

THE REPUBLIC OF UGANDA

**IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA ELECTION
PETITION APPEAL NO. 33 OF 2011**

**(Arising out of Election Petition Appeal No. 12 of 2011 before Hon. Lady Justice Margaret
Oumo Oguli)**

1. ELECTORAL COMMISSION
2. NATIONAL COUNCIL FOR HIGHER EDUCATION
3. MANGUSHO LAWRENCE CHEROP
4. NAJUUKA RASHIDA:.....APPELLANTS

VERSUS

CHELIMO NELSON KAPROKUTO :.....RESPONDENT

HON. JUSTICE A. E. N. MPAGI-BAHIGEINE, DCJ

HON. JUSTICE A. S. NSHIMYE, JA

HON. JUSTICE REMMY KASULE, JA

JUDGMENT OF A. E. N. MPAGI-BAHIGEINE, DCJ

At the elections for Kween District Chairperson held on the 23rd February, 2011 the 3rd appellant, Cherop Lawrence was declared winner and thus the District Chairperson.

The respondent, Chelimo Nelson Kaprokuto who also participated in the same elections, being aggrieved, filed an election petition in Mbale.

The On 31st August 2011, the learned trial judge, Oumo Oguli disqualified the 3rd appellant on the

ground of lack of the requisite academic qualifications and failure to comply with the electoral laws. The judge declared the seat of Kween District LC5 seat vacant and ordered the Electoral Commission, the 1st appellant to conduct fresh elections. The 1st and 2nd appellants were ordered to pay half the respondent's costs while the 3rd appellant would meet the rest.

The appellants appealed to this court arguing that the trial judge erred in finding the 3rd appellant academically unqualified to stand for the election.

The background facts are that the 3rd appellant, Mangusho Lawrence Cherop and the respondent Chelimo Nelson Kaprokuto participated in the elections organized by the 1st appellant the Electoral Commission, for the District Chairperson of Kween.

The 3rd appellant, who did not complete Advanced Level formal education 'A' Level, sought and obtained a Certificate of completion of formal education of Advanced Level Standard or its Equivalent (Equivalency Certificate") from the 2nd Appellant, the National Council for Higher Education (NCHE).

The 4th Appellant, the Returning Officer, Najjuka Rashida, declared the 3rd appellant the winner. Unhappy with the results, the Respondent filed an election petition, in the High Court in Mbale, alleging mainly that the 3rd appellant was not academically qualified to be a contestant in the election. Based on the evidence on record the trial judge agreed and found that the 3rd appellant did not complete 'A' level or its equivalent as required by law, and that the second appellant erroneously issued the Equivalency Certificate.

The learned trial judge consequently issued an order that the 3rd appellant vacate his seat and that the 1st respondent conducts fresh elections for the Kween District Chairperson. The trial judge also ordered the 1st and 2nd respondents to pay half the costs because of their failure to properly inquire into the educational credentials presences by the costs for presenting unauthentic documentation.

Seven grounds of Appeal were submitted:

1. *The learned trial judge erred in law and infact in holding that submitting a Mature Age Examination Certificate does not amount to qualification.*
2. *The learned trial judge erred in law and in fact in holding that the 3rd appellant's academic*

documents had never been verified by Makerere University.

3. *The learned trial judge erred in law and in fact in holding that the 3rd appellant did not have the requisite credits for his 'O' Level Certificate to be equated by the NCHE.*
4. *The learned trial judge erred in law and in fact in holding that the 3rd appellant paid more money for the clearance from NCHE than is required by law.*
5. *The learned trial judge erred in law and fact in holding that the 3rd appellant did not possess the required qualifications for election as LC5 Chairperson.*
6. *The learned trial judge erred in law and fact in holding that the Electoral Commission having not published and declared a winner has to date not executed its mandate in full.*
7. *The learned trial judge erred in law and in fact in failing that some other person was or is entitled to be declared duly elected.*
8. *The learned trial judge erred in law and in fact in failing to evaluate the evidence on "substantial effect" and the case for the 2nd respondent at all as a result of which she arrived at a wrong conclusion.*

These grounds for appeal were condensed into two issues, namely:

- (a) *Whether the trial judge erred in law and fact in holding that the 3rd appellant was not qualified to contest.*
- (b) *Whether the learned trial judge properly evaluated the evidence before the trial court.*
- (c) *The requirements for academic qualification to run in a district chairperson election are clear.*

In order to be a District Chairperson, both the local Government Act and the Constitution require that person to have a minimum formal education of 'A' Level or its equivalent.

