**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**HCT-00-CV-EP-0004 OF 2010**

**1.MUKUNDANE VINCENT**

**2. AHAISIBWE GORDIANS::::::::::::::::::::::PETITIONERS/APPELLANTS**

**VERSUS**

1. **THE ELECTORAL COMMISSION**
2. **MELICHIADIS KAZWENGYE::::::::::::::::::::::::::RESPONDENTS**

**BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE**

**JUDGMENT**

This is a petition in which the Petitioner seeks a declaration that the decision of the 1st respondent nominating the 2nd respondent as candidate for Ibanda District Chairperson be set aside. It was brought under Article 28, 64 (1) 142 of the Constitution of the Republic of Uganda, S. 101 of the Parliamentary Elections Act, 2005. The Appeal to the High Court from the Commission Rules S. 1. 141 – 1, and S. 98 of the Civil Procedure Act.

The brief facts are that both the 2nd Petitioner and the 2nd respondent are candidates nominated to contest for position of L.C. V Ibanda District Chairperson. The 2nd respondent does not possess Advanced Level Certificate of Education. At

nomination, the 2nd respondent presented a certificate of equivalence issued by the National Council for Higher Education dated 14/12/2005.

The grounds in support of the Petition, as gathered from the Petition are majorly that:

1) The 2nd respondent's nomination by the 1st respondent was based on a certificate of equivalence that did not follow the format prescribed under the second schedule to the Parliamentary Elections Act. The said certificate was therefore of no legal consequence.

2) The 2nd respondent did not establish his qualifications with the 1st respondent by forwarding the certificate of equivalence 2 months before the nomination date.

3) The 2nd respondent was not a registered voter since the names appearing on the nomination paper were different from those on his Personal Declaration Form and Voter Identity. So were the dates of birth.

4) The 2nd respondent was issued with a certificate of equivalence based on affidavits and not certificates.

In this answer to the Petition, the 2nd respondent denied all allegations in the Petition, and further stated that he had evidence that he completed the equivalence of 'A' level education, and his nomination was not based on affidavits but on his compliance with the relevant law. Further, he was a registered voter who complied with all legal requirements of nomination to the post he is contesting, and was validly nominated.

The Petition was supported by affidavits deponed to by the 1st Petitioner, Mukundane Vincent on 13/12/2010, and that of the 2nd Petitioner dated same date.

On his part, the 1st respondent responded through an affidavit in reply deponed to by Wettaka Patrick on 12/12/2010, stating that the Electoral Commission had received a complaint challenging the nomination of the respondent on grounds as already stated. Consequent upon this, the 1st respondent convened a meeting inter parties and heard testimonies and submissions of both parties; on the basis of which they determined that the complaint was baseless and upheld the decision of the Returning Officer, Ibanda to nominate the applicant. The nomination was hence lawful.

Two issues were agreed upon as follows:

1) Whether the 2nd respondent was validly nominated as candidate for District Chairperson, Ibanda District.

2) Remedies available to the parties.

The 1st Petitioner was represented by Mr. Luwum Adoch, the 2nd Petitioner by Mr. Caleb Mwesigwa, while the 1st respondent was represented was represented by Mr. Jude Mwasa and the 2nd respondent jointly by Mr. Kenneth Kakuru and Mr. Onoyesigire Frank.

In support of the Petition, Mr. Luwum submitted that Section 111 (3) of the Local Government Act, Cap. 243 required a certificate of equivalence under Section 4 (8) of the Parliamentary Elections Act in a format provided for under the 2nd schedule to that Act. The certificate submitted by the 2nd respondent on nomination day did not conform to the prescribed form in that it left out reference to the provision indicating that consultation had been done with the Uganda National Examination Board (UNEB). The nomination was, therefore, based on an illegality, and court could not overlook an illegality. (***Makula International Ltd. Vs HE Cardinal Emmanuel Nsubuga & Anor CACA 4 of 1981).***

Counsel further submitted that the purported Certificate of Equivalence which ought to have been submitted to the Electoral Commission two months prior to nomination, was only submitted on the nomination day, contrary to Section 111 (3) (a) of the LGA. He relied on ***Katege Ismail Green Partisan Party Vs National Council for Higher Education and Another*** for the proposition that the legal requirement to establish

qualifications with the Electoral Commission had to be complied with. Further, the attempts by the 2nd respondent to bring a fresh certificate in the correct format after nomination was futile and to no avail, and only proved that the one relied on at nomination was fatally defective. Further still, the 2nd respondent was not a registered voter because the particulars on the Nomination Paper and his Personal Declaration form varied as to name and age.

