THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT LIRA

IN THE MATTER OF THE PARLIAMENTARY ELECTIONS ACT, 2005 (AS AMENDED)
AND
THE MATTER OF PARLIAMENTARY ELECTIONS (ELECTION PETITIONS) RULES, 2006 (AS AMENDED)
AND
IN THE MATTER OF DIRECTLY ELECTED MEMBERS OF PARLIAMENT, PARLIAMENTARY ELECTIONS FOR KOLE CONSTITUENCY

ELECTION PETITION NO. 0017/2011

OTIM NAPE GEORGE WILLIAM……..PETITIONER
VERSUS
1. **EBIL FRED**
2. **ELECTORAL COMMISSION……RESPONDENTS**

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

RULING

The appearances in this petition are as follows:-

The petitioner was present. He is represented by **Mr. Chris Bakiza, Kangye Mugabe** and **Innocent Omara**. The first respondent **Ebil Fred** was in court represented by **Mr. Abwang Otim** together with **Louis Odong**. The two were assisted by **Mr. Oyugi**. The second respondent is represented by **Ms Carol Akware** of M/s Osilo and Co. Advocates.

The petition under consideration was filed by **Mr. Otim Nape George William** against **Hon Ebil Fred** who was declared winner in the Parliamentary Elections held on 18th February 2011 for Kole Constituency, Kole District, and the Electoral Commission which returned the 1st respondent as the validly elected candidate in the Uganda Gazette dated 21st February 2011.

Apart from the parties to this petition two other candidates contested for the seat to wit; **Olobo Lamek** and **Omara Felix Omara**. When the petition came up for scheduling conference both sides to the petition raised preliminary points of law challenging the validity of the petition on the one hand and the validity of the answer to the petition on the other.

Through **Mr. Abwang**, the respondents raised the following objection to the petition.

(1) That the petition is invalid because a fee of 150,000/= was not paid on presentation of the petition as required under Rule 5 Sub-rule 3 of the Parliamentary Elections (Election Petition) Rules SI 141-2. That this is mandatory otherwise the petition shall not be accepted. That on the 23.3.2011 when the petition was filed, 100,000/= was paid and 50,000/= was paid later as a top up.

(2) That security for costs was not paid which is supposed to be 250,000/=. Learned counsel promised to provide authority for this requirement but he did not.

(3) That the affidavit of **Otim Nape**, the petitioner was not paid for.

Learned counsel prayed that with the above omissions, this petition must be dismissed with costs.

In reply, **Mr. Chris Bakiza** for the petitioner conceded that when the petition was filed on 23.3.2011 only 100,000/= was paid because that was the assessment the Clerk was given by the Registrar. That subsequently as officers of the court counsel for the petitioner discovered the omission which he blamed on court, and paid a further 50,000/= as a top up. That since the error was corrected the same should not be visited on the petitioner.

Further that there has been substantial compliance with the law inspite of the errors. That the use of the word "shall" in the law is not mandatory hence the absence of sanctions for non-compliance.

2. Regarding security for costs, **Mr. Bakiza** submitted that it was paid and receipted.

Mr. Chris Bakiza's response was supplemented by **Mr. Kangye** who submitted that security for costs was paid in court and not in the Bank since it has to go to the respondents in case the petition is dismissed. **Mr. Omara** added that since the Registrar accepted 100,000/=, received the petition and issued a notice of petition, the petition should not be rejected. That the spirit of the law is to collect revenue which is not determinative of the petition. He referred court to Article 126 (2) (e) of the Constitution, urging this court to administer substantive justice.

The petitioner raised counter objection regarding the validity of the answer to the petition.

Mr. Chris Bakiza submitted that:-

(1) There was non-compliance with the mode of filing an answer to the petition as provided for under R.8 (3) of the Parliamentary Elections (Election Petitions) Rules SI 141-2. He singled out the affidavit of the Respondent of 29.3.2011 as being incompetent and incomplete for violating the Commissioner for Oaths Act Cap.5 S.1 (4) thereof. That the said affidavit was commissioned by one Acan Stella of Lira who had no Practising Certificate for 2010 and 2011. Therefore the said affidavit cannot be used to support an answer to a petition.

(2) That the affidavit of the 1st respondent is not in conformity with O.19 r.1 of the Civil Procedure Rules since it contains evidence, is argumentative and contains oppressive information as well as matters the deponent has no knowledge of. That the said affidavit be rejected and the answer to the petition be struck out. Since the same cannot be amended. **Mr. Chris Bakiza** also pointed out affidavits which were sworn contrary to the Illiterates Protection Act. These included that of **Odoch Dennis, Odyek Washington, Elida Morris Elida Ben** and **Angella alias Ojee Pad**. That failure to comply with S.3 of the Act is fatal because where a requirement of Statute is not complied with, the omission is fatal.

