

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT JINJA

ELECTION PETITION NO 5 OF 2016

KAWOMBE

LAMEKA.....

.....PETITIONER

VERSES

1. KAFEERO SSEKITOLEKO ROBERT

2.ELECTORAL

COMMISSION.....

.....RESPONDENT

-

BEFORE: HON.JUSTICE BENJAMIN KABIITO.

RULING

By petition filed on 31st March 2016, the petitioner seeks orders for the nullification of the 1st respondent's nomination and subsequent victory as a Member of Parliament for Nakifuma Constituency and for the 2nd respondent to organize a bi-election for the said constituency.

The petition is grounded under Section 15 (1),(2), (3) (4) & (5) of the Electoral Commissions Act, Cap 140 of the Laws of Uganda, section 4 (c) of the Parliamentary Elections Act, as amended, and other relevant provisions of the Constitution of the Republic of Uganda.

By affidavit dated 31st March 2016, the petitioner complains that the 1st respondent lacked the requisite qualifications of a minimum formal education of Advanced Level Standard or its equivalent for nomination and election as a Member of Parliament.

The petitioner complains further that the 2nd respondent nominated and later declared the 1st respondent as the Member of Parliament for Nakifuma Constituency, without the said qualifications.

In his answer to the petition, the 1st respondent contends that this petition is - incompetent, frivolous, vexatious, bad in law, incurably defective, misconceived and an abuse of the court process as there is no decision made by the 2nd respondent to be appealed against and no known compliant relating to the 1st respondent which was lodged by the petitioner to the 2nd respondent out of which the instant proceedings arise and the 1st respondent intended to raise preliminary objections to have the petition struck out / or dismissed with costs.

By affidavit dated 6th April 2016, the 1st respondent contends that there was no decision made or taken in terms of which the petitioner has a right to prosecute an appeal in terms of section 15 of the Electoral Commissions Act, Cap 140 of the Laws of Uganda.

The 1st respondent contends further that considering that he had been declared and gazetted as the duly elected Member of Parliament for Nakifuma Constituency, by the 2nd respondent, the petition as instituted before this court, under the provisions of section 15 of the Electoral Act, was misconceived and incompetent.

On its part, the 2nd respondent, in its answer to the petition contends that the petition as instituted is incurably defective as it does not arise out of a decision that it made in the course and management of the electoral process for the said constituency.

In his submissions to the court, on a preliminary point of law, the 1st respondent repeats the contention that the petitioner has no cause of action to institute this petition for the same reasons as set out in his affidavit.

Counsel for the 1st respondent has cited the case of *Kafeero Sekitoleko Robert vs Mugambe Joseph Kifomusana* EP No.6 of 2011, where Mukasa J, (As he then was), considered the import of section 15 of the Electoral Commissions Act, amongst other issues that are relevant to the resolution of the points of law before the court.

In its submissions, the 2nd respondent contends that the petitioner has not filed this petition as a losing candidate in terms of the provisions of the Parliamentary Elections (Interim Provisions) Rules, but as if it was an appeal against a decision of the Electoral Commission, that was not attached.

The petitioner has contended in response to these submissions that the petition is properly before the court as it is based on the ground of lack ,of academic qualification on the part of the 1st respondent, in terms of section 4(C) of the Parliamentary Elections Act and that the court should deal with the petition as instituted.

The petitioner has cited the case of *Labejah Bob Williams vs Independent Electoral Commission* EP No.2 of 2015 where the issue of the lack of academic qualification was considered by Mutonyi), in terms of Article 61(l)(f) of the Constitution and section 15 of the Electoral Commissions Act.

The distinguishing fact in the *Labejah* case is that the court considered the import of Section 15 of the Electoral Commissions Act, before the conduct of the elections while in the case before the court, the petitioner has cited the said provisions after the conduct of the elections and the declaration of results.

I have carefully considered the pleadings filed in this petition, the submissions of all the parties in this petition, and the authorities cited in the resolution of the preliminary points of law raised in this matter.

Before I consider the merits of the submissions there are two matters that need to be dealt with at the onset.

First, I note that there are no such provisions of the law as Section 4(c) of the Electoral Commissions Act as has been cited by the petitioner for this petition.

As has been conceded by the petitioner, it is the case that the petitioner intended to cite section 4(1) (c) of the said Act, as the one applicable to this petition.

