

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
ELECTION PETITION APPEAL NO. 47 OF 2021**

CORAM:

**HON. JUSTICE RICHARD BUTEERA, DCJ
HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA
HON. JUSTICE IRENE MULYAGONJA, JA**

MALE

WILSON :::APPELLANT

VERSUS

- 1. KAYONDOFRED**
- 2. ELECTORAL COMMISSION:::::::::::::
RESPONDENTS** (Arising from the decision of Olive Kazarwe
Mukwaya, J sitting
at Mukono in High Court Election Petition No. 001 of 2021)

JUDGMENT OF THE COURT

Wilson Male and 5 other candidates participated in the directly-elected Member of Parliament Elections for Mukono South Constituency which were held on 14th January 2021. They all lost to Fred Kayondo, the 1st respondent, who was declared winner of the election by the 2nd respondent. The petitioner lodged a petition seeking to have the Mukono South 14th of January election nullified. He cited inconsistencies and illegalities that tainted the election and whole campaign process.

When the matter came up for hearing before the trial Judge, the 1st respondent raised a preliminary objection to strike out the petition. His contention was that the appellant's affidavits supporting the petition were commissioned by a Commissioner for Oaths who had no valid practicing certificate at the material time. The trial Judge allowed the preliminary objection ruling

that the affidavits in support of the election petition were invalid owing to the fact that they were commissioned before a Commissioner for Oaths who had no valid practicing certificate. The learned trial Judge further ruled that the petition was 5 incompetent and incurably defective and struck it out with costs to the respondents.

This appeal consists of 6 grounds that:

1. The learned trial Judge erred in law and fact when she held that the appellants petition was incompetent and 10 incurably defective.
2. The learned trial Judge erred in law and fact when she refused and ignored to follow the decisions of Supreme Court and Court of Appeal which were binding on her.
3. The learned trial Judge erred in law and fact when she 15 held that the appellant was not under the protection of an innocent litigant.
4. The learned trial Judge erred in law and fact when she ignored and did not follow her previous binding decision.
5. The learned trial Judge erred in law and fact when she 20 overlooked and condoned the respondent's defective pleadings.
6. The learned trial Judge erred in law and fact when she did not consider the litigant's submissions.

Appearances and Representation

25 The Appellant was represented by LMN Advocates while the 1st respondent was represented by M/s Nalukoola Kaketo

advocates & Solicitors. The 2nd respondent was represented by Mr. Hamidu Lugoolobi, a Principle Legal Officer at the Election Commission of Uganda. Both counsel filed written submissions which this court relied on in the determination of this appeal. **The Appellant's Submissions**

The appellant argued grounds 1,2, and 3 together.

1. The learned trial Judge erred in law and fact when she held that the appellants petition was incompetent and incurably defective.
2. The learned trial Judge erred in law and fact when she refused and ignored to follow the decisions of Supreme Court and Court of Appeal which were binding on her.
3. The learned trial Judge erred in law and fact when she held that the appellant was not under the protection of an innocent litigant.

The Counsel for the appellant attacked the finding of the learned trial Judge that an affidavit commissioned by a commissioner for oaths without a valid practising license is incompetent and incurably defective. He submitted that the learned trial Judge erroneously struck out the petition on a mere technicality. He relied on **Kizza Besigye v Yoweri Kaguta Museveni Election Petition No.1 of 2001** and also **Kizza Besigye v Yoweri Museveni Election Petition No.1 of 2006** in which Supreme Court held that election petitions are very important, and a liberal approach or view should be taken in dealing with defective affidavits so that a petition is not defeated on technicalities. Counsel also relied on **Article 126** of the Constitution which provides that courts should administer substantive justice without undue regard to technicalities and that rules of procedure should not be employed to defeat justice but to be

