

IN THE HIGH COURT OF UGANDA AT SOROTI

ELECTION PETITION NO 2 OF 2021

OSSIYA SOLOMON

.....

PETITIONER

10

VERSUS

KOLUO JOSEPH ANDREW

1st RESPONDENT

ELECTORAL COMMISSION

.....

2nd RESPONDENT

BEFORE: HON. LADY JUSTICE JANE OKUO KAJUGA

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RULING

Introduction

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The 2nd Respondent conducted Parliamentary elections for Toroma County Constituency on the 14th of January 2021. The petitioner, Ossiya Solomon Alemu and 10 other candidates contested for the seat. The 1st Respondent, Koluo Joseph Andrew was declared winner with 9,179 votes polled and gazetted on 17th February 2021. The petitioner polled 8,013 votes and came second in the race. Being dissatisfied with the outcome, he filed this petition on the 15th of March 2021 contesting the election and declaration of the 1st Respondent as elected candidate.

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The petition:

The grounds of the petition are that the elections were not conducted in accordance with the principles and provisions laid down in electoral laws, and that this affected the outcome in a substantial manner. In essence the 2nd

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5 Respondent is faulted for failure to conduct free and fair elections. He contends
that there were illegal practices and offenses committed in connection with the
election by the candidate personally or with his knowledge, consent or approval.
These include bribery, undue influence, sectarianism and defamation. He sought
an order for annulment or setting aside of the elections and a declaration that he
10 was the rightful winner of the election, or in the alternative, conduct of fresh
elections.

Representation

When the petition came up for scheduling, Jude Byamukama appeared for the 1st
respondent, Patrick Wetaka and Gilda Katutu appeared jointly for the 2nd
15 respondent while Davis Ngonde and Okello Arthur appeared for the petitioner.
The latter were holding brief for Okello Oryem.

Both the petitioner and the 1st Respondent were in court.

Preliminary points of Law

A joint scheduling memorandum was prepared and filed by the parties, and
20 adopted by court. Three preliminary issues were identified for resolution, as set
out hereunder:

1. Whether 56 affidavits out of 60 affidavits of the petitioner offend the
provisions of the Illiterates Protection Act Cap 78 and the Oaths Act Cap 19?
- 25 2. Whether 20 affidavits in support of the petition ought to be expunged on
account of variations of the witness signatures on attached photocopies?
3. Whether election petition No 2 of 2021 was validly filed?

30 The petitioner had previous notice that preliminary points of law would be raised,
as evidenced from paragraphs 3 and 5 of the 1st respondents answer to the petition
and paragraph 2 of the 2nd respondents answer. The same were duly filed on court
record and served on the petitioner.

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5 I proceed to highlight the submissions of Counsel in respect of the identified issues and resolve the same, but opt to do so beginning with issue 3 (because it touches the foundational issue of the competence of the petition) followed by issue 1, then 2.

Issue three:

10 Counsel for the 1st respondent contends that the petition is incompetent on grounds that the petitioner's affidavit in support was commissioned by an Advocate, Raymond Owakukiroru who at the time did not possess a valid practising certificate. As a result, he had no legal capacity to commission documents because he had ceased being an advocate within the meaning of
15 Section 1(4) of the Commissioner for Oaths (Advocates Act) Cap 5.

He submitted that the affidavit of the petitioner is incurably defective, with the effect that the petition before court is incompetent for want of an accompanying affidavit and must collapse. He made reference to Rule 4(8) of the Parliamentary Elections (Interim Provisions) Rules-S1 141-2 that requires the petition to be
20 accompanied by an affidavit.

He supported his submission with a myriad of legal authorities including **Ssubi Kinyamatama Juliet and others Vs Ssentongo Robina and Electoral Commission** Election Petition Appeal No 92/2016 and **Returning Officer Iganga District and another Vs Hajji Muluya Mustafa** Civil Appeal No 19/1997

25 Additionally, counsel contends that the same Advocate appears to have commissioned the affidavit while working with Okello Oryem and Co. Advocates, the firm representing the petitioner in this matter, contrary to the law.

He prayed that court finds the petition incurably defective, backed by a void affidavit and that the same be struck out with costs to the respondents.

30 In reply, counsel for the petitioner submitted that the affidavit in support of the petition was valid since the advocate was at the time of commissioning, within the grace period granted for renewal of practicing certificates. In his view, the

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5 grace period is up to the 31st of March each year. That the affidavit was commissioned on the 10th of March 2021 which was within the grace period, and his application for renewal had already been lodged.

In the alternative he submitted that the remedy for lack of a certificate lies with the advocate not getting costs but not invalidating the matter. He supported his
10 position with the decision in **Professor Syed Huq versus the Islamic University in Uganda, Civil Appeal No 47/1995**. He further submitted that a person does not cease to be an advocate just because his practicing certificate has expired.

