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**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**ELECTION PETITION APPEAL N0s.49 & 101 OF 2016**

**1. DR. BENSON NYABWANA**

**2. ENG. KARUMA KAGYINA:..... APPELLANTS**

10

**VERSUS**

**THE ELECTORAL COMMISSION:..... RESPONDENT**

*(Arising from the decision of the High Court of Uganda at Kampala before His Lordship Hon. Justice Henry .I. Kawesa dated 08.07. 2016)*

**Coram:** Richard Buteera, Hellen Obura and Alfonse Owiny-Dollo, JJJA.

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**JUDGMENT OF THE COURT**

This is a consolidated appeal against the decision of His Lordship Henry Kawesa delivered on 08<sup>th</sup> July, 2016, in which he set aside an interim order stopping the swearing in of the new representatives of professional bodies on the Kampala Capital City Authority (KCCA) council and held that the respondent validly conducted elections for those representatives.

The facts as stated by the trial Judge were that the appellants participated in an election conducted by the respondent on 19<sup>th</sup> November, 2013 and were voted to represent the Uganda Medical Association (UMA) in the KCCA council as professional councilors. As the term of office of that council was coming to an end, the respondent conducted elections for new councilors on 5<sup>th</sup> May, 2016 in which the 1<sup>st</sup> appellant participated and he lost to Dr. Willington Amutuheire who was gazzetted as the duly elected



5 councilor in the Uganda Gazette by the respondent on 16/05/2016.

On 20<sup>th</sup> May 2016, KCCA was served with an interim order issued by the Assistant Registrar Her Worship Atigu Beatrice Stella in **Dr. Benson Nyabwana vs Electoral Commission, Miscellaneous Application No. 517 of 2016** arising from **Miscellaneous Application No. 516 of 2016** arising from **Miscellaneous Cause No. 80 of 2016** restraining among  
10 others, the respondent and KCCA from tampering with the position of Dr. Benson Nyabwana as the elected representative of UMA during the pendency of his five year tenure of office that began effective 19<sup>th</sup> November 2013. Consequently, Dr. Amutuheire Willington and the  
15 representatives of the professional bodies were not sworn in on 6/06/2016 when other KCCA councilors and the Lord Mayor were sworn in.

Dr. Amutuheire applied to court vide **Miscellaneous Cause No. 92 of 2016** seeking for orders of mandamus against KCCA compelling it to add him on the list of councilors to be sworn in and to swear him as the duly  
20 elected professional representative of UMA. He also sought an order of prohibition against KCCA to stop it from carrying out the swearing in of its councilors without the applicant as one of them. The learned trial Judge in his decision set aside the interim order issued by court on 6/06/2016 and ordered as follows;

25 *"1. Under section 76 (1) of the KCCA Act 2010, the tenure of office is bestowed upon the office not the office bearer.*

*2. The elections held by the Electoral Commission for representatives of Professional Bodies on the KCCA council, for the*



5 *new council running from 1<sup>st</sup> June, 2016, were validly conducted.*

*3. The interim order, issued by this court on 06.06.2016 stopping the swearing in of the representatives of the professional bodies is hereby set aside, and KCCA, is hereby authorized to conduct the swearing in.*

10 *4. The parties will bear their own costs of this application.”*

Being dissatisfied with the above decision, the appellants appealed to this Court on grounds that:

15 *1. The learned trial Judge erred in law and fact when he dismissed the appellant's cause on grounds that Article 61(2) and (4) of the Constitution was applicable to election conducted by the respondent in respect of KCCA.*

*2. The learned trial Judge erred in law and fact when he held the term of office of the respondent is deemed to run from the date the Electoral Commission sets the date for general election.*

20 *3. The learned trial Judge erred in law and fact when he held the appellant's five years tenure of office had expired.*

25 *4. The learned trial Judge erred in law and fact when he held that the elections held by the respondent for the representatives of the professional bodies on the KCCA new council running from 1<sup>st</sup> June were validly conducted.*



5 The 2<sup>nd</sup> appellant had filed ***Election Petition Appeal No. 101 of 2016, Eng. Karuma Kagyina vs Electoral Commission & Kampala Capital City Authority*** out of time but he sought an order for extension of time and validation of the appeal vide ***Miscellaneous Application No. 72 of 2016, Eng. Karuma Kagyina vs Electoral Commission & Kampala***  
10 ***Capital City Authority***. The 2<sup>nd</sup> appellant also sought for an order to consolidate his appeal with ***Election Petition Appeal No. 49 of 2016, Dr. Benson Nyabwana vs Electoral Commission & Kampala Capital City Authority***.

