

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Elizabeth Musoke, Muzamiru M. Kibeedi and Monica K. Mugenyi, JJA)

ELECTION PETITION APPEAL NO. 0023 OF 2021

5 **KATOTO HATWIB** **APPELLANT**

VERSUS

1. **KATO MUHAMMED**]

2. **ELECTORAL COMMISSION**] **RESPONDENTS**

10 [Appeal from the judgment of the High Court of Uganda at Mbarara (Kazibwe Kawumi, J) in
Election Petition No. 004 of 2021 delivered on the 21st day of September 2021)

JUDGMENT OF THE COURT

BACKGROUND

15 This appeal arises from the Ruling of Hon. Justice Moses Kazibwe Kawumi (trial judge)
delivered on the 21st day of September 2021 striking out Mbarara High Court Election Petition
No.004 of 2021 on a preliminary point of law.

20 The background facts leading to the above Petition as established by the trial judge were that
the appellant, the 1st respondent and four others contested for the seat of Member of Parliament
for Katerera County Constituency in Rubirizi Electoral 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 2,911 votes, having obtained 12,213 votes, while the
appellant was the runner up having garnered 9,302 votes. The election results were published in
the Uganda Gazette of the 17th day of February 2021 by the 2nd Respondent.



25 The appellant was dissatisfied with the election results and filed Election Petition No. 004 of
2021 in Mbarara High Court against the 1st and 2nd respondents seeking to nullify the said
election results on the ground that the 1st respondent was not validly nominated and elected
since at the time of his nomination and subsequent election he lacked the requisite academic
qualifications prescribed for a Member of Parliament. The appellant also alleged that there was
30 noncompliance with the electoral laws and principles which affected the result of the election in a
substantial manner. The alleged non-compliance included multiple voting, ballot stuffing,
intimidation of voters with guns and sticks and the 1st respondent's alleged printing and
displaying of posters with the name "KATOTO" to mislead voters as he passed off as
"KATOTO HATWIB", the appellant.

35 Lastly, the appellant alleged that the 1st respondent bribed voters with an obstetric machine
(scan) which he donated to Katerera Health Center and an electric pole at Katerera Town
Council.

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

At the trial, the respondents raised three Preliminary Objections of law relevant to this appeal.
The first was to the effect that the appellant had filed nine Affidavits out of the time granted by
40 court without leave to the prejudice of the respondents. The second was that the appellant's
Affidavits filed on 8th August 2021 were illegally on the court record because they introduced
new matters that were not pleaded in the Petition and the appellant's Affidavit Accompanying the
Petition (Principal Affidavit). The third objection was that there was no valid and competent
Petition before court as the Principal Affidavit was commissioned by a Commissioner for Oaths
45 whose Practicing Certificate as an advocate had, at the material time, expired.

In response, Counsel for the appellant invited the trial court to disregard the preliminary
objections and have the Petition set down for trial on its merits.

In his Ruling, the trial judge upheld the first objection and struck out the nine Affidavits for having
been filed out time.

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50 Regarding the second objection, the trial judge held that the introduction of new matters in the Appellant's Affidavits filed in court on 09th August 2021 amounted to departure from the pleadings and the court would expunge the offending paragraphs from the Affidavits.

As for the third objection, the trial judge found that the Principal Affidavit was defective for having been commissioned by a Commissioner for Oaths without a valid Practising Certificate which
55 rendered the Petition itself a nullity for being unsupported by an Affidavit in the terms of Section 60 of the Parliamentary Elections Act No. 17 of 2005 (PEA) and Rules 3(C) and 4(8) of the Parliamentary Elections (Interim Provisions) Rules, S.I. No. 141 -2 (the Election Petitions Rules). The trial judge held that the nullity could not be resuscitated by Section 14A of the Advocates Act. He accordingly struck out the Petition with orders that "*a Certificate of costs for two Counsel*
60 *is awarded to Counsel for the first respondent who shall be paid 80% of taxed costs [while] the 2nd respondent shall be paid 20% of the taxed costs.*"

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

1. *The Learned Trial Judge erred in law and fact when he expunged the Appellant's nine*
65 *affidavits for having been filed out of time hence occasioning a miscarriage of justice.*
2. *The Learned Trial Judge erred in law when he held that Section 14A of the Advocates (Amendment) Act, 2002 is not applicable in Election Petitions and thereby struck off the Appellant's affidavit for having been commissioned by an advocate without a valid practicing certificate hence occasioning a miscarriage of justice.*
- 70 3. *The learned Trial Judge erred in law and fact when he awarded a certificate of costs of two Counsel with no reason advanced at all for the same.*
4. *The learned Trial Judge erred in law and fact when he abdicated his duty of evaluating all the evidence on the Court record.*

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75 5. *The learned Trial Judge erred in law and fact when he wrongfully severed the appellant's affidavits for allegedly departing from the petition.*

REPRESENTATION

80 At the hearing, the appellant was represented by Hon. Medard Lubega Ssegoona and Ms. Annet Nalubowa. The 1st respondent was jointly represented by Messrs. Ronald Tusingwire, Emos Masiko and Sadam Solomon. Mr. Akachimpa Godfrey held brief for Mr. Godfrey Mwebesa, the second Counsel of the 1st respondent. The 2nd respondent was represented by Mr. Honest Baguma. Leave was granted to the parties to adopt, as their submissions, their respective Written Submissions/Conferencing Notes which had already been filed on the court record.

APPELLANT'S WRITTEN SUBMISSIONS

85 Counsel for the appellant argued the five grounds separately starting with ground No. 2, then 3, 4,5 and 1 respectively.

90 Regarding ground two, Counsel submitted that the trial judge having found that the advocate who commissioned the Principal Affidavit did not have a Practicing Certificate at the time he commissioned the Principal Affidavit, erred to have held that the Petition was a nullity and could not be resuscitated under Section 14A of the Advocates Act. Counsel argued that Section 14A of the Advocates Act was coined and meant to protect innocent litigants from Advocate's mistakes. Counsel invited Court to take judicial notice of the fact that a litigant will hardly inquire from an Advocate if the particular Advocate has a valid certificate. According to Counsel, that is the business of the Courts and the Law Council. Counsel submitted that to say that litigants who engage Advocates without a practicing certificate do so at their peril is harsh because the majority of the lay people do not know which Advocate is not entitled to practice.

Counsel further submitted that the documents drawn by an Advocate without a practicing certificate should not be regarded as illegal and invalid simply because the Advocate had no valid practicing certificate when he drew or signed such a document. For this submission,

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100 Counsel referred to the case of Attorney General & Hon. Nyombi Peter Vs Uganda Law Society, Misc. Cause No.321 of 2013, where it was held that because of Section 14A of the Advocates Act, the disqualification of an advocate without a valid practicing certificate, or an Advocate whose conduct violates the law including client confidentiality and conflict of interest or any other legal matter does not invalidate the proceedings.

105 Counsel further invited this Court to follow its decision in Suubi Kinyamatama Vs Robinah Ssentongo Election Petition Appeal No.0092 of 2016 where this Court is stated to have held that a document commissioned by an advocate without a practicing certificate could be cured by allowing the affidavit to be recommissioned pursuant to Section 14A of the Advocates Act.

110 Counsel concluded this ground by praying to this Court to find that the Learned Trial Judge erred in law and fact when he held that Section 14 A of the Advocates is not applicable in Election Petitions and thereby struck out the Principal Affidavit for having been commissioned by an advocate without a valid practicing certificate.

