THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT KAMPALA

(Coram: Egonda-Ntende, Mulyagonja & Mugenyi, JJA)

CIVIL APPEAL NO. 84 OF 2016

MWIRU PAUL ..... APPELLANT

VERSUS

1. **NATIONAL COUNCIL FOR HIGHER EDUCATION**
2. **UGANDA NATIONAL EXAMNIATIONS BOARD** — **RESPONDENTS**
3. **NATHAN SAMSON IGEME NABETA.**

(Appeal from the decision of the High Court of Uganda (Basaza Wasswa, J) in Misc. Cause No. 62 of 2015)

JUDGMENT OF MONICA K. MUGENYI, JCC

A. Introduction

1. On 24th June, 2015, the National Council for Higher Education (NCHE) ('the First Respondent'), in consultation with Uganda National Examinations Board (UNEB) ('the Second Respondent'), issued Mr. Nathan Samson Igeme Nabeta ('the Third Respondent') with a Certificate of Completion of Formal Education of Advanced Level Standard or its Equivalent No. NCHE/PAR/05/148 ('certificate of equivalence'). The certificate was sought by the Third Respondent to facilitate his nomination as a candidate in the Parliamentary Elections of 2016 for the position of Member of Parliament for Jinja Municipality East Constituency.

2. Mr. Paul Mwiru ('the Appellant'), a registered voter and then sitting Member of Parliament for the same constituency, thereupon filed *Miscellaneous Cause No. 62 of 2015* in the High Court of Uganda sitting at Jinja seeking to quash the First Respondent's decision to issue the said certificate of equivalence on the premise that it flouted *Legal Notice No. 12 of 2015* and the Universities and Other Tertiary Institutions (Equating of Degrees, Diplomas and Certificates) Regulations, 2005. The High Court dismissed *Miscellaneous Cause No. 62 of 2015*, hence the present Appeal.

3. The Appeal is premised on the following grounds of appeal:

    I. *The Learned trial Judge erred in law and in fact in holding that the certificate of completion of formal education of advanced level standard or its equivalent certificate number NCHE/PAR/05/148 issued by the first Respondent to the third Respondent was validly issued.*

    II. *The Learned trial Judge erred in law and in fact in assuming that the qualifications of the third Respondent that were actually equated by the first Respondent purportedly in consultation with the second Respondent were legally valid and accordingly that the Court had no jurisdiction to inquire into the equating process of the second Respondent.*

    III. *The Learned trial Judge erred in law and in fact in holding that the Appellant admitted to the authenticity and validity of the third Respondent's Uganda certificate of education and BSBA degree in international business obtained from Oklahoma State University.*

IV. *The Learned trial Judge erred in law and in fact in holding that expert evidence was required by Court from the Appellant to prove whether the third Respondent's credits from Los Angeles City College and Tulsa community college were transferred to Oklahoma State University.*

V. *The Learned trial Judge erred in law and in fact in holding that there were no discrepancies between the third Respondent's degree transcript from Oklahoma State University and his transcripts from Los Angeles City College and Tulsa community college which would have rendered the third Respondent ineligible to join university.*

4. The Appeal is opposed by the Respondents, with the First and Third Respondents additionally lodging cross appeals in the matter. The grounds of the First Respondent's Cross-Appeal are as follows:

I. *The Learned trial Judge erred in law and fact in finding that the Appellant had locus to file Miscellaneous Cause No 62 of 2015.*

II. *The Learned trial Judge erred in law and fact in finding that Miscellaneous Cause No 62 of 2015 was not res judicata.*

III. *The Learned trial Judge erred in law and fact when she held that Legal Notice 12 of 2015 (The Universities and Other Tertiary Institutions (Benchmarks for verifying, determining and recognising academic qualifications as person holding a minimum qualification of advanced level or its equivalent) notice 2015 issued on the 18th of September 2015 could operate retrospectively.*

5. Similarly, the Third Respondent's grounds of Cross-Appeal are reproduced below.

I. *The Learned trial Judge erred in law and fact in finding that Miscellaneous Cause No 62 of 2015 was not res judicata.*

II. *The Learned trial Judge erred in law and fact when she held that legal notice 12 of 2015 (The Universities and Other Tertiary Institutions (Benchmarks for verifying, determining and recognising academic qualifications as person holding a minimum qualification of Advanced level or its equivalent) notice 2015 issued on the 18th of September 2015 could operate retrospectively.*

III. *The Learned trial Judge erred in law and fact in holding that the Appellant's procedure of filing the application by way of notice of motion was proper.*

6. At the hearing, the Appellant was represented by Messrs. Edward Keyagu and Hannington Mutebi, holding brief for Mr. Peter Walubiri; the First Respondent was represented by Ms. Fiona Kunihira and Ms. Irene Nasaka, while the Third Respondent was represented by Mr. Isaac Bakayana. The Second Respondent was unrepresented.

