

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CIVIL APPEAL NO. 13/97.

(CORAM: HON. JUSTICE S.T. MANYINDO DCJ, HON. JUSTICE M. KIREJU AND HON.  
JUSTICE A. KANIA)

BETWEEN

1 THE RETURNING OFFICER, IGANGA DISTRICT):.....: APPELLANTS  
2.THE C/MAN INTERIM ELECTORAL COMMISSION)

VERSUS

HAJI MULUYA MUSTAPHAR:.....: RESPONDENT

( Appeal Against The Judgment Of The High Court ( Hon. Justice C.K. Byamugisha) Delivered  
On 24th March 1997 In Election Petition No. 13/97)

The appellant appealed against the judgment and orders made by C.K. Byamugisha J. At the close of the address by both counsel, we allowed the appeal and set aside the learned trial Judge's judgment and reserved our reasons for our judgment which we now give.

The brief background of this case is as follows:— The respondent, Hajji Muluya Mustaphar having contested and lost the Parliamentary Elections in Bunya East Constituency, petitioned against the successful candidate Alupa— kusadhi Wahibi Wamulongo on grounds among others that the later did not possess the minimum educational qualifications to stand for parliamentary elections that the elections were marred by malpractices and that he was besides not duly nominated a candidate in accordance with the Parliamentary Elections (Interim Provisions) Statute. The petition was supported by the affidavit of Hajji Muluya Mustaphar sworn before one Akampurira stated to be a Commissioner of Oaths. During the hearing of the petition on the 28<sup>th</sup>

October 1996, the learned counsel for the plaintiff/appellant took a preliminary point of law to the effect that the Petition was not properly before court as the evidence by affidavit supporting had been sworn before a commissioner of oaths at the time did not possess a practicing certificate as an Advocate for the year 1996. This objection was overruled, so was a subsequent application seeking a review of the order overruling the preliminary point with the result that the hearing of the petition proceeded on the merits. In her final judgment, the learned trial judge allowed the petition and set aside the elections held in Bunya East Constituency on the grounds that Alupakusadhi Wahibi Wamulongo did not possess the minimum formal education of Advanced Level Standard as required by the Parliamentary Elections (Interim provisions) Statute, and that he had not been duly nominated a candidate. Hence, this appeal though Alupakusadhi Wahibi Wamulongo who was directly affected by this judgment and the consequential orders is not a party to the appeal. The appellant filed two grounds of appeal, namely:—

- 1). The learned trial Judge erred in law in finding that an affidavit commissioned by an advocate without a valid practicing certificate is good in law and consequently her decision to proceed to hear/determine the petition was wrong.
  
- 2). The learned Judge erred in law and in fact when she held the Member of Parliament elect for Bunya East Constituency was not validly nominated.

Mr. Serwanga the learned State Attorney, Counsel for the applicants, submitted that the petition was incompetent in that the affidavit of Hajji Muluya Mustaphar sworn on 26th July 1996 in support of the petition was commissioned by an advocate who by the time of commissioning did not possess a valid practicing certificate for the year 1996. He relied on the decision of this court in Bakunda Darlington Vrs Kinyatta and Another, Civil Appeal No. 27/96 Arising from Election Petition No. 1/96, Kabale High Court.

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Counsel pointed out that in as far as the decisions of this court are binding on the High Court, the learned trial Judge erred in law by not following the above decision and by proceeding to hear the petition on its merits, He contended that Alupakusadhi Wahibi Wamulongo had been validly nominated because he complied with all the regulations relating to nominations and duly satisfied the Returning Officer Iganga District. He prayed that the appeal be allowed, the judgment of the trial Judge be set aside and Alupakusadhi Wamulongo be declared to have been validly elected. He also prayed for costs of the appeal.

Mr. Lwere, learned counsel for the respondent opposed the appeal and submitted that this court does not have the power to entertain an appeal from an interlocutory decision of the High Court. He contended that the appellants should first have obtained leave before appealing as prescribed by Order 40 of the C.P.R. since they had no right to appeal. In the alternative he argued that the learned trial Judge correctly rejected the appellant's application because there was no evidence adduced to show that Mr. Akampurira did not possess a practicing certificate by the time he commissioned the affidavit of Hajji Muluya Mustaphar. Counsel submitted that the learned trial Judge correctly declined to follow the case of Bakunda Darlington Vs Dr. Kinyatta and Another (Supra) because she correctly held the Advocates' Act and the Commissioner for Oaths (Advocates) Act had to be interpreted differently as they cater for different situations. It was Mr. Lwere's argument that even if the two acts had to be read together, the key words were "When he ceases or stops to practice." He submitted that there was no evidence that Akampurira had ceased or stopped to practice. He further submitted that Alupakusadhi Wahibi Wamulongo did not possess the basic minimum qualifications for being elected a member of parliament and that his purported nomination was contrary to the provisions of Section 42 of the Parliamentary Elections (Interim Provisions) Statute 1996. He prayed that the appeal be dismissed with costs.

We shall start with the submissions of Mr. Lwere that this appeal is improperly before this court because it arose out of an interlocutory decision. Section 96(1) of the Parliamentary Elections (Interim Provisions) Statute 1996 provides as follows: —

“96(1) A person aggrieved by the determination of the High Court on hearing an election petition may appeal to the Court of Appeal against the decision.”