115 On ground three, Counsel faulted the Trial Judge for awarding a certificate of costs of two Counsel without giving a reason for doing so. Counsel submitted that the determination by court of whether a case is one fit for a certificate of two advocates is dependent upon the appreciation by the Court of the nature of the application. For this submission Counsel relied on the case of Pallock House Ltd Vs Nairobi Wholesalers Ltd. (NO.002) [1972] E.A. 172, at page 175 and Rule 41 (1) of The Advocates (Remuneration and Taxation of Costs) Rules, S.I. No. 267- 4.

120 Further, that each case depends on its own facts, and one must consider them all and remember that there are times when engagement of two advocates by a party can be a luxury for which an opponent should not be made to pay or, in some cases it is proper to do so and that the Court may have every assistance possible in a difficult case in arriving at a proper conclusion. For this submission Counsel relied on the case of In re WT Potts, Ex parte Epstein Vs The Trustee and the Bankrupt, [1935] 1 Ch 334,341.


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Counsel argued that the instant petition did not meet the criteria for award of a Certificate of
125 Costs for two Counsel as the appellant challenged the nomination and election of the 1st
respondent and led evidence through his agents in the form of affidavits that were filed before
Court. That when the matter came up for hearing, the Respondent's Counsel raised preliminary
objections which disposed of the Petition. That the Respondent's Counsel did not go through the
strenuous litigation process of cross examination of the appellant's witnesses.

130 Further, that the Preliminary Objections raised by the 1st respondent's Counsel could have been
raised by one of them and would still have achieved the same effect it did.

Lastly that there was no difficulty in the case before the trial court.

Regarding ground four, Counsel faulted the trial judge for abdicating his duty of evaluating all the
evidence on the record of court. Counsel argued that even after the finding by the Trial Judge
135 that the Principal Affidavit was not properly commissioned and striking out the same, he was left
with 41 affidavits that were on record which he could rely on to establish whether the Appellant
had proved his case. For this submission, Counsel relied on the provisions of Rule 4 (8) of the
Election Petitions Rules which provides that 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
140 which the Petitioner intends to rely. That the said rule does not suggest that the Affidavit that
accompanies the Petition should be that of the Petitioner. That indeed the Rule is silent on the
same. Counsel argued that Rule 4 (8) of the Election Petitions Rules in providing that the
Petition shall be accompanied by an affidavit setting out the facts on which the Petition is based,
did not restrict the same to the Petitioner's affidavit As such, argued Counsel, the Supporting
145 Affidavit can be any of the affidavits in the Petition. Counsel invited this court to adopt the
holding in the case of Wicks V. DDP (1947) A.C 362 where it was held that the words of a
Statute must be interpreted according to their literal meaning and sentences according to their
grammatical meaning. That if the words of the Statute are clear and unambiguous and complete
on the face of it, they are conclusive evidence of the legislative intention.

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150 Counsel further argued that in the instant case, if the framers of the law had intended to restrict the Affidavit Accompanying the Petition to being made by the Petitioner only, they would have clearly stated so. But the failure to state that an affidavit must be sworn exclusively by the petitioner was intentional. Counsel prayed that this Court does find so.

Regarding ground five, Counsel faulted the trial judge for severing the appellant's affidavits for allegedly departing from the matters pleaded in the Petition. Counsel submitted that since Rule 15 (1) of the Election Petitions Rules provides that "*all evidence in election litigation in favour of or against a petition at the trial shall be by way of affidavits read in open Court*", then affidavits are part of the pleadings in an Election Petition. As such, Court erred to isolate the Petitioner's affidavits from the Petition in determining the Preliminary Objection. For this submission Counsel invited this court to follow the decision of this court in *Chebrot Steven Chemoiko Vs Soyekwo Kenneth & Electoral Commission, Election Petition Appeal No.0056 of 2016.*

Counsel concluded this ground by inviting this Court to find that the Learned Trial Judge erred in law when he wrongfully severed the appellant's affidavits for allegedly departing from the Petition.

165 Counsel submitted on ground one last. Counsel faulted the Trial Judge for expunging the appellant's nine affidavits for having been filed out of the time which occasioned a miscarriage of justice. Counsel submitted that the reason given by the Trial Judge that the affidavits filed out of time without leave of Court were prejudicial to the Respondents was not valid as the parties had just conducted the Pre-trial Scheduling and the Petition had not yet been heard by the Trial Judge.

Counsel further submitted that the delay to file the Affidavits was attributable to the expertise needed to transcribe and transfer the videos or the evidence on the CD from Muhwezi Edson's phone. Counsel invited us to follow the decision of this Court in *Tamale Julius Konde Vs Ssenkabuga Isaa and Electoral Commission, Election Petition No. 75 of 2016* where it was held that:



“since it is sometimes practically not possible to file all the affidavits in support of the petition at the same time as the petition, as long as the additional affidavits are filed before the scheduling conference is conducted, it’s usually acceptable as no prejudice would be occasioned to the Respondent even if no leave of Court is obtained.”

180 As his final submission Counsel prayed that this court be pleased to find that the Appellant has proved his case and that the appeal be allowed with costs to the Appellant.

1ST RESPONDENT’S SUBMISSIONS

Counsel submitted on each ground separately in the order in which they were laid out in the Memorandum of Appeal.

185 Concerning ground one, Counsel submitted that the Trial Judge did not err in law or fact when he expunged the Appellant’s nine additional affidavits for having been filed out of time and that there was no miscarriage of justice occasioned upon the appellant as claimed.

Counsel stated that when the matter came up for scheduling on 19th August 2021, the Appellant’s Counsel sought, and was granted leave of Court to file and serve five additional affidavits within a period of one week. Counsel for the 1st Respondent informed Court that they
190 intended to reply to the said affidavits once filed. The matter was then adjourned to 20th, 21st, 22nd and 23rd of September 2021 for hearing. However, the Appellant filed nine affidavits on 16th of September 2021 which was close to one month outside the set timelines and never served the same on the 1st Respondent.

195 That the reason given to the trial court by the appellant’s Counsel was that the late filing of the affidavits was due to the nature of the evidence and the absence of the Appellant’s Lead Counsel, Hon. Medard Lubega Ssegoona, who had many engagements. Counsel argued that allowing the affidavits on record of Court would have greatly caused a miscarriage of justice onto the Respondents who did not have an opportunity to respond to the same and would have
200 completely distorted the schedule of hearing of the Petition as set by the Trial Judge. Counsel

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supported the trial judge's decision and relied on the decision of this court in Election Petition Appeal No.82 of 2016, Muyanja Lutaaya Vs Kenneth Lubogo & Another.

205 Counsel further submitted that Election Petitions must be handled expeditiously, and parties are under an obligation to comply with the directives set by Court. That Article 140 (1) of the Constitution and Section 63 (2) of the PEA require Trial Judges to hear and determine Election Petitions expeditiously and, accordingly, the Trial Judge's decision to expunge the affidavits filed outside the prescribed time without leave of Court was in line with this requirement. Counsel relied on the case of Election Petition Appeal No. 97 of 2016, Kubeketerya James Vs Waira Kyenalabye & Anor where this court is stated to have emphasized the statutory obligation on the
210 part of court to handle Election Petitions expeditiously.

