

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ
HON. JUSTICE A.E.N. MPAGI BAHIGEINE, JA
HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSTICE C.N.B. KITUMBA, JA
HON. JUSTICE C.K. BYAMUGISHA, JA

CONSTITUTIONAL PETITION NO.1 OF 2006

1. **KABAGAMBE ASOL**
2. **FARAJ ABDULLAH**
3. **ATTORNEY GENERAL.....PETITIONERS**

V E R S U S

1. **THE ELECTORAL COMMISSION**
2. **DR. KIZZA BESIGYE.....RESPONDENTS**

JUDGMENT OF THE COURT;

On the 17th February 2006, due to the urgency of the matter, the Constitutional Court delivered the following summary judgment of the court:

"The petitioners filed this petition under Articles 50(1) and (2) and 137(1) and (3) of the Constitution of Uganda 1995, and the Modification to the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992 Directions 1996. They sought the following declarations and orders:-

(a) A declaration that the act of the 1st respondent in not following the legal advice of the Attorney General which advised that the nomination of the 2nd respondent should not proceed, was inconsistent with and in contravention of article 119 of the Constitution.

(b) A declaration that the act of the 1st respondent in accepting the nomination of the 2nd respondent as a Presidential candidate in be disposed of before the 23rd February 2006 which is the presidential election date. We did not give our reasons for the ruling but we promised to give them together with the main judgment. For the same reason, we are unable to give our full judgment with reasons for the same before the election date. This judgment contains our findings on the merits of the issues which were framed for determination. The reasons will be given together with the reasons why we overruled the two preliminary objections of the respondents."

What follows now are:-

(a) The reasons why we overruled the two preliminary objections of the respondents.

(b) The reasons why we decided that the petition be dismissed with costs to the petitioners.

The first preliminary objection was argued by Mr. David F.K. Mpanga, learned counsel for the 2nd respondent. It relates to the procedure which was followed in filing this petition. Mr Mpanga pointed out that on 19th January 2006, a petition was filed in this court purportedly by M/s Birungi & Co Advocates. On the face of it, it did not have M/s Birungi & Co. Advocates' endorsement. This contravened section 67 of the Advocates Act. On 20 January 2006 M/s Birungi & Co Advocates wrote to this court disassociating themselves from the petition. They stated that they had never filed the petition. On 23/1/2006 M/s Tumwesigye, Baingana & Co Advocates filed a notice of change of advocates indicating that they had been instructed to conduct the petition on behalf of the petitioners. They filed an amended petition which is the basis of this petition. Mr. Mpanga then submitted that the petition allegedly filed by M/s Birungi & Co Advocates was null and void because the firm had disowned it. This, in his view, meant that there was a forgery in filing that the petition which rendered it null and void. In his view, the forgery could not be amended to result into a valid petition. He asked the court to hold that the petition was filed fraudulently Section 64: Unqualified persons not to practice.

Section 65: Unqualified person not to hold himself or herself as qualified. Section 66: Penalty for unqualified persons preparing certain instruments.

This section reads in part:

"(1) Any person other than an advocate with a valid practising certificate or a person specifically authorised by any written law to do so who, unless he or she proves that the act was not done for, or in expectation of, any fee, gain or reward, either directly or indirectly, draws or prepares any instrument:-

(a) relating to movable or immovable property or any legal proceeding:

(b) for or in relation to the formation of any limited liability company whether private or public;

(c) For or in relation to the making of a deed of partnership or the dissolution of a partnership.

Commits an offence.

Section 67 provides:-

"(1) Every person who draws or prepares any instrument to which section 66 applies shall endorse or cause to be endorsed on it his or her name and address; and any such person omitting to do so or falsely endorsing or causing to be endorsed any of such requirements commits an offence.

(2) It shall not be lawful for any registering authority to accept or recognise any such instrument unless it purports to bear the name and address of the person who prepared it endorsed on the instrument.

Kiiza Besigye. This prompted a denial from the said firm of Advocates in a letter to the Registrar of this court dated 20th January 2006 in the following terms:

"Your Honour,

Re: NEWSPAPER ARTICLE PETITION FILED AGAINST BESIGYE,
MONITOR NEWSPAPER 20TH JANUARY 2006.

