THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
ELECTION PETITION APPEAL No. 91 OF 2016

MANDERA AMOS::APPELLANT

VS

BWOWE IVAN::RESPONDENT

CORAM:

HON. JUSTICE S. B. K. KAVUMA, DCJ
HON. LADY JUSTICE HELLEN OBURA, JA
HON. JUSTICE CHEBORION BARISHAKI, JA

JUDGMENT

Introduction

This is an Appeal from the Judgment and orders of the High Court of Uganda at Masaka (*Lawrence Gidudu, J*) delivered on the 13th of September 2016.

Background

The background to the Appeal is that the appellant, the respondent and 5 others contested for the seat of Member of Parliament, (MP) for Buyamba Constituency, Rakai District. The appellant emerged winner of the election conducted by the Electoral Commission (E.C.) on 18th February 2016. The respondent successfully petitioned the High Court of Uganda at Masaka, which set the appellant's election aside and ordered fresh elections. The appellant filed an Appeal in

this Court and an Application for leave to adduce additional evidence. His said Application was allowed.

Grounds of Appeal

The grounds of Appeal were laid out in the Memorandum of Appeal as follows:

1. **The learned trial Judge erred in law when he failed in his duty to properly evaluate the evidence on record thereby coming to a wrong conclusion that the 'O' Level Certificate in the names of Nandera Amos did not belong to the appellant.**
2. **The learned trial Judge erred in law and fact in holding that the appellant was at the time of his nomination not academically qualified to stand as a Member of Parliament.**
3. **The learned trial Judge erred in law and fact in holding that the burden of proof was on the appellant to prove that no other person by the names of Nandera Amos the alleged holder of the 'O' Level Certificate existed.**
4. **The learned trial Judge erred in law and fact when he indulged in assumption, conjecture and speculation that Nandera Amos ever existed and could have been paid off to go under cover or could be dead.**

5. **The learned trial Judge erred in law in holding that the petition was not incompetent for lack of service of the same on the appellant as required by law.** (Sic)

Representation

At the hearing of the Appeal, the appellant was represented by Mr. Tebyasa Ambrose and Mr. Ochieng Evans, (counsel for appellant), while the respondent was represented by Mr. Katumba, (counsel for the respondent).

The case for the appellant

Counsel for the appellant elected to argue grounds 1-4 together and ground 5 separately. He adopted the appellant's submissions in the lower court and the conferencing notes at this Court. Concerning the duty of this Court, he referred to Rule 30 of the Judicature (Court of Appeal Rules) Directions S.I. 13-10. Relying on **Mugema Peter v Mudhiobole Abed Nasser; EPA No. 30/ 2011,** he submitted that the burden and standard of proof in election matters is well settled under Section 61 (1) and (3) of the Parliamentary Elections Act, 2005 (PEA), to the effect that the appellant is required to prove the allegations in the Petition to the satisfaction of court and on a balance of probabilities by adducing credible cogent and sufficient evidence. He also cited and relied on **Oboth Marksons Jacob v Dr. Otiam Otala Emmanuel; EPA No. 38 of 2011**.

Grounds 1, 2, 3 and 4

Counsel noted that the learned trial Judge rightly found that the O' Level Certificate in the names of Nandera Amos was genuine. It was counsel's submission that since the contention was about the true holder of that certificate, the respondent by alleging that that holder was a one Nandera Amos and not Mandera Amos who had explained that his name had been mis-spelt on that certificate, had the duty to adduce credible and cogent evidence pointing to the existence of that other person called Nandera Amos. Besides, during cross- examination, the respondent himself acknowledged that he did not know this other person and he had no evidence whatsoever to suggest that that person ever existed.

Counsel referred to the Answer to the Petition and pointed out that the appellant clearly stated that he went to Mbirizi Muslim Primary School where he registered and sat for his exams as Mandera Amos, and then attended 'O' Level at Nakyenyi SSS where he registered as Mandera Amos only that his result slip came out with an error in his Mandera name being written as 'Nandera'. The appellant further explained that there was no other student in that school by the names of Mandera or Nandera Amos.

