

orders, the effect of which is to annul and set aside the election of the 1st Respondent, to declare the Petitioner who was the runner-up in the said elections as the legitimate elected winner of the said election, and for costs of the petition, among others.

[2] The petition was duly served upon the Respondents and both Respondents filed answers to the petition together with accompanying affidavits. The 1st Respondent further filed supplementary affidavits in support of the answer to the petition and the petitioner filed affidavits in rejoinder and in rebuttal to the supplementary affidavits.

Representation

[3] When the petition came up for scheduling, the Petitioner was represented by Mr. Madira Jimmy from Madira & Co. Advocates; the 1st Respondent by Mr. Arinaitwe Patson from Signum Advocates and Mr. Abio Ivan from Ederu & Gama Advocates & Solicitors; and the 2nd Respondent by Mr. Ezale Oshman holding brief for Mr. Eric Sabiiti.

Preliminary Objection

[4] When the matter came up for the scheduling conference, Counsel for the 1st Respondent indicated that they intended to raise an issue regarding the competence of the petition. It was agreed and directed by the Court that where a preliminary objection exists as to the competence of the petition, the substance of the petition could not be investigated until after the question on its competence is resolved. Counsel for the parties were therefore called upon to address the Court on the preliminary objection sought to be raised by the 1st Respondent's Counsel. The preliminary objection was to the effect that the affidavit of the Petitioner accompanying the petition was not duly commissioned and was therefore a nullity and could not support a petition. There was therefore no petition and the purported petition ought to be struck out with costs.

Submissions by the 1st Respondent's Counsel

[5] Counsel for the 1st Respondent submitted that the affidavit of the Petitioner supporting the petition was deposed on 15/03/2021 and purportedly commissioned by one Daisy Patience Bandaru on the same day. On 23/03/2021, M/s Ederu & Gama Advocates and Solicitors, one of the firms representing the 1st Respondent, wrote to the Chief Registrar of the Courts of Judicature in inquiry as to whether the said Daisy Patience Bandaru had obtained a Practicing Certificate (hereinafter to be referred to as "P.C") for the year 2021. On 30/03/2021, the Chief Registrar responded confirming, among others, that the said advocate, Daisy Patience Bandaru, had last renewed her P.C on 09/09/2020. Both correspondences were attached to the supplementary affidavit of Acidri Mubarak.

[6] Counsel for the 1st Respondent submitted that according to the affidavit in rebuttal deposed by Ecadri Michael, Daisy Patience Bandaru obtained renewal of her P.C for this year on 07/06/2021; further confirming that by 15/03/2021 when she purportedly commissioned the affidavit, she had no valid P.C. Counsel submitted that under Section 2 (4) of the Commissioner for Oaths (Advocates) Act, Cap 5, the power of an advocate to commission ceases upon an advocate ceasing to practice.

[7] Counsel further submitted that under Section 11 of the Advocates Act (as amended), for an advocate to practice, he/she must have a valid P.C which expires every 31st day of December of every calendar year. By virtue of Section 15 of the same Act, an advocate is given a grace period of up to 1st March of the following year during which period the advocate may practice without a P.C. Thereafter, all the acts an advocate undertakes in practice of law are illegal. Counsel relied on a number of authorities in which this position has been reiterated, namely, ***Abdu Ddamulira vs MSS Xsabo Power Ltd, HC M.A No. 046 of 2021 (Mpigi HC); The Returning Officer, Iganga District & Another***

Vs Haji Muluya Mustaphar, Court of Appeal Civil Appeal No. 13 of 1997; Suubi Kinyamatama Juliet Vs Sentongo Robinah Nakasirye, Court of Appeal Election Petition Appeal No. 92 of 2016; Mafabi Aisha Nabulo Vs Wamala Namboozo Florence & EC, HC Election Petition No. 018 of 2021 (Mbale HC); and Otim Nape George William Vs Ebil Fred & EC, Election Petition No. 017 of 2011 (Lira HC). Counsel concluded that the cumulative effect of the above decisions is that an affidavit commissioned by an advocate without a valid P.C is invalid and a petition supported by such an affidavit is contrary to the law and cannot stand. The same ought to be struck out with costs.

