

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT LIRA

ELECTION PETITION NO. 009 OF 2016.

OYURU ANTHONY=====PETITIONER

=VERSUS=

1. OKELLO P. CHARLES ENGOLA MACODWOGO

2. THE ELECTORAL COMMISSION =====RESPONDENTS

BEFORE HON. JUSTICE WILSON MASALU MUSENE.

RULING.

The Petitioner, Anthony Oyuru filed this amended Petition against Okello P. Charles Engola Macodwogo as the first respondent and the Electoral Commission as the second respondent.

The Amended Petition dated 21st day of April was filed under Article 68 of the Constitution of Uganda, S. 60 (2) of the Parliamentary Elections Act, 2005 and Rule 4 of the Parliamentary Elections (Election Petition) Rules.

Under paragraph 1 of the Petition, it is stated: “that your Petitioner is a person who was a candidate at the above

mentioned parliamentary election in Oyam County North Constituency

The petition continues under paragraph 2 that the Petitioner and Okello P. Charles Engola Macodwogo, George Ojwang Opota and Omodo Omodo were candidates in Oyam North

Constituency and Okello P. Charles Engola Macodwogo (1st Respondent) was declared as a validly elected vide the Ugandan gazette was attached and marked Annexure "A".

The grounds against the 1st and 2nd respondents were that in contravention and contrary to the provisions of the Constitution, Electoral Commission Act and the Parliamentary Elections Act, 2005 (as Amended).

It was further alleged that the 1st respondent personally or with his knowledge and consent or approval, committed illegal practices and Electoral offences including:-

That the 1st respondent before and during the said election with intent to either directly or indirectly influence voters to vote for him at different places in Oyam County North and at different polling stations, namely Angweta P.7, Adog Anni, Ongica Odok Market and

Widam in Angweta parish, Te-Itek in Oyam Town Council, and in other places. The 1st respondent is said to have given voters at the said places money, waragi, salt, contrary to S.68 (1) and (4) of the Parliamentary Elections Act, and that it was out of bribery that voters were influenced to vote for him.

It was further alleged that contrary to Section 80 (1) (a) and (b) of the Parliamentary Elections Act, 2005, the 1st respondent either directly or indirectly through his agents at various places adopted the use of threats and intimidation against the supporters of the petitioner, threatening them with serious reprisals, particularly exposing them to the return of the rebels of the Lord's Resistance Army under Joseph Kony.

It was alleged that that was to compel them not to vote for the petitioner for fear of being victimized and that it affected the election results in a substantial manner.

Further allegations were that ballot papers were unlawfully distributed on the eve of election day, notably 17th February 2016 to various places, and that the Resident District Commissioner openly campaigned for the 1st respondent as against the petitioner under 4(h), it was alleged that contrary to S.73 (1) and 92) of the Parliamentary Elections Act, the 1st respondent and his campaign agents particularly one Jakayo Ogile, used derogative, demeaning and defamatory words to explain to the voters the maliciously and recklessly carried pictures and showed in the Newspaper clips.

The defamatory pictures were of Hon. Ayena Odongo showing his sexuality printed in Red Paper Tabloid and electronic media. The derogatory, demeaning and defamatory words that according to the petitioner, Oyuru Anthony were to the effect that:

“You see. Is this what you elected Ayena to go and do in parliament? This is Ayena’s picture taken while fucking a woman while his colleagues are in Parliament. Is this not a great shame to all of you people of Oyam North who elected Ayena? Is this the person who you can vote for again?”

Lastly, other allegations against the respondent and his campaign agents were that they falsely told voters who had been traumatized by the effects of insurgency that Hon. Krispus Ayena Odongo who is the lead defence counsel, defending Dominic Ongwen at the International Criminal Court had told the International Criminal

Court during the pre-trial hearing that LRA Rebels had not killed anybody in Lango, even in Abok where 26 persons were killed and a lot of properties were destroyed by Ongwen.

When the election petition came up for scheduling and hearing on the 11th May 2016, counsel for the respondents Mr. Abwang Otim Mike for 1st respondent and for 2nd respondent Ms. Caroline Akware together with Abwang Otim Mike for the 2nd respondent raised preliminary objections.

