

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
ELECTION PETITION NO. 10 OF 2016

KABUGO ABDULAHUMAN.....PETITIONER

VERSUS

THE ELECTORAL COMMISSION.....RESPONDENT

BEFORE: HON. LADY JUSTICE MARGARET TIBULYA.

JUDGMENT

The Petitioner brought this petition for orders that;

1. The respondent's decision not publish the election results for the directly elected councilor Ndagwe Sub-County in the gazette and instead to call a by-election is unlawful.
2. The petitioner was the validly directly elected L.C 5 councilor representing Ndagwe Sub-County at Lwengo District Sub-county.
3. A permanent injunction restraining the respondent from further proceeding with the said election.
4. The said respondent pays the cost of this petition.

BACK GROUND

On the 24th February, 2016, elections were held for the post of L.C V councilor Ndagwe Sub-County. The petitioner contends that he emerged winner with 3399 votes against his competitor (Mr. Mwesigwa Ausi)'s 2760 votes. It is alleged that the respondent contrary to the law refused or neglected to declare him or anyone else winner. The petitioner alleged that his opponent together with the respondent's Ndagwe Sub-County Supervisor blocked the tallying and declaration of results. At around 10:00 pm of the same day, the petitioner was arrested and he spent two days in police custody on the allegation that his supporters were inciting violence. His

agent however collected all the declaration of result forms and took them to the returning officer who was claiming that she could not declare him winner because the forms had not reached her desk. The said Sub-County Supervisor who was said to have the DR forms called the petitioner on his phone number **0776416700** demanding for Ugx 2,000,000/= so that he could declare him winner, which money the petitioner refused to pay.

On 29/2016 the petitioners lawyers M/s Mbeeta, Kanya and Co. Advocates wrote to the respondent demanding that the petitioner be declared the winner. The respondent has to date not obliged. They instead told the petitioner that a decision had been made to call for fresh elections since according to them the one held on 24/2/2016 had aborted. The election results were not published in the gazette of 25 February, 2016 where all results were published. On Monday 9/5/2016 the respondents Returning Officer summoned the petitioner and his competitor one Ausi Mwesigwa and told them to make a campaign program for fresh elections to be held on 29th May 2016. The petitioner is aggrieved by the decision of the respondent to organize fresh elections and the failure to declare him the winner or publish his name in the gazette.

In reply **Lugolobi Hamidu**, the respondent's a legal officer swore an affidavit in which he said that the directly elected Councilor LC 5 elections were held and conducted in accordance with the provisions of Local Government Act but that there was a riot that disrupted the collection of the results. This made it impossible for the respondent to ascertain the results on which to base the declaration of the winner of the election.

The rest of the averments in the respondent's affidavit were plain denials of allegations in the petitioner's affidavit.

At the hearing Counsel Jude Mbabali for the petitioner submitted that the election came to a conclusion at about 5:00 pm and the petitioner got all the 32 Declaration of Result forms **(marked A.1 to A.32)** which had been dully endorsed by the other candidate's agents and are not disputed by the Electoral Commission. The respondent was not declared winner only because he did not give a bribe to the returning officer. He further submitted that the Electoral Commission had alternatives under section 136 of the Local Government Act. There is no police report that the electoral materials were stolen. Under Section 53 of the Parliamentary Election Act there is an alternative of opening the boxes in the presence of a police officer not below the

rank of the Inspector of Police. Since the voting was not stopped and the Declaration of result forms were filled and signed, he prayed that his client be declared winner of the election.

In response **Mr. Kayondo Abubakar** for the respondent argued that Electoral Commission conducted the election in strict adherence to the law especially the Local Government Act Cap 243. He said that during the process of the collection of results but before they were transmitted to the tally center there was a riot in which most of the materials could not remain in the same status as they were at the polling stations. It was risky for the Electoral Commission to declare a winner basing on the D.R forms as they were presented by the two candidates to the tally center. Under section 50 of the Electoral Commission Act, the Commission exercised its special powers since there were unforeseen circumstances of the riot. A drastic decision to conduct a residual election in which the two candidates were to re-run was made. This was for purposes of making a just declaration as provided under section 135 of the Local Government Act. Counsel prayed that the court finds the decision just for the protection of the interests of all the parties in the electoral process and prayed that the court disallows the petition.

In rejoinder, **Counsel Jude Mbabali** argued that it was not risky to declare the results. There are alternatives under section 136 of the Local Government Act and section 53 of the Parliamentary Elections Act. More over the other party did not file an election petition and has never complained but it is the election commission which is struggling for him.

I have carefully considered the evidence that was adduced, the arguments of both counsel and the issues that have been raised in the case. It is common cause that there was some kind of riot in the area on the day in issue. The question relates to the stage at which the riot took place. It is the petitioner's contention that it took place after the tallying of the results and after all candidates agents had signed the Declaration of Results Forms. According to the respondent, the riot took place during the collection of the results. The petitioner attached 32 D.R forms to his petition to prove the fact that tallying had been completed when the riot took place. The respondent does not dispute the DR forms.

I have scrutinized them and note that they are all dully signed by the various presiding officers and all candidate agents. That the DR forms bear all requisite signatures evidences the fact that the electoral process had advanced to a level at which it was clear who the winner was. It is therefore not true that by reason of the riot most of the materials were not in the same status as

they were at the polling stations. It is also not true that it was risky for the Electoral Commission to declare a winner basing on the D.R forms. By their signatures the candidate agents and presiding officers showed that they were satisfied with what had taken place. There was therefore no risk in declaring what they had already witnessed.

I find that Electoral Commission's so called drastic decision to conduct a residual election in which the two candidates were to re-run was unwarranted and constituted an interference with the proper exercise of the voters Constitutional right to elect leaders of their choice. The decision was not just and was not aimed at protecting anyone's interests. This is more so since no one complained to the Commission (**there is no evidence to that effect**).

On the basis of the evidence that voting took place and the DR forms were dully signed by all concerned, and that the petitioner got the majority votes in the election, I make the following declarations;

- The petitioner was the validly directly elected L.C 5 Councilor representing Ndagwe Sub County at Lwengo District Sub-county.
- The respondent's decision not to publish the election results for the directly elected councilor Ndagwe Sub-County in the gazette and instead to call a by-election is unlawful.

I accordingly issue a permanent injunction restraining the respondent from further proceeding with the said by-election and order that the petitioner be declared the winner of the elections and be gazetted as such.

Costs to the petitioner.

Margaret Tibulya

Judge

4th July 2016.