

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO.1/99

CORAM: HON. MR. JUSTICE S.T. MANYINDO, DCJ
HON. LADY JUSTICE A.E. MPAGI-BAHIGEINE, JA
HON. MR. JUSTICE J.P. BERKO, JA
HON. MR. JUSTICE S.G. ENGWAU, JA
HON. LADY JUSTICE C.N.B. KITUMBA, JA

AL HAJJI NASSER NTEGE SEBAGGALA. PETITIONER

VERSUS

THE ATTORNEY GENERAL..... FIRST RESPONDENT
THE ELECTORAL COMMISSION. SECOND RESPONDENT
THE CITY COUNCIL OF KAMPALA. THIRD RESPONDENT

RULING OF THE COURT.

This Constitutional Petition is brought by Al Hajji Nasser Ntege Sebaggala against the Attorney General as first respondent, the Electoral Commission, second respondent and City Council of Kampala, third respondent. It is brought under Articles 50 and 137 of the Constitution, and under the provisions of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992 as Modified by the Directions, 1996, Legal Notice No.4 of 1996.

The petition seeks the following declarations:-

- (i) that the Solicitor General's opinion based on his interpretation of the provisions of the Constitution set out in his letter to the Permanent Secretary, Ministry of Local Government dated 2-3-1999 to the effect that the Mayor of Kampala, Al Hajji Nasser Ntege Sebaggala is deemed to have vacated his office on being sentenced in USA to a term of imprisonment exceeding 9 months is contrary to the

thereof has lawfully become vacant or any other relief the court may deem appropriate under the circumstances and costs of the Petition.

The first respondent is the Attorney General of Uganda and is sued in his representative capacity under the Government Proceedings Act (Cap.69).

The second respondent is the Electoral Commission of Uganda established under Article 60 of the Constitution and responsible for organising elections and by-elections.

The third respondent is the Local Government/Council for City of Kampala/Kampala District established by the Local Government Act No.3 of 1997.

The Petitioner was on 19-4-98 elected Mayor of Kampala City under the Local Government Act for a period of four years.

On 24-2-1999 the Petitioner was sentenced to 15 months imprisonment by the USA District Court of Massachusetts. On 8-3-1999 he filed a notice of appeal to the U.S. Court of Appeals which appeal has not yet been heard or disposed of.

On 2-3-1999 the Solicitor General wrote to the Permanent Secretary, Ministry of Local Government (C.17) concerning the status of the Mayor of Kampala. This letter is not on record, only excerpts were cited by the Permanent Secretary in her communication

On receipt of Annexure "B", the Clerk to the third respondent, acting under Section 172(1) of the Local Government Act, 1997, by her letter, Annexure "C", notified the second respondent that the vacancy for the post of Mayor of Kampala occurred on 24-2-1999, the day the Petitioner was sentenced to 15 months imprisonment.

On 15-4-1999 the 2nd respondent issued a Press Release Annexure "D" informing the general public of the communication from the third respondent that the Mayoral seat of Kampala District had been declared vacant and therefore in accordance with Sections 102 and 172 Local Government Act, the second respondent was making preparations for filling the said vacancy.

On 23-4-1999 the 2nd respondent by a press release, Annexure "E" published the programme for the bye-election. According to the said programme polling day is due on 20th June 1999.

At the commencement of the hearing, Mr. Deus Byamugisha, Ag. Director Civil Litigation, leading a team of advocates for the first and second respondents, raised five preliminary points of objection to the Petition.

The first objection was that this Court lacked jurisdiction to entertain this Petition. It was argued that the Solicitor General's letter to the Permanent Secretary, Ministry of Local Government, was interpreting the Local Government Act and not the Constitution. It was pointed out that by virtue of Section 173, the Local Government Act had incorporated the Articles of the

other courts for other remedies enforceable by those courts under Article 50 of the Constitution. It was asserted that the Electoral Commission under Article 61(7) and Section 15(1) of the Electoral Commission Act, No.3/1997 is empowered to inquire into and investigate electoral complaints arising before and during the electoral process and that the occurrence of a Mayoral vacancy is part of the electoral process which the Commission could investigate and if need be decline to hold a bye-election on grounds of irregularity or non-existence of a vacancy.

