

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
IN THE MATTER OF THE PARLIAMENTARY ELECTIONS ACT NO 17/2005
AND
IN THE MATTER OF THE ELECTORAL COMMISSION ACT CAP 140
AND
IN THE MATTER OF THE ELECTIONS (ELECTION PETITION) RULES 2006
AND
IN THE MATTER OF THE NATIONAL YOUTH COUNCIL ACT CAP 319
ELECTION PETITION NO 003 OF 2016

KATONGOLE ARTHUR ::::::::::::::::::::::: PETITIONER

VERSUS

1. BABIRYE KITYO SARAH

2. ELECTORAL COMMISSION ::::::::::::::::::::::: RESPONDENTS

BEFORE HON. MR. JUSTICE MICHAEL ELUBU

RULING

The Petitioner, **Katongole Arthur**, filed this petition challenging the election of the 1st respondents, Babirye Kityo Sarah and The Electoral Commission, as the Central region Youth Member of Parliament, in the elections held in Masaka district on the 29th of February 2016.

At the commencement of the hearing, Counsel for the 1st Respondent, Mr Chris Bakiza who appeared with Mr Tony Okwenye and Mr Esau Isingoma, took two preliminary objections. The points raised can be summarised as follows:

- a. A mismatch in petitions, namely, a petition obtained by the 1st respondent allegedly from the Court registry, and the one served on her by the Court

process server on the 21st of April 2016 and whether the second petition is properly on the court record.

- b. That the validity of the petition was in question as it had been served on the respondent outside the statutory time, 7 days, provided for in the Parliamentary Elections Act.

Counsel on both sides addressed the Court on these preliminary points. The first respondent was represented by Mr Kyeyune Albert Collins, Mr Mukiibi Paul and Mr Tusingwire Andrew. My Kayondo Abubakar appears for the 2nd respondent.

It is the submission of Counsel for the 1st respondent that their client learnt of a petition that had been filed at the Masaka High Court against her election by Arthur Katongole. She took the initiative to come to Court and obtain a copy of that petition which she then presented to her lawyers to study. That petition was said to have been received by the Court on the 31st of March 2016 and commissioned by one Jacqueline Seguya. An affidavit in support and all its accompanying annexures were commissioned and endorsed by the same Jacqueline Seguya. Counsel furnished the Court with a copy from the bar.

Subsequently, on the 21st of April 2016, the 1st respondent was served with a Petition and a Notice of Presentation of a Petition, also filed on the 31st of March 2016, but commissioned by one Kamyia Stuart. The 1st respondent again shared this with her retained Counsel.

Mr Bakiza contends that there were material disparities between the two petitions. The first one did not have a copy of the gazette publishing the results of the general election attached; secondly the persons commissioning the petitions were different; and the marking of the annexures was altered although with the exception of the gazette the documents were the same.

The complaint of Counsel is that it is not clear at what stage the changes in the second petition were effected considering it had already been filed and received at the Court registry. Even more, as this amounts to an amendment of the first petition by the second, leave by this Court should have been sought to make any amendments. As no such leave was granted the second petition is not properly on the Court record and ought to be struck off the record. The decision in **Moses Ali Vs Pinto Santos Eruaga HCMA 12 of 2011** is cited as authority. As a result, the respondents reply to the petition is mismatched because the responses had been made against the numbering in the first petition. Counsel submits that there are two Petitions on the Court record.

In reply, Mr Kyeyune Albert Collins submitted that the Petitioner denies the existence of a second petition. There was no evidence led from the Petitioner to show where she obtained a copy as there is no copy of the petition on the Court record. That said, the copy provided over the bar is a photocopy leaving questions as to its authenticity. In his view, Counsel contends, this document would have to be closely investigated as to origin. The Court had only the word of Mr Bakiza, Counsel for the 1st Respondent on this, and he cannot adduce evidence from the bar. That a preliminary point should arise plainly out of the pleadings and require no farther inquiry which was not the case here and therefore the objection cannot stand.

