THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

ELECTION PETITION APPEAL NO. 12 OF 2021

(Arising from Chief Magistrates Court of Nabweru Election Petition No. 006 of 2021)

MWESIGYE BERNICE---------- APPELLANT

VERSUS

1. **NSUBUGA ISMAIL**
2. **BUSULWA PAUL**
3. **ELECTORAL COMMISSION---------- RESPONDENTS**

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The appellant and the 1st & 2nd respondents were some of the contestants in the elections conducted by the 2nd respondent on 25th January 2021 for the position of Directly Elected Councillor for Kawempe City Division – Kawempe 1E, Kampala District where the 1st respondent was returned and declared the winner with 386 votes, while the appellant was a runner-up with 116 votes and the 2nd respondent polled 77 votes in the 3rd position. There were other candidates who participated in the said election Luwedde Dorothy Nakato polled 33 votes; Ssali Godfrey Kivebulaaya polled 24 votes; Nkalubo Mugagga Lumala polled 09 votes; Ssuna John Paul polled 7 votes and Mayanja Saluwa Jackie polled 4 votes.

The appellant (who was an NRM candidate) was aggrieved and challenged the election results on grounds that the 1st and 2nd respondents were not validly nominated since the 1st respondent came on the NUP card and whereas the 2nd respondent who came as an independent candidate is the true flag bearer of NUP as he had participated in youth Election on NUP.

The lower court heard the election petition and dismissed the petition with costs to the respondents. The appellant being dissatisfied with the decision lodged this appeal on seven grounds.

1. ***The learned Chief Magistrate erred in law and fact when at scheduling framed an issue for determination, that is to say "whether Busulwa is a rightful flag bearer", does not answer or represent any point of law in the matter of the Local Government Act and Election petition. The decision on the issue framed is not in any way connected to the matter before her under the Local Government Act.***

2. ***The learned Chief Magistrate erred in law and fact when she made a decision on an issue based on the second respondent that does not conclude any matter raised by the Local Government Act or even the petition and therefore the issue framed was wrong and therefore also coming up with a wrong conclusion hence causing miscarriage of justice.***

3. ***The learned Chief Magistrate erred in law and fact when at scheduling ,she failed to frame proper legal issues. Furthermore, an illegality was presented before on record and was not determined thus coming up with an enormous decision.***

4. ***The learned Chief Magistrate erred in law and fact when she failed to effectively scrutinize the evidence on record that was an illegality in the petition, that came up for determination to state and show that the 1st***

respondent was never nominated by the Returning officer of the 3rd respondent and should not have appeared on the ballot paper or even participate in the given election. This makes the nomination of the 1st respondent as unlawful and invalid. This was not answered or determined anywhere in the judgment and as such came up with a wrong judgment.

5. ***The learned Chief Magistrate erred in law and fact when determining the decision went on to solve an issue without first addressing the illegality that was presented on record. The issue of contestation would have been of the two NUP flag bearers who were nominated by the 3rd respondent however the 1st respondent who should have been the other NUP bearer was not nominated at all and should not have appeared in the election in the first place. This makes the issue 1 presented at scheduling lack any substance that is to say if the illegality was solved, the issue for determination would not have come up therefore to make a wrong judgment.***

6. ***The Learned Chief Magistrate erred in law and fact when she failed to properly to evaluate the petition and evidence on record to prove the illegalities. The returning officer in his paragraph 3 of his affidavit admitted that "he wrongly declared the 1st respondent as the winner of the election" in favour of the petitioner. Furthermore, the Returning Officer during cross examination contended that the handwriting on the nomination paper of the 1st respondent was not his own, and that his name and that his name does not appear on the nomination paper of the same and thus was nominated by someone unauthorized by law which is an illegality. That there was also neglect of duty by the 3rd respondent when they actually allowed this to happen and that the first respondent should not have appeared on the ballot paper or in the given elections contrary the principles laid down in the Constitution of Uganda and Local Government Act concerning elections.***

7. ***The Learned Chief Magistrate erred in law and fact when in the judgment did not determine or mention who was validly nominated a candidate or even to mention the validly elected councilor for Kawempe 1E therefore the judgment is not conclusive on any matter thus coming up with a wrong conclusion and decision.***

The appellant prayed for the appeal to be allowed, the decision and orders of the Magistrate be set aside with costs to the appellant.

At the hearing of the appeal, the appellant was self-represented and the 1st respondent was represented *Kakande Sam* while 3rd respondent was represented by *Simon Odongoi.* The 2nd respondent was represented by *Public Interest Law Clinic*

In the interest of time the court directed that the matter proceeds by way of written submissions which I have read and considered in this Judgment.

Duty of 1st appellate court

It is true that the duty of this Court as first appellate court is to re-evaluate evidence and come up with its own conclusion.

Following the cases of ***Pandya vs R [1957] EA 336; Bogere Moses and Another v Uganda Criminal Appeal No.1/1997,*** the Supreme Court stated the duty of a first appellate court in ***Father Nanensio Begumisa and 3 Others vs Eric Tibebaga SCCA 17/20 (22.6.04)at Mengo from CACA 47/20000 [2004] KALR 236.***

The court observed that the legal obligation on a first appellate court to re-appraise evidence is founded in Common Law, rather than the Rules of Procedure. The court went ahead and stated the legal position as follows:-

"It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due

allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."