In rejoinder the 1st respondents lawyer asked the court not to be misled by the wrong date of 31st March presented by opposing Counsel as the end of the grace
15 period, and reiterated his prayer.

Opinion:

The conduct of elections for Member of Parliament are governed by the Parliamentary Elections Act 2005 and the Rules made thereunder. It is a requirement under Rule 4 (8) of the Parliamentary Elections (Interim Provisions)
20 Rules S.I 141-2 that a petition shall be accompanied by an affidavit setting out the facts on which the petition is based together with a list of any documents on which the petitioner intends to rely. Rule 3 (c) defines a petition as including the affidavit accompanying the petition.

The question of whether the requirements of the above provision have been met
25 in respect of the present petition is the crux of issue No 3. Is the affidavit in support of the petition valid if it was commissioned by an advocate who did not have a practicing certificate? If so, what is the effect on the competence of the petition? This is a matter of law and thus aptly raised as a preliminary Objection.

Section 2 (1) and (4) of the Commissioner for Oaths (Advocates) Act provides for
30 the appointment by the Chief Justice of practicing advocates as commissioners for oaths. These two provisions have been relied upon and expounded in many authorities in resolving whether an affidavit commissioned by an advocate

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5 without a practicing Certificate is valid. In **Otim Nape George William versus Ebil Fred and another** Election Petition No 17/2011 the trial Judge summarised the position as follows:

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. Therefore, 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 a commissioner for oaths operates"*

In another case of the **Returning Officer Iganga District and another** (supra) the Court of Appeal observed as follows:

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 Commissioner for oaths (Advocates) Act."*

20 In the present case, the 1st Respondent's agents wrote to the Chief Registrar of the High Court to verify whether advocate Owakikiroru had a valid practicing certificate. A copy of this letter and the response received, are annexures to the 1st respondent's additional affidavit in support of the answer to the petition deponed on 10/8/2021 and filed the next day. They are marked "A" and "B" respectively. From annexure "B", the Chief Registrar of courts of Judicature answered that the practicing certificate was renewed on 19th March 2021.

25 On 23/8/2021, counsel for the petitioner filed the affidavit of advocate Owakukiroru deponed on 21/8/2021. In para 2 thereof, he avers that he lodged his application for renewal of the practicing certificate for the year 2021 on 5/3/2021 and confirms that it was issued on 19/3/2021.

30 It was within this window period that the petitioner's affidavit in support was commissioned, specifically on 10/3/2021.

35 Section 11 (2) of the Advocates Act, Cap 267 provides that a practicing certificate shall be valid until the 31st day of December next after its issue, and shall be renewable on application being made on such form and on payment of such fee as the Law Council may by regulations prescribe. A grace period of up to 1st March is granted for renewal.

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5 This was the position enunciated by Justice Wambuzi in the case of **Professor Syed Huq** (supra) where he interpreted Section 14 (1) of the then Advocates Act No 22 of 1970, which is the equivalent of Section 15 (1) of the current Advocates Act Cap 267 and stated as follows in respect of the grace period *"it appears that an advocate whose practicing certificate has expired may practice as an advocate in the months of*
10 *January and February, but that if he does so he will not recover costs through the courts for any work during that period. The documents signed or filed by such an advocate in such a period are valid.*

In **Kabogere Coffee factory versus Haji Twalib Kigongo** SCCA No 10 / 1993 the same court held that *"documents filed by an advocate without a practicing certificate beyond*
15 *the 1st of March of every given year are invalid"*

It is clear from the preceding that the grace period covers January and February of every year. The grace period had expired at the time of the commissioning of the petitioner's affidavit on 10th of March 2021. The act of the commissioning was thus invalid. It was also a criminal act.

20 The above cases also disprove the propositions of counsel for the petitioner that advocate Owakikiroru had not "ceased" to practice just because his practicing certificate had expired, and that the grace period extended to 31st March of each year. The above authorities are crystal clear on the two issues.

25 The effect of the invalidity of the affidavit on the petition is that there is in fact, no petition before the court. A competent petition is one which is filed in accordance with Parliamentary Elections Act and the Interim Provisions Rules thereunder. A petition cannot stand without an affidavit in support, as the provisions of Rule 4 (8) which I have previously cited herein are couched in mandatory terms by the use of the word "Shall".

