THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM:
HON. MR. JUSTICE S.B.K KAVUMA, DCJ
HON. MR JUSTICE BARISHAKI CHEBORION, JA
HON. MR. JUSTICE PAUL KAHAIBALE MUGAMBA, JA

ELECTION PETITION APPEAL NO. 40 OF 2016

(ARISING FROM HIGH COURT ELECTION PETITION NO. 002 OF 2016)

AKURUT VIOLET ADOME:::PETITIONER

VERSUS

EMURUT SIMON PETER :: RESPONDENT

JUDGMENT OF THE COURT

This Election Petition Appeal is against the judgment of Justice David Wangutusi in Soroti High Court Election Petition No. 002 of 2016. The Judgment was delivered on 15th July 2016. In his verdict the learned trial Judge made the following declarations and orders:

1. That the 1st Respondent was not validly elected for nomination as Woman Member of Parliament for Katakwi District.
2. That the election of the 1st Respondent as Katakwi Woman Member of Parliament was thereby nullified.
3. That fresh elections were to be conducted for Woman Member of Parliament for Katakwi District.
4. The Petitioner was awarded costs of the petition against both Respondents.

Background

Emorut Simon Peter the respondent herein had earlier petitioned the High Court at Soroti contesting the election of the appellant herein as the duly elected Woman Member of Parliament for Katakwi District. The Petitioner was a registered voter in the area who had premised the Petition on the provisions of Section 60(2) (b) of the Parliamentary Elections Act. This requires such a Petition to be filed by a registered voter in the constituency concerned, supported by signatures of not less than five hundred voters registered in the constituency in a manner prescribed by regulations. It was the chief contention in the Petition that the nomination and subsequent election of the appellant herein were null and void given that she had not resigned from her public service employment. It is noteworthy that at the time of her election and immediately prior to then, the appellant herein was a Commissioner with the Uganda Human Rights Commission. Related legal provisions were quoted to support the Petition and it is the relationship of those provisions vis a vis the appellant's social standing that were at the core of the Petition and the heart of this Appeal.

Representation

At the hearing of the Appeal Messrs Kiryowa Kiwanuka and Usaama Sebuufu were counsel for the appellant. Messrs Caleb Alaka, Okecha Michael and Okiror Bosco were counsel for the respondent.

Issues

The following were the agreed issues:

1. The learned trial Judge failed to properly evaluate the evidence on record and came to the wrong conclusion that the respondent was personally served with the Petition and that the Petition had been rightly served.
2. The learned trial Judge erred in law and in fact when he held that Miscellaneous Application No. 5 of 2016 and Miscellaneous

Application No. 19 of 2016 arising out of Soroti Election Petition Number 2 of 2016 were filed in time and in accordance with the electoral laws.

3. The learned trial Judge erred in law and in fact when he interpreted the Constitution without jurisdiction and thereby occasioned a miscarriage of justice.
4. The learned trial Judge erred in law and fact when he found that the 1st respondent was such a person employed by the Human Rights Commission who ought to have resigned 90 days to nomination.
5. The learned trial Judge erred in law and fact when he found that a member of the Uganda Human Rights Commission had to resign 90 days to nomination if she or he wanted to run for Parliamentary Elections.
6. The learned trial Judge failed to properly evaluate the evidence on record and came to the wrong conclusion when he nullified the 1st respondent's election and held that the appellant had not been validly nominated for nomination as MP for Katakwi District.

Counsel's submissions

In his submission counsel for the appellant elected to argue grounds 1, 2, 3 and 6 separately but grounds 4 and 5 together. Counsel for the respondent adopted similar procedure.