Counsel further contended that the timelines within which to file the affidavits were Court directives which the Appellant had to comply with. That court directives are Court Orders and not mere technicalities and must be complied with. That failure to comply with the same cannot be cured by Article 126(2)(e). For this contention, Counsel referred to Civil Application 109 of 2004, Amrit Goyal v Harichand Goyal and 3 Ors.
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Counsel prayed that this Court finds that the Learned Trial Judge rightly expunged the Appellant's nine affidavits for having been filed out of time and, accordingly, dismiss ground one.

On ground two, Counsel supported the Trial Judge's decision to strike out the Principal Affidavit for having been commissioned by an advocate without a valid practicing certificate. Counsel also
220 supported the holding of the Trial Court that Section 14A of the Advocates (Amendment) Act, 2002 was not applicable in Election Petition since evoking the same would amount to extending time for the Appellant to bring a new Petition.

Counsel submitted that an Affidavit in support of the Petition commissioned by an advocate without a valid practicing certificate is invalid and cannot be relied on by a Court. For this
225 submission Counsel relied on Civil Appeal No. 27 of 1996 Bakunda Darlington v Dr. Kinyatta

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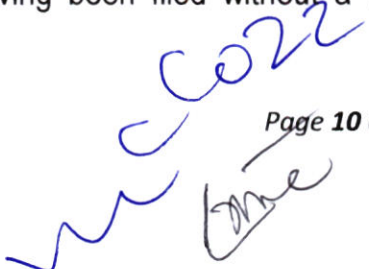
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Stanley and Another and Civil Appeal No. 13 of 1997 The Returning officer, Iganga and another v Haji Muluya Mustaphar.

230 Counsel further submitted that a Petition filed without a Petitioner's affidavit in support is incompetent, filed contrary to the laws and illegal. For this submission, Counsel relied on Rule 3(c) of the Election Petitions Rules where it is provided that a Petition includes an affidavit required by the rules to accompany the Petition, and Rule 4 (8) of the Election Petitions Rules where it is a requirement of the law for an Election Petition to be accompanied by an affidavit for it to be validly filed. It was Counsel's argument that Election Petitions are governed by specific legislations which prescribe the mode of presentation of the Petition and the timelines. That as
235 such, Court has a duty to ensure that the Election Petition laws are strictly complied with by the parties and that Court has no powers to extend the statutory timelines set. That by allowing the Appellant to file a new Petition supported by a valid affidavit pursuant to Section 14A of the Advocates Act the Trial Judge would be exercising powers to extend time within which to file the Petition which the Court did not have. For this position, Counsel relied on the decision of Rao and others, (1956)1 MLJ 40 cited with approval by the Supreme Court of Uganda in Civil Miscellaneous Application 1 of 2021, Kyagulanyi Ssentamu Vs Yoweri Museveni Tibuhaburwa and 2 Others.
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245 Counsel reiterated his submission that Section 14A of the Advocates Act does not apply to Election Petitions as its application would be in contravention of the timelines set by the electoral laws. Further, that the Trial Judge was justified to hold that any attempts to invoke Section 14A would imply that Court is extending time for the Petitioner to bring a fresh Petition beyond the statutory time limit set by Section 60 (3) of the PEA which mandate the court did not have.

250 Counsel invited us to follow the decision of this Court in Election Petition Appeal No. 92 of 2016, Suubi Kinyamatama Juliet v Sentongo Robinak Nakasirye and Electoral Commission where an affidavit commissioned by a Commissioner for Oaths without a valid Practicing Certificate was held to be invalid and that the Petition in the said appeal having been filed without a valid Accompanying Affidavit was held to have been:

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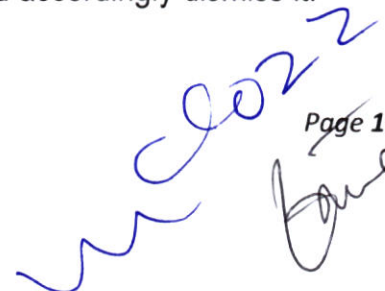
255 "illegally filed in Court in contravention of Section 60 of the Parliamentary Elections Act and Rules 3(C) and 4(8) of the Parliamentary Elections (Interim Provisions) Rules and therefore collapses with the affidavit in support ..."

Counsel prayed that this Honorable Court be pleased to dismiss ground 2 of the appeal.

Regarding ground three, Counsel supported the trial Court's decision to award a certificate of costs for two Counsel. Counsel submitted that at the trial the 1st Respondent was represented by two law firms namely: M/S Ortus Advocates and M/S Obed Mwebesa & Associated Advocates.

260 That the Court Record shows that the 1st Respondent's Affidavits in reply to the Petition were jointly drawn and filed by M/S Ortus Advocates and M/S Obed Mwebesa Associated Advocates. Further, even when the cases were called for hearing before the trial judge on 19th August 2021 and 20th September 2021 the 1st Respondent was represented by advocates from Ms. Obed Mwebesa & Associated Advocates, and Ms. Ortus Advocates. Counsel argued that
265 Regulation 41 (1) of the Advocates (Remuneration and Taxation of costs) Regulations, S.1. No. 267- 4 empowers the Trial Court to issue a certificate of two Counsel having regard to the importance and difficulty of the case. Counsel argued that Election Petitions are an important aspect in our electoral cycle and in the promotion of democracy. That given the nature of evidence adduced by the parties as reflected in the Record of Appeal, it was reasonable and
270 prudent for the 1st Respondent to engage two law firms to collect evidence, draft Affidavits in answer to the Petition, undertake extensive research and represent him in Court and to assist Court in determining the Petition. Counsel relied on Mutembuli Yusuf v Nangomu Moses Musamba and the Electoral Commission Election Petition Appeal No. 43 of 2016 where this Court is stated to have held thus: - "The voluminous nature of the Record of Appeal gives us a
275 clue on the involvement of Counsel in the lower Court and the attendant research related thereto. We find no reason and cannot therefore, fault the learned Trial Judge for awarding a certificate of two Counsel to the 1st Respondent who had engaged two law firms to tackle to arduous tasks involved."

Counsel prayed to this Court to find no merit in this ground and accordingly dismiss it.



280 Regarding ground 4, Counsel submitted that the Trial Judge cannot be faulted for not going ahead to evaluate the appellant's evidence upon upholding the preliminary objection that the Petition was incompetent. That upon the trial court making the said finding, the Appellant's Petition automatically collapsed, and this disposed of the Petition leaving no obligation on the Trial Judge to evaluate evidence in support of an incompetent Petition. For this submission,
285 Counsel relied on the case of The Returning officer, Iganga and another v Haji Muluya Mustaphar (supra) where this Court is stated to have held that: -

290 *"Having found as a fact that Mr. Akampurira did not possess a valid practicing certificate when he commissioned the affidavit of Hajji Muluya Mustaphar on 26th July 1996, the learned trial judge ought to have held that it was invalid following the decision of this court in Bakunda Darling-ton Vs Dr. Kinyatta (supra) which is binding on the High Court. Had the learned trial judge accepted the above decision, she would have held that the affidavit of Hajji Muluya Mustaphar commissioned by Mr. Akampurira on the 26th July 1996 was invalid and therefore that the petition was incompetent. That would have disposed of the petition."*

295 Counsel prayed that this court finds the appellant's complaint in ground four to be baseless and accordingly dismiss it.

