

**THE REPUBLIC OF UGANDA,
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO 06 OF 2016**

ONEGA ROBERT} PETITIONER

VERSUS

10 ELECTORAL COMMISSION} RESPONDENT

CORAM:

HON. MR. JUSTICE RICHARD BUTEERA, DCJ

HON. MR. JUSTICE KENNETH KAKURU, JCC

HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE, JCC


15 HON. MR. JUSTICE CHRISTOPHER MADRAMA, JCC

HON. LADY JUSTICE IRENE ESTHER MULAYGONJA, JCC

JUDGMENT OF JUSTICE CHRISTOPHER MADRAMA, JCC

20 The Petitioner brought this petition under Article 137(3) (b) of the Constitution of the Republic of Uganda and the Constitutional Court (Petitions and References) Rules, 2005 alleging inconsistency of the acts of the Respondent with the Constitution. Particularly, the Petitioner contends that the Respondent's decision to treat him as an unregistered voter and to disqualify him from participating in the 2016 general elections as a voter or candidate was inconsistent with the provisions of Articles 17(1) (h), 20(2), 21, 59, 61(e), 62 and 80(1) (b) of the Constitution.

25 The facts in support of the Petition are that on 2nd December, 2015, the Petitioner presented himself to the Respondent for nomination as a candidate for the position of Member of Parliament for Padyere County on the Forum for Democratic Change (FDC) ticket. The Respondent declined to nominate the Petitioner on the ground that his name did not appear on the National Voters' Register and as such he was not a qualified person to participate in
30 the electoral process as a candidate or a voter.


The undersigned Judge of the Constitutional Court of Uganda

5 The Petitioner had been registered as a voter and had been issued a voter's card since 2011. Prior to the nomination date of 22 April, 2015, the Petitioner participated in the national identification project where he was registered for purposes of receiving a National Identity Card. In July 2015, the Respondent 'retired' the National Voters' Register of 2011 and announced that it was going to use the National Identification Project Register as the National
10 Voters' Register for purposes of the 2016 general elections. Following the Respondent's announcement, the Petitioner checked the Respondent's website – www.ec.or.ug to ascertain whether his name was on the voters register but found that his application ID Number – 1126300003W9 was registered in the name of another person. The Petitioner engaged the Respondent and the National Identification and Registration Authority (NIRA), through his
15 lawyers – M/S Luganda, Ojok & Co. Advocates to include his name on the National Voters' Register but this was in vain and his complaints were either ignored or neglected.

The Petitioner states that he is aggrieved by the following matters being inconsistent with the constitution namely:

- 20 1. The act of quashing the National Voters' Register where the Petitioner's name was registered as a voter was inconsistent with Articles 17(1) (h), 59 and 61(e) of the Constitution in as far as it disenfranchised the Petitioner by rendering him ineligible to vote.
- 25 2. The act of adopting and relying on a National Identification Enrolment Register was inconsistent with Articles 61(e) and 62 of the Constitution in as far as the same did not amount to a compilation, update or maintenance of the National Voters' Register and vitiated the independence of the Respondent.
- 30 3. The omission of the Petitioner's name from the adopted National Voters' Register was inconsistent with Article 20(2), 21, 59 and 80(1) (b) of the Constitution in as far as it automatically disqualified him from participating in any national electoral activity either as a voter or candidate or even to have locus to contest any election.

35 Additionally, the Petitioner contends that even if the Respondent adopted the National Identity Card Enrolment Register as the new Voters' Register, the same ought to have been only for purposes of updating the existing National Voters' Register by inserting new voters but not erasing existing voters without an application to do so under Section 223 of the Electoral Commission Act, Cap 140.

5 The Petitioner avers that the Respondent's failure to compile, maintain, revise and update the existing Voters' Register occasioned a miscarriage of justice to him by disenfranchising him and automatically disqualifying him from being nominated as a candidate for the Parliamentary seat of Padyere County. This was further to the detriment of his Political Party and the electorate who intended to vote for him as their representative as Member of
10 Parliament. Further, the Petitioner averred that the Respondent could not have fulfilled its constitutional mandate of organizing a free and fair election in Padyere County Constituency when the Petitioner was unfairly and illegally disqualified by the Respondent from participating in the elections as a candidate.

The Petitioner seeks the following reliefs;

- 15 1. An order for compensation in special, general and exemplary damages of approximately UGX 500,000,000/=
2. Special damages of nomination fees paid to the Respondent to the tune of UGX. 3,000,000/=.
- 20 3. A declaration that the acts of the Respondent as above mentioned are inconsistent with the provisions of Articles 17(1)(h), 20(2), 21, 59, 61(e), 62 and 80(1)(b) of the Constitution.
4. Interest on Special damages at 24% per annum from the date of the cause of action until payment in full.
5. Interest at 24% per annum from the date of judgement until payment in full
- 25 6. Costs of the suit
7. Any other remedy which this honourable Court deems fit.

The Petition is supported by the affidavit of the Petitioner which deposes to the facts in support of the Petition. The affidavit discloses that on 2nd December, 2015, the Petitioner went to the offices of the Respondent's District Registrar in Nebbi District to be nominated as a candidate
30 for the position of Member of Parliament whereupon he was issued nomination papers and a receipt of payment pursuant to payment of the prescribed nomination fees. The Petitioner was informed that he could not be nominated because his name did not appear on the National Voters' Register and therefore he was not a qualified person to participate in the electoral process as a voter or a candidate.

35 The Petition is opposed by the Respondent's Answer to the Petition where the Respondent contended that it is mandated under the law to compile, revise and update the Voters Register. Further, that the Respondent is required to appoint a period within which to update

5 the Voters Register. The Respondent accordingly set the date of 11 May 2015 as the deadline
for registration of eligible voters. Thereafter, the Respondent displayed the National Voters
Register for 21 days and attended to all objections and omissions of particulars but the
Petitioner did not raise any complaint. Subsequently, the Respondent rejected the Petitioner's
10 nomination on the ground that he did not appeal against the Respondent's decision to the
High Court as required by law. The Respondent contends that the rejection of the Petitioner's
nomination was not inconsistent with Articles 17(1) (h), 59, 61 and 62 of the Constitution.
Further, that the exercise of extracting data from NIRA and using it to compile, revise and
update the National Voters Register was lawful and did not disenfranchise any vigilant voter
15 since the exercise was preceded by massive digital and print media advertisements by the
Respondent.

