

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT SOROTI**

**ELECTION PETITION NO. 10 OF 2022
(APPEAL FROM ELECTORAL COMMISSION DECISION)**

- 1. ENYANGU MICHAEL ETADU**
- 2. OPIO ENOCH**
- 3. AJOKU AARON**
- 4. ANWANGO MARY:..... PETITIONERS**

VERSUS

- 1. ELECTORAL COMMISSION**
- 2. HON.EBWALU JONATHAN:.....RESPONDENTS**

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The petitioners brought this petition, before this court, as an appeal against the decision of the Electoral Commission, pursuant to Article 64(1)(f) of the Constitution of the Republic of Uganda, 1995 as well as Section 15 of the Electoral Commission Act.

The petitioners filed a complaint with the 1st respondent regarding the illegal and unconstitutional acts and omissions tainting the then-planned by-election for the direct Member of Parliament of Soroti East Division constituency that had been slated for 28th July 2022.

According to the Statutory Instrument published in the Uganda Gazette of 13th November 2020 at pages 2267-2269 the Minister for Local Government confirmed that the Soroti East Division, Soroti City comprised of Eastern Municipal Division, Opuyo Parish, Acetgwen Parish, Opilyai Parish, Aloet Parish and Otatai Parish. That as had been confirmed in the Court of Appeal decision in Consolidated Election Petition No. 07 of 2021, the

parishes of Opilyai and Aloet were illegally and wrongfully placed in Soroti West Division constituency and for that reason the election for the Member of Parliament for Soroti East Division constituency held on 14th January 2021 was nullified and a by-election was ordered for that constituency.

It was from the above decision that the Electoral Commission on the 6th day of June 2022 issued a program for the by-election of the Member of Parliament for Soroti East Division constituency. Approximately 1,337 voters of Opilyai Parish and 3,896 voters of Aloet parish were slated to participate in that by election and indeed they participated.

The petitioners were aggrieved by the voters of Aloet and Opilyai parishes participating in that by-election yet they had also participated in the election of the Soroti West Division constituency member of parliament.

The petitioners prayed that the voters' registers for the two impugned constituencies be rectified by deleting all voters belonging to the Soroti East Division Constituency from the Soroti West Division constituency and adding the voters to the Soroti East Division Constituency to comply with the Court of Appeal decision. They also prayed that since the voters of Opilyai and Aloet were illegally and wrongfully placed and considered, the declared results of the elections must be deleted and since the number of votes to be deleted significantly altered the declared results the election be canceled and a by-election held. The petitioners also prayed that the by-election of the Soroti East Division constituency be halted as it contravened the laws of Uganda.

The Electoral Commission found no merit in the complaint and the by-election program for Soroti East Division Constituency continued as scheduled. The commission noted that the voters' register was updated in all seven parishes in the by-election and the transfer of voters in accordance with section 19 of the Electoral Commission Act was similarly done. The Chairperson of the Commission also stated that neither the court judgment

nor the electoral laws prohibited the voters in Olipyai and Aloet parishes from voting in the constituency and their participation did not offend the provisions of section 31 of the Parliamentary Elections Act 2005. The Commission noted that it was not mandated to cancel the electoral outcome for Soroti West Division constituency nor was it mandated to remove or deduct the votes from the declared results of the election conducted on the 14th January 2021 in Soroti City West constituency. It is from this decision that this appeal rose.

The petitioners prayed that that decision be set aside and sought the same orders as in the complaint to the commission.

In response, the 1st respondent stated that this petition was an abuse of court process, frivolous, vexatious and lacked merit. That the decision of the 1st respondent was legitimate, justified, and within the requirements of the law.

The 2nd respondent also contended that the petition lacked merit and did not raise any grounds of appeal for adjudication by the court. He raised several preliminary objects that will be determined by the court. The 2nd respondent also averred that he would still have emerged winner of the said election even if the results from the two parishes were deducted from the final tally hence the election was a true reflection of the will of the voters in the constituency.

The petitioner was represented by *Mr. Lester Kaganzi* and *Mr. Kassa Emmanuel*. *Mr. Ochieng Evans* appeared for the 2nd respondent whereas *Mr. Jude Mwassa* appeared for the 1st respondent.

The parties were directed and filed final written submissions that were considered by this court.

