

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**  
**HCT-01-CV-EP-0010/2006**

**BAGUMA ROBERT ELIPHAZ.....PETITIONER**

**VERSUS        }**

**1. THE ELECTORAL COMMISSION }.....RESPONDENTS**

**2. MPABAISI ROBERT NDIBAKWIRA }**

**BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI**

**RULING**

Baguma Robert Eliphazi the petitioner herein was one of the candidates in the elections for Chairperson of Bundibugyo Town Council. The Electoral Commission the 1<sup>st</sup> Respondent declared Mpabaisi Robert Ndibakwira the 2<sup>nd</sup> respondent as the winning candidate. The petitioner challenged the results of the elections, and in that respect, filed this petition. His only point of contention was that the 2<sup>nd</sup> respondent was not qualified to be elected, because he did not resign his post as chairperson of Bundibugyo Urban Tender Board before nomination as stipulated in the law.

The elections were held on 10/3/2006 and on 11/3/2006 the 2<sup>nd</sup> Respondent was declared the winner. The petition challenging those results was filed in the Kampala High Court registry on 25/5/2006. The petition was accompanied by 4 affidavits of Joan Mugume, Aliganyira Moses Ssalongo, Nsubuga Hood and Simon Byamaka.

On 19/7/2006 another set of documents were filed by the petitioner in the court registry at Fort Portal. These included the affidavit in support of the petition deposed by the petitioner Baguma Robert Eliphazi and annexed to the affidavit were various documents in support of the petition. These included the following:-

- Letters of complaint /petition by Baguma Robert Eliphaz to the Electoral Commission.
- Letter from Electoral Commission District Registrar to Town Clerk – Bundibugyo.

- Reply of Town Clerk to District Registrar.
- Letter of appointment of Mpabaizi Robert as Chairperson Bundibugyo Urban Tender Board.
- Resignation letter from Mpabaisi Robert addressed to Town Clerk.
- Letter of resignation by Mpabaisi Robert addressed to the Mayor.
- Another letter of complaint by Baguma Robert Eliphaz against Mpabaisi Robert and Ndibakwira addressed to District Registrar.
- Response by Mpabasi Robert to the complaint.
- Copy of minutes of meeting in office of District Registrar.
- Election results declaration form.
- Uganda Gazette of 11/5/2006 in which Mpabaisi Ndibakwira Robert was gazetted as the winning candidate.

Mr. Kwarisima learned counsel for the 1st respondent raised a preliminary point of law. He submitted that the petition was not competently before court, and therefore ought to be dismissed with costs for the reason that it was not accompanied by an affidavit setting out the facts on which the petition was based together with a list of any documents on which the petitioner intended to rely, as required under Rule 4(8) of the Parliamentary Elections (Election Petitions) Rules.

The reasons for this submission were two fold. First that the affidavit in support of the affidavit deponed by the petitioner and filed in court on 19/6/2006 was not dated. It therefore was not an affidavit known in law, and ought to be struck out, together with all its annexures. Second and connected with the above, the 4 affidavits which accompanied the petition on the date of filing were not the affidavit envisaged under rule 4(8) and therefore the petition did not comply with the law and could not stand in court.

Mr. Bwiruka learned counsel for the 2<sup>nd</sup> respondent associated himself with above submissions, and added that the provisions of the law were clear that such affidavit had to be that of the petitioner. These being mandatory provisions, non-compliance with the same meant that the petition was incompetent.

Mr. Richard Okallany, learned counsel for the petitioner submitted that the 4 affidavits, which accompanied the petition on presentation constituted sufficient compliance with the law. There was no requirement in rule 4(8) that the accompanying affidavit had to be that of the petitioner. Counsel argued also that non-dating of the affidavit of the petition was a minor irregularity, which could be cured by the person who commissioned the affidavit filing a supplementary affidavit indicating the date when he commissioned the same. The case of Rtd Col. Dr. Kiiza Besigye vs. Y.K Museveni & Anor: EP No. 1/2001 was cited in support.

It was submitted that the court should take a liberal approach and administer substantive justice by letting the petitioner file a dated affidavit, or allow him an adjournment so that the Commissioner for Oaths files a supplementary affidavit.