The Answer to the Petition is supported by the affidavit of Eng. Dr. Badru M. Kiggundu, the
then Chairperson of the Respondent. The affidavit mainly repeats the averments in the
Respondent's Answer to the Petition on oath and supports it with documentary evidence.

20 In rejoinder to the Respondent's Answer to the Petition, the Petitioner reiterated that the
Respondent did not follow the procedural steps it ought to have followed and further, that the
National Identification Register adopted by the Respondent as the new National Voters'
Register was never compiled with the supervision or participation of the Respondent as
required under Article 61(1) (e) and 62 of the Constitution.

Representation

25 At the hearing of the petition, the Petitioner was represented by learned Counsel Mr.
Mukwaya Kizito Deo while the Respondent was represented by learned Counsel Mr. Kugonza
Enock holding brief for learned Counsel Mr. Patrick Wettaka.

Issues:

By agreement, the parties proposed the following issues:

- 30 1. Whether the retirement of the Voters' Register as it stood in 2015 and adopting the
National Identification Enrolment Register of NIRA was inconsistent with Articles 17(1)
(b), 59(3) and 61(e) of the Constitution?
- 35 2. Whether the alleged omission of the Petitioner's name from the new Voters' Register
and his resultant disqualification as a voter and candidate for the Parliamentary seat
of Padyere County Constituency in the 2016 national presidential and parliamentary

5 elections conducted by the Respondent was inconsistent with Articles 20(2), 21, 59 and 80(1) (b) of the Constitution?

3. Whether the Petitioner is entitled to any recompense in damages?

Submissions of Counsel

10 The Petitioner's Counsel in the written amended submissions filed on 28 December, 2020 submitted that this Court has jurisdiction to hear the petition under Article 137 of the Constitution. He relied on **Paul Ssemwogerere v Attorney General, Supreme Court Constitutional Appeal No. 1 of 2000** where it was held that once a petition alleges that a provision of the Constitution has been infringed by an act or decision of any person or authority, the matter becomes the subject of interpretation of this Court. Counsel further relied
15 on the case of **Dr. Rwanyarare & Anor. V Attorney General, Constitutional Court Constitutional Petition No. 5 of 1999**, for the submission that for a Petitioner to have a cause of action under Article 137 of the Constitution, he or she must allege either that an Act of Parliament or any other law is inconsistent with or contravenes a particular provision of the Constitution, or that an act or omission by any person or authority is inconsistent with or
20 contravenes a certain provision of the Constitution. Counsel prayed that this Court finds that the petition discloses a cause of action.

Secondly, the Petitioner's Counsel outlined principles for interpretation of constitutions from several precedents. In **Dimanche Sharon & 2 Others v Makerere University, Supreme Court Constitutional Appeal No. 2 of 2004**, the learned Justices of the Supreme Court held
25 that "it is a well-established principle of constitutional interpretation that a broad and liberal spirit is required for its interpretation. It is essential that a Constitution is not interpreted in a narrow and legalistic way but generously and purposively so as to give effect to its spirit." Further in **Dr. Rwanyarare & Anor v Attorney General, Constitutional Court Constitutional Petition No. 5 of 1999** it was held that the first principle of constitutional interpretation is that words should be given their ordinary meaning, and secondly, that words
30 must be read in their context. Thirdly, the burden of proof in constitutional petitions lies on the party who alleges as held in **Paul Kawanga Ssemwogerere & Another v Attorney General, Constitutional Court Constitutional Petition No. 3 of 1999** where Justice Twinomujuni, JA stated that where a claim or defence rests upon a negative allegation, the one asserting such
35 a claim or defence is not relieved of the onus to prove it.

Issue one,



5 The Petitioner's counsel submitted that the mandate of the Respondent to compile, maintain, revise and update the National Voter's Register under Article 61 (e) of the Constitution is couched in mandatory terms and cannot be delegated, shared or assigned. Further, the Respondent's mandate does not include retiring a Voters' Register or re- compiling a new one or adopting a Register from another entity with the effect of removing already existing
10 voters from the Voters' Register. The Respondent having already compiled a Voters' Register is expected to maintain it and only revise or update it when the persons on the Register cease to exist or for purposes of adding new voters.

The Petitioner's counsel submitted that the Petitioner's right to vote, guaranteed under Article 59 (1) & (3) and 17(1) (h) of the Constitution was violated by the Respondent who erased his
15 name from the Voters Register without just cause.

In reply to the Petitioner's submissions on **issue One**, learned counsel for the Respondent submitted that the Respondent lawfully retired the old Voters Register and compiled a new Voters Register by extracting data from the National Identification Enrolment Register. Further that Section 65(2) of the Registration of Persons Act, 2015 allows the Respondent to use
20 information contained in the Register to compile, maintain, revise and update the Voters Register. Further, that Section 9(2)(ii) of the Registration of Persons Act, the Respondent is duly represented on the Board of Directors of the National Identification and Registration Authority (NIRA). This implied that the act of extracting information from the National Identification Enrolment Register by the Respondent was legitimate and did not negate the
25 independence of the Respondent since the Respondent is a Board Member of NIRA.

Secondly, counsel submitted that the issue before court is *res judicata* having been raised and determined by the Supreme Court in **Amama Mbabazi v Y.K Museveni & 2 Ors, SC PEP No. 1 of 2016 at page 25, paragraph 12** where the Learned Justices held that the use of data compiled by the National Identification and Registration Authority to compile the
30 National Voters Register did not in any way negate the independence of the Electoral Commission.

