

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

HCT-04-CV-EP-0001-2012

- 1. TIKEN FRANCIS**
- 2. CHELIMO NELSON KAPROKUTO.....PETITIONERS**

VERSUS

- 1. THE ELECTORAL COMMISSION**
- 2. NATIONAL COUNCIL FOR HIGHER EDUCATION**
- 3. KAPCHEMEIKO PAUL MACHINJACH.....RESPONDENTS**

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

RULING

Through their lawyers M/s Ilukor Advocates and Solicitors and Victoria Advocates and Legal Consultants, the two petitioners to wit **Tiken Francis** and **Chelimo Nelson** brought this election petition against the three respondents to wit: 1. The Electoral Commission, 2. The National Council for Higher Education and 3. **Kapchemeiko Paul Machinjach**.

The petition seeks declarations from this court that:

- (a) The 2nd respondent's letter dated 12th October 2012 purporting that the 3rd respondent holds the required academic qualifications to contest as District Chairperson for Kween be declared null and void, fundamentally irregular and highly misleading in law.

- (b) That the purported qualifications of the 3rd respondent is invalid/or irrelevant for purposes of nomination and election as a District Chairperson in Uganda.
- (c) That the 3rd respondent was at the time of election not qualified to be nominated and elected District Chairperson for Kween.
- (d) The 2nd Petitioner being a runner up of the by-election be declared validly elected District Chairperson for Kween District in the Interest of Justice and prevention of wastage of government funds.
- (e) That court issues any other orders that it may deem fit.

In the alternative that court orders for fresh elections. The 1st petitioner moved this court as a registered voter and has brought this petition supported by signatures of over five hundred people from Kween District electoral area which are annexed to the petition.

The 2nd petitioner **Chelimo Nelson Kaprokuto** was a candidate in the by-election and also a resident of Kween District.

Both petitioners deponed to their respective affidavits in support of the petition which detail their respective grievances which are not the subject of this ruling.

In its answer to the petition and the supporting affidavit the 1st respondent represented by its legal department maintains that it ensured that the entire electoral process was conducted in compliance with the law and that the 3rd respondent was qualified for nomination to contest in the election and was validly elected.

In its answer to the petition and its supporting affidavit the 2nd respondent represented by Lex Uganda Advocates and Solicitors contended that this petition is incompetent and bad in law disclosing no cause of action and it be struck out with costs. That failure to lodge documents in 2 weeks with the Electoral Commission is not a ground for nullification of an election even if it is true. That it is not necessary to issue a certificate of equivalence for a candidate who has an advanced level certificate obtained in Uganda or a qualification higher than the advanced level obtained in Uganda.

That the petition is thus baseless and a waste of courts time.

In his answer to the petition and its supporting affidavit, the third respondent represented by M/s Dagira & Co. Advocates insisted that the election of their client was held in accordance with the law. That the 3rd respondent was qualified to stand for the office of District Chairperson. Further that the purported list of voters supporting the 1st petitioner's petition was not compiled in accordance with the law and it ought to be expunged from the record and the petition be dismissed with costs.

After scheduling conference, **Mr. Dagira** learned counsel for the 3rd respondent raised a preliminary objection that the list of voters accompanying the petition was not compiled in accordance with the law. That the list includes 163 people who are illiterates but it does not comply with the illiterates Protection Act Cap.78 because it is not stated what language these people are fluent in. That it is not stated in what language the interpretation was done and therefore court cannot be convinced that these people understood the contents of what they were signing. Further that in this case there is no single certificate of verification under sections 2 and 3 of the Act. That **Mr. Tiken Francis** does not say he wrote the list and in which language he translated the document into. Therefore since this affects 163

people then if these are removed from 600 the balance would be 438 signatures supporting the petition which is less than 500 required.

Mr. Mwaswa for the 1st respondent agreed with the submission by **Mr. Dagira**. The same was the stand of **Mr. Mwenyi** for the second respondent. He however abandoned his objection regarding lack of a cause of action.

Regarding the 2nd petitioner **Mr. Dagira** submitted that there is infact one petition on record. That the losing candidate did not state that he petitioned in his own right. He does not say he is aggrieved. That he simply supports the 1st petitioner.