The parties all framed their own issues for determination by the court. The respondents objected to the issues raised by the petitioner that they did not

raise any ground of dissatisfaction or error by the 1st respondent to be considered by way of appeal under section 15 of the Electoral Commission Act.

The petitioners raised their issues as follows:

1. *Whether the Petition is properly before court or res judicata?*
2. *Whether the 2nd Respondent's reply to the Petition is properly on court record?*
3. *Whether the by-election for the directly elected Member of Parliament for Soroti East Division Constituency, held on 28th July 2022, is tainted by unconstitutional and illegal acts (irregularities)?*
4. *What remedies are available to the parties?*

The 1st respondent as follows:

- (i) *Whether the 1st Respondent took all steps necessary to fully comply with the Constitution and other laws as well as Orders of Court?*
- (ii) *What remedies are available to the parties?*

The 2nd respondent as follows:

- (i) *Whether there was a competent complaint before the 1st respondent against the 2nd respondent capable of giving rise to the petition Appeal under Section 15 of the Electoral Commission Act Cap 140.*

- (ii) *Whether the 1st respondent erred when in its decision, it ruled that it is not possessed with powers to cancel the election outcome in Soroti City West Constituency following the Court of Appeal Decision.*
- (iii) *Whether the 1st respondent is mandated to remove and or deduct votes from the declared results of the election conducted on 14th January 2021 in Soroti City west Constituency.*
- (iv) *Whether the Jurisdiction of the High Court under section 15 of the ECA is applicable in the circumstances of this case where the High court and court of appeal have since confirmed the election of the 2nd respondent as winner.*
- (v) *Whether the petitioners in their pleadings established their locus standi required under the law to challenge the 2nd respondents election.*
- (vi) *Whether the petition is incompetent on account of being barred by limitation*
- (vii) *What remedies are available to the parties?*

The court consolidated the issues raised by all the parties and shall determine as follows:

- 1. *Whether the petition is competently before this court.***
- 2. *Whether the voters of the two parishes of Opilyai and Aloet can legally participate in the planned bye-election for the Member of Parliament for Soroti East Division Constituency?***

3. *Whether the results of the 1st respondent for directly elected member of Parliament of Soroti City, Soroti West Division constituency which included the votes from Opilyai and Aloet parishes must be cancelled and a bye-election ordered in the same constituency?*
4. *What remedies are available to the parties?*

The petitioners raised a preliminary objection as to the propriety of the 2nd respondent's answer to the petition on grounds that it was filed out of time and without leave. Counsel submitted that the 2nd respondent's answer to the petition was filed without leave of court for late filing on the 2nd day of August 2022 - which was 11 (eleven) days from the date of service of the petition on his lawyers of *M/s Ochieng Associated Advocates and solicitors* on 22nd July 2022. That the 2nd respondent's late filing of the answer to the petition without leave of court to do so was never remedied and directly contravened the provisions of **Rule 8 (1) and (4) of *The Parliamentary Elections (Interim Provisions) (Appeals to the High Court from Commission) Rules S.I 141 – 1.***

Counsel cited the *Stop and See (U) Ltd v Tropical Africa Bank Ltd (MISC. APPLICATION NO 333 OF 2010)* where **Madrama J.** (as he then was) struck out an affidavit in reply for having been filed out of time and without leave of court to extend time. In the same decision the learned judge held that Article 126 (2) (e) does not cure this defect.

Counsel argued that the same applied in this case and prayed that the 2nd respondent's answer to the petition be struck off the record of court.

Matters relating to the electoral process are meant to be determined expeditiously to allow people and society to return to normalcy. The issues raised by the petitioners, in this case, require that the 2nd respondent be

heard since the potential outcome could have adverse effects on his parliamentary seat. It is only fair and just that his answer to the petition is allowed and validated which will also allow for the litigation of this matter to come to an end.

Whether the petition is competently before this court.

Counsel for the petitioners submitted that when the commission rejected the existence of an irregularity as it did in this case, then the complainants had a right to appeal against the decision of the commission by way of a petition to the High Court supported by affidavits of evidence, which was what the petitioners had done in this case as per *Section 15 (1) of the Electoral Commission Act, Cap 140*.

Counsel for the 1st respondent argued that the petition lacked merit and section 15 of the Electoral Commission Act through which this petition is brought was inapplicable to the 2nd Respondent, as he was not subject to the control or administrative powers of the Electoral Commission and as such, the purported complaint giving rise to this petition was no complaint at all in the eyes of the law and certainly not one envisaged under Section 15 of the Electoral Commission Act.