Concerning ground five, Counsel supported the Trial Judge's decision to sever the Appellant's affidavits on account of departure from the Petition. Counsel submitted that a Petitioner in an Election Petition must, when filing an Election Petition, have knowledge and the basis of the
300 grounds of the Petition and must expressly lay them down in the Petition with their particulars. For this submission, Counsel relied on the decision in Election Petition Appeal No. 14 & 16 of 2011 Mbagadhi Fredrick & Another Vs. Dr. Nabwiso Frank.

305 That in the instant matter, the grounds of the Petition were set out to be : The 1st Respondent did not have the requisite academic qualifications at the time of nomination and election; the election was not conducted in accordance with the electoral laws; Commission of the electoral offences of giving a bribe in form of a scan to Katerera Health Centre and an electric pole to Kabaseke; that the Presiding Officers employed by the 2nd Respondent allowed armed men to tick more than one ballot paper and stuffed them in the ballot boxes; and that the Presiding

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Officers employed by the 2nd Respondent allowed multiple voting. Counsel submitted that the
310 Appellant was bound by these grounds and had a duty to adduce evidence in support of the
same and could not be permitted to file affidavits introducing new grounds. For this submission
Counsel relied on the decision of the Supreme Court in Interfreight Forwarders (U) Limited Vs
East African Development Bank (Civil Appeal No.33 Of 1992) [1993] UGSC 16 .

Counsel also relied on the decision of this court in Mutembuli Yusuf Vs Nangomu Moses
315 Musamba and the Electoral Commission, Election Petition Appeal No. 43 of 2016 at **page 12**
where in this Court is stated to have held that: -

320 *“If we consider the Petition and reply thereto in an election petition to constitute
pleadings, then a petitioner is not permitted to introduce fresh issues or to change the
substance of his or her claim by introducing new matters by way of affidavits in
rejoinder. A party cannot adduce evidence in respect of a matter not pleaded. Affidavits
are considered purely as evidence and as such they can only contain what has already
been pleaded.”*

Counsel invited this court to dismiss ground five of the Appeal.

325 Counsel concluded by submitting that all the appellant's grounds of appeal were without basis in
law and fact. As such Counsel prayed that this court be pleased to uphold the Judgment of the
Learned Trial Judge and dismiss the Appeal with costs.

2ND RESPONDENT'S SUBMISSIONS

The substance of the 2nd respondent's submissions was not fundamentally different from that of
the 1st respondent. As such, we found it not necessary to reproduce the same.

330 **THE APPELLANT'S REJOINDER**

In the rejoinder to ground one, Counsel for the appellant submitted that the law, including Rules
4(8) and 15 of the Election Petitions Rules, does not stipulate that all affidavits intended to be
relied upon by the Appellant have to be filed within the restricted time. Counsel invited this Court
to follow its holding in the case of Akuguzibwe Lawrence Vs Muhumuza David & Another EPA

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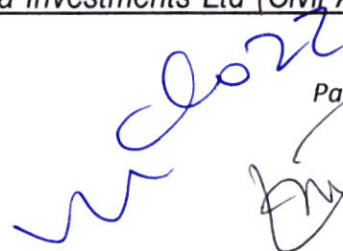

335 No.22 of 2016 and Tamale Julius Konde Vs Ssenkubuge Isaac and Electoral Commission
Election Petition Appeal No.75 of 2016, where it was held that affidavits filed before scheduling
are acceptable as no prejudice would be occasioned to the Respondent even if no leave of the
Court is obtained.

340 Counsel further submitted that courts have adopted a liberal approach to the filing of supporting
affidavits in Election Petitions because elections concern the general public. For this submission
Counsel referred to the case of Kizza Besigye Vs Yoweri Museveni Kaguta PEPE No.001 of
2001.

In respect of ground two, Counsel submitted that even if the laws governing Election Petitions
have stringent rules, they do not exist in a vacuum. That from the Supreme Court decision in
345 Sitenda Vs Njuba and Anor (Election Petition Appeal 26 of 2007 the purpose and intention of the
legislature in enacting the PEA was twofold: First, to ensure, in the public interest, that disputes
concerning election of people's representatives are resolved without undue delay. Second, by
setting up an elaborate system for judicial inquiry into alleged electoral malpractices, and for
setting aside election results found from such inquiry to be flawed on defined grounds, the
350 legislature also intended to ensure, equally in the public interest, that such allegations are
subjected to fair trial and determined on merit.

Counsel argued that this being an Election Petition where the decision of Court would affect so
many people in the society, Court ought to have taken a liberal approach and allowed the
Appellant time to recommit his affidavit before the said Fabian Aogon who, by the time the
355 trial took place, had renewed his Practicing Certificate for that year.

Concerning ground three, Counsel submitted that the authority of Mutembuli Yusuf (supra) is
distinguishable from the facts at hand since the Learned Trial Judge in that case gave his
reasons for awarding a certificate of costs to two Counsel unlike in the instant Petition where the
Learned Trial Judge did not advance any reasons at all. Counsel referred to the case of the
360 Commissioner General Uganda Revenue Authority Vs Meera Investments Ltd (Civil Appeal 22

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of 2007), where the Supreme Court faulted the Court of Appeal for awarding a certificate of two Counsel without giving the reasons for doing so.

365 As regards ground 5, Counsel submitted that the Affidavits in support of an Election Petition, though depositions, form part of the pleadings. For this submission Counsel cited Rule 3 (e) of the Elections Petitions Rules.

Accordingly, Counsel argued that the additional Affidavits filed on 09th August 2021 in support of the Petition are part and parcel of the pleadings of the appellant and only elucidated on the grounds as set out in the Petition, particularly paragraphs 5 to 10 of the Petition.

370 Counsel reiterated their prayer that this Court allows the Appeal with costs in this Court and the Court below.

CONSIDERATION BY THE COURT

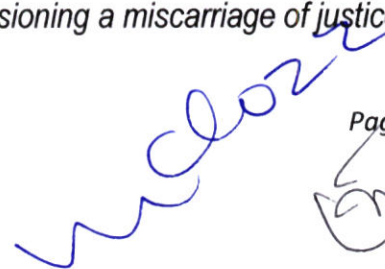

375 As a first Appellate Court, the duty of this Court in an appeal of this nature is to re-appraise the evidence before the Trial Court and draw its own inferences of fact while making allowance for the fact that it did not have the opportunity enjoyed by the Trial Court of seeing or hearing the witnesses 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).**

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

Ground One

Ground one was couched as follows:

“The Learned Trial Judge erred in law and fact when he expunged the Appellant’s nine affidavits for having been filed out of time hence occasioning a miscarriage of justice.”

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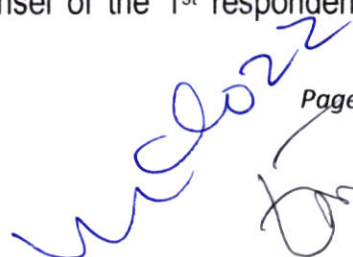


385 In their submissions, Counsel for the appellant faulted the trial judge for striking out the
appellant's nine Affidavits filed out of the time granted by court notwithstanding that the late filing
was not prejudicial to the Respondents as the hearing by the trial court had not yet commenced.
Counsel attributed their delay to file the impugned Affidavits in court to the expertise needed to
transcribe and transfer the evidence from the phone of a one Edson Muhwezi before they could
390 reduce the said evidence into Affidavit Form for filing in court. The second reason for the delay
was the tight schedule of the Lead Counsel.

