

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT JINJA**

**ELECTION PETITION NO. 0019 OF 2016**

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**WANYAMA GILBERT MACKMOT.....PETITIONER**

**VERSUS**

10 **1. HISA ALBERT**

**2. THE ELECTORAL COMMISSION.....RESPONDENTS**

**RULING**

**BEFORE THE HON. LADY JUSTICE EVA. K. LUSWATA**

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The petitioner filed this petition on 6/5/2016 contesting part of the result of the election of the 1<sup>st</sup> respondent as the chairperson of Sigulu Islands sub-county, Bukooli Islands County, Namayingo District. The petitioner is represented by Lule K. Ben, while Geoffrey Komaketch appeared for the 1<sup>st</sup> respondent and, Kevin Amujong for the 2<sup>nd</sup> respondent. At its commencement, counsel for the 2<sup>nd</sup> respondent raised two preliminary points for determination, to wit: -

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[1] The Petition is invalid as fees of UGX 150,000/= was not paid.

[2] The Petition is incompetent and improperly before this court on ground that it is accompanied by a defective affidavit.

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The parties were directed to file written submissions.

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In her submission, counsel for the 2<sup>nd</sup> respondent citing the authority of **Otim Nape George William vs. Ebil Fred & Electoral Commission [High Court Election Petition No. 0017 of 2011]**, argued that insufficient fees were paid as filing fees which contravened Rule 5[3] of the Parliamentary Elections [Interim Provisions Rules], SI 141-2 [hereafter the Rules], meaning that the petition was improperly before court. She asserted that only Shs.100,000/= was paid, yet the statutory requirement is for Shs.150,000/=. In her view, that was sufficient for the court to rule the petition incurably defective and prayed it to be struck off with costs.

Counsel for the petitioner disagreed. He conceded that Shs.100,000/= was paid as filing fees in the Bank. That following an assessment by the court cashier, an additional Shs.150,000/= was paid and received by the latter. He argued that the law cited for the 2<sup>nd</sup> respondent was not applicable, the governing law being the Local Government's Act Cap. 243 [hereinafter LGA] that made no provision for the payment of fees that the 2<sup>nd</sup> respondent alludes to. He confirmed that section 172 of the LGA only made provisions for the Electoral Commission [EC] to organize elections. He argued further that the case of **Otim Nape George William [supra]** was distinguishable as one dealing with Parliamentary and not Local Governments elections, as was the case here.

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In rejoinder, 2<sup>nd</sup> respondent's counsel submitted that only Shs.100,000/= was received by the Bank in line with the proper procedures laid down for payments to government of non-taxable revenue. She stressed that the payment of Shs.150,000/= as security for costs has no basis in law, and as is suspected as having been fraudulently entered on the record. She added that the petitioner could not deny the applicability of the Parliamentary Elections Act Cap 17/2005 [hereinafter the Act] since his own petition was presented under that same law. That in particular, Section 172 of the LGA makes references to general provisions for elections. Much of her arguments in rejoinder were given while relying on the recently decided case by this Court in **Bandibubi Boniface & 3 others vs. Sserwanga William Tom & Electoral Commission – [High Court Jinja Election petition No. 0024/2016]**.

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One of the main objectives of the Local Government's Act Cap. 243 is to provide for the election of Local Councils. Section 172 of that Act, opened up for the provisions of [*inter alia*] the Parliamentary Elections Act to apply with modifications to elections of Local Councils. The petitioner's counsel argued that that mandate extended only to the conduct of elections by the Electoral Commission, and not, payment of fees as is the case here. I disagree and the following are my reasons.

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Local Government Council elections are generally provided for under Part X of the LGA, and the commencement and trial of petitions with respect to LC.III Chairpersons, are covered by Sections 138 – 146. Under section 138, an aggrieved candidate may petition the High Court to

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contest an election. Filing of any action in this court would naturally attract the payment of a filing fee, the specifics of which are not covered in the LGA or any of the Rules under it. For that reason, Section 172 would come into play to cover that lacunae by directing such petitioner to the Parliamentary Elections Act. Indeed, as 2<sup>nd</sup> respondent's counsel pointed out, this petition was premised *inter alia* under the Parliamentary Elections Act. It would therefore be absurd and contradictory for the petitioner's counsel to argue that the Act makes no provision for payment of court fees yet, he admits payment of two categories of fees with respect to filing the petition. Thus contrary to submissions made for the petitioner, this court will have recourse to the Parliamentary Elections Act, with reference to the issue raised with respect to filing fees.

