THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

IN THE MATTER OF THE PARLIAMENTARY ELECTIONS ACT 2005

AND

IN THE MATTER OF THE ELECTORAL COMMISSION ACT CAP 140

AND

IN THE MATTER OF THE PARLIAMENTARY ELECTIONS (APPEALS TO THE HIGH COURT FROM COMMISSION) RULES SI NO. 141-1

ELECTION PETITION NO.002 OF 2018

ACHOLA CATHERINE OSUPELEM---------- PETITIONER

VERSUS

ELECTORAL COMMISSION----------RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGEMENT

This is an appeal by way of Petition, in which the Petitioner, Achola Catherine Osupelem, is challenging the decision of the respondent, the Electoral Commission, denominating her as a candidate for Pallisa Woman Member of Parliament, on grounds that she did not possess academic papers as required under section 4(1)(c) of the Parliamentary Elections Act, 2005.

The said decision was communicated in a letter dated 14th June 2018 communicated by the Chairman of the Respondent, Justice Byabakama Mugenyi Simon to the petitioner through her lawyers M/s R.Nsubuga & Co Advocates.

The above decision was made as a result of the complaint by the National Resistance Movement in a letter dated 4th June 2018 to the commission challenging the nomination of Achola Catherine Osupelem with names that do not match with the names on the requisite academic documents.

The petitioner was represented by Mr Niwagaba Wilfred and Mr Kyeyago Edward while the respondent was represented by Mr. Sabiti Eric & Mr. Lugoloobi Hamidu

The petitioner has raised some preliminary matters.

Locus Standi

Mr Niwagaba submitted that the complaint that was presented to the respondent was incompetent because it was not presented by a Voter. According to him Section 15 of the Parliamentary Elections Act provides for a registered voter on a voter's roll of a constituency.

According to him the National Resistance Movement that lodged the said complaint is not a registered voter.

Article 61(f) of the Constitution mandates the *Electoral Commission to hear and determine election complaints arising before and during polling.*

Section 15 of the Electoral commission Act provides;

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 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.

Section 10 of the Parliamentary Elections Act provides for a political party or Organisation being involved in sponsorship of candidates;

Under Multiparty political system, nomination of candidates may be made by a political organisation or political party sponsoring a candidate or by a candidate standing for election as an independent candidate without being sponsored by a political organisation or political party.

It can be seen in all the above provisions of the law and especially the Constitution and Electoral Commission Act, that there is no restriction on who can make a complaint. In absence of any restrictions being imposed by the Constitution, the Parliamentary Elections Act could not be interpreted to be that restrictive on Political parties or Organisations being involved in lodging complaints.

This is also buttressed by section 10 that allows such Political parties and Organisations to sponsor candidates and also nominate candidates to take part in an election. It would be absurd for a Political party which is allowed to sponsor and nominate a candidate and yet it cannot complain on behalf of such a candidate as a sponsor.

In the same vein, should another person who knows of the forgery of academic documents or impersonation of a candidate keep quiet because he/she is not a registered voter on the voter's roll of a constituency? This would be absurd to refuse to investigate the complaint and yet the different laws allow the complaints to be lodged with the Electoral Commission.

The complaint made by National Resistance Movement was properly made in accordance with the Constitution and Electoral Commission Act; the issue of lack of *locus standi* to lodge a complaint is devoid of merit.

Constitution of the Commission

The complaint under this head was that the decision of the Electoral Commission that was communicated to the petitioner is incompetent since it was signed by the Chairman of the Commission only.

According to the proceedings of the Commission, it is clear that the Commission was properly constituted and they resolved at page 4 of the proceedings. The minutes or proceedings of the Commission clearly show the members of the commission in attendance and at the end of the hearing they took a decision. The Chairman of the commission only communicated on behalf of Electoral Commission and it is not a requirement that all the members of the commission must sign on the said communication.

There are only two issues for determination;

Whether the respondent lawfully cancelled the nomination of the Petitioner?

Whether there are any remedies available to the parties?

The electoral commission received a complaint by National Resistance Movement challenging the nomination of the petitioner who had been nominated on 4th June 2018.

The petitioner was challenged on grounds that she was illegally nominated by the respondent's Returning Officer of Pallisa and that she did not possess the required academic qualifications to contest for the seat.

