

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO. 09 OF 2007

CORAM: _____ HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.

HON. JUSTICE S.G. ENGWAU, JA.

HON. JUSTICE C.K. BYAMUGISH A, JA

ESROM WILLIAM ALENYO::: APPELLANT

VERSUS

THE ELECTORAL COMMISSIN & ANOR::: RESPONDENT

(Arising from Election Petition No. 2 of 2006 High Court of Uganda at Arua)

JUDGMENT OF HON. A.E.N. MPAGI BAHIGEINE. JA:

This electoral appeal arises from Election Petition No. 2 of 2006, whereby the learned trial Judge, at Arua Court, upholding the elections dismissed the petition on 30th January, 2007.

The appellant, Esrom William Alenyo, together with the 2nd respondent, one John Pascal Wapokorwa and two others contested for the post of LC V Chairperson, Nebbi District, on 2nd March, 2006.

The 2nd respondent garnered 35,424 votes while the appellant obtained 31,424.

The Electoral Commission, hereinafter the 1st respondent, declared the 2nd respondent winner of the elections. Being dissatisfied with the results, the appellant petitioned the High Court on 16th May, 2006 for nullification of the said results.

The issues before the learned trial Judge were:-

1. *Whether the petition was served on the Respondents within the time prescribed by the Local Government Act.*
2. *If not, whether the petition was competent.*
3. *Whether there was failure and non-compliance to conduct the elections in accordance with the provisions of the law.*
4. *If so, whether the non-compliance and failure affected the result of the elections in a substantial manner.*
5. *Whether any illegal practice or any other offence under the Local Governments Act was committed in connection with the election by the candidate personally or with his knowledge and consent or approval.*

Remedies available to the parties.

The learned trial Judge declined to annul the elections as pointed out above. He dismissed the petition with costs to both respondents.

At the scheduling conference, both learned counsel agreed on the following issues to be determined by the Court.

1. *Whether the learned trial Judge recorded the evidence and marked all the exhibits before him.*
2. *Whether the disputed 105 polling stations had the appellant's polling station agents.*
3. *Whether the disputed 5025 affidavits are admissible in law.*
4. *Whether the learned trial Judge's judgment dealt with all the issues agreed before the trial.*
5. *Whether any election offence was committed by either of the respondents.*

6. ***Whether the election was held in conformity with the electoral law.***
7. ***Whether the learned trial Judge evaluated the evidence properly.***
8. ***Whether the 35 disputed ballot boxes had declaration forms.***
9. ***Whether there were 5 polling stations with unsigned declaration forms.***
10. ***Whether there were any missing ballot boxes during the opening exercise in Court.***

Mr. Arthur Katongole appeared for the appellant while Mr. Paul Kiapi represented the 1st respondent. Mr. Henry Rwaganika was for the 2nd respondent.

It is vital to remind oneself of the burden of proof in these matters. The burden of proof in election petitions like in other civil matters lies on the petitioner/appellant to prove the allegations leveled against the opposite party - ***Section 101 Evidence Act***. However, unlike in ordinary civil suits this burden of proof is slightly higher. It is to the satisfaction of the Court. This is because of the importance of the electoral process. It concerns the freedoms and liberties of the citizenry in a fundamental way. - ***See Election Petition No. 1 of 2001 Col (RTD) Dr. K. Besigye v. Museveni Yoweri Kaguta and Electoral Commission.***

Considering issue No. 1, learned counsel, Mr. Katongole argued that the trial Judge did not mark the exhibits nor did he name them as they were being pulled out of the ballot boxes. He opined it would have been better had he done so.

Mr. Paul Kiapi in reply pointed out that it was never shown that the appellant had made an application for exhibits to be tendered in evidence formally and thus to be marked. Learned counsel submitted that the purpose of opening the ballot boxes was not to retrieve evidence but to scrutinize and determine whether or not the appellant's polling agents were chased away from the polling stations as alleged by him. However, having examined the contents of the boxes and the evidence of the respondents, it became unnecessary to record voluminous evidence that was in the boxes including the ballot papers. It was established conclusively that the agents were at the polling stations till conclusion of polling, on account of their having signed the declaration of results forms. Their appointment letters were also found in the boxes.

The record indicates (page 161 para 15 Vol. One):

“Court: Petition adjourned to 1st November, 2006 at 9.00 a .m. and Court to sit at Nebbi. Court will examine the contents of the ballot boxes of the polling stations in Okoro County where Petitioner asserts his polling agents were chased away before closure of poll”.

The learned Judge found:

“The exercise was carried out by having a sealed ballot box of a polling station, being opened in open Court with the Petitioner and all other parties with their respective counsel as well as the general public present. The Returning Officer would then proceed to identify, in the open, the contents of the ballot box with particular emphasis to identifying the Declaration of Result Forms, Petitioner's polling agent's appointment letters as well as any other official documents, a polling agent signs and hands over to the Presiding Officer at end of polling.