***The local Government Act (Cap. 243) S. 11 I (3)(e), provides:- "A person shall not qualify for election as Chairperson of District or city unless that person-
(e) has completed a minimum education of Advanced Level standard or its equivalent.***

S. 183 (2) states:

"A person is not qualified to be elected district Chairperson unless he or she is-

(a) Qualified to "be elected a member of parliament;

Article 80(l)(c) of the constitution is to the effect that:

(1)A person is qualified to be a member of parliament if that person-

(b) *Has completed a minimum formal education of Advanced Level standard or its equivalent. Parliament enacts a law to establish the manner and time of that equivalent.*

At the time of nomination, the 3rd appellant presented an equivalency Certificate issued by the 2nd Appellant stating that the 3rd appellant had achieved a formal education equivalent to 'A' level. However, the respondent called into question the veracity of the underlying documents used to obtain the Equivalency Certificate and ultimately found that the Certificate was a nullify.

For the 3rd appellant, it was argued that the equating of qualifications is function assigned only to the 2nd appellant, (NCHE) and cannot be overturned by the High Court, citing Nicholas Davis vs Loi Kageni Kiryapawo, Election Petition Appeal 19 of 2007 (SC), where Katureebe, JSC observed: *"it is true that the equivalent must be determined in a manner stipulated by law. But there is a basic assumption that the qualifications, to be equated must be in existence and valid. If NCHE equates valid qualifications, then courts of law may not interfere with its decision. But where the certificate it purported to equate is what is being challenged, then the High Court has power to inquire into that question. It is not the equating which is being inquired into but the validity of the qualifications that were equated.*

.....that court is not questioning the criteria or method used by

NCHE for equating_qualifications. That would be preserved of the

Statutory body, NCHE What is being questioned and inquired into is

whether the qualifications equated by NCHE existed in the first place. If NCHE were found to have equated a non-existent or fraudulent

qualification, then the person elected on the basis of such certificate

would not have been validly elected to parliament. "

However, it is noteworthy that the appellant? Were adamant as to veracity of the Equivalency Certificate and the underlying documentation relying on the old version of the law in the

conferencing notes.

The appellant based their arguments on the University and other Tertiary Institutions (Equating of Degrees, Diplomas, and Certificates) Regulations 2005, while a new version was passed in 2007 which expressly states that the 2005 Regulations are revoked. The equating took place in 2010; the 2007 Regulations would clearly be in effect.

In opposition, the respondent relied on the text of the University and other Tertiary Institutions (Equating of Degrees, Diplomas and Certificates) Regulations 2007 to say that the trial judge's assessments were correct. Furthermore, the respondent called into question the underlying documents noting for instance, that Makerere University had no record of the 3rd appellant, the 3rd appellant paid significantly more to the NCHE that was required, and crucially the 3rd appellant could not remember the name of the school he attended. There were several excusable inconsistencies in the testimony and documentation by the 3rd appellant.

In the underlying or supporting documentation lacks veracity, then the equating certificate would be of necessity because a nullify -see Abdul Balingira Nakendo vs. Patrick Mwodah Election Petition Appeal No. 9 of 2007 (SC), per Katureebe, JSC:-

“.....there must be a basic presumption here that the above certificates must be genuine, and duly issued by the bodies named therein. If it were proved that those certificates on which NCHE based its decision to issue its own were not genuine, then it would follow that NCHE certificate would be a nullity as the person would not have the necessary qualifications. ”

The above being the legal position I turn to the burden of proof in election petitions, it lies on the petitioner and is on a slightly higher degree than the usual balance of probabilities applicable in an ordinary civil suit. *Col. Kiiza Besigye vs. Yoweri Kaguta Museveni, Election Petition Appeal No. 1 of 2001(SC).*

In this petition, however, the burden of proof for the overall election petition fell to the respondent. As learned Counsel for the respondent correctly stated, “the import of Article 80 of the Constitution is that the duty to produce valid certificates to be electoral authority lies with the intending candidates for election. Where (the authenticity of those Certificates is questioned, it can only be his burden to show that he has authentic certificates- Abdul Balingira(supra).

This is consistent with **section of the Evidence Act (Cap 6)** which states:-

“In civil Proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person.” Therefore as to the issue of whether the 3rd appellant is qualified, the burden lies with the the 3rd appellant to offer proof that he has in fact completed ‘A’ Level or its equivalent.

Since the law is clear as to the requisite academic qualifications, the issue in this case is whether the equating certificate issued by the 2nd appellant, NCHC, was valid. I would further refer to Abdul Balingira (supra) where Katureebe JSC also remarked, “if it were proved that those certificates upon which NCHE based its decision ... were not genuine, then it would follow that NCHE certificate would be a nullity.”