30 In the Ssubi Kinyamatama case (supra) the court of appeal upon concluding that such an affidavit is incurably defective, observed as follows:

35 *"The effect of such resolution of the ground is that the petition from which this 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) and it therefore collapses with the collapse of the affidavit in support that was filed alongside the said petition.*

In **Kasaala Growers Cooperative Society and Kakooza Jonathan and another**, Supreme Court Civil Application No 19/2010, the court drew a distinction

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5 between defective affidavits and failure to comply with statutory requirements and the effect of each. It was held as follows:

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

In the **Kinyamatama** case (supra), the appeal emanated from the decision of the High Court to proceed with the hearing of the petition even after holding that the affidavit in support had been commissioned by an advocate who did not have a valid practicing certificate, as in this case. The trial Judge had relied on Article 126 (2) (e) of the Constitution in a bid to cure the defect. The court of Appeal disagreed with this position and held as follows:

"...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."

20 This court cannot therefore rely on Article 126 (2) (e) to salvage this case. The petition was filed illegally, and thus collapses.

I am in agreement with the above decision and are bound to follow it by the doctrine of *Stare Decisis*.

Before I take leave of this issue, I have taken consideration of whether Section 14
A of the Advocates (Amendment) Act 2002 can be applied to rescue the petition.
25 It provides:

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-

30 (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;

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

Thunders

5 I am convinced that the above provision does not apply to the instant case where the petition has been deemed incompetent, for the following reasons:

- 10 i) Since there is in effect no petition before the Court, it follows that no correction can be made through amendment or rectification of the petition and the accompanying affidavit. I am convinced that section 14 (ii) which provides that a client would be given time to make good any defects arising, does not apply in this case. The only avenue out would be to bring a fresh petition.
- 15 ii) There are distinct time lines within which an election petition must be filed under the Parliamentary Elections Act, 2005. Section 60 (3) provides for within thirty days after the date on which the result of the election is published in the gazette. It is decided law that courts do not have inherent or residual powers to enlarge time lines that have been fixed by Statute. **Makula International versus His Eminence Cardinal Nsubuga SCCA 4/1981**. This court cannot therefore grant the petitioner extension of time to bring a fresh petition.
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I therefore do not find Section 14 A (1) (b)(2) as a remedy applicable in the circumstances of this case. It cannot be employed to amend the affidavit and somehow save the petition, which I have already held as incompetent.

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The second limb of the objection raised by counsel for the 1st Respondent is that the advocate who commissioned the affidavit in support appeared to be employed with the law firm which had instructions to handle the petition itself, i.e. Okello Oryem and Co Advocates at the time.

30 If established, this would mean that the affidavit in support would also be invalid for failure to comply with the provisions of the law. Section 4 of the Commissioner for Oaths (Advocates) Act Cap 5 provides that:

35 “ a commissioner for oaths may by virtue of his or her commission in any part of Uganda administer any oath or take any affidavit for the purpose of any court or matter in Uganda, including matters ecclesiastical, matters relating to the registration of any instrument whether under an act or otherwise and take any bail or recognisance in any or for the purpose of any civil proceeding in the High Court or any Magistrates Court except that the commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which

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5 he or she is the advocate for any of the parties to the proceeding or concerned in the matter, or
clerk to any such advocate or in which he or she is interested.

I have considered the impugned affidavit of the petitioner in support of the petition. The stamp of the advocate who commissioned it bears the following address, "P.O. Box 26870, Kampala". The petition was prepared and filed by
10 Okello Oryem and Co. Advocates, of P O Box 264 Ntinda.

I am of the view that there is nothing to suggest that at the time of commissioning, the advocate was working in the same firm. I am unable therefore, to find illegality in this respect, since the addresses cited above are different and there is no evidence to support the 1st respondent's contention.

15 I find therefore that the submission of the 1st Respondent that the petition was incompetent bears merit.

It was filed in contravention of the law and specifically Section 60 of the Parliamentary Elections Act and Rules 3 (c) and 4 (8) of the Parliamentary Elections (Interim Provisions) Rules. I hereby proceed to strike it out.

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Issues 1 and 2:

These two preliminary issues required the court to interrogate the question of whether indeed, 56 of the 60 affidavits filed in support of the petitioner's case offended the provisions of Section 3 and 4 of the Illiterates Protection Act and,
25 Section 1 of the Oaths Act and the format provided in Form B and E thereunder.

Court was also required to resolve the issue of whether 20 out of the 56 impugned affidavits bore manifest variations in the signatures of the deponents on the affidavits and the National Identity cards thereto attached.

Under decided law, such defects if confirmed would be incurably defective, with
30 the result of striking out most of the petitioner's evidence in support.

In the circumstances of this case, I find it moot to proceed with analysing evidence in support of a petition that has collapsed. The striking out of the petition, automatically renders all the evidence in support irrelevant.

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Orders:

The petition is struck out and I order costs to be awarded to the respondents.



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Jane Okuo Kajuga

JUDGE

6.9.2021

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