

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT MBALE**  
**ELECTION PETITION NO. 17 OF 2011**

- 1. RONNY WALUKU WATAKA**
- 2. MWISAKA GODFREY KABOOLE**
- 3. PATRICK N. BUKENI AND 800 OTHERS ::::::::::::::::::::**  
**PETITIONERS**

**VERSUS**

- 1. KIPOI TONNY NSUBUGA**
- 2. THE ELECTORAL COMMISSION ::::: :::::::::::::::::::: RESPONDENTS**
- 3. NATIONAL COUNCIL FOR HIGHER EDUCATION**

**BEFORE: HON. MR. JUSTICE MIKE J. CHIBITA**

**JUDGMENT**

This is a consolidated Election Petition arising out of three different Election Petitions namely:

**Mwisaka Godfrey Kaboole versus Kipoi Tonny Nsubuga, Electoral Commission and National Council for Higher Education No. 005/2011; Ronny Waluku Wataka versus Kipoi Tonny Nsubuga, Electoral Commission and National Council for Higher Education No. 17 of 2011 and**

**Patrick Namatiti Bukeni and 800 others versus Electoral Commission, The Returning Officer, Manafwa District and Kipoi Tonny Nsubuga No. 32 of 2011.**

Since all the three petitions were raising one single issue of whether the 1<sup>st</sup> respondent was possessed with the minimum academic requirements for nomination as a Member of Parliament, it was agreed that the petitions be consolidated into one and 17 of 2011 be adopted as the number for the consolidated petition.

The 1<sup>st</sup> petitioner, the 1<sup>st</sup> respondent, and 6 others, participated as parliamentary candidates in the election for the Bubulo West Constituency, Manafwa District Parliamentary seat on the 18<sup>th</sup> February, 2011 and the 1<sup>st</sup> respondent was declared winner. The 2<sup>nd</sup> and 3<sup>rd</sup> petitioners are registered voters in Bubulo West Constituency in Manafwa District.

The 2<sup>nd</sup> respondent is the body charged with conducting elections in Uganda and indeed did conduct the election in Bubulo West Constituency and declared the 1<sup>st</sup> respondent as the duly elected Member of Parliament after earlier nominating him.

The 3<sup>rd</sup> respondent is the body tasked with the duty of equating academic awards in Uganda and did equate the 1<sup>st</sup> respondent's qualifications of Makerere Mature Age Entry Examinations and awarded him a Certificate of Equivalence.

The 1<sup>st</sup> respondent's nomination was on the basis of presentation of a Certificate of Equivalence issued by the National Council for Higher Education (hereinafter referred to as NCHE). This certificate was issued on the basis of a Certificate of Recognition of the Makerere University Mature Age Entry Scheme Examination held on 20<sup>th</sup> February 2010.

It was agreed between the parties that around the time of the issue of the Certificate of Equivalence by NCHE there were several complaints lodged with the Academic Registrar, Makerere University to the effect that the 1<sup>st</sup> respondent had not sat the said examination in person but had used a third party to sit for him.

In September 2010 before the nomination of candidates for parliamentary elections, the Academic Registrar wrote referring the matter to the in charge Makerere University Police, for investigation. Soon thereafter NCHE wrote to the Academic Registrar indicating that a decision had been taken to recall the Certificate of Equivalence issued to the 1<sup>st</sup> respondent.

Meanwhile, it was discovered that the 1<sup>st</sup> respondent's file at the Academic Registrar's office bore the photograph of one Paul Namanda who had been named in the same application form as a referee by the applicant. Several other documents associated with the application, admission, examination and award of a Certificate to the 1<sup>st</sup> respondent were submitted to court.

The petitioners seek court declarations and orders that the 1<sup>st</sup> respondent was not validly nominated and elected as a Member of Parliament for Bubulo West Constituency, that the Mature Age Entry Certificate of Recognition of Makerere University dated 20<sup>th</sup> February 2010 and the Certificate of Equivalence to the Advanced Certificate of Education issued to the 1<sup>st</sup> respondent by the National Council for Higher Education be declared null and void and that the 1<sup>st</sup> petitioner be declared the validly elected Member of Parliament for the said seat.

They seek further Orders that the 1<sup>st</sup> respondent vacates the office of Member of Parliament for Bubulo West Constituency and orders to the NCHE for cancellation of the impugned certificates

held by the 1<sup>st</sup> respondent. They also seek orders for costs of the petition and any other relief that court may deem fit.

At the scheduling Conference where the above facts were agreed to, two issues were framed for consideration by the court:-

1. Whether or not the 1<sup>st</sup> respondent possessed the minimum academic qualifications for nomination and election as a Member of Parliament.
2. Whether the parties are entitled to the reliefs sought.

