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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT SOROTI
ELECTION PETITION NO 006 / 2021

OLOO PAUL

PETITIONER

10

VERSUS

DR LOKII JOHN BAPTIST:..... 1ST RESPONDENT
THE ELECTORAL COMMISSION 2ND RESPONDENT

BEFORE: Hon. Justice Jane Okuo Kajuga

15

RULING

Oloo Paul, the petitioner, contested for the seat of Member of Parliament for Matheniko Constituency in Moroto District. The elections were held on the 14th of January 2021 and the Electoral Commission returned the 1st Respondent, Dr. Lokii John Baptist as the winner with 6,794 votes against the petitioner's 6, 602 votes.

20 Being dissatisfied with the outcome, he lodged this petition contending that the elections were conducted in contravention of the provisions and principles of the Parliamentary Elections Act, the Electoral Commission Act and the Constitution, and that the same affected the outcome in a substantial manner.

25 At the commencement of the hearing, counsel for the 1st Respondent, and for the petitioner raised preliminary points of law.

Representation:

Richard Latigo and Kenneth Enguru appeared for the Petitioner
Caleb Alaka and Fred Kato appeared for the 1st Respondent
Wetaka Patrick and Gilda Katutu appeared for the 2nd Respondent.

30 Both the petitioner and the 1st Respondent were present in Court.

5 I proceed to briefly highlight the arguments raised by the parties in support of their preliminary objections and dispose of the same seriatim. The detailed arguments are on court record so I will not reproduce the same.

Preliminary points of law raised by the 1st Respondent

The objection was premised on two grounds

10 **Ground 1**

Counsel for the 1st respondent submitted that 14 of the affidavits filed by the petitioner in support of his case offend the mandatory provisions of the Oaths Act, Cap 19 and the Illiterates Protection Act, Cap 78.

15 The affidavits in issue were deponed by Lokiru Domenic, Lomer Daniel, Lotee Mark alias Loketo, Lokeris Angelina, Nakiru Mary, Nause Vicky, Angiroi Paul, Jaikol Johnson, Moru Hellen, Loput Francis, Aguma Micheal, Illukor Moses alias Ali, Lotee John Williams alias Narimix, Longok Joseph alias Surveyor and Sagal Thomas Lopilipili.

Fuller
20 Counsel relied on the decisions in **Mugema Peter versus Mudiobole**, Election Petition No 0016/2016 (specifically at pages 32 and 33 of the judgement), **Kasala Growers Cooperative Society versus Kakooza Jonathan and Kalemera Edson** SCCA No 19/2010, and **Plan Virginia Mugenyi versus Hon Tumwesigye Elioda and the Electoral Commission** Mbarara Election Petition No 001/2018 to support his proposition that the provisions of the law cited above are mandatory and non-compliance with them is not curable under Article 126 (2) (e) of the Constitution.

25 He submitted that Nyeko Moses, the interpreter whose name appears on all the 14 impugned affidavits did not provide his full and true address as required by law, that certification was made after the document was commissioned and that it is the role of the commissioner for oaths to certify that the illiterate deponent had understood the contents after interpretation and signed or affixed a mark in his presence. He relied on **Asea John**
30 **Bosco Ozuma versus Tumwesigye Deo Mbabazi and another**, Jinja Election Petition No 22/2016 for the requirement that the jurat is made before a commissioner for oaths and not the interpreter.

5 Counsel for the Petitioner in reply submitted that the 14 affidavits complied with the law, specifically Section 3 of the Illiterates Protection Act because the interpreter had indicated his full name and address as Ssebugwawo and Co Advocates. In his view this was sufficient to meet the requirements of the law, and confirm that the interpreter had been duly instructed to write the document.

10 Conceding that the affidavits in question deviated in form from the one provided under the schedule to the oath Act (Schedule E), he invited the court to rely on **Section 43 of the Interpretation Act** which provides that deviation in form of a document does not render the same void.

He submitted that the High Court had relied on the said provision in the **Asea John**
15 **Ozuma** (supra) to reject an application to strike out similarly offending affidavits.

In his view, the appearance of the deponents' signatures on each page of the affidavits confirmed that they own the contents of the same. There being no contest to the signatures, it follows that they understood what they were doing and the affidavits should be upheld. Finally, he submitted that the commissioner for oath had stamped the affidavit
20 twice after the signature of the deponent and after the certification of the interpreter.

