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**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
ELECTION PETITION APPEAL NO. 01 OF 2021**

NTENSIBE KIBLA MANOTI.....PETITIONER/APPELLANT

VERSUS

10 **THE INDEPENDENT ELECTORAL COMMISSION.....RESPONDENT**

BEFORE: HON. JUSTICE ESTA NAMBAYO

RULING

15 The Appellant/Petitioner, Ntensibe Kibla Manoti brought this Petition under **Article 61(1) (f), 64 (1) and Section 15 of the Electoral Commission Act Cap 140** against the Respondent, The Independent Electoral Commission, seeking for declarations that;

1. The decision by the Respondent not to appoint a period by notice in the gazette for display of voters' roll for the said election was un fair, illegal and renders the resultant election of Councilors null and void.
- 20 2. That the guidelines for Election of Workers' Councilors to Local Government Council, 2018 under which the said election was organized and held are not only illegal but also null and void and this renders the resultant election of Councilors null and void.
3. The nomination and election of Sekamwa Luke Musajjalumbwa as
- 25 unopposed was illegal, null and void.
4. The cancellation of the Petitioner's nomination was unfair given the circumstances.
5. That fresh nominations for workers' Councilors be ordered.
6. The Respondent pays the costs of this Petition.

30 The grounds of this petition/appeal are set out in the affidavit in support of the
Petition/ appeal sworn by the Petitioner/Appellant but briefly are: -

1. That before his nomination, the Petitioner went to the offices of the
Respondent in Masaka City to get guidelines for the election of the
Workers' Councilors and he was provided with a copy by the Returning
35 Officer of Masaka City which guidelines he later found to be irrational,
unconscionable, malafide, unjustified, ultra vires and illegal.
2. That pages 1, 2 and 3 of the said guidelines indicated that there was an
Electoral College to elect workers' Councilors from which intending
candidates were to get voters to propose, second and support their
40 nomination but the Appellant was not provided with the list of voters,
neither was one pinned up for intending candidates to identify the voters.
3. That the Appellant/Petitioner notified the Returning Officer of the
anomaly and also informed him that the Gazette notification had not
been displayed.
- 45 4. That as the nomination days drew closer, the Petitioner made several calls
to the Returning Officer but all in vain.
5. That failure to be provided with a list of voters left the Petitioner with no
choice but to rely on rumors to identify potential voters to nominate and
support his nomination and in the process, it led him to seek nomination
50 from an unregistered voter which led to cancellation of his nomination by
the Respondent basing on the complaint filed by his opponent, a one
Sekamwa Luke, who was then declared as unopposed.
6. That during the hearing of the matter at the Electoral Commission, it
came to the Appellant/petitioner's knowledge that the guidelines relied
55 on for the election of Workers' Councilors to the Local Government

Council, 2018 under which the said nomination was done and the impending elections were to be held were not only illegal but also null and void.

60 7. That because of the above stated reasons, the Petitioner prayed that fresh nominations to be held by the Respondent but the Respondent ignored his requests/prayers and in its ruling dated 11th day of January, 2021 cancelled his nomination and allowed the complainant/his opponent to sail through unopposed.

65 8. That on the 30th day of March 2021, the Petitioner being aggrieved wrote to the Respondent requesting it not to gazette the complainant because of the above stated anomalies and illegalities but to the Appellant's surprise and shock the Respondent went ahead to gazette the Sekamwa Luke as the duly elected workers' councilor for Masaka City.

9. That this petition/appeal should be heard in the interest of justice.

70 Mr. Agaba Rutemba Sam, the Returning Officer/District Election Administrator for Masaka City swore an affidavit opposing this application.

Background to the Petition

75 The brief background to this petition/appeal is that the Petitioner/Appellant together with Sekamwa Luke Musajjalumbwa were nominated to stand for the position of workers' councilor (male) for Masaka City. After the nominations, one of the seconders of the Appellant, Matovu Abdul, was accused of not being a registered voter and the Respondent after hearing the parties, cancelled the Appellant's nomination on those grounds, leaving Ssekamwa Luke Musajjalumbwa, unopposed, hence this appeal.

Legal representation.

Learned Counsel Jude Mbabali appeared for the Petitioner/Appellant while Counsel Eric Ssabit together with Kanyiginye Angela appeared for the Respondent.

When the matter came up for scheduling, Counsel for the Respondent raised
85 preliminary points of law that the appeal is incompetent, frivolous and time barred.