handmaidens of justice. Moreover, he added, that rule **26 of the Parliamentary Election (Interim Provisions) Rules SI 141-2** provides, in rather mandatory terms, that election petitions ought not to be struck out or defeated by mere technical defects or irregularities such as a defective affidavit. Counsel further relied on rule 4 (8) of the **Parliamentary Elections (Interim Provisions) Rules S.I 141-2** and rule 15 (1) which provide that election petition evidence shall be by affidavit. Counsel made a distinction between procedural and substantive justice submitting that this was a procedural irregularity not a matter of substantive law and could be cured under Article 126(e) of the Constitution. He submitted that had the trial Judge properly applied her mind to the law, she would have found that an affidavit commissioned by an advocate without a practising certificate could be cured. Counsel relied on **Banco Arabe Espanol v Bank of Uganda [1999] 2 EA 22** for the proposition that "the administration of justice requires that the substance of all disputes should be investigated and decided on their merits and that errors or lapses should not necessarily debar a litigant from the pursuit of his/her rights." Counsel also relied on **NEC v Mukisa Foods C.A.C.A No.42 of 1997** to submit that denying a litigant hearing should be a last resort. Counsel submitted that an election petition should not be struck

Lynd

BR

Bau

out or be defeated because of a defective affidavit commissioned by an advocate without a Practicing Certificate without according the petitioner time to make fresh affidavits. Counsel also faulted the learned trial judge for not adhering to the rule of *stare decisis* and precedent. He relied on **Wanambwa Milton v Wanjusi Wasieba & EC EPA No.1 of 2005** and **Namuju Dionizia Cissy & EC v Martin Kizito Sserwanga Election Petition Appeal No.62 of 2016** where it was held that it was against the principle of *stare decisis* for a lower court not to follow a binding decision or precedent of a higher court.

Counsel attacked the learned trial judge for striking out the pleadings and denying the petitioner justice by visiting the omissions, inadvertence, mistakes, faults, lapses, or the conduct of the advocate on the petitioner; see **Banco Arabe Espanol v Bank of Uganda**. He then relied on **section 66(1) of the Advocates Act CAP 267 as amended** which expressly prohibits an advocate without valid practicing certificate from taking instructions directly or indirectly from clients. He further argued that the Act forbids an advocate from drafting, drawing or preparing any instrument in any legal proceedings and makes it a ground for finding such counsel guilty of misconduct. Counsel relying on **Regulation 31(1), 11 and 14 of the Advocates Professional Conduct Regulations (supra)**, faulted the learned trial Judge for not making a finding that the Commissioner for Oaths who acted without a valid practising certificate and took instructions without disclosing the same, became the transgressor and not his client. It was Counsel's



submission that as the transgressor, the Commissioner for Oaths should have been punished for commissioning the affidavits without a valid Practising Certificate rather than visiting the full weight of the errors on the petitioner. He submitted that it is incumbent upon the advocate to disclose to the public that he either has a valid practising -certificate or not. He relied on **Prof Syed Huq v The Islamic University in Uganda SCCA No 47 of 1995** in which Karokora JSC declared that the remedies for the innocent litigant whose pleadings have been acted upon by an advocate without a valid practicing certificate would lie in starting the suit afresh. And further that **section 14A (1) (b) (ii) Advocates Amendment Act** provides that the innocent litigant shall be allowed time to engage another advocate and that in case of pleadings the client ought to rectify the defect of the pleadings signed by an advocate without a valid practising certificate by refiling the pleadings without seeking leave of court. He relied on **Suubi Kinyamatama Juliet v Sentongo Robinah Nakasirye Election Petition Appeal No.92 of 2016** which applied section 14A (1) (b) (ii) of the Advocates Act and found that the petitioner having realised that the affidavit had been commissioned by an advocate who had no practising certificate should have proceeded under the provisions of the section 14 A to make good the defect. Counsel added that the petitioner does not need to seek leave to rectify defective pleadings commissioned by an advocate without a valid Practising Certificate. Counsel submitted that in the instant appeal, upon realisation of the



