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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE

HCT- 04-CV- EP - 003 OF 2021

NYAKECHO ANNET:..... PETITIONER

VERSUS

10 **THE ELECTORAL COMMISSION:..... 1ST RESPONDENT**

EKANYA GEOFFREY:.....2ND RESPONDENT

BEFORE: HON. JUSTICE BASHAIJA K ANDREW

RULING

15 General elections were held for Member of Parliament for Tororo North County Constituency in the Tororo District on 14th January, 2021. Nyakecho Annet, the Petitioner, contested as a candidate together with Ekanya Geoffrey, the 2nd Respondent, and five other candidates. The 1st Respondent returned the 2nd Respondent as elected and declared him winner of the election. Dissatisfied, the Petitioner filed this petition challenging the result contending that the election is invalid. The main ground is that the election was not conducted in accordance 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 in a substantial manner.

25 When the matter was scheduled and set down for cross - examination of witnesses on their respective affidavits, Mr. Ekirapa Isaac, counsel for the 2nd Respondent, raised a preliminary objection that the petition is incompetent on grounds that the Petitioner’s sole affidavit in support of the petition was commissioned by an Advocate, Mr. Owakukiroru Raymond, who at the time did not possess a valid practicing certificate. He referred to a letter written by Chief Registrar of the Courts of Judicature date 6th September, 2021 to lawyers of the 1st Respondent that Advocate Owakukiroru Raymond was issued with a practicing certificate on 19th March 2021. Counsel submitted that the said Advocate commissioned the affidavit in issue on 10th March 2021. That,

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5 therefore, the letter brings to light the illegality in that an affidavit commissioned by an Advocate who does not have a valid practicing certificate is invalid. That the invalidity of the affidavit supporting the petition renders the petition null and void *ab initio*.

Citing Rule 4(8) of the Parliamentary Elections (Interim Provisions) Rules, SI 141 -2, counsel further submitted that it is mandatory that a petition shall be supported by an affidavit. That in the present case, the affidavit supporting the petition was commissioned by an Advocate whose commission had expired at the time. That the affidavit is therefore incurably defective and it cannot support the petition which collapses. For this proposition, counsel cited the case of ***Returning officer of Iganga District & Another vs. Hajji Mustafa, CA Civil Appeal No. 13 of 1997; Gadaffi Nassur vs. Ssekabira Denes & EC HC EP No. 016 of 2021*** and ***Suubi Kinyamatama Juliet & Others vs. Sentongo Robina & Electoral Commission, CA EPA No.92 of 2016***. Counsel noted that in the latter case, the Court of Appeal faulted the trial court for proceeding to hear the election petition after finding that the affidavit was defective having been commissioned by Advocates without a valid practicing certificate. Mr. Ekirapa further cited the cases of ***Apama Amato Boroa vs. Obiga Kania & Electoral Commission, HEP No. 002 of 2021*** (Arua High Court) and ***Ossiya Solomon vs. Koluo Joseph Andrew & Electoral Commission, HCEP No.002 of 2021*** (Soroti High Court) where court struck out the petitions supported by affidavits commissioned by Advocates with no valid practicing certificates. Counsel pointed out that in the ***Ossiya Solomon*** case (supra) the same Advocate Mr. Owakukiroru Raymond who was involved in the commissioning of the affidavit in support of the petition when his commission had expired is the same Advocate in the present case.

Further citing the case of ***Mori Samuel Sidiro & Another vs. Abibu Buga Khemis Awadi & Electoral Commission HC EP Nos. 005 & 006 of 2021*** (Arua High Court) counsel submitted that court arrived at the same conclusion that for a parliamentary election petition once the affidavit in support of the petition is defective, there is no remedy because Section 60(3) of the Parliamentary Elections Act provides for strict time lines for filing an election petition. Counsel argued that a Petitioner who becomes aware that the Advocate who commissioned the affidavit in support of the petition had no valid practicing certificate and does not move court to remedy the defect loses the opportunity of that remedy. That since the affidavit in issue is incurably defective, there is no

5 petition before court. Counsel prayed that the affidavit be struck out and the petition collapses and the 1st Respondent be awarded costs.

Mr. Jude Mwasu, counsel for 1st Respondent, associated himself with the submissions of counsel for the 2nd Respondent.