Mr. Kangye supported **Mr. Bakiza**'s submission and pointed out other affidavits which were commissioned by one **Acan Stella** including those of **ASP Isabirye Gerald, Ogwal Martin, Odyek Washington, Eleander Morris, Elida Ben, Angula Fredrick, Apio Eunice** and **Atodi Yuventino**. Further that the affidavits commissioned by the Magistrate did not comply with the 3rd Schedule to the Commissioner for Oaths (Advocates) rules because the Magistrate did not state his names. These affidavits include that of **Okeng Olet Charles, Okello Francis Ole,**

Ojok Alfred alias Munono, Okello Dennis, Omodi Gilbert and **Akullu Enin**. That all these affidavits be struck out.

In reply to the preliminary points of law raised by the petitioner, **Mr. Odong** had this to say:

(1) That **Mrs. Stella Acan** commissioned the affidavits complained of on 29.3.2011 in the grace period allowed by the Advocates Act because the law council takes time to inspect lawyers chambers which they complete at the end of March each year. That the grace period expires on 31st March every year. That a document signed by an advocate or commissioner who has no practicing certificate is not invalid. That it is the advocate who is punished.

(2) **Mr. Odong** further submitted that the affidavit in support of the answer is not oppressive because it is specific and answers the allegations by the petitioner. Further that O.19 r. 3 of the Civil Procedure Rules does not provide for expunging such affidavits but it provides for costs to be paid to the aggrieved.

(3) Regarding the Jurat **Mr. Odong** submitted that the Rule relied upon by learned counsel for the petitioner does not apply to judicial officers but if need be, an affidavit could be sworn by the judicial officer to correct the anomaly.

In support of **Mr. Odong**'s submission, **Mr. Abwang** said that in instances where an affidavit is argumentative court can punish the filing party in costs or use its discretion to ignore the argumentative paragraphs if found. Learned counsel however argued that his client's affidavit was not argumentative but was explanatory of the averments by the petitioner. Learned counsel wondered whether an illiterate is a person who does not know English or one's language. He

explained that the affidavits by the respondent are all explained to the deponents and a certification affixed to that effect.

S.93 of the Parliamentary Elections Act provides for enactment of Rules of Court to govern Parliamentary Election Petitions.
The said section provides that:

> "93 (1) *The Chief Justice, in consultation with the Attorney General may make rules as to the practice and procedure* ***to be observed*** *in respect of any jurisdiction which under this Act is exercisable by the High Court and also in respect of any appeals from the exercise of that jurisdiction*."

As a consequence of this law, the Parliamentary Elections (Election Petitions) Rules SI 141-2 were enacted. Rule 2 thereof provides that:-

> "*These Rules shall apply to the conduct of election petitions in respect of Parliamentary elections held under the statute*."

Rule 5 thereof regulates the mode of presentation of Petitions which has to be done within 30 days after the declaration of results of the election (R.5 (1)). Six copies of the petition have to be left with the Registrar (R.5 (2)). Then R.5 (3) provides as follows:

> "*The petitioner or the advocate of the petitioner shall, at the time of presenting the petition pay a fee of 150,000/= shillings*."

Non compliance with R.5 (3) has a sanction under R.5 (4) to the effect that:

"*If sub-rule (3) of this rule is not complied with, the petition shall not be accepted*."

My reading of the above provisions is that it is not optional to comply with the same when one is filing an election petition. These are rules of procedure and not court fees Rules. Payment of the prescribed fee is an essential step.

The consequences of failure to follow the prescribed procedure has been dealt with by the Court of Appeal for Uganda. Amongst the many decisions pronouncing on the said failure is the case of ***ELECTION PETITION APPLICATION NO. 35 OF 2007 (1) HON ROSE AKOL OKULLO*** **(2)** ***ELECTORAL COMMISSION VS AMONG ANNET ANITA***. Although the said decision was dealing with observance of the Court of Appeal Rules, it is relevant to the general observance and compliance with the Rules of procedure in Courts of law generally. The court of appeal held *inter alia* that.

" In the case of ***East and Southern Africa Development Bank (PTA) vs Concorp International Ltd CA No. 78 of 2001*** this court considered the **consequences of failure to comply with rules of procedure** and in particular those prescribed in Part IV of the Judicature (Court of Appeal Rules) Directions……..we said,

"……failure to serve a notice of appeal on a litigant affected by the intended appeal is an essential step. If not done within the required time, the appeal is rendered incompetent."