About 100 ballot boxes were opened and contents examined. At the end of the exercise, the documents found in 93 ballot boxes showed that there were polling

agents of the Petitioner, who at the end of polling signed either the Declaration of Result Form, or the Accountability of ballot papers Form, or the Report Book, or handed over to the Presiding Officer the polling Agent appointment letter, at each of the 93 polling stations, as each ballot box was of a particular polling station_____

Clearly the purpose of opening the ballot boxes was to ascertain whether the appellant's agents had been chased away from polling stations. This was done and proved in the negative. If the appellant needed all the forms marked as exhibits, it was his duty to apply to Court and tender them as such for whatever purpose. It was his case. The Judge has no duty to retain any item produced or examined in court as an exhibit. It was thus superfluous to even make such a suggestion, that the Judge should have done so. I would answer Issue No. 1 in the negative.

Regarding Issue No. 2 whether the disputed 105 polling stations had the appellant's polling station agents, Mr. Katongole contended that the letters recovered from the ballot boxes (*pp 727 - 1050 Vol. 4*) show that someone had attempted to call them polling agents by crossing out the word 'campaign'.

He argued that the appellant had issued letters for campaign agents and not for polling station agents. These letters were very distinct. Campaign agent letters instead of polling agent letters were found in the boxes.

Mr. Mutangi (RW1), the returning officer testified that neither campaign agents nor their letters should have been near the polling stations but they were chased away.

Their letters should have been near polling stations. Mr. Katongole still maintained that polling agents should have been the ones at the polling stations but they chased away.

Mr. Kiapi, on the other hand asserted that on opening the boxes it was found that the appellant had polling agents on all stations till the close of polling.

Furthermore, opening of the boxes was not on application by the appellant, Mr. Kiapi contended. It was on the Judge's own volition. A number of items were retrieved from the 105 boxes, as already pointed out above such as declaration of results forms signed by appellant's agents; appointment of campaign agents letters signed by the appellant, the accountability of ballot papers at polling stations (filled in triplicate) had been signed by the appellant's agents at the close of polling.

This was clear evidence for the learned Judge to conclude that the appellant had agents at the polling stations. There was no other evidence to counteract this or any affidavits to allege that the appellant's agents had been chased away. In actual fact there was only one affidavit to support the whole petition. This was filed by the appellant himself. In his evidence pp 144 Vol. 1 line 7, he stated:

“I did not visit any polling station on that day. That my polling agents were chased away from polling stations named in the petition. They were in Okoro County. I did not see any agent being chased away. I did not see it personally. I have witnesses”.

The learned Judge remarked:

“As already pointed out, the petitioner has submitted volume 5 “Evidence of agents chased away from polling stations and results in lieu of declaration forms. Together with his written submissions. Court has, with reasons rejected these affidavits”.

The learned Judge also noted: (page 1655, Vol. 7)

“The petitioner has in the course of submitting his written submissions filed in his Vol. V affidavits of what he calls “Evidence of Agents chased away from polling stations and Results in lieu of declaration forms.

These affidavits bear a Court stamp of 27.10.06. It is however not known, and the petitioner did not show when he paid fees for these affidavits it at all, any fees were paid No document is properly filed until the fees have been paid See UNTA

Exports Ltd. v. Customs (1970) EA 648 and also Marsaret Musanso v. Francis Musanso (1979) HCB 226.

There is no evidence that the same had been served upon counsel for the respondents before the hearing date of 30th October, 2006. The said affidavits were also not referred to by the petition in the course of the hearing”.

The learned Judge then dwelt at length on the effect of non-service of documents on the opposite party citing Craig v. Kanseen (1943) IAER 108, Esso Petroleum Co. Limited v. Southport Corporation (1956) A.C. 218 at 238, per Lord Normand, R.K. Kasule v. Makerere University (1975) HCB 376 and concluded:

“Court therefore holds the said affidavits in Volume V ‘Evidence of agents chased away from polling stations and results in lieu of Declaration forms” to be improperly before Court”.

I would fully agree with the above evaluation and would not fault the learned Judge. It was grossly erroneous for the petitioner to file any affidavit in support of his allegations with his final submissions. This would offer no option to the opposite party to cross examine the deponents had he so wished, even if they had been served on him, which was not done. Final submissions are mere summations of the evidence already tendered in Court. They are not an avenue for introducing new matters.

There was sufficient evidence to show that the appellant’s polling agents were at the polling stations all the way through till the end of the polling. All the forms found in the boxes which had to be handed over the Returning Officer were signed by the agents of the appellant. The Declaration of Results Forms signed by the appellant’s agents at the close of polling were all in the boxes.

The appellant admitted issuing letters of “Campaign agents” and not “polling agents”. He did not explain how these came to hand over these “campaign agent” letters to presiding officers as his polling agents. It would appear this was the appellant’s choice.

Issue No. 3 would also fail.