Counsel for the 1st respondents did not agree. They contended that there was no valid reason
advanced by the Appellants to account for their failure to comply with the Court Directives
intended to expeditiously dispose of the Petition as prescribed by the law. That under the said
395 Court Directives, the appellants had been granted leave to file only five Affidavits within Seven
days. Instead, they were not only late in their filing by about one month, but also filed nine
Affidavits instead of the five for which they had been granted Court leave. That this was greatly
prejudicial to the Respondents as it denied them an opportunity to respond to the same and
would completely distort the schedule of hearing of the Petition as set by the Trial Judge.

400 We have closely studied the record of the trial court. The matter first came up before the Trial
Court on 19th August 2021 for scheduling. But the Scheduling could not take place as Counsel
for the Appellant informed Court that he needed one week to file five more Affidavits. Further,
that after the filing of the responses from the Respondents, Counsel for all the parties would
meet in Kampala and generate a Joint Scheduling Memorandum. Court granted the appellant's
405 request and fixed the Petition for hearing on four consecutive days starting on 20th September
2021 to 23rd September 2021.

The seven days' period within which the appellant was supposed to file and serve the five
Affidavits ended on 26th August 2021 without the appellant fulfilling his obligation. Instead, the
contested Affidavits were filed in Court on Thursday 16th September 2021 and served on only
410 the 2nd Respondent on Friday 17th September 2021 at around 3PM. However, before the expiry
of the seven days, Mr. Ronald Tusingwire, one of the Counsel of the 1st respondent, made



phone calls to the Appellant's Lead Counsel on several different occasions reminding him about the time that was running out and the need for them to meet to work on the Joint Scheduling Memorandum. Upon request of the Appellant's Lead Counsel, Mr. Tusingwire sent him several
415 email addresses to which to send whatever documents that he had prepared and the Joint Scheduling Memorandum. By the time the Court reconvened on 20th September 2021, the Appellant's Counsel had neither served him the Affidavits nor emailed to him the intended Joint Scheduling Memorandum for his input. But to ensure that the 1st Respondent was not prejudiced by the inaction on the part of the Appellant's Counsel, Counsel for the 1st Respondent went
420 ahead to file 28 Affidavits on behalf of the 1st Respondent on Friday 17th September 2021. He also filed in court the 1st Respondent's Scheduling Notes and a letter addressed to court explaining what had transpired and indicating that they will be applying to strike out and expunge from the court record any Affidavits filed and not served on them.

When the Trial Court reconvened on Monday 20th September 2021, Counsel for the 1st
425 Respondent had not yet been served with the impugned Affidavits of the Appellant. He accordingly applied to have the nine Affidavits expunged from the Court record on the ground that allowing them would be condoning inordinate delays which would adversely affect the time set for the expeditious disposal of Election Petitions. Further, that the 1st Respondents would be prejudiced by the late filing in so far as it denied them an opportunity to reply to the matters
430 raised in the impugned Affidavits in time for the Hearing schedule already set by court.

The 1st respondent's Counsel were supported by Counsel for the 2nd Respondent.

In reply, Counsel for the appellant admitted the late filing of the nine Affidavits without court leave and gave two reasons to account for the situation. The first was that it had taken them
435 "some good time" to get a competent person to transfer and transcribe the evidence from the Phone of a one Muhwezi Edson and then put it together and come up with the necessary Affidavits which they filed in court on 16th September 2021. Second, that the Appellant's Lead Counsel, Hon. Medard Lubega Ssegoona, had very many engagements and was indisposed. As a result, they were unable to fulfill all that was communicated between him and Counsel for the


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1st respondent. Counsel then applied to Court for validation of the late filing contending that the
440 respondents would not be prejudiced as the Affidavits do not introduce new evidence. That the
impugned Affidavits only substantiate the evidence already indicated in the Petition.

In the Summary Ruling, the trial court upheld the objection. Court rejected the application for
validation in view of the failure of the appellant to fulfil the court order given to him, the non-
service of the impugned Affidavits upon the 1st Respondent and given the requirements to
445 conclude Petitions in time. Court reserved the detailed analysis of the reasons for the dismissal
of the application in the final judgment.

In the Ruling of the trial court which finally disposed of the Petition, the reasons for expunging
the impugned Affidavits and denying the appellant's application for validation were stated thus:

450 *"Section 63(2) of the [PEA] which relates to the hearing of election petitions ...*
underscores the importance attached to Election petitions which are expeditiously
handled at the expense of other matters (including criminal cases) which may have
been filed before the petitions. Dates set by the Court for the taking of particular
steps must therefore seriously be observed and leave sought if it is not practicable
so to do.

455 *Counsel for the Petitioner did not file and serve the Affidavits within the agreed*
seven days. Allowing the Affidavits on record would open the door for the
Respondent to be accorded time to respond to them. It would necessitate a long
period of time to gather potential witnesses to respond to the contents in the filed
Affidavits which would in essence diminish the spirit of Section 63(2) of the Act
460 *cited here in above.*

I further did not find merit in the submission that the delay was due to the difficulty
in getting a subscriber for the electronic evidence attached to the Affidavits. The
person who claims to have recorded the evidence transcribed from his phone to the
CD attached to the Affidavit stated that he walked to the Law firm to volunteer the
465 *evidence on 3rd September 2021. This was way after the agreed time for the filing of*
the five affidavits Counsel had applied for.

For all intents and purposes, the time sought was used for soliciting new evidence
and anything filed outside that period and without leave of court was inadmissible.
As correctly held in Kananura John Bosco V EC & Kagoro Kiiza Isimbwa EP No.
470 *008 / 2016 Affidavits filed out of time without leave of court are prejudicial to the*
Respondent as they amount to an attempt by the Petitioner to plug holes that the
Respondent's respective answers could have poked into the petition."

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For this court to interfere with the impugned order of the trial court, it must be satisfied that the trial judge in exercising his discretion misdirected himself in some matter and as a result arrived
475 at a wrong decision, or it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result injustice was occasioned. (See Mbogo Vs Shah [1968]EA 93 and TransAfrica Assurance Company Ltd Vs Cimbria 9EA) Ltd Civil Appeal No. 11 of 2001 [CA-U] Unreported).

We have reviewed the record of proceedings and the reasons advanced by the appellant to
480 account for his failure to meet the timelines given by the trial court. The trial judge cannot be faulted in his evaluation of the same and arriving at the decision he made. First, the timelines were set by court in the presence of, and with the consent of all the parties. All the Counsel involved must have taken into account their numerous commitments before consenting to the timeline. As such, attributing the failure to beat the set timelines to the numerous engagements
485 of the Lead Counsel is not tenable.

Second, the appellant retained not less than three Counsel to prosecute his Petition before the trial court. One would have expected that this was to ensure that they would work as a team, reinforce each other, and stand in for the other at all the critical times so that the expeditious trial expected of an election petition is achieved. As such, absence of one of the advocates could
490 not bar the other advocates from executing their mutual client's instructions and meet the timelines set by court. On the contrary, the trial judge noted that there was some apparent laxity on the part of the appellant's legal team in playing their part to the extent that even when it came to transcribing evidence from Muhwezi Edson's phone to the CD attached to his Affidavit it actually took place after the timelines given by court had long passed.

495 We find that the Trial judge cannot be faulted for finding that the reasons advanced by the appellant to account for the failure to comply with the timelines issued by court with the consent of Counsel for the parties were not satisfactory. Accordingly, ground one fails.





