

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
Coram: Buteera, DCJ, Bamugemereire & Mulyagonja, JJA
ELECTION PETITION APPEAL NO. 003 OF 2021

5

BETWEEN

SUMAYA ALIZA BALUNYWA :::APPELLANT

AND

10 1. ODOI BERNARD ONEN MUTUSA
 2. NATIONAL IDENTIFICATION &
 REGISTRATION AUTHORITY
 3. THE ELECTORAL COMMISSION } :::::::::::::::::::::::::::::: **RESPONDENTS**

15 *(Appeal from the decision of Hon. Lady Justice Cornelia Kakooza Sabiiti dated 18th August 2021, in Mbale High Election Petition No. 05 of 2021)*


JUDGMENT OF THE COURT

Introduction

20 This is an appeal from the decision of the High Court in which the trial judge, Cornelia Kakooza Sabiiti, J., declined to set aside the orders given in High Court Miscellaneous Application No. 68 of 2021 where Namundi, J dismissed an *ex parte* application for substituted service on the 1st respondent and thereafter dismissed the whole of the petition against him.

25 **Background**

The appellant, the 1st respondent and 4 others contested for the position of Member of Parliament representing the youth for the Eastern Region in elections that were held on 31st January, 2021. The 3rd respondent


Team


declared the 1st Respondent winner of the election with 967 votes, while the appellant was the first runner up with 448 votes.

Being dissatisfied with the results, the appellant brought Election Petition No. 5 of 2021 in the High Court at Mbale for a declaration that
5 the 1st respondent's election as Member of Parliament was illegal and/or in contravention of the Parliamentary Elections Act and the Parliamentary Elections (Special Interests Groups) Regulations.

Upon lodging the Petition, the appellant effected service on the 2nd and 3rd respondents. The appellant tried to effect service personally on the
10 1st respondent as is required by law but her efforts were in vain. Telephone calls to the 1st respondent's known telephone number were not answered; neither were they returned.

The appellant then filed Miscellaneous Application No. 68 of 2021 for substituted service upon the 1st respondent to be effected by
15 advertisement in the Daily Monitor and New Vision newspapers. Before the hearing of the application, the advocates for the appellant received a letter from Anguria & Co. Advocates informing them that the 1st respondent had instructed them to receive the petition on his behalf. The appellant then wrote to the Registrar to withdraw the application
20 for substituted service.

Nonetheless, the application came up for hearing on 31st March 2021 but it was dismissed by Namundi, J., for failure to effect service on the 1st respondent in the prescribed time. Thereafter, Namundi, J. entered a further order that the petition was dismissed. When the Petition came
25 up for a scheduling conference before Kakooza Sabiiti, J., counsel for the appellant made an oral application to set aside the orders of Namundi, J. The trial judge then stated that in effect, the dismissal of Miscellaneous Application No. 68 of 2021 rendered Election Petition No. 5 of 2021 useless as against the 1st respondent who was the main target

of the suit. She declined to set aside the dismissal of the petition by Namundi, J. and advised the appellant to appeal against it, with no order as to costs. The appellant then filed this appeal stating the following grounds:

- 5 1. The learned trial Judge erred in law and in fact when she dismissed the petition for want of service thereby occasioning a miscarriage of Justice.
2. The learned trial Judge erred in law and in fact when she declined to consider a prayer for leave to set aside the dismissal order and
10 reinstate the 1st respondent in Electoral Petition No. 5 of 2021.
3. The trial Judge erred in law and fact when she ignored the evidence of service of the 1st respondent on the record of court and dismissed the entire petition.
4. The learned trial Judge erred in law and in fact when he entertained
15 and dismissed the petition against the 1st respondent without hearing the petitioner/the parties.

She prayed that the appeal be allowed, the judgment and orders of the High Court be set aside with an order that the petition be heard on its merits, with costs. The 2nd and 3rd respondents opposed the appeal.

