

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.009 OF 2020

EKWENARE NAUME----- 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, Ekwenare Naume, is challenging the decision of the respondent, the Electoral Commission, denominating her as a candidate for Bukedea Woman Member of Parliament, on grounds that;

- (a) Ms Ekwenare was nominated as District councillor Bukedea Town Council on 29th September, 2020.
- (b) Ekwenare Naume presented herself for nomination as a woman Member of Parliament for Bukedea District on the 16th October, 2020.

(c) That Ekwanare Naume did not withdraw her nomination in (a) above before presenting herself for nomination as a candidate for Woman Member of Parliament for Bukedea.

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.

The above decision was made as a result of the complaint by the 2nd respondent who was added to this petition through a letter dated 19th October 2020 to the commission challenging the nomination of Ekwenare Naume since she was earlier nominated as a candidate for elections as Bukedea District Councillor by the District Returning Officer. She cannot be a candidate for two positions.

The petitioner was represented by *Mr. Mac Dusman Kabega* and *Mr Ndiwa Gerald* while the 1st respondent was represented by *Mr. Sabiti Eric* and the 2nd respondent was represented by *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 petition is competently before court?

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.

The respondents' counsel submitted that the appellant/Petitioner chose not to join Hon. Among Annet Anita since she was the candidate and that she was gazetted as unopposed.

Determination

The competency of the petition's 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 final orders the court may give based on the facts and circumstances of the case.

Whether the Commission had jurisdiction to determine the complaint?

The petitioner's counsel submitted that section 15 of the Electoral Commission Act does not give the Commission jurisdiction to entertain the complaint which had not been handled at the lower level. It was his contention that there is no evidence on court record by affidavit to show that the complaint was first handled at the lower level. He supported the submission with section 16 of the Parliamentary Elections Act.

The respondents both submitted that the Commission has jurisdiction to hear complaints as provided under Article 61(1)(f).

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 only vested with appellate jurisdiction only is flawed and the same is not the position of the Constitution. The provision envisages some complaints to 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.

Whether the denomination of the petitioner was lawful?

The petitioner's counsel contended that the petitioner was not nominated in two constituencies. They submitted that the commission failed to interpret the law or misapplied the law when determining whether the petitioner was nominated in two constituencies. According to counsel Constituency and Electoral area are two distinct things and that without her withdrawing from being District Woman Councillor for Bukedea Town Council she was at liberty to vie for Bukedea Woman Member of Parliament.

The respondents in their submission contended that it was not lawful for the petitioner to be nominated concurrently for distinct positions. It was their contention that the petitioner had not lawfully withdrawn her candidature for the earlier position for which she been nominated.

Determination

It can be deduced from the petitioner's submission that he believes that the petitioner can stand in both District/City Elections (Local Government Council Elections) as well as Parliamentary Elections since according to him there are very distinct.

According to the petitioner's counsel she need not to have withdrawn from the Local Government Election for which she had been nominated as District Woman Councillor for Bukedea Town Council.

In construing a statute the court must try to ascertain the intention of Parliament. The legislation at hand mentions Constituency but the same could not be construed to have intended persons vying for only Parliamentary Elections but

purposely standing for any election during the same election cycle. May be Parliament never anticipated such scenario where for example a Presidential Candidate can stand for in either Parliamentary Elections or Local Government Elections.

Judicial activism is regarded as the active interpretation of the existing provisions with the view of enhancing the utility and purpose of the legislation for betterment of the spirit of the Constitutional intent. The courts under its garb have to actively strive to achieve constitutional aspirations of the people and avoid any absurdity that any statute would create that is contrary to the Constitution should be addressed through judicial activism.

The law intended to bar any person (contesting candidate) to stand for more than one elective position either in Presidential Election or Parliamentary Election or Local Government Election. The contention of the petitioner's counsel is incredible and unsustainable since it defeats the principle of standing in one elective position at a time rather than trying different positions at different levels.

The court has set to work on the constructive task of finding the intention of Parliament and this could not only be done from the language of the statute but also from consideration of the social conditions and circumstances which give rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word to give "force and life" to the intention of the legislature.

The Electoral Commission rightly applied or invoked the provisions of section 172 of the Local Government Act to the circumstances of the case to bar the petitioner from contesting in both district local government elections and Parliamentary Elections.

The petitioner also contended that she duly withdrew from the local government elections by the time she was nominated. The respondent contended that the petitioner withdrew her nomination for District Councillor after she had been nominated for Bukedea Woman Member of Parliament.

The 1st respondent found that the petitioner had not withdrawn by the time she was nominated. A copy of the withdrawal in possession of the 1st respondent contained a time of 6:30pm and yet the petitioner claims to have withdrawn by 11am. It is a question of two documents one has time indicated therein while the other does not bear any time.

The 1st respondent in my view came to a proper finding that the petitioner had not resigned by the time of her nomination for Bukedea woman Member of Parliament.

Whether the Orders sought under the petition are tenable?

The petitioner contends that the court can set aside the gazette as illustrated in the case of ***Achola Catherine Osupelum vs Electoral Commission Election Petition No. 2 of 2018***. Thus the court could grant the remedies sought.

The respondent in their submissions contended that the remedies sought are untenable since a person has been declared a winner and the sum effect of declaring and gazetting a winner is that the election is concluded. The Respondent cited the case of ***Byanyima Winnie vs Ngoma Ngime HCCRev. No. 09 of 2002*** where the court held that a person who has been declared a winner of an election or even the one who lost one is no longer a candidate. He or she is beyond the administrative reach of the Commission.

Secondly the respondents contend that the person who has been declared and gazetted as winner was not made a party which would imply that the effect of the order removing her from the position as a winner will be affected. The person would be condemned unheard and this would be contrary to the Constitution.

Determination

The concern of 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 natural justice of being condemned unheard.

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. 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."

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 respondent was right to denominate the petitioner.

I make no order as to costs.

It is so ordered

SSEKAANA MUSA

JUDGE

1st /12/2020