THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO.0109 OF 2016

(ARISING FROM HIGH COURT ELECTION PETITION NO.12 OF 2016)

LUMU RICHARD KIZITO::APPELLANT

VERSUS

1. MAKUMBI KAMYA HENRY
2. ELECTORAL COMMISSION } **::::::::::::::::::::::::::::::::::::::RESPONDENTS**

CORAM: HON.MR. JUSTICE S.B.K KAVUMA, DCJ

HON.MR.JUSTICE BARISHAKI CHEBORION, JA

HON.MR.JUSTICE ALFONSE OWINY DOLLO, JA

JUDGMENT

This Election Petition Appeal is against the Judgment of the Joseph Murangira, J in Election Petition No.12 of 2016 in the High Court at Kampala. The Judgment in the said Petition followed two preliminary objections raised by counsel for the 1st respondent and one preliminary objection raised by counsel for the petitioner wherein the learned trial Judge upheld the two preliminary objections raised by counsel for the 1st Respondent and dismissed the Petition on grounds that the Notice of Presentation of the Petition and the Petition itself had been served on the 1st respondent out of time.

Background

The appellant, Lumu Richard Kizito, and the 1st respondent were both candidates in the election of the Member of Parliament for Mityana South Constituency in Mityana District. The 1st respondent was gazetted as the winner of the said parliamentary election held on 18th February 2016 having obtained 10,661 whereas the appellant obtained 6,407 votes.

The appellant petitioned the High Court at Kampala seeking the nullification of the election on grounds, inter alia, that the 1st respondent was not validly nominated on account of not being a registered voter within Mityana South constituency and that he did not resign from his position as the Resident District Commissioner of Luwero District.

The appellant also complained that the electoral process had not been conducted in compliance with the provisions and principles of the electoral laws and that the 1st respondent had personally or through his agents with his knowledge, consent or approval committed numerous electoral offences specified in the Petition.

In his answer to the Petition, the 1st respondent maintained that he had been validly nominated and that he had resigned his position as Resident District Commissioner of Luwero District as required by law. He denied that he had committed any electoral offences and that the election had been conducted in compliance with the electoral laws.

Similarly, the 2nd respondent maintained that the election had been held in compliance with the electoral laws and that the 1st respondent had been validly nominated. In the alternative, the 2nd respondent pleaded that any acts of non-compliance with electoral laws did not affect the outcome of the election in a substantial manner.

The Petition was initially heard by Vincent Okwanga, J before he recused himself from further proceedings in it. The file was then re-allocated to Joseph Murangira, J who, after hearing the parties, determined that it was proper to hear the Petition de novo.

The hearing of the Petition commenced on 17th May 2016 before the Honourable Vincent Okwanga, J who adjourned the same to 25th May 2016 for conferencing. On the said date, counsel for the Petitioner, Mr.Caleb Alaka, raised an objection against the participation of Mr. Joseph Luzige as part of the legal team representing the 1st respondent on grounds that he was a potential witness. His Lordship delivered a Ruling upholding the objection on 30th May 2016.

Subsequently, the matter was scheduled for hearing on 10th June 2016 but on the said date, counsel for the petitioner raised a preliminary objection against the supplementary affidavits filed by the 1st respondent on grounds that the same were filed out of time. The trial judge upheld the objection, struck out 23 affidavits filed by the 1st respondent and adjourned the matter to the next day 11th June 2016.

On the said date of 11th June 2016, counsel for the 1st respondent applied to address the court on a preliminary objection but the trial Judge declined on grounds that the same could be addressed as one of the issues. As a result of this ruling, counsel for the 1st respondent requested for a brief meeting in chambers between the bar and the bench.

The learned trial judge declined to meet counsel in chambers and noted that it appeared that counsel for the 1st respondent, was not ready to proceed based on the emotions and spirit with which he requested for the meeting in chambers. Additionally, the trial judge recused himself from further hearing of the Petition. As a consequence, he adjourned the hearing sine die pending re-allocation to another judge.

The hearing of the Petition was subsequently re-allocated to Joseph Murangira, J who mentioned the matter on 1st July 2017. The Record of Proceedings does not adequately reflect what transpired on the said date but both parties agree that the learned Judge proposed to hear the matter de novo.