The court will on its own instance make a correction of the error appearing on the face of the record to read the correct citation of the provisions of the law as section 4(1)(c) of the Act, relating academic qualification for Member of Parliament,

Second, the petitioner has purported to attach to his submissions on the preliminary points of law, a letter from his lawyers, Ms. Ayebazibwe-Makorogo & Advocates dated 8th December 2015, addressed to the Chairman of the Electoral

Commission, entitled "A REQUEST TO INVESTIGATE THE ACADEMIC QUALIFICATIONS OF KAFEERO SEKITOLEKO ROBERT AND LUKOOYA MUKOOME FRANCIS, THE PARLIAMENTARY CANDIDATE FOR NAKIFUMA COUNTY."

With respect, it is improper for the petitioner to seek to smuggle onto the record of the court, this document, in this manner that he has done.

This document could only have been introduced on the record of the court by way of affidavit that is read in open court, in terms of rule 15(1) of the Parliamentary Elections (Interim Provisions) Rules.

In the result and for the reasons stated, this document together with the Guidelines for Nomination of candidates is struck off the record of the court.

Coming now to the merits of the preliminary objections, as raised it is the case that one of the functions of the Electoral Commission is the authority to hear and determine election complaints arising before and during polling as set out in Article 61(1)(f) of the Constitution.

The Article reads thus;

"The Electoral Commission shall have the following functions;

"To hear and determine election complaints arising before and during polling."

A plain and ordinary interpretation of this clause of the words "*Before*" and "*During*", connote that this mandate does not extend to the activities of the electoral process that relate to the final outcome and the declaration of results and the winner of such an election by the Electoral Commission.

Indeed, Section 15(1) & (2), of Electoral Commissions Act provides for the mandate of the Commission to resolve complaints and appeals, during this restricted period of time of an electoral process. _

It reads thus;

"Any complaint submitted in writing alleging any irregularity with any aspect of the electoral process at any stage, if not satisfactorily resolved at a lower level of authority, shall be examined and decided by the Commission ; and where the irregularity is confirmed, the commission shall take necessary action to correct the irregularity and any effects it may have caused-

"An appeal shall lie to the High Court against a decision of the commission confirming or rejecting the existence of an irregularity."

In my view, the rationale for such a provision is to empower the commission to deal with any complaints, administratively and with expedition in order not to bog down the electoral process which is time sensitive in nature and with one process . graduating into another process until the entire process is completed and declarations of results made.

After one process is completed and the next embraced, a party to such a process cannot go back to the completed process but must deal with and the next phase[^] of the electoral cycle, if such party wishes to challenge the final outcome of such an election.

In respect to an appeal being prosecuted under sub-section 2 of section 15, of the Electoral Commissions Act, the governing rules are set out in Parliamentary Elections (Interim Provisions) (Appeals to the High Court from Commission) Rules.

Under these rules, a petition is defined as "a petition authorized by section 15 of - the Act, while "Respondent" means the commission and any candidate or person whose conduct is alleged to have caused an irregularity."

In this petition, the petitioner needed to demonstrate that he is a candidate affected by an order of the commission with regard to any alleged irregularity and that arising there from, he had a right to petition in accordance with section 15 of the said Act.

Further, the petitioner needed to provide details of the orders understood to have been given by the commission relating to the alleged irregularity or irregularities, whether confirmed or rejected by it, and of any measures taken by the commission to correct such an irregularity, if any, and the effects of those

measures if any that are relied upon in support of the petition brought to the court.

With respect this petition has not been brought in terms of section 15 of the Electoral Commissions Act and rule 4 of the applicable rules.

Given that the 2nd respondent declared the 1st respondent as the duly elected member of Parliament for Nakifuma Constituency, and gazetted the results, in the Uganda Gazette of 3rd March 2016, it is only a petition, grounded under Sections 60 and 61 of the Parliamentary Elections Act, that could be brought before the court to challenge any such declaration as has been made.

The 1st respondent being a person whose election a complaint is being made by a petition, the only petition that an aggrieved person could institute is one under Sections 60 and 61 of the Parliamentary Elections Act.

In the result, and for the reasons stated, this petition is misconceived, incompetent and invalid.

The petition is dismissed with costs to the 1st and 2nd respondents.

Orders accordingly,

BENJAMIN KABIITO

JUDGE

30/5/2016