20 **Representation**

At the hearing of the appeal, the appellant was represented by Mr. Robert Bautu and Mr. Akram Matovu. There was neither a representative of the 1st respondent in attendance, nor was there evidence that he was served with the memorandum of appeal and the
25 record in this appeal. The 2nd respondent was represented by Mr. Patrick Wetaka while Mr. Peter Masaba represented the 3rd Respondent.

The submissions of counsel

The appellant filed written submissions on 23rd March 2022 while the 2nd and 3rd respondents applied to court to adopt their conferencing



notes filed on 25th February 2022 and 14th February 2022, respectively, as their submissions and the court adopted them. Counsel offered brief oral submissions before the court. This appeal was therefore disposed of on the basis of both written and oral submissions of counsel.

5 The appellant's counsel addressed the grounds of appeal in the same order that they appear above. The respondents' advocates each replied in similar fashion. We have not set out the submissions here because we found it more appropriate to review them before we address the various grounds of appeal.

10 **Duty of the Court**

The duty of this court, as a first appellate court, is stated in rule 30 (1) of the Judicature (Court of Appeal Rules) Directions, SI 13-10. It is to re-appraise the whole of the evidence adduced before the trial court in order for it to reach its own conclusions, both on the facts and the law.

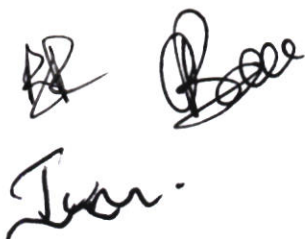
15 But in doing so the court should be mindful of the fact that it did not observe and hear the testimonies of the witnesses **(See Kifamunte Henry v. Uganda, SCCA 10 of 1997)**.

We shall therefore be guided by the principles above in the determination of the appeal and will consider the whole of the record that was placed before us, the submissions of counsel, authorities that they referred to and those that they did not refer to but which are appropriate for the determination of the appeal.

Determination of the Appeal

Ground 1

25 Ground 1 was a complaint that the trial judge dismissed the petition for want of service and thereby occasioned a miscarriage of justice.

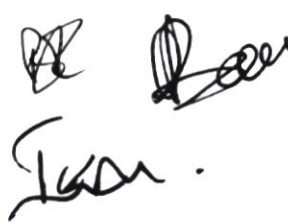
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Submissions of Counsel

In this regard, counsel for the appellant highlighted the ruling of the learned trial judge at page 160 of the record of appeal where she observed that the orders of Namundi, J. amounted to disposal of the petition against the respondent who was the principle party among the respondents. That the remedies sought in the petition were mainly targeted at him but he was no longer a party because notice of the petition was not given to him as is required by law. That in the circumstances, it would be an exercise in futility to proceed with the petition against the rest of the respondents.

Counsel referred us to the order of Namundi, J in Miscellaneous Application No. 68 of 2021, at page 140 of the record of appeal, and argued that the proceedings of the court at page 141 to 143 did not contain any such order dismissing the petition against the 1st respondent. He referred us to the definition of the term "*decree*" in section 2 of the Civil Procedure Act (CPA). He further submitted that a decree is also defined to mean an order of court pronounced on the hearing of a suit.

The appellant's counsel then referred us to section 25 of the Civil Procedure Act and Order 21 rule 6 of the Civil Procedure Rules (CPR) and submitted that after the pronouncement of judgment, the court must issue a decree which conforms to the judgment that has been pronounced. He contended that the order referred to by the trial judge in her ruling was not derived from the record of proceedings in MA No. 68 of 2021. That it was therefore of no legal effect. He added that according to the record of the court, the only order made by Namundi, J. was for the dismissal of MA No. 68 of 2021; any additional orders were a total deviation from the orders made by the judge during the proceedings.



The appellant's counsel went on to submit that after the court issued its order, it became *functus officio* and had no power to give further orders in the matter. He referred us to the decision in **Goodman Agencies Ltd v. Attorney General & Hassa Agencies K. Ltd, Constitutional Petition No. 3 of 2008** to support his argument.