I have carefully addressed myself to the submissions of Counsel on both sides on the first preliminary point of law. In my view there is no point of dwelling on this issue considering that the petition that Counsel takes issue with is not on the Court record. The only copy available is the illegible copy provided to Court by Counsel for the 1st respondent. There is no record or evidence to show how he came by this copy. I therefore agree with Counsel for the petitioner that the Court would have to inquire into the circumstances surrounding that petition to satisfy itself as to the authenticity of the 1st respondent's complaints.

In dealing with preliminary objections a court is limited to matters that arise by clear implication out of the pleadings and which if argued as preliminary points may dispose of the suit (see **Mukisa Biscuit Manufacturing Company Limited Vs West End Distributors Limited 1969 E.A 696**).

A matter that requires full inquiry such as the complaint on the first petition allegedly filed by the petitioner cannot be argued as a preliminary point of law. I therefore find that the first objection cannot be disposed of as a preliminary point of law.

The second preliminary point raised by Counsel for the second respondent is with regard to the suits competence or validity. It is the submission of Counsel for the 1st respondent that the declaration of results by the 2nd respondent through the gazette published on the 23rd of March 2016. The petition was filed on the 31st of March 2016. The respondent was served with the Notice of Presentation of a Petition and the Petition on the 21st of April 2016.

It is the contention of Counsel that service was out of time. He argued that S. 60(3) of the Parliamentary Elections Act, 2005 which provides

'Every Election petition shall be filed within 30 days after the day the day on which the result of the election is published by the commission in the Gazette'

The Parliamentary Elections (Interim Provisions) (Election Petitions) Rules provide in Rule 6 (1) that,

Within 7 days after filing the petition with the registrar, the petitioner or his or her advocate shall serve on each respondent notice in writing of the presentation of the petition, accompanied by a copy of the petition.

Counsel argues that noncompliance with these provisions rendered the petition a nullity especially considering that no application to enlarge the time within which to file had been made by the petitioner.

It is the submission of Counsel that the failure to apply for an extension of time rendered the whole action a nullity. The Supreme Court decision in **Sitenda Sebalu Vs Sam K Njuba Election Petition Appeal No. 26 of 2007** was cited by Counsel as authority for this proposition. There, both the Trial Court and the Court of Appeal had found that strict statutory enactments on time cannot be altered by Court in spite of an application to extend time that had been filed.

It is argued that the position is worse in the instant case because the service was late and yet there had been no application to seek leave of court to extend time. It was not possible that the registrar had issued the notice 21 days late without a Court order. Therefore this petition was bad for failure to serve the petition and notice of presentation of the petition in time. The case for the 1st respondent is that this amounted to an illegality and illegality once brought to the attention of court supersedes all matters including pleadings. The renowned case of **Makula International Vs Cardinal Nsubuga** was cited as authority.

It was argued farther that failure to adhere to the correct procedural provisions in the instant case rendered the entire petition a nullity. It's the contention of Counsel that the Court of appeal faced with a situation where the petitioner who had no locus standi had filed a petition contrary to the provisions of **the Local Government Elections Act** had held that the respondents failure to follow or comply with the law and procedural rules was fatal to the whole petition which could not have been regarded as a mere technicality under Art 126(2) (e) of the Constitution. That was the holding in **Ndaula Ronald Vs Hajii Nadduli Abdul COA EP Appeal No 20 of 2006**.

In reply Counsels for the petitioner argued that the petition was within time because it had been sealed on the 20th of April 2016. It was their argument that a close look at Rule 6 (1) shows that the rule should be read to include sealing by the registrar. The notice of

presentation of the petition cannot be served before it has been sealed by the registrar. Additionally there is a clear demonstration of vigilance on the part of the petitioner where within a day of the petition being sealed it was served on the respondents. It is the contention of the petitioners that the Court should apply the mischief rule of statutory interpretation which would show that it could not have been the intention of the legislature that the notice is served before it is sealed. It is the sealing that validates the notice.

Mr Mukiibi for the petitioner argued that in the case of **Sebalu** (supra) the Notice of presentation of the petition had been sealed but went missing in the Court registry. For that reason the petition could not be served in time though it had been sealed. The petition was only found after the statutory period had elapsed compelling the applicant to seek the courts leave to extend time. The Supreme Court found sufficient cause had been shown and on second appeal extended the time for service. This, according to Counsel, applied with equal force in the instant petition. The delay between 31st of March and 20th of April 2016 was not occasioned by the petitioner but by the Court.