The Local Government Councils elections such as the one now under consideration are provided for under the Local Government Act. Section 172 of that Act, a rather awkwardly drafted provision has applied the Presidential Elections Act and the Parliamentary Elections Act to the elections of Local Councils. The Parliamentary Elections (Elections Petitions) Rules S.I 141 –2 in rule 15 provides that all evidence in favour of or against the petition shall be by way of affidavit read in open court.

That means that evidence in a petition in respect of a Local Council election has to be by way of affidavit read in open court.

Rule 4 of the Parliamentary Elections (Elections Petitions) Rules provides for the form of petition. In sub rule (8) thereof, it provides as follows:-

‘(8) The petition shall be accompanied by an affidavit setting out the facts on which the petition is based together with a list of any documents on which the petitioner intends to rely.’

Rule 15(1) provides that all evidence at the trial in favour of or against the petition shall be by way of affidavit read in open court. The practical effect of the above provision is that in elections petitions, the evidence to prove the matters in contention by either side is by filing affidavits. But

rule 4 (8) of the Parliamentary Elections (Election Petitions) Rules provides for a specific affidavit, which is not necessarily part of the affidavits, which constitute the evidence in an election petition as specified in rule 15 of these rules. Of course this affidavit also forms part of the pleadings.

The affidavit under rule 4(8) must accompany the petition, meaning that it should be filed at the same time as the petition. This affidavit sets out the facts on which the petition is based, and includes a list of the documents, which the petitioner intends to rely on. This being a legal requirement, the petition would invariably indicate that it is accompanied by the affidavit of whoever would have sworn the affidavit in compliance with the above rule. To my mind, this ought to be the petitioner, though I suppose in rare cases, some other person might suffice.

However am not convinced that the mere fact of filing any number of affidavits accompanying the petition constitutes compliance with the provisions of rule 4(8) above cited. Such affidavits only constitute the evidence in proof of the issues in dispute as directed under rule 15. There is no time limit set out in these rules within which these supporting affidavits must be filed.

In the present case, there were 4 affidavits, which were filed along with the petition as I indicated at the beginning of this ruling. The affidavit of Joan Mughuma was in respect of a meeting of the Urban Tender Board, which the 2<sup>nd</sup> respondent is reported to have chaired. The one of Aliganyira Moses Salongo was in respect of a consultative meeting, which was convened by the Returning Officer, at which meeting the validity of the nomination of the 2<sup>nd</sup> respondent was discussed. There was the affidavit of Nsubuga Hood in which he deposed that he attended a meeting at which the validity of the 2<sup>nd</sup> respondents nomination was discussed, and the resolution was that a legal opinion of the 1<sup>st</sup> respondent on the matter be sought. The last affidavit was one deposed by Simon Byamaka, stating that he served the 2<sup>nd</sup> respondent with a letter of invitation to attend a meeting of the Urban Tender Board.

Each of these affidavits made reference to or was in respect of a specific act or incident, which all put together was the evidence in support of the petition in compliance with rule 15 of the

Parliamentary Elections (Election Petitions) rules above referred to. I did not find that there was any affidavit accompanying the petition in terms of rule 4 (8) of the same rules above.

That brings me to the affidavit in support of the petition filed in court on 19<sup>th</sup> July 2006, which was deposed by the petitioner. That affidavit was however not dated. Mr. Okallany learned Counsel for the petitioner submitted in the alternative that this was the affidavit in support of the petition in compliance with rule 4 (8) above referred to. I will shortly revert to the effect on non-dating of the affidavit.

I was not satisfied that this was the affidavit in compliance with rule 4(8) of the rules. The rule states that the affidavit must accompany the petition. To accompany means to go along with or together with. It does not mean to come after. If the legislature intended the later, they would no doubt have stated so clearly. The affidavit must therefore be filed along with or together with the petition.

The petition was filed on 25<sup>th</sup> May 2006. The affidavit in support by the petitioner was filed in court on 19<sup>th</sup> July 2006, more than 50 days later. It could not, by any stretch be said that this affidavit accompanied or came along with or together with the petition.

S. 138 (1) of the Local Government Act gives a right to an aggrieved candidate for chairperson in a local council election to petition the High Court for redress. Under subsection (4) thereof, the petition obviously with its accompanying affidavit must be filed within 14 days after publication of the results of the elections in the gazette. The petition, needless to add, together with its accompanying affidavit, under S. 141 of the same act, must be served on the respondent within 7 days after date of filing. These provisions are all couched in mandatory terms.