Counsel relied on the following decisions to support his contention;

Byanyima Winnie v Ngoma Ngime Civil Revision of Uganda No.0009 Of 2001. Where his Lordship Honourable Justice V.F.MUSOKE-KIBUUKA (RIP) held that *“the electoral process is segmented and the last segment is the segment of vote counting and declaring the winning Candidate and it closes with the publishing of the name of the winner in the Uganda gazette. That is the very last act of the electoral commission in respect of the election of a Member of Parliament. Once the person who is gazzetted takes up his or her seat in Parliament, the Electoral Commission can no longer reach him or her.”*

Mwesigye Enock v Electoral Commission, High Court Miscellaneous Cause No.62 of 1998, in which the Electoral Commission, had attempted to remove a sitting Councilor and declare a different person as elected instead, the High Court held;

“The role of the Electoral Commission to act administratively in relation to any candidate closes the very moment the candidate takes his or her seat as a Councilor or as Member of Parliament. The Electoral Commission’s powers can only be exercised in relation to candidates’ and not to councilors or Members of Parliament. A person who has been declared the winner of an election or even the one who has lost one is no longer a Candidate. He or she is beyond the administrative reach of the Commission. The Commission can only reach him through a court order. To attempt to extend those powers to Councilors and Members parliament is to act in excess of jurisdiction and any decision or action is ultra vires the Electoral Commission’s Act.”

Counsel submitted that section 15 of the Election Commission Act through which the petitioners lodged their complaint resulting in the petition was inapplicable to the 2nd respondent and once he was sworn in as a Member of Parliament, the 1st respondent had no powers to hear or entertain any complaint about his election as he was no longer a candidate and for a further reason that there was no election organized in his constituency or “electoral Process” going on as envisaged under section 15 ECA.

Counsel concluded that having been sworn in as a sitting Member of Parliament, the only question that could arise was whether the member of Parliament was validly elected which can only be determined by the High Court upon a petition presented in accordance with the provisions of section 60 to 68 of the Parliamentary elections Act and not through a complaint to the Electoral Commission or through a petition appeal as in the instant case.

Analysis

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

Section 15 (1), (2) and (3) of the Electoral Commission Act, Cap 140 provide 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) *The appeal shall be made by way of a petition, supported by affidavits of evidence, which shall clearly specify the declaration that the High Court is being requested to make.*

From the above provision it is clear that the petitioners had a right to bring an appeal petition under section 15 above. They were aggrieved by the decision of the Commission which they had a right to appeal. However, the orders being sought in this petition are orders that can only be achieved had the petitioners brought this petition under section 60 of the Parliamentary Elections Act. This court has no jurisdiction to interpret or construe clear provisions of the Constitution or a statute in the guise of promoting democracy when the enabling law does not allow.

The 2nd respondent being a validly elected sitting Member of Parliament cannot be administratively removed from office which is one of the orders sought by the petitioners. I agree with the court in *Byanyima Winnie vs Ngoma Ngime Civil Revision of Uganda No.0009 of 2001 and Mwesigye Enock v Electoral Commission, High Court Miscellaneous Cause No.62 of 1998* cited by counsel for the 2nd respondent.

The petitioners have disguised their appeal with a view of removing a sitting Member of Parliament through administrative and quasi-judicial powers of the Electoral Commission. The petitioners should have challenged the election of the 2nd respondent immediately after the election when he was gazzetted as the winner and would have used the same argument of wrongful inclusion of two parishes of Opilyai and Aloet. This court cannot allow them to challenge a duly elected and sitting member of Parliament out of the time stipulated in the Parliamentary Elections Act.

The petitioners indeed wanted the electoral commission to among others stop the voters of the two parishes of Opilyai and Aloet from voting in the bye-election of Soroti City East Constituency. The Electoral Commission rejected the argument and in my view correctly so, there is no law that would bar the voters in those two parishes from taking part in the bye-election since the Court of Appeal never made that order.

The right to vote is a creature of statute or special electoral laws and would only be subject to limitations envisaged under such law. The electoral commission is the guardian of democracy vested with wide powers under the Electoral laws, but it should not take away the power to vote without any enabling law.

