's
Principal Affidavit.

235 Regarding ground three, Counsel submitted that it is trite law that costs follow the event.
That the 2nd Respondent having successfully defended the Petition was entitled to costs.
The 2nd Respondent instructed private legal Counsel to represent it in defending the
Petition. The fact that the Petition was determined on a point of law, is not reason to deny
the 2nd Respondent costs.

240 Counsel prayed that this Court upholds the decision of the trial Court, finds that the appeal
lacks merit and dismisses it with costs.

Resolution



We note that the gist of the complaints raised by this appeal is about the validity of affidavits commissioned by an advocate who, at the material time, did not have a valid Practising Certificate, and whether an aggrieved Petitioner can be allowed to cure such commissioning defect in the Affidavit outside the 30 days' time limit prescribed by the PEA for institution of Election Petitions. Such complaints are not unique to the instant matter. They have become recurrent in election petitions arising from each one of our election cycles for Members of Parliament since 1996. The major reason appears to be that those elections have been held in the first quarter of the year and the resultant election petitions challenging the election results are filed soon thereafter. This is shortly after the "grace period" granted to advocates to renew their annual Practising Certificates has expired at the end of the month of February of the respective years and it is not uncommon, at that time, to find many advocates having not completed the process of renewal of their Practising Certificates in accordance with Section 11 of the Advocates Act, Cap. 267. As such, the issues raised by the appellant are matters of public importance.

As a first Appellate Court, the duty of this Court in an appeal of this nature is to re-appraise the evidence before the Trial Court and draw its own inferences of fact while making allowance for the fact that it did not have the opportunity enjoyed by the Trial Court of seeing or hearing the witnesses testify. **See Rule 30(1) of the Judicature (Court of Appeal) Rules S.I 13-10, Pandya Vs R [1957] EA 336, and The Executive Director of National Environmental Management Authority (NEMA) Vs Solid State Limited, Supreme Court Civil Appeal No.15 of 2015(unreported).**

It is with the above principles in mind that I now proceed to resolve the grounds of appeal in the order in which they were set out in the Memorandum of Appeal.

Ground 1

Ground 1 was couched as follows:



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“The Learned Trial Judge erred in law in rejecting the petitioner’s affidavit in support of the petition and other accompanying affidavits for having been commissioned by a commissioner for Oath who had not renewed his practicing certificate thereby occasioning the Petitioner, a miscarriage of Justice.”

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From the record of appeal, the reason given by the Learned Trial Judge for rejecting the Petitioner’s Principal Affidavit and the other accompanying Affidavits is that they were invalid on account of having been commissioned by an advocate who did not hold a Practising Certificate at the time.

In their submissions, Counsel for the appellant do not directly address the issue of the validity of the Affidavits commissioned by an advocate who did not have a valid Practising Certificate and yet this is critical to the resolution of ground one of the appeal.

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On the other hand, the respondents contend that the right of the advocate to commission Affidavits is dependent on his/her continued right to practice as an advocate. And that without a valid Practising Certificate, all the documents purportedly commissioned by such an advocate are invalid with no legal effect whatsoever.

In her Ruling, the trial judge stated addressed the issue as follows:

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“... it is clear that Mr. Komakech did not have a practicing certificate when he commissioned the affidavit of the petitioner on 12th March 2021 (a fact that was conceded to by Counsel for the petitioner) thereby rendering the said affidavit invalid. The petition before this Court is therefore fatally defective, invalid, incompetent and must collapse.” [Emphasis added]

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In coming to the above conclusions, the trial judge relied heavily on the decision of the Lira High Court (Musota, J) in the case of Otim Nape George William Vs Ebil Fred & Another Election Petition No. 17 of 2011 which, in turn, had relied on Kabogere Coffee Factory Vs Haji Twahibu Kigongo Supreme Court Civil Application No.10 of 1993 (unreported), and Bakunda Darlington Vs Dr. Kinyatta Stanley and Anor, Court of Appeal Civil Appeal No.27

295 of 1996 (Unreported) which the trial judge stated as having been followed in the cases of
The Returning Officer, Iganga District and Another Vs Haji Muluya Mustaphar, Civil Appeal
No.13 of 1997, and confirmed by the Supreme Court in the case of Prof. Syed Huq Vs The
Islamic University in Uganda, Civil Appeal No.47 of 1995.