In rejoinder to the Respondent's submissions on **issue one**; the Petitioner's counsel disputed the Respondent's submission that according to Section 65(2) of the Registration of Persons Act, 2015, the Respondent's act of deriving data from NIRA for purposes of compiling a new
35 National Voters Register was legitimate. He relied on the dictum of Odoki, CJ in the case of **Dimanche Sharon & 2 Ors. V Makerere University, SC, Constitutional Appeal No. 2 of 2004** where the learned Justice held that it is a well-established principle of constitutional

5 interpretation that a broad and liberal spirit is required for the interpretation of the Constitution. The interpretation should not be narrow or legalistic but generous and purposive so as to give effect to the spirit of the Constitution especially with provisions relating to the protection of fundamental rights.

10 The Petitioner's Counsel further submitted that it is public knowledge that the exercise of registering citizens for purposes of acquiring a National Identity Card commenced as a project under the Ministry of Internal Affairs without any legal framework. The Registration of Persons Act came into force after the registration exercise had already kicked off. This implies that the Registration of Persons Act ratified the registration exercise and gave it context so as to apply to registration of births and deaths thereby repealing the Births and Deaths Registration Act,
15 Cap. 309. Further, counsel submitted that it is public knowledge that not all citizens were captured by the Births and Deaths Registration Act. Specifically, not all citizens had registered birth Certificates within the meaning of the Act. On the other hand, all citizens who were eligible to vote before 2014-2015 had been registered by the Respondent under Section 18 and 19 of the Electoral Commission Act, Cap. 140 and were issued with voters' cards. There
20 was no requirement to have the said voters' cards registered with the Registrar of Births and Deaths under the Births and Deaths Registration Act. This shows that there was no nexus between the National Voters' Register and the Registration of Births and Deaths under the Births and Deaths Registration Act.

25 The Petitioner's counsel submitted that the Respondent's Registrars at District level designated under Section 21 of the Electoral Commission Act to monitor the update and maintenance of the National Voters' Register by accepting applications for voters and erasing those reported to be dead, were never involved in the exercise of compiling the data obtained by NIRA during the National Identity Card Registration process. According to counsel, it is not enough that the Respondent is a Board Member of NIRA; the Respondent was enjoined to
30 show how it participated in the compilation of the new National Voters' Register using the data extracted from NIRA. Counsel relied on Article 59 (3) of the Constitution which empowers the Respondent as a Government agency to ensure that a person who is eligible to vote is not disenfranchised by non- registration. The Petitioner not only had a voter's card but had also registered under the NIRA on 22/04/2014. Therefore, the act of substituting the existing
35 National Voters' Register with the said extracted data which was solely compiled by NIRA was not legitimized by Section 65 of the Births and Deaths Registration Act. Rather, it contravened Section 13 of the Electoral Commission Act and Article 20 (2), 61 (e) and 62 of the Constitution.



5 In rejoinder to the Respondent's submission that the issue before Court is *res judicata*, the
Petitioner's counsel submitted that the context of the instant petition is distinguishable from
the context within which the issue was dealt with by the Supreme Court in **Amama Mbabazi**
v Y. K Museveni & 2 Ors, SC EPE No. 1 of 2016. This petition does not contest the legality
10 of the Respondent's actions but the constitutionality of how the Respondent's actions were
implemented to the detriment of the Petitioner in light of his constitutional rights. Secondly,
the Supreme Court was not presented with the kind of evidence presented before this Court
nor was the Petitioner a party to the case before the Supreme Court. Therefore, within the
meaning of *res judicata* provided for under Section 7 of the Civil Procedure Act, the issue is
15 not *res judicata*. Counsel relied on the case of **Mansukhlal Ramji Karia and Crane Finance**
Co. Ltd v Attorney General & 2 others, SCCA No. 20 of 2002.

Furthermore, counsel submitted that the cause of action required to sustain a constitutional
petition under Article 137 of the Constitution is different from the cause of action required in
a presidential election petition brought under Section 59 of the Presidential Election Petitions
Act, 2005. In the instant petition, the Petitioner would discharge the burden of proof where he
20 shows on a balance of probabilities that the impugned acts of the Respondent are inconsistent
with the provisions of the Constitution whereas in a presidential election petition, the burden
is discharged when the Petitioner satisfies court to an extent *slightly beyond reasonable doubt*
that the impugned acts were non-compliant with the electoral laws and affected the result of
the election in a substantial manner. Counsel relied on the case of **Baku Raphael Obudra &**
25 **Anor v Attorney General, SC Constitutional Appeal No. 1 of 2003**.

Issue two,

The Petitioner's counsel submitted that the removal of the Petitioner from the Voters Register
violated his right to vote guaranteed under Article 20 and 59 of the Constitution. Further, that
the Respondent discriminated against the Petitioner based on his political standing as a
30 member of a Political Party in the opposition contrary to Article 21 of the Constitution. Further
that whereas the Respondent contends that the Petitioner ought to have appealed against its
decision to the High Court, the Petitioner could not take advantage of the provisions of Section
64 of the Electoral Commission Act since he was not a registered voter. Counsel submitted
that there is no law that bars the Petitioner from bringing this petition under Article 137 of the
35 Constitution. He relied on **Kabagambe Asol & Others v The Electoral Commission,**
Constitutional Petition No. 1 of 2006 in support of this submission.



5 In reply to **issue two**, the Respondent's counsel submitted that the Petitioner failed in his duty to take essential steps in time to get onto the new Voters Register. The Respondent displayed the updated Voters Register for 21 days to enable any person raise objections or complaints. It attended to and addressed all complaints raised regarding omissions in the updated Voters Register but the Petitioner did not raise any complaint. The Petitioner therefore sat on his rights during the prescribed days from 22nd July 2015 to 11th August, 2015 only to complain to NIRA on 25 October 2015 and to the Respondent on 30 November, 2015 which was barely days to the nomination dates of Parliamentary candidates slated for 2nd and 3rd December, 2015. The Respondent's counsel submitted that the Petitioner's delay amounted to gross negligence, indolence and laxity on his part which should not be attributed to the Respondent.