Submissions on the preliminary objection

Counsel for the Respondent submitted that the appeal was brought under Art. 61(1) (f) of the Constitution and S.15 of the Election Commission Act which provide for pre- polling complaints. That those Appeals come to this Court by way of inviting
90 Court to either reverse or confirm the decision of the Respondent where the Respondent is dealing with candidates in an election dispute. Counsel explained that the Respondent no longer has candidates for this election. He invited Court to look at the national gazette, which is annexure "J" to the affidavit of the Petitioner. That the said gazette shows that Ssekamwa Luke Musajjalumbwa was declared
95 unopposed on the 12th April, 2021. The Appeal was filed on the 27th May, 2021, almost a month after Musajjalumbwa Luke Ssekamwa had been declared and gazetted unopposed.

Counsel explained that the purported complaint which the Petitioner/Appellant appealed against is contained in the decision dated 11th January, 2021 as per
100 annexure "H" to the affidavit in support of the Appeal. That Rules governing appeals against the decision of the Electoral Commission are the Parliamentary Elections (interim provisions) (Appeals to the High Court from Commission) Rules, and specifically Rule 5 details a procedure and mode of the petition, service and specifically it must be appealed within 5 days. That the Respondent is given 3 days

105 under Rule 8 to file a reply. That the parties in this case were heard and the
decision issued as indicated in annexure "H". Counsel emphasized that the last day
to file an appeal to this court in such a matter should have been the 15th January,
2021 or 16th January, 2021. That even if this court reversed the decision of the
commission, it is no longer feasible to have candidates because the electoral
110 commission deals with only candidates to an election and that the candidate to that
election was declared unopposed and gazetted as such. He relied on the case of
Ngoma ngime –v- Winnie Byanyima CR No. 0009 of 2001 where court observed
that the electoral process is a progressive one and is not back tracked. That the
justification of pre-polling complaints and this Court being a final Court in such
115 matters, is intended to make sure that pre-polling complaints are concluded to their
finality before polling. And that even the Constitution is very clear under Article 64
and S. 15 of ECA, that in such matters the High Court is the final Court of Appeal
and the decision is delivered before polling. Counsel relied on the case of **Kafeero**
Sekitoleko Robert –v- Mugambe Joseph Election Petition No.6 of 2011 in which
120 Court dismissed the matter. He submitted that the cause of action of the Appellant
under S.15 of the Electoral Commission Act is different from the cause of action
under S.136. That under S.15 of the ECA there is no declared winner of the election.
That the High court either declares, reverses or upholds the decisions of the
electoral commission but cannot be invited inherently to reverse an elected
125 candidate as a winner of an election in such a proceeding.

Counsel further submitted that this appeal is time barred having been filed on the
27th May, 2021 more than three months from the time the Appellant got a decision
on the 11th January, 2021. That there is even no application for extension of time
and there is no justification for the delay for a decision made on the 11th January,
130 2021. Nothing in the affidavit shows that an attempt was made to arrest the

declaration by way of an interim Court order. He averred that this appeal is barred in law and should be dismissed with costs.

In reply Counsel for the petitioner/Appellant submitted that the complaints that the petitioner in this case raised to the Respondent were never answered in the
135 Respondent's ruling and the Petitioner wrote demanding for reasons why his complaints were not considered. He referred this court to annexure "I" to his affidavit dated 30th March, 2021. This is why the Petitioner resorted to this Appeal under Art. 61 (1) f and S. 15 of the Electoral Commission Act. That the appeal is against the decision of the Respondent as well as failure by the Respondent to
140 address his complaints.

That the petitioner's complaint was that at the time of nomination of candidates, there was no voters' roll displayed and/or gazetted as required by law. That this caused the Petitioner to be nominated by someone who claimed to be Abdu Matovu a name that appeared on the voters' roll, but he was not the actual Abdu
145 Matovu in person. A copy of the gazette attached to Petitioner's affidavit shows that the Respondent later on declared in the gazette dates for which councilors for un-unionized workers were to be elected (annexure "C" to the affidavit in support). That the Respondent had not compiled the voters' registers. All the Appellant's complaints were never addressed by the Respondent that is why he filed this appeal.
150 Counsel relied on the case of ***Kabugo Mugendawala- versus- Electoral commission*** and explained that Counsel for the Respondent's submission that the matter should have proceeded under Section 138 of the Local Government Act, was not possible because to proceed under that section, one must have been a candidate yet the Appellant was never a candidate, he was disqualified before that
155 stage and a non-candidate cannot file an election Petition.