Mr. Abwang Otim for the 1st respondent, Okello Charles Engola Macodwogo submitted that there is no valid and competent petition before court on following grounds:-

That according to the 1st ground of amended petition No. 9 of 2016; it is brought by a petitioner Oyuru Anthony who has no locus to institute the same. He added that whereas the heading puts Oyuru Anthony as the Petitioner, the opening paragraphs of the petition reads:-

“The Petition of Ayena Krispus Charles Odongo of C/o Katuntu & Co. Advocates,...” and under paragraph 1 states that the

Petitioner was a candidate in the parliamentary elections in Oyam North Constituency.

Further submissions were that Anthony Oyuru who appears as the petitioner in the heading has never been a candidate for parliamentary seat of Oyam North Constituency. That to state under paragraph 2 that the petitioner participated in the parliamentary election of 18th February, 2016 with Okello P. Charles Engola, George Ojwang Opota and Omodo Omodo was totally wrong and misleading.

Mr. Abwang Otim referred to section 60 (2) of the Parliamentary Elections Act, No. 17 of 2005 which provides that a petition can be filed by a candidate who loses an election and reiterated that

Mr. Oyuru Anthony was not a candidate for member of parliament and therefore never lost any election.

He added that even if we go by 2nd option of Mr. Oyuru Anthony petitioning as a voter, such a petition must be supported by signatures of 500 voters from that constituency and in a manner provided or prescribed by the regulations.

Counsel for the 1st respondent stated that there was nowhere in the amended petition No.9 of 2016 that describes Oyuru Anthony as a voter and so the petition cannot be said to have been filed under the 2nd leg of S.60 (2) (b) of the Parliamentary Elections Act.

Counsel for the 1st respondent noted that the only attempt by Mr. Anthony Oyuru to describe himself as a voter as in the affidavit, but that it should have been so stated in the main petition. And that since the affidavit in support by Oyuru supports a petitioner called Hon. Ayena Odongo Krispus, then the petitioner himself as Oyuru has no supportive affidavit of his own.

Counsel added that since the alleged supportive signatures were not necessary on the petition of Ayena Odongo who was a candidate and lost, then the alleged signatures on the petition are redundant.

Mr. Abwang Otim condemned the disconnected batches of lists of alleged signatories of supporters to the voter petition and yet some are even headed **“Names and particulars of petitioners.”**

He also pointed out other names on the lists, without signatures, which he submitted was fraudulent.

On the second affidavit of Okello Walter Ocen in support of the petition, it was submitted that he has since sworn another affidavit rejecting and or denouncing the one in support of Oyuru Anthony's petition. Counsel referred to the affidavit of Walter Okello Ocen in support of the answer to the amended petition.

Counsel for the 1st respondent also challenged the affidavit of Oyuru Anthony and wondered how it was sworn at Iceme, drawn in Kampala and commissioned in Lira. He added that those were fatal irregularities.

Counsel Abwang Otim also submitted that the amended petition was filed out of time and should have been with leave of court.

Mr. Muhwezi also for the 1st respondent supported Counsel Abwang Otim's submissions. He added that Mr. Oyuru Anthony attaches no proof that he was a candidate in the elections which petition should be dismissed.

Counsel Akware Caroline for the Electoral Commission added that the presentation of the petition was done with negligence and no due diligence on the part of counsel for the petitioner. She therefore prayed for its dismissal.

In reply, Mr. Ivan Wanume for the petitioner submitted that the petition is valid and it was filed by a registered voter, supported by over 500 signatures.

He added that where some paragraphs were reading Ayena Krispus Odongo instead of Oyuru Anthony, those were clerical errors which don't go to the root of the petition and that they could be

amended with leave of court. He referred to the case of **Mulwooza & Brothers LTD vs N. Shah & Co. LTD, Supreme Court Civil Appeal No. 26 of 2010**, to support his contention.

On supporting signatures, Mr. Ivan Wanume submitted that the supporting signatures are more than 500.

At the same time, he conceded that whereas Annexure "C" has 16 names, that there were other names and signatures which are behind and also part of Annexure "C".

Counsel for petitioner made reference to **Section 43** of the Interpretations Act which provides that where any form prescribed by any act or instrument does not affect the substance, then form should be disregarded, Emphasis was that all the names on the many lists behind Annexure "C" were aggrieved voters and that court should consider the substance.

