THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO 3 OF 2018

(Arising from HCT-12-CV-EP- 0001- 2017)

SIMON PETER KINYERA}..... APPELLANT

VERSUS

1. **ELECTORAL COMMISSION}**
2. **TABAN IDI AMIN}..... RESPONDENTS**

CORAM:

HON. MR. JUSTICE ALFONSE OWINY DOLLO, DCJ

HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE CHRISTOPHER IZAMA MADRAMA, JA

JUDGMENT OF COURT

Introduction

The appellant lodged this election petition appeal against the whole decision of the High Court of Uganda delivered at Masindi on the 12th of July 2018 by Hon. Rugadya Atwoki in which he sustained a preliminary objection on the competence of the appellant's petition filed as a registered voter under section 60 (2) (b) of the Parliamentary Elections Act. The petition was accordingly dismissed with costs to the respondents, hence the appeal.

Background

The brief background to the appeal is captured in the ruling of Rudadya, J. The second respondent is a Member of Parliament of Kibanda North Constituency, Kiryandongo District. He was elected unopposed in a repeat election after the first election was nullified by the Court of Appeal in **Hon. Otada Sam Amooti Owor v Taban Idi Amin & Electoral Commission Election Petition Appeal No. 93 of 2016.** The background of the previous petition culminating into nullification of the election in Election Petition Appeal No. 93 of 2016 is that the second respondent had been nominated as the person bearing the names Taban Idi Amin Tampo who was registered in the voter's register but it was asserted that the person having those names lacked the requisite academic qualifications. The second respondent then reverted to use of the name Taban Idi Amin at the point of contesting for election and the person bearing those names had the requisite academic qualification but is not the name appearing in the voter's register. Hon Sam Otada challenged the nomination and declaration of the person bearing the names Taban Idi Amin, which petition resulted in Election Petition Appeal No.93 of 2016 on the ground that nominee was not a registered voter or if he is Taban Idi Amin Tampo he has no requisite academic papers to contest the election. On 30th May, 2017, court held that Taban Idi Amin was not a registered voter and therefore was not qualified to be nominated and elected. Court also issued an interim order (page 1239 vol. 3 of the record) stopping any party from choosing a flag bearer.

The 2nd respondent subsequently by a deed poll which was published in the Uganda Gazette (page 11241 vol. 3 of the record of appeal) declared that he had changed his name from Taban Idi Amin Tampo to Taban Idi Amin. He thereafter participated in the bi-election for the seat of Member of Parliament for Kibanda North Constituency in February, 2016. The 1st respondent conducted the elections and declared the 2nd respondent the winner of the elections which results were gazetted. The petitioner who is the appellant in this appeal contested the second respondents' nomination

declaration. He lodged the petition in his capacity as a registered voter required to support his petition with a minimum of 500 registered voters of the constituency. The grounds of the petition were that:

1. The nomination was contrary to a court order.

2. The second respondent is not a registered voter and not a citizen of Uganda; and

3. The second respondent Taban Idi Amin had no requisite academic papers.

At the hearing of the petition ground 2 of the petition was abandoned. The respondents objected to the petition by way of a preliminary point of law contending that it was incompetent on ground that the petitioner and the persons who signed in support of the petition were not registered voters and as such the petition had no *locus standi* to lodge the petition. They asked the court to dismiss the petition on this preliminary point alone. The learned trial judge sustained the objection in a reserved ruling. The appellant being aggrieved with the said ruling appealed to this court on 4 grounds, namely:

1. The learned trial Judge erred in law and in fact when he upheld the preliminary objection that the Appellant and his supporting signatories were not registered voters, and that therefore the Petition is incompetent for the following reasons.
    - The learned trial Judge erroneously held that the appellant and his supporting signatories were not registered voters, when the same was not pleaded by the respondents.
    - The Learned trial Judge erroneously held that the Appellant and his supporting signatories were not registered voters, when the same was not proved by the respondents.