At the trial, the 1<sup>st</sup> petitioner was represented by Counsel Patrick Mugisha, the 2<sup>nd</sup> petitioner by Counsel Isaac Nabende, the 3<sup>rd</sup> petitioner by Counsel Wycliffe Birungi who at one time was represented by Counsel Sam Serwanga.

The 1<sup>st</sup> respondent was represented by Counsel Benon Wagabaza and Asuman Nyonyintono, the 2<sup>nd</sup> respondent by Francis Niinye and the 3<sup>rd</sup> respondent by Counsel Edmund Wakida.

The trial was mostly by way of affidavit evidence with some oral evidence given through cross examination of some deponents who included the 1<sup>st</sup> and 2<sup>nd</sup> petitioners, the 1<sup>st</sup> respondent, Detective Assistant Inspector of Police Sam Simon Oyuku and examination in chief of the Academic Registrars of Kyambogo Mrs. Anne Deborah Kuteesa Mugerwa and of Makerere University, Mr. Alfred Namoah Masikye and finally the Senior Assistant Registrar/Head Mature Age Entry Scheme, Mr. Herbert Batamy Kyobe.

The trial was characterized by various applications by the different parties for different reliefs, which court had to dispose of expeditiously in the interest of hearing and concluding the trial. The petitioners, for example, applied at a rather late stage, in my view, to have a hand writing expert called in to testify but this application was rejected.

The respondents at one time objected to the summoning of witnesses who had not sworn and filed affidavits but they were overruled because, in the view of court, there was still ample time to accommodate these witnesses.

Generally the court made its rulings after cautioning itself of the need to have an expeditious trial not bogged down by technicalities but with the overall aim of ensuring that the truth is arrived at, the law enforced and finally justice dispensed to all concerned.

The petitioner's case is simply that the 1<sup>st</sup> respondent did not sit the Mature Age Entry Examinations at Makerere University. It is further contended that those Examinations were sat for by Paul Namanda, whose photograph appears on the 1<sup>st</sup> respondent's application Form.

Therefore, they argue, the 2<sup>nd</sup> respondent should not have nominated him and the 3<sup>rd</sup> respondent should have withdrawn the Certificates that the 1<sup>st</sup> respondent used from the impugned examination to aid in his nomination.

The 1<sup>st</sup> respondent maintains that he is qualified and was validly nominated and elected. He maintains that he sat for the examinations in question and passed them hence the award of the Certificates.

The 2<sup>nd</sup> respondent basically contends that the 1<sup>st</sup> respondent availed the required qualifications and he had no alternative but to nominate him.

The 3<sup>rd</sup> respondents, for their part, aver that they are just an equating agency of qualifications and do not possess the power to cancel certificates since they are not an awarding institution. Such power lies with the Universities, they maintain.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents indicated that they wished to raise some preliminary points of law. One preliminary point is common to both respondents and therefore I will start with it.

Both 1<sup>st</sup> and 2<sup>nd</sup> respondents raise the point that under section 60 (2)(b) of the Parliamentary Elections Act (PEA) a valid petition by a registered voter has to be accompanied by the signatures of not less than five hundred voters registered. They insist that the annexure “A” does not conform to the legal requirement of having the signatures of the 500 or more registered voters and/or it is not certified.

I am not aware that any of the 800 voters represented has sworn an affidavit denying involvement in the petition. This was the intention of the law that a voter should not be made party to a petition which they would rather not be associated with. Since none of the 800 or so voters has disassociated themselves from the petition, it is assumed they are in favour of it.

In my view, this is not a substantive defect but one of form and using judicial discretion and Article 126(2) (e) of the Constitution I rule that this particular defect cannot be fatal to the petition.

Even if it were, which I have ruled it is not, there are other petitioners who would still continue with the petition. I don’t think Counsel for the two respondents are arguing that the consolidation of the petitions should result in what they consider a defective petition infecting the one or ones without defect. That would be a travesty.

Counsel for the 1<sup>st</sup> respondent then proceeded to raise an objection concerning the applicability of the Evidence Act, which they raised and a ruling was delivered. The 2<sup>nd</sup> respondent in his written submissions quotes, rightly according to that ruling, extensively from the Evidence Act. I am therefore at a loss what Counsel for the 1<sup>st</sup> respondent hopes to achieve by this latest resuscitation of that issue.

I refer to the ruling that I gave during the hearing, which was not appealed against.