The appellant's counsel further referred us to the decision in **Makula International Ltd. v. His Eminence Emmanuel Nsubuga & Anor [1989] HCB 11** and **Norattam Bhatia v. Crane Bank Ltd, Court of Appeal Civil Appeal No. 75 of 2006** and submitted that the illegalities occasioned by the 1st respondent and the trial judge ought not to go unnoticed by this court.

He concluded that the dismissal of the petition on the basis of an order that was not derived from the proceedings of court was an error amounting to an illegality.

In reply, counsel for the 2nd respondent submitted that this appeal is against the decision of Kakooza Sabiiti, J, in Election Petition No. 5 of 2021 and not Namundi, J, in MA No.68 of 2021. Further, that the appellant sought to introduce elements of an appeal against MA No. 68 of 2021 without leave of court to extend time within which to appeal. He explained that the petition was dismissed by Kakooza Sabiiti, J., for want of service and not Namundi, J. at the hearing of the application. Finally, that in the absence of the principal party in the election petition, the trial Judge correctly dismissed the petition.

For the 3rd respondent, it was argued that it was misleading of counsel for the appellant to argue that the learned trial Judge dismissed the petition for want of service when her ruling, at pages 159 to 160 of the record makes no mention of service of the petition. Counsel went on to submit that the dismissal of the petition against the 1st respondent

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conclusively determined the petition and it could not be set aside because it was final, not interlocutory.

Resolution of Ground 1

5 We observed from the record that the ruling from which the appeal arose was in Election Petition No 005 of 2021, **Sumaya Aliza Balunywa v Odoi Bernard & 2 Others**. Indeed, the grounds of appeal relate to Kakooza Sabiiti, J and not Namundi, J. There should be no contention between the parties about that because the origin of this appeal is very clear from the record of the court.

10 In her ruling, the trial judge in Mbale EP No. 005 of 2021 concluded the matter as follows:

15 *"The orders made by the trial judge in effect amounted to a disposal of the petition against the 1st respondent who is a principle party on the side of the respondents. The remedies/prayers sought under the petition are mainly targeted at the 1st respondent who is no longer a party and it would be an exercise in futility to proceed with the petition against the 2nd and 3rd respondents although they were served and filed answers to the petition without the 1st respondent as a party to answer to the petition and exercise the right to be heard.*

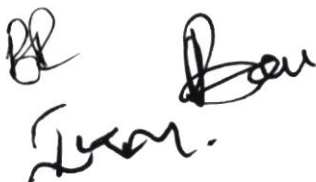
20 *The Parliamentary Elections (Interim Provisions) rules S.I 141-2 under Part III make provision for appeals to the Court of Appeal from decisions of the High Court on determination of election petitions. The petition cannot be revived as against the 1st respondent at the High Court as prayed by counsel for the petition to have the orders set aside however,*
25 *the petitioner should consider these provisions and appeal against the said ruling.*

In the circumstances, the oral application to set aside the orders of the learned trial judge made on 1st April 2021 is not granted. No order as to costs.

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{Emphasis supplied}

The decision and orders of the trial judge set out above were not based on any formal application by the parties to the petition. We observed that when the parties appeared before her for the scheduling of the petition for hearing, counsel for the appellant informed her that the

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petition was dismissed by Namundi, J. He then informally made an oral application that the dismissal of the petition by Namundi, J be set aside. Counsel for the 3rd respondent then contended that since the petition was dismissed as against the 1st respondent, it could not stand
5 against the rest of the respondents, and it was upon that submission that the trial judge made her comments about the status of the petition.

The analysis and orders of Namundi, J during the proceedings in MA 68 of 2021 appeared at page 143 of the record of proceedings. Since the necessary part of the proceedings is brief, we shall reproduce it
10 here below in order to facilitate a better understanding of our own decision in the matter.

