

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
IN THE MATTER OF THE PARLIAMENTARY ELECTIONS ACT 2005
AND
IN THE MATTER OF THE ELECTORAL COMMISSION ACT CAP 140
AND
IN THE MATTER OF THE PARLIAMENTARY ELECTIONS (APPEALS TO THE HIGH COURT FROM COMMISSION) RULES SI NO. 141-1
ELECTION PETITION NO.11 OF 2020

ASIO JESCA----- PETITIONER

VERSUS

1. ELECTORAL COMMISSION

2. EPILLO ISAAC-----RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

This is an appeal by way of Petition, in which the Petitioner, Asio Jesca, is challenging the decision of the 1st respondent, the Electoral Commission, denominating her as a candidate for Bukedea Woman Member of Parliament, on grounds that;

(a) Mr Emongot Charles, who proposed her for nomination denied before the Commission that he did not sign and propose on the nomination paper as a Member of Parliament for Bukedea District.

The said decision was contained in a letter dated 26th October, 2020 communicated by the Chairman of the Respondent, Justice Byabakama Mugenyi

Simon to the complainant's lawyer M/s Okello Oryem & Co. Advocates copied into to the petitioner personally and the Returning Officer.

The above decision was made as a result of the complaint by the 2nd respondent who was added to this petition through a complaint dated 19th October 2020 to the commission challenging the nomination of Asio Jesca based on the following grounds:

1. Asio Jesca did not verify the academic papers with UNEB prior to nomination.
2. UNEB does not have records of the academic papers of Asio Jesca. There are therefore forged.
3. The name and signature of the proposer of Asio Jesca was secured by fraud because that person by the names of Emongot Charles did not sign the nomination paper of Asio Jesca. The signature on the nomination paper is forged.
4. The name and signature of the seconder of Asio Jesca was secured by fraud because the seconder by the names of Auku Charles did not sign the nomination paper of Asio Jesca. The signature on the nomination paper is forged
5. The nomination of Asio Jesca is invalid and should be cancelled by the Commission.

The petitioner was represented by *Mr. Mac Dusman Kabega* while the 1st respondent was represented by *Mr. Sabiiti Eric* and the 2nd respondent was represented by *Mr. Okello Oryem, Mr. Caleb Alaka, Mr. Kyazze Joseph & Mr. Evans Ochieng*

The following issues were raised for courts determination.

1. *Whether the petition is competently before this court?*
2. *Whether the 1st respondent had jurisdiction to entertain the matter?*
3. *Whether the denomination of the petitioner was lawful?*
4. *Whether the Orders sought under the petition are tenable?*
5. *What remedies are available?*

Whether the 1st respondent had jurisdiction to entertain the matter?

The petitioner's counsel submitted that before a complaint can be lodged to the Electoral Commission, it has to first be lodged/submitted in writing, with the lower authority that is, District Returning Officer of Bukedea District. In the instant case, there is no evidence adduced by the respondents to show that the alleged complaint was lodged with the Returning Officer.

Therefore according counsel, the 1st respondent acted without authority and exceeded its powers granted under section 15(1) of the Electoral Commission Act when it handled a complaint not legally and competently before it.

Determination

Article 61(f) of the Constitution mandates the *Electoral Commission to hear and determine election complaints arising before and during polling.*

Section 15 of the Electoral commission Act provides;

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 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.

Section 16 of the Parliamentary Elections Act provides;

Where a nomination paper of a person has been rejected or has been regarded a void by virtue of section 13-

- (a) The returning officer shall forthwith notify the person of the decision giving reasons for the decision; and*
- (b) The person shall have the right to complain against the decision to the Commission within seven days from the date of rejection and the Commission may confirm or reverse the decision of the returning officer within seven days from the receipt of the complaint.*

It can be seen in all the above provisions of the law and especially the Constitution that the commission is vested with jurisdiction to handle complaints and Electoral Commission Act, seems to create another forum for determining complaints before the returning officer.

The Acts of Parliament are vesting the Returning Officer with original Jurisdiction to handle all complaints that come before them. This in my view does not take away the jurisdiction vested by the Constitution in the Commission. This would imply that the Commission may handle any complaints in respect of any electoral complaints but must be mindful of any earlier attempts of resolving the same by the Returning Officer or if such complaint has not already been resolved at the lower level to avoid duplication or lodging a second complaint.

The argument by the petitioner's counsel that the Commission is not vested with original jurisdiction to handle complaints or alternatively that it is vested with appellate jurisdiction only is flawed and the same is not the position envisaged under the Constitution. The provision envisages some complaints that have arisen at nomination and the same would be determined or resolved by the Returning Officer. Once the Returning officer has duly exercised his powers at nomination then any complaints arising after the said stage ought to be handled by the Commission. It implies that all the documents related to the nomination process stage have to be forwarded to the Commission and the said complaints arising after the nomination exercise ought to be handled by the Commission.