We have the honour to address you in respect of an Article, which appeared in the Monitor Newspaper of today the 20th January 2006, at page 2 under the heading petition filed against Besigye. The said Article stated Inter-alia that a Petition had been filed by M/s Birungi & Co. Advocates challenging nomination of Kiiza Besigye. As far as we are concerned, M/s Birungi & Co. Advocates have never filed any such petition in the Court of Appeal and we are not aware of it. We would like to correct the impression that had been created by the Newspaper Article.

We thank you. Yours faithfully,

M/S BIRUNGI & CO. ADVOCATES

cc The Editor, New Vision Newspaper cc The Editor, Monitor Newspaper"

There is of course a whole world of difference between a petition challenging the nomination of someone and a petition naming that someone a party to the petition. We can easily see that M/s Birungi & Co Advocates did not disown the petition they had filed on 19th January 2006. They only denied that the petition named Col. Dr. Besigye as a party. It is the firm of M/s Tumwesigye, Baingana & Co Advocates which decided to amend the petition by including Col. Dr. Kiiza Besigye, among other amendments, as a party to the petition. In our judgment, since the petition filed on 19th January was valid, it could be validly

There was no way they could challenge the Commission's failure to follow the advice of the Attorney General before the Commission itself. He invited us to hold that this is not an election complaint but a public interest petition, and to dismiss the preliminary objection.

Article 61 of the Constitution provides:-

' *

"The Electoral commission shall have the following functions:

(a).....

(b).....

(c).....

(d).....

(e).....

(f) To hear and determine election complaints arising before and during polling;

(g).....

(h)....."

Article 64(1) provides:-

"Any person aggrieved by the decision of the Electoral Commission in respect of the complaints referred to in paragraph (f) of article 61 of this Constitution may appeal to the High Court."

We agree with the submission of learned counsel for the petitioners that "aggrieved" person must mean a person who intends to stand as a candidate or who is already a candidate. It cannot be referring to persons who are complaining about a breach of the Constitution. Even if that was not the case, there is nothing in our law that can stop an aggrieved party within the meaning of article 137 of the Constitution from coming to this court. This objection has no merit and is hereby dismissed accordingly.

We now turn to the reasons why we dismissed the petition. Three issues were framed for determination. They are:-

No.1 of 2001 especially the lead judgment of Kanyeihamba, JSC, with which other members of the coram concurred. At page 15, the learned judge stated:-

"In my view, the opinion of the Attorney General as authenticated by his own hand and signature regarding the laws of Uganda and their effect or binding nature on any agreement, contract or other legal transaction should be accorded the highest respect by Government and public Institutions and their agents. Unless there are other agreed conditions, third parties are entitled to believe and act on that opinion without further inquiries or verifications. It is also my view that it is improper and untenable for the government, the Bank of Uganda or any other public institution or body in which the Government of Uganda has an interest, to question the correctness or validity of that opinion in so far as it affects the right and interests of third parties.

The contention by Mr. Masembe-Kanyerezi that the Attorney General's opinion is erroneous or that in any event, it does not bind the Bank of Uganda is not persuasive and I reject it."

He invited us to follow the decision of the Justices of the Supreme Court and to hold that the Electoral Commission was bound by the advice of the Attorney General.

On the other hand Mr. Sekaana Musa for the 1st respondent submitted that the Electoral Commission is not just like any other government department or agency. It is an independent institution by virtue of article 62 of the Constitution. He denied that article 62 was subject to article 119 of the Constitution. In his view, the Commission could seek advice from anybody including the Attorney General. However, the Commission was free to accept or reject the advice as it deemed appropriate. That is what happened in the instant case. The Commission decided to reject the advice of the Attorney General and it acted within its constitutional rights. He invited us to find that there was no merit in this issue and to dismiss it.

Secondly, in the impugned letter of the Attorney General, he stated in paragraph 8 and 9 thereof as follows:

"8. It is my considered opinion that Dr. Besigye's nomination would at this point in time, be tainted with illegalities. His nomination should therefore not proceed. If the commission feels strongly that in its view he deserves to be nominated it should defer consideration of the decision to accept his nomination until after his trial in the appropriate court has been completed.

9. I am mindful of the provisions of article 62 of the Constitution. But I was asked for advice which I have conscientiously given. I would also advise that section 50 of the Electoral Commission Act Cap, 140 be taken into account."

