

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT SOROTI
IN THE MATTER OF THE PARLIAMENTARY ELECTIONS ACT,
2005 (AS AMENDED)
AND
IN THE MATTER OF PARLIAMENTARY ELECTION FOR
DIRECTLY ELECTED MEMBERS OF PARLIAMENT FOR DODOTH
EAST COUNTY CONSTITUENCY, KAABONG DISTRICT
HELD ON THE 14TH DAY OF JANUARY, 2021

ELECTION PETITION NO. 01 OF 2021**

HON. LOKERIS SAMSON ::::::::::::::::::::::::::::::::::: PETITIONER

VERSUS

**1.KOMOL EMMANUEL
2.THE ELECTORAL COMMISSION::::::::::::::::::::::::: RESPONDENTS**

BEFORE: HON. LADY JUSTICE ANNA B. MUGENYI

RULING ON A PRELIMINARY OBJECTION

BRIEF BACKGROUND

This Petition arises from the Parliamentary Elections for directly elected member of parliament for Dodoth East County Constituency, Kaabong District held on 14th January, 2021. In the said election, the Petitioner herein and the 1st Respondent, together with Abuku Mark Sagallowany, Adir Charles, were all candidates in the race for directly elected member of Parliament for Dodoth East County constituency, Kaabong District.

Upon conclusion of the election, the Returning Officer of the 2nd Respondent returned the 1st Respondent as the validly elected member of Parliament for Dodoth East County, with 7,903 votes, with the petitioner having gathered 7,892 votes with a winning margin of 11 votes, and that a total of 1, 012 votes were declared invalid. The 2nd Respondent gazetted the Results of the said election in the Uganda Gazette of the 17th day of February, 2021:



The Petitioner filed the instant Petition against the 1st and 2nd Respondents challenging the election and declaration of the 1st Respondent by the 2nd Respondent as the elected Member of Parliament for Dodoth East County Constituency, Kaabong District and now seeks to set aside the said election on grounds contained in the Petition.

PETITIONER'S CONTENTION

The principles of free and fair elections stipulated in the Constitution of the Republic of Uganda 1995 as amended, the Electoral Commission Act, and the Parliamentary Elections Act, were compromised during the elections, for the directly elected Member of Parliament for the constituency of Dodoth East County in Kaabong District, and that there was failure to conduct the election in accordance with the principles laid down in those provisions.

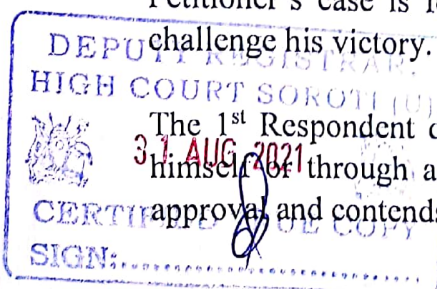
In the conduct of the said Elections, there was non-compliance with the provisions of the Parliamentary Elections Act 2005 (As amended) relating to the elections and that there was failure to conduct the election in accordance with the principles laid down in those provisions, and that the non-compliance and the failure affected the result of the election in a substantial manner.

Illegal practices or other offences under the Parliamentary Elections Act were committed in connection with the elections by the 1st Respondent personally, or with his knowledge and consent or approval.

1ST RESPONDENT'S CONTENTION

The Petitioner's allegations are denied and the election was conducted in substantial compliance with the law and despite the relatively small winning margin between the 1st Respondent and the Petitioner. There was never any non-compliance that influenced the outcome of that election and from which the 1st Respondent benefited. The 1st Respondent further contends that the Petitioner's case is founded on conjecture and fabrication to unjustifiably challenge his victory.

The 1st Respondent denies committing any illegal or electoral offences by himself or through any of his agents, with his knowledge and consent or approval, and contends that the people of Dodoth East freely and transparently



expressed their free will by overwhelmingly voting for the 1st Respondent as their preferred Candidate.

2ND RESPONDENT'S CONTENTION

The election was conducted in compliance with the provisions and principles laid down in the electoral laws of Uganda. The allegations made in para 7 (a) (i), (ii), (iii), (iv), (viii) (ix) and (x) of the Petition were not brought to the 2nd Respondent's attention. The Petitioner never made any formal request for a mandatory recount on 15th January as alleged. The letter requesting for the mandatory recount was served on the Returning officer on 18th January, 2021.