Both **Mr. Mwaswa** for the 1st respondent and **Mr. Mwenyi** for the 2nd respondent agreed with **Mr. Dagira**'s submissions.

In reply to the preliminary objection **Mr. Ilukor** maintains that the petition is competent and was in accordance with the law. That the 2nd petitioner brought the petition under S. 138 (3) (b) of the Local Government's Act. That the list of signatures accompanying the petition complied with S.2 of the Illiterates Protection Act. That the 2nd petitioner explained the contents of the document to the illiterates and he verified and authenticated the signatures.

Learned counsel implored this court to invoke Article 126 (2) (e) of the Constitution and administer substantive justice without undue regard to technicalities.

That the objection be overruled. That in the alternative if the court finds that the Illiterate Protection Act is not followed, then the 1st petitioner should be fined or imprisoned in default.

Finally that the petitioners brought the petition in their respective right.

I have considered the respective submissions by both learned counsel. I have considered the authorities cited for my assistance, and the law applicable. I will go ahead and resolve the two objections separately.

(1) Whether the list of voters supporting the petition was not compiled in accordance with the law and it ought to be expunged from the record.

As rightly submitted by **Mr. Dagira** learned counsel for the 3rd respondent, the petition is supported by a list of 600 (six hundred) counter signed names. However when I perused the same I found that signatures against names 437 to 447 (11 of them) have no polling stations indicated against them.

Then signatures Nos 353, 354 and 355 (3 of them) have no voters card numbers indicated against them.

Signatures Nos 369 has no polling station indicated against it. The names in numbers 588, 589 and 590 are neither signed nor thumb printed.

Then Names No. 389,392, 396 and 397 are thumb printed but not counter signed. These names total 22 in number.

I will now deal with the issue of whether the list of registered voters which included illiterate voters offends against sections 2 and 3 of the Illiterates Protection Act and if so whether it was illegally compiled.

S.2 of the Act provides that:

“No person shall write the name of an illiterate by way of a signature to any document unless such illiterate shall have first appended his mark thereto; and every person who so writes the name of the

illiterate shall also write on the document his own true full name and address as witness, and his so doing shall imply a statement that he wrote the name of the illiterate by way of a signature after the illiterate had appended his mark, and that he was instructed so to write by the illiterate, and that prior to the illiterate appending his mark the document was read over and explained to the illiterate.”

The duties that a witness has towards the illiterate are clearly outlined in this enactment.

S.3 of the Illiterate Protection Act provides that:

“Any person who shall write any document for or at the request, on behalf or in the name of any illiterate shall also write on the document his or her own true full name as the writer of the document and his or her true and full address, and his or her so doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her.”

There is a clear intention in the above enactments that a person who writes the document on behalf of the illiterate must append at the end of such a document a kind of ‘certificate’ consisting of that person’s full names and full address and certifying that that person was the writer of the document; that he wrote the document on the instructions of the illiterate and in fact, that he read the document

over to the illiterate or that he explained to the illiterate the contents of the document and that, in fact, the illiterate as a result of the explanation understood the contents of the document.

The import of S.3 of the Act is to ensure that documents which are purportedly written for and on instructions of illiterate persons are understood by such persons if they are to be bound by their contents.

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Per **Ntabgoba P.J.** (as he was).

These stringent requirements were intended to protect illiterate persons from manipulation or any oppressive acts of literate persons.

In the instant case, the 1st petitioner who apparently gathered the signatures to support his petition made a blanket claim at the end of the list that:

“I Tiken Francis of Kaprorong village, Kuobus Parish, Binyin Town Council, Kween District state that I am knowledgeable in English, Kiswahili and Kupsabiny language. That before the illiterates (as appearing in the petition) appended their signatures, I first read over the contents to them in English and translated to Kupsabiny and Kiswahili languages where they appeared to understand and signed/put their finger/thumbprints to witness the same. That I countersigned in confirmation of their signing.”

Definitely, there is no indication that this list was compiled in compliance with the strict requirements of sections 2 and 3 of the Illiterate Protection Act and on this I

agree with the submission by **Mr. Dagira** learned counsel for the 3rd respondent. The list of voters has about 168 illiterate people listed but the 1st petitioner who authored the list did not put a statement for each of the illiterates as required under sections 2 and 3 of the Act. It is therefore difficult to know who amongst these people knew either Swahili, sabinu or English. It is not stated in what language the interpretation of the petition was done making it difficult for this court to be convinced that each illiterate understood the contents of what they were appending their thumbprints on or that they appended their thumb prints against their actual names.

