

5

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE

HCT-04-CV-EP-004 OF 2021

OCHWA DAVID:..... PETITIONER

VERSUS

10 **OGWARI POLYCARP:..... 1ST RESPONDENT**

THE ELECTORAL COMMISSION:.....2ND RESPONDENT

BEFORE: HON. JUSTICE BASHAIJA K. ANDREW

RULING

The 2nd Respondent, the Electoral Commission, conducted Parliamentary elections for the directly
15 elected Member of Parliament for Agule County Constituency, in the Pallisa District. The
Petitioner, Ochwa David, contested on the National Resistance Movement Party (NRM) ticket, the
1st Respondent, Ogwari Polycarp, contested as an independent candidate. There were four other
candidates. The 2nd Respondent returned the 1st Respondent as the winner of the election. The
Petitioner contends that the election is invalid on ground that it was not conducted in accordance
20 with the principles laid down in the provisions of the Constitution of the Republic of Uganda, the
Parliamentary Elections Act and the Electoral Commission Act, and that the non – compliance
affected the result of the election in a substantial manner.

When the matter came up for hearing after scheduling, Mr. Okalebo Daniel, counsel for the 1st
Respondent, made an oral application for court’s leave to allow a supplementary affidavit of the
25 1st Respondent on court record and to validate it. The 1st Respondent seeks to introduce a letter
dated 6th September, 2021 authored by the Chief Registrar of the Courts of Judicature to the 1st
Respondent’s lawyers, as the basis of the objection. That the content of letter brings to light the
illegality that Advocate, Mr. Owakukiroru Raymond, who commissioned the sole Petitioner’s
affidavit in support of the petition did not possess a valid practicing certificate at the time. That
30 illegality is a point of law and it can be raised at any time.

5 Counsel submitted that the content of the letter reveals that the Advocate, Mr. Owakukiroru Raymond, was issued with a practicing certificate on 19th March,2021, yet he commissioned the impugned affidavit on 10th March,2021, which renders the affidavit in support of the petition invalid. Counsel relied on ***Makula International Ltd vs. His Eminence Cardinal Nsubuga & Another [1981] HCB 11(SC)*** that an illegality once brought to the attention of court supersedes
10 everything including pleadings or admissions made thereon, and that no court ought to allow itself to enforce an illegality once it is brought to its attention.

Mr. Okalebo further cited a myriad of other court decisions where the same issue was considered and the courts came to the same conclusion that the illegality renders the affidavit invalid and it cannot support the petition which is null and void. They include ***Suubi Kinyamatama Juliet & Others vs. Ssentongo Robina & Electoral Commission, Election Petition Appeal No 92 of 2016;***
15 ***Returning Officer of Iganga District & Another vs. Hajji Muluya Mustafa, Civil Appeal No.19 of 1997; Ossiya Solomon vs. Koluo Joseph Andrew & Electoral Commission HC EP No. 2 of 2021*** (Soroti High Court) ***Kamurali Jeremiah vs. Nathan Byanyima & Electoral Commission HC EP No.002 of 2021*** (Mbarara High Court), among others.

20 Counsel prayed that leave be granted, the 1st Respondent's affidavit be validated, the preliminary objection be upheld and the petition be dismissed as incompetent with costs to the 1st Respondent.

Mr. Jude Mwasa, counsel for the 2nd Respondent, associated himself with the submissions and prayers of Mr. Okalebo Daniel.

Mr. Okello Oryem, counsel for the Petitioner, opposed the application for leave to admit fresh
25 evidence at this stage and submitted that counsel for the 1st Respondent was giving evidence from the Bar to prove the alleged illegality, and then raising a preliminary objection of illegality itself. Counsel submitted that he has not seen the letter which Mr. Okalebo wrote putting court on notice that he would be raising the objection, and that the 1st Respondent's application violates the rules governing election petitions and the principle of fairness. Citing the case of ***Mutembuli Yusuf vs. Nagwomu Moses Musamba and Electoral Commission, Election Petition Appeal No.43 of 2016,***
30 counsel submitted that the law does not allow a supplementary affidavit to be admitted after rejoinders have been filed. That the procedure for election petitions is special and must be strictly

5 followed and there is no room in the procedure for admission of additional evidence after pleadings have closed.