Ground 2

500 The appellant couched ground two as follows:

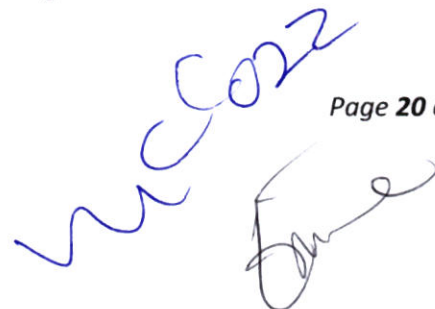
“The Learned Trial Judge erred in law when he held that Section 14A of the Advocates (Amendment) Act, 2002 is not applicable in Election Petitions and thereby struck off the Appellant’s affidavit for having been commissioned by an advocate without a valid practicing certificate hence occasioning a miscarriage of justice.”

505 From the submissions, the appellant’s case is that the Principal Affidavit having been commissioned by an advocate without a practicing certificate could be cured by allowing the affidavit to be re-commissioned pursuant to Section 14A of the Advocates Act. And in support of his submission, the appellant relied on the decision of this court in Suubi Kinyamatama Vs Robinah Ssentongo (op cit). On the other hand, the respondents support the holding of the Trial
510 Court that Section 14A of the Advocates Act was not applicable in the Election Petition since evoking the same would amount to extending time for the Appellant to bring a new Petition. Further, that without a validly commissioned Principal Affidavit the trial judge was justified in striking out both the Principal Affidavit and the Petition which it sought to accompany. Counsel likewise relied on the case of Suubi Kinyamatama Vs Robinah Ssentongo (op cit) to support the
515 trial court’s decision in this aspect.

We note that the wording of ground two and the arguments of both sides in respect of ground two are premised on the assumption that the trial judge was right to hold that the impugned Principal Affidavit having been commissioned by an advocate who, at the material time, had not renewed his Annual Practising Certificate for the year 2021 automatically rendered the Affidavit
520 and the Petition defective and could only be salvaged by invoking Section 14A of the Advocates Act. This is because there must first exist a defect before the aggrieved party can seek refuge in Section 14A of the Advocates Act to remedy the alleged defect.

In his Ruling, the trial judge stated as follows:

525 *‘... An inquiry by the Court from the Chambers of the Chief Registrar reveals that indeed Counsel Aogon Fabian did not have a valid practicing certificate at the time he*



purportedly commissioned the Affidavit in support of the Petition. This invariably renders the Affidavit defective and leaves the Petition unsupported and liable to be struck out.

The question to resolve however is whether this situation can be cured by Section 14A of the Advocates (amendment) Act. Act 27 of 2002...

530 ... My appreciation of the cited Section 14A (b) (ii) is that it does not apply to Election Petitions.

Rule 3(c) of the **Parliamentary Election (Interim Provisions) Rules. SI 141-2** defines a "Petition" to mean "an election petition and includes the affidavit required by these rules to accompany the petition."

535 Rule 4(8) provides:-

"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."

540 The Affidavit in support of the petition cannot be separated from the petition. Once the affidavit is purportedly commissioned by an Advocate without a valid practicing certificate, as in the instant case, it cannot be said that there is a valid Petition as envisaged by section 60 of the Parliamentary Election Act and Rules 3 (c) and 4(8).

545 Nothing can resuscitate a nullity. Any attempt to invoke section 14A of the Advocates Act as argued by Counsel for the Petitioner would imply that the Court is extending time for the Petitioner to bring a fresh petition. **Section 60(3) of the Parliamentary Elections Act** provides:-

"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."

550 The above limitation period is statutory and cannot be enlarged by the Court under Rule 19 of the Parliamentary Elections (Interim Provisions) Rules. SI 141-2 which provides for the enlargement or abridgment of time in election litigation matters.

555 I am in agreement with the submission of Counsel for the Petitioner about the window created by Section 14A to protect litigants from Advocates who illegally commission affidavits. The application of section 14A however is effective where it is lawfully available to the deponent of the Affidavit unlike in the instant case where there is no Petition to talk about in the first place.

... In sum, the Petition collapses since it is not supported with a valid affidavit. No valid intervention can be premised on section 14A of the Advocates Act to resuscitate what is regarded as a nullity under the law.' [Emphasis added]

560 From the above extract, it is apparent that the refusal of the trial judge to invoke Section 14A of the Advocates Act to salvage the appellant's Petition was based on his finding that the Principal

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Affidavit having been commissioned by an advocate without a valid Practising Certificate was defective. Second, that the defective Principal Affidavit automatically rendered the Petition a nullity and liable to be struck out as it did not meet the criteria of “**a valid Petition as envisaged by Section 60 of the Parliamentary Election Act and Rules 3 (c) and 4(8) [of the Election Petition Rules]**”.

In light of the aforesaid, before this court can appropriately resolve whether indeed the trial court erred in its decision to deny the appellant the protection prescribed by Section 14A of the Advocates Act, it is critical for us to first interrogate the correctness of the assumptions of counsel about the assumed invalidity of the Principal Affidavit and Petition on account of non-possession of a valid Practising certificate by the Commissioner for Oaths. Thereafter we shall analyse the appellant’s complaint about the applicability of Section 14A of the Advocates Act.

Validity of the Principal Affidavit and the Petition itself

This court had occasion to consider a similar question in the case of Suubi Kinyamatama Vs Robinah Ssentongo (op cit) which the appellant has heavily relied upon. In that case, the appellant filed an Election Petition in the High Court with an Affidavit in support commissioned by an advocate who had not renewed his Practising Certificate at the time of commissioning. The Court found that the said Affidavit was not duly commissioned. The Court held that the Petition having been accompanied by a defective Affidavit was likewise fatally defective for having been filed illegally in court in contravention of Section 60 of the PEA and Rules 3(C) and 4(8) of the Election Petition Rules and it therefore collapses with the collapse of the Affidavit in support that was filed alongside the said Petition.

We have closely reviewed and analysed the judgment of this court in the above case. It appears to us that in arriving at the decision, this court did not consider the binding decision of the Supreme Court of Uganda in Prof. Syed Huq Vs The Islamic University in Uganda, SCCA No. 47 of 1995 (Unreported) where the court considered the circumstances under which a Commission granted to an advocate pursuant to Section 1 of the Commissioner for Oaths (Advocates) Act,


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Cap. 5 is terminated or expires. As such we are unable to follow the decision in the case of Suubi Kinyamatama Vs Robinah Ssentongo (op cit).

590 This court subsequently had occasion to consider at great length the law governing the validity of the commission granted to advocates in the case of Lokeris Samson Vs the Electoral Commission and Komolo EPP No. 9 of 2021 (unreported) and held that the expiry of the Practising Certificate granted to an advocate 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
595 concerned advocate.


The reasons given in the Lokeris Case (ibid) to support the said holding were stated thus:

'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:

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

- 605 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 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.*
- 610 2) *...Not relevant.*
- 3) *... Not relevant.*
- 4) *Each commission shall immediately terminate on **the holder ceasing to practice as an advocate.**" [Emphasis mine]*

615 *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.*



620 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**
625 **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:

630 "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—section (4) does not mean expiry of the advocates
635 practising certificate. It is common knowledge that a practising certificate is issued for a particular year and expires on the 31st December of that year irrespective of the date of issue. If therefore an advocate gave up his legal practice in April to do other business or is suspended from practice, his commission to practice as Commissioner for Oaths would be terminated in April
640 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
645 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

650 for oaths after renewal of his Practising certificate as an advocate must lodge a fresh
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
655 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.'

