THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE

MISCELLEANOUS APPLICATION NO. 179 OF 2021

(ARISING FROM ELECTION PETITION NO. 002 OF 2021)

WANYOTO LYDIA MUTENDE :::::::::::::::::::::::::::::: PETITIONER

VERSUS

THE ELECTORAL COMMISSION:::::::::::::::::::: 1ST RESPONDENT

NAKAYENZE CONNIE GALIWANGO:::::::::::::::: 2ND RESPONDENT

BEFORE: HON DR. JUSTICE BASHAIJA K. ANDREW A

RULING

Wanyoto Lydia Mutende *(hereinafter referred to as the "Applicant")* brought this application against the Electoral Commission and Nakayenze Connie Galiwango *(hereinafter referred to as "1st "and "2nd" Respondent, respectively)* under Articles 28, 44, 126, 286 and 140 of the Constitution, Sections 14 and 33 Judicature Act Cap 13, and Section 98 Civil Procedure Act Cap 7; seeking orders to amend her Election Petition (EP) No. 02 of 2021. In particular, the Applicant's amendment seeks to include an alternative prayer for nullification of election results for a number of polling stations listed in her affidavit supporting the application, and also for the Applicant to be declared winner of the election. Details of the impugned polling stations are contained in certified copies of Declaration of Results Forms (DRFs) and Tally Sheets - *Annextures "QI"- "Q194".*

The grounds of the application are that being aggrieved by the election and declaration of the 2nd Respondent by the 1st Respondent, as winner of Woman Representative to Parliament for Mbale City, the Applicant instituted EP No. 02 of 2021, seeking, *inter alia,* an order for the conduct of a re-election for Mbale City Woman MP. That after the Applicant instituting the said petition, the 1st Respondent's Secretary without any reasonable cause or justification declined to avail the Applicant with certified copies of DRFs and Return of Transmission of Results forms necessary

for her evidence to support the said petition. That the evidence in the said election petition detailing the commissions, omissions and electoral malpractices was substantially premised on the said DRFs availed to her by the 1st Respondent's Returning officer for Mbale City on 16/01/2021. That upon being served with copy of the election petition, the 1st Respondent identified irregularities, anomalies and malpractices mentioned in the DRFs and illegally altered, adjusted, doctored and/or modified entries on the certified copies of the DRFs, which was done with the primary objective of concealing, veiling and/or disguising the electoral irregularities, anomalies and omissions that occurred during the electoral process. That as a result, it necessitated an amendment to the original petition to enable the Applicant to plead the nature and effect of the said modification without departing from the original evidence on the record.

Further, that the doctoring/modification of entries fundamentally affected the credibility, validity and authenticity of the results of the listed polling stations, which in turn affected the final result of the election. That the amendment of the original petition is essentially intended to particularize/specify the actual polling stations where the alleged fundamental breaches of law and rules of procedure regulating the conduct of a free and fair election occurred without necessarily interrogating the entire electoral process.

The Applicant thus seeks leave to amend her petition to add an alternative prayer for nullification of the impugned results specifically from the listed polling stations; upon which computation of the remainder of the results the petitioner avers she would obtain a numerical advantage over the 2nd Respondent and all other contestants in the said election and hence be declared winner.

The 1st Respondent opposed the application in the affidavit sworn by Mr. Charles Rebero, a Returning Officer of the 1st Respondent for Mbale City. He avers that the intended amendment is essentially a new petition sought to be filed after the lapse of the limitation period, disguised as an amendment. That it seeks to introduce new causes of action outside time for filing a petition in order to circumvent limitation. Also, that the Applicant seeks to add prayers which were not justified by the original pleadings and which necessarily arise out of fresh pleadings and causes of action. That the original petition was unsupported by evidence and now the Applicant is on a fishing expedition using this application to create evidence to support the petition in order to better her otherwise incompetent pleadings.

Further, that the application is filed in bad faith after the Applicant had benefit of reading through the answers to the petition and affidavits in support thereof. That it is just an afterthought, and allowing the amendment would be prejudicial to the Respondents. That queries raised by the Applicant can be remedied by cross-examination of witnesses, not the amendment of the petition.

The 2nd Respondent similarly opposed the application as an afterthought, devoid of merit and barred by law. In her affidavit in reply, she averred that there is no evidence to show that the Applicant applied for certified copies of DRFs and Voters Register from Secretary of the EC or at all. That the Applicant was indolent in obtaining DRFs from her agents who had them from all polling stations on election day. That as such, the Applicant is attempting a game of chance through this application.