I have closely studied the record of proceedings before the trial court. The appellant's
300 contested Principal Affidavit was titled, "Affidavit Accompanying and in Support of the
Petition" and stated to have been sworn at Kampala on 12th March 2021 before a
Commissioner for Oaths known as "Komakech Geoffrey" of "Victoria Advocates and Legal
Consultants". It was filed in the High Court of Uganda at Soroti on 15th March 2021 with the
Petition. There was no contention that at the time of Commissioning the impugned Affidavit,
305 Mr. Komakech had not renewed his Practising Certificate as prescribed under the
Advocates Act authorizing him to practice as an advocate in the High Court for the year
2021. This fact was confirmed by the Letter of the Chief Registrar of the Courts of
Judicature.

The contention is about the validity of the Affidavits commissioned by Mr. Komakech as a
310 Commissioner for Oaths when he did not have a valid Certificate to practice as an advocate.

Commissioning of Affidavits by an advocate is provided for by Section 1 of The
Commissioner for Oaths (Advocates) Act, Cap. 5. As far as is relevant to the matters under
consideration, the section states as follows:

"1. Appointment of practicing advocates as commissioners for oaths.

- 315 1) *The Chief Justice may, from time to time, by commission signed by
him or her appoint persons being practicing advocates who have
practiced 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 practicing advocates to be
320 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.

2) ...Not relevant.

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3) ... Not relevant.

4) Each commission shall immediately terminate on **the holder ceasing to practice as an advocate.** [Emphasis mine]

From the above provision of the law, the appointment of an advocate as a Commissioner for Oaths is *inter alia* dependent upon his/her being a "**practicing advocate**" at the material time. Therefore, there is no doubt that possession of a valid practising certificate issued pursuant to Section 11 of the Advocates Act is a key qualification criterion at the appointment stage.

Upon appointment, the Commissioner signs the Roll of Commissioners and the law that governs the discharge of his/her mandate as a Commissioner for Oaths is the Commissioners for Oaths (Advocates) Act. There is no provision in the Commissioners for Oaths (Advocates) Act that the Commission expires annually and/or that it should be renewed annually. Instead, it is provided that the commission continues to be valid until revoked by the Chief Justice under Section 1(1) of the Commissioners for Oaths (Advocates) Act, or until it is terminated on the holder "**ceasing to practice as an advocate**" pursuant to Section 1 (4) of the Commissioners for Oaths (Advocates) Act.

The Supreme Court of Uganda had occasion to consider the phrase "**ceasing to practice as an advocate**" in *Prof. Syed Huq Vs The Islamic University in Uganda, SCCA No. 47 of 1995 (Unreported)* where Wambuzi, C.J who wrote the leading judgment stated:

345 ***"Be that as it may and with respect I think there was some misconstruction of the provisions of section 2 (now section 1) 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—***

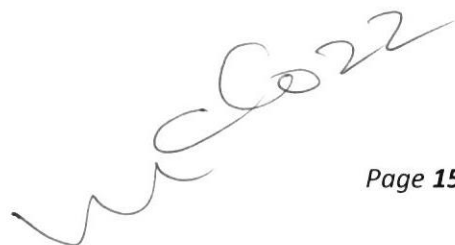
350 **section (4) does not mean expiry of the advocates practising certificate. It**
is common knowledge that a practising certificate is issued for a particular
year and expires on the 31st December of that year irrespective of the date
of issue. If therefore an advocate gave up his legal practice in April to do
355 **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.” [Emphasis added]

The above decision is still good law and binding on this court under the doctrine of Stare
decisis. I can simply add that to hold that the expiry of the annual Practising Certificate
issued to advocates under Section 11 of the Advocates Act automatically terminates the
360 Commission under Section 1 (4) of the of the Commissioners for Oaths (Advocates) Act
would inevitably imply that each year an advocate whose Commission was terminated on
account of the expiry of the Annual Practising Certificate as an advocate on the 31st of
December of the preceding year but who still desires to continue being a commissioner for
oaths after renewal of his Practising certificate as an advocate must lodge a fresh
365 application for appointment to the Chief Justice under Section 1(1) of the Commissioners for
Oaths (Advocates) Act and fulfill all the other conditions set out for qualification for a fresh
appointment of a Practising advocate as a Commissioners for Oaths. This is an absurdity
which could not have been intended by the law makers.