Before considering the arguments advanced for either side, we acknowledge the duty of a first appellate court to review the evidence on record and reconsider the materials before the trial Judge so that it may arrive at its own conclusion as to whether the finding of the trial court can be upheld. We bear in mind however that this Court does not share the unique advantage of the trial Judge who perceives the witnesses as they testify. See **Pandya v R [1957] EA 336.** We have in mind also the provisions of Section 61 of the Parliamentary Elections Act. Section 61(1) thereof which provides that the election of a candidate

as a Member of Parliament shall only be set aside on grounds stipulated in the section if those grounds are proved to the satisfaction of court. (The emphasis is added.) Indeed in **Odo Tayebwa v Basajjabalaba Nasscr and Electoral Commission, Election Petition Appeal No. 13 of 2011,** Mpagi Bahigeine DCJ, as she then was, observed:

> *'Before evaluating the submissions of Counsel it is noteworthy that in accordance with the general principles of evidence, the burden of proof in an election contest rests ordinarily upon the contestant, to prove to the satisfaction of court the grounds upon which he relies to get the election nullified. The burden does not shift. Many of the issues relating to trials in civil cases are generally applicable.'*

Section 61(3) of the Parliamentary Elections Act provides that any of the grounds specified in Section 61(1) of the Act is to be proved on the basis of a balance of probabilities.

Issue 1

This relates to the disputed service of the Petition on the appellant herein. The appellant hinges his argument on the provisions of rule 6(3) of the Parliamentary Election (interim Provisions) Rules, Statutory Instrument No. 141-2. Counsel for the appellant refers also to rule 6 (4) of the Rules. The former states that service of the Petition on a respondent under the Rules shall be personal except as provided in sub rule (4) of the rules. Sub rule (4) provides:

> *'(4) Where the respondent cannot be found within three days for effecting personal service on him or her, the petitioner or the advocate of the petitioner shall immediately make an application to the court supported by an affidavit, stating that all reasonable efforts have been made to effect personal service on the respondent but without success.'*

It is not contested that on 21st March 2016 a process server received the Petition from the High Court at Sororti for service on the appellant herein.

According to the process server, that same day at about 10am he made a telephone call to the appellant on a mobile phone. The appellant let the process server know that she was then on her way to Entebbe International Airport and if the process server was to meet her he should get on a boda boda in the next hour. It was the evidence of the process server that upon arrival at 10am he effected service on the appellant before moving on to the premises of M/s Kiwanuka and Karugire Advocates. The appellant however denies any service was effected on her as alleged and counsel for the appellant was incredulous how a person could possibly move from Soroti at 10am and reach Entebbe Airport at 10am to effect service as claimed. Counsel for the appellant wondered why, if service had been effected as alleged by the respondent, it was necessary for the process server later on to file an application for substituted service. Counsel wondered also why the trial Judge did not take such development into account before deciding that there had been effective service. He submitted that court should not have reached the conclusion it did that service was effected. He added that the petition was improperly before court given that failure to abide by the provisions of rule 6(3) and (4) of the Parliamentary Election (Interim Provisions) Rules was not a mere technicality.

It was contended on behalf of the respondent that service was properly effected since service is the procedure by which a party to a law suit gives an appropriate notice of initial legal action to another party in an effort to exercise jurisdiction over that person so as to enable that person to respond to the proceedings. Counsel stated that the process server got a Petition endorsed on 17th March 2016 and that he does not say he picked it in Soroti. It is submitted nevertheless that the date of receipt of the Petition by the process server was 21st March 2016 and that he was in Kampala when he received the Petition.

Regarding efforts to substituted service, counsel submitted that this was necessitated by the fact that the appellant avoided personal service when she refused to endorse the process. Counsel for the respondent added that

in the event the appellant put in appearance and replied to the Petition and no prejudice was caused to the appellant. It was argued on behalf of the respondent that in the circumstances, the trial court reached the right decision since the alleged flaw in effecting personal service was a mere technicality which should be covered by **Article 126(2)(e)** of the Constitution. Counsel asked for this ground of appeal to be dismissed.

Article 126(2)(e) of the Constitution ordains that in adjudicating cases of both a civil and a criminal nature, the courts shall, subject to the law, apply……substantive justice without undue regard to technicalities.

