THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

ELECTION PETITION NO. 04 OF 2011

KASIBBO JOSHUA :::::::: PETITIONER

VERSUS

1. **MBOGO KEZEKIA**
2. **THE ELECTORAL COMMISSION :::::::: RESPONDENTS**

BEFORE: HON. MR JUSTICE MIKE J. CHIBITA

JUDGMENT

This is a petition by Kasibbo Joshua, hereinafter referred to as the petitioner, who was a parliamentary candidate for Budaka Constituency alongside the 1st respondent, among others. The 1st respondent was duly declared winner of the election by the 2nd respondent, was gazetted and subsequently sworn in as the Member of Parliament for Budaka Constituency.

The petitioner's contention is that the 1st respondent has at all material times been a teacher at Bukedi College, Kachonga and never effectively resigned as required by law before nomination. His contention is based on his belief that the letter relied on by the 1st respondent as authorizing his resignation was a forgery according to confirmation he claims to have from the Ministry of Education and Sports.

The petitioner therefore prays for a declaration that the 1st respondent was not qualified for election as a Member of Parliament, an order setting aside the election, a declaration that the petitioner was validly elected as Member of Parliament or in the alternative, order for a new election and provide for costs of the application.

The petitioner is represented by Counsel Ahmed Mukasa Kalule of M/s Crane Associated Advocates.

The 1st respondent is represented by Counsel Edmund Wakida of M/s Lex Uganda, Advocates and Solicitors while the 2nd respondent is represented by Counsel Godfrey Kavuma.

The 1st respondent denies all the allegations in the petition and contends that he will raise a preliminary point of law to the effect that he was never served and that his response was entirely

without prejudice to that fact. He further contends, in his reply, that the petition is bad in law since the petitioner does not qualify as a 'candidate' because his names are inconsistent in various documents and does not possess the requisite academic qualifications.

He concludes by contending that he was validly nominated and elected since he legally resigned and was accordingly discharged from active service by the Ministry of Public Service. That this same matter was raised by the petitioner before the Electoral Commission, which arbitrated on it and ruled in his favour and since the petitioner did not appeal, the matter should be deemed to be res judicata.

The answer to the petition is accompanied by the affidavit of the 1st respondent, Mbogo Kezekia and several others.

The parties agreed to submit written submissions, which they did with exception of the 2nd respondent who filed neither a reply to the petition nor written submissions. The petitioner does not address this omission and so I will let it pass.

The parties agreed to the following issues:

- Whether the 1st respondent was at the time of his nomination and election qualified to be nominated and elected as a Member of Parliament.
- Whether the 2nd respondent validly nominated the 1st respondent.
- Whether the petitioner has locus to present the current petition.
- Whether the petitioner is entitled to the reliefs sought in the petition.

In his submissions, the petitioner's counsel sought to start with the third issue concerning whether the petitioner has locus to present the petition. Under this issue there are two legs on which it stands namely: the fact that the petitioner's names on the academic qualifications are at variance with those he used for nomination as a candidate in the instant election and, the fact that he relied, for his nomination, on a Bachelor's degree in Business Administration from Sikkim Manipal University of Health, Medical and Technological Sciences without first obtaining a Certificate of Equivalence from the National Council for Higher Education. Furthermore the 1st respondents doubt whether the degree itself has even been awarded at the time of presentation of the petition, or at all.

It is argued for the petitioner in support of his belief that he has locus to bring this petition that indeed he is 'a candidate who loses an election' as envisaged by the law. In support he quotes section 60 (2) of the Parliamentary Elections Act read together with section 1(1) of the same act to argue that 'a candidate who loses an election' means a person nominated as a candidate for election and a Certificate of Nomination duly issued to him by the 2nd respondent.

In direct response to the 1st respondent's contention that the nomination by the 2nd respondent of the petitioner was faulty because of the variance in names, the petitioner's counsel admits that indeed he was nominated as KASIBBO JOSHUA OMAYENDE, brought the petition under the names KASIBBO JOSHUA, swore an affidavit in 2005 renouncing use of the name OMAYENDE and his academic credentials prior to that date bear the name OMAYENDE JOSHUA.

Counsel contends that all the names belong to his client and no other person. That since the evidence to this effect was not impeached it should be taken to be wholly truthful. In support of this contention he quotes the case of **Tororo District Administration versus Andalapo Industries Limited 1997 IV KALR 126**.

Counsel also cites the case of **Ongole James Michael versus Electoral Commission and Ebukalin Sam Election Petition No. 008 of 2006** in which Justice Musota considered a similar issue and held that though the discrepancy in names creates a lot of suspicion that alone cannot be the basis for saying that the names refer to somebody else who has not been availed.

