THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT SOROTI

ELECTION PETITION NO. 08 OF 2016

IKIROR KEVIN::PETITIONER

VERSUS

OROT ISMAEL::RESPONDENT

Ruling

The Petitioner brought this petition under Articles 80 and 86 of the Constitution of the Republic of Uganda and Section 86 of the Parliamentary Elections Act (PEA) seeking for a declaration that the Respondent was not validly elected as Member of Parliament for Kanyum County Constituency for lack of the requisite academic qualifications, an order setting aside the election results for Kanyum county constituency and directing the Electoral Commission to conduct fresh elections; an order requiring the Respondent to refund monies he has drawn while serving in the office of Chairperson LCV, Kumi District and from Parliament while using academic documents allegedly not belonging to him, costs of the petition and any other relief the court may deem fit.

The respondent denied all allegations in the petition and prayed that the petition be dismissed with costs.

The petition was filed on 22nd/09/2016 challenging an election that was held in February, 2016. Court sought the opinion of both Counsel as to whether this was

not an election petition filed out of time. Counsel Okalany for the Respondent took on the point as a preliminary objection. He submitted that the petition was filed far out of time. He cited Section 60 (3) of the Parliamentary Elections Act which provides that:

'Every election petition shall be filed within thirty days after the day on which the result of the election is published by the Commission in the Gazette.'

In the instant petition the result was published in the gazette on 31/03/2016. Counsel submitted that this petition filed five (5) months thereafter would be time barred.

Counsel for the Respondent further submitted that Rule 19 of The Elections

(Interim Provisions) Rules allow court, in special circumstances, to enlarge time. But even then, the enlargement of time can only be allowed upon application. In the instant petition there is no such application for enlargement of time and so the petition was incompetent since it was filed out of time. He cited several cases in support of his submissions including

1. *Gen. Moses Ali v. Hon. Piro Santos Eruaga*, Misc. Application No. 12 of 2001 [2011] UGHC 62.
2. *Muiya v. Nyangah and others* [2003] 2 E.A 616 (HCK).
3. *Makula International v. Cardinal Nsubuga* [1982] HCB 11.

Counsel submitted that the Kenyan case of *Muiya v. Nyangah* reviewed that of *Makula International*. The Court ruled that much as election petitions are matters of great national importance. Strict time limits are fixed for petitions and any petition filed or served out of time is a nullity. Voters want to know and

must know with expedience their representatives in Parliament with certainty hence the strictness.

Counsel for the Respondent concluded that this Petition is an afterthought and should be struck out with costs.

In reply Counsel Tebyasa Ambrose for the Petitioner contended that the preliminary objection was misconceived. That this petition was competent only that he had proceeded under a unique Law. That unlike other election petitions which are usually filed under Section 60 and Section 61 of the Parliamentary Elections Act and must be filed within 30 days by a losing candidate or registered voter supported by 500 registered voters; this instant petition was filed under Article 86 of the Constitution and Section 86 of the PEA. That section 86 above mandates the High Court to conduct an inquiry as to whether a sitting member of Parliament was validly elected. That the procedure is set out in Section 86 (3) and (4) and is not time bound to be filed within thirty days.

Counsel Tebyasa explained that the Attorney General has the first option to petition the High Court to determine the question referred to it using Section 86 of the PEA. If upon application to the Attorney General in writing signed by not less than fifty registered voters stating that a question as to whether a person has been validly elected a Member of Parliament or the seat has become vacant has arisen the Attorney General fails to petition to the High Court within thirty days after receipt of the application; any one or more of the persons who made the application may petition the High Court for determination of the question.

Counsel Tebyasa further submitted that unlike under Section 60 (3) of the Parliamentary Elections Act, the time for filing a petition under Section 86 of the Constitution begins running from the last date following the thirty days if

the Attorney General fails to petition the High Court. In the instant petition the petitioner and other registered voters first applied to the Attorney General of Uganda requesting his office to petition Court challenging the Respondent's election but the Attorney General never took any action [see Attachments marked L and M to the petition].