“The communications that counsel is referring to that the 1st respondent has been served are not supported by way of affidavit of service to guide the court on when if at all the 1st respondent was served.

15 *It appears the applicant is not interested in this matter.
It had been fixed for ruling.*

The attempt to withdraw the same is therefore unexplained and amounts to abuse of court process.

I have no option but to dismiss the application.

20 *I rely on the provisions of section 98 of the Civil Procedure Act that provides for inherent powers of the court to make orders that may be necessary for the ends of justice or to prevent abuse of the process of the court.”*

{Emphasis supplied}

25 From the two sets of proceedings above, it is clear that Kakooza Sabiiti, J. did not dismiss Election Petition No 005 of 2021. Instead, she dismissed the oral application by counsel for the appellant to set aside the orders of Namundi, J., dismissing the application for substituted service of the petition on the 1st respondent in MA 68 of 2021.

30 As to whether Namundi, J indeed dismissed the petition in MA 68 of 2021, there is a conflict between the order that we have reproduced

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above and the order that was extracted which appears at page 139 and 140 of the record of proceedings. In the latter, it is shown that the order is in respect of MA 68 of 2021 and that Mr. Obedo Deogratiuous, who was holding the brief for Mr. Robert Bautu, for the applicant, the appellant here, was before the court.

It is clear from the order that Items 1 and 2 of the order have no issues for they are in conformity with the decision of Namundi, J, which we set out before. However, there appears to be an issue with item 3 of the order which reads as follows:

“(3) **The provisions of section 98 of the Civil Procedure Act provide for inherent powers of the court to make orders that may be necessary for the ends of justice or to prevent the abuse of the process of the court. Article 139 (1) of the Constitution gives this court unlimited original jurisdiction in all matters and such appellate jurisdiction as may be conferred on it by the Constitution or other law. The petition against the respondent is hereby dismissed on account of failure to serve him within the prescribed time by law.**”

We cannot accept the submissions of counsel that the decision of Namundi J, had to be reduced into a decree, or that it was reduced into a decree. Instead, we are of the view that though Namundi, J, issued an order in MA 68 of 2021 dismissing the application in the proceedings before him on the 1st April 2021, the order that was extracted from the proceedings and signed by him was inconsistent with the proceedings. The order that was extracted included the further order, made under section 98 of the CPA, that the whole petition was dismissed for failure to serve the 1st respondent within the prescribed time.

It was proper for the learned judge to dismiss MA No 68 of 2021 because on an application for substituted service made under Order 5 rule 18 (1) CPR, that rule provides as follows:

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(1) Where the court is satisfied that for any reason the summons cannot be served in the ordinary way, the court shall order the summons to be served by affixing a copy of it in some conspicuous place in the courthouse, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.

{Emphasis supplied}

We note that while the provision prescribes the modes of service that can be effected in its first part, at the end of it latitude is given to the judge to exercise discretion to determine how to effect service in a manner that he/she deems fit. The judge who is granted discretion to make such orders may also exercise that discretion not to do so, as the judge in this case did, for the reasons that he stated.

However, having done so, the learned judge had no power to make further orders to dismiss the petition after he entered and pronounced the order that MA 68 was dismissed because he had already signed the order dismissing the application as the final order of the court. The court thus became *functus officio* as soon as he pronounced and signed his order in the proceedings held on 1st April 2021. No further orders could be made by the judge in the application, or the petition for that matter, in the absence of an application to court to review its prior order, under section 82 of the CPA which provides as follows:

“82. Review.

Any person considering himself or herself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or




(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit.”

In the absence of such an application, Judge Namundi's order dismissing Election Petition No 5 of 2021 was improper, to say the least. It was also ineffective because it was issued contrary to the *functus officio* rule.