When the appeal came up for hearing, Mr. Yesse Mugenyi appeared for  
15 the appellants. There was no appearance for the Electoral Commission. Mr. Denis Byaruhanga appeared for KCCA, which was the 2<sup>nd</sup> respondent in both appeals. The application was called on for hearing first but before it could be heard, Mr. Byaruhanga objected to the joining of KCCA as the 2<sup>nd</sup>  
20 respondent on the ground that KCCA was never a party in the lower court where the decision appealed from was made. Counsel for the appellants conceded and stated that he was ready to withdraw the appeal as against KCCA provided no costs was awarded. Mr. Byaruhanga agreed to that proposal and the appeal as against KCCA was dismissed with no order as  
25 to costs, following its withdrawal by the appellants' counsel. The matter then proceeded *ex-parte* against the Electoral Commission as the only respondent.

The application for extension of time and validation of ***Election Petition Appeal No. 101 of 2016*** and consolidation of the two appeals was heard and the orders sought were granted. Consequently, ***Election Petition***

5 **Appeal No. 101 of 2016, Eng. Karuma Kagyina vs Electoral Commission & Kampala Capital City Authority and Election Petition Appeal No. 49 of 2016, Dr. Benson Nyabwana vs Electoral Commission & Kampala Capital City Authority** were consolidated.

10 Counsel for the appellants then proceeded to argue all the grounds of the appeal together. He submitted that section 76 (1) of the KCCA Act provides that the Lord Mayor, Deputy Lord Mayor and councilors of KCCA shall hold office for 5 years upon their election but the trial Judge relied on Article 61 (2) & (4) and held that the elections, which were held before the expiry of the appellants' 5 year term of office, were properly conducted.

15 Counsel relied on the case of **Theodore Ssekikubo & ors vs Attorney General & ors, Constitutional Petition No. 01 of 2015 at Pg.26** and argued that section 76 (1) of the KCCA Act is very clear that the councilors shall hold office for a period of 5 years upon their election and that this law should be given purpose and enforced. He also referred to the case of

20 **Byanyima Winnie vs Ngoma Ngime, Civil Revision No. 0009 of 2001.**

Counsel further submitted that the trial Judge never addressed himself to Article 5 of the Constitution which states that Parliament shall by law make provision for the administration and development of Kampala as the capital city. He also submitted that the preamble of KCCA Act states the purpose

25 of the Act. He contended that KCCA ceased to be a Local Government upon the coming into effect of the KCCA Act and therefore it was wrong for the trial Judge to equate KCCA to a Local Government and say that the Local Governments Act (LGA) and Article 61 (2) & (4) of the Constitution are of relevance and could prevail over section 76 (1) of the KCCA Act. He

30 referred to section 5 (4) of the KCCA Act and the case of **Mutonyi**



5 ***Margaret Wakyala vs Tito Wakyala HCT-04-CV-CR-0007-2011.***

Surprisingly, counsel contended that section 76 (1) of the KCCA Act prevails over Article 61 of the Constitution and submitted that Article 61 (2) & (4) only relate to Local Governments and not to KCCA which ceased to be a Local Government entity by virtue of Article 5 (6) of the Constitution and section 5 (4) of the KCCA Act. He prayed that the appeal be allowed so that the appellants hold office for 5 years.

The duty of this Court as a first appellate court is to re-evaluate all the evidence on record and come to its own conclusions as was held in the case of ***Oryem Richard vs Uganda, Criminal Appeal No. 22 of 2014 (SC)***. We have carefully studied the court record and considered the submissions of counsel as well as the authorities relied upon. We shall consider all the grounds together as argued by counsel for the appellants.

Counsel faulted the trial Judge for relying on Article 61(2) & (4) and finding that the elections that replaced them before their 5 year term ended were properly conducted yet section 76 (1) of the KCCA Act provides that the mayor, deputy mayor and councilors shall hold office for 5 years upon their election.

We shall re-produce the provisions of section 76 of the KCCA Act and Article 61 (2) & (4) of the Constitution here for a proper appreciation and analysis of counsel's argument.

Section 76 of the KCCA Act provides;

*" (1) The Lord Mayor, Deputy Lord Mayor and other councilors of the Authority, mayor, deputy mayor and chairpersons and councilors of*





5        *lower urban councils and members of street committees shall hold office for five years after their election as councilors and shall be eligible for re-election.*

10        *(2) Where a person is elected to fill a vacancy in one of the offices referred to in subsection (1), that person shall hold office for the remainder of the term of office of the person who vacated the office.”*

Article 61 (2) of the Constitution provides thus;

15        *“The Electoral Commission shall hold presidential, general parliamentary and local government council elections within the first thirty days of the last ninety days before the expiration of the term of the President.”*

Article 61 (4) states thus;