10 In reply, Mr. Okello Oryem, counsel for Petitioner, adopted his earlier submissions on a similar issue, in the case of *Ochwa David vs. Ogwari Polycarp & Electoral Commission, HC EP No. 004 of 2021* (Mable High Court) where he was also counsel for the petitioner. Counsel submitted that evidence in this case was closed, and in *Mutembuli Yusuf vs. Nagwomu & Electoral Commission CA EPA No. 43 of 2016*, evidence beyond rejoinders is not admissible in election petitions or civil matters. That Rule 15 of the Rules, requires that all evidence in election petitions shall be by affidavit evidence, but that in the present case there is no such evidence to support the allegation that the Advocate Raymond Owakukiroru did not possess a valid practicing certificate at the time he commissioned the impugned affidavit. Counsel maintained that the Chief Registrar's letter is not affidavit evidence and cannot be relied upon as it is not part of the record, and that it has no evidential value. Further, that it cannot be ascertained whether the Advocate, Mr. Raymond
15 Owakukiroru, mentioned in the Chief Registrar's letter is the same as referred to in *Ossiya Solomon* case (supra). That the issue requires evidence to prove it, but that it is lacking on record.

Counsel submitted that all that the court has are allegations of counsel for 1st Respondent from the Bar, which cannot be the basis to determine the fate of an election petition. That the only way to determine the issue would be by affidavit evidence.

25 Counsel also submitted that the objection being raised is not a point of law as it is based on a letter of the Chief Registrar, which is not a matter of law. That for the letter to have any evidential value, the 1st Respondent should have adduced it in evidence through an affidavit before pleadings closed or the Chief Registrar should have sworn an affidavit, but they did not and hence the objection cannot be sustained as it is unsupported.

30 Further, that the High Court, in the cases of *Mori Samuel Sidoru* (supra) and *Gadaffi Nassuru* (supra); relying on *Suubi Kinyamatama Juliet* (supra) *Returning officer Iganga District* (supra) held that an affidavit improperly commissioned can be rectified by subjected it to re-administering of the oath pursuant to Section 14A of the Advocates (Amendment) Act 2002, and in the spirit of

5 Article 126(2)(e) of the Constitution. That then the affidavit would be validated and the petition
cured. That Section 14A (supra) was enacted specifically to protect innocent litigants as against
incompetent Advocates/commissioners who do not reveal their incompetence to the litigants.
Counsel submitted that should the impugned affidavit be found to be irregular, court should invoke
10 provisions of Section 14 A (supra) and order for re-administering of the oath before a Magistrate
or Registrar, which would cure the defect and avoid a miscarriage of justice. That curing the defect
does not amount to extending timelines set by law in light the provisions of Section 14A (supra)
and Article 126(2)(e) (supra).

In his rejoinder, Mr. Ekirapa submitted that Article 126(2)(e) (supra) is not applicable in this case.
That in *Suubi Kinyamatama* case(supra) the Court of Appeal found that requirements of the law
15 for filing election petitions are substantive law and not technicalities as envisaged under Article
126 (2) (e)(supra) and that substantive requirements of law must be complied with. Further, that
in *Mori Samuel Sidiro* case (supra) court held that Section 14A(supra) was intended to protect
clients of Advocates. Counsel argued that a deponent of an affidavit cannot be a client of a
commissioner for oaths since it is forbidden under Section 4(1) of Commissioner for
20 Oaths(Advocates) Act. Counsel reiterated the earlier prayers.

Opinion:

The first issue is whether the objection raised by the 1st Respondent is a point of law. After
carefully considering the issue, court finds that the validity of an affidavit supporting a petition is
a question of law. For a petition to be valid, it must be filed in accordance with provisions of
25 Section 60 of the Parliamentary Elections Act and the Rules made thereunder. To determine the
validity of the petition, it requires examination of the relevant law pertaining to the filing of
election petitions under the Parliamentary Elections Act and the Rules made thereunder. It is a
mandatory requirement, under Rule 4(8) of the Parliamentary Election (Interim Provisions) Rules
(supra) that a petition shall be accompanied by an affidavit setting out the facts on which the
30 petitioner intends to rely. Rule 3(c) thereof, defines a “petition” to include the affidavit
accompanying the petition. In the present case, it is the very affidavit accompanying the petition
that the 1st Respondent seeks to assail as being incurably defective and hence cannot support the
petition. That alone would render the objection being raised an issue of law.

5 The above finding is fortified in *Kamurali Jeremiah vs. Nathan Byanyima & Electoral Commission HC EP No. 002 of 2021* (Mbarara High Court) in which it was held that the competency of an election petition is a question of law. Similar position was adopted by this court in the case of *Ochwa David vs. Ogwari Polycarp & Electoral Commission* (supra). Also in the case of *Ossiya Solomon* (supra) the issue concerned the validity of the affidavit in support of the
10 petition commissioned by an Advocate who did not possess a valid practicing certificate at the time. The court found that this was a matter of law concerning illegality of the affidavit and it could be raised at any time and the court would entertain it.