Counsel further submitted that unlike the other provisions limiting petitions to being heard within 30 days, Section 86 (7) mandates the High Court to hear and determine the petition within twelve months. Counsel reasoned that section 86 of the PEA was an alternative window to ordinary election petitions. That it was intended to enable voters to pull out unqualified sitting members of Parliament or where special circumstances occur for example where one becomes insane or absconds from the House. That the procedure of hearing and determining the question under section 86 of the PEA is by inquiry which is unique and has never been tested. Counsel Tebyasa implored this Court to set a precedent by accepting to hear a petition filed under this unique procedure set out in Article 86 of the Constitution.

In final reply Counsel Okalany for the Respondent submitted that any petition brought under Section 86 (3) of the Parliamentary Elections Act is subject to the provisions of this Act relating to election petitions. There is nothing like a unique procedure once one petitions the High Court.

That this is a petition by a registered voter who needs 500 signatures of registered voters in support of the petition. It is only the Attorney General who needs 50 signatures of registered voters to petition the High Court.

Counsel Okalany pointed out that the petitioner was trying to disguise an election petition based on lack of academic qualifications under Section 61 (d)

by bringing it under Section 86 of the Parliamentary Elections Act quite out of time. Counsel submitted that this is an ordinary petition which must conform to the ordinary procedure and standards of proof.

Finally Counsel argued that Parliament could not have intended to open a second window for new petitions after the 30 days. That this would open a can of worms and flood gates letting in election petitions long after elections. That Section 86 of the Parliamentary Elections Act should **not** be treated as an alternative window to the law relating to election petitions.

My Opinion

First of all, I do not buy the idea that Article 86 of the Constitution sets out the legal procedure, whether ordinary or unique, for hearing and determining an election petition. It reads

1) ***The High Court shall have jurisdiction to hear and determine any question whether-***

    a) ***A person has been validly elected a member of Parliament or the seat of a member of Parliament has become vacant; or***

    b) ***A person has been validly elected, as Speaker or Deputy Speaker or having been so elected, has vacated that office.***

2) ***A person aggrieved by the determination of the High Court under this article may appeal to the Court of Appeal.***

3) ***Parliament shall by law make provision with respect to-***

    a) ***The persons eligible to apply to the High Court for determination of any question under this article; and***

b) The circumstances and manner in which and the conditions upon which any such application may be made.

The subheading of Article 86 of the Constitution reads

"Determination of questions of membership"

The Article provides for jurisdiction of the High Court to hear and determine particular questions relating to the election of a Member of Parliament, Speaker and Deputy Speaker of Parliament. Article 86 may be read together with Articles 139 and 140 setting out the jurisdiction of the High Court.

For avoidance of doubt Clause (3) of Article 86 provides that Parliament shall by law make provisions with respect to circumstances and manner in which and the conditions upon which any such application may be made.

Parliament made the necessary law by passing the Parliamentary Elections Act, 2005 (as amended). The procedure for filing and hearing the parliamentary election petitions is set out in the Act and in the Parliamentary Elections (interim provisions) Rules (SI 141-2).

Whereas Section 86 (7) directs the High Court to determine the questions under this Section within twelve months after the petition relating to the question was lodged in the Court, the procedure relating to the trial of election petitions is set out in Section 63 of the Parliamentary Elections Act.

FILING OF ELECTION PETITIONS

Having carefully listened to the submissions of both Counsel I am of the considered opinion that election petitions are important matters that determine the political journey of a country and must therefore be handled within a

specific set period and with certainty. The law specifies who may file an election petition, where and when. The law prompts the judicial officer handling the petition on what Court must do, may do or order and gives time frames. Court may extend time within which to do certain things related to the trial and final disposal of the petition but only if the petition was filed in time. The discretion to enlarge time can only be exercised where valid proceedings exist on record. Rule 19 of The Elections (Interim Provisions) Rules reads

> ***'The Court may on 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 these rules for doing act if, in the opinion of the Court there exists such special circumstances as make it expedient to do so.'***

A valid petition must have been filed under Section 60 of the Parliamentary Elections Act. Subsection (3) of Section 60 of the Act provides that every election petition must be filed within thirty days. Any election petition filed after the thirty days is null and void. Rules for enlargement of time cannot supersede the provisions of a substantive parent Act of Parliament.