15 Furthermore, counsel submitted that Article 64(1) of the Constitution and Section 15(1) and (2) of the Electoral Commission Act, Cap. 140 enjoin the Respondent to address complaints regarding the Voters Register if brought to the Respondent's attention in time and in writing. If the complaint is not satisfactorily resolved by the Respondent, the Complainant is obliged to appeal the decision of the Respondent to the High Court for redress. The Petitioner disregarded this option which was available to him. In the premises, counsel submitted that the Petitioner was not qualified for nomination in accordance with Article 80(1) of the Constitution and the Respondent's actions were not inconsistent with Article 20, 21 and 59 of the Constitution.

25 In rejoinder to **issue two**, the Petitioner's counsel faulted the Respondent for justifying its omissions by casting the blame of inadvertence on the Petitioner. According to counsel, this was a misconception of the constitutional mandate of the Respondent. He relied on **Brigadier Henry Tumukunde v Attorney General & the Electoral Commission, SC Constitutional Appeal No. 2 of 2006** where Kanyehamba, JSC cited with approval **Speaker of the National Assembly v De Luke (1999) (4) S.A 863 (SCA)** for the holding that the Constitution is the ultimate source of all lawful authority in the country and no Parliament or official can perform an act which is not sanctioned by the Constitution. Any citizen affected by an action which is not properly authorized by the Constitution is entitled to the protection of the Court. Further Counsel submitted that the power vested in the people under Article 1 of the Constitution is only exercised once every five years through the right to vote Government officials who appoint the officials of the Respondent. It was grossly unconstitutional for the Respondent to undermine the mandate vested in it by the Constitution and the people by citing estoppels as a defense against the Petitioner and shifting the burden of ensuring that an eligible voter is registered onto the voter himself or herself. Further, counsel submitted that estoppels cannot



5 be raised as a defence in constitutional matters according to **Dimanche Sharon & 2 others v Makerere University, SC, Constitutional Appeal No. 2 of 2005**.

Counsel pointed out that the Petitioner lodged complaints with NIRA and the Respondent well ahead of the voting exercise but both institutions did not rectify the situation. Further the Respondent had sufficient time to rectify the error in the Petitioner's Identification Registration
10 process.

Issue three,

The Petitioner's counsel submitted that the Petitioner is entitled to a refund of Uganda Shillings 3,000,000/= paid as nomination fees by the Petitioner to the Respondent. Counsel further prayed for an award of general damages in a sum of Uganda Shillings 500,000,000/= and exemplary damages of Uganda Shillings 500,000,000/=. He contended that the
15 Respondent disenfranchised the Petitioner and as a result, the Petitioner lost an opportunity to participate in the 2016 general elections as a candidate for Padyere County Constituency where he had high chances of winning. Further, the Respondent remained adamant and chose to justify its unlawful conduct instead of complying with the law. This conduct on the
20 part of the Respondent justifies the award of exemplary damages.

In reply to **issue three**, the Respondents counsel submitted that the nomination fees pleaded by the Petitioner as special damages were paid to the Government and not to the Respondent. The Petitioner's claim for a refund of the nomination fees paid was therefore misplaced. The Respondent prayed that the court dismisses the Petition with costs.

Resolution of the Petition

I have carefully considered the facts and circumstances of this petition. The main contention of the petitioner is that the respondent unconstitutionally disqualified him from participating in the 2016 general election as a voter or candidate. It is a question of fact that the respondent used the national identification register to update its register. In the process of doing so the
30 petitioner's name was omitted.

A similar petition had been filed in **Nobert Mao and Chapter Four v Attorney General and Electoral Commission; Constitutional Petition No 004 of 2016** where the very same questions as to interpretation of the Constitution arising from the same cause of action in terms of article 137 (3) of the Constitution were raised and were determined by this court and
35 I would adopt the decision on the questions for resolution of this Petition.



5 In this petition the three issues raised are:

1. Whether the retirement of the Voters' Register as it stood in 2015 and adopting the National Identification Enrolment Register of NIRA was inconsistent with Articles 17(1) (b), 59(3) and 61(e) of the Constitution?
2. Whether the alleged omission of the Petitioner's name from the new Voters' Register and his resultant disqualification as a voter and candidate for the Parliamentary seat of Padyere County Constituency in the 2016 national presidential and parliamentary elections conducted by the Respondent was inconsistent with Articles 20(2), 21, 59 and 80(1) (b) of the Constitution?
3. Whether the Petitioner is entitled to any recompense in damages?

15 On the other hand, in **Nobert Mao and Chapter Four v Attorney General and Electoral Commission** (supra) the Petitioners sought for the following reliefs namely:

1. Declarations that:

- a) The second Respondent's act of not recognizing the first Petitioner and other persons who possess voters' cards and voter Identification Numbers issued by itself contravenes Article 28(1), 42, 44, 59(1), (3) and 61(e) of the Constitution.
- b) The second Respondent's act of unlawfully removing the first Petitioner from the voters' Register is inconsistent with Articles 28(1), 42, 44, 59(1), (3) of the Constitution.
- c) The second Respondent's act of declining to reinstate the first Petitioner to the voters' Register contravenes Article 59(1) and (3) of the Constitution.
- d) The second Respondent's act of declining to nominate the first Petitioner for election as a Member of Parliament for Gulu Municipality for purposes of the 2016 Parliamentary Elections contravenes Article 80(1) of the Constitution.
- e) The second Respondent's act of purporting to retire the voters' Register used for the 2011 general elections contravenes Articles 61 (a) & (e) of the Constitution.
- f) The second Respondent's act of purporting to import data from the National Identification and Registration Authority or any other sources into the Voters' Register contravenes Articles 61 (e) and 62 of the Constitution.