There is no indication that there was a consensus of mind between the first petitioner and the large number of illiterates appearing on the list. This could be ascertained if the 1st petitioner bothered to append a certificate of verification as required by the law with a full name and address saying that he interpreted on instruction of the illiterate and read the document over and explained the contents.

To compound it all, the 1st petitioner does not say he was the author of the list of the signatories who supported his petition.

I therefore do not agree with the submission by **Mr. Ilukor** that the list attached to the petition is in compliance with S.2 of the Illiterates Protection Act. The requirements of the Illiterate Protection Act are legal requirements and not procedural requirements. That law cannot therefore be bent under Article 126 (2) (e) of the Constitution. The proposal by **Mr. Ilukor** to fine them would not cure the irregularity either. The omissions enumerated renders the petition illegal and barred by law.

If 168 signatures are removed from the list plus the 22 which are either not signed, have no polling stations or registration numbers, then the remaining number of

signatures out of 600 would be 410 signatures which falls below the required number to validate a petition by a voter under S.138 (3) (b) of the Local Governments Act.

I will accordingly uphold the first preliminary objection.

The second preliminary objection regards the status of the 2nd petitioner **Chelimo Nelson Kaprokuto**.

According to **Mr. Dagira** learned counsel for the 3rd respondent there is only one petition filed. That the affidavit in support by the losing candidate does not say he is petitioning in his own right. Further that he does not say he is an aggrieved party. That the 2nd petitioner simply supports the 1st petitioner and should collapse with the first petitioner's petition. Both **Mr. Mwasia** and **Mr. Mwenyi** agreed with **Mr. Dagira**.

In reply, **Mr. Ilukor** submitted that the 2nd petitioner bought the petition in his own right and capacity under S. 138 (3) (b) of the Local Government's Act because he was a candidate in the by election. That both petitioners brought the petition in their respective capacities and this objection be overruled.

I will agree with **Mr. Dagira** on this objection as well. A careful perusal of the affidavit filed by the 2nd petitioner shows that he was infact supporting the first petitioner's complaints. Nowhere does he say that he is an aggrieved candidate as provided for under s. 138 (1) of the Local Government's Act. The 2nd petitioner merely describes himself as a former candidate who has an interest in the matter.

S. 138 LGA provides for the mode of filing different petitions by different petitioners. S. 138 (1) LGA provides that an aggrieved candidate for chairperson may petition that the declared candidate was not validly elected.

In S. 138 (2) LGA any person qualified to petition under subsection 3 aggrieved by a declaration of a councilor may petition the Chief Magistrate. Such person may be a candidate who lost the election or a registered voter. This subsection refers to election of councilors.

In S. 138 (3) LGA, a petition may be filed by a candidate who loses an election or (b) a registered voter supported by not less than 500 voters registered in the constituency. It is my considered view that different and separate petitions were envisaged under the law to be filed by different petitioners. The legislature never intended a combination of two or more petitioners to bring a joint petition because the conditions for filing each petition are clearly distinct. An aggrieved candidate who lost the election should file his petition in his own right. And a registered voter should file his petition differently supported by 500 signatures of voters in his/her own right as well.

Given that a registered voter must fulfill the condition of gathering 500 signatures before filing a valid petition there is no way he/she can be joined by someone else who may file a petition without conditionalities. Doing so would amount to a misjoinder which would put the trial court into an absurd situation while investigating the complaints.

The heading for the part of the law where S.138 is enacted is “Election Petitions” implying that the legislature envisaged different petitions by the prospective petitioners listed therein. The wording of the subsections under S. 138 is couched in singular terms.

I am therefore inclined to find that the joining of the 2nd petitioner to the 1st petitioner's petition was irregular with no legal justification.

I will uphold the 2nd objection as well.

Consequently, since I have answered the two objections in the affirmative I will order that this petition be and is hereby struck out with costs to the respondents.

Stephen Musota

JUDGE

02.04.2013