Counsel attempted to distinguish the case of *Ossiya Solomon vs. Koluo* (supra) and submitted that in that case, the evidence of illegality was adduced on record before scheduling started and the Commissioner for Oaths also filed an affidavit. That in the present case, no evidence of the alleged
10 illegality was filed on record. That court cannot even look at content of the Chief Registrar's letter because it is not in evidence on record. That under Rule 15 of the Parliamentary Elections (Interim Provisions) Rules, evidence in election petitions is by affidavit evidence, but that in this case there is no such evidence of the alleged illegality on court record.

Mr. Okello Oryem further submitted that whether the Advocate Mr. Owakukiroru Raymond had a
15 valid practicing certificate on 10th March, 2021 when he commissioned the impugned affidavit, is not a question of law but fact. That the 1st Respondent by his application seeks to adduce evidence to prove that point, but that there is no evidence on record to prove it. Further, that it is settled that a matter which requires evidence to prove it cannot be raised as a preliminary objection, and the alleged illegality requires evidence to prove it.

20 On the Chief Registrar's letter pertaining to when the Advocate Mr. Owakukiroru was issued with a practicing certificate, counsel submitted that the Chief Registrar turned herself into a witness, and that counsel for the 1st Respondent simply smuggled the letter on to the court record. That facts which have to be proved must be proved in evidence on record and not at the Bar. That the question whether Mr. Owakukiroru Raymond had a valid practicing certificate when he
25 commissioned the impugned affidavit, cannot be resolved without adducing evidence on record, but that such evidence is lacking. Counsel prayed that the affidavit be expunged.

Mr. Okello Oryem further submitted that even if the Advocate did not possess a valid practicing certificate at the time, the consequence would be that the affidavit is irregular, and the irregularity can be cured by court ordering that it be re-commissioned. Counsel relied on the *Returning Officer of Iganga District & Another vs. Hajji Muluya Mustafa* (supra) *Mori Samuel Sidoru & Another vs. Abibu Buga Awadi & Electoral Commission HC EP Nos. 005 & 006 of 2021* (Arua High Court) and submitted that in those cases, court ordered re-administering of the oath, and the
30 petitions were cured. Counsel also cited the case of *Gaddafi Nassur vs. Ssekabira Renes &*

5 ***Electoral Commission HC EP No. 016 of 2021*** where the affidavit had been improperly sworn and court ordered the oath to be re-administered. Counsel submitted that the affidavit is evidence and not pleadings and hence it can be rectified, and in that way substantive justice would be guaranteed in accordance with Article 126 (2)(e) of the Constitution and the innocent litigant who was not aware of the default of the Advocate is also protected pursuant to Section 14A of the
10 Advocates (Amended) Act 2002.

Counsel further submitted that Order 8r.18 (2) CPR which the 1st Respondent's counsel relied on, is not applicable in this case since the rules governing election petitions are strict. Counsel prayed that the preliminary objection be rejected and court orders re-administering of the oath in the impugned affidavit before the Magistrate or Registrar of the court.

15 In rejoinder, Mr. Okalebo insisted that the question of illegality being raised is purely a question of law and it can be raised at any time and once it is raised, court cannot ignore it. That the fact that counsel for the Petitioner wants the oath be re-administered is an admission that it is defective. Further, that the cases which Mr. Okello Oryem relied on for the re-administering the oaths, were in respect of affidavits in support of answer /reply and rejoinders, and not in respect of affidavits
20 in support of the petition whose oaths cannot be re-administered once the affidavits are found to be invalid. That to do so would have the effect of changing the timelines prescribed by the Act for filing an election petition. Counsel relied on ***Suubi Kinyamatama Juliet*** case(supra) where Court of Appeal held that the remedy of re-administering the oath can only be available before the timelines prescribed for filing the petition.

25 Mr. Okalebo also maintained that preliminary objections ordinarily consist of points of law which have either been pleaded or arise out of necessary implication. That what has been argued is on court record and that the letter of the Chief Registrar is a public document from court. Further, that how an illegality is brought to the attention of court is immaterial and that it can be raised at any time and cannot be defeated by technicalities. That since the petition was filed with the sole
30 affidavit in support which is invalid, the petition is unsupported and it collapses and it should be dismissed with costs.