Accordingly, I would hold that the expiry of the Practising Certificate granted to an advocate
370 under Section 11 of the Advocates Act on the 31st day of December of the year of issuance
does not ipso facto terminate the Commission of the concerned advocate. As such, the trial
judge erred to hold that the Affidavits of the appellant which were commissioned by Mr.
Komakech before renewing his practicing certificate for the year 2021 were invalid and/or
dismissing the appellant's suit on that ground. Ground one would succeed.

375 **Ground 2**

Ground two was couched as follows:



380 ***“The Learned Trial Judge erred in law when she misdirected herself in holding that the petitioner will be filing a fresh petition in the event that the petitioner’s affidavits are recommissioned before a commissioner for oaths with a valid practicing certificate.”***

When dealing with the issue as to whether after the expiry of the 30 days prescribed by Section 60 of the PEA for filing an election petition the court still had jurisdiction to permit the appellant to rectify the defects in the commissioning of the Principal Affidavit in the event of court finding that indeed the Principal Affidavit was invalid as argued by the respondents,
385 the trial judge stated as follows:

390 *“Counsel for the petitioner prayed that the Court allows the petitioner to file fresh affidavits in support of the petition should the Court indeed find that the affidavit in support of the petition is invalid. It should be noted that the said Mr. Komakech commissioned several other affidavits in support of the petition when he did not have a valid practicing certificate and the same are invalid and accordingly struck out.*

395 *As pointed out by Honourable Justice Moses Kazibwe in **Kamurali Jeremiah Birungi Vs Nathan Byanyima and Another Election Petition No.0002 of 2021**, while stating that the effect of non-renewal of a practicing certificate by the advocate who commissioned the affidavit did not amount to commissioning an affidavit; under Section 60 of the Parliamentary Elections Act and Rules 3 (c) and 4 (8) of the Parliamentary Elections (Interim Provisions) Rules, the petition filed with such an affidavit collapses since it is not supported by any evidence as the law requires...*

400 *From the above, it is the firm view of this Court that once a petition that is required by law to be filed thirty days after the publication of election results in the gazette is found to be incompetent and is struck out, allowing a petitioner to file a fresh petition several months later is illegal and in contravention of **section 60 of the Parliamentary Election Act** and will set a very bad precedent for electoral processes in this Country. In the circumstances, this Court is unable to grant the prayers of Counsel for the Petitioner as prayed.”*
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The decision of the trial court to deny the appellant leave to rectify the alleged defect in the commissioning of the Principal Affidavit appears to have been based on three reasons: First, that the commission of Komakech had expired simultaneously with his Practising

410 Certificate as an advocate. Second, that the Petition without an accompanying Principal
Affidavit is incompetent in law as it cannot stand without a valid accompanying Principal
Affidavit. And third, that granting the appellant leave to file a fresh Principal Affidavit after
the 30 days prescribed by Section 60 of the PEA for filing election Petitions would be
tantamount to allowing a fresh Petition to be filed in contravention of Section 60 of the PEA
415 and, as such, is illegal.

I have already found that the validity of the Commission granted to an advocate under
Section 1 of the Commissioners for Oaths (Advocates) Act is not dependent on the
existence of a valid Practising certificate on the part of the Commissioner for Oaths, and
that the trial judge erred to strike out the Principal Affidavit and, ultimately, dismiss the
420 petition. This finding would ordinarily dispose of ground two of the appeal. But for the
purpose of completeness, I will closely analyse reasons two and three above upon which
the trial judge based to make the decision which is the subject of ground two.

Competence of the Petition without the Principal Affidavit.