This position was reiterated by the Supreme in the case of ***Kifamunte Henry v Uganda SCCA No. 10 of 1997***, where it was held that;

> "*The first appellate court has a duty to review the evidence the evidence of the case and to reconsider the materials before the trial Judge. The appellate Court must make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it*."

I have taken the above principles into account as I consider the Appeal. I have considered the record of proceedings of the lower Court and have considered the written submissions of both parties.

<u>Preliminary Objections</u>

The 3rd respondent's counsel raised preliminary objections that the appeal is incompetent on the following grounds:

i. The memorandum of appeal is not signed by the appellant as required by law.
ii. The memorandum of appeal contains grounds which are imprecise, narrative and argumentative.

It was counsel's submission that the provisions of Order 43 of the Civil Procedure rules are mandatory and ought to be complied with. He further contended that memorandum of appeal is not signed by the appellant or his advocate. He invited court to strike out the memorandum of appeal with costs.

The appellant in his response to the submission of the 3rd respondent contended that the preliminary objection is wrongly presented before the honourable court and that the time for raising objections, or any other issues under the law, is overdue, as the preliminary objection is raised out of time. The appellant surprisingly cited the Judicature Court of Appeal-rule 102 about arguments at hearing and also Rule 82 about striking out the notice of appeal and appeal.

Analysis

The appellant appears to have conceded that indeed the memorandum was never signed by himself and that the memorandum of appeal is imprecise, narrative and argumentative.

The law requires that the memorandum of appeal must signed by the appellant or his or her advocate. Order 43(1) of the Civil Procedure Rules provides that; ***Every Appeal to the High Court shall be preferred in the form of a memorandum signed by the appellant or his or her advocate and presented to the court or to such officer as it shall appoint for that purpose.***

The present appeal presented by the appellant was never signed by the appellant since he is self-represented or any advocate. This is contrary to the above rule and makes the whole memorandum questionable.

Procedural requirements like signing of the memorandum of appeal are designed to further the interest of justice and any consequence that goes contrary to those interests must be treated with reservation. Rules of procedure are to be obeyed no matter how little and there has to be an explanation for the disobedience. The Supreme Court case of ***Utex Industries Ltd v Attorney General Civil Application No. 53 of 1995*** is quite instructive on the application of the Article 126(2)(e) of the Constitution. This Article is only applied with due regard to the circumstances of each case. Therefore, it is dangerous not to follow rules laid down for the administration of justice. The rules of court are intended for the protection of litigants and ensuring that justice is accessed in an orderly manner. Justice looks both ways but it must be administered in accordance with the law, not whim, caprice or sympathy.

The omission to sign the memorandum of appeal is fatal and renders the appeal incurably defective. Therefore, an unsigned appeal is no appeal and in the circumstances no appeal is before the court. See ***Lakeland Motors Ltd v Harbajan Singh Sembi Civil Appeal No. 303 of 1998(CCK); Parbat Keshnrwal v Abdul Ismail Nurani [1976] KLR 50***

In absence of any explanation as to why the memorandum of appeal was not signed by the appellant or presentation of any material upon which the court can exercise its discretion, this appeal is incurably defective and is struck out with costs to the respondents.

The memorandum of appeal as presented by the appellant offends the law since it argumentative and prolix. Order 43 rule 1(2) of the Civil Procedure Rules provides; ***The Memorandum shall set forth, concisely and under distinct heads, grounds of objection to the decree appealed from without any argument or narrative; and the grounds shall be numbered consecutively.*** *See Betuco (u) Limited & Another v Barclays bank of Uganda Limited & 3 Others SCCA No. 01 of 2017*

A memorandum of Appeal must set forth concisely the grounds of objection and therefore vague grounds are not to be entertained. See ***Moses Kipkolum Kogo v David Malakwen Civil Appeal No. 74 of 1998.*** The appellant took a casual attitude to litigation by trying to represent himself in complicated areas of the law especially trying to draft grounds of appeal which offended the rules of court. He has no one to blame and this court would not extend an indulgence to him simply because he is self-represented without an advocate.

The rules of court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be easier to seek an amendment to the particular rule. It would be wrong to regard rules of the court as of no substance. A rule of practice, however technical it may appeal, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See ***Onjula Enterprises Ltd v Sumaria [1986] KLR 651***

This was an election petition appeal which should have been handled with sensitivity and diligence that entails such matters instead of exhibiting undesirable nonchalance. The non-seriousness of the appellant is seen in his casual manner he responded to the objections and the citation of wrong rules of court of Appeal being cited in the High court. The grounds of appeal would equally have been struck out for being argumentative and prolix.

The appeal process ensures integrity and correctness of judicial decision-making, preserves the certainty of the law (through judicial precedent), develops jurisprudence and maintains public confidence in the administration of justice. A system of appeals exists simply because its importance to justice and is strictly regulated by rules concerning the conditions on which appeals are brought and the procedures which need to be complied with in initiating and pursuing the appeal. The appeal process is not simply a luxury for litigants to try if they are not sure of what is supposed to be done. It is a more serious business which must be explored only if the litigant should; the unnecessary extension of litigation is curtailed by the rules and timelines.

This appeal fails for the reasons set out herein above. The appeal is struck out with costs to the respondents.

I so Order

SSEKAANA MUSA
JUDGE
22nd April 2022