This court in **Electoral Commission and Another v Piro Santos, Civil Application No. 22 of 2011** quoted with approval the dicta in the Kenyan Case of **Muiya v Nyangah and others, [2003] 2 EA 616 C.H.C.K.** There the court commented on the need and reason to adhere to electoral law in the following terms:

> *'On this strictness, this court has one thing or two to say: Elections are `serious matters of state with its citizens. As elections are held, the outcome announced, the electorate must know their political leader quickly and assuredly. There must be limited or no uncertainty about this. The roles of elected representatives are many and diverse vis-à-vis their electors. To perform the roles well, the elected must be sure of his post and the elector of his leader. And the sooner the better to give that certainty. So either the election is accepted at once or when challenged, that challenge must be moved along to the end swiftly enough to restore certainty. And for that, election petitions are governed by this Act with its rules in a very strict manner. Election petition law and the regime in general, is a unique one and only intended for elections. It does not admit to other laws and procedures governing other types of disputes, unless it says so itself…'*

We agree with this fully and hasten to add that failure to adhere to the electoral stipulations should not simply be dismissed as a technicality, as counsel for the respondent would have us believe. Indeed failure to comply

should be eschewed and looked at with disfavor by court amongst others. Having so observed we find that the facts of this case present a unique situation. Mysteriously, the appellant was served with the Petition to which she proceeded to reply within time. In the circumstances quest of how service of the Petition came to be effected remains of academic interest. No prejudice resulted to either party. What is more, the Petition was heard in the fullest of time and it is its questionable outcome we should be addressing now. We do not, in the circumstances, find this ground successful. It is dismissed.

Issue 2

It is the contention of the appellant that the trial Judge erred when he held that Miscellaneous Application No.5 of 2016 and Miscellaneous Application No. 19 of 2016 arising out of Soroti High Court Election Petition No. 2 of 2016 were filed in time in accordance with the electoral laws.

The following facts are not in dispute. Election Petition No. 2 of 2016 was filed on 17th March 2016. Miscellaneous Application No. 5 of 2016 was filed on 23rd March 2016, never mind the Registrar's orders attendant to it which the High Court nullified; a decision we are in accord with. Miscellaneous Application No. 19 of 2016, seeking for an order for substituted service was filed on 5th April 2016. Section 62 of the Parliamentary Elections Act relates to notice of petition to be served on the respondent and reads:

> *'Notice in writing of the presentation of the petition accompanied by a copy of the petition shall, within seven days after the filing of the petition, be served by the petitioner on the respondent or respondents, as the case may be.'*

It is gainful also to refer to the Parliamentary Elections (Interim Provisions) Rules made under the Parliamentary Elections Act. Therein rule 6(1) and (4) are material to this issue. Theyprovide:

'6(1) Within seven days after filing the petition with the registrar, the petitioner or his or her advocate shall serve on each respondent notice in writing of the presentation of the petition, accompanied by a copy of the petition.

(2) .....

(3) .....

(4) Where the respondent cannot be found within three days after effecting personal service on him or her, the petitioner or the advocate of the petitioner shall immediately make an application to the court supported by an affidavit, stating that all reasonable efforts have been made to effect personal service on the respondent but without success.

.....'

It is worthwhile also to look at rule 19 of the same Rules. The rule concerns enlargement or abridgement of time and provides:

'The court may of its own motion or on application by any party to the proceedings, and upon such terms as the justice of the case may require, enlarge or abridge the time appointed by the Rules for doing any act if, in the opinion of the court, there exists such special circumstances as make it expedient to do so.'

Doubtless Rule 19 has a bearing on the provisions of Rule 6. In his judgment the trial Judge noted:

'In conclusion, since no particular time was set for the filing of the application, and also that they were filed within the time provided for service, it is my finding that applications 5 and 19 of 2016 were filed in time and in accordance with the electoral laws.'

With due respect to the learned Judge, that decision cannot be sustained. It suggests that the application be open ended and indefinite. There must be mention of the time frame involved in the enlargement or abridgement,

were that necessary. Secondly there exists no basis for court deducing that since no particular time frame was set the applications in issue were filed in time and in accordance with the electoral laws. Nothing can be farther from the truth.

This issue succeeds but is of no consequence to the appeal given our resolution of the first issue.