In the instant case it was argued that it is a unique petition brought under Article 86 of the Constitution and Section 86 of the Parliamentary Elections Act with a unique procedure of inquiry. That is not true and correct. I reject that reasoning of Counsel Tebyasa for the Petitioner. Every petition brought under Section 86 is subject to the law relating to election petitions in part X of Parliamentary Elections Act i.e. Sections 60-67. For avoidance of doubt Section 86 reads in part.

(1) The High Court shall have jurisdiction to hear and determine any question whether-

a) ***A person has been validly elected a member of Parliament or the seat of a member of Parliament has become vacant; or***

b) ***A person has been validly elected as Speaker or Deputy Speaker or having been so elected, has vacated that office.***

2) ***A person aggrieved by the determination of the High Court under this section may appeal to the Court of Appeal.***

3) ***<u>Subject to the provisions of this Act in relation to election petitions,</u> and to the provisions of article 137 of the Constitution, the Attorney General may petition the High Court under article 86 of the Constitution for the determination of the question referred to in that article. (emphasis mine)***

My understanding of this section is that it provides for the High Court as the Court of competent jurisdiction in matters relating to election petitions. It provides for appeals in the Court of Appeal and the Supreme Court emphasizing expedience. With all due respect, Senior Counsel Tebyasa did not properly understand the provisions of subsections (3) and (4) of Section 86 of the Parliamentary Elections Act. If he did, then he deliberately tried to mislead Court. The petitions under this section <u>are subject to</u> the other sections of the law relating to election petitions. Simple and clear.

The only new procedure introduced is to give at least 50 voters an option to apply to the Attorney General requesting the Attorney General to apply to the High Court to determine the question whether a person has been validly elected a Member of Parliament or the seat of a Member of Parliament has fallen vacant. Questions as to the constitutionality or legality of any Act of Parliament or any other law or actions

done during an election would ordinarily go to the Constitutional court under article 137 of the Constitution. But Article 86 picks out specific questions relating to elections which should go to the High Court as a court of first instance instead of the Constitutional Court. My understanding of this subsection is that it allows the Attorney General or any other petitioner with a question of law on an election to file petition in the High Court. But the Attorney General must be moved by an application in writing signed by not less than fifty registered voters from the constituency concerned.

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The said subsection reads:-

> ***'If upon application to the Attorney General in writing signed by not less than fifty registered voters stating that a question referred to in subsection (1) has risen stating the ground for coming to that conclusion the Attorney General fails to petition to the High Court within thirty days after receipt of the application, any one or more of the persons who made the application may petition the High Court for determination of the question.'***

The application may be made anytime from the date election results are announced and not necessarily gazetted. Once votes are counted and one is announced as a winner the voters may apply to the Attorney General to petition the High Court to interpret the law or process or procedure under which a Member of Parliament was elected or has ceased to be a Member of the Parliament. The language used is in the immediate past i.e. to hear and determine whether a person **has been** validly elected a Member of Parliament or the seat of a Member of Parliament **has become** vacant. One need not wait for publication of a gazette on a question of law. The Attorney General must be moved by the interest of registered voters who are not less than fifty in number and must fulfill all the other requirements of the law under article 137 of the Constitution.

Taken from that point of view, by the time the result of an election or act throwing out a Member of Parliament is published by the relevant institution in the gazette, voters will have been advised on the question of law. If the Attorney General fails to petition the High Court on question of Law then any one of the registered voters may petition.

The petitions on a question of law are not intended to substitute for substantive election petitions. Indeed the Attorney General is not an eligible petitioner under Section 60 of the PEA. Any eligible person who wishes to challenge the election of any candidate must revert to the provisions of the PEA relating to election petitions so that the High Court is able to inquire into the substantive issues and grant a remedy. There is no unique procedure allowing the Attorney General to enter the arena of challenging the Membership to Parliament of a Member of Parliament. It is only the losing candidate or registered voters who can file an election petition and the procedure has not been changed.