Regarding Issue No. 4 whether the trial Judge dealt with all the agreed issues at the trial, Mr. Katongole stated that the learned trial Judge completely ignored the fact that the 2nd respondent had attached to his affidavit a blank ballot paper. This ballot paper should never have been in possession of the 2nd respondent. He combined this with Issue No. 5 which was whether any electoral offence was committed by either of the respondents. He argued that it was only the Electoral Commission officials who had access to electoral materials. It was an offence for anybody else to access them.

Mr. Kiapi in reply re-phrased all these issues as mismanagement of the electoral process. Learned counsel conceded that in some areas there was mismanagement of the electoral process but which did not go to the root of the matter, like campaign agents bringing their letters to the polling stations, the absence of declaration of results forms from the 35 boxes which was also a minor irregularity. It did not affect the results because these forms are filled in 4 copies - (*see Section 136(1) Local Government Act Cap (243)*). If one copy gets lost or misplaced, there are always others from which to verify the results. The Returning Officer testified having received all the Declaration of Results Forms which he used to declare the results. Though some were missing from 35 boxes, he had his copies intact. *Vol. 1 pp 203 line 16* - Regarding the stray ballot paper which Mr. Katongole alleged signified lack of control over electoral material leading to stuffing of ballot boxes. Paragraph 5(e) of the petition alleges that:

“Your petitioner contends that on the day before the election date the vehicle carrying the ballot boxes to Nebbi allegedly had an accident, the ballot papers were hence re-packaged, exposed and held contrary to the law

without the incident or accident being reported to the police leading to ballot stuffing”.

Katongole of this **“alleged”** accident is denied by all parties concerned. It is only the petitioner who was aware of it. The 1st respondent denied this allegation - See the affidavit of the Chairperson and that of Abdu Mutanye para 8 (ii), (iii), (iv) and (v).

Para 12 of the 2nd respondent’s affidavit stats:

“That I am not aware of any accident involving any vehicle of the Electoral Commission carrying ballot papers for LC5 Chairperson of Nebbi District”.

The Returning Officer in his evidence at page 1674 Vol. 7 denied that vehicle No. UAG 705P carrying the materials to Nebbi on 29.02.06 from Kampala ever broke down. He pointed out that it was under the command of AIP Majid Kimeko and two other Constables of Uganda Police.

Ballot stuffing is a serious electoral offence. It has to be proved by showing the serial numbers of the foreign, imported or stuffed ballot papers which do not correspond to the serial numbers of the ballot papers of a particular polling station.

The learned Judge rightly found this allegation not to have been substantiated.

I would add it was sheer imagination on part of the petitioner.

Likewise the rest of the allegations/issues raised by Mr. Katongole were not substantiated at the trial as indeed the learned Judge had found. The alleged two missing ballot boxes were located at Jupumwoco Primary School Polling Station (page 202 line 9).

Mr. Henry Rwaganika in his brief remarks fully associated himself with the submissions of Mr. Kiapi. He also pointed out that the affidavit, dated 8th June 2006, of Oboko Robert, a Campaign Agent of the Appellant summed up the true position concerning the elections. Paragraph 12 thereof states:

“12. That as far as I know the campaign and voting were done in a free and fair atmosphere”.

He submitted that the judgment was elaborate and detailed. The learned Judge dealt with all the issues raised. The appellant failed to satisfy Court that there was any malpractice.

I would agree with both learned counsel that the appellant failed to substantiate the allegations he had made. He appears to have first thought out allegations in the vain hope of trying to get the evidence to substantiate them.

I would dismiss this appeal with costs here and below.

Since Byamugisha, JA agrees, the appeal fails as indicated above, by a majority of 2:1.

Dated at Kampala this 17th day of December, 2007.

Hon. A.E.N. Mpagi-Bahigeine

JUSTICE OF APPEAL.

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UGANDA**

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**CORAM: HON. LADY JUSTICE A.E.N. MPAGI-BEHIGEINE, JA
HON. MR. JUSTICE S.G. ENGWAU, JA
HON. LADY JUSTICE C.K. BYAMUGISHA, JA**

ELECTION PETITION APPEAL NO. 09/07

BETWEEN

ESROM WILLIAM ALENGYO ::::::::::::::::::::::::::::::::::: APPELLANT

AND

- 1. ELECTORAL COMMISSION**
- 2. WAPOKRWA JOHN PASCAL ::::::::::::::::::::::::::::::::::: RESPONDENTS**

[An appeal from the judgment and orders of the High Court of Uganda sitting at Arua Circuit (Kasule, J.) dated 30th January 2007 in Election Petition No. 2/06/

JUDGMENT OF BYAMUGISHA, JA:

I had the benefit of reading the very full judgment prepared by my learned colleague Bahigeine, J. which has just been delivered. It sets out the facts clearly and my own views of the case that I find it unnecessary to add anything further.

I concur in the judgment.

Dated at Kampala this 17th day of December, 2007.

**C.K. Byamugisha
JUSTICE OF
APPEAL.**