The petitioner through her lawyers M/s R.Nsubuga & Co Advocates responded to the complaint and provided the relevant documents and also availed the original copies.

The respondent in their affidavit in reply, contended that the petitioner whose names appear in the voters register as Achola Catherine Osupelem was different from the academic papers presented by the petitioner with the names Achola Catherine.

The respondent contended that the petitioner did not adduce any evidence to demonstrate that she complied with the procedure of change of name.

The Electoral Commission conducted a hearing on 14th June 2018 and denominated the petitioner on grounds that; the names of Achola Catherine Osupelem do not match the names on the requisite academic documents she presented for nomination. This was contained in the letter dated 14th June 2018.

Mr Niwagaba submitted that the respondent knew that its decision was being challenged but in bad faith and utter disregard of the judicial process proceeded to gazette the candidate of the complaining party but also cause her to be sworn in as a Member of Parliament.

Where a respondent has made a decision of declaring a candidate as if he or she is unopposed, that particular candidate is only deemed elected as a member of Parliament with effect from the polling day fixed by the respondent.

The gazetting by the respondent of the sole candidate and the subsequent declaration as the person elected to represent Pallisa district and the swearing in that happened thereafter are all premature, illegal for contravening section 14(1)(b) of the Parliamentary Elections Act.

Mr. Kyeyago further submitted on the change of name and contended that the Petitioner in this case was not changing the name rather she was adding the name Osupelem which was her father's name to already other names of Achola Catherine. Therefore according to him Section 36 of the Registration of person's Act is not applicable to the petitioner.

He also submitted that the petitioner is on the register in the names of Achola Catherine Osupelem and those are very names in which she was nominated as a candidate for Pallisa district Woman Member of Parliament. That because she added the name of Osupelem, she made a statutory declaration so that this can be brought in conformity with the name on the academic documents and names appearing in the national register.

The Petitioner's counsel concluded by making reference to several authorities which according to him they are on all fours with this particular matter and he prayed that the court finds them binding; ***Mutembuli Yusuf vs Nagwomu moses Musamba & EC EPA No. 43 of 2016, Okabe Patrick vs Opio Joseph Linos & EC EPA No. 87 of 2016, Mashate Magomu Peter vs EC & Another EPA NO. 47 of 2016, Mulindwa Isaac Ssozi vs Lugudde Katwe Elizabeth EPA NO. 14 of 2016, Mandera Amos vs Bwowe Ivan EPA No. 91 of 2016, Waliggo Aisha Nuluyati vs Ssekindi Aisha & EC EPA No. 29 of 2016, Sembatya Edward Ndawula vs Alfred Muwanga EPA No. 34 of 2016.***

Mr. Sabiti Eric submitted that where there are two candidates and one of them is disqualified, at that point the returning officer is mandated to declare the remaining candidate unopposed the election is complete. He indeed confirmed that the remaining candidate was gazetted and the mandate of the respondent was fully discharged.

According to him, the case of ***Ngoma Ngime vs Winnie Byanyima High Court Revision Case No. 9 of 2011***, quoted with approval of the case of *Enock Mwesigye vs Electoral Commission Miscellaneous Cause No. 62 of 1998*. Where the court held that the role of the Electoral Commission ceases after the gazette and the administrative hand of EC cannot be extended to a gazetted and sworn member either of Parliament or councillor.

The respondent counsel submitted that the academic qualifications presented at nomination are for *Achola Catherine* and the person nominated as *Achola Catherine Osupelem* did not provide evidence of her academic qualification. The petitioner did not change the names in accordance with the law.

The petitioner at the hearing before the Electoral Commission presented evidence of the deed poll dated 1st June 2018 and this meant that at the time the deed poll was made she was already *Achola Catherine Osupelem* and therefore you cannot change from yourself to yourself.

He finally submitted that the statutory declarations cannot adequately change the name legally.

<u>The proceedings at Electoral Commission hearing on 14th June 2018</u>

According to the proceedings of the Electoral Commission, the complaint before them was that;

(i) *Achola was nominated contrary to section 4(c) of the Parliamentary Elections Act and did not possess the required academic qualifications.*

(ii) *She illegally used the documents belonging to Achola Catherine and not Achola Catherine Osupelem.*

(iii) *The person nominated holds a National ID in the names of Achola Catherine Osupelem (CF4035102VIGG) and thus not the person who possesses the submitted academic papers*.

