

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT TORORO

Election Petition. No. 0015 of 2011

MUGENI GEOFFREYPETITIONER

VERSUS

- 1. OUMA ADEA GEORGE }**
2. THE ELECTORAL COMMISSION}RESPONDENTS

BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI

RULING

The 2nd respondent herein conducted elections for Chairpersons of Local Government Councils. In the Busia District Council elections, the 1st respondent was declared the winner thereof. The petitioner a registered voter in Busia Municipal Council in Busia district was dissatisfied with the conduct and outcome of the elections. He petitioned this court for a declaration that the 1st respondent was not possessed of the requisite academic qualifications to stand for election as Chairperson of the District. The petition was accompanied by a list of more than 500 persons who were said to be registered voters in the constituency.

When the petition came up for hearing, Counsel for the respondents raised two preliminary points of law for determination. Mr. Kamba learned counsel for the 1st respondent submitted that there was no service of the petition on the 1st respondent. There was an order by court to serve the 1st respondent by way of substituted service. What was put in the newspaper advert was only the notice of presentation of the petition, but the petition was not advertised. There was therefore no effective service on the 1st respondent.

Service of the petition being a statutory requirement, non service meant that the petition was not properly before court, and so ought to be dismissed. The cases of *Mbabali Jude v. Electoral Commission* EP No. 3 of 2006 (CA) and *Goyal v. Goyal & others* [2009]EA 143 CA-U, were cited in support.

Mr. Okalang learned Counsel for the 2nd respondent submitted on the 2nd preliminary point of law that the format of the list of persons supporting the petition was at variance with the form prescribed by the rules. On account of that, the list did not speak for itself as it ought to. This

made the petition incompetent as it was a legal requirement that a petition by a registered voter be accompanied by a list of at least 500 persons who are registered voters in the constituency. There was no certainty that the list attached to the petition was such a list as is required in law. The petition was therefore incompetent and ought to be dismissed.

In reply to the above, Mr. Otee learned Counsel for the petitioner submitted that the court on 5/5/2011 allowed an application for substituted service. This was complied with and an advert of notice of presentation of the petition was placed in the Monitor newspaper of 17th May 2011. An affidavit to that effect was on court record. Once the petitioner put an advert in the Monitor newspaper, that was sufficient compliance with the court order and so the petitioner was at law effectively served.

In respect of the list of registered voters, it was submitted for the petitioner that the list as drawn satisfied the requirements of the law. The Interpretation Act in Section 43 was to the effect that a document which was in a form similar to the form prescribed by the law would suffice so long as it was not meant to deceive. In any event, this was a mere technicality which the Constitution prohibited courts from relying on to the prejudice of litigants.

The petitioner applied for extension of time within which to serve the notice of presentation of the petition and the petition itself, and service by way of substituted service in HCT-04-CV-MA-0061 of 2011. On 5th May 2011, Chibita Mike J., sitting at Mbale High Court granted both prayers in the application.

Consequent upon that court order the petitioner advertised the notice of presentation of the petition in the Monitor newspaper which was published on 17th May 2011. In the meantime court set the petition down for hearing on 25th May 2011. At that hearing the petitioner claimed that he was not served and he did not appear. The 1st respondent appeared by his two counsel, and told court that this was so, upon reading the Monitor newspaper advert. The 2nd respondent duly appeared. Due to the absence of the petitioner, the matter was adjourned for hearing on 23rd June 2011, and it was at the commencement of this hearing that learned counsel raised these objections on points of law.

Rule 6 of the Parliamentary Elections (Election Petition) Rules, which I will hereinafter refer to as PE(EP) rules, provides for service. In sub rule 3 thereof, service of the petition on the respondent is personal. Sub rule 4 envisages a situation where personal service may fail, and hence makes provision for substituted service. Sub rule 5 gives the court power to, 'order that

service be effected in any of the ways prescribed by Order V of the Civil Procedure Rules for service other than personal service,’.

Order V of the Civil Procedure Rules (CPR) provides for service of summons. Rule 2 thereof provides that every summons shall be accompanied by a copy of the plaint, a brief summary of the evidence to be adduced, a list of witnesses, a list of documents and a list of authorities.

The service of summons other than personal service under the CPR which the PE(EP) rules refers to is rule 18 of Order V which is headed ‘substituted service’. Under this rule, once court is satisfied that summons cannot be served in the ordinary way, it orders that summons be served by affixing a copy of it in some conspicuous place in the courthouse, and also upon some conspicuous part of the house, if any, in which the defendant last resided or carried on business or personally worked for gain, or in such other manner as court thinks fit.

One sees that the rules go out of the way to ensure that summons is served on the defendant. The reason stems from the legal maxim that a party should not be condemned unheard. The Court of Appeal dealt with the object of service of process in Besweri Lubuye Kiwanuka v. Electoral Commission & Daniel Kokoola EPA No. 2 of 1999, and stated that this is;

‘To give notice to the party on whom it is made so that he or she might be aware of and be able to resist that which is sought against him and where that has been done so that the court might feel perfectly confident that service had reached him and that everything had been done that could be required.’ See Kistler v. Tetner [1905] 1 KB 45; Diamond v. Croft 3 Ch. D. 512. Service of process is required and goes to the root of our conceptions of the proper procedure in litigation. Craig v. Kanssen [1943] KB 256.’

