THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

IN THE MATTER OF THE PALIAMENTARY ELECTIONS ACT 2005

AND

IN THE MATTER OF THE ELECTORAL COMMISSION ACT CAP 140

MISC.APP NO.340 OF 2021

ARISING OUT OF ELECTION PETITION NO.09 OF 2021

MUKESH BABUBHAI SHUKLA::::::::::::::::::::::::::::APPLICANT

VERSUS

1. **ELECTORAL COMMISSION**
2. **SSENYONYI JOEL BESEKEZI::::::::::::::::::::::RESPONDENTS**

BEFORE HON: JUSTICE ISAAC MUWATA

RULING ON PRELIMINARY OBJECTIONS

The applicant brought this application under Rule 19 of the Parliamentary Elections (Interim Provisions) rules seeking leave to amend the petition filed in this court and that the costs of the application be provided for. The application was supported by the affidavit of Shukla Mukesh Babubhai the applicant herein and opposed by the 1st and 2nd respondent's affidavits in reply. At the hearing of this application, counsel Dennis Atwijukire for the 2nd respondent raised three preliminary objections;

I. That the application offends the rules of procedure for not disclosing the particulars of the parties.

II. That the annexures' attached to the application are not marked and serialized as required by the Commissioner for Oath Rules.

III. That the application is devoid of law and merit to the extent that there is no law that provides for amendment of an Election Petition.

Representation

Counsel Badru Bwango and Enock Kayondo appeared for the applicant.

Counsel Abubaker Kayondo appeared for the 1st respondent.

Counsel George Musisi, Derrick Ruzima, Dennis Atwijukire and Benjamin Katana appeared for the 2nd respondent

Respondents submissions

Counsel Dennis Atwijukire for the 2nd respondent submitted that this application is incurably defective to the extent that it does not indicate the particulars of the parties, he contended that this offends the rules of procedure. He cited the case of **Samuel Kayuki Vs Israel Katabika & 2ors. (Misc. Application No.0402 of 2016 at High Court Land division)**, where it was held that the omission to proceed under the proper procedure is fatal and that there is no need to go into the merits of the application.

Regarding the second objection, counsel submitted that the annexures' attached to the application are not marked and neither are they serialized as required by rule 8 of the Commissioner for Oaths Rules. He submitted that annexures to affidavits must be identified by the deponent for them to be properly before this court. He

further submitted that the fact that the annexures are not stamped only implies that they were smuggled on the affidavit. He cited the case of **Godfrey Ssentongo Vs David Barya Katumba Misc. Application No. 164 of 2016 at High Court Masaka),** where the court held that Rules 8 of the Commissioner for Oaths Rules is mandatory and where annexures are not marked they ought to be expunged. He prayed for the annexures to Miscellaneous Application No.340 of 2021 to be expunged from the court record.

On the amendment, counsel for the respondent submitted that the right to amend is a creature of statue, that there is no law granting a person the right to amend pleadings in an election petition matter. He also submitted that the application to amend is brought under Rule 19 of the Parliamentary Elections (Interim Provisions) Rules which provides for enlargement or abridgment of time, but not amendment of an election petition.

He further submitted that the Parliamentary Elections Act and the rules thereunder have no provisions for amending a petition already filed. He cited the case of **Kyagulanyi Robert Sentamu V Yoweri Kaguta Museveni Tibuhaburwa and 2 others (Supreme Court Misc. Application No.01 of 2021),** where their lordships held the Presidential Elections Act does not provide for extension of time for filing an Election Petition.

He argued that it is now settled law that a court has no inherent or residual power to extend or abridge time set by law for taking a step or doing an act by a party to proceedings. Counsel also cited **Wanyoto Lydia Mutende Vs Electoral Commission and Nakayenze Connie Galiwango Misc. Application No.179 of 2021 High Court at Mbale,** where the court was faced with a similar situation and Justice Andrew Bashaija held that enlargement and abridgement is only applicable where

time is appointed by the rules for doing an act and in the opinion of court there exists special circumstances to do so.

He cited the trial Judge in the above cited case where he held that since the court has no power to grant an amendment which is not envisaged by law, to do so would mean that court is conferring upon itself powers which are not provided by law.

He prayed that objections be sustained and the application is dismissed with costs.

Counsel for the 1st respondent associated himself with Counsel Dennis Atwijukirez submissions and also reiterated his prayers to have the application dismissed with costs.

Applicant's submissions in reply

In response to the first preliminary objection raised by counsel for the 2nd respondent, Mr. Enock Kayondo for the applicant submitted that their pleadings have a miscellaneous application number arising from the main petition and that the supporting affidavits indicate all these particulars. That the omission on the notice of motion is a mere technicality which is curable under Article 126(2) (e) of the 1995 Constitution as amended.