The tallying process was peaceful, free and fairly conducted without protests or intimidation and no complaint was raised by any candidate. Results from the polling stations in the Dodoth East Constituency were publicly announced and no query was raised by the Petitioner or his agents. The results that were tallied originated from tamper proof envelopes delivered to the tally centre by the 2nd Respondent's election supervisors. The tallying process was concluded on 15th January, 2021 and the 1st Respondent who had polled the highest number of votes was declared the winner. There was thus no delay in declaring the winner.

Upon declaration of the winner, the Returning officer printed out copies of the Tally sheets, save that by that time, the Petitioner's agents were not present to receive their copies. There were no reports made to the Returning officer regarding persons allegedly being chased away from polling stations who had intentions of assisting illiterates, the blind or disabled.

The presiding officers were duly trained and no incidences of invalidating valid votes were ever reported, no polling stations closed before 4:00pm as alleged and where by 4:00pm voters were still in the queue, they were allowed to vote. No form of bribery, inducements and or other electoral offences allegedly committed by the 1st Respondent or his approval were ever drawn to the attention of the Electoral Commission.

If at all there was any non-compliance with the provisions and principles of the Electoral Laws, such non-compliance did not affect the results of the election in a substantial manner.



REPRESENTATION

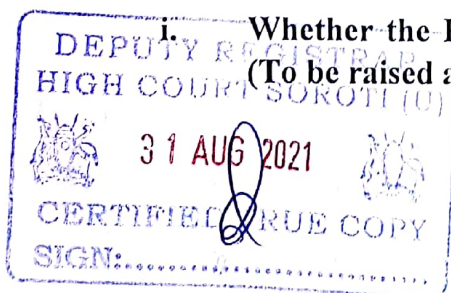
The petitioner was represented by M/s Alaka & Co. Advocates. The 1st respondent was represented by M/s Ambrose Tebyasa & Co. Advocates and M/s Ochieng Associated Advocates & Solicitors while the 2nd respondent was represented by M/s Magna Advocates.

RULING ON A PRELIMINARY OBJECTION

I have carefully read the pleadings and attachments thereto and listened to the submissions of the parties in this matter. During the scheduling conference, the following issues were agreed upon:

- i. **Whether the Petition is validly and competently before court. (To be raised as a preliminary objection)**
- ii. Whether during the elections for the directly elected Member of Parliament for Dodoth East County Constituency, there was non-compliance with the provisions and principles of the Parliamentary Elections Act.
- iii. If so whether the non-compliance affected the result of the election in a substantial manner.
- iv. Whether the 1st Respondent or his agents with his knowledge, consent and or approval, committed any illegal practice or offence under the Parliamentary Elections Act in connection with the Elections.
- v. What remedies are available to the parties.

Counsels for the parties agreed that **Issue i** is handled as a **Preliminary Objection** and made oral submission in that respect in Court. The submissions which have been considered in this Ruling are on court record and I do not find it necessary to replicate the same here.



i. **Whether the Petition is validly and competently before court. (To be raised as a preliminary objection)**

Counsel for the petitioner did not dispute that the Commissioner for Oaths who commissioned the petitioner's affidavit in support of the petition, Mr. Komakech, did not have a valid practising certificate when he commissioned the said affidavit.

Counsel for the petitioner also did not dispute the fact that the said Commissioner for Oaths renewed his practising certificate on 18th March 2021 as seen in annexure 'C' attached to a supplementary affidavit filed by the 1st respondent, way after he had commissioned the affidavit in support of the petition on 12th March 2021.

The Issue for resolution then was whether Mr. Komakech, the Commissioner of Oaths in this case, had authority to commission the affidavit in support of the petitioner when his practising certificate had expired and whether therefore the petition was valid and competent.

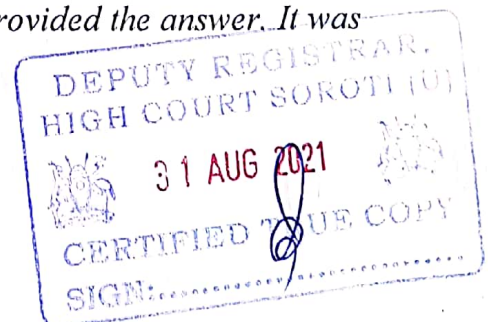
A myriad of case law has addressed the Issue above and I need not reinvent the wheel in this regard.

In the case of **Otim Nape George William Vs Ebil Fred & Another Election Petition No. 17 of 2011** Honourable Justice Musota Stephen held thus:

"...For an advocate to practice law, he/she must have a valid practising certificate (S.11 Advocates Act). It is on this basis therefore that an advocate can continue to be a Commissioner for Oaths. The commission granted to an advocate under the Act goes with a practising certificate. Once an advocate has ceased to practise as such the Commission also ceases. Therefore, it can be stated that an advocate whose practising certificate has expired cannot legally continue to administer an oath to anybody since his/her practicing certificate is the basis upon which the Commissioner for oaths operates."

