

petitioner's 5683 votes. Being aggrieved by the outcome of the election and subsequent declaration of the 1st respondent by the 2nd respondent as the validly elected chairperson of the said division, the petitioner herein petitioned this court challenging the election on grounds that the 2nd respondent failed in its duty to
5 conduct the elections in accordance with the Electoral Commission Act, the Parliamentary Elections Act, and the principles governing elections and that the non-compliance affected the final result of the election in a substantial manner.

Representation

Counsel Kabuye Lawrence together with Mr. Male Abubaker and Eletu Jonathan
10 appeared for the petitioner

Counsel Allan James Mwiggo together with Asuman Nyonyintono appeared for the
1st respondent

Counsel John Paul Baingana together with John Mary Mwaya and Ahumuza Edward appeared for the 2nd respondent.

15 When the matter came up for scheduling, the counsel for the respondents raised preliminary objections regarding several irregularities in this matter.

Before I consider the preliminary objection raised by counsel for the respondent, counsel for the petitioner raised an issue regarding the competence of the answer to the petition of the 1st respondent, he argued that it was filed out of time without the
20 leave of court, counsel for the respondent prayed for the court to validate the service done by the 1st respondent. I have considered the submissions and the affidavits of service and claims are really contradicted. There is no basis for believing the process server who was not cross examined. In the case of **Muhindo Rehema Vs Winfred Kizza and EC (Election Appeal No.29 of 2011)**, the court held

25 that service of process required in election petitions is directory rather than

mandatory, and the failure to do so, especially where no injustice or prejudice was caused cannot vitiate the proceedings before the court. Similarly, in this case the late service of the respondent's answer did not in any way prejudice the petitioner, the late service of the answer to the petition is hereby validated. I will now proceed
5 and handle the submissions raised by the respondents.

Counsel John Paul Baingana raised the following objections;

- i. Counsel referred to Rule 4(8) of the Parliamentary Elections (Interim Provisions) Rules which provides that the petition shall be accompanied by an affidavit setting out the facts on which the petition is based. He submitted
10 that the petitioner's affidavit does not have a fact within his knowledge but that all averments are provided by 3rd parties which averments offend the law. He cited the averments in paragraph 5(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n) and paragraph 6 and prayed that they be expunged from the affidavit.
- 15 ii. Counsel further stated that the declaration of results forms are public documents within section 73 of the Evidence Act which require that they be certified by the 2nd respondent as per section 76 of the Evidence Act. That they can only be admitted if it is shown by the petitioner that he requested for the documents and they were denied to him.
- 20 iii. Further counsel for the 2nd respondent contended that the affidavit of Farouk Mpanga the petitioner was commissioned by a one Nampeera Juliet certified by the Chief Registrar of the Courts of Judicature as an advocate practicing with Lukwago & Co. advocates the firm representing the petitioner which is contrary to the law.

iv. Counsel also stated that the 25 affidavits that were filed on 18/8/2021 and said to be in support of the petition cannot accompany a petition that was filed on 18/5/2021.

2nd Respondents submissions

5 Counsel John Paul Baingana for the 2nd respondent submitted that Rule 4(8) of the Parliamentary Elections (Interim Provisions) Rules provides that a petition shall be accompanied by an affidavit stating facts on which the petition is based.

He submitted that a petition is not a miscellaneous application but a substantive suit whose affidavits are supposed to be confined to issues or facts within the
10 knowledge of the deponent and that the only exception to that rule is in miscellaneous applications where a deponent can base on information provided by third parties. He relied on the case of **Zimula Fred v Bazigatillawo Kibuuka Francis (Election Petition Appeal No.1 of 2018)**

He specifically prayed for this court to expunge paragraph 5 (a), (b), (c), (d), (e),
15 (f), (g), (h), (i), (j), (k), (l), (m), (n) and paragraph 6 of the affidavit in support of the petition because they are based on information from third parties.

Counsel also submitted that the annexures starting from annexure F to the last are public documents within the meaning of section 73 of the Evidence Act and therefore ought to be certified as per section 76 of the Evidence Act. He submitted
20 that the only exception that court may rely on these uncertified declaration is if the petitioner had attached a copy of a letter requesting for the documents and the same had been denied to him. He relied on the case of **John Baptist Kakooza versus Electoral Commission and Yiga Anthony (Election Petition Appeal No.11 of 2007)**

He prayed for the attachments to the affidavit in support from (F) to the last be struck off the record.