35 All the above declarations sought could as well flow from the first two issues agreed to by the Petitioner and the Respondents as they all relate to the retiring of the old voter's register and substituting it with a new register sourced *inter alia* from the National Identification Data Bank.



5 In **Nobert Mao and Chapter Four v Attorney General and Electoral Commission** (supra) the facts are also similar in that the Petitioners grievance was the act of the second Respondent who refused to nominate the first Petitioner for election as a Member of Parliament for Gulu Municipality in the 2016 general elections. The basis of the refusal to
10 nominate Nobert Mao is the fact that his name did not appear on the voter register pursuant to the National Identification Card Project and use of that data bank to update the register by the second respondent.

In the premises, the decision in **Nobert Mao and Chapter Four v Attorney General and Electoral Commission** (supra) on the questions as to interpretation of the Constitution that were considered and determined earlier than in the instant petition are binding and there is
15 no need to reconsider them afresh. The facts of the petition were that the name of the first petitioner and his details as a registered voter were omitted in the updated voters register after an exercise where voters' registers were displayed with extracted data from an exercise to register Ugandans for issuance of National Ids. The subsequent facts demonstrated that after omitting to participate in the National registration exercise some names were omitted by
20 the Electoral Commission in its new voter's register. The consequence was that the name of the first petitioner and other Ugandan citizens were omitted for not having participated in the National ID registration exercise and update of register by the EC. In that exercise, the EC extracted data containing particulars of registered and verified Ugandan citizens from the National Identification Register. Where a person had not a registered for National ID during a
25 separate exercise, the person's name would not be reflected in the National Identification Register.

In **Nobert Mao and Chapter Four v Attorney General and Electoral Commission** (supra) it was held *inter alia* that:

- The Electoral Commission failed in its duty for whatever reason to maintain its data
30 bank in which the first petitioner was clearly a registered voter. It could not purport to have maintained its data bank of registered voters. It was further erroneous for the EC to retire its data bank as this contravened its mandate to maintain a voters register under article 61 of the Constitution.
- The enactment of section 66 (2) (b) of the Registration of Persons Act, 2015 by making
35 it mandatory in the identification of voters to use national IDs, did not shift the mandate of compiling, maintaining, revising and updating the voters register to another authority under the Ministry of Internal Affairs or any other Ministry of Government as



5 maintaining the voter register *inter alia* was the primary duty of the Electoral Commission. The issue before court concerned the duty of the Electoral Commission and not the mandatory use of national IDs for the identification of voters. The existence, compilation, maintenance and revision as well as updating of the voters' register has nothing to do with the National ID Project though the National ID project is an aid for the exercise and fulfilment of the functions of the Electoral Commission.

10

- The act of the Electoral Commission of not recognising the first petitioner as a registered voter contravened article 61 (1) (e) of the Constitution because it reveals that it did not maintain the register but substituted the register with the National Identification Project Data. The National ID project data ought to have been used to update the voters register and not to substitute it.

15

- Having registered the first petitioner who participated in several other previous elections, it was strange if not outright unfair to deny him the right to vote on the ground that he is not a registered voter. He could only participate as a candidate on the ground of being a registered voter among the qualifications to do so under article 80 (1) (b) of the Constitution.

20

- The act of the Electoral Commission which contravened the Constitution is the act not to maintain the voters register. The act of declining to reinstate the first petitioner on the voters' register was a dereliction of duty on the part of the Electoral Commission because it is supposed to have maintained the register where he was registered. The excuse that the first petitioner is not a registered voter does not hold water. There was overwhelming evidence that the first petitioner was a registered voter and participated in previous elections as an elected representative of the people.

25

- The primary duty of the Electoral Commission is to maintain the register and update it from time to time or revise it as the circumstances may require. The duty to maintain, compile, revise and update the voters register is not subject to the direction or control of the National Identification and Registration Authority or any other authority. It was simply a convenient administrative measure to ensure that the data with the National Identification and Registration Authority was used to compile, maintain, revise and update the register. It was not a substitute. To make it a substitute would shift the duty to compile the register, maintain, revise and update the register onto another authority.

30

35 There was however no evidence that the Electoral Commission acted under the direction or control of any person or authority and the only logical conclusion to be

5 made is that the Electoral Commission has a right to use any national data bank for purposes of fulfilling its mandate under article 61 (1) (e) of the Constitution.

The above decision applies to the petitioner's petition. The issues set out for consideration in the instant petition are resolved as follows:

- 10 1. Whether the retirement of the Voters' Register as it stood in 2015 and adopting the National Identification Enrolment Register of NIRA was inconsistent with Articles 17(1) (b), 59(3) and 61(e) of the Constitution?

15 It is the duty of the Electoral Commission to maintain its data bank of registered voters and therefore the omission of the names of registered voters by adoption of names of voters from the National Identification Data bank was inconsistent with its duty to main the existing data bank under article 61 (1) (e) of the Constitution. Further, the failure of the Respondent to maintain its existing data bank ended up violating the right of the Petitioner to vote. I would further find that article 59 (3) which commands the state to ensure that citizens exercise their right to vote by taking all necessary steps to ensure that they exercise that right is a general duty on all organs of State. There is a specific function of the Respondent under article 61 (1) (e) of the Constitution to maintain a register and it is superfluous to further consider the duty of the State under article 59 (3) and I decline to do so.

- 20 2. Whether the alleged omission of the Petitioner's name from the new Voters' Register and his resultant disqualification as a voter and candidate for the Parliamentary seat of Padyere County Constituency in the 2016 national presidential and parliamentary elections conducted by the Respondent was inconsistent with Articles 20(2), 21, 59 and 80(1) (b) of the Constitution?