Their next preliminary point of contention revolves around the witness of court HERBERT KYOBE BATAMYE. They raise the point that Counsel for the petitioners had objected to his testimony, that he was present during the testimony of other witnesses and that they were not afforded an opportunity to cross examine him.

Their points in regard to this witness are all noted and during the evaluation of evidence I will accordingly caution myself and ensure that only the right weight is attached to his testimony.

Having disposed of the preliminary points of law, this now paves way for issue number one to be considered.

1. Whether or not the 1<sup>st</sup> respondent possessed the minimum qualifications to be elected as Member of Parliament.

Most facts around this issue thankfully are not in dispute. Most important among these facts are:-

- That the photograph of Paul Namanda was found on the application form for the Mature Age Entry of the 1<sup>st</sup> respondent.
- That the same Forms refer to Paul Namanda as a referee of the 1<sup>st</sup> respondent.
- That Paul Namanda actually exists and was a student of Kyambogo University.
- That a complaint about the likely sitting of the 1<sup>st</sup> respondent's Mature Age Entry Examinations was referred to Makerere University Police by the Academic Registrar.
- That the 1<sup>st</sup> respondent was awarded a Certificate of Recognition of the Makerere University Mature Age Entry Scheme Examination and that this Certificate has never been cancelled.
- That based on this Certificate, the 3<sup>rd</sup> respondent issued the 1<sup>st</sup> respondent with a Certificate of Equivalence.
- That the 3<sup>rd</sup> respondent wrote a letter recalling the Certificate of Equivalence pending conclusion of investigations by the CID, Makerere University.
- That investigations into the matter were commenced by the Criminal Investigations Department of Makerere University.

As evidence the petitioners filed several documents, including:-

- Copies of the application form for Makerere University Mature Age Entry Examination.

- Bank slip used to pay for the Makerere University Examinations.
- Copy of the Makerere University Mature Age Entry Examinations.
- Kyambogo University answer script.
- Kyambogo University Registration Form.
- Kyambogo University application Form.
- Request to sit a retake at Kyambogo University.
- Kyambogo University bank pay slip.

Starting with the photograph, the petitioners contend that it belongs to the person who most likely sat the examinations for the 1<sup>st</sup> respondent. That person, who sat the examination for the 1<sup>st</sup> respondent is most likely the owner of the photograph, Paul Namanda.

The 1<sup>st</sup> respondent argues that the photograph of Paul Namanda was most likely placed on his forms by his political detractors. Interestingly, but not surprisingly Paul Namanda who would have helped clear the air has gone missing.

Who would benefit most from the disappearance of Paul Namanda? It is most probable that the person who hired him or his photo to appear on the application form would be most eager for him not to appear. The petitioner believes this individual is one of his political detractors. He however does not offer any suggestions of who this might be. Neither does he mention any other incidents of political sabotage against him.

Of course the onus is not him to prove his innocence. It however would not hurt him to provide some evidence of political sabotage against him. His demeanour during cross examination did not portray him as a truthful and confident witness. He acted as if he had something to hide. He agonized over many answers and confessed that he was stressed at being in court.

Furthermore the 1<sup>st</sup> respondent testified that Paul Namanda is his good friend as evidenced by the fact that his name appears as a referee on his application forms for the Mature Age Entry Scheme. It would therefore not be out of the ordinary for a friend to want to help a friend.

The Academic Registrar, Makerere University testified that the records of the University are kept securely and were not tampered with. He therefore implied that the photo on those forms could not have been changed after being fixed the first time. Attempts by Counsel for the respondents to make him admit that the photo could have been stapled on after another had been removed did not move him from his evidence.

He testified that the Head of Mature Age Entry Scheme, Herbert Batamye reported to him that a certain Oyuku had wished to have the photo changed to safeguard the interests of a certain person, the 1<sup>st</sup> respondent, by implication. This revelation prompted him to refer the matter to Police. Batamye corroborates this information in his testimony and Oyuku in his affidavit depones that indeed Batamye filed a complaint with him.

The handwriting on the documents written by Paul Namanda provided by the Academic Registrar Kyambogo bear some resemblance to the examination answer sheet from Makerere University. They are also markedly different from the sample provided by the 1<sup>st</sup> respondent. The Academic Registrar, Kyambogo University reached the same conclusion when asked.

Though court is not possessed with expertise to interpret handwriting, the features of the handwritings in this case are quite glaring.

The signatures on the application form, bank slip and affidavits filed in court all bear a resemblance but differ from the hand in slip, the registration slip and the attendance slip. The 1<sup>st</sup> respondent contended that he has two signatures, which happens.