Counsel further submitted that the appellant had not gone back to Uganda National Examination Board, (UNEB), to have that mistake corrected because he believed that relying on a statutory declaration explaining the mistake would suffice.

Counsel also referred to the affidavits of one Sengali Vincent and Kiiza Richard at pages 204-210 of the Record of Appeal. In his affidavit, Sengali Vicent explained that he was a teacher of the appellant at Nakyenyi SSS from S.3 and that the appellant registered for 'O' Level examinations as Mandera Amos and that he was able to see that because he was one of the teachers assisting students, including the appellant, in filling their forms. He noted that Sengali was cross examined in the lower court and his testimony about his teaching the appellant remained unshaken and un-contradicted.

In his affidavit, Kiiza Richard averred that he studied with the appellant right from Mbirizi Muslim Primary School up to S.4 at Nakyenyi SSS. He also explained that the appellant registered for 'O' Level exams in the names of Mandera Amos and he was able to know that because they were sharing their registration information. Kiiza Richard attached a copy of his 'O' Level Certificate to his affidavit which bears the index number of U0498/011. Counsel noted that that Certificate corresponded with that one of the appellant in respect of the school index number of U0498.

Counsel thus contended that the appellant having proved that he was the holder of the Certificate in question, the learned trial Judge by requiring him to prove that no other person went by the names of Nandera Amos and actually existed alongside the appellant, erroneously shifted the burden of proof to him. He submitted that under Sections 100-103 of the Evidence Act, Cap 6 of the Laws of

Uganda, the onus to prove an allegation is on the person who asserts it. To him, the respondent having asserted that there was another person called Nandera Amos, the onus was on him to prove the existence of that other person.

In disputing the appellant's explanation that his name on the Certificate had been mis-spelt as Nandera instead of Mandera, the respondent relied on **Aggrey Awori Siryoyi v Kevina Taaka Wanaha Wandera & EC; HCT-04 CV EP 0019 of 2011**. Counsel contended that a critical analysis of that case confirmed that UNEB makes mistakes but it can always correct them.

The trial Judge on his part relied on **Abdul Nakendo vs. Patrick Mwondha; EPA No. 9/ 07** to hold that the onus to prove that the appellant was not Nandera Amos was on him. Counsel submitted that the trial Judge misapplied the decision in **Nakendo's** case (supra) arguing that in Election Petitions, the burden of proof does not shift as it remains with the petitioner to prove his case on a balance of probabilities. He noted that the decision of **Nakendo** (supra) was looking at the time of nomination by the Electoral Commission (EC) because this is the candidate who goes to the EC and he has to prove that he holds genuine papers, but that at the Election Petition time, the burden of proof does not shift from the petitioner.

He thus submitted that the evidence which had been adduced by the respondent in the lower court had not established a prima facie case to warrant the evidential burden to shift to the appellant

because he had failed to establish the identity of another person owning the name in issue.

Counsel emphasized that the appellant, by using a statutory declaration, was not seeking to change his name but rather to clarify that the 'O' Level Certificate bearing the name Nandera instead of Mandera belonged to no other person than himself. He further submitted explaining that as shown by the additional evidence before Court, the appellant subsequently went and had the mistake on his papers corrected.

Counsel conceded that the learned Judge did not have the additional evidence that this Court now has tabled before him when he decided as he did. He thus submitted that with the evidence consistently pointing to one person Mandera Amos, that was sufficient explanation to enable Court to make a finding that the appellant held the qualifications reflected in the 'O' Level Certificate in issue and as such, he was qualified to be nominated a candidate for Member of Parliament. He prayed Court to find so.

Ground 5

On the non-service of the Petition in time as required by law, counsel for the appellant referred to the Petition which was filed in Court on 1st April 2016, the Notice of Presentation of the Petition which was issued by Court on 5th of April 2016 and the Petition which was served on the appellant on 14th April 2016, 14 days from the time the Petition was filed and 9 days after the Notice of

Presentation of the Petition had been issued by Court. Counsel noted that the trial Judge agreed with those timelines and yet concluded that the Petition was not invalidated by reason of service out of time.