Counsel for the 1st respondent quoted the same case to support his client's prayer for dismissal of the petition on account of the petitioner lacking locus. The judge in that case dismissed the petition on grounds that the petitioner himself lacked the requisite academic qualifications and therefore lacked locus to file the petition.

Counsel cites section 12(2) of the Parliamentary Elections Act which enjoins a returning officer to refuse to accept any nomination paper if there appears to be a major variation between the names of the person as they appear on the Nomination paper and the Voters Roll. He cites the cases of **Baku Raphael Obudra versus Agard Didi and EC, and Obiga Kania versus Kassiano Wadri** where it was held that the variation in names was of a substantial nature and had the effect of confusing voters.

Section 12(2) of the Parliamentary Elections Act reads:-

"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 the voters roll"

The operative words in that section, in my view, are 'shall' and 'major variation'. However 'major variation' should first be established before the 'shall' kicks in. Absence of a finding of a 'major variation' therefore renders the 'shall' inapplicable.

It is inquisitive why the petitioner renounced the name OMAYENDE in his own affidavit and five years later reverted to it. I take judicial notice of the fact that Ugandans use several names interchangeably, which is a cause of great annoyance. This is further complicated by the fact the country has no National Identity Card and therefore there is no central system requiring citizens

to stick to a particular order of their names. There is no mechanism of enforcing compliance with a given order of names.

It is this lack of a National Identity Card that has allowed the interchangeable use of names to flourish; sometimes for fraudulent purposes but other times just innocently and because there are no sanctions against it. The duty of courts and other administrative bodies therefore is to establish whether the change in names, or in the order of names, was done with a fraudulent intent in mind or not.

The relevant law here sets the standard of whether the variation in names was major or not. Court is to evaluate the available evidence to establish whether or not the variation in the instant case was major or minor. I find that the variation between OMAYENDE JOSHUA AND OMAYENDE JOSHUA KASIBBO was not a major enough variation to confuse the voters.

On the sub issue of qualifications, counsel for the petitioner argues that as long as the petitioner possessed the minimum qualification, the Uganda Advanced Certificate of Education, the said degree was immaterial.

Counsel for the 1st respondent avers that the petitioner presented for his nominations a degree in Business Administration, which he did not attach and therefore did not possess. Furthermore that this degree having been obtained from INDIA and therefore a foreign qualification, had to be verified by the National Council for Higher Education and a Certificate of Equivalence issued, which it was not.

I agree with counsel for the petitioner that having the basic minimum qualification, the Uganda Advanced Certificate of Education is ample qualification for one to be nominated as a candidate for parliament in Uganda as provided by section 4(I)© of the Parliamentary Elections Act.

There was an emerging issue concerning service of process, which I consider moot at this point now that parties except the 2nd respondent have filed the relevant documents.

Consequently issue one is resolved in favour of the petitioner having been found to have locus to file the petition.

I will next consider the issue of whether the 2nd respondent validly nominated the 1st respondent. This issue could easily have been collapsed into the first issue. However it was framed as a separate issue and so I will very quickly dispose of it.

Counsel for the petitioner puts forward the argument that the 2nd respondent ought to have noted that the letter of release from Public Service presented by the 1st respondent was not written by the proper officer and on that ground should have declined to nominate the 1st respondent.

Counsel for the 1st respondent states that this issue overlaps with the next issue regarding whether or not the 1st respondent resigned from the Public Service before nomination. He adds that this issue was considered by the 2nd respondent following the petitioner's complaint.

He contends that the 2nd respondent having ruled on the matter, the petitioner should have either; appealed against the decision, considered the matter res judicata and let it rest, or filed an election petition like he has done and forgotten about the issue of resignation or lack of it by the 1st respondent.

I find that at the level of the 2nd respondent, the complaint was raised about the effective resignation of the 1st respondent, the 2nd respondent gave the parties a hearing and a decision was made in favour of the 1st respondent. Whether the decision reached by the 2nd respondent was right or wrong is the subject of the next issue.

As far as this issue is considered the 2nd respondent found that the 1st petitioner was a fit and proper person to be nominated and proceeded to nominate him. Indeed after finding that the 1st respondent was a fit and proper person to be nominated; had the 2nd respondent refused to nominate him then there would be legitimate legal trouble for it.

Indeed, if the petitioner was aggrieved by the decision of the 2nd respondent, as has been pointed out by counsel for the 1st respondent, he should have appealed against it. Since he did not appeal against the decision of the 2nd respondent at the time, the 2nd respondent was well within its right to nominate the 1st respondent.