The argument of Counsel for the respondents, which the trial judge accepted, is that an
425 Election Petition is required by law to be accompanied by the Principal Affidavit. And that
once the Principal Affidavit is found to be invalid or defective, then the Petition automatically
collapses and is rendered incompetent. In support of their argument, Counsel relied on Rule
4(8) of the Election Petition Rules which requires the Petition to be accompanied by an
Affidavit, and the definition of the term "petition" under Rule 3 of the Election Petition Rules
430 to include the Affidavit accompanying the Petition. Counsel also quoted the decision of this
court in Suubi Kinyamatama Juliet Vs Sentongo Robinah Nakasirye & Anor. (op cit) in that
aspect.

With great respect, I am unable to accept the above arguments of counsel and/or to follow
the decision of this court in Suubi Kinyamatama Juliet Vs Sentongo Robinah Nakasirye &

435 Anor, (op cit) for the reasons below:

First, the PEA itself sets out the definition of the term "**Election Petition**" for purposes of the PEA in Section 1(1) of the PEA. As far as is relevant, the section provides as follows:

"S.1 Interpretation

1. (1) *In this Act, unless the context otherwise requires—*

440 ... "**election petition**" means a petition filed in accordance with section 60..."

Section 60 of the PEA, on the other hand, is couched as follows:

"S.60 Who may present election petition

(1) *Election petitions under this Act shall be filed in the High Court.*

445 (2) *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 in a manner prescribed by regulations.*

450 (3) *Every election petition shall be filed within thirty days after the day on which the result of the election is published by the Commission in the Gazette.*

455 (4) *For the purposes of this section, where any rules of court require a petition to be filed in any particular registry of the High Court, the filing of the petition in a registry of the High Court other than in the first-mentioned registry shall not invalidate the petition; and the registrar at the place where it is filed shall take necessary steps to cause the petition to be transferred to the appropriate registry but the court may award costs in respect of such filing."*

The definition of "**election petition**" as set out in Section 1(1) of the PEA read together with Section 60 of the PEA leads to the conclusion that once the "Petition" meets the



460 components set out in Section 60 of the PEA, then it qualifies to be termed as an “Election
Petition” for purposes of the PEA. The “Affidavit Accompanying the Petition” (Principal
Affidavit) is not one of the components set out in Section 60 of the PEA.

Second, the Principal Affidavit simply contains evidence in proof of the allegations and
claims as set out in the Petition. However, the PEA in Section 64 expressly provides, *inter*
465 *alia*, the mode of proof of the allegations and claims in election petitions to be in the same
manner as in any other civil proceedings. The section is couched as follows:

“64 Witnesses in election petitions

(1) *At the trial of an election petition—*

470 (a) *any witness shall be summoned and sworn in the same manner as a
witness may be summoned and sworn in civil proceedings;*

(b) *the court may summon and examine any person who, in the opinion of
the court is likely to assist the court to arrive at an appropriate
decision;*

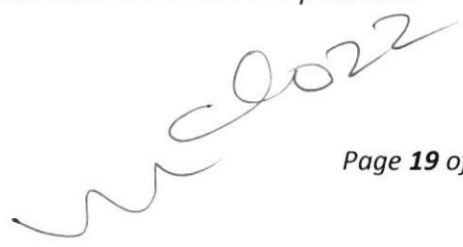
475 (c) *any person summoned by the court under paragraph (b) may be
cross-examined by the parties to the petition if they so wish.*

(2) *...Not applicable” [Emphasis added]*

The inference from the above section is that an Election Petition can stand without the
Accompanying Affidavit and the allegations in the Petition may be proved by other forms of
evidence as usually happens in ordinary civil proceedings.

480 Third, the requirement for an Election Petition to be accompanied by an Affidavit, the
Principal Affidavit, was a creature of Rule 4(8) of the Election Petition Rules. Rule 4(8) of
the Election Petition Rules provides:

485 *“The petition shall be accompanied by an affidavit setting out the facts on which
the petition is based together with a list of any documents on which the petitioner
intends to rely.”*



My understanding of the above Rule is that it was intended to expedite the trial of Election Petitions. But in the absence of the Principal Affidavit, the above Rule cannot be said to have excluded recourse to proof of the allegations in the Election Petition using the other modes applicable in ordinary civil proceedings which are permissible by Section 64 of the PEA. So, Rule 4(8) of the Election Petition Rules does not form a valid legal basis for holding that the Petition cannot stand without the Accompanying Principal Affidavit.