He further submitted that the affidavit in support sworn by Mpanga Farouk the petitioner herein is commissioned by a one Nampeera Juliet who is an advocate in the firm representing the petitioner M/s Lukwago and Company Advocates, he
5 argued that this is contrary to the law which bars a commissioner for oaths from commissioning his or her own documents or documents prepared by the firm where the he or she works. He cited the Kenyan case of **Stephen M. Mogaka Vs Independent Electoral and Boundaries Commission & 2 others (Election Petition No.2 of 2017)** and **Fatuma Nakatudde and Anor Vs Makerere University (Miscellaneous Cause No.175 of 2019 at High Court Civil Division)**.
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Counsel further submitted that the 25 affidavits filed on the 18th August 2021 were headed as affidavits in support of the petition ,he contended that the law requires that the petition must be accompanied by the affidavit in support and that these
15 affidavits filed on the 18th August 2021 cannot accompany a petition that was filed in 18th May 2021. That what court can only order is either filing supplementary affidavits or additional affidavits, he continued by submitting that the law does not envisage a set of affidavits in support of the petition long after the petition has been filed because that would in effect prejudice the respondents right to answer. He
20 prayed for the same to be expunged.

Counsel John Paul Baingana concluded by praying that the petition is dismissed for having no accompanying affidavit.

Petitioners submissions in reply

In response to the first preliminary objection Lawrence Kabuye counsel for the
25 petitioner submitted that the accompanying affidavit of the petitioner clearly

discloses the sources of information in all the paragraph's where he relies on them. While relying on the case of **Dr. Colonel Kizza Besigye V Yoweri Kaguta Museveni (Presidential Election Petition No.1 of 2001)**, he submitted that court took a liberal approach of this matter and stated that parties to a petition can depone on facts
5 received from witnesses provided they disclose the source of information of those facts, he also reechoed the words of Justice Tsekoko in the same case where he emphasized that a candidate in a petition is not everywhere. That's why he needs information from his agents who are on the ground with information on what's happening at various polling stations. He prayed for the objection to be overruled
10 because the affidavit in support conform to the law and duly discloses the sources of information.

Regarding the annexures to the affidavit in support of the petition, counsel submitted that they had written to the electoral commission requesting for the certified copies of the declaration forms but the same have not been availed. He
15 showed court the two letters requesting for the same. He relied on the case of **John Baptist Kakooza versus Electoral Commission and Yiga Anthony (Supreme Court Election Petition Appeal No.11 of 2007)** which was to the effect that the court may rely on uncertified public documents if there is proof that the same was requested for and have not been availed.

20 Regarding the commissioning of the affidavit in support by Ms. Nampeera Juliet who is also an advocate at Lukwago and Company Advocates, it was counsel's submission that section 4(1) of Commissioner for Oaths (Advocates) Act does not stop an advocate from the same law firm to commission a document drawn by that very firm provided they are not in personal conduct of the matter and have no
25 interest in the matter. He further submitted Ms. Nampeera Juliet is not on court record and neither is she interested in this matter before court. He relied on the

case of **Markly Vincent Okidi & 4others Vs Peter Odok W'Oceng. (Election
Petition No.9 of 2011 at Gulu High Court)** where Ruby Aweri Opio J (as he was
then) stated that the authority to commission oaths is personal to holder and is not
issued to an advocate as a member of a particular firm. He invited this court to cure
5 the same under section 14A of the Advocates Act as amended and also Article
126(2)(e) of the Constitution should it find that the affidavit commissioned by
Nampeera Juliet was defective.

Regarding the 25 affidavits in support counsel submitted that under Rule 4(8) of
the Parliamentary Elections (Interim Provision) Rules provides that the petition
10 shall be accompanied by an affidavit. That this provision does not prevent the
petitioner from filing other affidavits. That there is no statutory title given to those
affidavits and invited court to look at the subject rather than the form and allow the
affidavits on record the way they are. He invited this court to cure the same under
section 14A of the Advocates Act as amended and Article 126(2)(e) of the
15 constitution should it make a finding that the title given to the affidavits did not
conform to the law.

I have also considered the submissions in rejoinder by both counsel for the
respondents.

The following issues arise for the determination of the above objections

- 20 1. Whether the affidavit in support of the petition cannot support the petition
having been based on information from third parties
2. Whether the annexures to the affidavit in support of the petition should be
struck out for non-certification as required by law
3. Whether the commissioning of the affidavit in support of the petition by a
25 one Nampera Juliet who practices in the firm representing the petitioner
renders it fatally defective.