This failure to appeal, however, does not disentitle the petitioner from bringing this petition. High Court, I agree, has original jurisdiction and can hear a complaint afresh. What is res judicata, in my view, is the finding by the 2nd respondent that the 1st respondent was a person fit to be nominated. Whereupon basing on that decision, which went unchallenged, within that context, the 1st respondent was nominated.

The petitioner cannot now reopen that issue in as far as adjudication by the 2nd respondent is concerned. This issue is strictly restricted to the final decision that was reached and not the process of reaching that decision, which is the subject of the next issue.

In other words, if the 2nd respondent had, in the final analysis, found that the 1st respondent was not a fit and proper person to be nominated but gone ahead and nominated him then the 1st respondent would not have been validly nominated.

Having concluded, whether rightly or wrongly, that the 1st respondent was fit and proper, the 2nd respondent had no other option but to nominate the candidate. It is therefore my finding regarding issue No. 2 that the 2nd respondent validly nominated the 1st respondent.

Issue number one as framed by the parties is whether the respondent was, at the time of his nomination and election, qualified to be elected as a Member of Parliament. This, in my view, is the central issue to this petition.

Counsel for the petitioner contends, in his pleadings, that the 1st respondent, at the time of his nomination and election, was not qualified to be nominated and elected as a Member of Parliament in as much as he had not resigned from the public service as required by law.

Counsel for the 1st respondent for his part maintains that his client was correctly nominated having fulfilled the requirements of the law by resigning effectively from the Public Service.

It is important to look at the raw facts of this resignation before applying the law and then drawing the conclusions. The raw facts mostly rotate around letters written by the 1st respondent and then the various replies by the two government Ministries.

It is not in dispute that the 1st respondent wrote a letter on 2nd May, 2010 on Bukedi College Kachonga headed paper, under the subject heading: RESIGNATION OF EMPLOYMENT. The letter is routed through the Headmaster, Bukedi College Kachonga and through the Permanent Secretary, Ministry of Education and Sports to the Permanent Secretary, Ministry of Public Service.

That letter bearers the stamp of the Headmaster, Bukedi College Kachonga with the word 'Forwarded', a signature and the date of 15/5/2010. There is also a stamp of the Permanent Secretary, Ministry of Education and Sports, the words 'Forwarded Ok', a signature and the date thereof is either 18/10/10. Finally the letter bears the stamp of the Ministry of Public Service Security Registry with the word 'RECEIVED' dated Oct 2010 whose actual date is not legible to me. This letter is annexure A to the answer to the Petition.

The second uncontested letter is one dated 5/07/2010 on Ministry of Education and Sports headed paper, addressed to the 1st respondent and signed by a one P. Behangana for the Permanent Secretary. The letter refers to the one above and states that the request to resign has been granted. This letter is copied to the Head teacher, Bukedi College, Kachonga and Public Service Commission. This letter is annexure C to the Petition

The petitioner states that this particular letter from P. Behangana is a forgery. We shall return to this point later.

Another letter not in dispute is one from the Ministry of Public Service dated 6 December 2010 addressed to the 1st respondent and signed by a one Kaggwa Dennis for the Permanent Secretary. That letter refers to another by the 1st respondent dated 28 October 2010 and yet another by the author of 7 October 2010 and states that 1st respondent is no longer active on the payroll and '… that the Public Service has no objection to your leaving the service…' This letter is annexure C to the answer to the Petition.

There are several other letters which were attached as annextures in support of the petition. There is annexure C to the affidavit in rejoinder to the petition which is a letter from the Ministry of Education and Sports, signed by S. Opio Okiror on behalf of the Permanent Secretary dated 10th November 2010 and addressed to the petitioner on the subject of the 1st respondent's resignation.

There is another letter dated 7th October, 2010 addressed to the petitioner signed by Dennis Kaggwa for Permanent Secretary, Ministry of Public Service on the issue of the resignation of the 1st respondent. It is annexure D to the Petition

This same Kaggwa Dennis wrote another letter to Crane Advocates on the subject of Mbogo Kezekia, the 1st respondent, dated 3rd March 2011. This letter is annexure F to the petition.

It is from these letters that the raw material for the issue of whether the resignation was effective or not derives.

There is also mention of a letter, supposed to have been written by the 1st respondent on 28th October, 2011, and referred to by counsel for the petitioner in his submissions as 'attempted second resignation'. This letter is referred to in annexure C in the answer to the petition, letter by Dennis Kaggwa signing for the Permanent Secretary Ministry of Public Service in his letter of 6th December, 2010.

The 1st respondent denies knowledge and authorship of this letter according to his counsel's written submissions.

