THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA

MISC. APPLICATION NO. 0012 OF 2011

(ARISING FROM ELECTION PETITION NO. 0001 0F 2011)

GEN. MOSES ALI :::::::::::::::::::::::: APPLICANT

=VERSUS=

HON. PIRO SANTOS ERUAGA :::::::::::::::::::::::: RESPONDENT

RULING

(BEFORE HON. JUSTICE JOSEPH MURANGIRA)

The applicant through his lawyers M/s Muwema & Mugerwa Advocates & Solicitor brought this application against the respondent under rule 17 of the Parliamentary Elections (Election Petitions) Rules, Statutory instrument no. 141 – 2; Order 6 rules 22 and 31 of the Civil Procedure Rules. The respondent through his lawyers M/s Bwambale, Musede & Co. Advocates and M/s Akampumuza & Co. Advocates filed in court an affidavit in reply and opposition to this application.

This application is seeking the following orders, namely:-

a) The amended petition filed by the respondent/petitioner on 8th/4/2011 be disallowed.
b) Costs of this application be provided for.

Further, this application is supported by the affidavit of the applicant which sets out the grounds of the application but briefly they are that:-

1) The amended petition is misconceived and incurably defective.
2) The amended petition introduces new grounds for setting aside the election which have the effect of bringing a new petition out of the statutory time provided for under the law.
3) The amended petition introduces new causes of action
4) The amendments to the petition have the effect of changing the original petition into one of a substantially different character which shall occasion injustice to the applicant that cannot be compensated for by costs.
5) The amendments to the petition are prejudicial to the rights of the applicant which existed at the date of the amendment.

On 9th/5/2011 and 16/5/2011 when this application came up for hearing pursuant to Rule 27 A of the Parliamentary Elections (Election Petition) Rules, the court held a scheduling conference to sort out points of agreement and disagreement and the possibility of settlement of the case by alternative dispute resolution. Unfortunately, the parties failed to reach a settlement. Hence the trial of this application proceeded as scheduled.

Counsel for the applicant, Mr. Siraji Ali, by way of submissions argued the application on the basis of the grounds of the application. He prayed that this application be allowed and the amended petition be disallowed with costs.

Dr. James Akampumuza, counsel for the respondent did not agree with the submission by counsel for the applicant. He submitted that the application in incompetent, incurably defective, frivolous and vexatious. He applied for this application's dismissal with costs. That the amended petition was done within the law.

Counsel for the respondent's arguments on his contention that this application is incompetent and incurably defective is that the application is not supported by any evidence. That the affidavit of the applicant in support of this application is incurably defective. He referred the court to page 2 of the said affidavit and submitted that the applicant's affidavit does not conform to the law in that in its jurat the non-appearance of the word "deponent" affects its format. That the applicant's affidavit does not conform with order 19 rule 3 of the Civil Procedure Rules in that the said affidavit is not confined to such facts within the knowledge of the applicant in this regard, counsel referred court to paragraph 4 of the applicant's affidavit that the applicant does not state in his affidavit the basis of his belief of his lawyers' advice. That the applicant's affidavit is argumentative and as such it should be struck out. That the applicant's failure to attach a copy of the amended petition leads the applicant into alleging unsubstantiated statement/allegations. He further submitted that the consequence of the aforesaid:

a) There is no evidence to show which parts of the amended petition would prejudice him.
b) The applicant does not show evidence which new grounds have been introduced in the amended petition.
c) The applicant does not show court what he alleges is a new change of the cause of action.
d) The applicant does not demonstrate what is res judicata in that amended petition.

On this point, counsel for the respondent finally submitted that the applicant's affidavit is not an affidavit in law and that it should be struck out.

Counsel for applicant, Mr. Siraj Ali in his submissions in reply does not agree with counsel for respondent's submissions. He reiterated his first submission on the matters and maintained that the application is proper.

On the issue of the applicant's affidavit being incurably defective, I have looked at and considered the said affidavit in its entirety in light of the submissions by both counsel for the parties and I find the said affidavit proper. The said affidavit does comply with the law. My finding is supported by the case of MBAYO JACOB ROBERT –VS- ELECTORAL

COMMISSION & TALONSYA SINAH, Election Petition Appeal no.007 0f 2006 whereby the court of Appeal read with approval the Supreme Court decision in Dr. Kiiza Besigye –Vs- Electoral Commission and Museveni Kaguta. Election Petition no. 0001 of 2001; where it was held by the court that Election Petitions are very important and that therefore courts should take a liberal view of affidavits so that petitions are not defeated on technicalities. In specific reference to the Jurat, the Hon. Chief Justice J.B. Odoki held in his judgment that the essential requirements of the Jurat are:-

a) The place and
b) The date when the affidavit was made, therefore, failure or omission to include the word "deponent" below the signature of Moses Ali does not offend any law at all.