- The learned trial Judge erroneously held that the appellant bore the burden to prove that he and his supporting signatories were not registered voters when the burden lay on the respondent to discharge.
- The learned trial Judge erroneously held that the 1st respondent was not estopped from challenging the status of the appellant and his supporting signatories as registered voters.

2. The learned trial Judge erred in law and fact when he failed to find that the petition was competent.
3. The learned trial Judge erred in law and fact when he failed to nullify the nomination and subsequent election of the respondent in the impugned election and thereby condoning the illegality of violation of an interim Order of court prohibiting the choosing of the NRM candidate, the 2nd respondent herein, for the by-election.
4. The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record proving eligibility of the Petition respectively, and thereby reaching the wrong conclusions on all issues.

Representation

At the hearing, the appellant was represented by Counsel Alex Candia, the 2nd respondent was represented by Counsel Caleb Alaka and the 1st Respondent was represented by Counsel Eric Sabiti.

Appellant's submissions

The Appellant's counsel submitted on grounds 1 and 4 together that, the question of whether or not a person is a registered voter is not entirely a question of law. Further that, it is first a question of fact and once established, a question of law arises under section 1 of the Parliamentary Elections Act (hereafter written as PEA) as to whether such as a person is a

registered voter. He contended that, the assertion that the appellant's supporters were not registered voters was not pleaded to and was a departure from their pleadings contrary to Order 6 rule 1 and 7 of the Civil Procedure Rules. He relied on **Interfreight Forwarders (U) LTD v E.A.D.B; Supreme Court Civil Appeal No. 33 of 1992,** in support of his argument. Furthermore, he submitted that even if the assertion was contained in the pleadings, the question would be whether or not the respondents in their defence, produced evidence to prove that the appellant and those who supported his petition were not registered voters but they did not. Counsel relied on **Hon. Otada Sam Amooti Owor v Taban Idi Amin & Anor E.P.A No.93 of 2016** for the proposition that the production of the voters' register is conclusive proof of persons registered as voters for this particular election.

Counsel further submitted that the court allowed the respondent to succeed on a matter where they did not produce proof for the court to satisfy itself that the petitioners and signatories in support of the petition are not registered voters. He went on to argue that, the respondents were served with the petition in September 2018 and they filed their responses. The 1st respondent is the maker and custodian of the voters' register and had perused the petition with all the annexure thereon. If they found that the petitioner and signatories in support of the petition are not registered voters, they should have stated so in their Written Statement of Defence. Counsel drew the attention of Court to the joint scheduling memorandum of the parties on the court record where it was admitted by the respondents that all the signatories are registered voters. He prayed that the court finds that the learned trial Judge erred in holding that, the appellant and signatories in support of the petition were not registered whereas this fact was not pleaded and proved and further, the respondents were barred by the doctrine of estoppel from raising the issue of registered

voters at a later stage, having admitted that fact during the scheduling conference.

On ground 3 the appellant's counsel faulted the judge for not considering whether the nomination of the 2nd respondent was an illegality on the ground that the nomination occurred when there was an interim court order barring it from taking place. He relied on the case of **Makula International v Cardinal Nsubuga (1982) HCB 11 and Beatrice Kobusingye v Fiona Nyakana and Anor; S.C.C.A No. 5 of 2004** for the proposition that the court cannot ignore an illegality and illegality once brought to the attention of court overrides all pleadings including admissions make therein. He further relied on the case of **Johnson Mugisha and Others v KCCA C.A.C.A No. 191 of 2016** where the persons who appealed in that matter were not parties to the original suit. The trial Judge Hon. Lady Justice Elizabeth Musoke as she then was, entertained the matter even though the parties had no right of appeal. The appellants counsel prayed that the court allows the appeal and sets aside the dismissal of the petition and order it to be heard on the merits.