Opinion:

5 By his supplementary affidavit, the 1st Respondent's seeks to introduce in evidence a letter from
the Chief Registrar showing that the Advocate, Mr.Owakukiroru Raymond, who commissioned
the impugned affidavit, was not in possession of a valid practicing certificate at the time he
commissioned it. The basis of the preliminary objection is that it is an illegality for an Advocate
whose commission has expired to commission an affidavit, and the illegality invalidates the
10 affidavit which cannot support the petition.

The first issue is whether court is vested with power, under the law, to grant the leave to validate
a supplementary affidavit in support of the answer to the petition after pleadings have closed. From
the wealth of decided cases and provisions the Parliamentary Elections Act and the Rules made
thereunder, it would appear court is vested with such power. Section 60 (3) PEA prescribes
15 timeframe for filing an election petition as follows;

***“Every election petition shall be filed within thirty days after the day on which the result
of the election is published by the Commission in the Gazette.”***

Rule 3(a) of the Parliamentary Election (Interim Provisions) Rules SI 141-2, defines “petition” to
include the affidavit accompanying the petition. Therefore, the petition required to be filed in
20 accordance with Section 60 (3) PEA must be accompanied by an affidavit. Worth noting is that
the Act does not prescribe the timeframe for a Respondent to file the answer to the petition. A
Respondent who wishes to oppose the petition must instead comply with time lines set by the
Rules, in particular Rule 8 (1) which provides that;

***“If the respondent wishes to oppose the petition, the respondent shall, within ten days
25 after the petition was served on him or her, file an answer to the petition.”***

The Rule 8 (3)(a) also requires that the answer of the Respondent shall be accompanied by an
affidavit. Under Rule 17(supra) it is provided that;

***“Subject to these Rules, the practice and procedure in respect of a petition shall be
regulated, as nearly as may be, in accordance with the Civil Procedure Act and the Rules
30 made under that Act relating to the trial of a suit in the High Court, with such
modifications as the court may consider necessary in the interests of justice and
expedition of the proceedings.”***

5 Under Rule 9(supra) it is provided that;

“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 doing any act if, in the opinion of the court, there exists such special circumstances as make it expedient to do so.” [underlined for emphasis].

10 The above provisions show a marked distinction between time prescribed under the Act for filing a petition and the time prescribed under the Rules for filing an answer to a petition. In the former, the court has no residual power to extent the time set by the Act. This is the principle in the oft-cited case of *Makula International Ltd vs. His Eminence Cardinal Nsubuga & Another* (supra). In the latter instance, court has power to enlarge or abridge the time set by the Rules either on
15 application of the party or on its own motion because the Rules permit so. It would follow that court’s hands are not tied in the granting of leave for the 1st Respondent to file a supplementary affidavit even after pleadings have closed if in the opinion of court there exists such special circumstances as to make it expedient to do so. In so doing, court is usually guided by the necessity of the interest of justice to be met.

20 In the case of *Mori Samuel Sidoru & Another vs. Abibu Buya Khemis Awadi & Another* (supra) the court took a similar view on the distinction that provisions of Section 60 PEA and Rule 3(c) and 4(8) of the Rules made thereunder, are not available for the answer to the petition. That an answer to the petition has no similar bar as expressly provided for in the case of the petition under Section 60 PEA. Further, that it was within court’s power to extend time within which the answer
25 to the petition may be filed. On strength of these authorities, the first issue is answered in the affirmative.

The second issue is whether a preliminary objection premised on illegality can be entertained where it was not prior canvassed by affidavit evidence on court record. It is indeed good practice that a party who wishes to raise a preliminary objection does so at the earliest possible time to
30 enable the opposite party to prepare a response and for court to expeditiously adjudicate the point. It is also the settled that where a matter needs evidence to establish, it cannot constitute a preliminary objection. See: *Lweza Clays Ltd & Kizito Lutwama Mause v. Tropical Bank Ltd & Fred Muwema, S.C Misc. Appl. No. 31 of 2018*. It is, however, settled that an issue of law can be

5 raised at any time and court shall entertain it. Therefore, the second issue is answered in the affirmative.