Further, the 2nd Respondent denied the allegations of alteration, adjustment, doctoring and/or modification of entries on certified copies of DRFs. That in any case, results of all candidates on the DRFs attached to the affidavit in support by the Applicant do not differ hence do not call for amendment of the original petition since copies of both DRFs are already on court record. Furthermore, that the application seeks to introduce new grounds of alteration, concealment and falsification of results as a foundation for a new prayer which was not intended in the original petition which, if allowed, would be unlawful. Also, that the Applicant is not contesting results but arithmetic process which has no effect on the final outcome of the election. That this application is caught by latches and is *mala fide* and intended to subvert the course of justice.

At the hearing, Mr. Mutembuli Yusuf represented the 2nd Respondent, Mr. Sserunjogi Nasser represented the 1st Respondent, Mr. Nangulu Edmond, Mr. Swabur Marzuq, Mr. Silas Mugabi, Mr. Peter Allan Musoke and Andrew Wambi, jointly represented the Applicant. All counsel made their respective submissions which court has duly taken into account arriving at a decision herein.

Opinion:

The Applicant seeks leave of court to amend her election petition in terms of the orders as sought in the application. It is worthy observing, at the outset, that generally amendment of pleadings is an issue of law. In ordinary civil suits, court is vested with wide discretion to allow amendment if in the opinion of court, the circumstances call for it and it is necessary for the ends of justice. This

is reflected in the Civil Procedure Act Cap 71, and Rules made thereunder, specifically Order 6 r.19 CPR which provides that;

> ***"The court may, at any stage of the proceedings, allow either party to alter or amend his or her pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."***

Rules 20 -25 provide for instances and circumstances under which parties to the proceedings may amend their pleadings with or without leave of court, the effect of the amendment and of the failure to amend. As regards the instant application, the principles pertaining to amendment of pleadings under the CPA and CPR are, by virtue of Rule 17 of the Parliamentary Elections (Election Petitions) Rules SI 141-2; made applicable to parliamentary election petitions, subject to such modifications as the court may consider necessary in the interest of justice. Rule 17(supra) provides;

> ***"Subject to these Rules, the practice and procedure in respect of a petition shall be regulated, as nearly as <u>may be</u>, in accordance with the Civil Procedure Act and the Rules made under that Act relating to the <u>trial</u> of a suit in the High court, with such modifications as the court may consider necessary in the interest of justice and expedition of the proceedings."*** [underlined for emphasis].

From the reading of Rule 17 (supra) it is evident that it limits the applicability of the CPA and CPR only to a "trial" of election petition. The term "trial" is defined by ***Black's Law Dictionary 8th Edition*** at p.1542 to mean;

> ***"A formal judicial examination of evidence and determination of legal claims in adversary proceedings."***

On the other hand, the term "amendment", of which the Applicant herein seeks the orders, is defined (at page 89 (supra)) to mean;

> ***"A formal revision or addition proposed or made to a statute, constitution, pleading, order, or other instrument…. a change made by addition, deletion or correction…an alteration in wording."***

Given the definition of the phrases above, it is in no doubt that "amendment" is not a "trial". As such, provisions of CPA and CPR pursuant to Rule 17 (supra) are inapplicable to amendment of election petition. It would seem clearly that amendment of election petition was never envisaged under the law. This finding is derived from the provisions of the law relating to time within which a party must file an election petition. S.60 (3) of the Parliamentary Election Act (supra) provides that;

> ***"(3) 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."***

Apart from the above provision mandating time within which to file a petition, the Act does not provide for extension of time for filing an election petition. It is now settled law that a court has no inherent or residual power to extend or abridge time set by an Act for taking a step or doing an act by a party to proceedings. See: ***Makula International Ltd v. His Eminence Cardinal Nsubuga & Another Civil Appeal 1981/4 [1982] UGSC2.***

Even under Rule 19 (supra) which provides for enlargement and abridgement of time, it is only applicable where time is appointed by the Rules for doing any act if in the opinion of the court there exists such special circumstances as to make it expedient to do so. However, court would not resort to this Rule where time appointed is set by the Act itself, such as in filing election petition. Therefore, any attempt to amend an election petition outside time set by law for filing the petition would appear to be an exercise in futility. To allow it would have the practical effect of court extending time for filing the petition; which power court is not vested with.

The Supreme Court of Uganda was recently seized with the same subject of amendment of election petition in ***Kyagulanyi Ssentamu Robert v.Yoweri Museveni Tibuhaburwa Kaguta & 2 Others Miscellaneous Application No. 01 of 2021(Arising from Presidential Election Petition No. 01 of 2021).*** The issue arose whether the Uganda law relating to determination of a presidential election petition provides for amendment of pleadings by any party to the proceedings. Court found that the available chronology of steps leading to the determination of the petition does not indicate that amendment of pleadings is envisaged in a presidential election petition. The applicant therein had sought to invoke Rule 15 of the Presidential Elections (Election Petitions) Rules, which is couched in the exact same terms and wording as Rule 17 of the Parliamentary Elections (Election Petitions)

Rules (supra); to move the court to have his petition amended. The applicant argued that Rule 15 (supra) makes applicable the general law relating to the hearing of civil matters hence the application of the CPA and CPR to election petition.