As for the definition of the term "petition" by Rule 3 of the Election Petition Rules, it is stated thus:

"3) Interpretation

In these Rules, unless the context otherwise requires—

(a) *Not applicable.*

(b) ... *Not applicable.*

(c) *"petition" means an election petition and includes the affidavit required by these Rules to accompany the petition;*" [Emphasis added]

My understanding of the use of the expression "***In these Rules***" in Rule 3 is that the definition of the term "petition" as set out in the Rule applies and/or is limited to the Election Petition Rules only. To stretch the said definition to extend to the PEA which itself has its own definition of the same term has no legal basis.

In the premises aforesaid, I would hold that an invalid or defective Principal Affidavit does not, automatically render an election petition under Section 60 of the PEA defective. The requirement by the Election Petition Rules for use of the Affidavit Accompanying the Petition and Affidavit evidence generally in the trial of election Petitions was intended to expedite the trial of election petitions in compliance with the spirit of the PEA. It should be encouraged and ought to be respected by litigants in election petitions. But it does not oust the other forms of evidence ordinarily used in civil proceedings which are permissible under Section

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64 of the PEA. Such forms of evidence include oral evidence and witness statements. Where the trial Court finds that the Affidavit Accompanying Petition (Principal Affidavit) is defective, the Court still has the option of granting the affected party the option to proceed to prove the claims in the Petition using the other options ordinarily available to litigants in ordinary civil proceedings like the use of oral evidence, Witness Statements or any other form of adducing evidence.

Rectification of the defects in the Principal Affidavit after the 30 days prescribed by Section 60 for filing election Petitions.

The power of the trial court to grant the appellant time to make good the defect in documents occasioned by the use of an advocate who had no valid Practising Certificate arises from Section 14A (1) (b) and Section 14A (2) of the Advocates (Amendment) Act, 2002; while the 30 days' time limit for filing of the election Petition is prescribed by Section 60 (3) of the PEA, and Rule 5(1) of the Election Petition Rules. Section 60(3) of the PEA is couched as follows:

“Every election petition shall be filed within thirty days after the day on which the result of the election is published by the Commission in the Gazette.” [Emphasis added]

On the other hand, Rule 5(1) of the Election Petition Rules provides as follows:

“Presentation of a petition shall be made by the petitioner leaving it in person or by or through his or her advocate, if any, named at the foot of the petition, at the office of the registrar within thirty days after the declaration of the result of the election” [Emphasis added]

Whether the trial court erred in denying the appellant time to rectify the alleged defect in commissioning the Principal Affidavit on the ground that to do so would contravene the timelines set by S.60 of the PEA depends on whether the alleged wrongdoing complained about in respect of the Principal Affidavit is one of those covered by Section 14A of the

Advocates Act.

Section 14A of the advocates Act is couched in the following terms:

“14A Protection of clients of advocates

- 540 1) *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—*
 - 545 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;*
 - 550 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.*
- 555 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.*
- 560 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.” [Emphasis added]*

565 The operative words from the above section are “**pleading or contract or other document made or action taken by the advocate on behalf of any client**”. My understanding of the import of the above phrase is that the section covers documents made and actions taken where an advocate-client relationship exists or has existed. The term “advocate” is defined by Section 1 of the Advocates Act to mean “any person whose name is duly entered upon the Roll [of Advocates]”.

On the other hand, the term “client” is defined by the same section in the following terms:

570 “**client**” includes “any person who, as principal 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
575 any costs”

The question that arises is whether the commissioning of the Principal Affidavit is one of the actions made in the circumstances where an advocate – client relationship exists.

I think not. My view is further reinforced by Section 4 of the Commissioners for Oaths Act which expressly bars a Commissioner for Oaths from commissioning documents “in any
580 proceeding or matter in which he or she is the advocate for any of the parties to the proceeding or concerned in the matter or clerk to any such advocate or in which he or she is interested”. The section is couched thus:

4. Powers of a Commissioner for oaths

585 (1) A commissioner for oaths may, by virtue of his or her commission, in any part of Uganda, administer any oath or take any affidavit for the purpose of any court or matter in Uganda, including matters ecclesiastical, matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognisance in or for the purpose of any civil proceeding in the High Court or any magistrate’s court; except that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he or she is the advocate for any of the parties to the proceeding or concerned in the matter or clerk to any such advocate or in which he or she is interested. [Emphasis added]
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In the premises aforesaid and for completely different reasons, I would not fault the trial
595 court for refusing to invoke Section 14A of the Advocates Act to remedy the alleged defects in the commissioning of the Principal Affidavit.

