

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF KAMPALA AT KAMPALA
CIVIL DIVISION
ELECTION APPEAL NO. 75 OF 2011
KIKONGO NOELINA

-VS-

- 1. THE ELECTORAL COMMISSION**
- 2. YUSUFU ZULAIKA**

BEFORE HON: JUSTICE NYANZI YASIN

JUDGMENT

BACK GROUND

1. Three years ago now the appellant and the respondent (2nd) contested for the seat of a woman councillor for Mengo Kisenyi 111 Parish – Kampala central Division. That was on the 2nd March 2011 when the 1st respondent organized elections.
2. The 2nd respondent won the elections with 617 votes. The appellant got 588 votes. She was not satisfied with that result. She instituted election petition

No. 007 of 2011 at the Chief Magistrate Court of Mengo to challenge the election of the respondent.

3. From the record of Proceedings it is shown that the petition was supported by affidavits of Kigongo Noeline the appellants Mwebe Denis, Kursham Idris , Segwanyi Bosco, Sengiyunva Ibrahim, Mulema Musa, Mutyaba Yunus and Kyeyune Musa.
4. At the trial of the petition which occurred on 6th Oct 2011 Counsel Eric Sabiti who appeared for the respondent raised a preliminary objection. The objection was that the affidavits accompanying the petitions offended S.6 of the Oath Act.
5. From the record court made a finding of fact which is relevant to this appeal. it stated

“ Souda Nsereko supported Mr. Sabiti that their affidavits were not signed. They presented their affidavits to court, it was confirmed that affidavits were not signed. The affidavits on court record were signed. The affidavits with counsel for petition were also signed”

6. Mr. Katumba Chrisostome in reply agreed that there were affidavits that were not signed but argued that the provision of S.6 of the Oath Act is not mandatory. Secondly that in electoral cases courts have to be liberal on questions of affidavits given the circumstances under which documents are filed. That mistake would be some times inevitable. He relied on the

supreme court decision in RTD COL DR. KIIZA BESIGYE –VS-
YOWERI KAGUTA MUSEVENI

Presidential Election petition No. O1/2001

7. In her ruling her worship Esta Nambayo held that the provision of S. 6 of the Oath Act is mandatory. She also stated that it was her understanding that.

“Pleadings on court record should be the same in every inch with the pleadings served on the opposite party”

8. In the result she found that the petition could not be entertained and dismissed it with costs.

9. That decision aggrieved the appellant and appealed to this court. The memorandum of appeal raised four grounds restated as here below.

- i) The learned Trial Magistrate erred in law and fact in dismissing the petition when the same was properly accompanied by an affidavit properly sworn and filed on court record.
- ii) That the learned Magistrate erred in law and fact in dismissing the petition on the basis that the affidavit in support of the petition served on both respondents were not dated and ignored the dated affidavit on court record.

- iii) That the Trial Magistrate erred in law and fact by holding that S.6 of the Commission for Oath Act is mandatory.
- iv) The learned Magistrate erred in law and fact when she granted a prayer that was not prayed for.

10. This appeal proceeded by written submissions. M/s Lukwago & Co. Advocates filed submission on behalf of the appellant. M/s Nsereko Mukalazi & Co. Advocates filed the respondent's submissions. I have read both presentations I need not restate the contents but I have considered the same in arriving at this decision herein.

11. The four grounds of appeal can be reduced into (3) issues to dispose of this appeal. Namely the issues are.

- i). Whether the provision of S.6 of the Oaths Act are mandatory.
- ii). What was the legal effect of having affidavits served on the parties undated while the court record had dated affidavits.
- iii) Whether the Trial Magistrate erred by dismissing the petition instead of striking out the affidavits that were said to be offensive to S.6 of the oath Act.

12. Whether the provision of S.6 of the Oath Act is Mandatory.

Counsel for the appellant cited to this court a court decision which answers this issue. in **SAGGU -VS- ROAD MASTER CYCLES (U) LTD [2002]EA 258**

It was held

“A defect in the Jurat or any irregularity in the form of the affidavit cannot be allowed to vitiate an affidavit in view of Article 126 (2)(e) of the constitution of Uganda 1995. A judge has power to order that an undated affidavit be dated in court or that the affidavit be re sworn and may penalise the offending party its costs. See (IBRAHIM –VS- SHIEK BROS INVESTMENTS LTD [1972] EA 118 APPEALED.