On the issue of the different names used by the 2nd respondent at nomination and at the elections, it was the argument of counsel for the appellant that Taban Idi Amin and Taban Idi Amin Tampa are two different people. He submitted that the person Taban Idi Amin Tampa was resolved by this court in **Hon. Otada Sam Amooti Owor v Taban Iddi Amin and Electoral Commission** (supra)

Submissions of the 2nd respondent's counsel

In reply the second respondent's counsel submitted that the preliminary point of law was pleaded. He referred court to the 2nd respondent's answer to the petition in which the 2ndrespondent averred that it intended to move court on a preliminary point of law to have the petition struck out on

grounds that the petitioner did not have the right to challenge the election of the 2nd respondent as Member of Parliament for Kibanda County North Constituency. Secondly, he supported the decision of the trial court that the petition did not comply with the law.

He submitted further that, section 60 (2) (b) of the PEA provides for the category of persons who can file an election petition. These categories include a registered voter in the constituency concerned supported by the signatures of not less than 500 registered voters in the same constituency and registered in the manner prescribed by regulations. Section 1 of the PEA defines a Registered Voter to mean a person whose name is entered in the voter's register. He further relied on the decision of this court in **Hon. Otada Sam Amooti Owori v Taban Iddi Amin and Electoral Commission (supra),** where the court held that it is not enough to merely aver that the name in issue is in the register, the petitioner has to extract the relevant page of the register and present it in evidence. Furthermore, by virtue of the section 1 of the Parliamentary Elections Act, conclusive proof of a registered voter is by evidence of a person's name appearing in the National Voter's Register and not mere possession of a national identify card.

With reference to section 66 of the Registration of Persons Act, 2015, the 2nd Respondents counsel submitted that the mandatory provision for use of National Identification Cards for purposes of identification of voters among others is merely to cross check and confirm particulars in the voter's register with the National ID before a voter can be allowed to vote. The national identification card did not replace nor do away with a voter's register which, is a special document prepared by the Electoral Commission.

In the premises, the 2nd respondent's counsel submitted that the trial Judge correctly looked at the evidence and the pleadings before him. The voters' register is a public document that is made available upon application and

payment of a prescribed fee and was available to the petitioner. Furthermore, the burden of proof for purposes of the petition is not on the Electoral Commission to prove that the signatories were not registered voters but on the petitioner to prove that he is entitled to present the petition.

He submitted that the learned trial Judge considered section 18 of the Electoral Commission Act which gives the 1st respondent power to compile, maintain and update the National Voter's Register and correctly applied it to the facts of the case.

Counsel relied on section 106 of the Evidence Act for the proposition that the evidential burden only shifts once the information is in possession of the opponent. Therefore counsel argued that, when it comes to the issue of a voter's register the appellant had a burden of applying for it and presenting the same in court.

Submissions of the 1st respondent's Counsel

The 1st respondent associated himself with the submissions of the 2nd respondents counsel and added that the petitioner/appellant and the supporting signatories are not registered voters. Secondly, the burden to prove their status as registered voters was on the petitioner and this burden does not shift unless the petitioner shows exceptional circumstances which prove that some factors prevented the petitioner from accessing the register that was available at that time.

He submitted that when the petition was filed, the respondent only looked at the supporting evidence to ascertain whether it is competent. The record or proceedings proves that there was no evidence from the petitioner to prove that they were registered voters and the holding in **Hon. Otada Sam Amooti Owor v Amin (supra)** applies.

Counsel sought to distinguish the case of **Arumadri John Drazu v Etuuka Isaac Joakino E.P.A. No. 37 of 2016** with respect to ground 3 on the ground that in that case there was no illegality making the petition a nullity and that the facts were different from the one in the petition from which this appeal arises.

Resolution of the Appeal

We have carefully considered submissions of counsel, the record of proceedings, the cases cited to us and relevant laws.

The duty of this court as a first appellate court is to subject the evidence on record to fresh scrutiny and come to its own conclusions bearing in mind, that it did not hear or see the witnesses testify. This duty is spelt out by Rule 30 (1) of the **Judicature (Court of Appeal Rules) Direction S.I 13-10** which provides that:

> "30. Power to reappraise evidence and to take additional evidence.
>
> (1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—
>
> (a) reappraise the evidence and draw inferences of fact; and
>
> (b) in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner."