The third issue is whether commissioning of the affidavit by an Advocate without a valid practicing certificate is a question of law. Mr. Okalebo contended that it is an illegality and therefore a question of law. That once an illegality is brought to the attention of court supersedes everything including pleadings and admissions made thereon. Counsel relied on *Makula International Ltd* case (supra). For his part, Mr. Okello Oryem contended that the alleged illegality is a matter of fact that requires evidence to prove. That whether the Advocate had a valid practicing certificate or not, is not a question of law but of fact and cannot constitute a preliminary objection. Distinguishing the case of *Kamuruli Jeremiah Birungi vs. Nathan Byanyima and Electoral Commission* (supra) Mr. Okello Oryem submitted that in that case, all the evidence regarding the validity of the affidavit was on court record before scheduling. That in the present case, there is no such evidence on record. Further, that by writing the letter that the Advocate had no valid practicing certificate at the time he commissioned the affidavit, the Chief Registrar has turned herself into a witness and counsel for the 1st Respondent simply smuggled the letter onto the court record and attempted to adduce evidence from the Bar, which is not on court record.

After carefully considering the issue, court is of the opinion that the legality or competence of an election petition is a question of law and not of fact. Whether an election petition is validly filed would require examining provisions of the law on the particular issue. The Court of Appeal in the *Suubi Kinyamatama Juliet* case (supra) found that it was an illegality to file an election petition in court in contravention of Section 60PEA and Rule 3 (c) and 4 of the Rules made thereunder. That being the case, a party to the proceedings can raise illegality as a matter of law at any time, and it does not necessarily require a formal application to do so. It is more so when the legality of the proceedings themselves is in issue. This position in *Makula International Ltd* case (supra) that an illegality once brought to the attention of court supersedes everything including pleadings and admissions made thereon. A petition is defined under Rule 3 (c) to include the affidavit supporting the petition. That renders the affidavit in support pleadings or part of the pleadings. It means that these too are superseded by the illegality once it is raised.

The illegality in the present case is a matter of law because, in addition, it calls for examination of the Section 11(2) of the Advocates Act Cap 267 which provides that a practicing certificate shall

5 be valid until the 31st day of December next after its issue, and shall be renewable on application being made on such form and payment of fee as the Law Council may by regulations prescribe. A grace period of up to 1st March is granted for renewal. This position was considered by the Supreme Court in *Prof. Syed Huq vs. Islamic University in Uganda Civil Appeal No.47 of 1995* that;

10 *“It appears that an advocate whose practicing certificate has expired may practice as an advocate in the months of January and February, but if he does so he will not recover costs through courts for any work done during that period...”*

Similarly, in *Kabogere Coffee Factory vs. Haji Twalib Kigongo SCCA No.10 of 1993* the court held that;

15 *“Documents filed by an advocate without a practicing certificate beyond 1st of March of every given year are invalid.”*

Based on the foregone, the legality or competence of an election petition is a question of law and not of fact. The third issue is answered in the affirmative.

20 The fourth issue concerns how the illegality is brought to the attention of court once detected. There appears to be no particular or single prescribed manner or format of doing so. It may be by a formal application or summarily raised by counsel before court at any time. It may be by court itself taking the matter and making a finding on the record or taking judicial notice of relevant material bearing on the issue. It can be in any other manner provided court is notified or made aware of the illegality.

25 In the present case, the illegality is brought to court’s attention firstly, through submissions of counsel for the 1st Respondent premised on the Chief Registrar’s letter which confirms that by the time he commissioned the impugned affidavit, the Advocate Mr. Owakukiroru’s commission had expired. The Chief Registrar of the Courts of Judicature is a senior judicial officer appointed under Article 145 of the Constitution, and whose functions are spelt out under Section 15 of the Judiciary Administration Act, No. 8 of 2020. The Chief Registrar is the chief custodian of the Roll of
30 Advocates in Uganda and is the authority that issues practicing certificates to Advocates in any given year. Therefore, a letter under the hand and signature of the Chief Registrar written in the

5 course of official business is sufficient proof on the status of any practicing certificate of an Advocate unless the authenticity of such a letter is assailed; which was not the case in this matter.