The Honourable Judge continued to state that:

*"...Regarding the effect on the validity of an affidavit commissioned or documents filed by an advocate whose certificate had expired... the later case of **Kabogere Coffee Factory V Haji Twahibu Kigongo Supreme Court Civil Application No. 10 of 1993 (unreported)** provided the answer. It was*



held and specifically stated that documents filed after the expiry of the days of grace were invalid.

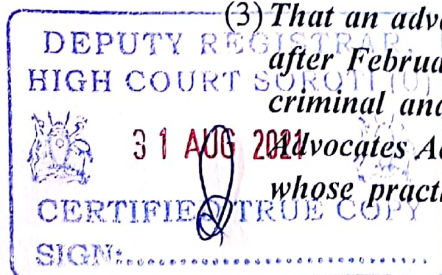
In the Court of Appeal, the position of the law was further clarified in the case of *Bakunda Darlington vs Dr. Kinyatta Stanley and Anor Civil Appeal No. 27 of 1996*. It was held *inter alia* that:

"An advocate who is commissioned by the Chief Justice under S.2 (1) (now S.1) of the Commissioner for Oaths (Advocates) Act ceases to be a Commissioner for Oaths the moment his practising certificate expires and that an advocate who practises without a practising certificate commits an offence under S.14 (now S. 15) of the Advocates Act. Accordingly, all the acts which he (or she) performs in his capacity as an advocate or commissioner for oaths after the period of grace has expired are invalid. It may be stated that here that any person who administers an oath where he has no authority to do so commits an offence under the Penal Code Act" (The Commissioner for Oaths Act (Advocates) Act S.6 also makes it an offence)."

The position above was followed in the cases of *The Returning Officer, Iganga District and Another Vs. Haji Muluya Mustaphar, Civil Appeal No. 13 of 1997*; and confirmed by the Supreme Court in the case of *Prof. Syed Huq Vs. The Islamic University in Uganda Civil Appeal No. 47 of 1995* when, on 7th November 1997, Wambuzi C.J (as he was then) held that:

"... 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 documents 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 & 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.”
(emphasis mine).

Applying the above authorities to the present matter, it is clear that Mr. Komakech did not have a practising certificate when he commissioned the affidavit of the petitioner on 12th March 2021 (a fact that was conceded to by counsel for the petitioner) thereby rendering the said affidavit invalid. The petition before this Court is therefore fatally defective, invalid, incompetent and must collapse.

Counsel for the petitioner prayed that the Court allows the petitioner to file fresh affidavits in support of the petition should the Court indeed find that the affidavit in support of the petition is invalid. It should be noted that the said Mr. Komakech commissioned several other affidavits in support of the petition when he did not have a valid practising certificate and the same are invalid and accordingly struck out.

As pointed out by Honourable Justice Moses Kazibwe in **Kamurali Jeremiah Birungi Vs Nathan Byanyima and Another Election Petition No. 0002 of 2021**, while stating that the effect of non-renewal of a practising certificate by the advocate who commissioned the affidavit did not amount to commissioning an affidavit; under section 60 of the Parliamentary Elections Act and Rules 3 (c) and 4(8) of the Parliamentary Elections (Interim Provisions) Rules, the petition filed with such an affidavit collapses since it is not supported by any evidence as the law requires.

Further, as submitted by counsel for the respondents with whom I agree, even **Article 126(2) (e) of the Constitution of the Republic of Uganda** cannot cure a petition and affidavit in support filed in contravention of substantive law because that Article was not created/ intended to defeat the law (see **Suubi Kinyamatama Juliet Vs. Sentongo Robinah Nakasirye and Another Election Petition Appeal No. 92 of 2016**).

From the above, it is the firm view of this Court that once a petition that is required by law to be filed thirty days after the publication of election results in the gazette is found to be incompetent and is struck out, allowing a petitioner to file a fresh petition several months later is illegal and in contravention of **section 60 of the Parliamentary Elections Act** and will set a very bad precedent for electoral processes in this country. In the



circumstances, this Court is unable to grant the prayers of counsel for the petitioner as prayed.

In the result, there is no legal petition before this Court. The preliminary objection raised by the respondents in this regard is upheld and the present petition is accordingly dismissed with costs to the two respondents.

Anna B. Mugenyi

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HON. LADY JUSTICE ANNA B. MUGENYI

DATED.....31/8/2021.....