4. Whether the 25 affidavits in support of the petition should be expunged from the record having been filed after the petition had been long filed.

Determination

- 5 **1. Whether the affidavit in support of the petition cannot support the petition having been based on information from third parties.**

Rule 15(1) of the Parliamentary Elections (Interim Provision) Rules provides that **“subject to this rule all evidence in election litigation in favour of or against a petition at trial shall be by way of affidavits read in open court.”**

- 10 It is also provided under Order 19 rule 3 of the Civil Procedure Rules that the evidence set out in an affidavit should be confined to the particular facts within the personal knowledge of the deponent. In the instant case it was counsel for the 2nd respondent’s contention that the information in paragraph 5 (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n) and paragraph 6 of the affidavit in support were
15 based on information from third parties. In the impugned paragraphs which the respondent is seeking to expunge raise issues of non-compliance with electoral laws, the petitioner has clearly disclosed the source of his information. Given the fact that the petitioner cannot be everywhere and is ably represented by his agents it normally follows that he relies on information that he is given by the agents. **See**
20 **the cases of Dr. Kizza Besigye V Yoweri Kaguta Museveni (Presidential Election Petition No.1 of 2001) and Chemoiko v Soyekwo & EC (Election Appeal No.56 of 2016)** where it was emphasized that proper and full disclosure by the deponent in an affidavit of the particulars of his sources of information is a crucial requirement in election matters. In view of the foregoing, I find that the disclosure of the

sources of information by the petitioner is sufficient to satisfy the requirements under rule 15(1) as cited above.

2. Whether the annexures to the affidavit in support of the petition should be struck out for non-certification as required by law

5 Section 76 of the Evidence Act provides for proof of public documents by production of the original or certified copies. A declaration of results form is a public document within the meaning of section 73(a) (ii) of the Evidence Act. It requires certification if it is to be presented as an authentic and valid document in evidence. In this case, it was counsel for the petitioner's contention that they had
10 written two letters dated 18th February 2021 and 19th August 2021 to the 1st respondent requesting to be availed certified copies of the declaration of results forms but the same has since been denied.

That notwithstanding this is a matter of evidence which requires the court to have a thorough scrutiny of the declaration forms. The question of admissibility of these
15 uncertified declaration forms can only be determined after the matter has been scheduled and not in a preliminary objection. I therefore find that the objection in this matter is premature. **See: Tamale Julius Konde Vs Ssenkubuge & Electoral Commission (Election Petition Appeal No.75 of 2016)**

**3. Whether the commissioning of the affidavit in support of the petition by a one
20 Nampera Juliet who practices in the firm representing the petitioner renders it fatally defective.**

It was counsel for the respondents' contention that the affidavit in support of the petition sworn by the petitioner before Ms. Nampera Juliet was fatally defective. He contended that Ms. Nampera Juliet being an advocate with Lukwago & Co.

Advocates which is the law firm representing the petitioner contravened Section 4(1) of the Commissioner for Oaths (Advocates) Act.

The question to answer here is whether a commissioner for oaths can exercise the powers given under the Commissioner for Oaths (Advocates) Act in any proceeding or matter in which he/she is the advocate for any of the parties to the proceedings or concerned in the matter or in which he or she is interested.

Section 4(1) of the Commissioner for Oaths (Advocates) Act provides;

“..... except that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he or she is the advocate for any of the parties to the proceedings or concerned in the matter or clerk to any such advocate or in which he or she is interested.”

The gist of the above section is that a commissioner for oaths cannot commission his or her own documents or documents prepared by the firm where the commissioner works or where he/she is interested. This section is couched in mandatory terms.