The complainant's counsel submitted that the Ms *Achola Catherine Osupelem* was illegally nominated. He further submitted that Ms *Achola Catherine Osupelem* who was nominated is different from *Achola Catherine* whose academic papers were tendered in during the nomination. Lastly, the statutory declaration filed during nomination did not comply with the laws that define proper change of names. It was not registered with the registrar of documents as required by law.

The Petitioner while appearing before the Commission submitted as follows;

(ii) *The gist of the complaint was on the names on the academic documents.*

(iii) *Ms Achola Catherine Osupelem complied with S.36 (registration of Persons Act 2015) since she published a Notice in the Gazette (1/6/2018)*

(iv) *The same gazette was submitted to the DR/RO during nominations on 4/6/2018 who declared her a duly nominated.*

(v) *Ms Achola Catherine Osupelem was on the Voters Register and complied with S. 36 (Registration of persons Act 2015) and thus the issue of amendment of names on the Voters Register does not arise.*

(vi) *His client was the owner of the documents. The complainant did not present another person claiming to be the owner of the names on the academic documents submitted by Achola Catherine Osupelem.*

(vii) *There was no specific law covering the situation that they were in and thus they borrowed other laws-S 36 and took a step confirming/informing the public of the right names of the candidate.*

The respondent decided as follows;

8. ***That Pursuant to Section 15 Electoral Commission Act, to cancel/denominate the Respondent as a candidate for Pallisa District Woman MP on the following grounds;***

(i) The names Achola Catherine Osupelem do not match the names on the requisite academic documents presented for nomination.

(ii) Failure to furnish evidence showing that there was compliance with the law when she adopted the said names at the time of registration for the National ID Card in 2015.

(iii) The Notice in the gazette of 1/6/2018 that was tendered to the commission as proof of change of names from Achola Catherine to Achola Catherine Osupelem under S.36(1) of the registration of Persons Act was a mere confirmation of the said names that were adopted in 2015 which is contrary to the purpose of the said S. 36

The main question for the determination of the court arising out of the decision of the Electoral Commission is whether the Electoral Commission was right to denominate the petitioner and or take the decision that was taken.

For the better appreciation of the gist of this appeal, I have reproduced the same in order keep within the confines of the appeal process initiated by way of petition.

The petitioner's counsel submitted on matters that are outside the decision of the Electoral Commission because of the new developments that occurred immediately after the complaint was decided and the same will be considered later.

The decision of the electoral commission to denominate the petitioner was premised on the fact she presented academic documents which are in the names that are different from those which are in the national register or her national Identity card.

The burden to confirm that the academic papers presented at nomination belonged to the petitioner lies with the person presenting them. The academic documents should be self-explanatory and once there is any question of explanation that must be made then the person receiving them has every reason to refuse to accept them.

The petitioner in this case run the risk of putting 'her' academic documents in question and the presentation of them without following the law indeed creates doubt as to whether she is one and the same or whether she is not trying to use another person's academic documents.

The explanations that the petitioner tried to give in respect of the so called added name of Osupelem, ought to have been done in accordance with the law. Once you recklessly add names to your original name, indeed the character and person has changed unless and until everything

done is thoroughly explained and the circumstances that are surrounding your change of name or addition of names will make any reasonable person to become suspicious of your personality.

The petitioner tried to validate the names in order to be able to use 'her' academic papers by swearing a statutory declaration and later having a deed poll. But this aggravated the bad situation and by that date, the petitioner's names had already changed.

When a new name is added, that will automatically mean a change of person or new identity and any person who knew the person before the change of name will definitely not be in position to recognise the person by the new names unless explanations are made or a photograph is shown. Therefore, the changing of the name of the petitioner created difficulty of substantiating the previous identity alongside the new name.

The change of name will also invite multiple situations that would involve multiple background checks upon presentation of the academic papers that are in different names especially when the change of name was not done in accordance with the law.

The respondent on the available evidence which was insufficient was right to denominate the petitioner because of the varying names in the academic papers presented. The presentation of statutory declaration which was not registered as the explanation for the variation of names cannot be justification for disregarding the law. The respondent should have had better evidence to accept the academic documents of *Achola Catherine* as belonging to *Achola Catherine Osupelem* without proof of change of name in accordance with the law.