This jurisdiction and principles apply to civil as well as criminal proceedings. In the case of **Peters v Sunday Post Limited [1958] 1 EA 424**, the Court of Appeal for East Africa in the judgment of Sir Kenneth O'Connor P set out this jurisdiction at page 429:

> "An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon

that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."

In the lower court the petition was supported by affidavit evidence and was expected to be heard on the merits based on the pleadings and the attached evidence. We therefore have the same material to consider whether the conclusion reached by the learned trial judge is supported by the pleadings and the attached evidence. In **Supreme Court Criminal Appeal case No. 10 of 1997 Kifamunte Henry v Uganda;** the Supreme Court considered the duty of a first appellate when they held that:

"The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."

The gist of grounds 1, 2, and 3 of the appeal will determine whether the learned trial Judge erred in law to hold that the appellant's petition was incompetent because it was not brought by a registered voter or supported by a minimum of 500 registered voters as stipulated in section 60 of the Parliamentary Elections Act.

Starting with pleadings, a preliminary objection can be made on the basis of **Order 7 rule 11 (a) of the Civil Procedure Rules** which stipulates that a plaint shall be rejected for:

"(a) disclosing no cause of action".

Secondly, under **Order 7 rules 11 (d) of the Civil Procedure Rules**, the plaint shall be rejected:

"where the suit appears from the statement in the plaint to be barred by any law".

Where a plaint is barred by law, there is also no cause of action disclosed. Where a point of law is raised which if considered, without taking evidence, would have the effect of disposing of a suit, wholly or substantially, the court shall try those issues first in accordance with **Order 15 rule 2 of the Civil Procedure Rules**. In the East African Court of Appeal decision in **Auto Garage v Motokov (1971) EA 514** it was held that the provision that a plaint be rejected for disclosing no cause of action is mandatory. A Plaint which discloses no cause of action is a nullity and cannot be amended. An amendment will not be allowed when the cause of action is barred by the law of limitation. The Supreme Court exhaustively considered what a cause of action is in the case of **Major General David Tinyefunza v Attorney General of Uganda Constitutional Appeal No. 1 of 1997** and **Ismail Serugo v KCC & the Attorney General Constitutional Appeal No. 2 of 1998.**

In **Attorney General v Tinyefunza Constitutional Appeal No. 1 of 1997** and the Judgment of Wambuzi, C. J at pages 18 – 19 of his judgment, cites with approval a passage from **Mulla on the Indian Code of Civil Procedure, Volume 1, 14th Edition** at page 206 for the definition of a cause of action as:

> "A cause of action means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove the facts but every fact necessary for the plaintiff to prove to enable him to

obtain decree. Everything which if not proved would give the defendant a right to an immediate judgement must be part of the cause of action. It is, in other words, a bundle of facts, which it is necessary for the plaintiff to prove in order to succeed in the suit. But it has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It is a media upon which the plaintiff asks the court to arrive at a conclusion in his favour. The cause of action must be antecedent to the institution of the suit."

The Supreme Court agreed with earlier authorities of **AG v Oluoch 1972 EA 392** and **Sullivan v Ali Mohamed Osman (1959) EA 239,** that the facts must be alleged in the plaint and it should be assumed that the facts are true. In **Attorney General v Oluoch (1972) EA 392**, the East African Court of Appeal, per Spry Ag. President said at page 394:

"In deciding whether or not a suit discloses a cause of action, one looks, ordinarily, only at the plaint (Jeroj Shariff & Co v Chotai Family Stores (1960 EA 374) and assumes that the facts alleged in it are true."