"Why would the 1st respondent who had already submitted an earlier resignation letter in May 2010, and which was accepted in July 2010 issue a 2nd resignation letter of October 2010?" he writes. In brief, counsel is alleging that the letter is a concoction.

Counsel for the petitioner also referred to another letter supposed to have been written by P. Behangana on behalf of the Permanent Secretary, Ministry of Education and Sports on 5/07/2010, as a forgery.

Given that the authors of these letters were not brought to testify before court, did not provide affidavits and were not cross examined, and given that there are many questions raised about some of these contested letters including allegations of forgery, court will not consider their contents at face value. If they are considered at all, it will be with utmost caution.

The law applicable to resignation of Public Officers is Article 80(4) of the Constitution which provides that a public officer who wishes to stand as a Member of Parliament shall resign his/her office at least ninety days before nomination day. This same provision is repeated in the Parliamentary Elections Act section 4(4).

Article 252 of the Constitution also contains provisions relating to resignation of persons elected to offices established by the Constitution.

There is also reference to the Uganda Public Service Standing Orders, Section A Part (A-n) paragraph 11 which deals with resignation. A number of cases have also been cited to illustrate particular points during the course of submissions. These include:

Wasike Stephen Mugeni versus Aggrey Awori Election Petition Appeal No. 05 of 2007, (Supreme Court),

Mbayo Jacob versus Talonsya and EC Election Appeal No. 7 of 2006, (Court of Appeal),

Col. Rtd Dr. Kiiza Besigye versus Yoweri Museveni Presidential Election Petition No. 1/2001 (Supreme Court),

Eddie Kwizera versus Attorney General Constitutional Petition 14/2005 and,

Brigadier Henry Tumukunde versus Attorney General, EC Constitutional Appeal No. 2 of 2006.

I think the parties are agreed on the laws applicable. They agree that the 1st respondent was a Public Servant as defined by the law and that he required to resign at least 90 days before nomination. That for a resignation to be effective it must be addressed to, received by, and accepted by, the proper officer.

The parties are also agreed on the fact that the 1st respondent wrote a letter of resignation on 2nd May 2011 addressed to the Permanent Secretary, Ministry of Public Service through his Head teacher and the Permanent Secretary, Ministry of Education and Sports.

The letter unequivocally states that the author, the 1st respondent, tenders his resignation in accordance with the law in order to contest for Parliament. The letter was stamped and forwarded by the Headmaster, Bukedi College Kachonga on 15/5/2010.

This same letter was stamped and forwarded by the Permanent Secretary, Ministry of Education and Sports on 18/10/2010 and received on the same day in the Security Registry of the Ministry of Public Service on the same day. Where was this letter for the whole three months between 15/5/2010 and when it was forwarded by the Permanent Secretary, Ministry of Education and Sports on 18/10/2010?

Did the Headmaster Bukedi College Kachonga ‘forward’ the letter but retained it till October? Was the letter lying somewhere in the Ministry of Education and Sports between May and October? Was the letter with the 1st respondent? Was it recklessness, negligence, malice, trickery that the letter took three months to move from the Headmaster to the Ministry of Education and Sports or, from the Ministry of Education and Sports to the Ministry of Public Service?

Who is to blame for this delay? Why has the Ministry of Public Service never acknowledged receipt of this letter? Why have they never written to the author of that particular letter accepting

or rejecting his resignation? Who should be penalized? Should anybody be rewarded for such a delay?

Unfortunately none of the two parties addressed court on this time frame, yet it seems to be at the heart of this petition, in my view. It would be easy to say that the letter of resignation was written on 2nd May 2011 but was not received by the proper officer until 18th October 2010 and since that particular letter has not even been responded to, there has never been effective resignation! Court however should not act mechanically. They should analyze and evaluate evidence.

Court takes judicial notice of the fact that this same Ministry of Public Service, which up to now has not honoured the 1st respondent's letter of 2nd May, 2011 wrote three letters to the petitioner in quick succession.

On 7th October, 2010 there is a letter, annexure D written by Dennis Kaggwa to Mr. Kasibbo Joshua acknowledging receipt of a letter written by the addressee on 6th October, 2010. In this letter he states that the 1st respondent was active on the payroll by September 2010. This letter is responded to in record time of one day!

On 6th December, 2010 the same Kaggwa Dennis writes to Mr. Mbogo Kezekia in reference to his letter of 28th October, 2010. This particular response is after more than one month. He states that the 1st respondent is no longer active on the payroll in December. This letter is annexure C to the answer to the Petition.