Counsel for the 1st respondent, Mr. Jude Mwaka, did not agree. He responded that the 2nd respondent's nomination was not based on affidavits as alleged by on a certificate of equivalence from the NCHE. Counsel relied on Section 4 (a) of the Parliamentary Elections Act as amended and S. 172 of the LGA to state that a certificate issued by NCHE would be sufficient in respect of any election for which the same qualification was required. Failure to include the phrase "…….in consultation with UNEB……." did not invalidate the certificate as they did not form part of the format when the certificate was issued in 2005. The certificate has never been recalled by NCHE. Counsel further submitted that no evidence was adduced to support the allegation that the 2nd respondent had not established his qualifications with the 2nd respondent as required by the law. And the 1st respondent had evidence on record to show that the 2nd respondent was a registered voter, and any anomalies on the nomination form and other documents relied on by the Petitioner were not

attributable to the 2nd respondent and indeed the voter information at the 1st respondent had been updated and anomalies corrected as per document presented.

Mr. Kakuru for the 2nd respondent, while associating himself with Mr. Mwaka's submission, relied on ***Gole Nicholas Davis Vs Loyi Kaagan Kiryapawo, Election Petition Appeal No. 19/2007*** to state that a Certificate of Equivalence was not the qualification but a certificate issued after relevant qualifications had been verified and equated.

Further, if a Certificate of Equivalence was issued without consultation with UNEB, it was null and void. The affidavit from NCHE affirming such consultation was not challenged. What mattered was not the form but the fact of consultation. On establishment of the qualifications, there was no established procedure for this; it was only an administrative procedure to allow the Electoral Commission to verify the papers. 2nd respondent asserted it was done and there is no evidence contrary to this. Further, on the differences in names, Counsel submitted that typographical errors cannot be imputed on the voter.

On the remedies sought for a declaration that the 2nd respondent was not qualified, Counsel submitted it was not borne out of the Petitioner's case which was that the nomination of the 2nd respondent was erroneous. They could not seek a different remedy.

Mr. Oyesigire Frank also for the 2nd respondent emphasized that defecto there was consultation with UNEB as evidenced by Annextures F1, F2, and G of the affidavit verifying equation of certificates; and if there was any defect in the format of the certificate of equivalence, it was curable under Section 4 (1) of the Parliamentary Elections Act and the Interpretation Act.

In reply, the Petitioners' Counsel reiterated their argument that the Certificate of Equivalency was illegal for not being in the prescribed format, and no other evidence could be permitted to prove otherwise. A document speaks for itself. The reply, which was a written submission, dwelt on the fresh certificate issued to the 2nd respondent by NCHE on the 20/12/2010, although the respondent's Counsel had not based their case on that document. They further relied on ***Grunarck Processing Laboratories Ltd Vs ACAS [1998] AC 277, and Braidbury Vs Enfield LBC [1967] IWLR III*** to emphasize that where the law required consultation of certain persons before taking action is taken, this had to be done. On the alleged failure to establish the certificate of equivalence within the prescribed time, the Petitioners' case is that the duty to prove that the 2nd respondent established his qualifications in time by producing an acknowledgment in court, lay with the respondents and the petitioners could not be expected to prove a "negative". They reiterated their earlier prayers.

I have considered the submission for learned Counsel on both sides and the law and authorities relied on. The main issue as agreed was whether the nomination of the 2nd respondent was lawful. This rotates around the validity of the format used by NCHE in the Certificate of Equivalence awarded in 2005; the question of the "establishment" of the qualifications with the 1st respondent; as well as whether variations in the voter information could nullify registration of a voter.

I will start by bringing into view the law relevant to the issues at hand.

**THE LAW**

1) S. 12 (2) (a) Local Government Act Cap. 243:

   "***A District Chairperson shall be a person qualified to be elected a Member of Parliament".***

2) The qualifications of a member of Parliament are to be found under Article 8 as follows:

   ***"80 (1); A person is qualified to be a Member of Parliament if that person;***

   ***a) is a citizen of Uganda.***

   ***b) is a registered voter, and***

   ***c) has completed a formal education of Advanced level standard or its equivalent which shall be established in a manner and at a time prescribed by Parliament by law"***

3) In compliance with the above, Parliament enacted the Parliamentary Elections Act, 2005.

The relevant sections are as follows:

S.4 (1) re-enacted Article 80 of the Constitution (Supra).