5 Going back to the issue whether Kakooza Sabiiti, J erred when she did not grant the oral application to set aside the alleged order to dismiss the petition, we are of the firm opinion that she made no error at all. In any event, the petition was not dismissed because the alleged order to do so that was inserted in the formal order extracted subsequently from
10 the proceedings and signed by Namundi, J. (at page 139-40 of the record of appeal) was improper and could not be supported by any law.

In addition, we are of the view that the oral application that was made before Kakooza Sabiiti, J was also improper. We say so because the facts on the record were not consistent with the submissions of Mr Robert
15 Bautu who made the application. When he appeared before the trial judge, Mr Bautu stated that Mr Deogratius Obedo, the advocate who appeared before Namundi, J at the hearing of the application for substituted service, was not known to him and he did not have his instructions to hold the brief. However, the record clearly shows that Mr
20 Obedo appeared before Namundi J, as counsel holding the brief in the application for Mr Bautu. Mr Obedo had also appeared before the judge in the same application on 30th March 2021 and argued the application. It was then adjourned to 31st March 2021 for the ruling when he returned and made the application to withdraw the application.

25 We are of the view that in order for the judge in EP No. 05 of 2021 to believe that Mr Obedo did not hold Mr Bautu's brief, the latter ought to have gone on record on oath in a formal application supported by his own affidavit in which he deposed to those facts. He then could not have represented himself in such an application because he would have

turned into a witness. In the absence of that, the trial judge made no error when she summarily ruled on the oral application and dismissed it. Ground 1 of the appeal therefore fails.

Grounds 2 and 3




5 The complaint in ground 2 was that the trial judge erred in law and fact when she declined to consider the prayer for leave to set aside Namundi, J's order of dismissal and reinstate the 1st respondent in the election petition, while ground 3 was the grievance that the trial judge ignored the evidence of service of the petition on the 1st respondent and therefore
10 erroneously dismissed the petition.

Resolution of Grounds 2 and 3

We considered the submissions of counsel for all the parties to this appeal on grounds 2 and 3. We observed that the submissions of counsel for the appellant were premised on the incorrect perception that
15 Namundi, J properly dismissed the petition when he disposed of MA 68 of 2021. We have already found that Namundi, J did not in fact dismiss the petition because the order that appears on the record was in conflict with what transpired and was recorded in the proceedings of the court on 1st April 2021.

20 It has also been established that the trial judge could not set aside the orders of Namundi, J in the circumstances of the case, first, because the petition was not dismissed against the 1st respondent, as counsel argued. Secondly, the informal application that counsel for the appellant made before the trial judge lacked the necessary evidence required for
25 her to consider and dispose of it.

With regard to ground 3, we do not agree that there was affidavit evidence before the trial judge that the petition was served on the 1st

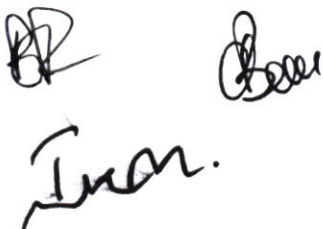
respondent through Anguria & Co, Advocates. We note that there are two affidavits of service on the record; one at page 147 thereof being an affidavit sworn by Aliganyira Joseph on 22nd March 2021 to prove that copies of the petition were served upon the 2nd and 3rd respondents. The
5 only other affidavit was sworn by the same person on 9th April 2021 to prove service of court orders on various institutions to produce documents in respect of the 1st respondent's academic qualifications.

We therefore confirmed that as Namundi, J. pointed out, there was no affidavit of service to show that Anguria & Co, Advocates were served
10 with a copy of the petition. Instead, there is on the record a letter dated 30th March 2021 (at page 134) from M/s Anguria & Co, Advocates to M/s Arcadia Advocates, counsel for the appellant. In the letter, Anguria & Co informed Arcadia Advocates that they had instructions to represent the 1st respondent in the petition and to receive service thereof
15 on his behalf. Endorsed on the letter was an acknowledgement that Anguria Joseph was served with the petition at Arcadia Chambers on 30th March 2021. Service was further acknowledged on a copy of the petition which was at page 10 of the record.