Issue 3

In the third issue it is contended by the appellant that the trial Judge erred in law and in fact when he interpreted the Constitution without jurisdiction and in the process occasioned a miscarriage of Justice. This issue is based on **Article 137(1)** of the Constitution which provides:

> *'Any question as to the interpretation of this Constitution shall be determined by the court of Appeal sitting as the constitutional court.*

It is urged by the appellant that the trial Judge had no power to interpret the Constitution the way he did. In **Jude Mbabaali v Sekandi and Attorney General, Constitutional Petition No. 28 to 2012** Remmy Kasule JA/JCC observed;

> *'Interpretation of the Constitution also embraces the term "Construction" that is inferring with the meaning of the provision(s) of the Constitution from a broader set of evidence, such as considering the whole structure of the Constitution as well as its legislative history .....'*

The learned Justice went on to state:

> *'The issue that calls for interpretation of the Constitution by the Constitutional Court must involve and show that there is an apparent conflict within the Constitution by an Act of Parliament or some other law, or an act or omission done or failed to be done by some person or authority. Further, the dispute where the apparent conflict exists must be such that its resolution must be only when and after the Constitutional Court has*

interpreted the Constitution. The Constitutionality of statute or some law, or the act or omission of a person or authority must be brought forth for determination. '

Reference was made to the Kenyan Court of Appeal case of **Hassan Ali Joho and Another v Suleiman Shahbal and 2 others (2013) e KLR.** It was submitted for the appellant that the IIigh Court erred and strayed into constitutional interpretation which is by no means its mandate but rather that the trial Judge should have read the Constitution as it is and proceeded to apply it. The sticking point was the relationship between **Article 257(2)(b)** and **80 (4)** of the Constitution. In the course of his Judgment the learned trial Judge wrote, particularly lines 9 to 19 on page 22 of the judgment:

'In the instant petition, Article 80(4) and 257 would have to be brought in view and interpreted so as to effectuate the great purpose of the Uganda Constitution. So what then was the great purpose of Article 80(4)? It was in my view to harmonise the campaign field, do away with a group that would use public resources for their campaigns against all the other candidates who were not well placed...

Furthermore, a close reading of Article 257 shows that the said Article was subject to other provisions of the Constitution. So when the legislators amended the Constitution in 2005, they included the commissioners who were part of government and drawing salary; into the category that had to resign.'

While it was the position of the appellant that in the process, inclusive of the above discourse the learned Judge had indulged in interpretation of the Constitution, the position of the respondent was that the Judge had read and gone ahead to apply the Constitution and that as such there was no merit in the grounds of appeal, which should be dismissed. He added that the Judge's verdict was informed by this Court's decision in **Kwizera Eddie vs Attorney General, Constitutional Petition No. 14 of 2005.**

Having looked at the Judgment as a whole, we find that the learned Judge went beyond reading and applying the Constitution. By delving into the reason for the promulgation, the history and eventually deciding how a provision should be applied court went beyond its remit. It essayed to interpret the Constitution which clearly is not its role. This issue succeeds.

Issues 4 and 5

Issue 4 and 5 were argued together as indeed they are clearly related. While issue 4 finds fault with the trial Judge's finding that the appellant was a person employed by the Human Rights Commission who ought to have resigned 90 days to nomination, issue 5 finds fault with the decision of the trial court to the effect that a member of Uganda Human Rights Commission had to resign 90 days to nomination if she or he wanted to run for Parliamentary elections.

It was submitted on behalf of the appellant that a member of the Human Rights Commission is not an employee of the Commission and as such, there is no requirement for such a member to have to resign at least 90 days prior to nomination. On the other hand, it was conceded on behalf of the appellant that an employee of the Commission had to resign. For the respondent however, the position was that the trial court correctly found that the appellant was an employee of the Human Rights Commission and as such it was incumbent on her to resign at least 90 days before nomination. The respondent added that they might be employed differently but the commissioners too are employees.

We proceed to look at the law in contention. **Article 80 (4)** of the Constitution provides:

> *'Under the multiparty political systems, a public officer or a person employed in any government department or agency of the government or an employee of a local government or any body in which the government has controlling interest, who wishes to stand in a general election as a member*

of Parliament shall resign his or her office at least ninety days before nomination day.'