Counsel for the petitioner opposed the proposal to hear the matter de novo whereas the respondents were in agreement with the learned Judge. The learned Judge ruled that he would hear the matter de novo and ordered the parties to do a re-scheduling of the Petition afresh.

Scheduling was conducted afresh and the trial Judge then adjourned the matter to 11th July 2016 to deal with the points of law concerning affidavits and the issue of service of the Petition. On the 11th July 2016, the parties

addressed court on the said points of law but did not exhaust their submissions and it was further adjourned to 13th July 2016.

The Record of Appeal, at pages 1283 to 1291, indicates that on the said date of 13th July 2016 counsel for the appellant/petitioner, Mr. Caleb Alaka, conceded to the expunging of 31 Affidavits in Support of the Petition on grounds that they did not comply with the Oaths Act and the Illiterates' Protection Act. He also conceded to the expunging of the annextures to the petitioner's own affidavit on grounds that the same were not commissioned in accordance with Rule 8 of the Commissioner for Oaths Rules.

Counsel for the 1st respondent also conceded to the expunging of 10 Affidavits In Support of his answer to the Petition for similar reasons. However, counsel argued that the rest of his Affidavits did not contravene the Oaths Act and the Illiterates' Protection Act.

Counsel for the appellant also addressed the trial Judge on his decision to try the Petition de novo and requested for a right to rejoin Affidavits In Reply filed by the 1st respondent in respect of those which would not be struck out.

The trial judge delivered his Ruling on the preliminary objections on 15th July 2016 striking out the Petition on grounds of late service and expunging 31 of the Petitioner's Affidavits as well as 10 affidavits of the respondent. He held that the same violated the provisions of the Oaths Act and the Illiterates' Protection Act as conceded by both parties. He further held that as a consequence of expunging of the 31 affidavits, the Petitioner had no credible

evidence remaining on court record to effectively discharge the statutory burden of proof imposed upon a petitioner in Election Petitions under the Parliamentary Elections Act.

The trial judge took the view that with only four (4) remaining affidavits in support of the petition as opposed to the many affidavits and documentary evidence in support of the 1st and 2nd Respondents' answers to the petition, he could not discharge his burden of proof.

The Appellant was dissatisfied with the decision of the trial judge striking out the petition and hence this appeal.

Legal representation

At the hearing of the Appeal, Muyizi Mulindwa and Luyimbaazi Nalukoola were counsel for the appellant. Mr. Joseph Luzige, Ahmed Kalule and David Mayinja Tebusweke represented the 1st respondent whereas Mr. Hamidu Lugoloobi represented the 2nd respondent.

Although it was not directly raised before us, we shall also address whether it was proper for Counsel Joseph Luzige, who deponed an affidavit supporting the 1st respondent's Answer to the Petition, see page 784 of the Record of Appeal, to appear as counsel for the 1st respondent during the hearing of this Appeal.

Issues

The appellant's Memorandum Of Appeal contains 13 grounds of appeal. Counsel for the 1st respondent complained that grounds 9, 11 and 12 contained in the Memorandum of Appeal did not arise out of the lower court's determination. We shall address that complaint in determining the framed issues.

At the conferencing of this Appeal, counsel for the appellant abandoned grounds 5 and 6 contained in the Memorandum of Appeal. In their conferencing notes, counsel for the appellant further abandoned ground 11 of the Memorandum of Appeal. This partially resolves the complaint that some of the appellant's grounds of appeal had no basis in the trial court's decision.

The following were the agreed issues framed by the parties for court's determination;

1. *Whether the learned trial judge erred in law and in fact when he decided that the petition be heard de novo*

2. *Whether the learned trial judge erred in law and in fact when he relied on expunged affidavits and without affording the Appellant the right to rejoin.*

3. *Whether the learned trial judge erred in law and in fact when he held that the remaining affidavits of the Petitioner/Appellant were not sufficient to*

sustain the petition and as a result also failed to hear and determine the issue, whether the 1st Respondent was validly nominated.