In the case before me, the court made an order that service of court process on the 1st respondent be by way of substituted service. The petitioner duly placed an advert in the Monitor newspaper. The notice in that advert set out the details of the petition, including the court where it was filed as The high Court of Uganda at Mbale, the parties thereto and the petition number. It in part read thus;

‘NOTICE OF PRESENTATION OF THE PETITION

TO: Ouma Adea George

The Electoral Commission

Take notice that Mugeni Geoffrey has presented an election petition in this court against you, seeking the reliefs (sic) stated in the petition hereto attached.

Take further notice that in default of your appearance on the day fixed for the determination of this petition, the petition will be heard and determined in your absence.’

The notice was signed by the Registrar of the High Court Mbale.

Consequent upon the above notice in the Monitor newspaper, Counsel for the 1st respondent mindful that the petition might be heard and determined in their absence if they did not appear on the day fixed for hearing the same, duly appeared on 25th May 2011, and effectively represented the 1st respondent in court proceedings of that day.

The question for court now is whether the 1st respondent was effectively served when the advert in the Monitor newspaper did not include a copy of the petition.

Court is aware of rule 6(6) of the PE(EP) rules which provides that

‘The Registrar shall , in any case, post on the court notice board a certified copy of the petition ad shall, if the court so directs, cause a copy of the petition to be published in the gazette.’

There was no intimation that the Registrar did not post a certified copy of the petition on the court notice board in compliance with the above rule. The court did not order publication in the gazette. Subrule (2) of rule 18 of Order V of the CPR provides that substituted service under an order of court shall be as effectual as if it had been made on the defendant personally.

It was submitted that there was non compliance with the court order. The order of Chibita Mike J., of 5th May 2011 was that court process be served on the 1st respondent by way of substituted service. The case of *Goyal v. Goyal & others* [2009] EA 143 (CA-U) is clear on compliance with court orders. It held that a court order is not a mere technical rule of procedure that can be simply ignored. Court orders must be respected and complied with. A court order must be obeyed as ordered unless set aside or varied. Those who choose to ignore them do so at their own peril. In that case, the appellant was ordered to deposit security for costs within a month of the order. He failed to comply with that court order, and argued that the appeal had not been heard in any case. The Court of Appeal dismissed his argument and allowed the appeal.

In the present case the petitioner was ordered to serve the 1st respondent by way of substituted service. He did that, and in my view, the publication of the notice of presentation of the petition in which all the relevant details were set out, was proper compliance with the court order. The fact that the 1st respondent as a matter of fact responded to the service of court process through the substituted service vindicates the petitioner that he effectively served him.

That objection is accordingly dismissed.

The 2nd objection was in respect of the format of the list of persons who supported the petition. Section 138(3)(b) of the Local Government Act provides for a person other than the loser in the election bringing an election petition. Such a person must be:

‘a registered voter in the constituency concerned supported by the signatures of not less than five hundred voters registered in the constituency.’

This is similar to the Parliamentary Elections Act, which in Section 60(2)(b) provides that a petition may be brought by ;

‘a registered voter in the constituency concerned supported by the signatures of not less than five hundred voters registered in the constituency *in a manner prescribed by regulations.*’ (emphasis added).

The difference between the two provisions is that unlike the petitions brought under the Parliamentary Election Act, in respect of the Local Government Council elections, there is no legal requirement to conform to any prescribed form when listing the signatures of those supporting the petition.

The complaint by Counsel Okalang was that the list did not comply with the format set out in form EP of S.I. 141-3 The Parliamentary Elections (Prescription of Forms) Regulations. This form has a description of the person whose election petition those signing the form support. The form is divided in columns of name of supporter, signature or thumbprint, voter number, age, sex, constituency, parish and village. This form is in respect of petitions brought under the Parliamentary Elections Act. Elections for chairperson of the district are conducted, and petitions there from brought under the Local Government Act.

The Interpretation Act in S.43 which provides that where any form is prescribed by any Act, an instrument or document which purports to be in such a form shall not be void by reason of

any deviation which does not affect the substance of the document or which is not calculated to mislead, while a useful provision, would therefore be of no relevance here.

I noted that on each of the 21 sheets of the list of those supporting the petition, the details were given as: name, polling station, voter identification number and signature or thumbprint.

Let me reiterate what I said sometime back. The provision (sic) in S. 138 (3)(b) of the Local Government Act states that the petition must be accompanied by signatures of not less than five hundred *voters registered in the constituency*. (Emphasis added). There must not only be signatures to the form of supporters of the petition, but these signatures must be of voters registered in the constituency. The way of showing this is by adding to their signatures their voter registration numbers. Where the voters' registration numbers are missing from the form of supporters, then the provisions of the section will not have been complied with. See Wanambwa Milton v. Wanjusi Wasieba & Electoral Commission HCT-04-CV-EP-0001 of 2004 (Mbale High Court).

In the present case I found that there was compliance with the law and accordingly the 2nd objection is also dismissed.

In the event therefore the two grounds of objection are dismissed with costs to the petitioner.

RUGADYA ATWOKI

JUDGE

24/06/2011.