However, we are of the view that in the absence of an affidavit of service
20 on record, these are facts that ought to have come to the attention of the trial judge in a formal application filed by Mr Bautu seeking the orders that he sought from the court in favour of his client. But he did not file any application. It then becomes clear to us why the trial judge did not see these fine distinctions in the record of the court.

25 Nonetheless, we have already found and held that the trial judge did not dismiss the entire petition or any part of it. Instead, she dismissed the appellant's informal application to set aside the erroneous order of Namundi, J, in which he purported to dismiss the petition.

Grounds 2 and 3 therefore also fail.

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Ground 4



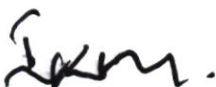
The appellant's complaint in ground 4 was that the trial judge erred in law and fact when she entertained and dismissed the petition against the 1st respondent without hearing the petitioners/the parties.

- 5 Though counsel for the appellant advanced arguments in respect of this ground of appeal, there is nothing new in them. We therefore relied on our earlier analysis of the facts deduced from the record to resolve this ground of appeal.

10 The most important point to note in ground 4, as it was framed by the appellant's advocates, is that they still refer to the dismissal of the petition against the 1st respondent. We did not find any order by the trial judge dismissing the petition against the 1st respondent, or any order dismissing the petition at all. The trial judge simply dismissed the oral application to reinstate the petition, which was never properly dismissed
15 by Namundi J, as we have already found and held.

In view of those observations, ground 4 of the appeal was a misdirection by counsel of himself and this court because the trial judge did not dismiss the petition. What was presented to her in the submissions of counsel for the appellant was that the petition was dismissed by
20 Namundi, J. The petitioner, now the appellant, prayed that it be reinstated. In those circumstances, the trial judge could not have heard the petition and dismissed it. Ground 4 had no merit at all. It therefore also must fail.

The upshot of our decision here is that the purported dismissal of Mbale
25 Election Petition No 5 of 2021 was of no effect because the order of Namundi J, to that effect was made in error. The learned judge misdirected himself about his powers after he rendered his decision in MA No. 68 of 2021 dismissing the application for leave to effect

substituted service of the petition on the 1st respondent. His order therefore cannot stand and Mbale Election Petition No. 05 of 2021 still subsists before the court, save that notice of its lodgement has never been effectively brought to the attention of the 1st respondent. We do not
5 consider service on M/s Anguria & Co, Advocates as effective service in view of the fact that it was not proved that they had instructions from the 1st respondent to represent him.

Remedies

The appellant prayed that this court allows her appeal and sets aside
10 the orders of the High Court. She also prayed that this court orders that the petition be heard on its merits, and for costs of the appeal.

For the reasons stated above, we find it appropriate to set the order of Namundi, J dismissing the petition aside and we hereby formally do so. Having done so, it must be decided whether the petition ought to be
15 heard on its merits.

We observed from the petition, at page 11 of the record of appeal, that the appellant's main grievance was against the National Identification Registration Authority (NIRA) whose officials are alleged to have colluded with the 3rd respondent, the EC, to fraudulently alter the 1st
20 respondent's birth registration details in the National Identification Register. Further grievance is that NIRA abdicated its responsibility to verify and authenticate the details of the 1st respondent's birth date, leading to the impression that he was qualified to contest for the office of Youth Member of Parliament. The petitioner thus sought for
25 declarations and orders that:

- a) The 1st respondent fraudulently caused alterations of information in the National Information Register to reflect that he was born on the 28th Day of August 1991, whereas not;