25 Further to the decision in **Nobert Mao and Chapter Four v Attorney General and Electoral Commission** (supra) issue 2 imports a question of fact of omission of the name of the petitioner that is not contested. Further, Article 20 (2) of the Constitution imposes a general duty on all organs and agencies of the State to respect, uphold and promote fundamental right and freedoms of the individual. In light of the specific function of the respondent to compile, maintain, update and revise the voters register, the answer to the question of whether it fulfilled its function in respect of the Petition was in the negative. In follows that there is no need to further consider whether the respondent promoted or upheld the rights of the petitioner. Last but not least, article 80 (1) (b) makes it a necessary qualification for a member of Parliament to be a registered voter. Obviously, upon omission of the Petitioners

5 names from the new register compiled by the Respondent using the National ID Project data bank, the Petitioner could not be nominated as a candidate to contest for the Padyere, Member of Parliament seat and therefore his right to do so was violated. The Petitioner proved that he was registered voter, having been registered as such before and this evidence was not rebutted.

10 3. Whether the Petitioner is entitled to any recompense in damages?

Article 137 (4) of the Constitution allows this court to grant consequential redress to a petitioner for any act or omission that is found inconsistent with the Constitution. The Petitioner claims Uganda shillings 500,000,000/- as general damages and Uganda shillings 500,000,000/- as exemplary damages. Exemplary damages may be awarded by courts for
15 arbitrary and unconstitutional acts.

The assessment for award of general damages has to fulfil the principle of *restitutio in integrum*. This was held by the East African Court of Appeal in **Dharamshi vs. Karsan [1974] 1 EA 41**. They stated that the fundamental principle by which Courts are guided in awarding damages is *restitutio in integrum*. It means that the plaintiff has to be restored as nearly as
20 possible to a position he or she would have been had the injury complained of not occurred. The award of damages is presumed to follow the event and this is explained in **Halsbury's Laws of England Fourth Edition (Reissue) Volume 12 (1)** and paragraph 802 which defines general damages are those damages which will be presumed to be the natural or probable consequence of the wrong complained of, with the result that the plaintiff is required
25 only to assert that such damage has been suffered.

What is the natural or probable consequence of not been nominated to contest for the Post of MP? It is speculative to suppose that the Petitioner would have succeeded. It is further speculative to determine how much money he would have lost if he did not succeed. There is simply no evidence to assess the natural and probable consequence of not being
30 nominated.

As far as exemplary damages are concerned, **Osborn's Concise Law Dictionary** states that they are awarded in relation to certain tortious acts (such as defamation, intimidation and trespass) but not for breach of contract. The circumstances under which exemplary damages could be awarded were considered by the East African Court of Appeal sitting at Nairobi in
35 **Obongo and another v Municipal Council of Kisumu [1971] 1 EA 91** per Spry VP at page 94 citing with approval the House of Lords in **Rookes vs Barnard [1964] A.C. 1129** that:



5 "In the first place, it was held that exemplary damages for tort may only be awarded in two classes
of case (apart from any case where it is authorized by statute): these are, first, where there is
oppressive, arbitrary or unconstitutional action by the servants of the government and, secondly,
where the defendant's conduct was calculated to procure him some benefit, not necessarily financial,
at the expense of the plaintiff. As regards the actual award, the plaintiff must have suffered as a
10 result of the punishable behaviour; the punishment imposed must not exceed what would be likely
to have been imposed in criminal proceedings if the conduct were criminal; and the means of the
parties and everything which aggravates or mitigates the defendant's conduct is to be taken into
account. It will be seen that the House took the firm view that exemplary damages are penal, not
consolatory as had sometimes been suggested".

15 The Petitioner suffered unconstitutional violation of his right to vote and participate as a
candidate for the elective office of Member of Parliament of Uganda in the 2016 elections. He
was disqualified through no fault of his own but as a consequence of the Respondent failing
to carry out its duty of maintaining an existing voter's register in which the Petitioner had been
registered.

20 This court may either refer a matter for redress to the High Court to determine the appropriate
redress or award the redress.

In the circumstances of this Petition, I would refer the claim for redress to the High Court to
determine the appropriate redress.

25 In the circumstances, this is not just a public interest petition but a petition in which the
petitioner alleged and proved an infringement of his rights. I would allow the petition on the
above terms with costs and would remit the issue of appropriate redress to the High Court for
trial.

Dated at Kampala the 9th day of Aug 2021



30 **Christopher Madrama Izama**

Justice of Court of Appeal/Constitutional Court

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
[Coram: Buteera, DCJ; Kakuru, Bamugemereire, Madrama, Mulyagonja; JJA/JJCC]
CONSTITUTIONAL PETITION NO. 06 OF 2016

VERSUS

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JUDGMENT OF RICHARD BUTEERA, DCJ

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I have also read in draft the Judgments of Justice Kakuru JCC, Justice Bamugemereire JCC and Justice Mulyagonja JCC.

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I will proceed to give my reasons.

30

On 2nd December 2015, the Petitioner proceeded to the Respondent's District Registrars offices, Nebbi District for nomination as a candidate for Member of Parliament on the

5 Forum for Democratic Change ticket. The Petitioner was notified that he could not be nominated because his name did not appear on the voters register and as such the Petitioner was disqualified from participating in the electoral process as a voter or candidate.

10 Prior to the nomination date, the Petitioner had participated in the national identification project on 22nd April 2015, wherein he was registered for purposes of receiving a National Identity Card under Application number 1126300003W9.

15 In July 2015, the Respondent through a press release announced that it had retired the National Voters register of 2011 and was going to consider the National Identification projects register as the National Voters register for purposes of the 2016 National elections.

The Respondent appointed the period commencing 22nd July 2015 to 11th August 2015 for display of the National Voters Register. The purpose of the display was to address all objections and omissions of particulars that were made in the National Voters Register.

20 The Petitioner proceeded to check online at the Respondents website at www.ec.or.ug to ascertain whether he was a registered voter but found that someone else's name was registered under the his Application ID number 1126300003W9.

25 He made a complaint to the National Identification and Registration Authority on 26th October 2015 and also engaged the Respondent in a letter dated 27th November 2015 but did not receive any response.

