

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT CENTRAL CIRCUIT AT NAGURU**

**ELECTION PETITION NO. 02 OF 2016**

**ABIRIG Y. A. IBRAHIM ..... PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL COMMISSION:::::::::: RESPONDENT**

**BEFORE: HON. JUSTICE DAMALIE N. LWANGA**

**JUDGMENT**

This is an appeal against the decision of the Respondent to reverse the nomination of the Appellant/Petitioner to contest for the elective position of Member of Parliament (MP) for Arua Municipality in the Parliamentary Elections of 18/2/16. The appeal was brought by way of petition under Articles 64, 28(1) & (12), 42, 44(c) and 50 of the Constitution as amended; Sections 4-10 of the Parliamentary Elections, (Appeals to the High Court from Commission) Rules; Sections 33, 36 and 39 of the Judicature Act; The Parliamentary Elections Act 2005, and Section 98 of the Civil Procedure Act as amended. It seeks the following orders:

- a) That the decision of the Commission be set aside.
- b) A declaration that the Petitioner was rightfully nominated as a candidate for the elective position of Member of Parliament Arua Municipality, Arua District and thus be maintained so.

A permanent injunction restraining the Respondent and its agents from interfering with the nomination and election of the Petitioner.

- c) An order to allow the Petitioner to continue with campaign and election processes



6. That he was not given a fair hearing and or opportunity to prepare his defence to the allegations against him by the Commission, and he only learnt about the decision when it was circulated on social media.
7. That the Petitioner has been grossly prejudiced and he is likely to suffer irredeemable losses and colossal damages which cannot be compensated by any award of damages if he is denied the opportunity to contest in the Parliamentary Elections of 18/2/16.
8. That it is just and equitable that this court grants this application and the orders sought therein, and makes necessary orders to meet the ends of justice.

The Petitioner filed a supplementary affidavit in support of the Petition, sworn on 11/2/16 where he averred;

1. That the complaint against him is incompetent having been made to the Respondent prior to the nomination process that occurred on 2<sup>nd</sup> – 3<sup>rd</sup> December 2015.

2. That the decision of the Respondent is void for having been made in disregard of an order of this Honourable Court issued in Misc. Application No. 1018 of 2015 by Justice Masalu Musene dated 30<sup>th</sup> September 2015.
3. That upon the presentation of the court order and the Respondent's request for explanation as to whether the Order applied to it, the learned Judge issued a letter dated 5<sup>th</sup> January 2016, addressed to the Respondent clarifying that the Court Order dated 30<sup>th</sup> September 2015 equally applied to the Respondent.
4. That by reason of the matters aforesaid the Petitioner has been and stands to be greatly injured in his right to participate in the electoral process and shall suffer irreparable loss and damage if the Respondent is not restrained.
5. That it is in the best interest of justice that this Election Petition is allowed.
6. That the balance of convenience favours the Petitioner, who is already nominated, has been campaigning and is left with 5 days to the Election Day.
  7. That the Respondent shall suffer no prejudice since the Petitioner if elected successfully can be removed by an Election Petition duly filed after the gazette and declaration by the Respondent, yet the Petitioner and the electorate will have no remedy if the Respondent's decision stands.
8. That the ballot papers for the election were procured and delivered to the Respondent before the impugned decision was made.

At the hearing the Petitioner/Appellant was represented by Mr. Edwin Karugire and Mr. Usaama Sebuufu. The Respondent never filed any affidavit in reply to the petition, and never appeared on the hearing date, which had been fixed by consent of Counsel for both parties on 15/2/16 when Misc. Application No. 49 of 2016 for a temporary injunction was disposed of, and a supplementary affidavit in support of the Petition was filed and served upon the Respondent as indicated in the affidavit of service sworn by Fred Kyakwambala on 22/4/16, and the attached acknowledgement of service. The hearing therefore proceeded in absence of the Respondent.