The learned Attorney General was at all times mindful of the independence of the Commission conferred by article 62 of the Constitution. He did not seek to invoke the alleged superiority of article 119 of the Constitution at all. Instead, he advised the Commission to consider invoking its powers under section 50 of the Electoral Commission Act, which provides:-

"SPECIAL POWERS OF THE COMMISSION.

(1) **Where, during the course of an election, it appears to the commission that by reason of any mistake, miscalculation, emergency or unusual or unforeseen**

circumstances any of the provisions of this act or any law relating to the election, other than the constitution, does not accord with the exigencies of the situation, the commission may, by particular or general instructions, extend the time for doing any act, increase the number of election officers or polling stations or otherwise adapt any of those provisions as may be required to achieve the purposes of this act or that law to such extent as the commission considers necessary to meet the exigencies of the situation.

(2) For the avoidance of doubt, this section applies to the whole electoral process, including all steps taken for the purposes of the election and includes nomination."

In the instant case we are dealing with the powers of the Attorney General under article 119 of the Constitution vis-a-vis article 62 of the Constitution which vests the Electoral Commission with independence.

Lastly, there is no doubt that the Attorney General is the principal legal advisor to government. The English meaning of the words "advise, advice and advisor" are common knowledge to anyone with some knowledge of the English language. No advice can be binding on the entity being advised. In the judgment of the court, we stated:-

"Though the Attorney General is the principal advisor of Government, the Constitution does not provide anywhere that such advice amounts to a directive that must be obeyed. In case of the Electoral Commission, it can seek, receive and accept or reject the advice of the Attorney General." We reiterate this holding.

For the aforesaid reasons, we answered the 1st issue in the negative.

ISSUE NO.2

The issue was whether the nomination of the 2nd respondent by the 1st respondent in *absentia* was inconsistent and contravened article 103(2)(a) of the Constitution.

Article 103(2)(a) of the Constitution provides:-

"A person shall not be a candidate in a presidential election unless:- that person submits to the Electoral Commission on or before the day appointed as nomination day in relation to the election, a document

Mr. David Mpanga, learned counsel for the 2nd respondent associated himself fully with the arguments of Mr. Sekaana. He only added, however, that at the time of nominations, the 2nd respondent was being illegally detained at Luzira prison. He submitted that to construe article 103(2)(a) of the Constitution the way the petitioners wanted would be tantamount to legitimising the illegal detention of the 2nd respondent. He pointed out cases in the past where aspirants in an election were prevented by their powerful opponents from reaching the nomination venue which resulted into their being disqualified. He invited us not to legitimise such actions.

In the judgment of the court which was delivered on 17th February 2006, we, on this issue held:-

ISSUE NO.2

The nomination of the 2nd respondent by the 1st respondent in absentia was NOT inconsistent and did NOT contravene article 103(2)(a) of the Constitution. Article 61 confers on the Electoral Commission a monopoly to ensure that regular, free and fair elections are held in Uganda. It is enjoined to organise, conduct and supervise elections and referenda in accordance with the Constitution.

Needless to say, the carrying out of nomination exercise for various candidates falls squarely in the functions of the Commission.

Article 103(2)(a) on the other hand provides:-

"A person shall not be a candidate in a presidential election unless-

"FACTORS WHICH MAY INVALIDATE A NOMINATION

A person shall not be regarded as duly nominated and the nomination paper of any person shall be regarded as void if-

- (a) the person's nomination paper was not signed and seconded in accordance with section 10(1) and (2);**
- (b) the nomination paper of the person was not accompanied by the list of names of registered voters as required by section 10(1) and (3);**
- (c) the person has not complied with section 10(6);**
- (d) the person seeking nomination was not qualified for election under section 4;**
- or**
- (e) the person seeking nomination has been duly nominated for election as a Member of Parliament."**

It can clearly be discerned that physical presence of a candidate is not one of the condition for valid nomination. All that he is required to do is to submit to the Commission "on or before the day appointed as nomination day" a document signed by that person nominating him as candidate. This can be **done by her/him or on their behalf provided the document so submitted has been signed by the candidate. We decide this issue in the NEGATIVE."**

We reiterate the above reasons and we have nothing useful to add.

For the reasons given above, we reached a unanimous decision that this petition should be dismissed with costs to the respondents.

Dated at Kampala this 2nd day of June 2006.

Hon. Justice L.E.M. Mukasa-Kikonyogo

DEPUTY CHIEF JUSTICE