B. **Determination**

7. In addition to the question of *res judicata* that arises in the First and Third Respondents' cross-appeal, all the Respondents raised a preliminary objection that the Appeal was moot and overtaken by events. I propose to address the issue of mootness forthwith as if resolved in the affirmative it would conclusively dispose of the Appeal.

8. It is the First Respondent's contention that the certificate of equivalence that is in issue under the present Appeal lapsed with the conclusion of the 2016 electoral cycle. Reference in that regard is made to this Court's decision in **Paul Mwiru v Hon Nathan Igeme Nabeta & 2 Others, Election Petition Appeal No. 6 of 2011** where it was held that the equating of academic papers for purposes of elections was not a one-time exercise.

9. In the same vein, the Second and Third Respondents contend that the present Appeal is moot given that it is premised on the revocation of a certificate of equivalence in respect of the now concluded 2016 parliamentary elections. In their view, any orders granted by this Court would, under section 4(11) of the Parliamentary Elections Act, be restricted to the remedies that were available to the High Court, to wit, the confirmation, modification or reversal of the First Respondent's decision. To the extent that the said decision pertains to an electoral cycle that has since been concluded, the orders sought are untenable and the Appeal is moot. The Second Appellant additionally questions the Appellant's prayer for a permanent injunction stopping the First Respondent from issuing any other certificates of equivalence in respect of the Third Respondent insofar as it seeks to interfere with the First and Second Respondent's statutory duties.

10. Conversely, it is the Appellant's contention that section 4(11) of the Parliamentary Elections Act, 2005 does not limit the appeals cited therein to election cycles but,

rather, an appeal that is filed in time would not be affected by the concluded election cycle. It is further argued that an illegality such as the present one in respect of the wrongful issuance of certificate No. NCHE/PAR/05/048 would require interrogation by the Court unaffected by any limitations of time. The case of **Makula International vs Emmanuel Cardinal Nsubuga Civil Appeal No. 4 of 1981** is cited in support of this position. Similarly, the prayer for a futuristic permanent injunction is opined to survive any election cycle and render the dispute active.

11. Section 4(11) of the Parliamentary Elections Act, to which we were referred, provides as follows on the remedies available in an application made thereunder:

> **A person aggrieved by the grant or refusal to grant a certificate by the National Council for Higher Education under this section is entitled to appeal to the High Court against the decision and the High Court may confirm, modify or reverse the decision.**

12. Meanwhile, as quite correctly argued by the Respondents, this Court did in **Paul Mwiru v Hon Nathan Igeme Nabeta & 2 Others** (supra) hold that a certificate of equivalence must be re-issued for every election in which a candidate seeks to rely on it. It was held (per Byamugisha, JA):

> I am not persuaded by the case put forward by the 3rd respondent when it claims that once it issues a certificate for one election, the certificate is valid for future elections. This would tantamount to amending the law. Equating of academic papers for purposes of elections is not a once (in a) life time exercise unless the law is amended.

13. Turning to the present Appeal, the matter that was before the trial court was a challenge to the validity of the Third Respondent's qualifications that formed the basis for the issuance of the certificate of equivalence by the First Respondent. In **Gole Nicholas v Loi Kiryapau, Election Petition Appeal No. 19 of 2017**, the Supreme Court held that the High Court did have the jurisdiction to consider a challenge to certificates that the NCHE had purported to grant equivalence, without necessarily usurping the function of equating of certificates, which the court acknowledged to be the preserve of NCHE. It was held:

> If NCHE equates valid qualifications, then courts of law may not interfere with its decision, but where the certificate it purported to equate is what is being challenged, then the High Court has power to inquire into that question. It is not the equating which is being inquired into but the validity of the qualifications that were equated.

14. In the event, the trial court declined to set aside the First Respondent's decision to issue the certificate of equivalence, and on that premise declined to consider the other reliefs sought by the Appellant, including a prayer for permanent injunction against the issuance of any certificate of equivalence by the First Respondent.

15. I take judicial notice of the fact that the 2016 electoral cycle in respect of which the impugned certificate of equivalence was issued has indeed been concluded. Given this Court's decision in **Paul Mwiru v Hon Nathan Igeme Nabeta & 2 Others** (supra) that the applicability of a certificate of equivalence is restricted to the electoral cycle in respect of which it has been issued, would it be conceivable that there remains a live dispute between the parties that warrants determination by this Court?