- b) An order that the 2nd respondent's failure to verify and authenticate the 1st respondent's information regarding his birth date before accepting the return/change in his birth date was illegal or fraudulent.
- 5 c) An order doth issue directing the 2nd respondent to cancel the registration of the 1st respondent from the National Identification Register to the extent that it reflects him having been born on the 28th Day of August 1991, whereas not.
- 10 d) An order doth issue directing the 2nd respondent to rectify the respondent's date of birth to his actual date of birth as 28th August, 1982.
- e) A declaration that the 1st respondent's election as member of parliament for Youth-Eastern Region was illegal or in contravention of the Parliamentary Elections Act and the
15 Parliamentary Elections (Special Groups) Regulations, since he was above the youth age as required by law.
- f) The petitioner who was declared by the 3rd respondent as the first runner up be returned as the duly elected member of Parliament representing the youth of Eastern Uganda.
- 20 g) The respondents pay the costs of this petition.

We also noted that in answer to the petition, the Electoral Commission filed an additional affidavit affirmed by Kayondo Abubaker, on 21st April 2021. In his affidavit (at page 81 of the record) Kayondo Abubaker states that Kapisi Douglas and Wanyama Judas Thadeo, through Weere
25 Associated Advocates, lodged complaints with the Electoral Commission (EC) to challenge the nomination of the 1st respondent to contest for the position of Youth MP for Eastern Region. The deponent further averred that upon examining the said complaints, the EC found that the candidate's information and all the evidence adduced during the hearing

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of the complaint was at variance with the Voter Registration Details in the possession of the Commission.

Kayondo Abubaker went on to state that the EC found that the 1st respondent was ineligible to contest in the elections for Youth MP under section 8D of the Parliamentary Elections Act, 2005, as amended. Further, that the EC reversed the Returning Officer's decision to nominate the 1st respondent but the latter appealed against the decision to the High Court, which rendered its decision reversing the decision of the EC and finding that the 1st respondent was eligible to stand for the position. A copy of the judgment of the High Court in Election Petition Appeal No 09 of 2021 was attached to that affidavit as **Annexure B**.

We perused the decision of Baguma, J in **Election Petition Appeal No. 09 of 2021, Odoi Bernard Onen Mutusa v. The Independent Electoral Commission, Wanyama Thadeo & 2 Others**, which was delivered on the 31st January 2021. The appellate judge found and held, at page 8 of his judgment, as follows:

"The petitioner presented both the birth certificate, National Identification Card from NIRA and passport No. A00223920 issued by the National Citizenship and Immigration Board, the authorised bodies to issue the said documents which have helped this court to reach a just decision to prove the age of the petitioner.

The petitioner also presented a notification of change of error in the information from NIRA regarding his date of birth.

This court is therefore bound by the official documents issued by NIRA and the National Citizenship and Immigration Board about the date of birth of the petitioner since they are the authorised bodies with the bio-data in Uganda to validate such information in line with section 5 (1) of the Registration of Persons Act, cited above.

In the final result, court finds that the official birth certificate, National Identification Card and passport prove that the petitioner was born on 28th August 1991."

Section 15 of the Electoral Commission Act empowers the Commission to resolve complaints and for appeals from its decisions as follows:

“15. Power of the commission to resolve complaints; appeals.

- 5 (1) Any complaint submitted in writing alleging any irregularity with any aspect of the electoral process at any stage, if not satisfactorily resolved at a lower level of authority, shall be examined and decided by the commission; and where the irregularity is confirmed, the commission shall take necessary action to correct the irregularity and any effects it may have caused.
- 10 (2) An appeal shall lie to the High Court against a decision of the commission confirming or rejecting the existence of an irregularity.
- 15 (3) The appeal shall be made by way of a petition, supported by affidavits of evidence, which shall clearly specify the declaration that the High Court is being requested to make.
- (4) On hearing a petition under subsection (2), the High Court may make such order as it thinks fit, and its decision shall be final.
- ...”

20 According to the complaints to the Commission contained in **Annexure C** to the affidavit of Kayondo Abubakar, at pages 87, 88 and 89 of the record, Kapisi Douglas was a voter who stated that he had observed the conduct of the 1st respondent as he changed his date of birth every time he was interested in contending for the position as representative of the youth. Nabuyanda John Solomon was an aspirant for the position of Youth MP Eastern Region, while Wanyama Judas Thadeo was also a voter aspiring to contest for the same position. The two complainants to the Commission also complained about the inconsistencies in the age of the 1st respondent which he alleged at different times and for different purposes.