Counsel also submitted that there was an error on the affidavits which were not commissioned. He referred to the case of **Sabu vs Roadmaster cycles, [2002], E.A 258**, stressing that irregularities in an affidavit cannot be allowed to vitiate the same. And that court has powers to order undated affidavit to be dated by court. Counsel for the petitioner also quoted the case of **Dr. Kiiza Besigye vs Yoweri Museveni & Another, Presidential Election Petition No. 001 of 2001**, where it was held that courts should take a liberal approach in the interpretation of affidavits with errors.

On the issue of the affidavit of Walter Okello Ocen being retracted in the 1st respondent's answer to the petition, it was submitted that Walter Okello Ocen was forced to do so.

Counsel also added that the issue of filing an amended petition without leave of court should not

arise as the respondents were not prejudiced and they responded.

Counsel for the petitioner concluded that the amended petition was rightly before court and that the objections raised should be overruled.

This court has carefully considered the submissions on both sides in this Application to dismiss the petition as being incompetent.

I have also read the cases cited and the provisions of the law, particularly the Parliamentary Elections Act and the Rules made thereunder.

The first and basic ground of objection was that Mr. Anthony Oyuru, the petitioner in amended petition No.9 of 2016 has no *locus standi* to institute the petition in the manner it is brought.

The heading of the petition is that **Anthony Oyuru is the Petitioner** and yet in the body of the petition, it is stated that it is the petition of Ayean Krispus Charles Odongo

The question to be paused at this preliminary stage is whose petition is Amended Petition No.9 of 2016? Is it the petition of Mr. Anthony Oyuru or Ayena Krispus Charles Odongo? It cannot definitely and for all practical purposes be of both. The two were distinct separate persons and cannot be one in two.

Secondly, the opening paragraph 1 states that your petitioner was a candidate at the parliamentary elections in Oyam North Constituency. Counsel for the 1st respondent has categorically submitted that Anthony Oyuru the petitioner was never a parliamentary candidate in Oyam North Constituency.

The candidates in Oyam North Constituency were Ayena Krispus Charles Odongo, Okello P. Charles Engola Macodwogo, George Ojwang Opota and Omodo Omodo. So to continue the pleadings under paragraph 2 of the petition that election held on the 18th February 2016 when the petitioner (Oyuru Anthony) participated with others is totally misleading and presents a lot of confusion. This is particularly when the body of the petition is Ayena Odongo Charles and the heading under the Seal of this court is Oyuru Anthony as the petitioner.

Under Section 60(2) of the Parliamentary Elections Act, a petition can only be filed by a candidate who loses an election. Since Mr.

Anthony Oyuru was not a parliamentary candidate and who did not

lose, then the petition No. 9 of 2016 as amended is incompetent

right from the word go. And even in his reply, Mr. Ivan Wanume for

the petitioner did not dispute that fact that his client, Mr. Anthony

Oyuru was never a parliamentary candidate. Instead, his argument was that Mr. Anthony Oyuru filed the petition as a registered voter.

He further submitted that except for form, the petition was supported by more than 500 voters as required under the Parliamentary Elections Act.

He cited the case of **Mulwooza & Brothers LTD vs N. Shah & Co. LTD, Supreme Court Civil**

Appeal No. 26 of 2010 to support his contention that it is the substance of the petition and not the

form which should be considered. But as Mr. Abwang Mike Otim for the 1st respondent submitted,

it is not stated anywhere in the body of the petition that Mr. Anthony Oyuru was filing the petition

as a registered voter.

Right from paragraph 1 of the petition up to 4 (a) to 4 (z), there is no mention of Anthony Oyuru as a registered voter filing the petition.

Instead and as already noted, under paragraphs 1 and 2, he states that your petitioner was a candidate together with others, which has been disapproved as false and I find the case of Mulwooza and Brothers (supra) quoted by Mr. Ivan Wanume for the petitioner not applicable to the circumstances of this case. For avoidance of doubt, the Justices of the Supreme court in the lead judgment of **Tumwesigye JSC held:-**

“Amendments are allowed by courts so that the real question in controversy between the parties is determined and justice is administered without undue regard to technicalities in accordance with Article 126 (2) (e) of the Constitution.