4. *Whether the learned trial Judge erred in law and in fact when he relied on the 1st Respondent's answer and his affidavit evidence which were, allegedly, improperly before Court*

5. *Whether the learned trial judge erred in law and in fact when he held that the petition was served out of time whereas not.*

6. *Whether the Appellant is entitled to the reliefs sought.*

Before considering the arguments advanced for either side, we acknowledge our duty as the first appellate court to review the evidence on record and reconsider the materials before the trial judge so that we arrive at our own conclusion as to whether the finding of the trial court can be upheld. This is in accordance with ***Rule 30 (1) (a) of the Judicature (Court of Appeal) Rules*** and various decisions such as ***Kifamunte Henry vs Uganda, SCCA No.10 of 1997 and Pandya vs R (1957) EA 336.***

We also have in mind 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.

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 One

This concerns the trial judge's decision to hear the matter de novo after the recusal of Vincent Okwanga, J. It is worth noting though that the hearing of evidence from witnesses had not yet commenced before the trial Judge recused himself from further hearing of the matter. However, he had made three preliminary rulings in the matter. When the file was re-allocated to Joseph Murangira, J; he opted to try the matter de novo after hearing from both parties.

Counsel for the appellant argued that the decision by the trial Judge to try the matter de novo was without merit and unlawful. It was argued that the trial Judge misconstrued the provisions of Section 20(2) of the Judicature Act in holding that this particular Section empowered him to hear the Petition de novo following the recusal of the previous Judge. It was further argued that the decision to try a matter de novo can only be made by an appellate court referring the case back to a trial court.

Counsel argued that in view of the authorities he cited, especially the Indian decision of ***Ajay Kumar Ghoshal Vs State of Bihar & ANR (Criminal Appeal Nos.119-122 of 2017)*** and the Nigerian case of ***Yohanna Nyawen vs Jauro Mago & 2 others (2016) LPELR – 40825 (CA)***, only an appellate court can

order a trial de novo and in exceptional circumstances. Counsel argued that as a consequence of the order to proceed de novo, the 1st respondent was able to rely on 24 affidavits which had previously been expunged from the record for late service. He further pointed out that the order prohibiting one of the 1st respondent's advocates, Mr. Joseph Luzige, from participating in the hearing of the Petition on grounds that he was a potential witness was also disregarded in the hearing of this appeal.

Counsel for the 1st respondent supported the decision of the trial Judge to hear the matter de novo following the recusal of the previous Judge. He argued that the decision to proceed to hear the Petition de novo was an exercise of the trial Judge's discretion which should not be interfered with. He cited the decision of the East African Court of Appeal in ***Mbogo & another vs Shah, 1968 EA 93*** to support this argument.

Counsel also cited the authority of ***Wilson Kyakurugaha vs Uganda, Criminal Appeal No.51 of 2014*** where it was observed, obiter dicta, that criminal trials should generally be conducted by one judge and where this is not practicable or inconvenient, the new trial judge should initially determine whether or not the trial should proceed de novo or on the old record.

The 2nd respondent's counsel associated himself with the arguments advanced by counsel for the 1st respondent supporting the trial judge's decision to hear the matter afresh.

We have given due regard to the arguments for both sides. The decision to proceed de novo was clearly an exercise of the trial Judge's discretion. For us to set it aside, we must be satisfied that his discretion was not exercised judiciously. It is not sufficient that we might have indeed exercised the discretion differently.

We are also fortified in our approach by the cited decision of ***Wilson Kyakurugaha vs Uganda, Criminal Appeal No.51 of 2014*** wherein the Justices of this Court, observed as follows;

> **"As a matter of practice we would encourage that the traditional practice that had traditionally obtained at the High Court where one single judge conducts wholly the proceedings in each criminal case and disposes of the matter be maintained. Where for some reason that is not practicable or convenient the new trial judge should initially determine, after hearing from the parties, whether or not the trial should proceed de novo or on the old record."**

This dicta, though for criminal trials, contradicts the appellant's argument that only an appellate court can order a trial court to hear a matter de novo. It also supports the trial judge's interpretation of Section 20(2) of the Judicature Act. The authorities cited by counsel for the appellant to support the proposition that only appellate courts can order trial courts to proceed de novo were clearly taken out of their context. It is not correct that only appellate courts can order

a trial to proceed de novo. It also supports our earlier view that the decision to proceed de novo is an exercise of judicial discretion. The Record of Appeal indicates that the trial Judge heard both parties and then made a decision to proceed de novo. He ruled that the actual hearing of the Petition had not yet commenced and that the trial judge had recused himself from the matter because of certain criticisms of his previous rulings by Counsel for the 1st respondent. The Record does not indicate that Counsel for the 1st Respondent actually criticized the trial judge in the manner suggested in the trial judge's Ruling. However the manner under which the trial judge recused himself from the matter was confusing as no clear reason was given to the parties. This was the situation which the trial Judge found on the file when the matter was re-allocated to him.