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Though the Commission found for the complainants, the 1st respondent appealed against the decision of the Commission in the petition to the High Court that we mentioned above. He was successful in the appeal

and according to section 15 (4) of the Electoral Commission Act, the decision of the High Court for purposes of electoral disputes in the same cycle on such matters is final.

5 This seems to be the reason why the 1st respondent was elusive and paid no heed to the fact that the appellant had filed a petition to challenge his election as Youth Member of Parliament, on account of suspicious documents. He was confident that he was 'home dry' because the decision of the High Court on the matter could not be subjected to an appeal.

10 However, the 1st respondent ought to know that this petition and other civil action to challenge the alleged misrepresentations about his age are not the only remedies available under the law. It is also an offence to utter false documents and it is proscribed by section 351 of the Penal Code, which is akin to forgery. Forgery is a felony provided for by section 15 347 of the Penal Code Act and if one is found guilty, the punishment prescribed for it is imprisonment for three years. Further, it is an offence under section 353 of the Penal Code to procure the execution of documents by false pretences. The person found guilty of the offence is liable to the same punishment as one who forges the document.

20 Going back to the case at hand, much as the appellant's complaints seems to have a grain of truth in them, as is shown in the report of the EC at page 59 of the record of appeal, section 7 of the CPA provides for the defence of *res judicata* as follows:

25 **"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court."**

30

Explanation 6 thereunder goes on to clarify as follows:

5 **Explanation 6 —Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in that right shall, for the purposes of this section, be deemed to claim under the persons so litigating.**

The respondents in High Court Election Appeal No 09 of 2021 were litigating for a public right to ensure that the person contending for a position to represent them in Parliament did not ride on fraudulent
10 actions to get into that august House. Though they also litigated in their own personal interests, the action was also in the nature of public interest litigation. It therefore fell squarely under Explanation 6 of section 7 CPA. We therefore find that the appellant's petition was *res*
judicata within the meaning of that provision.

15 Consequently, it is clear to us from the pleadings on record that any order made to have the petition heard on its merits would be futile in the face of the decision of the High Court in EPA No 09 of 2021. This court does not make orders in vain. We therefore cannot make the orders that the appellant seeks from this court because they would be
20 futile, the mater being *res judicata*.

It is also pertinent to point out that the appellant continued her bid for the position of Member of Parliament for the Youth in Eastern Region against the 1st respondent even in the knowledge that he was most probably ineligible to stand for that position. She did not complain to
25 the EC about his past conduct before the election and his known age before he placed his bid. She only complained after she lost the bid and filed Election Petition No 05 in the High Court at Mbale. By doing so, the appellant sat on her rights; she raised complaints that she ought to have raised before the polls under section 15 of the Electoral Commissions
30 Act.

Conclusion

In the circumstances, we decline to make the order sought to have the petition served on the 1st respondent and heard on its merits though it still subsists, because it is *res judicata*. And in view of the prohibition of litigation under section 7 of the CPA, and section 11 of the Judicature Act, which bestows on this court all the powers, authority and jurisdiction vested under any written law in the court exercising original jurisdiction from which the appeal originally emanated, **Mbale Election Petition No. 05 of 2021** is hereby dismissed.

Finally, since the matter was in the nature of litigation in the public interest and the appeal has substantially failed, we make no order as to costs.

Dated at Kampala this 13th day of July 2022.

Richard Buteera

Richard Buteera
DEPUTY CHIEF JUSTICE

Catherine Bamugemereire

Catherine Bamugemereire
JUSTICE OF APPEAL

Irene Mulyagonja

Irene Mulyagonja
JUSTICE OF APPEAL