[8] Counsel for the 2nd Respondent associated himself with the submissions of the 1st Respondent's Counsel and prayed that the objection be upheld and the petition be dismissed with costs to the 2nd Respondent as well.

Submissions by the Petitioner's Counsel in reply

[9] In reply, Counsel for the Petitioner submitted that the Petitioner opposed the preliminary objection raised by the Respondents' Counsel. Counsel submitted that the only contention was on the interpretation of Section 1 (4) of the Commissioner for Oaths (Advocates) Act. Counsel submitted that although the Respondent's Counsel have interpreted it to mean that it invalidates any document signed by a person without a valid P.C, the Petitioner's Counsel differed from that interpretation and submits that it does not invalidate the acts of such an advocate. Counsel argued that if the legislature intended that such acts be invalid, they should have stated so. But the Act is silent on this. Counsel invited the Court to read the provisions of the Commissioner for Oaths Act together with the Advocates Act as amended by Act No. 27 of 2002. Counsel referred to Section 14A of the Advocates (Amendment) Act which saves the acts of an advocate who practices without a P.C. Counsel reasoned that one must first be an advocate within the meaning of Section 2 of the Advocates Act before practicing as a Commissioner for Oaths. He submitted that Counsel Daisy

Bandaru was such an advocate since her name was still on the roll of advocates.

[10] Counsel for the Petitioner further submitted that when an advocate is appointed as a Commissioner for Oaths, he/she remains as such until the commission is revoked. Counsel reasoned that for the commission to be revoked, the person must be given a fair hearing. He submitted that there was no evidence that Bandaru's commission was revoked and, as such, she is still a Commissioner for Oaths. Counsel argued that the act of the Commissioner for Oaths practicing without a P.C is merely a professional misconduct and an irregularity; whose penalty is stated in Section 6 of the Commissioner for Oaths (Advocates) Act. Otherwise, it does not invalidate the pleadings as the acts of such an advocate are saved by Section 14A of the Advocates (Amendment) Act.

[11] Counsel Concluded that given the importance of election matters, such technicalities should be ignored in preference to substantive justice in accordance with Article 126 (2) (e) of the Constitution and Rule 26 of the Parliamentary Elections (Interim Provisions) Rules, S.I 141 - 2. Counsel relied on the case of ***Ritah Natai Vs Ali Sekanjako, HC M.A No. 333 of 2014*** which departed from the old position of invalidating the acts of an advocate who commissioned an affidavit without a valid P.C. Counsel invited the court to adopt the same approach. Counsel concluded that the affidavit could still be saved by the court directing that the same be re-commissioned in the interest of justice. He prayed that the objection be overruled.

[12] Counsel for the 1st Respondent made further submissions in rejoinder which I have also taken into consideration.

Determination by the Court

[13] The relevant provision of the Commissioner for Oaths (Advocates) Act, Cap 5, is Section 1 thereof. Under Section 1 (4) of the Act, "[e]ach commission shall

immediately terminate on the holder ceasing to practise as an advocate". Section 11 of the Advocates Act Cap 267 provides for issue of practicing certificates and right to practice. It provides as follows:

"Issue of practising certificates and right to practise.