***"S. 5 (5) for purposes of paragraph (c) of Sub-section (1), any of the following persons wishing to stand for election as a member of Parliament shall establish his or her qualification with the Commission as a person holding a minimum qualification of Advanced Level or its equivalent at least two months before nomination day in the case of a general election, and two weeks in the case of a by-election".***

***a) Persons, whether their qualification is obtained from Uganda or outside Uganda who are claiming to have their equivalent qualification acquitted as to advanced level education".***

Section 4 (6):

***"A person who claims to possess a qualification referred to in Sub-section (5) shall do so by the production of a certificate issued to him or her by the National Council for Higher Education in consultation with the Uganda National Examinations Board'.***

***"(8) The certificate shall be in the form in the 2nd schedule to this Act".***

The 2nd schedule to the Act is as follows:

***"Parliamentary Elections Act, 2005***

***Section 4(8)***

***SECOND SCHEDULE***

***FORMS***

***CERTIFICATE OF COMPLETION OF FORMAL EDUCATION OF ADVANCED LEVEL STANDARD OR OF ITS EQUIVALENT***

***THE PARLIAMENTARY ELECTIONS ACT***

***I certify that ……who was born on the ……. has satisfied the National Council, for Higher Education in consultation with the Uganda National Examinations Board that he has completed formal education of advanced level standard or its equivalent, in that he holds the following qualification/s:***

**……..** **……**

***Executive Director*** ***Date***

***National Council for Higher Education***

***Seal of National Council for Higher Education***

***Serial Number***

***The National Council for Higher Education is not responsible for the identity of this person"***

S.12: Factors which do not invalidate nomination paper.

***"12 (2) (b); A returning officer shall refuse to accept any nomination paper if:***

***(b) There appears a major variation between the name of any person as it appears on the nomination paper and voter's roll".***

S.13; Factors which may invalidate a nomination.

***(c) The person seeking nomination was not qualified for election under Section 4;***

***(e) The person has not complied with the provisions of Section 4.***

S. 4 (9);

***"A certificate issued by NCHE under Sub-section (6) shall be sufficient in respect of any elections for which same qualification is required".***

S. 172; Local Governments Act;

***"For any issue not provided for under this part of the Act, the Parliamentary Election law in force for the time being shall apply with such modifications as are deemed necessary".***

1) ***Of importation too is S. 43 of the Interpretation Act Cap. 3 which states:***

   ***"Where any form is prescribed by any Act, an instrument or document which purports to be in such form shall not be void by reason or any deviation from that form which does not affect the substance of the instrument or document which is not calculated to mislead".***

Next, I will go to the question as to whether the failure to follow the format prescribed under schedule 2 of the PEA was fatal. The Certificate of Equivalence issued to the 2nd respondent by NCHE on the December 14, 2005, followed the prescribed format but missed out the phrase " …… in consultation with the Uganda National Examinations Board ……..".

The Petitioners/Appellants have complained that the omission is fatal and that even the production of an affidavit of Farida Bukirwa, Legal Officer of NCHE dated 24/01/2011 attaching a copy of the letter from UNEB communicating the results of the consultation by NCHE, would not cure the defect since the UNEB letter was not presented at the nomination day.

Counsel for the Petitioners relied on ***Ahamed Kawoya Kangu Vs Bangu Aggrey Fred*** (Supra) to support their point of objection. The court however finds that the reference to that case was misconceived since in that case, no consultation with UNEB ever took place at all, as required by the law. Indeed Mpagi J.A. as she then was, stated at page 27 that it was not lack of the correct format that was crucial, but that it was important that consultation took place.

So, did consultation with UNEB take place in the present case as required under S. 4 (6) of the PEA. It is clear that the requirement for such consultation is a question of law. However, as to whether consultation did take place is a question of fact. The Respondents adduced in evidence an affidavit by Ms. Farida Bukirwa, the Legal Secretary of NCHE in which under paragraphs 2, 3, and 4 she stated that the 2nd respondent had submitted to NCHE his academic qualifications for equating to Advanced Level of Formal Education. After the required consultation with UNEB were made and a response obtained, a certificate of equivalence dated 14/12/2005

was issued to the 2nd respondent. The letter from UNEB indicating the results of the consultations was attached as Annexture G.

The main thrust of the petitioners' complaint was that the phrase indicating consultation was missing. Indeed the validity of the qualifications which were equated are not in issue. The petitioners' Counsel did not want the evidence of consultation to be brought up at this moment since it was not submitted at nomination.

The court, having reviewed the evidence on record finds that although the format left out the phrase referring to consultation with UNEB by NCHE, the fact of consultation has been proved. The affidavit of Bukirwa and the letters confirming consultation were not submitted at nomination because the fact of consultation or defective format had never been raised before. And in light of S. 43 of the Interpretation Act, I find that the certificate cannot be declared void for reason of deviation from the prescribed format when the substance of the certificate has not been affected.