We are of the view that the trial Judge was entitled to determine whether to proceed with the petition in its state or to proceed de novo. After hearing the parties, he took a decision to proceed de novo. The appellant has not demonstrated that in taking this decision, the Judge failed to take into account any relevant circumstances or that he took into account irrelevant circumstances.

The appellant's main grievance is that he lost a purely procedural advantage gained from the Ruling of the previous trial Judge expunging 24 affidavits of the 1st respondent for late service. This is not a circumstance that the trial Judge was required to take into account since this Ruling was clearly a result

of the timelines set by the previous Judge for the hearing of the Petition. The 1st respondent had flouted set timelines for completion of filings and this tended to prejudice the appellant who could not file any rejoinders prior to the hearing date set by the previous trial Judge.

Since the timelines set by the previous trial Judge had been rendered moot by his recusal from hearing the matter, the new trial Judge was not required to take into account this particular Ruling in deciding whether to proceed de novo. We think the situation would have been different if those affidavits had been expunged by the previous trial Judge for non-compliance with the Oaths Act and the Illiterates' Protection Act for instance.

We are not persuaded that the appellant suffered any miscarriage of justice save for losing a procedural advantage that he would have faced a "weakened" defence. Ultimately, the final decision in the matter by the trial judge to strike out the Petition for non-service was not even influenced by the said 24 affidavits. Besides, the burden to prove the Petition rested entirely on the appellant's shoulders and could not shift to the 1st respondent even if he put forward a weakened defence.

The trial Judge's exercise of discretion to proceed de novo was not an error in law. Consequently, we answer the first issue in the negative.

Issue Two

The appellant's contention was that the trial Judge relied on affidavit evidence which had been expunged by the Judge who subsequently recused himself

from the matter. The appellant contended that he was also denied opportunity to file rejoinders to the said affidavit evidence.

Counsel for the appellant faulted the Trial judge for relying on the expunged affidavits of the 1st respondent and for denying the appellant a right to file rejoinders to the said affidavits. In counsel's view, this amounted to denial of a fair trial.

It was argued that the re-admission of the said affidavits on court record prejudiced the appellant since they formed the basis of the Judgment by the trial judge.

For the 1st respondent, whose arguments were endorsed by counsel for the 2nd respondent, it was argued that once the trial Judge made a decision to hear the matter de novo, then the expunged affidavits were re-introduced on court record. Counsel provided numerous definitions of meaning of the phrase "de novo".

In view of our earlier finding that the trial Judge's exercise of discretion to hear the matter de novo cannot be faulted, this ground is without merit. Once the trial Judge ruled that he would hear the petition afresh, he was not bound by any of the Preliminary Rulings made by the previous trial Judge. This is the essence of ordering a trial de novo.

We are in agreement with counsel for the 1st respondent's argument that once the order to proceed de novo was made, all the materials on court record could

be reconsidered. The Preliminary Ruling expunging the said affidavits ceased to have any legal effect.

In regard to the appellant's contention that he was denied a right to rejoin the said affidavits, we are not persuaded that this is the case. The trial Judge, in his Judgment, struck out the Petition for late service on the 1st respondent and consequently, he did not need to address the right to rejoin. Besides, considering that all but four of the appellant's affidavits supporting the Petition had been expunged for flouting the Oaths Act and the Illiterates' Protection Act, we are unable to appreciate the purpose which the rejoinders would have served since a significant portion of the "surviving" Affidavits In Reply were intended to be responses to affidavits that had been expunged from the record for non-compliance with the law.

The findings by the trial Judge that the Petition was incompetent disposed of the matter and we do not think it was necessary to address the appellant's prayer to file rejoinders in the circumstances.