He cited the case of **Conform Uganda Limited versus Mega industries Uganda limited Misc. No.1084 of 2014(Commercial Division)** where court held that the citing of a wrong law is not fatal to an application as the essence of all disputes is that they should be heard and determined. He prayed for this court to find that the omission does not render the application a nullity.

Regarding the issue of the annexures not being serialized, counsel for the applicant submitted authorities where the same was overruled in the interest of substantive

justice. He cited **Baryaija Julius V Kikwisire Zaverio & anor. (Court of Appeal Misc. Application No.324 of 2016)** where the court held so in the interest of justice.

Regarding the issue of amendment of pleadings in election petition matters, counsel submitted that Rule 17 of the Parliamentary Election (Interim Provisions) Rules instructs court to refer to the Civil Procedure Act and the Civil Procedure Rules where a procedure is not specifically provided for. He also submitted that Order 6 rule 19 of the civil procedure rules allows this court to allow amendments to pleadings.

Counsel also distinguished the case of **Kyagulanyi Robert V Yoweri Museveni Tibuhaburwa & 2 others (Supreme Court Misc. Application No.01 of 2021)** with the facts before this court arguing that the above case was decided in respect of the Presidential Elections Petition and not the Parliamentary Elections petition. He further contended that **Wanyoto Lydia Mutende Vs Electoral Commission and Nakayenze Connie Galiwango Misc. Application No.179 of 2021 High Court at Mbale** as cited by the respondent is not binding on this court.

Counsel Badru Bwango also for the applicant added that the courts should not treat any incorrect act or omission as a nullity unless the incorrect act is of the most fundamental nature, he concluded by saying matters of procedure are not of a fundamental nature.

Counsel Badru Bwango reiterated the prayers raised by his co-counsel and submitted that the preliminary points of law raised by counsel for the respondent are mere technicalities that should not bar this court from proceeding to determine the application. He prayed for the same to be dismissed.

Counsel Dennis Atwijukire made rejoinder submissions which I have also considered, I have also considered the authorities submitted by both counsel and I will refer to them where necessary.

The issues for determine that arise from the above submissions are

1. **Whether the application offends the rules of procedure in as far as the particulars of the parties are not indicated.**
2. **Whether the annexures to the affidavit in support of application are properly before this court.**
3. **Whether this court has power to allow an amendment to an election petition**

Determination

Whether the application offends the rules of procedure in as far as the particulars of the parties are not indicated.

It is now settled that article 126 (2) (e) of the constitution has not done away with the requirement that litigants must comply with the Rules of procedure in litigation. The article merely gives constitutional force to the well settled common law principle that rules of procedure act as handmaidens of justice. The framers of the constitution were alive to this fact. That is why they provided that the principles in article 126 including administering substantive justice without undue regard to technicalities, must be applied "subject to the law." Such laws include the Rules of procedure. **See: Mulindwa George William V Kisubika Joseph Supreme Court Civil Appeal No.12 of 2014.**

A litigant who relies on the provisions of Article 126 (2) (e) of the constitution must satisfy the court that in the circumstances of the particular case before the

court, it was not desirable to pay undue regard to that technicality. Article 126 (2) (e) of the constitution is not a magic wand in the hands of defaulting litigants as pointed out in the case of **Kasirye Byaruhanga & Co. Advocates v Uganda Development Bank, Supreme Court Civil Application No. 2/97.**

Counsel for the applicant submitted that despite the unnumbered application and the non-inclusion of the particulars of the parties, the supporting affidavit to the application is correctly marked. I have looked at the application and the supporting affidavit and in as much as the main application was not numbered the supporting affidavit is properly numbered and the parties thereto are also rightly indicated.

It is also my considered view that an affidavit is an accompaniment to the notice of motion and not a separate document, so where the supporting affidavit is properly marked then the omission is not of a fundamental nature. The application has served its purpose for which it was intended and both parties are before court. This error can therefore be ignored since it has not caused any injustice to any of the parties.

Whether the annexures to the affidavit in support of application are properly before this court.

Under Rule 8 of the Commissioner for Oaths Rules, all exhibits to affidavits have to be securely sealed to the affidavits under the seal of the Commissioner for Oaths, and marked with the serial number of the identification. This section is couched in mandatory terms.

Counsel for the respondent submitted that the annexures' offend a provision of the law and cannot be cured under Article 126(2) (e) of the constitution as prayed by the applicant's. In response counsel for the applicant's argument rotated around the

higher threshold of the administering substantive justice rather than dwelling on technicalities. He cited a number of authorities to that effect.