That the available option could have been to proceed by collection of the 500 signatures but the voters register for workers does not have the 500 voters. So the Appellant/Petitioner had no other option. That the case of **Ngoma Ngime (supra)** cited by Counsel for the Respondent relates to Election Petitions, yet the current matter is an appeal under S.15 ECA. Counsel prayed that the objection be overruled so that the matter is heard on merit.

Analysis

Article 61 (1) (f) of the Constitution mandates the Electoral Commission to hear and determine Election complaints arising before and during polling.

Under Article 64 (1) of the Constitution, any person aggrieved by the decision of the Electoral Commission in respect of any of the complaints referred to in article 61 (1) (f), of this constitution may appeal to the High Court.

Section 15 of the Electoral Commission Act Cap 140, provides that;

(1) 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 of 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.

(2) An appeal shall lie to the High Court against a decision of the Commission confirming or rejecting the existence of an irregularity.

(3) On hearing a petition under subsection (2), the High Court may make such order as it thinks fit, and its decision shall be final.

In *Kasirye Zzimula Fred -v- Bazigatirawo Kibuuka Francis Amooti & Anor Election Petition Appeal No.1 of 2018*, the Court of Appeal held that;

"...it appears to us that the intention of the legislature in enacting Section 15 of the Electoral Commission Act was to ensure that all disputes arising prior or during nominations before voting are resolved with finality before the election date, except where the law otherwise specifically provides. Timely complaints will avoid undue expense and inconvenience to the parties inclusive of the electorate who do not have to vote where nomination is contested. Issues of nomination should be resolved before elections." (underlining is mine for emphasis)

It was further noted that;

"it appears to us that the appellant waived his rights to complain when he failed to bring the complaints within the stipulated period and as such would be estopped from doing so after the election..."

Under paragraph 13 of the affidavit in support of the petition/appeal, the Petitioner states that he requested the Respondent to run fresh nominations due to the illegalities, irregularities and unfairness that he pointed out, but the Respondent in its ruling dated 11/1/2021, disregarded his request for fresh nominations and it went ahead to gazette his opponent Ssekamwa Luke Musajjalumbwa as unopposed. The petitioner filed his appeal in this court on the 25th/5/2021, after the Opponent, Ssekamwa Luke had been gazetted as the duly elected workers' councilor for Masaka City. Once Ssekamwa Luke was gazetted, it meant that the matter was no longer a pre-polling or polling case as provided under Art 61(1) (f) of the Constitution and S.15 (1) of the Electoral Commission Act and therefore, it cannot be brought to this Court under Art. 64(1) of the Constitution and S.15(2) of the

Electoral Commission Act. The available option to the Petitioner/Appellant would be
205 to file against declared elected candidate. In this case, the Petitioner should have
proceeded under S.138 of the Local Government Act. ***S.138(2) of the LGA,
specifically provides that;***

***“A person qualified to petition under subsection (3) who is aggrieved by a
declaration of the results of a councilor may petition the Chief Magistrate’s
210 Court having jurisdiction in the constituency.***

***Under S.138(3) of the LGA, it is provided that an election petition may be filed
by any of the following persons-----***

(a) A candidate who loses an election; or

***(b) A registered voter in the constituency concerned supported by the
215 signatures of not less than five hundred voters registered in the
constituency.***

***S.138(4) provides that an election petition shall be filed within fourteen days
after the day on which the results of the election have been notified by the
Electoral Commission in the Gazette.***

220 In this case, the results were notified in the Gazette on the 12th/4/2021, while the
petition was brought to court on the 27th May, 2021, more than a month after the
gazetting of the results.

In view of the above, it is my finding that this petition/appeal was wrongly filed
before this court as it was brought after the Electoral Commission had gazetted Mr.
225 Ssekamwa Luke Mussajjalumbwa as the councilor for Masaka City. The gazetting
made the matter a post-election case. The Petitioner should have filed this case
before the Chief Magistrate’s Court having jurisdiction in the Constituency within a

period of 14 days after gazetting. I uphold the preliminary points of law raised by Counsel for the Respondent and dismiss this petition/appeal with costs.

230 I so Order.

Dated, signed and delivered by mail at Masaka, on this 1st day of September, 2021.

Esta Nambayo

235 **JUDGE**

1/09/2021