The fifth point of objection concerned one of the two affidavits in support of the Petition. The Petitioner's affidavit dated 4-5-1999 (paragraphs 3,4 & 5) was attacked for non-disclosure of the source of information. It was contended that the following words appearing in paragraph 4 thereof " That I have received information from Uganda conveyed inter alia, by Mr. Mathias Nsubuga ... " were too wide and lacked precision as to who gave him that information. It was however conceded that there was nothing wrong with the second affidavit supporting the Petition.

Mr. Sendege Jehoash, learned Counsel for the third respondent, associated himself with the submissions of Counsel for the first and second respondents, Mr. Cheborion Barishaki, Senior Principal State Attorney, who half-way took over from Mr. Deus Byamugisha. Mr. Sendege addressed the Court only on the question of jurisdiction and contended that once the provisions of the Constitution are incorporated they become part and parcel of the incorporating law, in this case the Local Government Act.

with jurisdiction in this matter under Article 137 (3) (a) (b) .

Regarding the objection concerning lack of cause of action, Mr. Lule submitted that there was a chain of acts by the respondents making one complete whole which affects the Petitioner's constitutional rights and thus constitute a cause of action.

As to the Petition being time-barred, Mr. Lule pointed out that it was not clear who moved the Solicitor General, but that his letter to the Permanent Secretary was not copied to the Petitioner, though it was copied to several other officials. Nor was that of the Permanent Secretary to third respondent copied to the Petitioner. He submitted that there was therefore no way the Petitioner could have known of the decisions of the Solicitor General and the Permanent Secretary. It was not until the Press Release of 15-4-1999 that the Petitioner became aware of what was happening. According to Mr. Lule, the Press Release was the culmination of a series of acts which constituted a cause of action and that until then there was no cause of action. The petition was filed and received by the Court on 13-5-1999 and served on and received by the respondents the following day on 14-5-1999. The action was therefore not time-barred. It was within the 30 days prescribed by Rule 4(1) of Legal Notice No.4/1996.

Regarding the fourth point of objection that this matter lay with the Electoral Commission under Section 15(1) of the Electoral Commission Act, Mr. Lule submitted that the irregularities envisaged in the section do not extend to, cover or embrace the

question as to whether or not a vacancy had occurred. Therefore it was not open to the second respondent to investigate the matter of the vacancy of the seat.

Regarding the objection to the Petitioner's affidavit, Mr. Lule submitted that the source of knowledge, information and belief were duly disclosed by paragraph 4 of the Petitioner's affidavit, mentioning Mr. Mathias Nsubuga, the Petitioner's political adviser, as the source. He said paragraph 5 is a follow up on paragraph 4 and is an expression of grief over what has happened as a result of paragraph 4 which information had been released by Mr. Nsubuga. Paragraph 6 states his belief that the acts revealed by Mr. Nsubuga are in violation of his constitutional rights. He asserted that paragraph 9 was an incorporating paragraph, incorporating all paragraphs which show his source of information and belief. He submitted that this affidavit was competent and that in any case there was a second affidavit which was not attacked.

In reply, Mr. Cheborion Barishaki, Senior Principal State Attorney, disputed Mr. Lule's claim that there was a chain of actions and that the cause of action arose after the press release. He asserted that there were distinct actions separate from each other and done on separate dates; the Solicitor General's letter was written on 2-3-1999 while that of the Permanent Secretary was dated 25-3-1999. He argued that neither Mr. Nsubuga nor the Petitioner states the dates when the said letters came to their notice. He suggested, however, that whatever the position, the Petitioner should have applied for extension of time by exemption and after

pleading it.

Regarding the objection as to jurisdiction, Mr. Cheborion further argued that the Petition disclosed no matter for interpretation as the Constitutional provisions relating to elections of Council members are contained in Part 10 of the Local Government Act and S.173 thereof invokes the Parliamentary Elections Law which is partly found in Articles 183, 80, 83 and 257 of the Constitution to fill the gaps by importing those articles into the Local Government Act. He stated that Article 257 only comes in aid of specific articles and there was therefore nothing constitutional about it.

Mr. Lule with leave of the Court further replied on a point of law that the incorporation of Article 257(1) into the Local Government Act could not arise under section 173 of Local Government Act which only extends to Part 10 of the Act and not beyond. He said Part 10 only deals with Electoral process. It does not refer to the definition of "court".