I have looked at the annexures being referred to and I note that sealing of annexures to an affidavit is a legal requirement which inter alia facilitates the identification of documents. Failure to comply with this requirement presupposes that the deponent did not appear before the commissioner of oath. This procedure must be adhered to in spite of article 126(2) (e) of the constitution. This article of the constitution did not do away with the rules of procedures. The annexures to the affidavit offend the provisions of the law for failing to comply with Rule 8 of the Commissioner for Oaths Rules as held in the supreme court case of **Utex Industries Vs Attorney General, Supreme Court Civil Application No. 52 of 1995.** In view of the foregoing, I find that this objection is sustained.

The main issue to determine in this objection is whether <u>the intended amendment is proper.</u>

Amendment of pleadings is provided for under order 6 rule 19 of the Civil Procedure Rules as follows,

"The court may, at any stage of the proceedings, allow either party to alter or amend his or her pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

The gist of the above rule is that court is vested with wide discretion to allow an amendment if in the opinion of the court the circumstances call for it and it is necessary for the ends of justice.

Order 6 rule 20-25 provides for the circumstances under which parties may amend their pleadings with or without leave of court, the effect of the amendment and of the failure to amend.

Counsel for the applicant brought this application under Rule 19 of the Parliamentary Elections (Interim Provision) Rules seeking to amend his petition. It provides;

"The court may of its own motion or on application by any party to the proceedings, and upon such terms as the justice of the case may require, enlarge or abridge the time appointed by the Rules for doing any act if, in the opinion of the court, there exists such special circumstances as make it expedient to do so."

Regarding the applicability of the Civil Procedure Act and the rules thereunder, counsel for the applicant sought to rely on Rule 19 of the Parliamentary Elections (Interim Provisions) Rules. It provides that;

''Subject to the provisions of these rules, the practice and procedure in respect of a petition shall be regulated, as nearly as may be, in accordance with the Civil Procedure Act and the rules made under that Act relating to the trial of a suit in the High Court, with such modifications as the court may consider necessary in the interest of justice and expedition of proceedings."

From the reading of the above rule, it is not mandatory for this court to apply the Civil Procedure Act and the Rules made thereunder in the determination of a Parliamentary Election petition. The practice and procedure of a petition regarding the Civil Procedure Act and rules is limited to the trial /hearing of the petitions only.

Honorable Justice Andrew Bashaija in **Wanyoto Lydia Mutende vs EC and Nakayenze Connie Galiwango Miscellaneous application No.179 of 2021 High Court at Mbale** in interpreting the above rule noted that the term trial as referred to in the Parliamentary Elections(Interim Provisions)Rules refers to a formal judicial examination of evidence and determination of legal claims in adversary proceedings, he also referred to the definition of an amendment as a formal revision or addition proposed or made to a statute, constitution, pleading, order or other instrument or a change made by addition, deletion or correction. He concluded by holding that an amendment is not a trial and the provisions of the Civil Procedure Act and the Civil Procedure Rules pursuant to Rule 17 are in applicable to amendment of an election petition. I respectfully agree with the said position.

In this case the applicant is seeking leave to amend the petition under Rule 19 of the Parliamentary Elections (Interim Provisions) Rules, the said rules are in respect of enlargement and abridgement of time. As noted above, enlargement and abridgement of time is provided by the rules for doing any particular acts. The same rules cannot be used in the present case given the fact that Rule 19 provides for enlargement and abridgement of time set by the rules whereas the time within which to file a petition is set by the Parliamentary Elections Act.

This court cannot therefore purport to enlarge and/or abridge time where the law did not provide for it. As noted in **Kyagulanyi Ssentamu Robert V Yoweri Museveni Tibuhaburwa & 2 others. (Supreme Court Misc. Application No.01 of 2021),** the court does not have the inherent or residue power to extend or abridge time set by law for taking a step or doing an act by a party to proceedings.

The law envisages that once a petition has been filed, the journey towards its final determination commences, which by and large should be uninterrupted. An amendment which could be seen as an interruption towards the expeditious trial of an election petition is not specifically provided for either in the Constitution, the Presidential Elections Act or Parliamentary Elections Act and the rules. If this court were to allow an amendment to a presidential election petition, then it would be acting outside the law that governs the trial and determination of that petition. **See: Kyagulanyi Ssentamu Robert V Yoweri Museveni Tibuhaburwa & 2 others. (Supreme Court Misc. Application No.01 of 2021).**

As noted in the Kyagulanyi case, supra, the principles laid out also apply to this case in as far as it relates to an amendment of an election petition.

Accordingly, I find that the intended amendment of the petition by the applicant cannot be sustained in light of the above objections.

Since this court cannot sanction an amendment in the circumstances, this application is misplaced, misconceived and is hereby struck out with costs to the respondents

I so order.

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JUDGE

15/09/2021

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