Therefore, if the plaintiff applies for leave to amend his pleadings, courts should in the interest of promoting justice freely allow him to do so unless this would cause injustice to the opposite party which cannot be compensated for by the award of costs, or unless the amendment allowed introduce a distinct cause of action in place of the original cause.”

The above case is not applicable in the present circumstances because Mr. Ivan Wanume has not made any application for amendment before the preliminary objections were raised and even then, the preliminary objection is raised on an already amended petition which was done out of time

without leave of court. The case was therefore quoted by learned counsel out of context.

However, and even if this court were to admit the petition of Oyuru Anthony as that of a registered voter, which I have said it is not so stated in the petition, then the format under **Statutory Instrument 141-3**, the Parliamentary Election (Prescription of forms regulations), Form EP un under the heading **"500 persons supporting the Election Petition under S.60 (2) (b) of the Parliamentary Elections Act."**

Then it goes as follows:-

"We the undersigned support the Election Petition of..... (Name of the Petitioner), who is registered as a voter in the Constituency of.....and whose voter Registration Number is.....and other particulars.

Then it has to have a serial number, names [Surname and others], signature or thumbprint of the supporters, their voter numbers, age, sex, constituency, parish, village, etc.

That is the requirement of the law which cannot be disregarded as a mere technicality. It was meant to provide for a systematic, elaborate and civilized way of presenting Election Petitions especially where 500 people are supporting a petition to challenge the victory of an elected member of parliament. It is a very serious matter and the courts of law under this era of great scientific advance not to mention technological advancement will not sit back and allow half-baked, disorganized and uncoordinated apparently hurriedly prepared list of persons, some lacking signatures and detailed

particulars as people validly supporting the Election Petition of one Anthony Oyuru.

That is unacceptable, particularly by High Court of Uganda, a court of record having unlimited territorial jurisdiction as provided under the Constitution and other supporting laws.

In the case of **Utex Industries LTD vs Attorney General, Supreme Court Civil Application No. 52 of 1995**, it was held that Article 126(2) (e) of the Constitution was not intended to wipe out the rules of procedure of our courts.

And whereas Mr. Anthony Oyuru in his affidavit refers to Annexure "C" as the list which he has attached to support the petition, Annexure "C" on the record has only 16 persons or people, and it is the only list which is commissioned by one **Owor Buga David**, Advocate and Commissioner for Oaths dated 3rd April 2016.

That is the only nearer to be authentic Annexure. Unfortunately, it has only sixteen (16) persons and not 500 as required under the Parliamentary Elections Act. The other lists of names are not commissioned as required under the law; they are not marked as Annexure "C" or part thereof and are **naked documents**.

Most of them are not headed, while other lists are under the heading of "**Names and particulars of petitioners.**" That is total anarchy of pleadings and cannot be accepted by this court. The Supreme Court of Uganda has had the occasion to pronounce itself on the importance of pleadings in the case of **Interfreight Forwarders (U) vs East African Development Bank [1990-1994] E.A 117**.

The Hon. Oder, JSC (RIP) as he then was at page 125 stated:-

“The system of pleadings necessary in litigation. It operates to define and deliver it with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the double purposes of informing each party what is the case of the opposite party which will govern the interlocutory proceedings before the trial and which at the court will determine at the trial,... thus the issues are formed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to prove the case so set and covered by the issues framed therein. A party is expected and is bound to prove the case as alleged by him as covered in the issues framed. He will not be allowed to succeed on a case not set up by him and be allowed at the trial to change his case or set up a case inconsistent with which he alleged in the pleadings.”

In this present case, can it be that looking at the double standard petition and affidavits in support one can tell whether Oyuru Anthony or for Krispus Ayena Odongo, and what case are the 1st and respondents expected to answer to?

In my humble view, the present petition or alleged petition of Anthony Oyuru does not meet the standards set up by the Supreme Court in the case quoted and so it cannot be allowed to stand.

Anthony Oyuru cannot petition as a candidate who participated in the Parliamentary Elections of Oyam North Constituency in the main petition and then swear an affidavit in support of that petition as if he has petitioned as a voter. Such double standards result into unclear, uncertain and

unpredictable pleadings which this court cannot in the circumstances allow.