The next question to resolve is whether the 2nd respondent established his qualifications with the Electoral Commission as required by Section 4 (5) (d) of the PEA, two months prior to the nomination day. Counsel for petitioners submitted that there was no evidence that the 2nd respondent had fulfilled the above requirement. On

the other hand the respondents' case was that there was no evidence adduced by the petitioners to prove that this requirement had not been adhered to by the 2nd respondent. The petitioners replied that they could not prove a negative. It should be the 2nd respondent to produce evidence that he complied.

I have looked at the relevant provisions of the law. Section 111 (3) of the Local Government Act made the required qualification for candidacy for L.C. V Chairman equal to that of a Member of Parliament, which qualifications were laid down under Article 80 of the Constitution (Supra). Article 80 of the Constitution empowers Parliament to prescribe the manner and time of establishment of the required qualifications. Parliament on its part enacted the Parliamentary Elections Act, S. 4 (6) of which requires the establishment (in the case of a person ct with 'A' level equivalent) to be done by production of a certificate issued to him of her by NCHE in consultation with UNEB. Meanwhile Sub-section (5) requires that the "establishment" is done with the Electoral Commission 2 months before nomination day in case of a general election.

The procedure to be followed in establishing the qualifications with the Electoral Commission was not prescribed. Counsel Kakuru submitted that this was an administrative matter which had not had any specified procedure. Although the petitioners did insisted that the respondent ought to have produced an

acknowledgement, they did show where the requirement for an acknowledgement is based and neither did go further to submit any sample of "acknowledgement" that the Electoral Commission has ever given to a candidate who has established his qualification.

There being no evidence adduced to support the averment that the 2nd respondent did not establish his qualification as per S. 5 of the PEA, and there being no prescribed procedure or sanction for none compliance, I find myself unable to agree with the petitioners that this aspect of the complaint could and should invalidate the 2nd respondent's nomination. The factors that may invalidate a nomination relevant to this case under S. 3 of the PEA were given earlier as the candidate not being qualified and non compliance with S. 4 of the Parliamentary Election Act. S. 4 does not give any procedure to follow to establish one qualifications or certificate of equivalence. Without any evidence to the contrary, the fact of nomination would suffice that Section 4 was complied with. And as earlier stated, it was not in issue that the 2nd respondent was qualified for election under S. 4 of the PEA. Since he was qualified for election, and I have already ruled that the Certificate of Equivalence issued in 2005 was valid, and since the fact of failure to establish has not been proved, I would not declare that the 2nd respondent be denominated on this ground.

The next issue is whether the 2nd respondent is a registered voter. The petitioners complained that the 2nd respondent was not a registered voter anywhere in Uganda

and the African continent for that matter. They referred to the 2nd respondent's voter identity which called him KAJWENGE Melchiadis Tumuhairwe with the date of birth of 28/01/1960 yet all his other documents he is referred to as KAZWENGYE Melchiadis. Since the voter Identity has Kajwenge, and the 2nd respondent claims to be Kazwenge, the 2nd respondent is not registered as a voter in Uganda. The petitioners also queried the addition of the name Tumusiime.

I have looked at the documents relied on in this respect by Counsel for both sides. The picture of the voter was clear on the Voter Information Card. It was of the 2nd respondent who appeared in court. There is on record, an affidavit in reply to the petition by Mr. Wetaka Patrick, a Legal officer of the Electoral Commission clarifying under paragraphs 9 and 10 that it was observed that the voter's details submitted by the 2nd respondent for purposes of nomination contained a spelling error which was however rectified by the 2nd respondent during the update of the National voters' register. Annexture C indicated the details on the updated register. The 2nd respondent had also attached Annextures "B" and "D.13" to his affidavit in support of the answer to the petition which are a Statutory Declaration and an Affidavit respectively, both deponing that his personal name was Tumuhairwe but he dropped it in favour of his father's name, Kazwenge. This is not disputed, or controverted by the petitioners' affidavits. Further, the petitioners have not indicated to court that they know of another voter by the names Melchiadis Kazwenge Tumuhairwe.

I find that there is enough evidence on record to show that the names on the updated Voter Information Form are those of the 2nd respondent and that he was duly nominated.

In conclusion, the court finds that the prayers for orders and declaration that the nomination of the 2nd respondent is null and void because he was not qualified for candidature, and hence his nomination be set aside, cannot be granted for reasons indicated. The petition is hereby dismissed with costs to the respondents.

**Elizabeth Musoke**

**JUDGE**

**7/02/2011**