The issue arising from the Petition was:

Whether the Respondents act of retiring the 2011 Voters Register and adopting the National Identification Enrolment Register of NIRA as the National Voters Register for purposes of the 2016 National elections and the omission of the

5 Petitioner's name from the National Voters Register was inconsistent with articles
17 (1) (h), 20 (2), 21, 59, 61 (e), 62 and 80 (1) (b) of the Constitution of Uganda 1995.

A similar issue was raised in *Constitutional Petition No.004 of 2016, Nobert Mao and Chapter Four vs. The Attorney General and the Electoral Commission*, in which I respectfully disagreed with my learned brothers and the Lady Justices when they held
10 that the action of the second Respondent of not recognising the first Petitioner as a registered voter contravened **Article 61 (1) (e) of the Constitution** by failure to maintain its then existing register. I found as follows:

15 *"Article 61 (1) (e) of the Constitution states one of the functions of the Electoral Commission to be "to compile, maintain, revise and update the Voters Register".*

The Commission had the mandate to update the Voters Register. They chose a method of doing the update which method is explained in the Chairperson's press release that is quoted above.

20 *A different method of work is actually proposed in the Judgment of my brother Justice Madrama which stated:*

25 *"Why did it not only "maintain" the existing register and update it with occurrences in the status of registered voters that would take them out of the register or addition of new voters to the register based on an increasing population or other relevant factors such as acquisition of citizenship rights by a former alien."* (The underlining is mine)."

30 *The exercise that the Electoral Commission engaged in would enable the Commission register people who become 18 years. The exercise was also for the purpose of removing from the Register persons who died, persons who may have been on the Register illegally for example those that may be non citizen or persons who are no longer eligible to vote and should be deregistered.*

35 *Using the method that the Commission adopted those who were dead were removed from the register and so were those who got on the Register illegally.*

40 *The ones who were removed from the Register by error as was the case for the 1st appellant had opportunity to raise complaints and they would be re-instated.*

If the method proposed in the Judgment of my brother Justice Madrama was the one used then all the people on the Register would all be maintained. The ones who died or got on the Register illegally would remain registered. This would result into an error that would not be easy to correct as the dead and those on the Register illegally would not volunteer and come forward to complain.

The Electoral Commission mode of operation in updating the Register should not be condemned simply because we would probably have preferred a different mode of operation.

I agree with my learned brother Justice Madrama in respect of his holding when he held in his Judgment:- "I decline to issue a declaration that the second Respondents act of retiring the voters register used for the 2011 general elections contravened Article 61 (a) of the Constitution of the Republic of Uganda 1995 as there is no evidence of any scale of omissions of registered voters compromising the conduct of free and fair elections."

I also agree with my learned brother Justice Kakuru when he held in his Judgment that the National Voters Register was not retired. It was updated.

I would hold that the Electoral Commission conducted an update of the Register. The word "retiring" the register was used but the whole process and the activities were only a process of updating the Register. The Commission did not simply take data from the National Identification Register. It used the extracted data to update and come up with an updated Register. This was within its mandate under Article 61(1) (e) of the Constitution. When the updating exercise is looked at as a whole, the use of the word "retiring" which is not in Article 61 (1) (e) should not be over emphasised. The provisions of Article 126 (2) (e) of the Constitution that substantive justice shall be administered without undue regard to technicalities should be considered. Any other word other than "retiring" could have been used. What has to be considered is the exercise as a whole. Its purpose and effect was to produce an updated Voters Register and that was achieved through a process that the Electoral Commission conducted within its mandate. I would hold that Electoral Commission updated the Registered and the process of updating the Registrar did not contravene the Article 61 (1) (e) of the Constitution.

5 *The 1st Respondent was a registered voter who had participated in previous elections. His name was removed from the register by an administrative error. He is aggrieved by the denial of his right to participate in elections as a result. This is a grievance for which he should seek redress. Does the fact that he was*
10 *aggrieved require a Constitutional interpretation?*

10 *For the legal principles that provide a guide in answering the question posed above, I would refer to Constitutional Appeal No. 1 of 1997, Attorney General Versus Major General David Tinyefuza, where Justice Kanyehamba held:-*

15 *“I do believe that the jurisdiction of the Constitutional Court as derived from Article 137 (3) is concurrent with the jurisdiction of those other Courts which may apply and enforce the articles enumerated above, but there is an important distinction that I see, and that is, that for the Constitutional Court to claim and exercise the concurrent jurisdiction, the validity of that claim and the exercise of the jurisdiction must be*
20 *derived from either a petition or reference to have the Constitution or one of its provisions interpreted or construed by the Constitutional Court. In other words, the concurrent original jurisdiction of the Court of Appeal sitting as a Constitutional Court can only arise and be exercised if the petition also raises questions as to the interpretation or*
25 *construction of the Constitution as the primary objective or objectives of the petition. To hold otherwise might lead to injustice and, in some situations, manifest absurdity.*

30 *Take the case of a pupil who comes late in a primary school. The teacher imposes a punishment upon the pupil who is required to clean the classroom after school hours. Can it have been the intention of the framers of the Constitution that as an alternative to the pupil’s right to complain and seek redress from the head teacher or the school board of governors. The pupil would be entitled to petition the Constitutional Court under Article 137 (3) (b) on the grounds that his or her rights*
35 *under Article 25 (3) have been violated in that he or she has been compelled to do “forced labour”.*

40 *Wambuzi, CJ in Constitutional Appeal No. 2 of 1998, Ismail Serugo Versus Kampala City Council and Attorney General held:-*

“In my view for the Constitutional Court to have jurisdiction the petition must show, on the face of it, that interpretation of a provision of the

5 *Constitution is required. It is not enough to allege merely that a Constitutional provision has been violated.*

10 *If therefore any rights have been violated as claimed, these are enforceable under Article 50 of the Constitution by another competent Court. The article provides in so far as is relevant.*

15 *“(1) Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.....””*

20 *In this Petition the 1st appellant is alleging that his rights were violated. He should have sought his rights to be enforced in a competent Court. I do not find that there is an issue for Constitutional interpretation and do not therefore find that this Court has jurisdiction.*

I would strike out the Petition.”