- (1) *The registrar shall issue a practising certificate to every advocate whose name is on the roll and who applies for such a certificate ..."*
- (2) *A practising certificate shall be valid until the thirty-first day of December next after its issue, and it shall be renewable on application being made ..."*

[14] The above provisions of the law have been interpreted in a number of cases. In the case of ***The Returning Officer, Iganga District & Another Vs Haji Muluya Mustaphar, Court of Appeal Civil Appeal No. 13 of 1997***, the Court of Appeal had this to say:

"Under Section 2(1) [now Section 1 (1)] of the Commissioner for Oaths (Advocates) Act the Chief Justice can only grant a commission to persons being practicing advocates who have practiced as such for not less than two years in Uganda immediately prior to making any application. Under the same section sub-section (4) the commission so granted forthwith terminates on the holder ceasing to practice as an advocate. It is very clear from the [above] two sub-sections that the granting of a commission is dependent on the authority of an advocate to practice [which is] derived from the provisions of the Advocates Act. The two Acts ... are intimately interrelated and must be read and interpreted together to give them their natural effect. The Chief Justice cannot under the Commissioner for Oaths (Advocates) Act grant a commission to an advocate who is not authorized to practice as such under the Advocates Act. This means in our view that if an advocate who has been granted a commission fails in any year to obtain a practicing certificate he ceases and stops to

act as an advocate, and therefore his commission ceases in terms of the Commissioner for Oaths (Advocates) Act. The above position has been finally settled in the Supreme Court case of Kabogere Coffee Factory Vs Haji Twalibu Kigongo SCCA No. 10/93 where it was held that documents filed by an advocate without a practicing certificate beyond the 1st March of any given year are invalid. This Court in following the above case specifically held in Bakunda Darlington Vs Dr. Kinyata & Anooother (supra) that an affidavit sworn before an advocate not in possession of a practicing certificate is invalid."

[15] The same position was reached in the Supreme Court case of **Professor Syed Hug vs. The Islamic University of Uganda, S.C.C.A No. 47 of 1995** in which **Wambuzi, CJ** (as he then was) held as follows:

"On the law and the authorities I have referred to, the position appears to be:

- (1) That an advocate is not entitled to practice without a valid practicing certificate;*
- (2) That an advocate whose practicing certificate has expired may practice as an advocate in the months of January and February but that if he does so he will not recover costs through the courts for any work done during that period. The document signed or filed by such an advocate in such a period are valid;*
- (3) That an advocate who practices without a valid practicing certificate after February in any year commits an offence and is liable to both criminal and disciplinary proceedings (See sections 14 and 18 of the Advocates Act). The documents prepared or filed by such an advocate whose practice is illegal are invalid and of no legal effect on the principle that courts will not condone or perpetuate illegalities."*

[16] It was argued by Counsel for the Petitioner herein that the above position has been departed from in preference to a more progressive interpretation of the said relevant provisions. Unfortunately, the case of **Ritah Natai Vs Ali Sekanjako (supra)** cited by the Petitioner's Counsel is a decision of the High Court which, in any case, I have not found persuasive. To the contrary, the application of Section 14A of the Advocates (Amendment) Act No. 27 of 2002 has been subject to interpretation by the Court of Appeal and in specific reference to election matters, which decision is binding on this Court. In **Suubi Kinyamatama Juliet Vs Sentongo Robinah Nakasirye, Court of Appeal Election Petition Appeal No. 92 of 2016**, the Court of Appeal had this to say:

"The petition was filed with an affidavit in support sworn by the petitioner but the same was not duly commissioned [by] one of the advocates who commissioned. One Namanya Moses had not renewed his practicing certificate for the year 2016. ... The trial Judge held that the affidavit was not duly commissioned but invoked Article 126 (2) (e) of the Constitution in a bid to cure the defect. The essence of section 14A of the Advocates (Amendment) Act 2002 is to protect innocent litigants [against] unscrupulous advocates. We note however that section 14A (1) (b) (2) makes provision for a victim of such an advocate to be given time to make good any defects arising out such an event. This, in our view, means that the matter should not proceed with defective pleadings but time would be given to the innocent litigant to rectify the error, which was not done in the instant case. The petitioner, having realised that the affidavit had been commissioned by an advocate who had no practicing certificate should have proceeded under the above section to make good the defect. ... This should, therefore not be such a case where the court should invoke Article 126 (2) (e) of the Constitution because what is being addressed here is, in our view, not a technicality within the meaning of that Article."