In the appellant's case the pleading was accompanied by affidavit evidence in support and the matter can be considered as far as pleadings are concerned and where the pleadings are okay, to the extent whether the pleadings were proved by the affidavit evidence. Before we embark on examining the issue we have considered the decision of the Supreme Court in **Ismail Serugo v Kampala City Council and The Attorney General Constitutional Appeal No. 2 of 1998**, which decision considers preliminary points of law. **Wambuzi CJ at pages 2 and 3** held that:

"In my view, it is important to note that both respondents asked the Constitutional Court to strike out the petition and that was the

remedy granted. The relevant provisions in this regard would appear to be Order 7 Rule 11 or Order 6 Rule 29.

Order 7 Rule 11 provides as follows in so far as is relevant: 'The plaint shall be rejected in the following cases-

'where it does not disclose a cause of action···

(d) where the suit appears from the statement in the plaint to be barred by any law···

and in so far as is relevant Order 6 Rule 29 provides as follows;

The court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action and, in such case, may order the suit to be stayed or dismissed or judgment to be entered accordingly···

I agree that in either case, that is whether or not there is a cause of action under Order 7 Rule 11 or a reasonable cause of action under Order 6 Rule 29 only the plaint can be looked at..."

The definition was held to apply to plaints as well as to petitions. We have accordingly considered the pleadings from which this appeal arises as well as the affidavit evidence in support. Furthermore, we have considered section 60 of the PEA 2005 which provides that:

"60. Who may present election petition

(1) Election petitions under this Act shall be filed in the High Court.
(2) An election petition may be filed by any of the following persons –
(a) a candidate who loses an election; or
(b) a registered voter in the constituency concerned supported by the signatures of not less than five hundred voters registered in the constituency in a manner prescribed by the regulations.

(3) ... ".

The appellant falls under section 60 (2) (b) of the PEA which gives a right to a registered voter to lodge an election petition. The election petition at pages 53 – 71 challenges the election of the second respondent and seeks inter alia for the election to be set aside and for there to be fresh elections. He further prayed for inter alia, a declaration that the second respondent was not validly nominated or elected. The right of the petitioner to bring the petition was challenged. The appellant averred in paragraph 1 of his petition that he was a person entitled in law to bring the petition. In paragraph 2 he averred that he brought the petition in his capacity as a registered voter of Kibanda North Constituency supported by not less than 500 signatures of registered voters. As far as the rules of pleadings are concerned, the pleading disclosed a cause of action on the assumption that what is averred in it is true.

Being a petition supported by affidavit evidence we can consider whether evidence was adduced in support of the assertion that the petitioner was an entitled person to bring the petition. The crux of the matter is that the affidavit in support of the petition sworn to by the petitioner in paragraph 1 thereof deposed that the appellant is a registered voter and brought the petition with the support of not less than 500 registered voters of the Kibanda County North Constituency. He deposed that:

> "My voter's Card and the names and signatures are hereunto incorporated into my petition as annexure "A"."

Annexure "A" at page 71 of the record is a National ID and not a voter's card or an excerpt of the voters register containing the name of registered voters from which the name of the appellant could be established and verified by the National ID. The learned trial judge as a matter of fact which has not been challenged established that annexure "A' to the appellant's

affidavit in support of the petition is a national identity card and only 69 of the signatories in support of the application had voter's cards. The learned trial judge applied the decision of this court in **Hon. Otada Sam Amooti Owor v Taban Idi Amin and Electoral Commission, Election Petition Appeal No. 93 of 2016** and the holding to the effect it was not enough to merely state that one's name appears in the register of voters. One has to extract the page and annex it. Similarly, the voters' card needed to be annexed to the affidavit in support. We have considered the passage in the decision of this court relied on by the learned trial judge which passage is quoted below:

> *"By virtue of the provisions of Section 1 of the PEA, conclusive proof of a registered voter is by evidence of the person's name appearing in the National Voters' Register and not possession of a National Identity Card. Section 66 of the Registration of Persons Act 2015 provides for a mandatory use of national Identification Cards for purposes of identification of voters among others. Our understanding of this legal provision is that for national elections, the National Identity Card is used to cross check and confirm particulars in the voters' register before a voter can be allowed to vote. The National Identification Card did not replace or do away with the voters register which is a special document prepared by the Electoral Commission. Section 66 of the registration of Persons Act 2015 did not amend Section 18 (1) of the Electoral Commission Act which requires the Commission to, compile, maintain and update, on a continuing basis, the National Voters Register which includes the names of all persons entitled to vote in any national or local government elections. "*