It is our finding that the trial judge erred to hold that the Principal Affidavit in the instant matter
655 was defective on account of having been commissioned by a Commissioner for Oaths who had
not renewed his Practising Certificate for the year 2021. The Commission granted to an
advocate under Section 1 of the Advocates (Commissioner for Oaths) Act does not terminate
with the expiry of the Annual Practising Certificate issued to advocates under Section 11 of the
Advocates. And this leads us to our interrogation of the second assumption of the appellant's
660 Counsel namely, that the defective Principal Affidavit automatically rendered the Petition a
nullity.

Effect of a Defective Principal Affidavit on the Petition itself

When resolving the above issue in the case of Suubi Kinyamatama Vs Sentongo Robinah
665 Nakasirye and Electoral Commission (op cit), this court held thus:

665 "The effect ...is that the Petition from which this appeal arises, was illegally filed in court
in contravention of Section 60 of the Parliamentary Elections Act and Rules 3(C) and
4(8) of the Parliamentary (Interim Provisions) Rules and it therefore collapses with the
collapse of the Affidavit in Support that was filed alongside the said Petition. That
670 Petition was not supported by any evidence as is required by law. The Petition was,
therefore, fatally defective and as such there was no Petition in law before the trial
court."

Our closer analysis of the above case indicates that this court in arriving at the decision did not
consider the provisions in the PEA itself which specifically define Petitions for purposes of
challenging the results from Parliamentary elections and specifically provide for the different
675 modes of adducing evidence to prove the claims set out in the Petition under the PEA. As such,
and with the greatest respect, we are unable to hold that a defective Affidavit accompanying the


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Petition automatically renders the Petition under Section 60 of the PEA a nullity. And for this position, we adopt the same reasons which were given in detail in the case of Lokeris Samson Vs the Electoral Commission and Komolo (op cit) thus:

680 '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—

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

685 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.

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

(a) a candidate who loses an election; or

690 (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.

(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.

695 (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
700 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 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.

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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 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:

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“64 Witnesses in election petitions

(1) At the trial of an election petition—

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

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

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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.

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:

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“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.”

730

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

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Petition cannot stand without the Accompanying Principal Affidavit.

735 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.

740 (b) ... Not applicable.

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

745 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.

750 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
755 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
760 form of adducing evidence.'

In the circumstances, we find that the trial judge erred to have held that the appellant's Principal Affidavit having been found to be defective left the Petition unsupported and liable to be struck out.

765 Having interrogated and resolved the two assumptions underlying the appellant's grievance in ground two, we can now proceed to interrogate the appellant's complaint as set out in ground two. This interrogation is, for purposes of only completeness of the resolution of appellant's ground two in the very form as set out in the ground of appeal.

Applicability of Section 14A of the Advocates Act to remedy the alleged defects in the Appellant's Principal Affidavit.

770 As already stated, the gist of the appellant's complaint in ground two of the appeal is that the trial judge erred to have held that Section 14A of the Advocates Act was not applicable to remedy the invalidity found by the trial judge in the appellant's Principal Affidavit arising from its having been commissioned by an advocate who did not have a valid practicing certificate.

Section 14A of the Advocates Act provides thus:

775 **"14A Protection of clients of advocates**

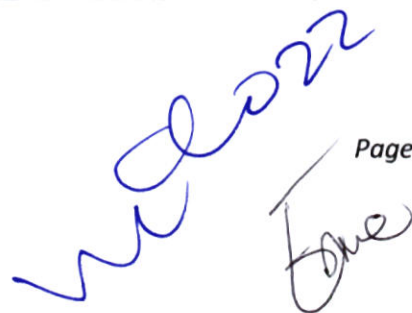
1) *Where—*

a) *an advocate practices as an advocate contrary to subsection (1) of section 14 or;*

780 b) *in any proceedings, for any reason, an advocate is lawfully denied audience or authority to represent a party by any court or tribunal; then—*

i. *no pleading or contract or other document made or action taken by the advocate on behalf of any client shall be invalidated by any such event; and in the case of any proceedings, the case of the client shall not be dismissed by reason of any such event;*

785 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.*



- 790 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.*
- 795 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]

800 From its wording, it is apparent that section 14A of the Advocates Act is intended to protect "clients of advocates". As such, before the appellant could invoke the protection granted by the section, he had to prove that by his Principal Affidavit being commissioned by the advocate in issue, he thereby became that advocate's "client".

Section 1 of the Advocates Act, defines the term "client" thus:

805 "**client**" includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ, an advocate and any person who is or may be liable to pay to an advocate any costs"

810 On the other hand, Section 4(1) of the Commissioner for Oaths (Advocates) Act which defines the scope of the powers of the Commissioner for Oaths expressly bars a Commissioner for Oaths from commissioning documents "*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*". The section provides thus:

4. Powers of a Commissioner for oaths

- 815 (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*
- 820

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]

825 From the above, it is our finding that Section 14A of the Advocates Act applies only where a client-advocate relationship exists. No client-advocate relationship existed between the appellant and the advocate who commissioned his impugned Affidavit. As such, but for completely different reasons, we cannot fault the trial judge for the conclusion that section 14A of the Advocates Act was inapplicable to the appellant's Principal Affidavit. However, following our
830 finding that neither the appellant's Principal Affidavit nor the Petition were defective, we hold that the trial judge erred to strike out the appellant's Principal Affidavit and the Petition.

The above resolution of ground two would ordinarily dispose of the appeal. But for purposes of completeness, we shall consider the remaining grounds.

Ground 3

835 The appellant's complaint in ground three is that the trial judge erred not to give the reasons as to why he found it fit to award a certificate of costs of two Counsel in the matter before him. The ground was couched as follows:

"The learned Trial Judge erred in law and fact when he awarded a certificate of costs of two Counsel with no reason advanced at all for the same."

840 The respondents did not agree. They argued that the trial judge had the discretion under Regulation 41 (1) of the Advocates (Remuneration and Taxation of costs) Regulations to award a certificate of two Counsel in light of the importance and difficulty of the case, and the fact that the 1st respondent had engaged two law firms to defend him.

There is no doubt that Regulation 41 (1) of the Advocates (Remuneration and Taxation of Costs)
845 Regulations grants the trial court the discretion to grant costs to more than one advocate in the circumstances detailed therein. The Regulation provides as follows:

"The costs of more than one Advocate may be allowed on the basis hereafter provided in causes or matters in which the Judge at trial or on delivery of judgment shall have

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850 *certified under his or her hand that more than one Advocate was reasonable and proper, having regard, in the case of a plaintiff, to the amount recovered or paid in settlement or the relief awarded or the nature, importance or difficulty of the case and, in the case of a defendant, having regard to the amount sued for or the relief claimed or the nature, importance or difficulty of the case.”*

855 The complaint of the appellant is about the failure by the trial court to give reasons for awarding costs to two advocates in the matter before him.

When dealing with the issue of costs, the trial judge stated thus:

“A certificate of Costs for two Counsel is awarded to Counsel for the 1st Respondent who shall be paid 80% of the taxed costs. The 2nd Respondent shall be paid 20% of the Taxed costs.”