[17] The above decision has been variously followed by the courts in determining matters based on the same facts and circumstances during this very electoral petitions cycle, among others, namely, ***Mafabi Aisha Nabulo Vs Wamala Namboozo Florence & EC, HC Election Petition No. 018 of 2021 (Mbale HC)***; ***Hon. Lokeris Samson Vs Komol Emmanuel & EC, HC EP No. 01 of 2021 (Soroti HC)***; ***Kamurall Jeremiah Birungi Vs Nathan Byanyima & EC, HC EP No. 002 of 2021 (Mbarara HC)***.

[18] The total effect of the above decisions is that an affidavit commissioned by an advocate who is not in possession of a valid practicing certificate is invalid. It cannot be saved by the invocation of Article 126 (2) (e) of the Constitution as such is neither a technicality nor a curable defect or irregularity. The argument by the Petitioner's Counsel that expiry of a practicing certificate does not amount to ceasing or stopping to practice is not a correct construction of the law in issue. The reference to "practice" under both the Commissioner for Oaths (Advocates) Act and the Advocates Act (as amended) means to "practice lawfully". Practicing without a practicing certificate is unlawful and in fact a criminal offence. As such, such an advocate cannot be said to be a practicing advocate within the above highlighted provisions.

[19] It is clear from the provision under Section 14A of the Advocates (Amendment) Act and from the decision of the Court of Appeal in ***Suubi Kinyamatama Juliet Vs Sentongo Robinah Nakasirye (supra)*** that there is a window for the litigant to take steps to ameliorate the situation by having another affidavit properly commissioned and filed. It is clear, however, that the said option exists where it is lawfully available and where such a party applies to the Court for leave to take such a step before the issue is brought before the Court for consideration. In the present case, the option does not appear to be available and, in any case, upon realizing that the impugned affidavit was commissioned by an advocate without a practicing certificate, the Petitioner never took any step to rectify the error.

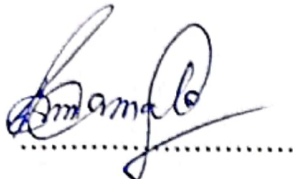
[20] It is my considered view that the option is not lawfully available, as well, because once the accompanying affidavit is invalid, there is no petition before the Court. Rectifying the affidavit would imply bringing a new petition which is not permissible under the provisions of *Section 60 of the Parliamentary Elections Act* and *Rules 3 (c) and 4 (8) of the Parliamentary Elections (Interim Provisions) Rules S.I 141 – 2*. This Court has no residual power to extend the time within which to bring the petition since the same is fixed by an Act of Parliament. As such, the option of rectifying the defect is not legally available in the present case.

[21] In light of the foregoing therefore, the objection by the 1st Respondent's Counsel bears merit and is upheld. The affidavit accompanying the petition before the court is invalid for having been commissioned by an advocate who was not in possession of a valid practicing certificate and had thus ceased to practice as an advocate at the time. It follows that the petition is not accompanied by any affidavit as required under Section 60 of the PEA and Rule 3 (c) and 4 (8) of the Rules. No valid petition is therefore before the Court. The petition filed by the Petitioner is therefore stuck out.

[22] Regarding costs, the law on costs in election petitions follows the same principles enshrined under the Civil Procedure Act. Under Section 27 of the CPA, costs follow the event unless, for good cause, the Court orders otherwise. The provision also leaves award of costs to the discretion of the Court. In the instant case, there is no reason as to why the Respondents should not be awarded costs. The Petitioner has the option of taking disciplinary proceedings against his advocate, who himself was not in possession of a valid practicing certificate, to recover any loss and costs incurred. Otherwise the Respondents are entitled to the costs of the petition as against the Petitioner and the same are awarded.

[23] In all therefore, for the above reasons, this petition is struck out with an order that the costs of the petition are awarded to both Respondents against the Petitioner.

It is so ordered.

A handwritten signature in blue ink, appearing to read 'Boniface Wamala', is written over a dotted line.

Boniface Wamala

JUDGE

01/09/2021