He referred to Section 62 of the Parliamentary Elections Act (PEA) and Rule 6 (1) of the Election Petition Rules which enjoin the petitioner to serve the Petition on the respondent within 7 days. He cited Rule 6 (4) which directs that if the respondent cannot be found within the first 3 days, the petitioner should go back to Court and seek to serve the Petition by substituted service. He noted that the learned trial Judge, in reaching his decision, relied on the Supreme Court decision in **Mukasa Anthony Harris v Dr. Bayiga Michael Philip Lulume; Election Petition Appeal No.18 of 2007**. Counsel contended that this decision did not give a blanket license for petitioners to default on the rules and the procedure under Section 62 and Rule 6 (1) and (4) of the Parliamentary Elections (Interim Provisions) (Elections Petitions) Rules S.I 141-2.

He submitted that the case of **Dr. Lulume Bayiga** (supra), did not actually investigate and analyze the relevant provisions as to service. He agreed that the PEA and the Rules thereunder do not specify a sanction for non- service in time and yet Rule 17 of the Rules (supra) invokes the application of the Civil Procedure Act, (CPA), Cap 71 Laws of Uganda, and the Civil Procedure Rules, (CPR) S.I. 71-1, with such necessary modifications where the PEA and the Parliamentary Elections (Interim Provisions) (Elections Petitions)

Rules thereunder are silent. He contended that despite the absence of a specific provision or sanction for failure to serve the Petition on the respondent within 7 days, the application of the CPA and the CPR to the instant Appeal should justify court to find that failure to serve the opposite party within 21 days of the date of issue of the summons under Order 5 Rules 1 and 2 of the CPR would lead to a dismissal of the suit without notice.

Counsel contended that it would create a very dangerous precedent for courts to give a blanket license to intending petitioners to present their Petitions in court and then serve them to the opposite parties at will.

Counsel submitted that the rationale behind applying for extension of time is for Court to issue a fresh notice since proceedings are not served on expired notices. To him, the moment the 7 days expired, the Notice, which was supposed to be served, also expired and the Petition could only be revived by a freshly issued Notice to be served on the respondent.

He prayed that the Appeal be allowed, the Judgment and the findings of the trial court be set aside and costs be awarded to the appellant.

The case for the respondent

Counsel for the respondent agreed with counsel for the appellant on the duty of an appellate court. He chose to argue grounds 1 and 2 together first, 3 and 4 next, and 5 separately. He relied on the

respondent's submissions in the lower court, and on the conferencing notes together with the respondent's skeletal arguments.

Counsel submitted in addition to the above, that there was no dispute that the Certificate the appellant presented for nomination bore the name Nandera Amos and as such, the learned trial Judge rightly found that the 'O' Level Certificate that the appellant presented was in the names Nandera Amos, yet his name is Mandera Amos. To counsel, this was done before the evidence showing the corrections effected by UNEB and as such, the learned Judge could not be faulted for deciding the way he did.

On the corrected document, counsel disputed this saying that UNEB should have used their records to correct the Certificate and not the information received from the school. It was his contention that UNEB did not have sufficient material upon which it issued the new certificate. Counsel referred to the letter by Mr. Odongo where he guided the appellant on the process of rectification noting that UNEB needs a lot of information to be able to amend specific anomalies. Counsel contended that that was supposed to be done within 4 weeks of the release of the results yet in the instant case, the Application was made after 28 years.

He further argued that this new Certificate could only be of use in subsequent elections, and should not be used to pre-empt and overturn the decision of the trial Judge. He stated that this was

because it was procured after the trial Judge had made his decision.

On the effect of the additional evidence, counsel contended that that should be evidence that existed at the time court made its decision, but by either inadvertence, omission or otherwise, it was not recorded. To him, this evidence was not available at the time the Judge passed his decision and it was moreover procured at the advice of the learned trial Judge and as such, it could not be based on to affect the decision of this Court or the lower one.