The different cases decided are distinguishable since the different persons who were being challenged produced necessary evidence to show that they are one and the same. In ***Mashate Magomu Peter vs EC & Another***; the person challenged had lawfully changed his names and there was a deed poll.

In the case of ***Mulindwa Isaac Ssozi vs Lugudde Katwe Elizabeth***; the appellant proved that he is one and the same person by lining up several witnesses from Makerere University former course mates and Academic registrar, Principal Examinations Officer UNEB who produced a photo album of the appellant for senior six. And above all he had changed name by way of a deed poll.

In the case of ***Mandera Amos vs Bwowe Ivan***; the appellant's certificate which had an error in his name of 'Mandera' written as 'Nandera' on his certificate. Court held that the use of a statutory declaration was sufficient to prove and explain the clerical errors in his name.

In the case of ***Waligo Aisha Nuluyati vs Ssekindi Aisha & EC***; The 1st respondent explained her discrepancy in one of her names 'Ayisa' instead of 'Aisha' by statutory declaration and court was satisfied with the explanation together with other evidence that 'Sekindi Ayisa' and 'Sekindi Aisha' are one and the same.

In the case of ***Ssembatya Edward Ndawula vs Alfred Muwanga*** the court relied wholly on the decision of *Mandera Amos vs Bwowe Ivan*.

All the above authorities are distinguishable on the facts and also on the nature of the evidence presented at accept that they were one and the same person.

In absence of a proper deed poll by the petitioner, a statutory declaration could not explain a change of name or addition of a name. Statutory declaration would only be applicable in cases of misspelling of names. Secondly, the petitioner had a duty to produce evidence from Uganda National Examinations Board, Institute of Teacher Education Kyambogo, Uganda Christian University, parents or relatives and persons she went to school with to prove she is one and the same as *Achola Catherine* and *Achola Catherine Osupelem* this because of not following the law in adding a name to her original name.

The electoral Commission was right to denominate her due to discrepancy in her names in academic documents and National Register and National Identity card.

Whether the respondent was right to gazette and subsequent declaration as the person elected to represent Pallisa District and the swearing in that happened thereafter was premature, illegal for contravening Section 14(1)(b) of the Parliamentary Elections Act.

The petitioner's counsel submitted that the actions of the respondent after the decision of their hearing while there is pending appeal before the High Court was done in bad faith. It was his argument that once the commission makes a decision and an appeal process to the high Court is initiated, then by necessary implication there should be a stay on the commission's actions.

According to him, once an appeal process has begun the electoral commission has no jurisdiction to do anything that would undermine the powers of court to make a decision under section 15 of the Electoral Commission Act.

Section 14(1)(b) provides;

Where at the close of nomination days; Only one person has been duly nominated for the election for a constituency, the returning officer shall forthwith declare that person duly elected as a member of parliament with effect from the polling day fixed in accordance with this Act.

Section 14(2) further provides;

Where a returning officer makes a declaration under subsection (1)(b), the returning officer shall notify the Commission which shall cause to be published in the Gazette a notice of the name of the candidate declared so elected and the day with effect from which he or she was declared elected.

Section 14(3) also provides;

If, by virtue of an appeal under Section 16 or as otherwise permitted under this Act, an additional candidate is later duly nominated, the Commission shall revoke the Gazette notice and the returning officer shall revoke his or her declaration.

It is therefore very clear that whatever the respondent did was within the law i.e declaring the remaining candidate as duly elected. Secondly, publish in the Gazette the name of the person so declared.

The Commission in empowered under the same law, to revoke the declaration and the notice in the Gazette.

In light of the above provisions of the law, the Electoral Commission was right to do whatever it did. The swearing in exercise is by Parliament and the Electoral Commission cannot be blamed for what happened after and is not within its control.

If there is a lacunae in the law about swearing in before the appeal is determined then it is a question for amendment of the law rather than court issuing orders to stop the process without any express provision of the law. It could be true that the law never envisaged the present situation and now that it has happened then it should be flagged off for reform or amendment.

In the final result this Petition fails and the respondent was right to denominate the petitioner.

There is no order as to costs.

It is so ordered

SSEKAANA MUSA
JUDGE
13th /07/2018