With the law and the requisite burden of proof in mind, it remains for this court to consider the validity or invalidity of the certificate used to obtain the equating certificate.

In this regard, several documents were used to establish that the 3rd appellant completed a formal education equivalent to ‘A’ Level. The first of these certificates is the Uganda Certificate of Education granted to the 3rd appellant in 1981.

Although the learned trial judge delved into the passes and credits required, my view is that the analysis was unnecessary.

This certificate merely demonstrates that the 3rd appellant completed his ordinary Level of education.

The legal requirement is for the candidate to have completed a minimum of ‘A’ Level or its equivalent.

The 3rd Appellant produced, in purported satisfaction thereof, the Mature Age Examination UNEN 1981 -“B”. Although the record contains some verification allegedly from Makerere University, a subsequent letter from the Academic Registrar of the University notes that, upon reviewing the

letter supposedly confirming the qualifications, they found it not to be authentic (letter dated 10th July, 2011 from Alfred Masika Namoah, Academic Registrar). By this letter of 10th July 2011 the Academic Registrar reiterates their earlier assertions that according to their records pertaining to the Mature Age Scheme, Cherop Lawrence was not among the candidates who sat the Examinations in 1997/ 1998.

This is confirmed by the Academic Registrar's Affidavit sworn on 14th February 2011, in reply to the 3rd Appellants' application for prerogative Order.

Second, the 3rd appellant failed to attend either of the meetings set up to clarify his qualifications with Makerere University, setting up utterly implausible explanations. On 23/11/2012 Makerere University requested Ms/Odokol Opolot & Co Advocates to avail to them the letter inviting the appellant to sit the Mature Age Entry Examination to facilitate further investigations. This was never complied with.

On 15/02/2011, the 3rd appellant was invited by Makerere University to appear before the Senate and throw light on how he obtained his papers and clarify his Mature-Age Examinations for 1997/1998.

A reminder was sent to him on 21/02/2011. The Academic Registrar depones to this in his affidavit dated 14th February 2011, paragraph 5, that he requested for more information from the 3rd appellant to conduct further search but was not availed any. The fact thus remains that the 3rd appellant failed to take the steps necessary to show that his documents were in fact authentic. Further, the certificate submitted lacks an index number, which is usually included as evidenced by the authentic certificate offered by the respondent as an example.

Finally, ordinarily payment for the Certificate of Equivalence from NCHE is Ushs.60,000/= **Registration 6 r Part IV of University and other Tertiary Institutions (equating of Degrees, Diplomas and Certificates) Regulations 2007**. However the 3rd appellant paid the whole Ushs.750,000/= to NCHE. (paragraph 15 of his affidavit dated 4th March 2011) for reasons best known to himself. The appellants' only argument against this fact relies on an outdated version of the law, which must of necessity fail. This colossal difference paid to the appellant in my view leans towards an inference of impropriety in the equating process.

In view of the above Facts, therefore the 3rd appellant has totally failed to discharge his duty/Trust upon him under Article 80 of the Constitution "to produce certificates to the electoral authorities". - see **Abdul Balingira** (supra). In addition to the failure of the 3rd appellant to discharge Ms, duty, the respondent, through his election petition, has successfully cast serious doubt on the veracity of the documentation offered by the 3rd appellant. After a thorough perusal and scrutiny of the records,

this court finds that the learned trial judge properly weighed the evidence and properly found the 3rd appellant to be academically unqualified for the position of District Chairperson. Her findings cannot be faulted and are affirmed.

Consequently, I would dismiss the appeal with costs to the respondent.

The election of Mangusho Lawrence Cherop as District Chairperson of Kween District is hereby nullified.

It is hereby ordered that fresh elections be conducted by the 1st appellant as soon as possible. Since my Lords A. S. Nshimye and R. Kasule JJA both agree, the appeal stands dismissed with orders as above stated.

Dated 1st day of August, 2012

A.E.N Mpagi .Bahigeine,

DEPUTY CHIEF JUSTICE.

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JUDGMENT OF REMMY KASULE, OA

I have had the advantage of reading updraft the judgment of my Lord Hon. Justice **A. E. N. MPAGI-BAHIGEINE, DCJ.**

I agree with the conclusion she has reached^{P^}hat the appeal be Dismissed and that fresh elections be conducted for the seat of the Chairperson Kween District.

I also concur in the order as to costs as proposed by the Honourable Deputy Chief Justice.

Dated 1st day of August, 2012

REMMY KASULE, JA JUSTICE OF APPEAL.