The implication of the decisions in the *Ochwa David* and *Ossiya Solomon* cases (supra) is that a preliminary objection on a point of law needs not to be pleaded or brought by affidavit evidence
15 before the pleadings closed, as was argued by counsel for the Petitioner. Illegality can be raised at any time and court must determine it. That is the import of the holding in *Makula International Ltd vs. His Eminence Cardinal Nsubuga & Another [1982] HCB 11 (SC)* that;

20 “A court of law cannot sanction what is illegal and illegality once brought to the attention of court overrides all questions of pleading, including any admission made thereon.” [underlined for emphasis].

Mr. Okello Oryem submitted that the Chief Registrar’s letter, which brings to light the illegality in issue, is not evidence. That under Rule 15 of the Rules, evidence in election petitions is by affidavit evidence and that none was sworn either by the 1st Respondent or the Chief Registrar introducing fresh evidence of the letter on court record. That as such, court cannot even look at the
25 content of the letter to determine the issue.

A similar argument was raised in *Ochwa David* case (supra) and it was held that the legality or competence of an election petition is a question of law which can be raised at any time. Further relying on *Makula International Ltd* case (supra) court held that illegality once brought to the attention of court cannot be ignored and it supersedes everything including pleadings and
30 admissions thereon. It follows that even if the letter of the Chief Registrar in issue had been introduced through affidavit evidence, still it would invariably be superseded by the inherent illegality being brought to the attention of court.

5 As was held in the *Ochwa David* case (supra) that there is no particular or single prescribed manner
or format of bringing illegality to the attention of court. It may be by a formal application or
summarily raised by counsel before court at any time or by a court itself taking the matter and
making a finding on the record or taking judicial notice of relevant material bearing on the issue.
It may be in any other manner, provided the court is notified or made aware of the illegality. In the
10 present case, the illegality was brought home to the attention of court through an oral application
by counsel for the 1st Respondent premised on the Chief Registrar’s letter. As was held in the case
of *Musoke Mike and Mubiru Vincent vs. Kulumba James, HC Rev. Appl. No.09 of 2019*, that
courts ordinarily take cognizance of official documents from the Chief Registrar of the Courts of
Judicature under his or her hand/signature authored in the official course of business, to be
15 authentic official documents. The Chief Registrar is a senior judicial officer appointed under
Article 145 of the Constitution and functions spelt out under Section 15 of the Judiciary
Administration Act, No. 8 of 2020. He or she is the chief custodian of the Roll of Advocates and
is the authority responsible for the issuance of practicing certificates to eligible Advocates in
Uganda in any given year pursuant to Section 11(1) of the Advocates Act, which provides as
20 follows;

***“The registrar shall issue a practising certificate to every advocate whose name is on the
roll and who applies for such a certificate on such form and on payment of such fee as
the Law Council may, by regulations, prescribe; and different fees may be prescribed for
different categories of advocates.”***

25 Therefore, a letter authored by the Chief Registrar in the official course of business regarding the
status of a practicing certificate issued to an Advocate, is authoritative on the issue, unless its
authenticity is put in question; which was not the case in this matter. The Chief Registrar thus
needs not to swear an affidavit verifying content of the letter authored in an official capacity.

The second issue pertains to the merits of the objection itself. The objection is premised on
30 illegality born out of the affidavit in support of the petition commissioned by an Advocate, Mr.
Owakukiroru Raymond, whose commission had expired at the time he commissioned the
impugned affidavit. Section 3 (1) and (4) of the Commission of Oaths (Advocate) Act, provides
for appointment of practicing Advocates as commissioners for oaths, by the Chief Justice. There
is a wealth of legal authorities to support the view that an affidavit commissioned by an Advocate

5 without a practicing certificate is invalid. In *Otim Nape George William vs. Ebil Fred & Electoral Commission, HC EP No. 17 of 2011*, court held that;

10 *“The commission granted to an advocate under the Act goes with the practicing certificate. Once an advocate has ceased to practice as such, the commission also ceases. It can be stated that an advocate whose practicing certificate has expired cannot legally continue to administer an oath to anybody since his or her practicing certificate is the basis upon which the commissioner for oaths operates.”* [Underlined for emphasis].