The court has set to work on the constructive task of finding the intention of Parliament and this could not only be done from the language of the statute but also from consideration of the social conditions and circumstances which give rise to it and of the mischief which it was passed

to remedy, and then he must supplement the written word to give “force and life” to the intention of the legislature.

The petitioners further in disguised manner argued that the commission should cancel the electoral outcome in Soroti City West Constituency. This was premised on another argument that the votes in the two parishes of Opilyai and Aloet should be removed or deducted from the original results obtained in the election conducted on 14th January 2021 in Soroti City West Constituency.

Judicial activism is regarded as the active interpretation of the existing provisions with the view of enhancing the utility and purpose of the legislation for betterment of the spirit of the Constitutional intent. The courts under its garb have to actively strive to achieve constitutional aspirations of the people and avoid any absurdity that any statute would create that is contrary to the Constitution should be addressed through judicial activism. The law does not provide the scenario the petitioner is advancing and the same cannot be addressed through judicial activism.

The Electoral Commission rejected this complaint and argument since it could not as quasi-judicial body begin to deduct and remove votes already gazzetted as results of a concluded election of Soroti West Constituency in order to facilitate a nullification of the election of a sitting member of Parliament.

That being the case, there was no valid complaint as against the 2nd respondent filed before the commission, and hence no ground of appeal arising therefrom. This renders the entire appeal incompetent since the intended orders of nullifying the election of Soroti City, Soroti West Division Constituency cannot be given in the circumstances of this case.

While interpreting a special statute like the Electoral laws, the court must consider the intention of legislature. The reason for this fidelity towards legislative intent is that the Statute has been enacted with specific purpose,

which must be measured from the wording of the statute strictly construed.

The judge is simply not authorised to legislate law. If there is a law, Judges can certainly enforce it, but Judges cannot create a law and seek to enforce it. Like in this case, the court would be creating a law and try to enforce the same. The court cannot remove a sitting Member of Parliament as not validly elected because two parishes have been removed from the constituency and especially where such a person is not a party to the proceedings.

This court's finding is buttressed by the decision of *Byanyima Winnie vs Ngoma Ngime HCCR No. 9 of 2009* where the Learned Judge noted that: *A person who has been declared the winner of an election or even one who has lost one is no longer a Candidate. He or she is beyond administrative reach of the Commission. Once one of the candidates has been declared a Member of Parliament, the question is now whether the said Member of Parliament has been validly elected or not and that question cannot be determined in a petition of this nature by this court. The question can only be determined upon a petition presented in the High Court and heard and determined in accordance with the provisions of Section 61 to 68 of the Parliamentary Elections Act.*

In addition, the High Court in the case of *Kafeero Ssekitoleko Robert v Mugambe Joseph Kifomusana & EC HC-EP No. 006 of 2011*, the court was invited to determine whether in an appeal from the decision of the Commission, it could grant orders nullifying the election of a declared and gazetted candidate and the court held thus;

"I agree with Mr Tebyasa that once one segment is completed there is no going back to it. Thus once the Commission has completed its mandate as regards the election process by ascertaining, declaring and publishing results of the election then it ceases to have any mandate to revisit the results. Any complaint against a winner who has been so published in the Gazette would be against the elected person in line with the respondent's definition in Rule 3(e) of the Election Petition

*Rules that it means “the person of whose election a complaint is made in a petition.” As at the time of filing of this petition the 3rd respondent had ceased to be a “candidate” and became a “person of whose election a complaint is made in a petition”. The only proper procedure was to file a petition under the Parliamentary Election Petition Rules.” See **Ekwanare Naume v EC & Epillo Isaac Election Petition No. 22 of 2020***

On that note, it is clear that the petition is incompetent in as far as it relates to the 2nd respondent. The 2nd respondent was never a party to the complaint that was lodged by the petitioners’ complaint and he was not even copied in as a party who was likely to be affected by the decision sought from Electoral Commission. How did the 2nd respondent become a party on appeal in a matter he was not a party at the time of lodging the complaint on 01 July 2022.

It would not be proper in my view, to have joined a person who was not party to the original proceedings before the Electoral Commission to become parties in an appeal. It is a question of reforming the law to either limit complaints to contesting candidates or to make it mandatory to join the rest of the candidates for the position to the proceedings at the hearing stage, if they are interested in matter before the commission.

This petition is incompetent and devoid of any merit. It is accordingly dismissed with costs to the respondents.

I so Order.

SSEKAANA MUSA
JUDGE
20th January 2023