From the letter of the Chief Registrar, it is not in doubt that that Nampeera Juliet is an advocate practicing with Lukwago & Co. Advocates the firm representing the petitioner and it's not denied by the petitioners. The argument by the petitioner's counsel that the authority to commission oaths is personal to holder and is not issued to the firm does not apply in these circumstances because a client does not instruct an individual advocate, but instructs a law firm, that is why the documents herein do not bear the name of the individual advocate that drew them but that of the firm. Similarly, no one can be a commissioner for oath without being an advocate and an advocate must have an address of belonging which is by way of law firm. Suffice it to note that a law firm is not a body corporate, it is a

partnership and all actions of the partners and agents thereof bind each in their individual capacity. So the actions of the commissioner in this case are the actions of the law firm. **See: Stephen M. Mogaka Vs Independent Electoral and Boundaries Commission & 2 others (Election Petition No.2 of 2017) and Fatuma Nakatudde and Anor Vs Makerere University (Miscellaneous Cause No.175 of 2019 High Court at Civil Division).**

It is clear from the facts before this court that the petitioner is represented by the firm of M/s Lukwago & Co. Advocates, the firm which drew and filed the affidavit in support. The affidavit in support was sworn before Ms. Nampeera Juliet, a Commissioner for Oaths who practices with the said firm, which is representing the petitioner. Ms. Nampeera Juliet being an advocate practicing in the firm, that is acting for the petitioner is concerned and /or interested in the matter by virtue of her employment with the said law firm.

Counsel for the petitioner sought to rely on section 14A of the Advocates Act as amended and article 126(2) (e) of the constitution to cure that defect. The essence of Section 14A of the Advocates Act as amended is to protect innocent litigants from unscrupulous advocates, it is not meant to cure an illegality.

Similarly, in this case an affidavit sworn in violation of section 4(1) of the Commissioner for Oaths (Advocates) Act is for all intents and purposes not an affidavit as envisaged in law and is not capable of being cured under article 126 (2) (e) of the Constitution and section 14 A of the Advocates Act as amended as it offends a provision of an Act of Parliament and does not present as a mere irregularity but a matter that goes to the root of the legality of the affidavit in issue. This court cannot shut its eyes as it is obligated to interpret and apply the law.

Article 126(2) (e) of the constitution cannot cure the defect in the affidavit in support filed in contravention of substantive law because the article was not created or intended to defeat the law. **See: Suubi Kinyamatama Juliet Vs Sentongo Robinah Nakasirye and another. (Election Petition Appeal No.92 of 2016).** It therefore follows that the impugned affidavit in support of the petition is incurably defective.

4. Whether the 25 affidavits in support of the petition should be expunged from the record have been filed after the petition had been long filed.

Counsel for the respondent contended that the law requires that the petition must be accompanied by the affidavit in support and that these affidavits filed on the 18th August 2021 cannot accompany a petition that was filed in 18th May 2021. In response counsel for the petitioner argued that rule 4(8) of the Parliamentary Elections (Interim Provisions) Rules does not prevent a petitioner from filing other affidavits.

Rule 4(8) of the Parliamentary Elections (Interim Provisions) Rules provides that; **“The petition shall be accompanied by an affidavit setting out the facts on which the petition is based together with a list of any documents on which the petitioner intends to rely.”**

The above provision and rule 15 of the Parliamentary Elections (Interim Provisions) Rules does not stipulate that all affidavits intended to be relied upon by the petitioner have to be filed within the restricted time and neither does it prevent the petitioner from filing other affidavits. **See: Akuguzibwe Lawrence v Muhumuza David, Mulimira and EC. (Election Petition Appeal No.22 of 2016)**

In relation to the filing of the 25 affidavits, courts have always adopted a liberal approach when dealing with affidavits in election matters given the peculiar

circumstances it presents. First of all, election are matters of great public interest, secondly, the statutory time frame for filing election petitions is quite short and thirdly, evidence has to be gathered from a wide spectrum of people, including candidate's agents, voters and in this case from the entire division. The evidence
5 gathered has to be assessed for probative value before it is reduced into affidavits which are then commissioned and filed in court. It is sometimes practically not possible to file all affidavits in support of the petition at the same time with the petition. **See: Tamale Julius Konde Vs Ssenkubuge & Electoral Commission (Election Petition Appeal No.75 of 2016).** I therefore find that the 25 affidavits
10 were properly filed in court.

In conclusion, Rule 3(c) of the Parliamentary Elections (Interim Provisions) Rules **defines a petition to mean an election petition and includes the affidavit required by the rules to accompany the petition.**

Rule 4(8) of the Parliamentary Elections (Interim Provisions) Rules provides that;
15 **“The petition shall be accompanied by an affidavit setting out the facts on which the petition is based together with a list of any documents on which the petitioner intends to rely.”**

Having found that the supporting affidavit is incurably defective, it follows that this petition is not accompanied by any affidavit as required by the above cited
20 law. It therefore collapses and is struck out with costs to the respondents.

I so order

JUDGE

8/9/2021