Similar position was taken in *Returning Officer Iganga District* case (supra) that;

15 *“...if an Advocate who has been granted a commission fails in any year to obtain a practicing certificate, he ceases and stops to act as an Advocate, and therefore his commission ceases in the terms of commission for oaths (Advocates) Act.”* [Underlined for emphasis].

In the instant case, the 1st Respondent’s lawyers wrote to the Chief Registrar on 3rd Septwember,2021 seeking to ascertain whether the Advocate, Mr. Raymond Owakukiroru, had a valid practicing certificate for the year 2021. In letter dated 6th Septemebr,2021, the Chief Registrar
20 replied that the said Advocate was issued with a practicing certificate on 19th March,2021. It is observed that the said Advocate commissioned the impugned affidavit on 10th March 2021 after the grace period for renewing practicing certificates had lapsed and prior to the issuance to him of the practicing certificate for the year 2021. Section 11(2) of the Advocates Act Cap 261, provides that;

25 *“A practising certificate shall be valid until the thirty-first day of December next after its issue, and it shall be renewable on application being made on such form and on payment of such fee as the Law Council may, by regulations, prescribe; and different fees may be prescribed for different categories of Advocates.”* [Emphasis added].

30 A grace period of up to 1st March is granted for renewal. Similar provisions as above were considered in *Prof. Syed Huq vs. Islamic University in Uganda SCCA No.47 of 1995* and it was held that;

5 ***“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*, it was held that;

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

Based on the above cited authorities, it would follow that the affidavit in support of the petition in the present case, is invalid for having been commissioned by an Advocate whose commission had expired at the time. The effect of the invalidity of the affidavit on the petition is that in fact, there is no petition before court. A competent petition is one that is filed in accordance with the Parliamentary Elections Act and the Rules made thereunder. A petition cannot stand without an affidavit in support. This is the requirement of Rule 4 (8) of the Rules which is mandatory. In *Suubi Kinyamatama Juliet & Others* case (supra) the Court of Appeal found that the affidavit was incurably defective held as follows;

20 ***“The effect of such resolution of the ground is that the petition from which the appeal arises was illegally filed in court in contravention of Section 60 of the Parliamentary Elections Act and Rules 3 (c) and 4 (8) of the Parliamentary elections (Interim Provisions) Rules and therefore collapses with the collapse of the affidavit in support which was filed alongside the said petition.”*** [underlined for emphasis].

25 Mr. Okello Oryem submitted that should the affidavit in support of the petition be found to have been improperly commissioned, court should, pursuant to Section 14A of the Advocates (Amendment) Act (supra) order that the oath can be re-administered by the Registrar or Magistrate and the petition cured under Article 126 (2) (e) of the Constitution. Counsel sought to be on record as applying for the re-administering of the oath.

30 In *Kasala Growers Cooperative Society vs. Kakooza Jonathan & Another SCCA No. 19 of 2010*, court made a distinction between defective affidavit and failure to comply with statutory requirements and the effect of each and held as follows;

5 ***“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.”*** [emphasis added].

In the *Suubi Kinyamatama Juliet* case (supra) the trial court had proceeded with hearing the petition on merit after finding that the affidavit had been commissioned by an Advocate who was not in possession of a valid practicing certificate. The trial court 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;

10 ***“...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”.***
15 [Emphasis added].

It would follow that the present petition cannot be cured relying on Article 126 (2) (e) of the Constitution or applying Section 14 A of the Advocates (Amendment) Act (supra). Where a petition is null and void *ab initio*, in effect there is no petition before in the first place and no amendment or rectification can be made to a non-existent petition. So, Mr.Okello Oryem’s application is unsustainable in the circumstances. The net effect is that the preliminary objection wholly succeeds. Since the petition cannot be filed afresh in light of provisions of Section 60 (3) (supra) where court has no residual power to extend time lines set by the Act, it is dismissed with costs to the 1st and 2nd Respondent.

BASHAIJA K. ANDREW

25 ***JUDGE***

14/09/2021.

Mr. Ekirapa Ebil Isaac counsel for the 1st Respondent present.

Mr. Ngonde Davis and Mr. Arthur Okello holding brief for Mr. Okello Oryem Counsel for the Petitioner present.

30 Mr. Mwasa Jude counsel for the 2nd Respondent (reportedly berieved) and Mr. Ekirapa holding brief for him.

5 Petitioner present.

1st Respondent present.

Ms. Dorothy Kenyange Court Clerk present.

Ruling read in open court.

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BASHAIJA K. ANDREW

JUDGE

14/09/2021.