On 3rd March 2011, Dennis Kaggwa again writes to Crane Advocates the lawyers for the Petitioner in response written on 1st March, 2011. Here he states that the 1st respondent was still active on the payroll up to January 2011! This letter is responded to after just two days. It is annexure F to the petition.

The Ministry of Education and Sports' S. Opio Okiror however tops them all when he writes to Mr. Kasibbo Joshua on 10th November, 2010 in response to a letter written to him that very day 10/11/2010!

Of course there is the letter from P. Behangana dated 5/07/2010 replying to Mbogo Kezekia vide his letter dated 02/05/2010. This would be fine if it was not that the stamp on that letter from Mbogo Kezekia indicates that it was received on 18/10/2010. So the letter was responded to before it was officially stamped as received three months later.

This litany of communication betrays dysfunctionality in the system. It shows that the ideal situation envisaged when deciding that 'resignation takes effect on acceptance' was absent in this case.

It would be unjust and injudicious to subject such a dysfunctional system to the same standard as expected in an ideal system. In an ideal system where mail is responded to uniformly and diligently resignation cannot be complete until accepted by a proper officer.

However in a system where there is selective acknowledgment of communication and therefore lack of proper systems an exception has to be made to the rule that resignation is complete only after acceptance of resignation.

Resignation in such situations should only be read from the intention of the officer wishing to resign, when he wrote the letter of resignation, when it was received by the proper officer, if at all, and whether the proper officer acknowledged receipt of the letter and accepted or rejected the request to resign and after how long.

If a reasonable time has elapsed and the proper officer has not taken any action on a letter, which evidence shows has been received, it should be surmised that such an officer has abdicated his duties. In this case, more than six months have elapsed since the 1st respondent's letter was received by the Security Registry of the Ministry of Public Service. Yet no response, one way or another, has been received according to evidence available to this court.

There should be a reasonable time within which to expect certain things. It should be expected that when a letter is written it should be received within a certain period of time. After it has been received it should be responded to within a certain period of time. Failure of which somebody should be held to account and in my view that person should not be the person who is seeking an answer from the proper officer.

I am of the view that three months is way too long a time for a letter to stagnate between any two points regardless of how far from each other within Uganda.

The only way that delay of three months should be held against the respondent would be if it was shown and proved that he had a hand in that delay. No evidence to that effect has been led. I find that it would be too harsh and unjust to visit the penalty for those three months delay on the 1st respondent.

He expressed his intention to resign and run for office way before the expiry of the 90 days. The proper officer cannot be given a lifetime to respond. After passage of a reasonable time, I would suggest that the officer expecting a response can act on the silence and construe it to mean consent. Otherwise we would make a mockery of the 90 days and consequently frustrate officers wishing to resign.

Indeed, all communication from the office of the proper officer seems to indicate that they did not have any problem with the 1st respondent's request to resign. There is no single communication that suggests that there was an intention to stop the 1st respondent from resigning and proceeding to run for Parliament. All this can be surmised from the letters of Mr. Kaggwa who seems to have become the Desk Officer in charge of this petition in the Ministry of Public Service.

If there had been an indication that there was resistance against or opposition to the resignation then it would have been very important to hear from the proper officer. This was the situation in the case of **Attorney General versus Major General David Tinyefuza Constitutional Appeal No. 1 of 1997.** Whereas in the case of **Wasike Stephen Mugeni versus Aggrey Awori** the issue was about whether the appellant had beaten the 90 days deadline from the date of writing the resignation letter to the nomination date, which he had not.

In the case of **Brigadier Henry Tumukunde versus Attorney General and Electoral Commission** the question was whether the purported resignation was done willingly or under duress. Those three cases where it was held that resignation takes effect on acceptance can therefore be distinguished.

I therefore find that considering the imperfections of the system within which he operated, the 1st respondent expressed desire to resign more than 90 days before nomination. The peculiar circumstances of this case deserve to be treated as an exception to the general rule where acceptance of resignation is required before resignation is deemed to be complete.

The petition is therefore dismissed with costs to the 1st respondent.

Dated this 29th day of June 2011

MIKE J. CHIBITA

JUDGE

Judgment read and delivered in the presence of:

1. Petitioner: Joshua Kasibbo
2. Counsel for petitioner: Ahmed Mukasa Kalulu
3. Respondents: Mbogo Kezekia
4. Counsel for respondents: Tiyo Jonathan, Edumnd Wakida
5. Court clerk: Grace Kanagwa

Dated this 29th day of June 2011

MIKE J. CHIBITA

JUDGE

TIYO JONATHAN: Both Counsel for the respondents submitted jointly so it is not that Counsel for the 2nd respondent did not submit.