25 Hon, Justice Remmy Kasule, JA, on the issue of Constitutional interpretation in *Constitutional Petition No,0028 of 2012, Mbabali Jude vs. Edward Kiwanuka Sekandi* held as follows:-

30 *“There is however, a difference between the Constitutional Court interpreting a provision of the Constitution as stated above and any other court of law applying a particular provision of the Constitution to a particular set of facts of a case that is being determined by that court.*

35 *To apply the Constitution or its provision, in my considered view, is for the court concerned, to operate or effect a particular provision of the Constitution to the facts of a particular case that court is determining. It is the process by which that court makes use of the constitution. In such a case the dispute before the court is capable of being resolved without the Constitution first being interpreted by the Constitutional Court.*

5 *A competent court determining a cause is at liberty to find and pronounce itself as to whether or not, in its finding, a particular set of facts of the case, are contrary to or are in compliance with the Constitution. By doing so, such a court is not interpreting the Constitution. The said court is just applying the constitution to the facts of the case before the Court.*

10 *Likewise, one seeking enforcement of a right or freedom guaranteed under the Constitution by claiming redress for its infringement may apply to any other competent court for such redress under Article 50 of the Constitution. Such a one does not necessarily apply to the constitutional court because, in order to get such redress there is no need for the Constitutional Court to first interpret*
15 *the Constitution. All that is needed is the court adjudicating the matter to apply the Constitution to the proved set of facts and/or law and proceed to grant or not to grant the redress sought.”*

In the instant case, when the Petitioner found out that someone else’s name was registered under his Application ID number 1126300003W9, he made a complaint to
20 the National Identification and Registration Authority on 26th October 2015 and also engaged the Respondent in a letter dated 27th November 2015. According to the Respondent, it appointed the period commencing 22nd July 2015 to 11th August 2015 for display of the National Voters Register. The purpose of which was to address all objections and omissions of particulars that were made in the National Voters Register.
25 Objections by some voters were raised and addressed. The Petitioner raised no objection during this period. His complaints were raised on 26th October 2015 and 27th November 2015 when the deadline stipulated by the Respondent had already passed.

As noted in **Nobert Mao (supra)**, in the conduct of a nationwide programme such as the updating of the National Register, having deadlines is only a work method that
30 enables the institution to measure its performance over a set timeline. It is not irregular, illegal or unconstitutional to fix a deadline for the activity. Had the Petitioner been vigilant enough to raise his complaint within the period of 22nd July 2015 to 11th August

5 2015 as required by the Respondent, the omission of his name would most probably have been corrected. These, however, are triable issues before a competent Court.

The Petitioner's name was omitted due to an administrative error. He is aggrieved by the denial of his right to participate in elections as a result. This is a grievance for which he should seek redress in the High Court or any other competent Court under **Article 50**
10 **of the Constitution**. His complaint is that his rights were violated. The enforcement of his rights is what he should pursue. This does not require Constitutional interpretation. See: *Attorney General vs. Major General David Tinyefuza, Constitutional Appeal No. 01 of 1997* and *Ismail Serugo vs. Kampala City Council and Attorney General, Constitutional Appeal No. 02 of 1998*.

15

I find that there is no issue for Constitutional interpretation and do not therefore find that this Court has jurisdiction.

I would strike out the Petition and order each party to bear its own costs.


20

The majority view and therefore the decision of this Court is that the Petition succeeds. The Petition is hereby allowed.

The orders proposed in the Judgment of my learned brother Justice Madrama are the
25 orders adopted and issued by this Court.

The Petitioner is awarded costs of this Petition.

30 Dated at Kampala this 9th day of Aug 2021



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Richard Buteera
DEPUTY CHIEF JUSTICE

THE REPUBLIC OF UGANDA

In the Constitutional Court of Uganda at Kampala

Constitutional Petition No. 006 of 2016

Onega Robert.....Petitioners

Versus

Electoral CommissionRespondents

CORAM:

HON. MR. JUSTICE RICHARD BUTEERA, DCJ

HON. MR. JUSTICE KENNETH KAKURU, JCC

HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE, JCC

HON. MR. JUSTICE CHRISTOPHER MADRAMA, JCC

HON. LADY JUSTICE IRENE ESTHER MULYAGONJA, JCC

Judgment of Hon. Lady Justice Catherine Bamugemereire JCC

I have read in draft the Judgment of my learned brother Christopher Madrama JCC. The facts are clear and undisputed. I do agree with his reasoning and particularly with his conclusion. I too do find that the Petitioner underwent constitutional breaches which were solely due to the unconstitutional actions of the Respondent.

I do agree with Madrama JCC's conclusions.



9/8/2021

Catherine Bamugemereire
Justice of the Constitutional Court

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO.06 OF 2016

ONEGA ROBERTPETITIONER

VERSUS

THE ELECTORAL COMMISSION RESPONDENT

CORAM: Hon. Mr. Justice Richard Buteera, DCJ
Hon. Mr. Justice Kenneth Kakuru, JA/JCC
Hon. Lady Justice Catherine Bamugemereire B.K, JA/JCC.
Hon. Mr. Justice Christopher Madrama Izama, JA/JCC
Hon. Lady Justice Irene Esther Mulyagonja, JA/JCC

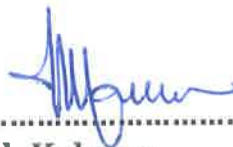
JUDGMENT OF JUSTICE KENNETH KAKURU, JA/ JCC

I have had the benefit of reading in draft the Judgment of my learned brother Madrama, JCC.

I agree with him that this petition has merit and ought to succeed. I also agree with the orders he has proposed.

I have nothing useful to add.

Dated at Kampala this^{9th}.....day of^{Aug}..... 2021.



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Kenneth Kakuru
JUSTICE OF APPEAL/CONSTITUTIONAL COURT

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