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According to Section 5[3] of the Parliamentary Elections [Interim Provisions] Rules SI 141-2, [hereinafter the Rules] the prescribed fee at filing of an election petition is Shs.150,000/=. It will be issue for the court to decide whether that provision is mandatory or merely directory.

15 I am in that respect keen to refer to the decision of the Court of Appeal in **Edward Byaruhanga Katumba vs. Daniel Kiwalabye Musoke [Election Appeal No. 2/1998]** in which a question was raised as to whether Section 143 LGA is mandatory. The Justices of Appeal following the authority of **Secretary of State for Trade & Industry vs. Langridge [1991]3 ALL ER** quoted a passage from **The Smith's Judicial Review of Administrative Action 4<sup>th</sup> Edition 1980 pp.**

20 **142-143**, which is relevant to the facts here that: *“When Parliament prescribes the manner or form in which a duty is to be performed or power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The court must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as*  
25 *directory, in which case disobedience will be treated as irregularity not affecting the validity of what has been done [though in some cases it has been said there must be ‘substantial compliance’ with the statutory provisions if the deviation is to be excused as a mere irregularity].”*

30 In connection to the facts here, Parliament did prescribe the consequences of non-payment of the filing fee of Shs.150,000/=. According to Rule 5[4] “If the fee is not paid, the petition shall not

be accepted.” That section implies that the jurisdiction of the court is ousted where no or insufficient fees are paid and the court cannot formulate any criteria or exercise her jurisdiction to treat the section as merely directory.

5 Petitioner’s counsel admits that Shs.100,000/= was paid in the Bank as filing fees. An additional shs.150,000/= was paid to the High Court cashier. The above admission would mean that the filing fees would fall short by Shs.50,000/= and this in my view, would contravene the law in material particular. The question therefore would be; was the additional payment of Shs.150,000/= made on the same date the petition was filed, amount to filing fees?

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A copy of the acknowledgement attached to the petitioner’s submissions indicates an acknowledgment of receipt dated 6/5/2016 headed “Election Petition No. 19/2016, justifiably this very one. It is in respect of payment of Shs.150,000/= by Wanyama Gilbert Makmot [the petitioner] and in respect of “election petition security”. It is signed by one Akeru Daniel for the

15 Deputy Registrar Jinja High Court on 6/5/2016.

In my view that payment cannot be interpreted to be payment of court fees and the following are my reasons; Firstly, it clearly states that it is paid in respect of security for the petition, a payment not known in this area of law, unless where the respondents have sought and received a court order for security of costs which is not the case here.

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Secondly, the payment, if it was made, contravenes the provisions of the Treasury Accounting Instructions 2003, created under Section 7[2] of the Public Finance and Accountability Act, which makes provisions for compilation, management and safety of public monies and resources of Government.

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The accounting officer of this court is the Deputy Registrar [appointed as a sub-accounting officer]. However for matters of revenue collection, each court has a designated cashier, who is empowered to make assessments of *inter alia* filing fees of court actions to be paid as Non-Tax Revenue [NTR]. All assessments made are to be paid in full into a designated bank. Any other payment cannot qualify to be a payment duly made to the Government of Uganda. I know

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counsel for the petitioner is aware of that fact because, in making the payment of Shs.100,000/=, he followed that procedure and, a receipt was duly issued by the Diamond Trust Bank, George Street Branch.

5 It is not clear why the payment of Shs.150,000/= was made directly to court purportedly on behalf of the Deputy Registrar of the court. Even if it were so made, that officer has no authority to receive payments in cash, at the court. Whether or not that payment was smuggled into court subsequent to filing the petition as suspected by 2<sup>nd</sup> respondent's counsel, would not matter. It is a payment unknown and contrary to law.

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I would thus conclude that only Shs.100,000/= was paid and not the prescribed fee of Shs.150,000/=. The High Court has previously in the cases of **Otim Nape George William [supra]** and **Bandibubi Boniface & 3 Others [supra]** already chosen to consider the provisions of Section 172 of the Parliamentary Elections Act to be mandatory. I would find both authorities  
15 persuasive and have no reason to depart from either Judge in their findings. Thus this petition is an abuse of court process and incompetent.

For the above reasons, I would find no reason to investigate the merits of the second objection. The affidavits filed with an election petition are part and parcel of it. They cannot stand where  
20 the petition, is deemed to be defective.

I thereby move to allow the first objection. The petition is struck off the record with costs to the 2<sup>nd</sup> Respondent.

25 I so order.

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**EVA K. LUSWATA**

30 **JUDGE**

**19/10/2016**