We therefore answer this issue too in the negative.

Issue Three

The appellant protested the trial judge's finding that as a consequence of the expunging of 32 affidavits supporting his case, his Petition was left without any credibility as the remaining four affidavits were no match for the 23 Affidavits In Reply filed by the 1st respondent.

Counsel for the appellant argued that as a result of this misdirection, the trial Judge failed to hear and determine the question of whether the 1st respondent was validly nominated. The appellant's case challenging the validity of the 1st respondent's nomination covered his non-registration as a voter in Mityana South Constituency and the alleged failure to resign as the Resident District Commissioner, Luwero District prior to nomination as a candidate.

Counsel for the Appellant strongly criticized the trial Judge's ruling that the four affidavits remaining on court record in support of the petition, following the order expunging the rest of the Appellant/Petitioner's affidavits, were insufficient to sustain the petition.

Counsel argued that in law, there is no specific number of affidavits required to support a petition and that the trial Judge determined, at a preliminary level, the whole petition without affording the appellant an opportunity to present his case.

In support of his argument, Counsel cited this court's decision in ***Kasirye Zzimula Fred vs Bazigatirawo Francis Amooti & Anor EPA No.3 of 2016*** wherein the trial Judge was faulted for summarily determining a question of fact by way of preliminary objection when the matters were not confined to points of law only. As a consequence, this Court ordered a retrial of that election petition.

Counsel contends that the remaining evidence on record, contained in the affidavits of **Kakande Rogers, Mutyaba John, Ssebaana Muyini and Kaweesa**

Paul had a ground on validity of the 1st respondent's nomination which was a matter of mixed law and fact.

It was argued that the evidence in the aforementioned affidavits supported the appellant's case challenging the nomination of the 1st respondent on grounds that he was not a registered voter in Mityana South Constituency and that he did not resign the public office of Resident District Commissioner, Luwero District, 90 days prior to his nomination as a candidate.

Counsel for the 1st respondent, in reply, argued that the question of whether the 1st respondent was validly nominated could not be tried on its merits since the petition was struck out for late service of the notice of its presentation.

He further argued that once the appellant's 31 affidavits and all the annextures to his own affidavit were struck out, with the consent of his counsel, the trial Judge rightly found that the appellant had disabled his own Petition.

He contended that the trial Judge weighed the remaining evidence, in his own style, before coming to the conclusion that it was not credible to support the Petition.

Counsel for the 2nd respondent associated himself with the arguments advanced by counsel for the 1st respondent.

The trial Judge struck out the Petition for late service of the Notice of its Presentation to the 1st respondent but also dismissed the same on grounds that following the order expunging 31 affidavits supporting the Petition and all

the annextures to the appellant's Affidavit In Support of the Petition, it was left "naked" in the eyes of the law.

The question of whether the Petition was rightfully struck out for late service shall be addressed separately but in this instance, we must determine whether the trial Judge's conclusion that the Petition had no credible evidence to support it can be supported.

We take note of the fact that counsel for the appellant implicitly conceded that the four remaining affidavits could only support the case in respect of the question of whether the 1st respondent was validly nominated. He only halfheartedly noted that the remaining 4 affidavits also complained of electoral offences.

The trial judge, in his judgment, held as follows;

> ***"...my own analysis and conclusions I have made therein above in this judgment, show that the Notice of Presentation of the Petition and the petition were served on to the first Respondent out of time. In that regard the petition cannot stand. Again the petitioner and his counsel having conceded that the 31 (thirty one) affidavits in support of the petition and all annextures that were in support of the petition be expunged from the Court record, certainly the petition remained or was left naked in the eyes of the law. The petitioner in that regard disabled his petition. All the affidavits and documents of the 2nd Respondent were never***

challenged by counsel for the petitioner. And about the 30 (thirty) affidavits and annextures in support of the 1st Respondent's answer to the petition for the fact that the evidence of the petitioner was so disabled, the petitioner had no credible evidence remaining on court record, in my view, to discredit the evidence of the respondents as against the petition." (Sic)

It is this passage of the trial Judge's Ruling that is the subject of criticism from counsel for the appellant who contends that there were issues of mixed law and fact concerning the validity of the 1st respondent's nomination in the surviving affidavits.

