

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO. 01 OF 2018

KASIRYE ZZIMULA FRED APPELLANT

VERSUS

- 10 1. BAZIGATIRAWO KIBUUKA FRANCIS AMOOTI
2. ELECTORAL COMMISSION..... RESPONDENTS

(Appeal from the decision of the Hon. Dr. Justice Henry Peter Adonyo delivered on the 31st day of October, 2017 at Mubende in Election Petition No. 008 of 2016)

15 CORAM: HON. MR JUSTICE ALFONSE OWINY-DOLLO, DCJ
HON. MR. JUSTICE KENNETH KAKURU, JA
HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF THE COURT

20 This appeal arises from the decision of Henry Peter Adonyo, J in the High Court Election Petition No. 008 of 2016 at Mubende dated 31st October, 2017.

25 The appellant and the 1st respondent contested for the position of Chairperson for Mubende District Local Council (V) in the 2016 general elections. The 1st respondent was returned duly elected by the 2nd respondent. The appellant challenged the election in Court at the High Court on a point of laws successfully. However, on appeal this Court reversed the High Court decision and ordered a fresh hearing of the petition on merit. After a full hearing the 1st respondent was successful. The appellant being dissatisfied with the High Court decision dismissing his petition filed this appeal on the following grounds;-

- 5
1. *The learned trial Judge erred in law and fact when he held that the 1st respondent was properly nominated at Kassanda Sub-county.*
 2. *The learned trial Judge erred in law and fact when he selectively evaluated evidence in favour of the 1st respondent and found that the non-indication of the 1st respondent's name on the nomination form of Kiyuni Sub-county Butologo*
10 *was a mere technicality that cannot preclude the validation of the nomination.*
 3. *The learned trial Judge erred in law and fact he held that the affidavit of Jude Musisi disposed of facts which are not within his knowledge but within some other person's knowledge.*
 4. *The learned trial Judge erred in law and fact when he held that the 1st respondent was lawfully nominated.*
15
 5. *The learned trial Judge erred in law when he held that the appellant had foreclosed his rights to challenge the nomination of the 1st respondent.*
 6. *The learned trial Judge erred in law when he held that the possession of a National ID is not within the ambit of the statutory definition of a registered*
20 *voter.*

When the appeal was called for hearing, learned Counsel *Ms. Patricia Nyangoma* appeared for the appellant while learned Counsel *Mr. Moses Kabega* appeared for the 1st respondent and learned Counsel *Eric Sabiti* appeared for the 2nd respondent. Both the appellant and the 1st respondent were present.

25 Both parties with leave of Court adopted their conferencing notes as their written submissions. They were also granted leave to briefly address Court orally.

The appellant's case

In respect of grounds one and two, Counsel submitted that the nomination forms submitted by the 1st respondent for his nomination were invalid as they did not
30 comply with *Section 111 (3) (g)* of the Local Governments Act Cap 243.

5 Counsel contended that the 1st respondent was unable to submit nomination forms accompanied by the required 50 voters' signatures and names. Further the forms containing the signatures were written on papers and did not indicate the person being nominated and the details of his particulars as required by *Section 113 (3) (g)* of the Local Government Act. Counsel faulted the Judge for having accepted the
10 irregularities on the forms but went on to find that the irregularities were minor and not sufficient to invalidate the nomination.

In respect of ground three and four, Counsel attached the decision of the Judge accepting an affidavit that was deponed to by Jude Musisi in which contained hearsay evidence. He contended that, the nomination of the 1st respondent was
15 invalid because Form EC2 submitted by the 1st respondent was not commissioned by a Commissioner for Oaths. Further the Electoral Commission form EC2 was neither dated nor signed and as such offended *Section 5* of the Commissioner for Oaths (Advocates) Act.

In respect of ground five, Counsel submitted that the trial Judge erred when he held
20 that the appellant ought to have challenged the nomination before the elections were conducted and this petition was untenable on the ground alone, having been brought after the elections had been concluded.

Lastly Counsel submitted that the trial Judge erred when he held that a National Identity Card was not proof of voter registration.