In rejoinder, it was submitted that it is not the number of times that the affidavit is stamped by the commissioner for Oaths that matters. It is substantive law that the Commissioner for oaths is to certify a jurat and this can be done only after the contents have been
25 translated to the illiterate. The affidavits are commissioned before certificate of translation, contrary to the law. In his view Section 43 of the Interpretation Act was not applicable.

Resolution of Ground 1

30 I have carefully considered the submissions made by the parties, and the provisions of the Oaths Act and the Illiterates Protection Act. I have also carefully appraised the myriad

5 of authorities presented by Counsel and considered the 14 affidavits. I find the latter to all be similar in form. After the last paragraph, the affidavits continue as extracted below:

SWORN at MOROTO by the said on this ... day of 2021

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.....

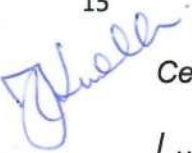
(deponent's mark or signature)

BEFORE me:

.....

(Commissioner for oaths stamp and
Signature)

15

 Certificate of translation

10 Iof C/O Ssebugwawo and Company Advocates of 2nd Floor Colline House, Plot 4 Pilkington Road, P.O. Box 787 Kampala, being fluent in both English and Ngakarimojong do hereby certify that I have read, understood and interpreted the contents of the affidavit to the deponent in Ngakarimojong language that he understands and speaks, and that he has understood that the same as true and correct representation of the matters he deposes and thereafter appending his signature hereon in my presence and before the commissioner of oaths/Magistrate

Name:

25

Signature:

BEFORE ME:

.....

Commissioner for Oaths/Magistrate

I am satisfied that the deponents are illiterates within the meaning of Section 1 (b) of the Illiterates Protection Act. This is clear from the certificates of translation on each of them. They are not able to read and understand the English language in which the affidavits are written, thus necessitating the services of an interpreter, i.e. Nyeko Moses.

- 10 The question for resolution is whether the format in the 14 affidavits conform with the requirements of the law.

Section 1 of the Oaths Act stipulates that:

"The oaths which shall be taken as occasion shall demand shall be the oaths set out in the first schedule to this Act."

- 15 FORM E provides for the Oath of the Interpreter and the form of jurat as follows:

'Sworn at ...in the District of ...this ...day of....2020, through the interpretation of of(address) the said having first been sworn that he or she had truly and faithfully interpreted the contents of this affidavit to the deponent,and that he (or she) truly and faithfully interpreted the oath administered to him (or her)

- 20 Before me:

.....

Commissioner for Oaths

- The above requires that the commissioner for oaths himself (herself), makes the jurat to confirm that the interpreter had first been sworn and had then interpreted the contents of the affidavit to the deponent before he or she affixed their mark or signed.
- 25

- In all the 14 impugned affidavits the deponent signs, then the commissioner stamps and signs immediately thereafter. There is no certification by the commissioner for oaths that the document was read in his presence, interpreted and signed thereafter. In the case of **Asea John Bosco (supra)** the court held, and I agree, that the law requires that it should be the commissioner of oaths that makes the affirmation and certifies that the document and all its annexures were read and explained to the deponent. The obligation to certify
- 30

5 is placed on the Commissioner for oaths personally. In that regard I agree with the 1st Respondent's counsel that it is not a mere matter of stamping the affidavit.

It must be clear from the document that the right process was followed, as this is the only way to ensure the full protection of the illiterate from manipulation. As observed by Justice Michael Elubu in that case,

10 *'the duty and the obligation for safe guard is placed on the commissioner to ensure the protection of the illiterate and integrity and veracity of the translation of the affidavit and that non-compliance with the law goes to the very root of the legality of the document.'*

I am satisfied that the impugned affidavits all offend the provisions of the Oaths Act. In the absence of the Commissioner for Oaths affirmation, it remains unclear to this court
15 whether the deponents physically appeared before him to administer the oaths, and whether the interpretation met the requirements of Form E. The safeguards set by law were therefore not met. The affidavit is supposed to speak for itself. It does not. On that ground alone, the application succeeds.

Thel
20 In the cases of **Kasala Growers Cooperative society versus Kakooza and another** SCCA 19/2010, cited in **Violet Nakiwala and 2 others versus Rwekibira and another** HCCS 280/2006 and a myriad of other authorities, failure to follow the provisions of the law in making of affidavits has been held to be incurable. Neither Article 126 (2) (e) of the Constitution, nor Section 43 of the Interpretation Act can be relied upon to remedy such affidavits.