The Constitution as the Supreme law of the land has vested the jurisdiction to handle complaints in the Commission, the same cannot be removed by an Act of Parliament. The construction of the legislation should commend itself to justice and reason. It is the duty of the court to give broad interpretation, keeping in view the purpose of the concerned legislation. The interpretation should further the object of the Constitution and not to dilute it.

The provisions of the Electoral Commission Act were never enacted to remove the jurisdiction of the Commission to handle complaints as provided under the Constitution. The narrow view of interpretation of the jurisdiction is not sustainable.

The Constitution visualizes the adjudication of election disputes on the basis of complaints presented to Electoral Commission and Election petition to High Court in such a manner as the competent legislature may by law provide and power also extends to provide appeals against decisions of the Electoral Commission.

The petitioner has introduced another argument in his submissions in rejoinder contending that there was no quorum of the five members or the decision was not taken by the 5 members during the impugned hearing.

This court finds that this argument is supported by any evidence presented in the affidavit in support since the petitioner never mentioned this essential fact in the affidavit and indeed stated “that Emongot Charles and Auku Charles were paraded before the commission” atleast he does not state that they appeared before Chairperson alone as contended in the submissions.

Secondly, it is the duty of the petitioner to seek and attach the record of proceedings in order to argue a meaningful appeal premised on what actually happened. It would be erroneous to sit back and hope that the respondent has to present the record of proceedings.

The complaint seems to be the decision of the Electoral Commission that was communicated to the petitioner is incompetent since it was signed by the Chairperson of the Commission only.

The Chairperson of the commission only communicated on behalf of Electoral Commission and it is not a requirement that all the members of the commission must sign on the said communication.

In absence of any evidence to support this submission, I cannot make a finding that the decision was taken without the quorum of five members.

Whether the petition is competently before court? And Whether the Orders sought under the petition are tenable.

This court has decided to resolve the two issues together since they relate to sustainability of the entire petition and are interrelated in effect to the petition.

The petitioner's counsel contended that the petition is competently before the court since it was presented under the provisions of the law i.e the Constitution and the Electoral Commission Act and the Parliamentary Elections Act.

On the next issue counsel for the petitioner argued that this court is seized with the powers and jurisdiction to make orders sought citing the Constitution, Judicature Act, Electoral Commission Act and Parliamentary Elections Act.

The petitioner contended that rule 14 of the Parliamentary Elections (Appeals to the High Court from Commission) Rules provides that no proceedings shall be defeated by any formal objection or by miscarriage of justice of any notice or other document sent by the registrar to any party to the petition. It was their submission that the respondents by stating that Hon. Among Anita Annet has already been gazetted, are trying to raise a formal objection to this objection to this petition, which objection is untenable at law.

The respondents' counsel submitted that in order for a petition under the said provisions to be competent, the reliefs sought must still be tenable under the law. That petition is rendered incompetent and improperly before the court in so far as it seeks to obtain remedies which will affect the interests of 3rd parties who are not party to the petition. See ***Constitutional Petition No. 15 of 2006 Carolyne Turyatamba and 4 others vs Attorney General.***

On the next issue counsel for the respondents submitted that the election has been concluded with the declaration and gazetting of the Hon. Among Anita Annet as the elected Woman Member of Parliament (Unopposed) for Bukedea District.

That the Orders sought if granted would consequentially amount to nullifying her election as the Woman Member of Parliament for Bukedea District and yet she is not a party to the present proceedings.

Counsel for the petitioner further submitted that the Electoral laws give distinct remedies at every stage of the electoral process and that the remedy of Appeal to nominate a candidate is only available before the Electoral Commission has

gazetted a winner. Once the gazette has been issued the available remedy is to file a petition under section 61 of the Parliamentary Elections Act.

Determination

The competency of the petition is a question of law and can be determined from the provisions which give the petitioner locus to appear in court. The petitioner has locus to bring this petition as a person aggrieved by the decision of the Electoral Commission since the following laws allow her to do.

Article 64(1) of the Constitution provides;

Any person aggrieved by a decision of the Electoral Commission in respect of any of the complaints referred to in article 61(1)(f) of this Constitution may appeal to the High Court.

Section 15(2) of the Electoral Commission Act provides;

An Appeal shall lie to the High Court against a decision of the commission confirming or rejecting the existence of an irregularity.

The failure by the petitioner to add all the necessary parties would not render the petition incompetent or improperly before the court but rather it would affect the remedies or the final orders the court may give based on the facts and circumstances of the case.

This court acknowledges that by the time the petitioner filed this petition on 2nd November 2020, the 1st respondent had not yet declared and gazetted the winner as an unopposed candidate. But the following day on 3rd November 2020, the Electoral Commission declared and Gazetted Hon Among Annet Anita as the unopposed candidate. This automatically changed the circumstances and the possible remedies available to the petitioner under the provisions of the Parliamentary Elections Act.

The court does not agree with the petitioner's counsel that the fact of declaring and gazetting the candidate (Among Anita Annet) is merely a formal objection, which objection is untenable. The declaration and gazetting of the winner is the

final stage in the electoral process and once it has happened then the Electoral process has ended and the nature of the remedies available would be to challenge the winning candidate.