13.If the provision of S.6 of the Oath Act were to be held mandatory the above decision would not have been made by court. According to that decision the undated affidavits could be dated in court and costs would be awarded to any one aggrieved by that action.

14.S.6 of the Oaths Act itself provides as follows.

“Every Commissioner for Oath or Notary public before whom any Oath or affidavit is taken or made under this Act shall state truly in the Jurat or attestation at what place and on what date the Oath or affidavit is taken or made.

15. It was the strong argument of the appellant's counsel that the use of the word "shall" in the section above has no mandatory implication. He cited to this court the Court of Appeal decision **LUBYAYI IDDI KISIKI –VS- KAGIMU MAURICE PETER ELECTION PETITION APPEAL No. 6 of 2002**. In that case the appellant court had the occasion to interpret and decide on the applicability of the term "shall" and its mandatory implication. The court clarified when the word is used in directory or mandatory nature.

16. On interpretation of statutes the court observed that it is the courts duty to interpret a statute in a manner which will not defeat the intention of parliament and not cause a miscarriage of justice. The court added that in interpreting a provision of the law a court must ensure that justice is done and pay less respect to technicalities.

17. I have already stated that the decision in SAGGU (supra) would not have been reached if the "**shall**" in S.6 of the Oath Act was mandatory . The court added in that case that any grievance by the omission would be cured by award of costs. I therefore agree with the appellant's advocates that the "**shall**" as raised in S. 6 of the Oaths Act is more directory than mandatory.

18. What is the legal effect of having affidavits served on the other party undated while the court record had dated affidavits

This was a matter that was not contested. I earlier stated the observations and finding the court itself made. It was the court finding that the affidavits on court record were dated while those with the opposite counsel were not. Still the affidavits of the appellant counsel then petitioner were also dated.

19. According to the advocate of the respondent in their submission that was forgery. Counsel submitted at length to prove this point and cited many criminal jurisdiction decisions defining forgery and accused the fellow advocates of having done so to mislead court.

20. With respect, counsel for the respondent went into excesses on this point. There are two reasons in my view which made this point a matter of trivia and not so significant as counsel invited me to believe.

21. In the first place the SAGGU case said affidavit if undated could be dated even in court or re-sworn. That shows that the failure to date an affidavit is not forgery. Forgery is criminal and cannot be cured by taking action before court.

Secondly the whole affidavit could be re sworn. All that is done to ensure that the provision of Art 126 (2) (e) constitution of Uganda 1995 are complied with.

22. Secondly the court admitted that the affidavits on the file were dated. The court record in my view are the documents on file as whole .That is the official point of reference in all proceeding. That's why when an appeal is preferred, it is only the court record that is relied on, not any notes or documents of parties.

23. In the present case the moment the trial court found out that the court file affidavits were dated, it then became official that the affidavits in support of the motion/petition were dated.

24. Anybody /party was free to get a certified copy of the court file documents and the matter proceeds. The cost of such inconveniences would be paid by the offending party. The Trial Magistrate erred in treating the documents used by the opposite counsel as part of the record of proceedings.

Issue 3.

25. Whether the trial Magistrate erred by dismissing the whole petition instead of striking out the affidavits which were not dated.

26. M/S Nsereko at page 165 of the record of appeal made the prayer below to court.

“I pray that court strikes out undated affidavits with costs”

On the part of Mr. Sabiti at page 165 he prayed that the 7 affidavits be expunged with costs.

26. The record does not show that the counsel who objected to the use of the affidavits also asked that the petition be dismissed. They only prayed that the affidavit be expunged from the record.

27. If by so doing the result would have been to render the application incompetent, the trial court would have clearly explained this in its ruling. There are no such reasons. I find no justification why the learned trial Magistrate dismissed the whole petition instead of granting a simple prayer of expunging the offensive affidavits from the record as the objectors had asked her to do.

28. I believe by granting a prayer that the parties never asked for the court descended into the arena instead of keeping its role as a neutral ampire.

29. Having answered all the issues in the affirmative the result is that all the grounds of this appeal succeed. I allow the appeal and set aside the orders of the court below.

I order that election petition No.75/2011 proceeds on its merits.

Award costs of this appeal to the appellant.

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NYANZI YASIN

2/03/2012