Further, on the submission that paragraph 4 of the said applicant's affidavit do not include the basis of his belief. In that paragraph 4 the applicant stated that:
"That I have been advised by my lawyers M/s Muwema & Mugerwa & Co. Advocates whose advice I verily believe to be true……." It is very clear to everyone that the basis of his belief was indicated or well spelt out in that paragraph. Thus, the respondent's counsel contention in that regard does not hold water.
Consequently, on the submissions by counsel for the respondent on the averments by the applicant on matters of law, I have perused the applicant's said affidavit and found that in the matters of law deponed on by the applicant are based on the advice of his lawyers. And where they were not the matters of law must have been in the applicant's knowledge and that he could lawfully depone on them. In regard to this contention by counsel for the respondent, I perused the respondent's affidavit in reply and found no evidence therein to challenge the applicant's knowledge of the law. May be the respondent and his lawyer very well knew that the applicant is a lawyer, himself and if there was any doubt about the applicant's knowledge of the law, counsel for the respondent would have the applicant cross-examined on these points. Short of that, such contention raised by counsel for the respondent ought to be answered in the negative.

Furthermore, on the issue of none attachment of the amended petition on the applicant's affidavit in support of the application, hence rendering that affidavit incurably defective. The application and the affidavit of applicant in support of the petition all refer in absolute words that the

respondent's amended petition filed in court on 8/4/2011 is defective. The applicant's affidavit goes ahead to state evidence why the applicant thinks that, that amended petition should be disallowed. In the affidavit in reply to this application, the respondent in his statements very well understands what amended petition the applicant is referring to. Therefore, it is my finding that since this application arises out of the main petition no. 0001 of 2011 where the amended petition was filed and placed it was not mandatory for the applicant to have attached the same on his affidavit in support of this application. Hence counsel for respondent's submissions on that point are answered in the negative.

Counsel for the respondent further submitted that there is no evidence to show that the applicant shall be prejudiced because of the amended petition. That the proposed amendment only affects the Electoral Commission which is in charge of the conduct of elections. That the Electoral Commission has not objected and that it beautifully filed an answer to the amended petition. That the applicant too on 15/4/2011 filed in this court an answer to the amended petition. That therefore, this application is a waste of time. I have looked at both answers to the amended petition filed by the applicant and the Electoral Commission and noted that the aforesaid parties in their ground do object to the amended petition. I further note from their answers to the petition that the said respective parties filed their answers to the petition without prejudice. Hence, it is not true that the applicant conceded to the amended petition. Thus, the applicant was entitled to file this application. The application, therefore, cannot be said to be a waste of time of the court.

It is the submission of counsel for the respondent that the amendment of the petition with or without leave is allowed in election petitions, like in any other pleadings. That Rule 17 of the Parliamentary Elections (Elections Petitions) Rules does not at all prohibit amendments. He submitted that the grounds argued by the counsel for the applicant are in effect the same. That the cases cited by the applicant's counsel do not support the applicant's position of the law. He too relied on the cases of **SITENDA SEBALU –VS- SAM .K. NJUBA & THE ELECTORAL COMMISSION, SUPREME COURT ELECTION PETITION APPEAL NO. 026 OF 2007;** that the case dealt with the situation whereby the Supreme Court overturned the decision of the High Court and Court of appeal that failure to serve the notice of presentation of petition within

seven (7) days as prescribed under the Parliamentary Elections Act was a matter fixed by statute and no application could be made to enlarge time within which to file and serve the notice of representation. That the parties in that case had relied on the case of **Makula International Ltd –Vs- His Eminence Cardinal Emmanuel Nsubuga & Another [1982] HCB 11,** and that the Supreme Court allowed service of Notice of Presentation of the petition after two (2) years. That all the cases cited by counsel for the applicant were cited out of contest.