We have evaluated the affidavit evidence of the appellant to wit, the affidavits of Kakande Rogers, Mutyaba John, Kaweesa Paul and Muyini Ssebaana which remained on court record after 32 of the appellant's affidavits were expunged, by consent, for non-compliance with the Oaths Act and the Illiterates' Protection Act.

The appellant's affidavit was left without any documentary proof of his assertions after all its annextures were expunged. The expunged annextures were the appellant's National Identity Card, the Nomination papers of the 1st respondent, a circular in New Vision, Complaint to the Electoral Commission, Correspondences to the Electoral Commission, Medical forms and various Declaration of Results Forms.

The appellant's affidavit was left with averments that did not have any documentary proof to support them. This included the claims that the 1st respondent was not a registered voter in Mityana South Constituency and that he did not resign his office of RDC 90 days prior to nomination as a candidate.

In his affidavit, Kakande Rogers testified to alleged irregularities he observed at one polling station and his suspicion that the Presiding Officer was directly involved in the same. Mutyaba John testified in his affidavit about alleged voter bribery carried out by unidentified individuals who were moving in a vehicle. He stated that they bribed unnamed voters at Kidduzi Central Polling Station on voting day.

Kaweesa Paul testified that he was an agent of the appellant at Kitanswa polling station located at Makajo barracks. He stated in his affidavit that the voting process at the said polling station was marred by numerous irregularities committed by soldiers including multiple voting, impersonation and intimidation.

Muyini Ssebaana also testified in his affidavit that he was a sub-county coordinator for the appellant's campaign and he observed pre-ticking of ballot papers at Lunyolya polling station acquiesced in by the Officer in Charge at Namungo Police Post. He also stated that he was told of similar irregularities at two other polling stations at Namungo and Nakabazi. Lastly, he testified about being threatened with a pistol by Joseph Luzige who also intimidated everyone else present at that incident.

This was the total sum of the surviving evidence in support of the Petition after the expunging of the other affidavits. The trial Judge determined this matter at a preliminary level. The Record of Proceedings clearly demonstrates that he heard arguments restricted to the issue of the competency of affidavits filed by both parties and the question of late service of the notice of presentation of the Petition.

It is not true that the trial Judge evaluated the remaining evidence after the expunging of the affidavits before he concluded that the Petition was, in his words, naked.

Further, it is also not true, as counsel for the appellant argued, that the surviving affidavits established a ground on validity of the 1st respondent's nomination. As we have demonstrated above, they were in respect of non-compliance which counsel for the appellant seemed to abandon and did not explain whether they raised a prima facie case in that regard.

The appellant's surviving 4 (four) affidavits provided evidence in respect of non-compliance with electoral laws at not more than five polling stations. Two of the affidavits, from Kaweesa Paul and Muyini Ssebaana, were from self-confessed supporters and agents of the appellant. These were partisan witnesses.

The 1st respondent's surviving affidavits strongly denied the allegations of non-compliance made in the four affidavits cited above. In his Affidavit in Reply, he

provided documentary proof of the fact that he resigned from the office of RDC on 24th May 2015 and the same was accepted on 22nd June 2015.

The question that now needs to be resolved is whether the four remaining affidavits earlier cited in support of the appellant's case could competently support a Petition in respect of failure to resign from a public office by the 1st respondent and the alleged non-compliance with electoral laws substantially affecting the outcome.

Although we do not wholly endorse the approach adopted by the trial Judge in concluding that the said evidence was insufficient to support the Petition yet he was determining preliminary objections and had not evaluated the same, we have ourselves evaluated the evidence on record and have reached the same conclusion as he did.

The four remaining affidavits, after expunging 32 of the appellant's affidavits and all the annextures to his affidavit, did not provide credible evidence to support the Petition.

If we had been satisfied that they at least established a prima facie case, we would have had no option but to order a retrial based on the materials on court record. With due respect to counsel for the appellant, we are fully convinced that such an order would be unjustified in the circumstances of the case before us.