This decision was binding on the learned trial judge. It decided that the proof of being a registered voter is by production of a voter card or by an extract of the National Voters Register which has the registration of the

voter. The petitioner did not attach his voter's card or extract a relevant page of the register. Secondly, only 69 out of the requisite 500 supporting signatures had voter's cards. They did not attach the relevant extract or extract showing their registration in the National Voters Register. On that basis the petitioner had no proof that he fulfilled the criteria of being a registered voter whose petition is supported by a least 500 signatures of registered voters under section 60 (2) (b) of the Parliamentary Elections Act 2005 as amended. While the petition itself had the material averment of the appellant and supporting signatories being registered voters, the evidence was lacking. There was no proof of the averment of being registered voters specifically of the constituency of Kibanda County North in Kiryandongo District.

We have further considered the burden of proof following the submission that the first respondent had custody and possession of the national register. We agree with the submissions of the respondent's counsel that the burden is on the petitioner to prove his petition. We have further considered the scheduling notes at the High Court and there is no admission that there petitioner and supporting signatories are registered voters of the relevant constituency.

Last but not least we do not find any basis from departing from the decision of this court in **Hon. Otada Sam Amooti Owor v Taban Idi Amin and Electoral Commission, Election Petition Appeal No. 93 of 2016.** This court is bound by its own decisions and may depart there from only on exceptional grounds. We have found no exceptional grounds to depart from the above decision. The conclusive proof of being a registered voter is by adducing in evidence the voter's card or an extract of the national voter's register showing the person concerned is a registered voter in the constituency whose elections are being challenged in court.

The basis for departure from earlier decisions of a court of coordinate jurisdiction are very limited and discussed in **Young v Bristol Aeroplane Co Ltd [1944] 2 All ER 293** the Court of Appeal of England held (per judgment read by Lord Greene MR) at page 297 on the issue of departure from previous decisions of a Court of co-ordinate jurisdiction that:

> "In considering the question whether or not this Court is bound by its previous decisions and those of Courts of co-ordinate jurisdiction, it is necessary to distinguish four classes of cases. The first is that with which we are now concerned, namely, cases where this Court finds itself confronted with one or more decisions of its own or of a Court of co-ordinate jurisdiction which cover the question before it, and there is no conflicting decision of this Court or of a Court of co-ordinate jurisdiction. The second is where there is such a conflicting decision. The third is where this Court comes to the conclusion that a previous decision, although not expressly overruled, cannot stand with a subsequent decision of the House of Lords. The fourth (a special case) is where this Court comes to the conclusion that a previous decision was given per incuriam. In the second and third classes of case it is beyond question that the previous decision is open to examination. In the second class, the Court is unquestionably entitled to choose between the two conflicting decisions. In the third class of case the Court is merely giving effect to what it considers to have been a decision of the House of Lords by which it is bound. The fourth class requires more detailed examination and we will refer to it again later in this judgment. ...

The court of appeal concluded at page 300

> "On a careful examination of the whole matter we have come to the clear conclusion that this Court is bound to follow previous decisions of its own as well as those of Courts of co-ordinate jurisdiction. The

only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarise: (i) The Court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (ii) The Court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its opinion stand with a decision of the House of Lords. (iii) The Court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam."

The decision in **Hon. Otada Sam Amooti Owor v Taban Idi Amin and Electoral Commission** (supra) is not contrary to statute and there is no decision of the Supreme Court contrary to it. We are therefore bound by it in the absence of any grounds to depart from it.

Concerning the burden of proof this court held in **Odo Tayebwa v Bassajjabalaba Nasser & the Electoral Commission E.P.A No. 13 of 2011** that:

"the burden of proof in an election contest rests ordinarily upon the contestant, to prove to the satisfaction of the court the grounds upon which he relies to get the election nullified. The burden does not shift... As regards the standard of proof ***section 61 the Parliamentary Elections Act (PEA) (17 2005)*** specifies that:

(1) The election of a candidate as a member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court-

.....