25 I accordingly strike out the 14 affidavits for illegality with costs as prayed for.

Ground 2

The second limb of the objection by Counsel for the 1st Respondent was that another set of eight (8) affidavits filed in support of the petition are illegal because they were sworn
30 by election officials in contravention of Section 7 (4) and (6) of the Parliamentary Elections Act that requires election officials not to reveal any matters relating to elections without

5 authority. He emphasized that disclosure without authority is conduct that is criminalized by under subsection 6.

The affected affidavits are those deponed by Longoli Joseph, Lotyang Samuel Suguru, Angiroi Paul, Moru Hellen, Lomongin Moses, Lomomgin Bruno, Lochoro Daniel and Lotee John. The eight deponents were criticized by counsel for the 1st respondent for purporting to swear illegal affidavits as they did not indicate that they had sought authority from the Electoral Commission to do so. He submitted that the law is meant to safeguard the process of elections.

Counsel prayed that the court strikes out all the said affidavits for offending the law.

In reply, Counsel for the Petitioner submitted that the election officials were involved in the conduct of the elections and therefore have capacity to swear affidavits in regards to what they had seen on the ground. In his view, the election officials had not committed any criminal offense in this case and there was no legal basis for expunging the affidavits. The Constitution provides for the sovereignty of the people and the importance of the exercise of elections as an expression of the peoples will. That the objection was a technical one meant to defeat the petition, as there was no contravention of the law by the deponents.

Rejoinder

Counsel in rejoinder enjoined Court not to sanction illegalities because of the importance of elections.

Opinion:

I proceed to analyze the substance of the objection regarding illegality and first reproduce the Sections of the Parliamentary Elections Act that the 8 affidavits are said to offend.

Section 7 (4) provides as follows:

'A person shall before be assuming the duties of election officer take and subscribe the oath in Form EO specified in the second schedule to this Act.'

The oath reads as follows:

5 'I...being appointed to exercise the functions of election Officer swear in the name of the Almighty God / solemnly affirm that I will discharge my duties as election Officer to the best of my abilities without fear or favour.'

Section 7 (6) provides as follows:

10 *An election officer who without lawful authority reveals to any person any matter that has come to his or her knowledge or notice as a result of his or her appointment, commits an offense and is liable to a fine not exceeding twenty-four currency points or imprisonment not exceeding one year or both*

There is no contention regarding the appointment of the deponents in this case as election officers and I find that they fall within the meaning of an election officer under section 1 of the Act. An **"election Officer"** is defined thereunder as including a returning officer, assistant returning officer, registration officer, assistant registration officer and any other officer appointed by or under the authority of the commission with responsibility for registration of voters or for presiding over voting in any election or for counting votes at any election.

20 The use of the term **"including"** therein, means the list of the titles is not exhaustive and therefore that any other official employed for the purposes specified therein qualifies to be an election officer.

Theller
25 All the eight are presiding officers, polling assistants and Biometric Voter verification systems (BVVS) machine operators at the various polling stations. I note the Petitioner's counsel did not contest their employment as election officers. Indeed, they identify themselves as working for Electoral Commission in their affidavits.

30 The submission of Counsel for the 1st Respondent that there is no evidence of lawful authority for the disclosure of information by the deponents went unopposed. I have gone through the affidavits and/ or annexures thereto, and find there is no reference to, or evidence of such authorization. The question therefore is whether the deponents disclosed information that came to their knowledge in their official capacity.?

It is a foregone conclusion, that the affidavits themselves, having been prepared and filed by the lawyers for the petitioner, are sufficient proof that the deponents shared information

5 relating to the events of the polling day with the petitioner/ his agents. This information sharing preceded the making of the affidavits.

I have gone through each of the affidavits, and without reproducing their full content here, I am satisfied that the information shared was obtained by the officials in the course of the exercise of their functions at the various polling stations. This information relates to
10 alleged filling and identification of incomplete results on DR Forms by presiding officers (Longoli Joseph), alleged interference with use of biometric voter identification machines, alleged interference by third parties in the process of voting and counting, wrong entries on DR Forms (Lotyang Samuel Suguru, Angiroi Paul) alleged destruction on seals on boxes, confusion at the station and usurping of powers of the presiding officers by third
15 parties etc.

From my reading of the Parliamentary Elections Act, the oath taken by the election officials is not one for secrecy but rather one for affirming that the officer shall exercise his or her duties in the best manner, with the diligence required and without fear or favour. The phrase "without fear of favour" is used to mean in a fair way, free of influence, without
20 partiality. It follows that election officials are expected to be impartial.

The spirit of the law is that the election official must act in an independent manner, free from influence, without fearing or favoring any party in the execution of their duties.