The evidence of partisan witnesses such as Kaweesa Paul and Muyini Ssebaana must be corroborated in law for it to be safe to rely upon. There is no

such corroboration on record. The irregularities complained about by Kakande Rogers and Mutyaba John were restricted to not more than 3 polling stations and these were single testifying witnesses. Clearly, they could not sustain the legal standard of proof.

Lastly, we must now address the question of the invalidity of the 1st respondent's nomination on grounds that he was not a registered voter in Mityana South Constituency. It is correct that this is a point of mixed law and fact.

With due respect to counsel for the appellant, this point of law is greatly misconceived. The law does not require a candidate for the office of Member of Parliament to be a registered voter in the particular constituency where he or she stands.

The requirements for eligibility of a candidate to contest for election as Member of Parliament are provided in **Article 80** of the Constitution and Section 4 of the Parliamentary Elections Act. It is sufficient that an individual is a registered voter.

It is not required to be a registered voter in the constituency where one contests. If this had been intended by the framers of the law, they would have expressly provided so. It is not for court to re-write the provisions of the law and purport to introduce new requirements for eligibility to contest through a nuanced interpretation of the existing law.

The requirement that a Nomination Paper must be signed by 10 registered voters from the particular constituency where a candidate is nominated cannot be stretched to include the candidate. That would be contrary to the express provisions of **Article 80** of the Constitution which does not leave room for Parliament to provide by law further qualifications for eligibility as a Member of Parliament.

Consequently, the second question of mixed law and fact was simply misconceived. The Petition did not complain that the 1st respondent was not a registered voter at all but rather that he was not a registered voter in Mityana South Constituency.

This aspect of the Petition was misconceived hence it has no merit as it was founded on an erroneous understanding of the legal requirements for eligibility for nomination.

In ***Nsubuga Silvest Ssekutu vs Kalibbala Charles & Another, EPA No.70 of 2016,*** this Court upheld the decision of the trial Judge to the effect that once the impugned affidavits were expunged from Court Record, the Petition could no longer be sustained for lack of supporting evidence.

We find that this is the same scenario in this matter and hereby uphold the decision of the trial Judge; except that he should have struck out the Petition and not dismissed it as he had not heard the evidence in the matter.

This issue is, therefore, answered in the negative and the ground of appeal disallowed. This disposes of the whole Appeal; but for the sake of clarity in the

law and addressing all the framed issues from conferencing, we shall consider the remaining issues as well.

Issue Four

The appellant contends that the trial Judge based his determination of the Petition on documents which were improperly on court record in view of the earlier findings by Vincent Okwanga, J that they were photocopies and improperly attested.

The respondents contested this complaint and argued that the essence of trial de novo was that all the Rulings of the previous trial Judge ceased to have legal effect in the matter.

We already approved of the position that once the trial commenced de novo, the previous Rulings were of no legal consequence. We gave our reasons for finding so. Besides, counsel for the appellant was at liberty to raise the similar preliminary objection before the new trial Judge in respect of these affidavits and he did not do so. He raised the objection in respect of the 1st respondent's affidavits which were non-compliant with the Oaths Act and Illiterates' Protection Act and the objection was upheld.

However, the two affidavits of Miiro Gyaviira and Mabirizi Haruna mentioned in the said Ruling did not influence the decision of the trial Judge in our view. His findings were a result of the decision to expunge the non-compliant affidavits and the question of late service which we now address. The complaint is without merit.

This issue is therefore answered in the negative and the corresponding ground of appeal is hereby disallowed.

Issue Five

This concerned the service of the Petition and the Notice of Presentation of the same. The trial Judge struck out the Petition on grounds that the 1st respondent was served the Petition outside the statutory seven days.

The appellant argued that the 1st respondent was actually served on the 8th day of April 2016 in accordance with the affidavit of service on record although he acknowledged service on 13th April 2016. It is argued that if there was any ambiguity in the said affidavit, the process server should have been summoned for cross examination.

Further, counsel for the appellant cited this court's decision in ***Muhindo Rehema vs Winfred Kizza & Electoral Commission, EPA No.29 of 2011*** where it was held that the service of process required in election Petitions is directory rather than mandatory, and that failure to do so, especially where no injustice or prejudice was caused, will be a mere irregularity that did not vitiate the proceedings.