The emphasis above is added.

Section 4(4)(a) of the Parliamentary Elections Act provides:

> *'(4) 'Under the multiparty political system, a public officer or a person employed in any government department or agency of the government or an employee of a local government or any body in which the government has controlling interest, who wishes to stand for election as a member of Parliament shall-*
>
> *(a) in the case of a general election, resign his or her office at least ninety days before nomination day….'*

The emphasis is added.

It is gainful to look at section 4(19) of the Parliamentary Elections Act. The enactment provides:

> *'(19) in this section, "public service" and "public officer" have the meanings assigned to them by Article 257 of the Constitution; and "public officer" shall for avoidance of doubt, include an employee of any Commission established by the Constitution.'*

Again the emphasis above is added and what is mutual on the reading of the above provision is that an employee of any Commission is a public officer.

Article 257(2)(b) of the Constitution ordains that in the Constitution a reference to an officer in the public service does not include a reference to the office of the President, the Vice President, the Speaker or Deputy Speaker, a Minister, the Attorney General, a member of Parliament or a member of any Commission, authority, council or committee established by the Constitution. The emphasis is added. It is in this context that **Article 51(1)** of the Constitution which establishes the Uganda Human Rights

Commission should be given due regard. Also relevant is **Article 51(2)** of the Constitution which stipulates that the Commission shall be composed of a Chairperson and not less than three other persons appointed by the President with the approval of Parliament. Needless to say, the provision relates to the appointment of Commissioners.

The Uganda Human Rights Commission Act, Cap 24 of the laws of Uganda yields some material revelation also. Section 2(1) thereof is not dissimilar to **Article 50** of the Constitution. Under the heading of appointment and composition of the Commission, it is stated thereunder that the Chairperson and other members of the Uganda Human Rights Commission should be appointed by the President with the approval of Parliament. Further on Section 2(2) of the Act provides that the members of the Commission, other than the chairperson, shall not be less than three. Indeed it is striking to note that Section 5(d) states that a Public Officer ought to relinquish his or her office on being appointed a member of the Commission. A Public Officer, therefore cannot be a member of the Commission. Section 10 of the Act relates to other staff of the Commission. It is worthwhile to lay out the provisions of Section 10 which are material to this Appeal, which read:

'(1) The Commission shall also have such other officers and employees as may be necessary for the discharge of its functions.

(2) The officers and employees referred to in subsection (1) shall be appointed by the Commission in consultation with the Public Service Commission and shall hold office upon such terms and conditions as may be determined by the Commission in consultation with the Public Service Commission.

(3) .....

(4) .....

We added the emphasis above.

From the above, it is clear Commissioners are appointed differently from officers and employees of the Uganda Human Rights Commission, who according to **Article 257(2)(b)** of the Constitution do not belong to an office in the Public Service. In the circumstances **Article 175** of the Constitution too, is not inclusive of the Commissioners; one of whom the Appellant was. Receipt of money by the Commission from the Consolidated Fund is of no consequence in the circumstances. The legal provisions involved here are straight forward when read as they stand.

Given that issue 4 and 5 complement each other and are argued together, we find that both issues succeed in that there was no requirement for the appellant as a member of the Uganda Human Rights Commission to resign.

Issue 6

It was argued on behalf of the appellant under this issue that the trial Judge failed to properly evaluate the evidence on record and came to a wrong conclusion when he nullified the appellant's election and held that the appellant had not been validly nominated for election as Woman Member of Parliament for Katakwi District. On the other hand, it was submitted on behalf of the respondent that the learned Judge properly evaluated the evidence before him and arrived at the correct decision when he nullified the election.

We have stated elsewhere in this Judgment that no impediment existed to the nomination and eventual election of the appellant. The learned trial Judge indeed erred in law when he found that a requirement existed for the appellant to resign ninety days prior to her nomination or at all. We find no evidence of such imperative. The appellant was properly elected and nullification of her election by the High Court must, in the circumstances, be set aside.