Counsel cited **Honorable Otada Sam Owor VS Taban Iddi Amin and EC; EPP No. 93 of 2016** regarding the procedure for changing a name and argued that this matter concerned the change of name from Nandera to Mandera and as such, it had to take the due process. He also referred to **Aggrey Awori Siryoi v Kevinah Taka Wanaha Wandera** (supra) and **Serunjogi James Mukiibi v Lule Mawiya; Election Petition Appeal No. 15 of 2007.**

Grounds 3 and 4

Counsel submitted that it would have been dangerous for the learned trial Judge to assume that the Certificate in issue belonged to the appellant yet it bore a different name. He referred to the case of **Nakendo** (supra), and contended that the burden to prove that the documents belonged to the appellant was on the appellant since the respondent had made an allegation that the documents belonged to another person called Nandera Amos.

Ground 5

Counsel submitted that upon failure to serve the appellant in time, the respondent filed MA No. 44 of 2016 to seek extension of time within which to serve. He noted that before the Application could be heard, the appellant filed his Answer to the Petition and the matter was fixed for hearing.

Regarding the case of **Mukasa Anthony Harris** (supra) that was relied on by counsel for the appellant, counsel for the respondent contended that in that case, the Supreme Court took into account all the previous decisions before holding that service within 7 days is not mandatory.

He argued that the Rules in regard to service of Notices do not provide sanctions and so, one could not go to the CPRs to look for a Rule that can be applied to the instant case. He stated that by the time the Supreme Court made its decision, it interpreted the Parliamentary Election Petition Rules to find that the rule regarding service of the Notice of Presentation of a Petition is not mandatory but directory.

He contended that the late service of the Notice of Presentation of the Petition did not prejudice the appellant because he filed his Answer to the Petition, and the matter was heard and determined. It was his argument that the failure to serve in time was a technicality curable under **Article 126 (2) (e)** of the Constitution that should not be used against the respondent now.

To him, the learned Judge was justified in holding that the rule regarding service of the Notice of Presentation of a Petition within 7 days was not mandatory. He thus prayed that this Court be pleased to find that the trial Judge properly evaluated the evidence before him and reached the right decision and that the judgment of the trial Judge should be left to stand. He also prayed that the Appeal be dismissed with costs.

Rejoinder

In rejoinder and regarding the contention that the evidence adduced was new, counsel for the appellant submitted that under Rule 30 of the Judicature (Court of Appeal Rules) Directions S.I. 13-10, it is allowed to adduce it. He prayed that this Court evaluates the additional evidence, the adducing of which Court had already allowed the applicant to do, and take a decision.

He further submitted that the authority of **Taban Idi** (supra) cited by counsel for the respondent was distinguishable since it dealt with a change of name while the instant case is dealing with the correction of an error in the appellant's Certificate in issue.

Court's consideration of the Appeal

This being the first and the last appellate Court in the instant Appeal, it has the duty to re-hear the case, re-evaluate the evidence before it, reconsider the materials that were placed before the trial Judge and make up its mind after carefully weighing and considering the same. While exercising that duty, the Court is guided by the established principles that govern the burden and standard of proof in election matters. See **Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions S.I. 13-10** and **Mugema Peter v Mudhiobole Abed Nasser; EPA No. 30 of 2011**.

The main dispute in the instant Appeal revolves around the ownership of the 'O' Level Certificate presented by the appellant in support of his candidature as MP for Buyamba Constituency. The Certificate bears the names of Nandera Amos while the appellant's name is Mandera Amos. In finding that there could have been another person called Nandera Amos who sat and obtained the 'O' Level Certificate in question, the learned trial Judge blamed the appellant for failing to prove that no such person existed.