(3) Any grounds specified in subsection (1) shall be proved on the basis of a balance of probabilities.

Furthermore, in the case of **Matisko Winfred Komuhangi v Babihuga T. Winnie; Election Petition Appeal No 9 of 2002,** it was held by this court

that "it is incumbent upon the petitioner to produce credible cogent evidence to prove his allegations and not to rely on the weakness of the respondent's case."

With regard to ground 3, the appellant's counsel submitted that the learned trial Judge erred in law and fact when he failed to nullify the nomination and subsequent election of the 2nd respondent thereby condoning the illegality of violation of an interim order of court prohibiting the nomination of the NRM Party candidate for the by-election. The assertion is that the respondents proceeded with the nomination and elections in total disregard of the Court Order in Miscellaneous Application No 0049 of 2017 issued on 14th July, 2017 and therefore there is an illegality brought to the attention of the court. The appellant's Counsel relied on **Makula International v Cardinal Nsubuga (supra)** where it was held that it is a **well settled principle of the law that Court cannot sanction what is illegal and an illegality once brought to the attention of the court, overrides all question of pleadings, including any admissions made thereon**.

We have carefully considered the matter and agree with the law. Courts protect their own orders from disregard. In the English case of **Hadikson v Hadikson [1952] 2 ALL ER 567**, Romer LJ held that disregard of an order of court is a matter of sufficient gravity when he held at 569:

> "It is the plain and unqualified obligation of every person or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham LC said in Chuck V Cremer (1Coop temp Cott 342):

"A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it···it would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid-whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."

Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court (and I am not considering disobedience of orders relating merely to matters of procedure) is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to the court by such a person will be entertained until he has purged himself of his contempt··· "

While we agree that disobedience of court order ought not to be condoned, the appellant's submissions are not supported by any evidence of disobedience of court order. A perusal of the record of appeal reveals that there is indeed a **Court Order in Misc. Application No. 0049 of 2017** at page 1239 issued by Her Worship Acio Julia the Assistant Registrar, Masindi High Court on 14th July, 2017. This order was vacated by Court Order Misc. Application No. 008 2017 of the same court issued by the resident Judge, Rugadya Atwooki, J, on 17th July, 2017. On the same day, the applicant's application for a temporary injunction restraining the respondents from conducting NRM Party Primaries was said to have been overtaken by events and the file closed.

The record indicates at page 1224 that the 2nd respondent was nominated on 20th July, 2017, three days after vacating the Order in Misc. Application

No. 0049 of 2017. This was an agreed fact at the scheduling conference, before the trial court. The appellant, then the petitioner stated in his scheduling memorandum of agreed facts as fellows:-

> "III. **ON 20th July 2017**, the 1st respondent nominated the 2nd respondent as the sole candidate of the same Constituency on NRM ticket and was gazetted as such on the **18th of August 2017**."

The joint scheduling memorandum is endorsed by counsel of all parties on the 27th of June 2018. Notice for polling day for M.P Kibanda County North Constituency was published in the Uganda Gazette on the issued on 15th June 2017 for the 10th day of August, 2017 according to a copy of the gazette at 1264 of the Record. The notice was issued before the interim order and the interim order had been vacated by the time of nomination on 20th of July 2017.

In the premises there was no illegality brought to the attention of the court. The learned trial judge came to the right decision to sustain the preliminary objection that the petitioner's petition did not comply with section 60 (2) (b) of the Parliamentary Election Act 2015. In the premises, we find that this appeal lacks merit and it is hereby dismissed with costs.

Dated at Kampala this 6th day of Jan 2020

Alfonse C. Owiny – Dollo

Deputy Chief Justice

Kenneth Kakuru,

Justice of Appeal

5

Christopher Izama Madrama,

Justice of Appeal