*“Subject to this Constitution, the Electoral Commission shall, in accordance with the law, determine the dates for holding the elections referred to in clause (2).”*

20        The trial Judge in his judgment at page 10, paragraphs 19-31 (Pg. 64 of the record of appeal) stated thus;

25        *“I believe that the intentions of the Parliament while enacting section 76 of the KCCA Act was to ensure that the KCCA would through those elections get a fully constituted council so as to benefit from the Constitutional practice in Uganda of holding periodic free and fair elections. The conduct of such elections is generally the preserve of the Electoral Commission whose mandate is specifically provided for under Article 61 (2) of the Constitution. The mandate is to manage the*



5        *conduct of elections and under Article 61 (4) to determine the dates for*  
*holding the elections. The section was intended to provide for the*  
*conduct of KCCA Council elections in conformity with the other*  
*elections under a calendar that is predictable. Parliament under Article*  
10        *61 (3), requires the Electoral Commission to hold the presidential,*  
*general Parliamentary and Local Government council elections on the*  
*same day.”*

In our view, this is a question of interpretation of the statute. We agree with  
counsel that section 76 (1) of the KCCA Act provides that the councilors  
shall hold office for 5 years upon their election. However, we also find it  
15        essential to understand the intention of Parliament in drafting that provision  
and the purpose of periodically conducting elections in order to give it the  
correct construction. The Supreme Court in the case of ***Sitenda Sebalu vs***  
***Sam K. Njuba & Anor, Supreme Court Election Petition Appeal No. 26***  
20        ***of 2007*** while relying on the Australian case of ***Project Blue Sky Inc. vs.***  
***Australian Broadcasting Authority (1988) 194 CLR 355***, emphasized  
the importance of statutory interpretation by looking at the purpose of the  
relevant provision from the language used as well as the scope and object  
of the whole statute. That is the approach we shall adopt in interpreting the  
relevant provisions of the Constitution and the KCCA Act in the instant  
25        case.

In our understanding, the purpose of enacting section 76 (1) of the KCCA  
Act is to provide for the tenure of office of the Lord Mayor, Deputy Lord  
Mayor and the councilors of KCCA collectively. Parliament could not have  
intended to give individual members of the council a five year term of office  
30        irrespective of when he/she is elected to the office. To suggest so would





5 cause disorder in the election cycles and chaos in the conduct of council  
business if for some unforeseeable reason some members are elected at  
different times. I do not think the legislature would intend to create such  
disorder and chaos.

10 We are of the considered view that the five year tenure of office provided  
for under section 76 (1) refers to the life of the council and collectively the  
councilors who are elected to that council from the day the Electoral  
Commission sets the calendar and declares the date for the general  
elections to the date of the next election period provided for under Article  
15 61 (2). In our opinion, it does not matter at what time the different  
representatives assume office as long as it is within the five years  
stipulated under the said provision.

Our view is fortified by the provision of section 76 (2) of the KCCA Act  
which states that a person elected to fill a vacancy in one of the offices  
referred to in subsection (1) shall hold office for the remainder of the term  
20 of office of the person who vacated the office. If at all the legislature  
intended to peg the term of office to the individual councilor that subsection  
would not have provided that a person elected to fill in a vacancy would  
only hold office for the remainder of the term of office of the person who  
vacated. It would have provided for a full term of five years.

25 It is therefore our finding that the trial Judge was right to come to the  
conclusion at page 11, paragraph 26 of his judgment, that the KCCA Act  
under section 76 was not intended to provide for the councilors term of  
office to be bestowed upon the office bearer but upon the office. Similarly,  
we find that the term of office under section 76 of the KCCA Act is deemed  
30 to run from the date when the Electoral Commission declares the date for



5 the general elections until the date when the Electoral Commission  
organizes the next general election. This means in the instant case, that  
tenure of the appellants' office was coming to an end when the respondent  
organized the general elections for a new council on 9<sup>th</sup> May, 2016. We  
are also of the considered view that the participation of the 1<sup>st</sup> appellant in  
10 the elections was in itself an acknowledgement that the term of office of  
that council was due to end and there was need for fresh elections for a  
new term.

It is important to note that Article 61(2) & (4) of the Constitution gives the  
Electoral Commission the mandate to determine the dates for holding  
15 elections and to hold presidential, general parliamentary and local  
government council elections within the first thirty days of the last ninety  
days before the expiration of the term of the President. In the instant case,  
the respondent organized the election for councilors on 9<sup>th</sup> May, 2016,  
which day it deemed fit according to its mandate. We cannot therefore fault  
20 the respondent for having carried out its statutory mandate for an orderly  
transition from the old council to the new one within the time stipulated by  
law. In the premises, we find no reason to fault the trial Judge for his  
findings that the 5 year term of office of the appellants had expired and the  
respondent rightly conducted the elections for the representatives of the  
25 professional bodies and the new council members were validly elected.