The only difference is that people with more than one signature usually use a consistent signature for the same transaction or place. Why would the 1<sup>st</sup> respondent or anybody else for that matter, use two different signatures for the same transaction of getting admitted into the University.

It is quite curious that what should have been a simple, straight forward investigation with several helpful leads was not concluded fast. The only evidence of conclusion comes in form of a letter to the lawyers of the 1<sup>st</sup> respondent in February, 2011. It is purportedly copied to the complainant, the Academic Registrar, Makerere University who denies ever receiving the letter.

The letter states that the resident State Attorney, Buganda Road Court advised closure of the file for insufficiency of evidence. Unfortunately, the letter from the Resident State Attorney was not availed to court for proof or scrutiny.

Be that as it may, standards of evidence required to prosecute a criminal case are much higher than the standards required in civil matters like the present one. It is therefore possible that there was not enough evidence to sustain a criminal matter. That however does not mean that a civil suit, in this case an election petition, cannot be sustained basing on the same evidence.

Court is left with the impression that the investigation was not properly done, was deliberately not concluded and was probably interfered with. D/AIP Oyuku testified that the file was called for from CID headquarters before he could complete his investigations, thereafter he was transferred to another station. One wonders if his transfer had something to do with this particular case.

Unfortunately he did not portray a very straight forward and honest Police officer. He evaded questions, asked his own questions instead of answering and appeared hostile to Counsel cross examining him. He could not tell who or where the Commissioner of Oaths was who had handled his affidavit. His demeanour betrayed an unreliable and troubled witness.

Any of these pieces of evidence; the mystery photo, the handwriting disparities, the two signatures, the allegations of photo swapping, the disappearance of Paul Namanda, the calling of the file by CID headquarters in the midst of investigations, the transfer of Oyuku to another station midway the investigation, the incomplete investigation and sudden report of closure of the file for insufficiency of evidence and the uneasy demeanour of key witnesses; any of these factors alone would not amount to much.

But when considered together they form an avalanche of circumstantial evidence that forces one to begin piecing together possibilities and raising questions about the qualifications being contested.

It is now trite law that the grounds of an election petition are to be proved to the satisfaction of court. I believe the thinking behind this standard of proof is that a leader should be above board and beyond reproach. Otherwise how will he participate in making laws for the smooth running of society when question marks are written all over his credentials and integrity?

I therefore find that the petitioners have proved to the satisfaction of court that the 1<sup>st</sup> respondent did not sit the Mature Age entry examination for which he was awarded the Certificate of Recognition and upon which the Certificate of Equivalence was based.

Consequently Makerere University is ordered to cancel the Certificate of Recognition awarded to Kipoi Tonny Nsubuga. The Certificate of Equivalence issued by the NCHE therefore has no foundation to stand on and therefore collapses. It should be formally withdrawn by NCHE.

Without these Certificates the 1<sup>st</sup> respondent could not have been validly nominated and elected given that he has not shown to have attained an Advanced Level Certificate as required by law. His nomination and election is therefore declared invalid.

The Bubulo West Constituency Parliamentary seat is declared vacant. Court cannot declare anybody as the validly elected Member of Parliament, in this case because that would be disenfranchising the voters.

There is no empirical evidence that if the 1<sup>st</sup> respondent had not been on the ballot paper the voters would have elected the runner up, the third or fourth candidate. All those are possibilities but court is not able to make such an order.

The Electoral Commission will have to organize another election as a result.



I however find that the 3<sup>rd</sup> respondents acted innocently and on the basis that the certificates were valid because at the time of equating they had not been cancelled. They even wrote a letter recalling the Certificate at some point though it appeared half hearted. Indeed the investigations into the matter were still being said to be incomplete.

The 3<sup>rd</sup> respondents are as a result absolved of any responsibility in this matter.

Costs are awarded to the three lead petitioners. I am convinced by the authority of **Serunjogi James Mukiibi versus Lule Umar Mawiya EPA No. 15 of 2006**, the judgment of Byamugisha JA not to award certificate for more than two advocates. Certificate for two advocates is however issued.

Dated this 30<sup>th</sup> day of June 2011

**MIKE J. CHIBITA**

**JUDGE**

Judgment read and delivered in the presence of:

1. Petitioner: Patrick Namatiti
2. Counsel for petitioners: Isaac Nabende, representing the other petitioners counsel
3. Respondents: Kipoi Tonny Nsubuga
4. Counsel for respondents: Wagabaza Ben, Asuman Nyonyintono, holding brief for counsel Wakida and Niinye.
5. Court clerk: Grace Kanagwa

Dated the 30<sup>th</sup> day of June 2011

MIKE J. CHIBITA

JUDGE