The other matter to consider is the falsehoods in the affidavit of Oyuru Anthony which is not even dated. Mr. Ivan Wanume for the petitioner quoted the case of **Sabu vs Roadmaster cycles [2002] E.A 258**, where it was held that any irregularities in an affidavit cannot be allowed to vitiate the same. And that court has powers to order an undated affidavit to be dated.

Counsel for the petitioner also relied on Presidential Election Petition No.001 of 2001, Dr. Kiiza Besigye vs Yoweri Museveni and Electoral Commission.

He submitted that it was held that courts should take a liberal approach in interpretation of affidavits with errors. However, and on the basis of the same case, Mr. Mike Abwang Otim for the 1st respondent submitted that affidavits which contain falsehoods should be expunged and in this regard that of Anthony Oyuru.

One of the falsehoods in Oyuru's affidavit is paragraph 41 where he depones that his petition is supported by more than 600 voters from the constituency whose names and signatures recorded in the lists attached to the petition marked "C". However, and as court has noted already, Annexure "C" is only one list containing 16 names and not 600 as alleged. Then the affidavit is stated to have been sworn at Iceme on unknown date and month in the year 2016. This has court established that there is no Magistrates' court at Iceme, hence no Magistrate which was another falsehood, and given that no date and month were given, it is even doubtful whether the said affidavit was actually sworn or it was a statement seeking to pass out as affidavit evidence.

In the **Election Petition Appeal No. 11 of 2007, Kakooza John Baptist vs Electoral Commission & Yiga Anthony**, the Supreme court considered similar issue and Kanyeihamba JSC as he then was had this to say:- *“In the circumstances, I find this case differs from both Kiiza Besigye’s case (supra) and the Mbayo Jacob Robert’s case (supra). To condone such an unsworn statement seeking to pass as an affidavit evidence would undermine the importance of affidavit which is rooted in the fact that it is made on oath.”*

In the present case, Anthony Oyuru’s affidavit could not have been sworn at Iceme where there is no Magistrate or court. There was no one there to administer the same. It is in the circumstances rejected.

And so as submitted by Counsel for the respondent, that leaves the affidavit of Walter Okello Ocen in support of the amended petition. But even then, in the 1st respondent’s answer to the amended petition, the same Walter Okello Ocen swore affidavit stating under paragraphs 4, 5, 6, 8, 9, 10, 11 and 12 that he was deceived by Anthony Oyuru into signing the earlier affidavit as Oyuru never read and explained to him the contents.

So with the second affidavit in support of Oyuru Anthony’s petition being retracted, then the alleged petition is not supported by any affidavit as required under the Parliamentary Elections Act. The petition not supported by affidavits cannot therefore stand.

Furthermore, even if this court were to take a liberal approach and allow the amended petition to be amended further by substituting Oyuru Anthony as the petitioner instead of Ayena Krispus Charles

Odongo in the main petition, all the same it would not work. It would not work for instance where under 4(h), the 1st respondent and his agent one Jakayo Ogile are said to have used derogatory, demeaning and defamatory words to explain the malicious pictures of sex scandal printed in the Red paper Tabloid. Those applied to Krispus Ayena Odongo as a person and cannot be amended to apply to Anthony Oyuru.

The same applies to allegations about representation of Ongwen at the International Criminal Court. That was done by Ayena Odongo and cannot be substituted by Anthony Oyuru.

In fact any proposed further amendment would introduce a completely new cause of action with new and fresh allegations 1st and 2nd respondent committed against Oyuru Anthony so as to annul the election.

It is unfortunately too late for any further amendment and as was held in Epaineto vs Uganda Commercial Bank, 1071] E.A 185, “A proposed amendment which introduces a new cause of action after expiry of a period of limitation must be rejected.”

All in all, and in view of what I have outlined, I find and hold that there are too many defects in the entire petition and the supportive affidavits. They offend the Parliamentary Elections Act and the Regulations made there under.

In the circumstances, I do hereby dismiss the petition with costs. However, I decline to award certificate to two counsels as prayed by Advocates for the Respondents.

In the final analysis, the Parliamentary Election Petition No. 9 of 2016 filed by Oyuru Anthony

is dismissed.

HON. JUSTICE WILSON MASALU MUSENE JUDGE.

18/05/2016.