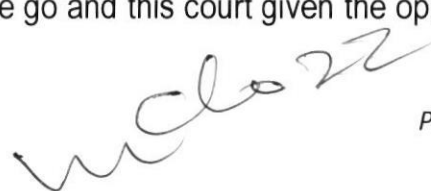


Accordingly, ground two would fail.

Conclusion

- 600 1. This appeal having succeeded only on ground one and failed on ground two, I would allow the appeal in part.
2. I would set aside the orders of the trial court.
3. I would order that the case be remitted back to the High Court for trial by another judge on its merits.
- 605 4. As far as the costs are concerned, I would order that each party bears its costs in this court. But the costs in the lower court should abide the outcome of the trial of the case on the merits. The reason for this order is that the appeal has succeeded based on reasons which are different from those articulated by Counsel for the appellant. Second, the winning margin in this election was very narrow and bound to raise very high emotions and anxiety amongst the contestants and the electorate. As such, without
610 evidence of obvious abuse of the court process, the aggrieved parties should always be encouraged to access the court for civil resolution of the allegations of election malpractice without fearing to be penalized by way of costs.

Before I take leave of this matter, I wish to note that the effect of the decision of this court in this matter is that adjudication of the electoral dispute between the parties is going to start
615 afresh in the High Court at a time when the Parliamentary elections cycle is at an advanced stage of the hearing and conclusion of election petition appeals. This would have been avoided if the trial judge had, upon resolving the preliminary point of law, gone ahead to consider the merits of the case – just in case it subsequently turns out that she erred in her interpretation and application of the law in respect of the preliminary objection. In that case,
620 the dispute would get to the appellate stage in one go and this court given the opportunity to



likewise dispose of the dispute conclusively at once.

I need to re-emphasize that the cardinal obligation of the trial court in election petitions is to ensure that not only is the law complied with, but also that election disputes are investigated on their merits and expeditiously disposed of at the trial and appellate stages. Where a matter would in an ordinary trial be disposed of through a Ruling on a point of law, the trial court in a Parliamentary election dispute ought to go a step further and even consider the merits of the case itself. Our history in Parliamentary election disputes teaches us that most Parliamentary election petitions disputes are likely to end up in the final appellate court before the litigants give up. Expeditious disposal and conclusion of such election disputes which is expected of our courts by the PEA would have been greatly facilitated by the trial court if it had made a decision on both the preliminary points of law and the merits of the case itself. With such a decision of the trial court in place, this court after resolving the preliminary points of law and overruling the trial court, would have been in a position to go ahead with resolution of the appeal on its merits without having to send the file back to the High Court as has happened in this matter.

Signed, dated and delivered at Kampala this ^{18th} day of ^{July} 2022.



MUZAMIRU MUTANGULA KIBEEDI
Justice of Appeal



THE REPUBLIC OF UGANDA

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

CORAM: EGONDA-NTENDE, KIBEEDI AND MUGENYI, JJA

ELECTION PETITION APPEAL NO. 9 OF 2021

(Arising from Election Petition No. 8 of 2021)

SAMSON LOKERIS APPELLANT

VERSUS

**1. EMMANUEL KOMOL
2. ELECTORAL COMMISSION RESPONDENTS**

**(Appeal from the Judgment of the High Court of Uganda holden at Soroti
(Mugenyi Bitature, J) in Election Petition No. 1 of 2021)**

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JUDGMENT OF MONICA K. MUGENYI, JA

I have had the benefit of reading in draft the lead Judgment of my brother Hon. Justice Muzamiru Mutangula Kibeedi, JA in this Election Appeal. I agree with the decision arrived at, the reasons therefor and the orders proposed, and have nothing useful to add.

Dated and delivered at Kampala this ^{12th} Day of ^{July},
2022.



Monica Kalyegira Mugenyi

Justice of Appeal