The crux of this preliminary objection is whether the petition lodged is competent or was caught by the strict provisions regarding time within which to file and serve a petition challenging an election. Section 60(3) of the **Parliamentary Elections Act** and rule 6(3) of **The Parliamentary Elections (Interim Provisions) (Election Petitions) Rules** both set exact timelines as highlighted earlier.

Clearly a petition must be lodged in Court within 30 days of the gazetting of the results by the second respondent. That petition and a notice of presentation of the petition shall then be served on the respondent within 7 days after the filing. This is the plain meaning of the legislative provisions governing the filing and service of the election petitions as provided for in the law and procedural rules above. I am guided by the holding in **Hon. T. Sekikubo & 4 others Vs A-G & 4 others S.C.C.A No. 001/2015** where their Lordships held that the first and cardinal rule of Statutory Interpretation is that where words are clear and unambiguous, they should be given their primary, plain, ordinary and natural meaning.

The law governing filing and service of petitions is clear and unambiguous and I have no difficulty in stating that a petition must be filed in Court within 30 days of the day on which the results are gazetted and served on the respondent together with a notice of presentation of petition within 7 days of filing the petition with the registrar. Prima facie therefore any petition not filed in accordance with these provisions is not properly before the court.

The question would be what happens where, such as in the instant case, the registrar has not sealed the petition within the limitation period set by statute. It is my considered view recourse must then be heard to Rule 19 of **The Parliamentary Elections (Interim Provisions) (Election Petitions) Rules**,

‘The court may of 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 the rules for the doing of any act if, in the opinion of the court, there exists such special circumstances as make it expedient to do so’

It is clearly envisaged that there may be bona fide grounds that could arise to warrant an extension of time by the court. In those circumstances it would be improper to simply file an action in contravention of these provisions.

The petitioners in this case state that the petition was filed on the 31st of March 2016 and the Notice of presentation of the petition was only sealed on the 20th of April 2016 20 days after the gazetting of the results by the 2nd respondent. The last day available for service should have been the 7th of April 2016. Here notice was issued by the registrar on the 20th of April 2016 and promptly served on the respondents the next day. For that reason it is argued the Court should find that the petition was served in time. **I am not persuaded by this argument.**

The delay here was occasioned by the court. It has not been demonstrated that the petitioners contributed in any way to the delay or were dilatory in their pursuit of the notice or its sealing by the court registrar. The responsibility for any late sealing remained with the court. That in my view was sufficient cause for an application to enlarge the time within which to serve the notice. The proper course here should therefore have been for such an application to extend time to be made.

However just as happened in **Sitenda Sebalu** (Supra) failures by the court were deemed to constitute sufficient cause to extend time. The court on its own motion allowed an application to serve a petition and notice out of time.

I am also mindful that electoral petitions are matters of great public importance and vital to the building of democracy and good governance of a nation. It is also evident that there was sufficient cause for delay to serve notice of presentation of the petition and the petition on the respondent in time. The notice was not sealed until the 20th of April 2016 20 days after filing and 14 days after the time limit provided for in Rule 6 (1).

It is for those reasons that I shall invoke Rule 19 and hold that leave to serve the petition and notice of presentation to the petition out of time is deemed to have been granted in this case.

The second preliminary objection is accordingly dismissed.

At the hearing of these preliminary points the court found that the petitioner had not fully paid the requisite filing fees for the petition. The general receipt on record shows that only 100,000/- was paid on the 30th of March 2016. Rule 5 (3) of the **PEAEPR** provides that a petitioner shall at the time of presentation of the petition pay 150,000=.

Pursuant to S. 97 of **the Civil Procedure Act Cap 71** I order the petitioner to make up the deficiency in the court fees.

In the result, the preliminary points of law raised by the plaintiffs are dismissed.

Dated at Masaka this24th day of May 2016

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Michael Elubu

Judge