The Court of appeal went on to hold that:-

"In ***Gaba Beach Hotels Ltd vs Cairo international Bank Ltd*** in the circumstances relevant to this application we followed the Supreme Court decision in ***Utex Industries Ltd v. Attorney General C. Application No.52 of 1995 and Civil Appeal No.2 of 2001*** and stated:

> "*We do not regard the rules relating to the Institution of appeals in this court to be mere technicalities that parties can dispense with under Article 126 (2) (e)of the Constitution. They go to the root of the substantive justice and the doctrine of a fair trial. They are intended to protect both parties from possible abuse of court process to the prejudice of proper administration of justice."*

With the above analogy in mind, I am in agreement with the submissions by learned counsel for the respondents that it is a mandatory requirement of the law that upon presentation of an election petition, a fee of 150,000/= must be paid and in full otherwise the petition would not be accepted. This rule is intended to regulate presentation of petitions and prevention of abuse of court process to the prejudice of proper administration of justice. As rightly submitted by learned counsel for the respondents, when the petition was presented, shs.100,000/= was paid as fees contrary to R.5 (3) of the Rules. Although the learned Registrar purported to receive the petition, that reception did not amount to legal receipt as envisaged under the law. He ought to have rejected the petition under R.5 (4) for non-compliance with R.5 (3) of the Rules.

When I perused the record, I discovered that the faulty petition was the one which was served onto the respondents on 25 March 2011, 2 days later and on 28.3.2011 respectively.

Basing on this service the first respondent answered the petition on 1st April 2011 and the 2nd respondent answered on 5th April 2011. All this process was being done before full fees was paid. After the pleadings were apparently completed, the petitioner purported to pay 50,000/= on 17th May 2011 as "top up on filling fees in election petition No.17/2011". Top ups are not provided for anywhere in the Rules. This was the day on which the hearing of the petition began. It is not clear at what time the "top up" was made. It could have been made after court adjourned since the hearing had been adjourned by 10:00A.M on that day. The mandatory requirement of R.5 (3) is not a technicality which can be dispensed with by court under Article 126 (2) (e) of the Constitution as submitted by counsel for the petitioner.

In Election Petition matters, if the prescribed fee is not paid in full before the petition is accepted, it is fatal and it invalidates the petition. It is an essential step. If it is not done as required then the petition is rendered incompetent.

Learned counsel for the petitioner tried to down play this requirement of the law as merely intended to collect revenue for the government. I do not agree. Courts are not revenue collection agencies. The role of courts is to administer justice in an orderly manner facilitated by the rules of procedure to prevent abuse of the process. Otherwise there would be total anarchy in the process if litigants were allowed to do what they wanted at their own volition and in their own time.

Regarding whether any fees was paid for the affidavit of the petitioner, it is not clear from the record. Like all the supporting affidavits, the affidavits only contain a High Court received stamp but no stamp indicating that fees was paid. However, the record has a bundle of receipts or Bank payment advice forms and pay in slips indicating that bulk fees was banked in respect of different affidavits. These slips are dated long after the petition was filed. For example there is a pay in slip dated 31 May 2011 of 30,000/=, 25th May 2011 of 22500/= and 17th May 2011 of 4500/=. It is difficult to know for which affidavits these payments were made. That notwithstanding, I am of the view that this could be explained during the scheduling conference in case it is held.

Regarding the payment of security for costs, learned counsel for the respondents did not provide a legal backing for a requirement of a deposit of 250,000/= as security for costs. It is the Parliamentary Elections (Appeals to the High Court from Commission) Rules SI 141-1 which provide for a deposit of 150,000/= as security for costs but not the rules under SI 141-2. According to the Parliamentary Elections (Election Petition) Rules, R.27 thereof:

> "*All costs of and incidental to the presentation and the proceedings consequent on the petition shall be defrayed by the parties to the petition in such a manner and in such proportions as the court may determine*."

For the reasons I have given herein above, I will uphold the submission by learned counsel for the respondent that this petition is incompetent for not having complied with the mandatory provisions of the law. This conclusion disposes of this petition but for academic purposes I will comment on the issues raised by learned counsel for the petitioner concerning affidavits commissioned by a

commissioner for oaths who is an advocate but without a valid practising certificate and others commissioned by a Magistrate who did not write his or her names in full.

What came out in the objection on this point by learned counsel for the petitioner are three issues. The first is whether an advocate who has been appointed as commissioner for oaths under the provisions of S.2 of the Commissioner for Oaths (Advocates) Act can continue to serve as a Commissioner for Oaths after his/her certificate has expired. The second issue is what is the effect of an oath or affidavit taken before a commissioner for oaths who is an advocate and whose practicing certificate had expired at the time he/she administered the oath.

Thirdly, what is the effect of a Magistrate who administered an oath but did not write his names in full.