Counsel for the respondents argued that the failure of the appellant to apply for leave to serve the Petition out of time was fatal and the trial Judge was therefore justified in his decision to strike it out.

With the greatest respect to the trial Judge, we do not agree that late service of the Petition was a legal and legitimate ground for striking out the same.

Firstly, the evidence on record in the form of the affidavit of service contradicted the 1st respondent's claims that he was served on 13th April 2016 and not 8th April 2016 as per the said affidavit.

We think it is plausible that the 1st respondent could have been served on 8th April 2016 but acknowledged service a few days later. On the other hand, it is also plausible that the process server, Busuulwa Joseph, could have told a lie in his affidavit of service filed on 15th April 2016 that he served process on the 1st respondent on 8th April 2016.

In view of the accusations and counter accusations, this was not a question which the trial Judge could have determined in a preliminary objection. There was no basis for believing the 1st respondent's version of events over the said process server who was not cross examined.

Secondly, under the doctrine of stare decisis, the cited decision of this Court in ***Muhindo Rehema vs Winfred Kizza & Electoral Commission, EPA No.29 of 2011*** is binding on the High Court. The trial Judge had no justification for disregarding the changed position of the law as spelt out by appellate courts on the question of late service of a Petition.

The 1st respondent did not suffer any prejudice and filed his answer to the Petition in a timely manner. The trial Judge should, therefore, have exercised

his discretion to validate the late service, if any, even if no such application was placed before him.

In the circumstances, we answer this issue in the affirmative and allow the corresponding ground of appeal.

Issue Six

The appellant prayed that his Appeal be allowed with an order for fresh elections or an order that he was singularly nominated. The Appeal has been substantially unsuccessful. We uphold the decision of the trial Judge but substitute his order dismissing the Petition with an order striking it out.

On the issue of costs, we note firstly that Counsel for the Appellant conceded to the order expunging the affidavits in support of the Petition in the lower court. We considered those affidavits and agree that he took the right decision in the circumstances.

Secondly, we are concerned that counsel for the 1st respondent, Mr. Joseph Luzige, participated in this Appeal despite the fact that he deponed an affidavit in support of the Answer to the Petition.

Regulation 9 of the Advocates (Professional Conduct) Regulations S. I 267—2. Provides that:

> *'No advocate may appear before any court or tribunal in any matter in which he or she has reason to believe that he or she will be required as a witness to give evidence, whether verbally or by affidavit; and if, while*

appearing in any matter, it becomes apparent that he or she will be required as a witness to give evidence whether verbally or by affidavit, he or she shall not continue to appear; except that this regulation shall not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on a formal or non-contentious matter or fact in any matter in which he or she acts or appears.' Emphasis added.

Counsel's actions were not proper as he flouted the provisions of the Advocates (Professional Conduct) Regulations which bar Counsel from appearing in a matter in which he/she is a potential witness. In this instance, counsel was not merely a potential witness but had filed affidavit evidence in support of the respondent in the lower court.

Thirdly, we also noted that the respondents' case in this court was substantially conducted by counsel for the 1st respondent. We therefore do not think it would be fair to award costs to the 2nd respondent for this Appeal. In addition, due to the 1st respondents' counsel's conduct as discussed above, we do not think he deserves award of costs in this Appeal.

Consequently, taking the three considerations into account, we now make the following orders;

1. The Appeal substantially fails and is hereby dismissed.
2. The Order of the High Court dismissing the Petition is hereby set aside and substituted with an order striking it out.

3. The appellant shall pay costs to the respondent save for instruction and attendance fees in this Court and the court below.

4. The Appellant shall pay one-third of the 2nd Respondent's costs in the High Court but none are awarded to it for this Court.

Dated at Kampala this ..27th.... day of ..Sept..... 2017

.....

HON. MR. JUSTICE S.B.K KAVUMA

DEPUTY CHIEF JUSTICE

.....

HON. MR. JUSTICE BARISHAKI CHEBORION

JUSTICE OF APPEAL

.....

HON. MR. JUSTICE ALFONSE OWINY DOLLO

JUSTICE OF APPEAL

27/9/2017
Joseph Luzige for Ahmed Kalule & Kavuma for 1st Respondent.
Ituza Samuel for Appellant
Eric Kabiito for 2nd Respondent