Counsel for the respondent also relied on the case of Mbayo Jacob Robert –Vs- Electoral Commission & Another (Supra) in support of his submissions that the court of Appeal was clear that an amendment of pleadings is aimed at allowing a litigant to plead the whole claim he was entitled to make in respect of his or her cause of action. That therefore, the amended petition falls within the law. In reply, counsel for the applicant do not agree with the submission by counsel for the respondent.

From the submissions by both counsel, they all touch on the principle laid down in the case of Makula International Ltd –Vs- His Eminence Nsubuga & Another (Supra). It is important to note that the principle in that case is that court shall not exercise its residual or inherent jurisdiction to extend or enlarge time which is fixed by an Act of Parliament. That principle is cited with approval in the case of Besweri Lubuye Kibuka –Vs- Electoral Commission & Another, constitutional Petition no. 08 of 1998 whereby it was held that:-

> *"In our view, the correct ratio decidendi of Makula International Ltd is that if there is no statutory provision or rule which gives the court discretion to extend or a bridge the time set by statute or rule, then the court has no residual or inherent jurisdiction to enlarge a period of time laid down by the statute or rule. This interpretation is in consonant with the decisions in the two cases of the Supreme Court relied upon."*

I have read the case of Sitenda Sebalu (Supra) the Supreme Court confirmed or emphasized that principle that where time is fixed by statute, court cannot exercise its discretion to extend it. However, in the facts of that particular case the Supreme Court held that since the time fixed by section 62 of the Parliamentary Elections Act for service of Notice of presentation of Petition was also fixed in the Parliamentary Elections (Election Petition) Rules, Rule 6 (1) the court had

powers to exercise its inherent powers to extend that time since that power is enshrined in Rule 19 of the said Rules. The Court held further that since Parliament under section 93 had empowered the Chief Justice in consultation with the Attorney General to make Rules relating inter alia to service of Notice of Presentation of Petition it was the intention of Parliament that the terms of section 62 of PEA which uses the word shall would not be mandatory but rather directory.

In the instant application, the principle in Makula International LTD (Supra) applies in that section 60 (3) of the PEA provides for the filing of petition within 30 (thirty) days. There is no rule in the Parliamentary Elections (Election Petition) Rules that repeats such provision such as to fall squarely in the decision of Sitenda Sebalu case as submitted by counsel for the respondent. It is my considered view that an amendment that carries with it new grounds of the petition as set out under section 61 (1) of PEA would be barred by limitation as set out in section 60 (3) of the PEA.

On the 1st ground that the amended petition is misconceived and incurably defective. It is an agreed fact that the respondent amended the petition without first seeking leave of court to do so. According to rule 17 of the Parliamentary Elections (Election Petition) Rules, the court has discretion to determine what modification of the application of the Civil Procedure Act and Civil Procedure Rules in relation to Election Petitions so that the interests of Justice the expeditious trial of the petition can be met. Therefore if a party wishes to amend its pleadings, an application seeking for leave to amend has to be filed in court and heard interparties. In the case of Mbayo Jacob Robert (Supra) the court held that application for an amendment can be made orally or informally by chamber summons. Also see section 100 of the Civil Procedure Act. The power to sanction any amendment of any pleadings lies with the court.

The aforesaid, therefore clears the contention by counsel for the respondent that an amendment of pleadings can be made as of right without leave of court even after the closure of pleadings by a party. Therefore, an amendment filed in court after the subscribed time allowed by law and without the leave of the court is definitely incurably defective. And such pleadings ought to be

illegal and a nullity at law. And therefore, under the principle in the Makula International LTD case (Supra) such amended pleadings must be rejected by court.

It is also my considered view that order 6 rule 20 of the Civil Procedure Rules under which the respondent's counsel based themselves to effect the amendment without seeking leave of court is not applicable to matters concerning election petitions. The rationale for the discretion give to court in this regard under Rule 17 (Supra) is due to the great public interest and importance attached to the conduct and determination of election petitions. The PEA and its Rules provide very strict time limits for the conduct of the election petitions. For instance under S.60 (3) of the PEA a petitioner is given 30 (thirty) days from the date of the results were gazetted to file a petition. Under Rule 6 of the Rules governing election petitions the petitioner has only 7 (seven) days within which to serve the Notice of presentation of a petition and the petition on the respondent. The respondent has only 10 (ten) days from the date of service to file an answer to the petition and only 5 (five) days within which to serve the petitioner with the answer (See Rule 8 (1) of the said Rules). The court itself is required to handle the election petition expeditiously on day to day and to set aside all other matters (see section 63 (2) of the PEA).