The second way the illegality is brought home to court's attention is through the case *Ossiya Solomon vs. Koluo Joseph Andrew & Electoral Commission* (supra) on the exact same issue involving the same Advocate, Mr. Owakukiroru Raymond. In that case the Chief Registrar also
10 wrote a letter that the practicing certificate of the said Advocate was renewed on 19th March, 2021. Court judgments, among other matters, are ordinarily taken judicial notice of. Given that the same Mr. Owakukiroru Raymond who commissioned the Petitioner's affidavit in support of the present petition, was the same Advocate found by court in *Ossiya Solomon's* case (supra) to have had no valid practicing certificate at the time, the illegality is duly brought home to the attention of court.
15 Court is satisfied that the Advocate, Mr. Owakukiroru Raymond, who was issued with a practicing certificate on 19th March, 2021 in the *Ossiya Solomon's* case (supra) is the same as in the present case. The name of the Advocate and date of issuance of the practicing certificate to him are constant factors in all cases. They are independent variables which cannot be manipulated by changed circumstances and court cannot hold otherwise.

20 The fifth issue is the effect of an affidavit commissioned by Advocate whose commission has expired. The position of the law is that such an affidavit is invalid. The effect of the invalidity of the affidavit on the petition is that there is in fact, no petition before court. A petition cannot be competent unless it is filed in accordance with provisions of the Parliamentary Elections Act and the Rules thereunder. This is the position of the Court of Appeal in the *Suubi Kinyamatama Juliet*
25 case (supra).

Mr. Okello Oryem argued that that the affidavit in issue is not fatally defective and that pursuant to Section 14A of the Advocates (Amended) Act, 2002, the oath can be re-administered and the petition cured under Article 126 (2) (e) of the Constitution. In reply Mr. Okalebo submitted that re-administering the oath does not apply to affidavits in support of the petition as that would have
30 the effect of changing the timelines set by law within which to file a petition.

In determining the issue, guidance is taken from *Kasala Growers Cooperative Society vs. Kakooza Jonathan & Another SCCA No. 19 of 2010*, of the distinction between defective

5 affidavit and failure to comply with statutory requirements and the effect of each. The Supreme Court held that;

“A defective affidavit is for example, where the deponent did not sign or date the affidavit. Failure to comply with statutory requirement is where a requirement of the statute has not been complied with. In my view the latter is fatal.”

10 In the *Suubi Kinyamatama Juliet* case (supra) the trial court had proceeded with hearing the petition on merit despite having found that the affidavit in support of the petition had been commissioned by an Advocate who did not possess a valid practicing certificate. Court had invoked Article 126 (2) (e) in an attempt to cure the defect. While overturning the trial court’s decision, the Court of Appeal held as follows;

15 *“...the purported commissioning of the affidavit in support of the petition under review is not an irregularity that can be cured under Article 126 (2) (e) of the Constitution”.*

Based on the above authorities, it would follow that the present petition cannot be cured relying on Article 126 (2) (e) of the Constitution. Similarly, Section 14 A of the Advocates (Amendment) Act 2002, which was cited by Mr. Okello Oryem, cannot be resorted to. It provides as follows;

20 *“(1) Where—*

(a) an advocate practices as an advocate contrary to subsection (1) of section 14; or

b) in any proceedings, for any reason, an advocate is lawfully denied audience or authority to represent a party by any court or tribunal; then—

25 *(i) no pleading or contract or other document made or action taken by the advocate on behalf of any client shall be invalidated by any such event; and in the case of any proceedings, the case of the client shall not be dismissed by reason of any such event;*

30 *(ii) the client who is a party in the proceedings shall, where necessary, be allowed time to engage another advocate or otherwise to make good any defects arising out of any such event.”*

5 The above provisions would not apply where a petition is found to be incompetent since in effect, there is no petition before court. No amendment or rectification can be made to a non-existent petition. Therefore, the option to rectify the defects and cure the petition under Section 14A (supra) is also not available. Similarly, the Petitioner cannot bring a fresh petition given provisions of Section 60 (3) (supra) where court has no residual power to extend the time lines set by the Act.

10 The petition is dismissed with costs to 1st and 2nd Respondent.

BASHAIJA K. ANDREW

JUDGE

14/09/2021

15 Mr. Ngonde Davis and Mr. Okello Arthur, holding brief for Mr. Okello Oryem, counsel for the Petitioner present.

Mr. Okalebo Daniel, Mr. Outeke Richard and Simon Peter Odongi joint counsel for the 1st Respondent present.

Mr. Jude Mwasa counsel for the 2nd Respondent, reportedly bereaved – absent.

20 Petitioner and 1st Respondent present

Ms. Dorothy Kenyange Court Clerk present.

Ruling read in open court.

BASHAIJA K. ANDREW

JUDGE

14/09/2021.

25