25 She asked Court to allow the appeal and grant the remedies set out in the memorandum of appeal.

1st Respondent's reply

In reply to grounds one and two, it was submitted that the nomination forms tendered in Court were clear. The said forms were counted by Court, which found
30 that the signatures were more than the required 50. Counsel submitted that the

5 learned trial Judge was right when he found that the irregularities on the nomination forms were a mere technicality and as such it could not invalidate the nomination of the 1st respondent. It was further noted by the learned trial Judge that the registered persons appearing on the nomination papers never denied nominating the 1st respondent in order to invalidate his nomination.

10 Ground three, four, five and six it was submitted that, the Court was justified in finding that the affidavit of Jude Musisi was based on Hearsay Evidence because the contents contained therein clearly showed that the facts were not made with the deponent's own knowledge. It was further submitted that ought to have challenged the irregularities of the 1st respondent's nomination immediately after the
15 nomination exercise under *Section 15* of the Electoral Commission Act and not after the election process. Counsel submitted that the learned trial Judge was right when he found that possession of a National Identity Card is not within the ambit of the statutory definition of a registered voter. It was argued that the Section 11 of the Parliamentary Elections Act defines a voter as a person whose name is entered on
20 the voter's register.

Counsel asked Court to dismiss the appeal with Costs.

The submissions of the 2nd respondent are interrelated with those of the 1st respondent and as such we have found no reason to reproduce them.

Resolution

25 We have studied the record of appeal and the Judgment of the lower Court. We have also considered the conferencing notes of both parties, oral submissions of Counsel for the parties and the authorities that were availed to Court.

This being the first and final appellate Court for election matters, it has a duty to subject the evidence adduced at the trial to a fresh and exhaustive reappraisal,
30 scrutiny and then decide whether or not the learned trial Judge came to correct

5 conclusions, and if not then this Court is entitled to reach its own conclusions. See:-
Rule 30 (1) (a) of the Rules of this Court *Fr. Narcensio Begumisa & others vs Eric Tibebaaga, Supreme Court Civil Appeal No. 17 of 2002.*

The main thrust of this Appeal revolves about allegations of irregularities in respect of the 1st respondent's nomination to contest for the position of Chairperson for
10 Mubende District Local Council (V) in the 2016 general elections which were ignored by the learned trial Judge.

Counsel for the appellant contended that the 1st respondent's nomination forms were invalid as they did not comply with *Section 111 (3) (y)* of the Local Governments Act Cap 243.

15 Section 111(3) (g) of the Local Government's Act provides as follows:-

"(3) A person shall not qualify for election as chairperson of a district or city unless that person—

*(g) attaches to his or her nomination paper a list of names of fifty registered voters from at least two-thirds of the electoral areas, and each of the fifty shall
20 have appended to that list his or her name, signature, physical address and voters registration number as specified in Form EC 1 of the Seventh Schedule."*

While resolving this issue the learned trial Judge held as follows at pages 13 and 17 of his Judgment:-

*"A physical count of the names on the nomination forms tendered in Court and
25 which were not contested at pages U1 to U11 of the affidavit in sur-rejoinder indicates that a total of 110 registered voters nominated the 1st respondent at Kassanda Sub County. So even if Kiddu Francis's testimony is taken as true that he did not nominate the first respondent in that particular Sub county and his name is removed from the list of those who nominated the first respondent from*

5 *Sub County there would still remain a total of 109 names under Kassanda Sub
County. This is way above the statutory minimum required by the law of fifty
registered voters. Consequently, the fact would remain that for Kassanda Sub
County, the 1st respondent would still have secured the requisite number of
10 voters nominating him. I would thus find this as a matter of fact and conclude
without further ado that indeed with the undisputed and proven number of
persons nomination the respondent being way above the required minimum at
Kassanda Sub County, the first respondent did get and was properly nominated
at that sub County contrary to the assertions of the petitioner...*

15 *From the record it is evident that the nomination forms for the first respondent
with numbers of those nominating him came from the following Sub County:
Kiyuni with Seventy (70), Kiganda Fifty (50), Madudu Fifty (50), West Division
(50), Kibalinga Fifty (50), Bagezza Fifty (50), Makokoto Fifty (50), Butologo
Sixty (60), Nabingoola Sixty Eight (680, Kalwana Fifty (50), Kassanda One
Hundred Nine (109), South Division Fifty (50), Kasambya Fifty (50) and East
20 Division One Hundred Ten(110).*

The nomination forms tendered in Court clearly indicate that the signatures from
Kassanda Sub County were in actual sense more than those required under *Section
111(3) (g)* of Local Government Act and as such we find no reason whatsoever to
depart from the learned trial Judge's findings.