860 It is apparent that the trial court did not give reasons as to why it exercised its discretion in the way it did. As such, it is not possible for an appellate court to determine from the record what principles guided the decision of the trial court in order to evaluate their correctness and application. It is settled law that the court in exercising the discretionary power conferred upon it must act judiciously. By not giving reasons for its order as to costs, the trial court acted
865 injudiciously (See *Ogeng Okwir Vs Transocean (U) Limited Civil Appeal No. 52 OF 1999 [CA-U] and Francis Butagira Vs Deborah Namukasa S.C.C.A No. 6 of 1989*). Accordingly, the appellant’s complaint in ground three has merit.

870 We can add that under our current Constitutional order, giving reasons for judicial decisions is part of the accountability expected from judicial officers to the people of Uganda from whom judicial power is derived and, in whose name, judicial power is exercised pursuant to Article 126(1) of the Constitution of Uganda, 1995, which provides thus:

“126. Exercise of judicial power

875 *(1) Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people.”*

As such, failure of a judicial officer to give reasons for his/her decision should never be taken lightly. Ground three accordingly succeeds.

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Ground 4

Ground four was couched as follows:

880 *"The learned Trial Judge erred in law and fact when he abdicated his duty of
evaluating all the evidence on the Court record."*

From, the record of proceedings, it is crystal clear that the reason as to why the trial judge did not evaluate all the evidence on the court record was that in his view, the dispute before the trial court was resolved when the Petition was struck out upon court upholding the preliminary
885 objection raised by the respondents as to the validity of the Petition. The appellant's argument under this ground is that even after the trial court finding the appellant's Principal Affidavit to be defective, several other Affidavits deponed upon by the appellant's witness remained on record. As such, instead of striking out the Petition for not being accompanied by the Appellant's Principal Affidavit, the trial court should have gone ahead to find that in the absence of the
890 appellant's Principal Affidavit, the Affidavits of the appellant's remaining witnesses fulfilled the legal requirement of the Petition being accompanied by an affidavit as set out in Rule 4(8) of the Election Petition Rules.


Following our finding that the Petition under the PEA can stand on its own without any supporting Affidavit, the appellant's complaint in ground four was thereby rendered moot. We so
895 hold.

Ground 5

Ground five was couched as follows:

*"The learned Trial Judge erred in law and fact when he wrongfully severed the
appellant's affidavits for allegedly departing from the petition."*

900 The appellant's Affidavits relevant to this issue were the Additional Affidavits filed on 09th August 2021. According to Counsel for the Appellants, by virtue of Rule 3 (e) of the Elections Petitions Rules, the said additional Affidavits having been filed in support of the Petition are part and

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parcel of the pleadings of the appellant and only elucidated on the grounds as set out in the Petition, particularly paragraphs 5 to 10 of the Petition. Accordingly, so argued the appellant's
905 counsel, the trial judge erred to hold that the said Affidavits departed from the pleadings.

Counsel for the respondents supported the trial judge's decision arguing that the impugned Affidavits were simply part of the appellant's evidence intended to prove the grounds as set out in the Petition. That the appellant was rightly barred by the trial court from introducing new grounds through the filing of the Additional Affidavits.

910 When dealing with the subject, the trial court held that the additional affidavits were part of the appellant's evidence and not part of the pleadings. Further that:

915 *"The affidavits filed on 9th August 2021 illegally introduced new matters like the alleged donation of culverts by the 1st Respondent, an electric pole at Kanywero Church of Uganda, bribery at Katokoni and other malpractices. This amounts to a departure from the pleadings. The remedy would be for the Court to expunge all such paragraphs from the Affidavits."*

Our finding is that the contested Affidavits were filed by the appellant pursuant to Rule 15 of the Election Petition Rules which provides as follows:

"15. Evidence at trial.

- 920 (1) *Subject to this rule, all evidence at the trial, in favour of or against the petition shall be by way of affidavit read in open court.*
- (2) *With the leave of the court, any person swearing an affidavit which is before the court may be cross-examined by the opposite party and reexamined by the party on behalf of whom the affidavit is sworn.*
- 925 (3) *The court may, of its own motion, examine any witness or call and examine or recall any witness if the court is of the opinion that the evidence of the witness is likely to assist the court to arrive at a just decision.*
- (4) *A person summoned as a witness by the court under subrule (3) of this rule may be cross-examined by the parties to the petition."*

930 Accordingly, the trial judge cannot be faulted for holding that the Additional Affidavits were part and parcel of the appellant's evidence.

We have closely examined the said Affidavits to confirm whether they indeed contained matters outside the grounds set out in the Petition. The Affidavits of Muhindo Loyce, Byamukama Stanley, Katoto Gabriel, Muhindo Maureen and Arinaitwe Michael contained evidence of alleged
935 donation of electric poles at Kanywero Church of Uganda. This claim was not pleaded in the Petition. The affidavits of Kemiryango Mebral, Ahimbisibwe Josephat, Amanyanya Augustine and Asiimwe Margret introduced the issue of the alleged donation of a culvert which was not pleaded in the Petition. The affidavits of Kemiryango Mebral, Balikubiri Geoffrey, Byamukama Stanley, Katoto Gabriel, Twesigye Rogers, Bamaturaki Danson, Rwamagoza Whitehouse, Sanyu Aisha,
940 Asiimwe Margret, Hamidu Simba, Kamusime Sauda, Ndyomuhangi John, Musisi Bashir and Akampulira Augustine introduced the allegation of voter bribery with money and masks which was not one of the grounds in the Petition. The affidavits of Nakate Jane Scovia, Katuramu Paddy, Tusiime Godad and Guniya Matia alleged interruption of the Petitioner's campaign at Kirugu Town Council. This was likewise not one of the claims set out in the Petition.

945 The Supreme Court and this court have on diverse occasions held that parties are bound by their pleadings and *cannot be allowed to succeed on a case not set up by them in the pleadings*(See Interfreight Forwarders (U) Limited Vs East African Development Bank (Civil Appeal No.33 Of 1992) [1993] UGSC 16. Further, that a party cannot be permitted to introduce fresh issues or to change the substance of his/her claim by introducing new matters by way of
950 affidavits". (See Mutembuli Yusuf Vs Nangomu Moses Musamba and the Electoral Commission, Election Petition Appeal No.43 of 2016)

Accordingly, the trial judge cannot be faulted for expunging the offending paragraphs from the Appellant's Affidavits. Ground five fails.

Decision of Court:

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- 1) The appeal partly succeeds.
 - 2) The Order of the High Court declining to grant the appellant's application to validate the Affidavits filed out of time is hereby upheld.
 - 3) The Order of the High Court expunging, from the Appellant's Affidavits filed on 09th August

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2021, all the paragraphs which introduced matters not pleaded in the Petition is hereby upheld.


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- 4) The Orders of the trial court striking out the Petition and the accompanying Affidavit of the Appellant with costs are hereby set aside.
 - 5) The matter is hereby sent back to the High Court for trial by another judge on its merits.
 - 6) Each party shall bear its costs in this court. But the costs in the High Court shall abide the
- 965
- outcome of the trial of the case on the merits. The reason for this Order as to costs is that the High Court Order which was the crux of the appeal namely, striking out the Petition and the appellant's Principal Affidavit, has been set aside based on reasons which are different from those articulated by Counsel for the appellant. At the same time, the respondents succeeded in respect of some of the other grounds of appeal.

970 We so order.

Signed, dated and delivered at Kampala this 13th day of July 2022.


ELIZABETH MUSOKE
Justice of Appeal


MUZAMIRU MUTANGULA KIBEEDI
Justice of Appeal


MONICA K. MUGENYI
Justice of Appeal