In the present case, even if one was to concede that the affidavit of the petitioner in support was the affidavit accompanying the petition, there would be no way of complying with the above referred to provisions of the law considering that the affidavit in issue was filed almost two months after date of filing the petition. This further proves to my mind that the affidavit in

support, which was filed in court on 19<sup>th</sup> July 2006 was not the affidavit accompanying the petition in terms of rule 4(8) of the Parliamentary Elections (Election Petitions) Rules.

The above would dispose of the matter. But there was also a submission regarding the validity of the affidavit in support, which was deposed by the petitioner, and filed in court on 19<sup>th</sup> July 2006. I will deal with it for what it is worth. The reason for the objection thereto was because the affidavit was not dated. It was argued that this offended the law and the affidavit ought to be struck out.

There was no dispute about the fact that the affidavit, which was filed in court on 19<sup>th</sup> July 2006 was not dated. Mr. Okallany argued that the non-dating of the affidavit was a mere irregularity, which could be cured by court granting an adjournment after which the person who commissioned the affidavit would file a supplementary affidavit verifying the date on which he commissioned it. He referred to the *Besigye decision* (supra) and the cases therein cited by Odoki C.J. in respect of affidavits.

The Oaths Act in section 6 provides for the place and date of an oath. It enjoins every Commissioner for Oaths before whom any oath or affidavit is taken or made to state truly in the attestation or jurat at what place and on what date the oath or affidavit is taken or made. This provision is replicated S.5 of the Commissioners for Oaths (Advocates) Act. According to Halsbury's Laws of England, parties cannot waive the irregularities in the form of a jurat. See Vol. 17 para 316.

In *Zola and Another V. Ralli Brothers Ltd. and Another* [1969] EA. 691 CA, Sir Charles Newbold P., held that if the affidavit is a nullity, then the trial Judge should not act on it, but should dismiss the motion. He however cautioned that courts should hesitate to treat an incorrect or irregular act as a nullity, particularly where the act relates to matters of procedure. He cited the courts decision in *Prabhudas & Co. V. The Standard Bank Ltd.* [1968] EA. 670.

In the much cited *Besigye decision* (supra), (at page 29 of the certified copy of the judgement) Odoki C.J., dealt with an affidavit which was commissioned by Mr. Gidudu the Registrar of the

High Court (as he then was), but there was no indication of his title or that he was a Commissioner for Oaths. There however was the seal of the High Court. The Chief Justice held as follows,

‘The Registrar’s jurat satisfied *the essential requirements of the jurat namely the place and date the affidavit was made*. But it should have included his name and title to strictly comply with the form of jurat contained in the schedule. The lack of proper form was however cured by the affidavit sworn by Mr. Gidudu.’ (Italics added for emphasis).

Mulenga JSC, (at page 297 of the certified copy of the judgement) also commented on the Gidudu affidavit. He held that while it was proper and common practice to include the expression, ‘Commissioner for Oaths’, the provisions of the Act did not make it mandatory to do so. Its omission did not make the affidavit invalid.

In the case before me, the affidavit was not dated. The law requires that in the form of jurat, the affidavit must inter alia be dated. This is not a mere procedural matter, meaning that the failure to do so is a mere irregularity, in respect of which a Judge could use his or her discretion whether or not to admit the same. To my mind, the non-dating of the affidavit made the affidavit a nullity. As was rightly held in *Bitaitana V. Kananura* [1977] HCB 11, affidavit is evidence on oath. It must be clear to the respondent when and where it was taken or made. This enables the opposite party to prepare his or her defence fully in that respect. It must not be left to imagination or speculation when the evidence by way of affidavit was made or taken.

The case before me is clearly distinguishable from the *Besigye decision* (supra) as the affidavit in this case did not satisfy *the essential requirements of the jurat namely the place and date the affidavit was made or taken*, as required under the law. For those reasons I would hold that the affidavit which was not dated did not comply with the requirements of the law, and so ought to be struck out, and I would consequently strike it out.

For the reasons I have given above, the petition is dismissed with costs to the respondents.

**RUGADYA ATWOKI**

**JUDGE**

**11/8/2006.**