The concern of this court is that the person who was declared and gazetted a winner is not a party to the proceedings before this court and yet the court is invited to give an order which is contrary to the rules of fairness or natural justice of being condemned unheard. The effect of the remedy sought would indeed have the effect of nullifying the candidate who has been declared a winner (unopposed) Hon. Among Anita Annet.

This is rooted in the fact that the law is silent on the different steps taken at every stage of the election process and available remedies. In this particular case the person complaining 2nd respondent is not the person contesting in the election and this created the unintended consequence of not being a party to the whole process of denomination and has therefore become a lucky beneficiary.

Where such a candidate is party, the issue of not being heard would not arise and according to the rules governing this appeal by way of a petition envisages original parties to the complaint from the electoral commission.

It would not be proper in my view, to have joined a person who was not party to the original proceedings before the Electoral Commission to become parties in an appeal. It is a question of reforming the law to either limit complaints to contesting candidates or to make it mandatory to join the rest of the candidates for the position to the proceedings at the hearing stage, if they are interested in matter before the commission.

The law allows the court to grant such remedies but the Constitutional mandate and provisions Article 28(1) and 44(c) of not condemning someone unheard is sacrosanct and inviolable. There is a total vacuum in law, and it is a complete absence of active law to provide for the effective redress to such a person like the current declared winner of the election while the proceedings are pending in court.

The provision cited by the petitioner's counsel Section 14(3) applies to the process arising from the Returning officer is not applicable since it specifically provides for different proceedings which are not court related. The courts need guidance with a legislation or similar provision to address the lacunae.

The court cannot re-write the law, re-cast or reframe the legislation for the very good reason that it has no power to legislate. The very power to legislate has not been conferred on the Court.

While interpreting a special statute like the Electoral laws, the court must consider the intention of legislature. The reason for this fidelity towards legislative intent is that the Statute has been enacted with specific purpose, which must be measured from the wording of the statute strictly construed.

The judge is simply not authorised to legislate law. If there is a law, Judges can certainly enforce it, but Judges cannot create a law and seek to enforce it. Like in this case, the court would be creating a law and try to enforce the same. The court cannot remove or declare a person already declared by Electoral Commission as not validly elected and especially where such a person is not a party to the proceedings.

This court's finding is buttressed by the decision of ***Byanyima Winnie vs Ngoma Ngime HCCR No. 9 of 2009*** where the Learned Judge noted that: *A person who has been declared the winner of an election or even one who has lost one is no longer a Candidate. He or she is beyond administrative reach of the Commission. Once one of the candidates has been declared a Member of Parliament, the question is now whether the said Member of Parliament has been validly elected or not and that question cannot be determined in a petition of this nature by this court. The question can only be determined upon a petition presented in the High Court and heard and determined in accordance with the provisions of Section 61 to 68 of the Parliamentary Elections Act.*

In addition, the High Court in the case of ***Kafeero Ssekitoleko Robert v Mugambe Joseph Kifomusana & EC HC-EP No. 006 of 2011***, the court was invited to determine whether in an appeal from the decision of the Commission, it could

grant orders nullifying the election of a declared and gazetted candidate and the court held thus;

“I agree with Mr Tebyasa that once one segment is completed there is no going back to it. Thus once the Commission has completed its mandate as regards the election process by ascertaining, declaring and publishing results of the election then it ceases to have any mandate to revisit the results. Any complaint against a winner who has been so published in the Gazette would be against the elected person in line with the respondent’s definition in Rule 3(e) of the Election Petition Rules that it means “the person of whose election a complaint is made in a petition.” As at the time of filing of this petition the 3rd respondent had ceased to be a “candidate” and became a “person of whose election a complaint is made in a petition”. The only proper procedure was to file a petition under the Parliamentary Election Petition Rules.”

This court agrees with the above decision and the submission of counsel for the respondents’ that the Electoral laws give different and distinct remedies at every stage of the electoral process from nomination to Campaigns, to voting, counting and declaration of results and candidates. The remedy sought at this stage has been overtaken by events and changed circumstances since the 1st respondent has declared and gazetted a winner.

This court cannot invoke its inherent powers to grant such a remedy which is not provided for under the Electoral laws since the elections are governed by a special legislation that confers a special jurisdiction which has always to be exercised in accordance with the statute creating it. The court cannot resort to other concepts (common law or equity) outside the legislation since they are strangers to Election law, unless statutorily embodied.

Therefore any person aggrieved by the decision to declare and gazette a candidate should file a petition under sections 60 and 61 of the Parliamentary Elections Act contending that the person declared a winner was not validly elected.

The remedies sought in this petition are not tenable since a candidate has already been declared a winner or unopposed.

In the final result this Petition fails and the court has not found it necessary to delve in the issue of the propriety of denomination process of the petitioner.

I make no order as to costs.

It is so ordered

SSEKAANA MUSA

JUDGE

1st /12/2020