I will deal with these points separately starting with the first.

(1) Under the Commissioner for oaths (Advocates) Act Cap.5, the Chief Justice appoints practicing advocates who have practiced for not less than 2 years in Uganda prior to making the application for appointment, and who are certified to be fit and proper persons by two other advocates to be commissioners for oaths. This appointment is published in the Gazette. Each commission terminates forthwith on the holder thereof ceasing to practice as an advocate. (See SI of Cap.5).

For an advocate to practise law, he/she must have a valid practising certificate (S.11 Advocates Act). It is on this basis therefore that an

advocate can continue to be a Commissioner for Oaths. The commission granted to an advocate under the Act goes with a practising certificate. Once an advocate has ceased to practise as such the Commission also ceases. Therefore, it can be stated that an advocate whose practising certificate has expired cannot legally continue to administer an oath to anybody since his/her practising certificate is the basis upon which the Commissioner for oaths operates.

(2) Regarding the effect on the validity of an affidavit commissioned or documents filed by an advocate whose certificate had expired it was held in the case of ***OLWORA V. Uganda Central Cooperative Union Ltd Civil Appeal No.25 of 1992*** that documents signed or filed by an advocate who has no practising certificate during the period of grace are valid. Nothing was decided about documents signed and filed outside the grace period. The later case of ***Kabogere Coffee Factory v. Haji Twahibu Kigongo Supreme Court Civil Application No.10 of 1993*** (Unreported) provided the answer. It was held and specifically stated that documents filed after the expiry of the days of grace were invalid.

In the Court of Appeal, the position of the law was further clarified in the case of ***Bakunda Darlington vs Dr. Kinyatta Stanley and Anor. Civil Appeal No. 27 of 1996***. It was held *inter alia* that:

> "*An advocate who is commissioned by the Chief Justice under S.2(1) (now S.1) of the Commissioner for Oaths (Advocates) Act ceases to be a Commissioner for Oaths the moment his practising certificate expires and that an advocate who practices*

without a practising certificate commits an offence under S.14 (Now. S.15) of the Advocates Act. Accordingly all the acts which he (or she) performs in his capacity as an advocate or commissioner for oaths after the period of grace has expired are invalid. It may be stated here that any person who administers an oath when he has no authority to do so commits an offence under S.85 of the Penal Code Act."

(The Commissioner for Oaths (Advocates) Act S.6 also makes it an offence).

Applying the above statement of the law, had this petition been properly before this court, I would not have hesitated to uphold the submission by learned counsel for the petitioner that the affidavits commissioned by **Stella Acan** are invalid because she did it without a valid practising certificate. The unchallenged communication from the Chief Registrar who is the licensing officer confirmed that **Stella Acan** had no practising certificates for both 2010 and 2011. Therefore her actions could not be salvaged under the period of grace.

(3) There are people/officers who under The Commissioners for Oaths (Advocates) Act are permitted to serve as Commissioners for Oaths even though they are not advocates. Under S.3 thereof:

"*Every Magistrate and the Chief Registrar of the High Court (which expression shall include Deputy and district Registrars) shall have, virtute officii, all powers and duties of Commission for Oaths*."

Magistrates and Registrars are therefore *ex-officii* Commissioners for Oaths.

Learned counsel for the petitioner contended that failure by the magistrate to state his or her names on the affidavits of **Okeng Olet Charles, Okello Francis Ole, Ojok Alfred** alias **Munono, Okello Dennis, Omondi Gilbert** and **Akullu Enin** was fatal and invalidated the said affidavits. Learned counsel contended that this is a requirement under Rule 9 and the third Schedule to the Rules. The third Schedule provides the form of Jurat as follows:-

> "*Sworn/Declared before me……this ……day of ……, 20……at ……*
>
> ……
>
> *Commissioner for Oaths*"

Clearly there is a requirement to state the names of the Commissioner for Oaths be it an advocate or Magistrate in the space provided. This omission is however, minor and can be curable by an affidavit clarifying the particulars of the officer who administered the oath.

In conclusion, I will order that this petition be struck out with costs.

Musota Stephen

JUDGE

16.6.2011

Order:

M/s Abwang Otim & Co. Advocates to get two certificates for costs since he represented both the 1st respondent and 2nd respondent.

Musota Stephen

JUDGE

16.6.2011

16.6.2011

Omara Innocent representing Petitioner.

Petitioner in court.

Louis Odong for 1st Respondent together with **Abwang Otim** assisted by **Oyugi**.

Abwang Otim for 2nd Respondent.

1st Respondent in court.

Omara Interpreter.

Omara: The matter is for Ruling and we are ready to receive it.

Court: Ruling delivered.

Musota Stephen

JUDGE

16.6.2011