The Supreme Court pronounced itself that Rule 15 (supra) does not make it mandatory for court to apply the CPA and CPR in the determination of election petition given the use of the phrase "may". Of particular relevance to the instant application, the court also found that if the need arose to apply the CPA and CPR, their use would be limited to the trial/ hearing of the petition only. To that end, the Supreme Court held that;

> ***"It is only at the trial / hearing of the presidential election petition that the court may apply the CPA and CPR. Anything outside a trial makes the CPA and the Rules made thereunder inapplicable. Needless to say, the amendment of a petition is not a trial."*** [Underlined for emphasis].

Clearly, the law and procedure dealing with amendment of ordinary civil suits are of no relevance when it comes to amendment of an election petition. To that end, the Supreme Court cited ***Uwais CJN in Orubu v. NEC, (1988) 5 NWLR (Pt.94 232 at 347)*** which gives the rationale, as follows;

> ***"An election petition is not the same as the ordinary civil proceedings. It is a special proceeding because of the nature of elections which, by reason of their importance to the well-being of a democratic society, are regarded with aura that places them above normal day today transactions between individuals which gives rise to ordinary or general claim in court. As a matter of deliberate policy to enhance urgency, election petitions are expected to be devoid of the procedural clogs that cause delay in the disposition of the substantive dispute."***

The Supreme Court found the above case to be in *pari-materia* with requirements of the Uganda legal regime dealing with the determination of a presidential election petition. As already noted, the same principles regarding amendment of presidential election petition, apply *mutatis mutandis* to a parliamentary election petition, such as one under consideration.

The record of the instant petition sought to be amended shows that it is still in the preliminary filing stages. Filing of an election petition is not a trial/hearing, and as such Rule 17 (supra) cannot

be invoked. It would seem clearly that the law as it stands now, envisages that once an election petition has been filed, the journey towards its final determination commences, which by and large should be uninterrupted. An amendment, such as one being sought through the instant application, could be seen as an interruption towards the expeditious trial of the election petition; besides not being specifically provided for in the law. If this court were to allow the amendment, it would be acting outside the law that governs the trial and determination of election petitions.

For the above reasons, this court could not be persuaded by the argument of joint counsel for the Applicant, that the principles enunciated in the ***Kyagulanyi Sentamu Robert petition*** (supra) only apply to a presidential election petition because the Constitution sets time limits for the swearing in of the president- elect. Quite to the contrary, the same principles equally apply to parliamentary election petitions since the interpretation by the Supreme Court was in respect of similar provisions of the law and rules governing amendment and determination of election petitions in a Parliamentary election. Mr. Swabur Marzuq also cited S.39 of the Judicature Act Cap 13, arguing that this court can adopt a procedure suitable under the circumstances to grant leave to the Applicant to amend her petition. This is, however, a misdirection in respect of the law. Firstly, S.39 (supra) would act as a safety- valve only where court is determining an ordinary suit governed by the ordinary/general law and procedure; not an election petition which is governed by a specific legal and procedural regime as already found above. Secondly, in finding as it did in ***Kyagulanyi Sentamu Robert*** (supra) the court must have been acutely alive to provisions of S.39 (supra) but never resorted to it. The court instead set down rules of specific application to guide courts when confronted with issues pertaining to amendment of election petitions. The Supreme Court, and indeed this court, has no power to order amendment of election petition. To do so would be unlawful. This position is further fortified by ***Dhartpakar Madan Lal Agarwal vs. Rajiv Gandhi, May 1987 AIR 1577, 1987 SCR (3) 369*** cited in the ***Kyagulanyi Sentamu Robert*** case (supra) where it was held that;

> ***"…. there is a long line of authority for the proposition that there can be no amendment to a petition after the expiration of the time limit, …an amendment would not be allowed where there was a rigid limit of time for the presentation of the petition. To allow otherwise would have the practical effect of extending the time for filing the petition."*** [underlined for emphasis].

As already observed, court has no inherent or residual power under the law to extend time for filing the petition. The net effect is that the Applicant's election petition cannot be amended after the expiration of the time limit provided by law for filing a petition. Having found as such, other issues posed by the application as to whether the amendment sought would raise new cause(s) of action/new grounds and/or new prayers, are rendered moot. The Applicant shall restrict herself to her original petition. This application fails in its entirety and it is accordingly dismissed with costs to the Respondents.

BASHAIJA K. ANDREW

JUDGE

28/08/2021.