Mr. Lule pointed out that the Act has a definition Clause under Section 3 where there is no general definition of "Court".

We now turn to the first objection which is whether this Court has jurisdiction in this matter. It is the contention of the petitioner that the Solicitor General's interpretation of Articles 80(2)(e), 83(1)(b), and 183(1)(b) of the Constitution is wrong and he is aggrieved by the misapplication of those articles to his circumstances. These articles form the basis of the Solicitor General's "guidance" in his letter to the Permanent Secretary,

"(3). A person who alleges that -

(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or

(b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate."

We do consider it plain enough that this Court has jurisdiction to entertain this Petition. The Court cannot lose jurisdiction merely because the Local Government Act has incorporated certain articles of the Constitution. Strangely all the authorities cited relate to incorporation of Acts into other Acts and none refers to a situation where the provisions of the Constitution have been incorporated into Acts. We are of the view that provisions of a Constitution cannot be diluted by incorporation. In this case that would derogate from the provisions of Article 2 which guarantees the Supremacy of the Constitution. For the foregoing reasons this ground of objection is overruled.

The next point to consider is whether or not there was a cause of action. Cause of action was defined by Mulla on the Code of Civil Procedure, Vol.1, 14th Edition at page 206 as follows:-

" 'A cause of action' means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which

With regard to the second respondent, it is clear that it is obligated under Article 60(7) -

"to hear and determine election complaints arising before and during polling."

In our view this would embrace the electoral process including registration, checking of registers and voters cards. We do not consider that this would involve investigating or inquiring into the occurrence of a vacancy.

As Mr. Lule rightly pointed out the Electoral Commission is a necessary party to the proceedings as it would be the body to execute this Court's orders in the event the petition succeeded. As for the third respondent, it merely notified the second respondent about the existence of the vacancy for the post of Mayor of Kampala under section 172(1) of the Local Government Act. In so doing the third respondent was merely carrying out its statutory obligation. We are satisfied that there is no cause of action against the second and third respondents. Therefore this ground of objection succeeds only in part.

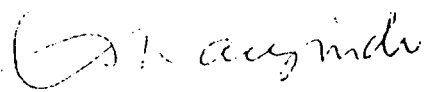
As for the alleged defects in the petitioner's affidavit, we see none. In paragraph 4 of that affidavit the petitioner cites Mathias Nsubuga, his political assistant, as his source of information. In any case there is a second affidavit of Nsubuga himself in support of the petition and which affidavit has not been challenged. Accordingly we overrule this objection.

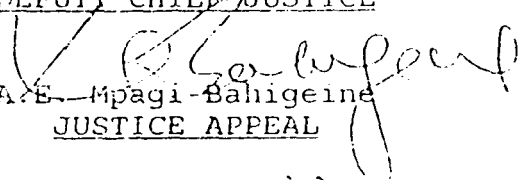
O.7, r.6 of the Civil Procedure Rules. The Petitioner should have sought exemption from Court but did not.

In Eridad Otabong vs. Attorney General, S.C. C.A. 6/1990, (1991) ULSLR 150 it was held that where a period of limitation is imposed, it begins to run from the date on which the cause of action accrues.

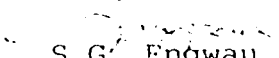
The Supreme Court further held that as the plaint did not plead disability as an exemption from limitation as required by O.7, r.6 of the Civil Procedure Rules, which is couched in mandatory terms, failure to do so was fatal to the claim outside limitation. Coupled with the above, O.7, r.11 provides for the rejection of the plaint where the suit appears from the statement in the plaint to be barred by any law. For the foregoing reasons, this Court has no alternative but to dismiss the Petition on this ground and it is so ordered. The respondents shall recover their costs from the petitioner.


Dated at Kampala this 18th day of June 1999.


S.T. Manyindo
DEPUTY CHIEF JUSTICE


A.E. Mpigi-Bahigeine
JUSTICE APPEAL

J.P. Berko
JUSTICE OF APPEAL


S.G. Engwau,
JUSTICE OF APPEAL


C.N.B. Kitumba
JUSTICE OF APPEAL