25 It was further contended that the learned trial Judge erred when he found that the
non-indication of the 1st respondent's name on the nomination forms for Kiyuni
Sub- County, Butolongo was a mere technicality. The learned trial Judge resolved
this issue as follows;-

30 *"...I have had the occasion to peruse those forms which are found at pages 1.1 to
1.7 of the affidavit in sur rejoinder. While it is true that the top most form at
page 1.1 bears the name of the first respondent, the accompanying forms 1.2 to*

5 1.7 do not bear the names of the first respondent. However, all those bear the name of Kiyuni Sub County and they are all attached and duly stamped and received by the second respondent..

10 ...The fact of subsequent Forms 1.2 to 1.7 for Kiyuni Sub County not bearing the name of the first respondent but attached to 1.1 which bears the name of the first respondent and their being endorsed as a bundle as being for Kiyuni Sub County in my considered opinion and view is merely a technicality and cannot preclude the validity of nomination since the non-indication of the first respondent's name onto the subsequent forms have names of voters who have not denied nominating the first respondent from that very single sub county confirms the voters intention of nominating the first respondent even if there was that lapse of not writing the name of the person they were nominating in the subsequent but attached accompanying form for the named sub county...

15 Similarly, Butolongo Sub County falls under similar circumstances with Kiyuni Sub County..."

20 It appears clearly to us that the Forms and the attached list of names formed one document and were to be read and construed together. Since the name of the candidate appears on the form it was not necessary for the name also to appear on the attached list of names.

25 We agree with the learned trial Judge's findings and as such we find no merit whatsoever in grounds one and two of this appeal.

○ Grounds three, four, five and Six the learned trial Judge is faulted for having found that the affidavit of Jude contained hearsay evidence. The evidence set out in an affidavit should be confined to the particular facts within the personal knowledge of the deponent. While resolving this issue the learned trial Judge stated as follows;-

30 *"In disposing of the contestation, I refer to and note that Section 59(a) of the Evidence Act imposes on a deponent to depose to facts with the deponent's knowledge..."*

5 *This requirement applies in equal measure to election petitions as was held by the Supreme Court of Uganda in Election Petition No. 1 of 2001, Kizza Besigye vs Yoweri Kaguta Museveni and Another Odoki CJ (as he then was) noting in his judgment that:*

10 *“An election petition is not an interlocutory proceeding but a final proceeding, which is aimed at determining the merits of the case. Therefore affidavits admissible in such proceedings must be based on the deponent’s own knowledge, not information and belief.”*

15 *If the above provisions of the law and the holding of the Supreme Court are related to the affidavit of Jude Musisi, it would appear to me that it falls short of the required standard he deposes to the facts which are not within his knowledge but within some other person’s knowledge consequently leaving what he says to remain hearsay, which would be unsafe to be used to invalidate the nomination of the 1st respondent...”*

20 The learned trial Judge critically analysed the evidence contained in the affidavit of Jude Musisi and found that it was not based on the deponent’s own knowledge. We find no reason to fault him, as we have come to the same conclusion after carefully perusing it. Once Court severed all the offending provisions of the impugned affidavit the remaining averments would be insufficient to sustain the complaint. Ground 3 therefore fails.

25 In respect of other irregularities alleged by the appellant, we are of the view that the appellant ought to have challenged the said irregularities at the earliest opportunity by submitting a complaint to the Electoral Commission.

 Section 15 of the Electoral Commission Act (Cap 140) allows parties aggrieved by the nominations to lodge their complaints to the Commission. It provides thus;-

30 *“15. Power of the commission to resolve complaints; appeals.*

5 (1) Any complaint submitted in writing alleging any irregularity with any aspect of the electoral process at any stage, if not satisfactorily resolved at a lower level of authority, shall be examined and decided by the commission; and where the irregularity is confirmed, the commission shall take necessary action to correct the irregularity and any effects it may have caused.

10 (2) An appeal shall lie to the High Court against a decision of the commission confirming or rejecting the existence of an irregularity.