Whereas the oath under the second Schedule to the Act is not one of secrecy, the provisions of **Section 7 (6)** are specific and form sufficient basis for the conclusion that
25 election officers, generally, are required not to divulge information without authority because of the requirement of impartiality.

I am not in doubt that the deponents of the eight affidavits have acted in contravention of the law. I have already found that they disclosed information to third parties without authority and hence committing illegal acts. This conduct is so serious as to attract
30 criminal sanctions under the law. The dilemma is whether in the above circumstances, the court can look the other way and proceed to admit the affidavits and rely on them.

This dilemma is worsened by the fact that there are no hard and fast rules regarding the admissibility of evidence secured illegally. Different jurisdictions have adopted different

5 approaches to this. What is clear however is that courts are enjoined to bear in mind that election petitions are not ordinary suits where a party is enforcing a right accruing to him as a person. It is an exercise which involves the determination of the constitutional rights of many people.

10 This is the position in Election Appeal No 62/2016, **Namujju Dionizia Cissy and the Electoral Commission Versus Martin Kizito Sserwanga**.

The court of Appeal in that case stated that the procedures set down to be followed in election petitions are special and must be followed strictly and failure by a party to comply should not be taken lightly.

15 In that case, the court was dealing with the application of the provisions of Section 60 (2) (b) of the Parliamentary Elections Act. It further observed there in that "Section 60 (2) (b) enacts a substantive legal requirement and non-compliance is not a mere technicality.

I find the above decision very instructive in this matter, where I am faced with a similar issue regarding the interpretation and application of Section 7 (6) of the same Act.

The same case dealt with statutory interpretation in election matters and observed:

20 *'It is the duty of a court of justice to try to get at the real intention of the legislature by carefully attending the whole scope of the statute under scrutiny. In this instant case we believe the intention of the legislature is clear. By enacting Section 60 (2) (b) parliament intended to restrict persons who could file election petitions so as to eliminate vexatious litigants.'*

25 I have carefully considered Section 7 of the Parliamentary Elections Act which enacts substantive legal requirements. It is clear that the intention of the Parliament was the protection of the integrity of the secret ballot. The heading to the section is "Secrecy required of election Officers and others". The provisions require that candidates, election officers, clerks, candidates' agents etc. maintain secrecy of the voting. This is covered under sub sections 1-3 and 5. It is a criminal offense to offend the provisions
30 aforementioned.

Sub section 6 specifically applies to election officials and the disclosure of information is not only restricted to the issues of the integrity of the secret ballot/ voting cited in sub

5 sections 1-3. I am convinced that sub section 6 has a wider application, as it covers the disclosure of any matter that may have come to the officers' knowledge by virtue of his/her work. This provision does not prohibit the sharing of information but sets a requirement for lawful authorization. It is my belief that the legislature intended to protect the integrity of the electoral process, to guard against the election officers jumping into the arena of matters relating to elections especially disputes, without authorization. For the affidavits to be admitted court should be satisfied that the law was complied with and that the requisite authorization was sought and granted.

In the circumstances, I am convinced that court cannot look the other way when an illegality has been brought to its attention, i.e. the illegality of disclosure of information to the petitioner/ and his agents, which form the basis of the impugned affidavit. The affidavit becomes tainted with this illegality and is rendered inadmissible for the same reason.

It is trite law that court cannot sanction what is illegal. See *Makula International Ltd versus His Eminence Cardinal Nsubuga and Rev Fr. Dr. Kyeyune CACA No 4/1981*.

Illegality supersedes everything else raised by the parties See *Ndaula Ronald Versus Hajji Nadduli Abdul (Election Appeal No 20/2006)*

I am unable to agree with the petitioner's submission that the objection is a mere technicality. To the contrary I find the same to be a matter of law, that goes right to the root.

The preliminary objection succeeds and I accordingly expunge the 8 affidavits in issue.

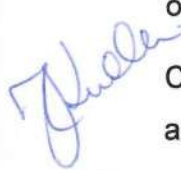
Preliminary points of law by the petitioner

Counsel for the petitioner raised two preliminary points of law.

The first limb was in respect of the identity of the deponent on two affidavits allegedly sworn by the returning Officer for Moroto, Loumo Rosemary Okot, in support of the 2nd respondents reply to the petition. The affidavits bear the dates of 30th March 2021 and 30th April 2021.