If it is an election petition brought by a registered voter, like in the instant case, challenging the election of a Member of Parliament, the petitioner must have the support of at least five hundred registered voters. I do not see those signatures in support of this petition!

If it is the election petition against a representative of a special group or a Speaker or Deputy Speaker of Parliament, a lesser number of registered voters within that Electoral College would have been realistic. But the Law as it is now remains a requirement of support of at least five hundred registered voters. I stand to be corrected. Infact court has already advised the workers to question the legality of the law under which the worker's representatives were elected or can be recalled when they are less than 500 registered voters. It looks like there is a lacuna in the law. [See ***Mutambo Wephukulu and 5 Others v. The Electoral Commission and 5 Others*** Election Petition No. 06 of 2016]. Perhaps this is one good area where section 86 of the PEA would come into play.

The instant election petition brought in disguise under section 86 is based on the wrong law and cannot stand in law.

Enlargement of Time

For any person or authority to argue that one can file a parliamentary election petition after 30 days or enlarge time for filing an election petition under the rules when it is not provided for under the Parent Act would be misleading.

I find support for my opinion in one judgment of my senior brother Justice Andrew K. Bashaija in **Kakumba Abdul- Versus- Kabajo Kyewalabye and Electoral Commission,** M.A NO. 133 of 2011**.** Rule 19 in the instant case is redundant in respect of filing petitions. It is only applicable in instances where the Court's discretion is exercisable upon the proceedings prior to a subsequent application seeking to extend the time fixed by the Rules for doing any act. In the instant petition there is no application filed for extension of time and the Counsel for the Petitioner wrongly insisted that this petition was not time barred.

Essence of Time in Election Petitions

As rightly argued by Counsel for the Respondent, election petitions are matters of great importance to this Country. The Constitution provides that people shall express their will and consent on who shall govern them and how they should be governed, through **regular**, free and fair elections of their representatives or through referenda.[Article 1 (4) of the Constitution]. 'Regular' means that there must be well known dates of Primary elections, nominations and General elections. Once elections are over we enter a set period of election petitions. The Parliamentary Elections Act in part X deals with election petitions. They must be filed in the High Court within thirty days. The Rules set the procedure for trials to hear and determine petitions within given time frames with expedience. Sections 60-67 and Sections 86 of the Parliamentary Elections Act read together with the Rules made under the Act point to one fact - time for petitions is limited

and not indefinite. We cannot be politicking all the time. The people want to know their legally elected representatives in the shortest time possible. The Members of Parliament want also to be certain and sure that there is no petition against them. The President may also want to form a government and appoint Members of Cabinet and other political offices. The sooner petitions are done with the better. Once all the parties are certain the country moves away from the stage of politicking to forming a government for running more serious business. It would defeat the principles of democracy to keep the nation in election politics, political rallies or election petitions all the time endlessly. Each stage of elections must be dealt with at the set time and be closed off with certainty. We cannot have election petitions throughout the five year term with no serious government business.

Election petitions must be filed within the set time. Thereafter all election petitions are locked out. Just like Christians believe that once the wedding is done no caveat can undo the holy matrimony, no election petition should be entertained out of time even if one is making serious allegations of an illegality or non-qualification of the political candidate. Indeed political petitions are not an exception to the general holding that court cannot close its eyes to an illegality. No single illegality has yet been proved at the stage of filing an election petition. All are mere allegations at this stage.

This court is of the strong opinion that the principle set out in **Muiya Versus Nyangah and Others (supra)** that election petitions are governed by a strict law on time for certainty is good Law.

This election petition filed under the wrong law and coming 5 months late is a second thought. It is not disclosing any cause of action. It is null and void and is struck out with costs.

BATEMA N.D.A.
JUDGE
Date: 24th .11.2016