The court is also required to conclude the election petitions within the period of 30 (thirty) days after commencement of the hearing (see Rule 13 (1) and (2) of the said Rules). All the aforesaid instances clearly show that time is of essence. On the contrary, order 6 rule 20 of the civil procedure Rules create completely different time frames which contradict the law governing the trial and hearing of election petitions. Order 6 rule 20 thereof allows the plaintiff to amend his plaint at any time within 21 days or where the written statement of defence is filed, then within 14 days from the time of filing the defence. Then order 6 rule 24 of the defendant has a right to reply to the amended plaint within 14 days. Therefore, the modifications of applying the Civil Procedure in election petitions talked of in Rule 17 of the Rules governing election petitions can not allow order 6 rule 20 of CPR to override the election petition laws and their rules made there under. That's why therefore it was necessary for the respondent to have sought leave of the court first, before, he could amend his petition. All in all, considering my analysis of the law and the submissions of both parties on this point, I answer the 1st ground of this application in the affirmative.

On the second ground of the application of whether the amended petition introduces a new cause of action after the expiry of the statutory limited period of 30(thirty) days within which to file the election petition.

It is trite law that an amendment that introduces a new cause of action cannot be allowed.
This principle is well set in the following cases: **Epaineto –Vs- Uganda Commercial Bank (1971) EA 185 where it was held that:**
"A proposed amendment which introduces a new cause of action after the expiry of a period of limitation must be rejected."
See also the case of **Auto Garage & others –Vs- Motorkov (no. 3) [1971] EA 514** whereby it (Mustafa, JA dissenting) was held that:
"The amendment introduced a new cause of action should not be allowed so as to defeat a defence of limitation."

I have read the amended petition and the original petition together with its affidavit in support and I am in agreement with counsel for the applicant that the amended petition introduces a new cause of action, that of non-compliance with the provisions of the PEA in section 61 (1) (a). The original petition had only the ground of wrong declaration of results whereby, the applicant was declared a winner whereas not. All the amended paragraphs of the amended petition clearly show that the non-compliance of the provisions of the PEA is a new cause of action which was not obtaining in the original petition. It is also important to note that each ground set out in section 61 of the PEA is a separate cause of action.

Therefore the amendment in question filed on 8th/4/2011 was well after the expiry of 30 (thirty) days. The results of these elections were gazetted on 4th March, 2011. Hence to permit the respondent/petitioner to amend his petition and introduce a new cause of action after the expiry of the statutory period of 30 (thirty) days would deprive the applicant of his right to raise the preliminary objections he set out in his answer to the original petition. I wish also to observe that the amended petition was prompted by the preliminary objections raised by the applicant in his answer to the petition. This is also a conduct of counsel for the respondent to render

nugatory the said objections by curing the defects in the original petition by bringing the amended petition. Thus, these have the effect of depriving the applicant from exercing his right to a defence of limitation, and res judicata he raised as preliminary objections in answer to the original petition. I therefore answer the second ground of the applicant in the affirmative.

Lastly, having resolved the 1st and 2nd grounds in favour of the applicant, it is my finding that the amended petition is prejudicial to the rights of the applicant that existed at the date of the amendments, namely;-

> *"The right to raise preliminary objections as set out in the answer to the original petition."*

It is trite law that no amendment would be allowed to the prejudice of the opposite party's rights that existed at the date of the proposed amendments. In the case of **Lubowa Gyaviira & others –Vs- Makerere University, High Court Miscellaneous application no. 071 of 2009, Hon. Mr. Justice Yorokamu Bamwine(as he then was held** that:-

"No amendment would be allowed which would prejudice the rights of the opposite party existing at the date of the proposed amendment."

I, therefore, answer this 3rd ground of the application in the affirmative.
In the result and for the reasons given herein above in this ruling, the applicant's application has merit. Accordingly, this application is allowed in the following terms:-

The amended petition filed by the respondent/petitioner on 8th April 2011 is disallowed.
The said amended petition is struck out of the record of this court.
Costs of this application are awarded to the applicant.

Dated at Arua this 20th day of May 2011.

SIGNED

JUDGE

20/5/2011

Court: The main petition is fixed for hearing on 23/5/2011 at 9.00am.

……..

JOSEPH MURANGIRA

JUDGE

20/5/2011.