error in commissioned affidavits the appellant ameliorated the defect when he recommissioned the affidavits and did not alter any contents that were contained in his pleadings but refiled and served them on the respondents who were not, in any way, prejudiced. Counsel submitted that it was erroneous of the learned trial Judge to have overlooked this effort. He further faulted the learned trial Judge for finding that there was no client-advocate relationship existing between the appellant and his Commissioner for Oaths Aogon Fabian and that he only performed the role of Commissioner for Oaths as he was barred from being the
10 petitioner's advocate in the same proceedings. Counsel submitted that the learned trial Judge erred in law and did not appreciate the legal services rendered by a Commissioners for Oaths (Advocates) Act under section 4(3) of the Commission Oaths Act which provides that a Commissioner of Oaths is entitled to charge and be paid such fees for
15 administering or taking oath or affirmation of an affidavit. Counsel argued that although the commissioner is barred from representing the appellant because he is an attesting witness, this does not render the fact that a clientadvocate relationship was created by the fact of attestation. He reiterated that the learned trial Judge erred in law and in fact when
20 she made a finding that the relationship between a Commissioner for Oaths and a Deponent was not a clientadvocate relationship.

Ground No.4, whether the learned trial Judge erred in law when she ignored and did not follow her previous binding decision.

Counsel criticised the learned trial Judge for not considering her earlier decision on a similar preliminary objection. Counsel was concerned that the learned Judge did not provide any justification for disregarding or deviating from the reasons contained in her earlier or previous decisions over the same subject matter contained in **Kibulwe Simon & 2 Ors v Paul Mbazzi Kiggye &**



2 Ors, Originating Summons No. 10 of 2018 while adjudicating the same preliminary objection in this case. He observed that because the trial Judge did not follow her own precedent, there are two conflicting decisions concerning the same subject matter not only by the same court but also by the same judge.

Ground No.5, whether the learned trial Judge erred in law and fact when she overlooked and condoned the respondent's defective pleadings. Counsel faulted the learned trial Judge for ignoring the defect in the respondent's pleadings since they were also commissioned by a Commissioner for Oaths without a current practicing certificate and the 2nd respondent's pleadings were drafted and acted upon by an advocate who last renewed his practising certificate 4 years back in 2017. Counsel submitted that an illegality can be raised at any point during proceedings as was held in **Uganda Railways Corp v Ekwaru & Ors [2008] HCB 61 at 62**, that once this illegality had been brought to the attention of court it overrides all questions of

pleadings. He also referred to **Makula International v Cardinal Nsubuga & Anor (1982) HCB 12**. Counsel submitted that the appellate courts cannot afford to let an illegality that escaped the eyes of the trial court stand. Counsel elaborated that these 5 illegalities were brought to the attention of the learned trial Judge who disregarded them. Counsel submitted that the respondent's pleadings ought to have been struck out with costs since the respondents had come to court with unclean hands and that the doctrine was applicable to them as well although 10 the trial Judge chose to be wilfully blind.

On Ground No.6 whether the learned trial Judge erred in law and fact when she did not consider the litigant's submissions.

Counsel faulted the learned trial judge for rejecting the appellant's rejoinder filed out of time. He contended that the 15 learned trial Judge did not consider the appellant's prayer and misdirected herself when she found that the appellant had not sought leave. Counsel further criticized the learned trial Judge for overlooking the defective pleadings of the opposite party only to punished the appellant the same mistake that all parties 20 had made. He submitted that the respondents should not have benefitted from a process they too had flouted. Counsel

submitted that if the Judge had considered the submissions of the appellant she would have applied the same reasoning she applied on the 2nd respondent since section 14A of the 25 **Advocates Amendment Act** stipulates that litigant's pleadings shall not be dismissed for reason that the advocate who acted upon them had no valid practicing certificate. Counsel attacked



the learned trial Judge's findings and prayed that the decision be set aside with costs and that the petition be heard on its merits. He prayed that court be pleased to grant other remedies or reliefs as it shall deem fit.