When considering this matter, we are mindful of the principle that the standard of proof in election litigation is on a balance of probabilities and not beyond reasonable doubt as is the case for criminal matters. In the instant case, the appellant relied on a statutory declaration to clarify the discrepancy between the two names. We are fully aware and are ready to take judicial notice of the fact that a statutory declaration is one mode through which

discrepancies in names in a document may be clarified. Section 2 of the Statutory Declarations Act Cap. 22, Laws of Uganda, provides:-

> **"After the commencement of this Act, no affidavit shall be sworn for any purpose, except—**
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> **(a) where it relates to any proceedings, application or other matter commenced in any court or referable to a court; or**
>
> **(b) where under any written law an affidavit is authorised to be sworn."**
>
> **Section 3 of the Act states that:**
>
> **"(1) In every case to which section 2 does not apply, a person wishing to depone to any fact for any purpose may do so by means of a statutory declaration.**
>
> **(2) Where any person has sworn to an affidavit for any purpose other than a purpose referred to in section 2, that affidavit shall, nevertheless, be taken for all purposes to be a statutory declaration."** (Emphasis added)

We are satisfied that in the instant Appeal, the use of a statutory declaration was sufficient to prove and explain the misspelling of the appellant's name. With that statutory declaration, and having found that the Certificate in issue was authentic, the learned trial Judge should have found that that Certificate belonged to no other

person than the appellant. Notably, no evidence had been adduced to prove the existence of another person named Nandera Amos.

The argument by counsel for the respondent that UNEB should have used its own records to correct the appellant's Certificate and not information from the School is not tenable. UNEB clearly stated that it uses the information given to them by the schools to prepare academic documents. With an affidavit from the school and the appellant's teacher proving that the appellant used the name Mandera, it is our considered view that UNEB rightly based on that information to correct the mis-spelt name on the Certificate in issue.

Counsel for the respondent sought to challenge the manner in which the Head Teacher requested for the correction of the appellant's documents. Court also notes that the letter counsel based himself on to make this argument dated the 9th November 2016, was merely guiding as to how queries are submitted to UNEB and the fact that UNEB was expressing regret that the school did not submit that information at the time when the Certificate and Result Slip were issued.

Going back to the question of proof, we find that the appellant has satisfied Court that the Certificate he presented at his nomination belonged to him and the only challenge was the mis-spelt name, which discrepancy has been resolved by the relevant body. We see no reason to dispute the same.

Counsel for the respondent submitted that the new Certificate was best suited for futuristic use and that accepting the same would upset the decision that was reached by the trial Judge without that evidence. We hold the firm view that the essence of the appeal concept in our justice system and the principle that allows the adducing of additional evidence before the appellate court are intended to correct errors or deficiencies at the lower court in the interest of justice to the parties before court. As stated hereinabove, the appellant in the instant Appeal was allowed by Court to adduce the additional evidence he is relying on. More importantly, considering the full circumstances of the Appeal, we find it appropriate to invoke **Article 126 (2) (e)** of the Constitution which requires a Court of law to administer substantive justice without undue regard to technicalities.

The main reason the learned trial Judge decided the way he did was because of the belief he had that the Certificate in the names of Nandera Amos did not belong to the appellant. However, that having been clarified by UNEB, we find no more justification for the continued denial to the appellant the benefit of what rightfully belongs to him.

On the issue of the non- service of the Notice of Presentation of the Petition, we find that its late service did not, in any way, prejudice the appellant because he filed his Answer to the Petition and the matter was heard and determined. This is a matter where **Article**

126 (2) (e) of the Constitution comes in handy and we find that the learned trial Judge rightly held as he did.

In the result, we find that the appellant was qualified for nomination to stand and contest in the Parliamentary elections held on the 18th of February 2016 and was consequently validly elected as the Member of Parliament for Buyamba County Constituency. We, therefore, allow the Appeal. The orders of the High Court nullifying the appellant's election as the MP for Buyamba Constituency, Rakai District, are hereby reversed.

The respondent shall pay the costs here and at the court below.

We so order.

Dated at Kampala this ..... Day of 2017

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S. B. K. Kavuma

DEPUTY CHIEF JUSTICE

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Hellen Obura

JUSTICE OF APPEAL

.....

Cheborion Barishaki

JUSTICE OF APPEAL