5 He submitted that the signature on the two affidavits were in sharp and obvious contrast to the said officer's signatures on other official documents thus casting doubt on whether she indeed signed the affidavits. These official documents include the nomination of candidates Form signed in 2020, the results tally sheet also signed in 2020 and on Exhibit 2 which is the return form for transmission of Results admitted during the scheduling.

10 He further pointed out that all the documents attached to the affidavits in issue bear the official signature of Oumo Rose Lily as the Returning Officer of Moroto District. He relied on the decisions in **Muyanja Simon Lutaaya versus Kenneth Lubogo, Election Petition Appeal No 82/16** and **Doctor Bayiga Michael Phillip Lulume Versus Mutebi and Electoral Commission, Election Petition 14 of 2016** to support his argument that
15 where differences in the signature are so obvious to the naked eye, the only conclusion is that the signature belongs to different people. He prayed that the affidavits be struck off.

 Counsel for the 2nd Respondent opposed the application and cited Black's law dictionary as authority that a signature can be a mark, name, initial intended for identifying
20 authorization of a document.

He cited Rule 15 of the Parliamentary Elections (Interim Provisions) Rules which provide that Court may on its own motion examine any witness if it is of the view that it is necessary to help court arrive at a just decision.

He invited court to allow the witness to be examined as it could not on its own motion,
25 assume the role of an expert.

Opinion

I have carefully scrutinized the impugned affidavits of Oumo Rose Lily. The two bear a writing "Loumo". There is a stark difference between the signature on the affidavits and those on all other official documents. The difference is very apparent to the naked eye. I
30 note that there is consistency of the signature attributed to Rose Lily on all the official documents. Only the signature on the affidavits deviate.

5 In the case of Kenneth Lubogo (supra) the court considered the decision of the High Court whereby the trial Judge had expunged 23 affidavits on the ground that the signatures thereon differed from the signatures of the deponent on the National Identity card. She had stated as follows *'The differences in signature are so obvious to the naked eye that the only logical conclusion would be that signatures belong to different people'*

10 The court of Appeal considered the Indian case of **V R Kamath vs Divisional Controller AIR 1997 Kant 275** and reproduced the decision in their judgement as follows:

'Administering oath/ affirmation to a wrong deponent is nothing but permitting impersonation of a witness giving evidence. Making an endorsement relating to administration of oath or affirmation in the absence of a party is similar to recording evidence in the absence of a witness.'

15 The court then concluded that it is important that the identity of a deponent to an affidavit is not in doubt. It found that whereas caution needs to be exercised in matters relating to handwriting, there are cases where the differences are so obvious that a hand writing expert's opinion is not required.

Shall
20 In the **Bayiga Michael case(supra)**, the court that affidavits that have inconsistent signatures should be treated with suspicion. They are inherently unreliable and have no probative value.

I agree with Counsel for the Petitioner that in this case the difference is so obvious to the naked eye that expert evidence is not required. I do not see any merit in the argument of counsel for the 2nd respondent that the signatures in the impugned affidavits were not
25 being compared to those on her National ID. Signatures on official records as in this case are just as important, especially those signed consistently over a period of time. For that reason I see no harm in basing my decision on them.

The preliminary objection succeeds. The two affidavits are struck off with costs.

30 The second and last limb of the objection by the petitioner is in respect of the affidavits of Ssire Mark, Nangiro Moses, Lotee George William, Locoro Daniel, and Lokeris Basil. Counsel contends that they do not meet the requirements of the law as they do not

5 disclose the name or person before whom they are sworn. In reply, the 2nd Respondents contend that the seal of the Court on the affidavit is sufficient.

Opinion

Rule 9 of the schedule to the Commissioner for Oaths(Advocates) Act provides that the jurat shall state the name of the Commissioner, date and place where the jurat is made.

10 I have considered the affidavits in issue. All of them bear the seal of the Chief Magistrates Court Moroto, and a signature therein. Neither the name of the person who commissioned, nor their title/designation appears.

In the case of **Alice Asianut Alaso versus EC and Hellen Odoa, Election Petition No 005/2016 at Soroti**, the Court dealt with a similar issue and expunged 47 affidavits that
15 bore only the stamp of the chief magistrate's court Soroti accompanied by the signature of the Chief Magistrate. In that case court held that the commissioner for oaths was not known nor could court ascertain whether he had authority to commission the affidavits.

In the present case, the name and title of the person who commissioned the affidavit is not known. There is a signature and a court seal. This is insufficient to meet the
20 requirements of the law.

I uphold the preliminary objection and strike off all the impugned affidavits with costs.



25

Jane Okuo Kajuga
Judge of the High Court
2.9.2021

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