16. The Supreme Court of Canada succinctly articulated the question of mootness in **Joseph Borowski v Attorney General of Canada (1989) 1 SCR 342 at 353** as follows:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. **This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no live controversy exists which affects the rights of the parties, the case is said to be moot**. *(my emphasis)*

17. That case additionally proposes that the mootness doctrine is rooted in an adversarial legal system that hinges on live controversies for adjudication; as well as the notion of judicial economy that requires courts to examine the circumstances of a case to determine if it is worthwhile allocating scarce judicial resources to

resolve moot and hypothetical questions. It posits a third premise for the mootness doctrine, which enjoins courts to be sensitive to their role as the adjudicative branch in the political framework, so that **'pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.'**

18. A related approach was adopted in **Legal Brains Trust Ltd v Attorney General of Uganda, EACJ Appeal No. 4 of 2012**, where the East African Court of Justice compellingly observed:

> In this regard, it is a cardinal doctrine of our jurisprudence that a court of law will not adjudicate hypothetical questions – namely, those concerning which no real dispute exists. A court will not hear a case in the abstract, or one which is purely academic or speculative in nature – about which there exists no underlying facts in contention. .... the resulting exercise would be an abuse of the court's process.

19. The foregoing principles were applied in **Justice Okumu Wengi v Attorney General (2007) 600 KaLR**, where it was persuasively held:

> Courts of law do not decide cases where no live dispute exists between the parties. Courts do not decide cases or issue orders for academic purposes only. Courts cannot issue orders where the issues in dispute have been removed or merely no longer exist. It is now a mere moot case.

20. In the present Appeal, it is apparent from the record that the Appellant sought to have the trial court confirm, modify or reverse the grant of the certificate pursuant to section 4(11) of the Parliamentary Elections Act. Those orders are no longer tenable given the restricted application of the certificate of equivalence in respect of which they are sought. Consequently, even if per chance the Appellant emerged victorious in this Appeal, it would be superfluous for the Court to issue orders for the modification or reversal of a certificate of equivalence that has lapsed.

21. Whereas the Appellant seems to suggest that the permanent injunction against the issuance of any other certificates to the Third Respondent represents a live dispute, such a relief is untenable given the decision in **Paul Mwiru v Hon Nathan Igeme Nabeta & 2 Others** (supra) that the First Respondent reconsiders afresh

any applications for the issuance of certificates of equivalence in each election cycle.

22. A court's inability to grant an actual relief in a matter is recognized as one of the characteristics of a moot case. Thus, in *Diamond, Sidney A, '**Federal Jurisdiction to Decide Moot Cases**,' University of Pennsylvania Law Review, Vol. 94 at p. 125*, the Common Law restriction of judicial intervention to cases that present justiciable controversies is delineated in the following terms:

> If the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, the case is moot and the court is without power to render a decision.

23. I am alive to the *public interest exception* to the determination of moot cases, which was encapsulated in *Black's Law Dictionary, 9th Edition, p.1350* as '**the principle that an appellate court may consider and decide a moot case – although such decisions are generally prohibited – if (1) the case involves a question of considerable public importance, (2) the question is likely to arise in future, (3) the question has evaded appellate review.**' In this case, however, I find no attempt whatsoever by the Appellant to bring his Appeal within the parameters of the public interest exception to the doctrine of mootness. I would therefore uphold the preliminary objection and do find that this Appeal is moot.

C. **Conclusion**

24. In *Diamond, Sidney A, '**Federal Jurisdiction to Decide Moot Cases**,'*[1] it is proposed that '**when a court decides that a case before it is moot, it ousts itself of jurisdiction**.' Accordingly, my finding of mootness would conclusively determine this matter without the need to delve into the merits of the Appeal.

25. The upshot of my consideration hereof is to hereby strike out this Appeal and order each party to bear its own costs.

26. I would so order.

[1] Ibid., at p. 127.

Dated and delivered at Kampala this 22nd day of January, 2024.

Monica K. Mugenyi

Justice of Appeal

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Mulyagonja & Mugenyi, JJA)

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:: :: :: :: RESPONDENTS

(Appeal from the decision of the High Court of Uganda (Basaza Wasswa, J) in Jinja Misc. Cause No. 62 of 2015)

JUDGMENT OF IRENE MULYAGONJA, JA

I have had the benefit of reading in draft the judgment of my sister, Monica K. Mugenyi, JA. I agree with her decision that this appeal is moot and ought to be dismissed with the orders that she has proposed.

Dated at Kampala this 22nd day of January 2024

Irene Mulyagonja

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Mulyagonja & Mugenyi, JJA)

Civil Appeal No. 84 of 2016

BETWEEN

Mwiru Paul==========Appellant

AND

National Council For Higher Education==========Respondent No.1

Uganda National Examinations Board==========Respondent No.2

Nathan Samson Igeme Nabeta==========Respondent No.3

(Appeal from the decision of the High Court of Uganda (Basaza Wasswa, J.) in Jinja Misc. Cause No. 62 of 2016)

JUDGMENT OF FREDRICK EGONDA-NTENDE, JA

[1] I have had the benefit of reading in draft the judgment of my sister, Mugenyi, JA. I agree with it.

[2] As Mulyagonja, JA, also agrees this appeal is dismissed with each party bearing his or its costs.

Signed, dated and delivered this 22nd day of January 2024

Fredrick Egonda-Ntende

Justice of Appeal