This provision does not give a right of appeal against an interlocutory decision; This court has already pronounced itself on this matter in the case of Margaret Zziwa vs. Catherine Naava Nabagesera, Parliamentary Election Petition Miscellaneous Application No. 9/96.

A decision in our view is interlocutory in a petition in the context of Section 96(1) of Statute when the hearing of the petition is proceeding and the petition is finally determined. The rationale for restricting appeals to when a petition has been finally determined is clear from the provisions of Rule 13(1) and (2) of the Parliamentary Elections (Election Petitions) Rules 1996 which are in these terms:

13(1) The Court shall, in accordance with subsection 2 of Section 93 of the Statute, hear and determine the petition expeditiously; and it shall declare its findings not later than thirty days from the date it commenced the hearing of the petition unless the Court for sufficient reason, extends the time.

(2). The court shall sit from day to day and may, for the purpose of hearing and determining the petition suspend any other matter pending before it.”

It appears to us that as election petitions are matters of public importance, the legislature intended that they be disposed of with speed and expeditiously, thus the provisions of section 96(1) and (2). Therefore we agree with the submission of Mr. Lwere, the appellants would have no right to appeal against a decision of the High Court in an interlocutory matter. But in this case the trial judge did not only overrule the petition but proceeded to determine the case on the merits. In other words the trial was completed. See Margaret Zziwa Vs Catherine Naava Nabagesera (Supra). The reason for this was well stated in that case.

We now turn to the first ground of the appeal which is that the learned trial Judge erred in law in finding that an affidavit commissioned by an advocate without a practicing certificate is good in law and consequently her decision to proceed and hear determine the petition was wrong.

The learned trial Judge in her ruling of 25th February 1997 held that the Advocates Act and the Commissioner for Oaths (Advocates) Act Cap 53 are two separate statutes that have to be read and interpreted separately. She was of the view that if a commission granted under the Commissioner for Oaths (Advocates) Act has to cease, it can only do so if the advocate to whom it was granted ceases or stops to practice as such but not merely by reason that he fails to obtain a practicing certificate in any given year.

Under Section 2(1) of the Commissioners for Oaths (Advocates) Act the Chief Justice can only grant a commission to persons being practicing Advocates who have practiced as such for not less than two years in Uganda immediately prior to making an application. Under the same section subsection (4) the commission so granted forthwith terminates on the holder ceasing to practice as an Advocate. It is very clear from the two subsections of section 2 of the Commissioners for Oaths (Advocates) Act that the granting of a commission is dependent on the authority of an advocate to practice is derived from the provisions of the Advocates Act. The two acts that matter are intimately interrelated and must be read and interpreted together to give them their natural effect. The Chief Justice cannot under the Commissioners for Oaths (Advocates) Act grant a commission to an Advocate who is not authorized to practice as such under the Advocates Act. This means in our view that 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 terms of Commissioners for oaths (Advocates) Act. The above position has been finally settled in the Supreme Court Case of Kabogere Coffee Factory Vs Haji Twalibu Kigongo SCCA No. 10/93 where it was held, that, documents filed by an advocate without a practicing certificate beyond the 1st March of any given year are invalid. This court in following the above case specifically held in Bakunda Darlington Vs. Dr. Kinyatta and

Another (Supra) that an affidavit sworn before an Advocate not in possession of a practicing certificate is invalid.

Mr. Lwere submitted that unlike in Bakunda Darlington Vrs Dr. Kinyatta (Supra), the learned trial Judge did not in the instant case find as a fact that Mr. Akampurira who commissioned the affidavit of Raji Muluya Mustaphar had no practicing certificate at the time of such commissioning. It is true the learned trial Judge expressed doubt as to the source of Ms Kahwa a averment in her affidavit that Mr. Akampurira did not possess a practicing certificate but she seemed to believe all the same that Mr. Akampurira had no practicing certificate when he commissioned Hajji Muluya Mustaphar' s affidavit on 26th July 1996. What the learned Judge said on page 2 of her ruling illustrates this:—

“The affidavit deponed by the petitioner complied with the provisions of the law under which it was made and the decided cases on the subject. There is no provision in the statutes I have referred to above which authorizes this court to reject an affidavit or any other document for that matter which is signed by an advocate who has no valid practicing certificate as claimed by counsel for respondents.”

Having found as a fact that Mr. Akampurira did not possess a valid practicing certificate when he commissioned the affidavit of Hajji Muluya Mustaphar 26th July 1996, the learned trial judge ought to have held that it was invalid following the decision of this court in Bakunda Darling-ton Vs Dr.Kinyatta (supra) which is binding on the high court. Had the learned trial judge accepted the above decision, she would have held that the affidavit of Hajji Muluya Mustaphar commissioned by Mr. Akampurira on the 26<sup>th</sup> July 1996 was invalid and therefore that the petition was incompetent. That would have disposed of the petition. In view of this finding we don not find it necessary to decide on ground two. In the result, we allow the appeal set aside the judgment and orders of the High Court. Each party shall bear his own costs here and in the Court below.

Dated at Kampala this 20<sup>th</sup> day of. June 1997

**S.T. MANYINDO**

**DEPUTY CHIEF JUSTICE**

**M.KIREJU**

**JUDGE**

**A.KANIA**

**JUDGE**