(3) The appeal shall be made by way of a petition, supported by affidavits of evidence, which shall clearly specify the declaration that the High Court is being requested to make.

15 (4) On hearing a petition under subsection (2), the High Court may make such order as it thinks fit, and its decision shall be final.

(5) The High Court shall proceed to hear and determine an appeal under this section as expeditiously as possible and may, for that purpose, suspend any other matter pending before it.

20 (6) The Chief Justice shall, in consultation with the Attorney General, make rules of court for regulating the procedure in respect of any appeals under this section and may, for that purpose, adopt any procedure prescribed by any enactment, subject to such modifications as the Chief Justice may specify."

Section 15 of the Parliamentary Elections Act, 2005 also provides as follows:-

25 "Inspection of nomination papers and lodging of complaints any voter registered on the voters roll of a constituency may—

(a) during office hours on the nomination day at the office of the returning officer, inspect any nomination paper filed with the returning officer in respect of the constituency;

5 (b) after the closure of the nomination time and during such period as
may be prescribed, inspect any nomination paper in respect of the
constituency at such time and subject to such conditions as may be
prescribed; and lodge any complaint with the returning officer or the
Commission in relation to any nomination in respect of the constituency
10 challenging the qualifications of any person nominated.”

From the reading of the above provisions of the law, it appears to us that the
intention of the legislature in enacting *Section 15* of the Electoral Commission Act
was to ensure that all disputes arising prior or during nominations before voting are
resolved with finality before the election date, except where the law otherwise
15 specifically provides. Timely complaints will avoid undue expense and
inconvenience to the parties inclusive of the electorate who do not have to vote
where nomination is contested. Issues of nomination should be resolved before
elections.

It appears to us that, the appellant waived his rights to complain when he failed to
20 bring the complaints within the stipulated period and as such would be estopped
from doing so after the election. Grounds 4 and 5 therefore fail.

In respect of ground 6, the learned trial Judge for found that a national identity card
is not sufficient to qualify a person as a registered voter.

In this regard, Section 1 of the Parliamentary Elections Act defines a registered voter
25 as;-

“A person whose name is entered on the voters register”

A national identity card may be proof that the holder is the person whose name also
appears on the register. Without the holder’s name appearing on the national voters
register the national identity card is useless for the purpose of an election.

5 In *Lanyero Sarah Ochieng vs Lanyero Molly, Court of Appeal Election Petition Appeal No. 32 of 2011*, it was held that;-

10 *"The conclusive proof of a registered voter, therefore, is by evidence of a person's name or names and other relevant data having been entered on the National Voters Register. It is not the voter's card or any other election document but the National Voters Register."*

See: *Kabuusa Moses Wagaba vs Lwanga Timothy Election Petition Appeal No. 53 of 2011*.

15 The definition of a registered voter is clear. Having national identity card is not sufficient on its own to qualify a person as a registered voter. A registered voter must have registered as such and his or her name must appear clearly on the national voters register. We find that the learned trial Judge was justified when he found so. Ground 6 therefore fails.

The complaints raised in the petition from which this appeal arises were to a large extent based on form rather than substance.

20 In this regard, *Section 43* of the Interpretation Act Cap 3 provides as follows;-

"Deviation from form

25 *Where any form is prescribed by any Act, an instrument or document which purports to be in such form shall not be void by reason of any deviation from that form which does not affect the substance of the instrument or document or which is not calculated to mislead."*

The learned trial Judge was on the basis of the above provision of the law justified when he held that, the appellant's complaints in this matter related to form rather than substance and were therefore insufficient to sustain the petition. We have found no reason to fault his decision which we hereby uphold.

5 This appeal fails and is hereby dismissed with costs.

We so order.

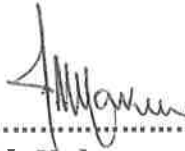
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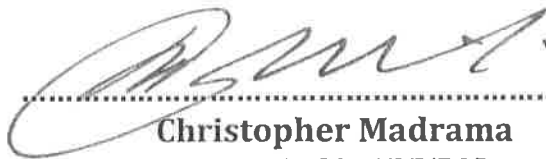
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Alfonse Owiny-Dollo
DEPUTY CHIEF JUSTICE

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Kenneth Kakuru
JUSTICE OF APPEAL

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Christopher Madrama
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