The 1st Respondent's Submissions

10 The 1st respondent submitted that the petition that was presented
10 before the High Court was incompetent and incurably defective
and it was not a surprise that it was struck out with costs. Counsel
agreed with the learned trial Judge when she refused to grant the
appellant a remedy for the defective pleadings, which request was
made belatedly in submissions in rejoinder after a preliminary
objection had been raised on the competency of the petition.
Counsel agreed with the findings of the learned trial Judge that the
appellant's affidavits that supported the petition were incurably
15 defective since the Commissioner for Oaths did not have a PC.
15 Counsel referred to the decision in **Suubi Kinyamatama Juliet v
Sentongo Robinah Nakasirye (supra)** to submit that the
affidavits commissioned by an advocate who is not in possession
of a valid PC are not valid and cannot be cured by Article 126.
20 Counsel submitted that rectifying the affidavits would imply
20 bringing a new petition which is not permissible under **section 60
of the Parliamentary Elections Act and Rules 3(c) and 4(8)** of
the **Parliamentary Elections (Interim Provisions) Rules**. It was
the respondent's argument that the High Court had no residual
power to extend the time within which to bring the petition since
the timelines are fixed by an



Act of Parliament and that an option of rectifying the default is not legally available in the present case. Counsel submitted that the provisions of **Section 14A** of the Advocates (amendment) Act applied in **Suubi Kinyamatama Juliet v Sentongo Robinah Nakasirye (supra)** provide that there is a window for the litigant to take steps to ameliorate the situation by having another affidavit properly commissioned and filed. It is clear however, that the said option only exists where it is lawfully available and where such a party applies to the court for leave to take such a step before the issue is brought before the court for consideration. And that in this case the option was not available and upon realizing the impugned affidavits were commissioned by an advocate without a PC the appellant never took a step to rectify the error. That the affidavits accompanying the petition were invalid for having been commissioned by an advocate who was not in possession of a valid PC who had thus ceased to practice as an advocate at the time. He submitted that the petition was not accompanied by any affidavits as required by **section 60** of the PEA and rule 3 and 4(8) of the rules. Election petition No.1 of 2021 in the High Court at Mukono was incompetent and had to be struck out with costs to the respondents.

2nd Respondent's Submissions

Counsel argued Grounds No.1, No. 2 and No. 3 concurrently and the rest independently. Counsel argued that the appellant's petition was supported by affidavits commissioned by Aogon Fabian an advocate and Commissioner for Oaths who at the time of commissioning did not have a valid practicing certificate. Counsel submitted that the counsel did not have the capacity to administer the oath and that the affidavits

he commissioned were therefore invalid. He argued the petition was for that reason not compliant with the law and could not be cured under Article 126(2)(e) of the Constitution. Counsel submitted that the law requires practicing advocates to be appointed as Commissioner for Oaths and according to the letter by the Chief Registrar dated 26th August 2021 the said Fabian Aogon was not a practicing advocate. He further contended that the counsel therefore committed an offence under section 14 (1) A of the Act and that the documents he prepared, signed and filed were fatally flawed. Counsel relied on the Kenyan case of **Omusoti v The Returning Officer Mumias East Constituency, Independent Electoral and Boundaries Commission and Benjamin Washiali Jomo Election Petition No.9 Of 2017** and invited this court to be persuaded that a petition not supported by affidavit does not comply with the mandatory provisions of the law and is not competent. It was counsel's contention that this petition is dead on arrival and should not be allowed to see the light of day. Counsel added that this was not a mere procedural technicality, but a substantive requirement which this court should not tolerate. Counsel submitted that the learned trial Judge correctly struck out the appellant's petition.

Regarding Ground No. 4, whether the learned trial Judge did not follow binding precedent: Counsel agreed with how the

learned trial Judge applied the Court of Appeal decision of **Suubi Kinyamatama Juliet v Ssentongo Robinah Nakasirye & Anor Election Petition No.92 of 2016**. Agreeing with the trial Judge, counsel insisted that there was no advocate-client relationship between the appellant and the Commissioner for Oaths since one cannot act in the capacity of an advocate and the Commissioner for Oaths at the same time. Counsel invited this court to find that the appellant's petition was **void ab initio** and therefore incapable of rectification.

As regards Ground No.5 Counsel contended that the learned trial Judge did not overlook the respondent's defective pleadings as the appellant claimed. Counsel argued that instead, the learned trial Judge ably tackled the appellant's counter objection precisely and in accordance with the law. Counsel submitted that the appellant only raised the issue of lack of practicing certificates of the opposing counsel Hamidu Lugolobi and Kawalya for the first time in his rejoinder to the written submissions and therefore Mr. Lugolobi was never accorded an opportunity to respond to the appellant's false claims.