But the hearing took place after the Parliamentary Elections had already taken place, therefore some of the grounds and orders sought were rendered irrelevant; and Counsel for the Petitioner/Appellant argued only three grounds; 4 (b), (d) and

In his submissions on grounds 4 (d) & (e) learned counsel contended that the manner in which the nomination of the Petitioner/Appellant was cancelled was illegal, irregular and in breach of his Constitutional rights, because evidence shows that he was not served with the particulars of the complaint but was only invited for a meeting to interface with the Commissioners; and his prayer for time to make a response was rejected. Further the decision of the Respondent to reverse the nomination of the Petitioner/Appellant which was taken on 3/2/15 was in total disregard of the Order of this court which was issued in Misc. Application No. 1018 of 2015 dated 30/9/15, which was presented to the Respondent; and the letter of clarification by the same Judge dated 5/1/16. He submitted that the Respondent's action amounted to contempt of a court order.

Concerning grounds 4(b) & (e), Mr. Karugire submitted that the Respondent's decision was unlawful for breach of the principles of natural justice because the Petitioner was not served with any particulars of a complaint against him, and his prayers to be given time to prepare a response were rejected. He finally prayed that the Petition be allowed.

**Learned counsel cited the authorities of *Ambrit Goyal Vs Harichand Goyal & 3 Others, Court of Appeal Civil Application No. 109 of 2004; Lukwago Erias Lord Mayor & KCCA Vs Attorney General & 3 Others, Civil Division HCMA No. 94 of 2014; Muriisa Nicholas Vs Attorney General & 2 Others; and Kampala University Vs. National Council For Higher Education, High Court Misc. Cause No. 53 of 2014.***

I have perused the petition/appeal; both affidavits; the submissions of Counsel for the Petitioner/Appellant and the authorities cited. The evidence of the Petitioner/Appellant was not challenged. It is trite law that evidence which is not controverted is deemed admitted. In the case of ***Samwiri Massa Vs. Rose Achieng (1978) HCB 297*** it was held that where the facts as adduced in the affidavit evidence are neither denied nor rebutted, they are presumed to be admitted by the opposite party.

The evidence shows that the decision of the Respondent to reverse the nomination of the Petitioner/Appellant for the elective position of MP, Arua Municipality, Arua District was based on a complaint regarding his academic documents that had formed the basis for his nomination. However, on 3/2/16 when that decision was taken there was a court order to the effect that the

Petitioner/Applicant had attained the equivalent of Uganda Certificate of Advanced Education (UACE); and that he qualifies to contest for the NRM primaries for Arua Municipality. Although that order had been directed to the Chairman Electoral Commission of the NRM Political party, the same Judge who made that order on 5/1/16 wrote a letter clarifying that the order applies also to the Respondent as the court had already verified and confirmed the academic qualifications of the Petitioner/Appellant to be an equivalent of Uganda Advanced Certificate of Education.

Regarding grounds 4 (d) & (e), the Respondent is a Government body that is duty bound to give effect to court orders in its operations. However, it went against the court order and made a decision to reverse the nomination of the Petitioner/Appellant as a candidate for the elective position of, MP Arua Municipality. If the Respondent had any issue with the court order they should have taken action to have it varied or set aside before taking a decision in contempt of the order. It was not open to the Respondent to simply ignore the court order yet it had knowledge about it. A court order must be respected. This is what the Court of Appeal had to say in the case of **Ambrit Goyal Vs. Harichand Goyal (supra)**:

*“A court order is a court order. It must be obeyed as ordered unless set aside or varied. It is not a mere technicality that can be ignored. If we allowed court orders to be ignored with impunity, this would destroy the authority of judicial orders which is the heart of all judicial systems  
..... In our jurisprudence court orders must be respected and complied with. Those who choose to ignore them do so at their own peril”.*

The issue was also considered in the case of Wild Life Lodges Ltd. Vs. County Council of Narok & Another (2005) Vol 2 EALR p. 344 which was cited in Lukvago Erias Lord Mayor & KCCA Vs Attorney General & 3 Others

(supra) and the court held:

*“A party who knows of an order whether null or void, regular or irregular cannot be permitted to disobey it. It would be most dangerous to hold that suitors or their solicitors could themselves judge whether an order was null or valid; whether it was regular or irregular an ex parte order by the court is a valid order like any other. To obey the orders of court is to obey an order made both ex parte or inter partes. Where a party considers an ex parte order to cause him undue hardship, a simple application will create an opportunity for an appropriate variation to be effected and therefore there will be no excuse for a party to disobey a Court Order merely on the ground that it had been made*

*exparte. ”*

In the case of **Muriisa Nicholas Vs Attorney General & 3 Others** (supra) the court held that a state organ or agency or person legally and duty bound to give due compliance must do so because court orders cannot be issued in vain; and that the whole essence of judicial administration is lost if orders issued by court through the set judicial process in the normal functioning of courts are not complied with in full by those targeted and/or called upon to give due compliance/effect. The learned Judge held:

*"As was held in the case of Housing Finance Bank Ltd. & Anor Vs. Edward Musisi (supra) (on page 11), a party who knows of an order regardless of whether in the view of that party the order is null or valid, regular or irregular cannot be permitted to disobey it by reason of what that party regards the order to be. It is not up to that party to choose whether to comply or not to comply with such an order. The order must be complied with in totality, in all circumstances by the party concerned, subject to the party's right to challenge the order in issue, in such a lawful way as the law permits.*

*I am equally not persuaded by the argument that because the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were not parties, they were not required to give effect and/or implement or comply with the orders in issue. I believe that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were, in no doubt, aware of the existence of the court orders.*

*My believe is based on the fact that the 1<sup>st</sup> Respondent is specifically vested with a clear mandate under Article 189 (supra) as being responsible for all actions of Local Governments in Uganda, while the 2<sup>nd</sup> Respondent, whose Chief Administrative Officer is a servant of the 1<sup>st</sup> Respondent, was specifically made aware through a letter 'Annexure D ' by the Applicant's Counsel.*

*The two being State agencies/organs cannot shy away from the responsibility placed upon them under Article 128 (3) (supra) by merely deposing that they were not made parties or were unaware of the court order. According to the Bashaija John Kazoora case (supra), court orders are issued in rent, and organs and agencies and / or persons legally and / or constitutionally mandated to implement them are deemed to take cognizance of them. ”*

Paragraph 4 of the supplementary affidavit states that it was upon the Respondent's request for explanation as to whether the court order dated 30<sup>th</sup> September 2015 applied to it that the learned Judge wrote a letter dated 5<sup>th</sup> January 2016, addressed to the Respondent clarifying that the court

order equally applied to the Respondent. The Respondent therefore had knowledge of the order and only chose to ignore it when it made the impugned decision to reverse the Petitioner's nomination. I accordingly find that the decision taken by the Respondent on 3/2/16 to reverse the nomination of the Petitioner/Appellant to contest for election for the position of MP for Arua Municipality was null and void.

Concerning grounds 4(b) & (e); the uncontroverted evidence of the Petitioner is that he was not given a fair hearing as he was never served with the particulars of any complaint against him, and he was denied the opportunity by the Commission to prepare his defence to the allegations when he got to know them. This was a violation of his right to a fair hearing, which is a Constitutional right enshrined in **Articles 28(1), 42 and 44(c) of the Constitution.**

**Article 42 of the Constitution provides:**

*“Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her. ”*

**Article 28(1) reads:**

*“Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the right to fair hearing. ”*

All in all I find and hold that the decision taken by the Respondent on 3/2/16 to reverse the nomination of the Petitioner/Appellant was unlawful, a nullity & void abinitio. It is therefore, set aside. It is declared that the Petitioner was rightly nominated as a candidate for the elective position of Member of Parliament for Arua Municipality Arua District

The costs of this petition are awarded to the Petitioner.

Dated the 11<sup>th</sup> day of May 2016



**DAMALIE N. LWANGA**

***JUDGE***