Before we take leave of this matter, we wish to address some of the  
arguments that were advanced by counsel for the appellants. He  
submitted that KCCA ceased to be a Local Government upon the coming  
into effect of the KCCA Act and therefore it was wrong for the trial Judge to  
30 equate KCCA to a Local Government and say that the KCCA Act, the LGA

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5 and the Constitutional provisions that apply to Local Governments also  
apply to the KCCA. He argued that Article 61 (2) & (4) only relate to Local  
Governments and not to KCCA which ceased to be a Local Government  
entity by virtue of Article 5 (6) of the Constitution and section 5 (4) of the  
KCCA Act. He referred this Court to section 5 (4) of the KCCA Act and the  
10 case of **Mutonyi Margaret Wakyala vs Tito Wakyala HCT-04-CV-CR-  
0007-2011** to support his argument. Counsel also contended that section  
76 (1) of the KCCA Act prevails over Article 61 of the Constitution.

Article 5 (6) of the Constitution provides for the making of administrative  
and development provisions for Kampala as a Capital City and section 5  
15 (4) of the KCCA Act makes enactments that apply to a district applicable to  
the KCCA subject to that Act and with the necessary modifications. The  
LGA is an enactment that applies to a district and by virtue of section 5 (4),  
it is applicable to KCCA.

Section 13 (2) of the KCCA Act provides that;

20 *"The Local Government Act shall, with the necessary modifications,  
apply to the election of Councilors under this Act."*

The composition of the KCCA is provided for under section 6 of the KCCA  
Act but specifically the composition of the councilors representing  
professional bodies is provided for under section 6 (1) (g) thereof. Section  
25 13 (3) of the KCCA Act provides that their election should be in  
accordance with Regulations made by the Minister in consultation with the  
Electoral Commission. We have looked at the Kampala Capital City  
(Election of Representatives of Professional Bodies) Regulations, 2012  
made by the Minister under section 13 (3) and it makes reference to the

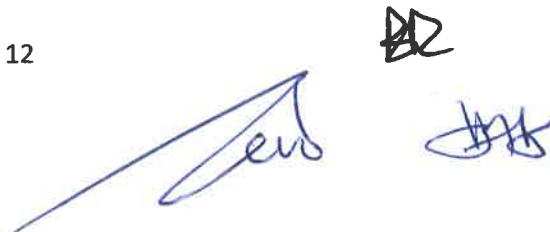


5 LGA. For instance, regulation 5 (b) provides for qualifications of councilors in accordance with section 116 of the LGA.

Similarly, regulation 6 provides that provisions relating to resignation from office applicable to councilors under the LGA shall apply to a councilor representing a prescribed body. From the foregoing, we find that the  
10 KCCA Act was enacted for administrative and development purposes of Kampala as a Capital City but on the issue of elections, the LGA applies with the necessary modifications. To our minds, the intention of Parliament in enacting Article 5 (6) of the Constitution and section 5 (4) of the KCCA Act was not to make the Authority an independent entity regarding election  
15 matters.

In the premises, we agree with the trial Judge's finding at Pg. 8, paragraph 6 of his Judgment that the provisions of section 76 (1) of the KCCA Act are not a strictly stand-alone statutory provision for which a strictly grammatical interpretation should be applied without recourse to any other  
20 Act or Statute.

On counsel's contention that section 76 (1) of the KCCA Act prevails over Article 61 of the Constitution, the answer lies in Article 2 (1) of the Constitution. It clearly provides that the Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons  
25 throughout Uganda. Clause (2) of that Article provides that if any other law or custom is inconsistent with any of its provisions, the Constitution shall prevail and that other law or custom shall, to the extent of the inconsistency, be void. We therefore find counsel's contention that section 76 (1) of the KCCA Act prevails over Article 61 of the Constitution  
30 untenable.

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5 Finally, we take note of the fact that the 1<sup>st</sup> appellant fully participated in the elections organized by the respondent; and it was after he lost that he decided to challenge the validity of the elections. This leaves us wondering whether the situation would have been different had he won the election. We find this an afterthought and a double standard.

10 In the premises, we do not find any merit in this appeal and it stands dismissed. Since the points of law raised in this matter is of great public importance we order that each party bears his/its own costs.

We so order.

Dated at Kampala this... 17<sup>th</sup> day of August ..... 2017

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HON. JUSTICE RICHARD BUTEERA  
JUSTICE OF APPEAL

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HON. LADY JUSTICE HELLEN OBURA  
JUSTICE OF APPEAL

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HON. JUSTICE ALFONSE OWINY DOLLO  
JUSTICE OF APPEAL