As relates to Ground No.6 counsel submitted that the learned trial Judge considered the written submissions of both parties but did not consider the ones that did not comply with court issued schedules but that even if she had considered them her decision would not have differed. Finally, counsel submitted that the petition was incompetent from the onset and fatally defective for being accompanied by defective affidavits.

Counsel prayed that this court finds no merit in the appeal, and dismisses it with costs.

Appellant's Submissions in Rejoinder

The appellant in rejoinder submitted that the appellant

recommissioned the affidavits and filed afresh the pleadings taking steps to ameliorate the defect of his affidavit. Counsel contended that the law does not require one to seek leave in order to rectify defective documents. He again relied on section 14 a (l)(b) (ii) of the Advocates Act and **Kinyamatama Juliet v Sentongo Robinah Nakasirye (supra)**. He then added that he sought leave from the Judge to consider the impugned affidavits, but the learned trial Judge did not consider his prayer and an innocent litigant was denied justice. Counsel disagreed with the submissions of the 2nd respondent that the irresponsibility must be accorded to the client or litigant and not the advocate. Counsel submitted that failure to commission the affidavit was professional misconduct for the advocate and that the affidavit commissioned without a PC is a curable defective. Counsel disagreed with the 2nd respondent's submission that a litigant can only be protected under section 14A of the Advocates Act if there exists a client - advocate relationship and the commissioner for oaths can never be in such a capacity. Counsel submitted that the rationale for one to become a commissioner for oaths must have one as an advocate. On ground no.5 Counsel submitted that the respondents had no clean hands and that the learned trial Judge erred when she

overlooked the defects in their pleadings, yet their pleadings should have been struck out with costs.

Lastly, on ground no.6 Counsel criticized the trial Judge again for disregarding the respondent's submissions in rejoinder and 5 appellant's submission in **surrejoinder**. Counsel reiterated his prayers again to allow the appeal and set aside judgment of the learned trial Judge and grant other remedies as deemed fit.

Consideration of the Court

This court is alive to its duty as the 1st appellate court to review, 10 and reappraise the evidence and consider all the materials which were before the trial court and come to its own

conclusion regarding the matter, considering, however, the fact that it neither saw nor heard the witnesses testify. **Rule 30 of**

the Judicature (Court of Appeal Rules) Directions, SI 13
15 **10, Pandya v R [1957] E A 336, Okeno v Republic [1972] E. A**
32

and Kifamunte Henry v Uganda SCCA NO. 10 of 1997. We
shall bear the above principles in mind.

We thank all Counsel for the well-thought-through submissions and authorities. We shall first consider ground No.1 and 3 of 20 this petition.

Ground No.1 & No.3

1. The learned trial Judge erred in law and fact when she held that the appellants petition was incompetent and incurably defective.



2. The learned trial Judge erred in law and fact when she held that the appellant was not under the protection of an innocent litigant.

The above two grounds attack the learned trial Judge's finding 5 that affidavits commissioned by a commissioner of oaths without a valid PC are incompetent and incurably defective.

Counsel for the appellant contended that such a defect is curable under **Article 126** of the Constitution as the petitioner is an innocent litigant and **section 14A 1 b (ii) of the Advocates** 10 **Amendment Act** allows a party to remedy the defect without leave of court. On the other hand, the respondent agreed with the trial judge's finding that the appellant instituted an incompetent petition with defective affidavits and never sought

leave of court in good time to correct it and as a result, the 15 petition was rightfully struck out. In contention is the interpretation of section 14A (b) (ii) of the Advocates Amendment Act. This section reads as follows:

"14A. Protection of Clients of Advocates

(1) Where-
20 (a) an advocate practises 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
25 (i)^{no} **pleading or contract or other document made or action taken by the advocate on behalf of any client shall be invalidated by any such event; and in the case of any**



proceedings, the case of the client shall not be dismissed by reason of any such event;

(ii)the client who is a party in the proceedings shall, where necessary, be allowed time to engage another advocate or otherwise to make good any defects arising out of any such event."

We are in agreement with the learned counsel for the appellant's interpretation of the section 14A. With great respect, we are unable to accept the learned trial Judge's position and conclusions in the interpretation of section 14A. It was contradictory that the trial Judge impeached the affidavits sworn before a Commissioner for Oaths for lack of a practicing certificate and impeached his inability to practice as an advocate and yet in the same breath allowed equally defective affidavits by the opposite counsel.

The facts as revealed in this case re-affirm the status of the innocent-litigator remedies available as was found in section 14A of the Advocates (Amendment) Act protects innocent litigants from crooked or errant advocates. Section 14A (b) (ii) makes provision for a victim to make good any defects arising from such an event and an election petition, however urgent, cannot circumvent section 14A where its applicable. In application of section 14 A, a court should not, when attention is drawn to it, proceed with defective pleadings but rather, time should be granted to the innocent litigant to rectify the error and correct, replace and file fresh affidavits. We therefore find that in the instant case, the affidavit in support of the petition had

not been duly commissioned, in so far as one of the advocates who commissioned it had not renewed his practicing certificate for the year 2016. This court finds that the court ought to have allowed the petitioner proceed to under section 14A(l)(b)(ii) 5 and to file fresh affidavits which were in compliance with the law.

More recently in **Ochwa David v Ogwari Polycarp & EC Election petition appeal No.16 of 2021**, a petitioner's election petition was struck out by the high court for being incompetent and incurably defective for reason that the affidavits supporting the petition were not commissioned by a commissioner for oaths without a valid practising certificate. This court declared that in circumstances such as those brought about by an errant

Advocate, the trial Judge erred when he denied the application to rectify the affidavit in support of the petition in compliance with section 14A of the Advocate's Act. The court also found that a petition can stand alone and can be heard without the accompanying affidavit and that where there is an affidavit in support, it is brought in witness of and not as an integral part of the petition. Where the affidavit in support is defective, it can be struck off without affecting the petition. We find no cause to depart from the above reasoning.

We are satisfied that the appellant made an application to the trial court seeking to rectify the defect and that this application ought to have been allowed by the trial Judge. We find that the appellant was entitled to partake of the remedy provided to him

under section 14A 1 (b) (ii) of the Advocates Act This court finds that section 14A does not create any time restrictions as to when an application to rectify might be made. This court is satisfied that this application was made as soon as the appellant was made aware of the defect in his pleading and ought to have been allowed, and the matter heard on its merits.

We therefore find that the learned trial Judge erred by not following the provisions of section 14A and also erred when she disregarded the protections granted to the appellant under section 14A. Ground No. 1 & 3 of this appeal succeed.

Our findings regarding Ground No. 1 & No. 3 dispose of the most important matters in this appeal. Having found them in the affirmative, we allow this appeal and see no reason to delve into the other grounds.

The appellant prayed that this court allows his appeal and exercises its jurisdiction enshrined in rule 32 (1) of the Judicature Court of Appeal Rules Directions SI 13-10 to set aside or vary the judgment of the trial Judge and remit the Election Petition to the High Court to be determined on its merits and that we be pleased to grant any other reliefs as we deem fit. In conclusion therefore, this court sets aside the decision of the learned trial judge dismissing Election Petition No. 47 of 2021. This court therefore finds that its right and just for Election Petition No. 27 of 2021 to be re-instated. The appellant ought to be granted time to file an affidavit in support of the petition.



This appeal succeeds. This court orders as follows:

1. The order of the trial Judge dismissing the petition is set aside
2. Election Petition No. 00| of 2021 is remitted to the High Court and is to be determined on its merits before a different Judge.
3. Each party shall bear its own costs in this court and in the court below.

We so order.

Dated and sign at Kampala this day of July .2022
Hon. Mr. Justice Richard Buteera



Deputy Chief Justice
Hon. Lady Justice Catherine Bamugemereire
Justice of Appeal

Hon. Lady Justice Irene Mirfyagonja
Justice of Appeal

