

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA
ELECTION PETITION NO.003 OF 2021

HON.TUMURAMYE GENENSIO

PETITIONER

VERSUS

- 1. TAYEBWA HERBERT MUSASIZI**
- 2. THE ELECTORAL COMMISSION**

RESPONDENTS

BEFORE HON JUSTICE MOSES KAZIBWE KAWUMI
RULING

The Petitioner contested for the position of Member of Parliament for Kashongi County Constituency against the 1st Respondent and Mr. Asimwe Joseph. The election was held on 14th January 2021 and the 2nd Respondent declared the 1st Respondent as the winner with 7,790 votes as opposed to the Petitioner who polled 7,500 votes.

Dissatisfied with the declared results, the Petitioner seeks a declaration that the election was conducted in non-compliance with the Electoral Laws and principles governing elections and that he should be declared to have won. In the alternative, the Petitioner seeks an order for the 2nd Respondent to hold fresh elections for Kashongi County Constituency, Kiruhura District.

Legal Representation.



Mr. Agaba Jadson assisted by Mr. Musasire Allan and Mr. Munabi Phillip appeared for the Petitioner. Mr. Kandebe Ntambirweki assisted by Ms. Tumukunde Christeen appeared for the Respondents.

Preliminary Objections.

At the commencement of the hearing, Counsel for the Respondent objected to the validity of the Petition contending that the Petitioner was not validly elected as a candidate and could not therefore lodge a valid Petition to challenge the election of the 1st Respondent.

Counsel contend that under **section 60(2) of the Parliamentary Elections Act, Act 17 of 2005** 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.

It is contended that the Petitioner was not validly nominated since his nomination papers did not bear names and signatures of a minimum of ten persons who are registered voters to support his nomination as required by **Section 11(1)(c) of the Parliamentary Elections Act.**

Counsel for the Respondents argued that the nomination paper submitted by the Petitioner should be regarded as void in line with **Section 13 of the Parliamentary Elections Act.** It provides:-

"A person shall not be regarded as duly nominated for a constituency and the nomination paper of any person shall be regarded as void if—

(a) the person's nomination paper was not signed and countersigned in accordance with subsection (1) of section 11;

- (b) the nomination fee referred to in subsection (3) of section 11 was not lodged with his or her nomination paper;*
- (c) the person seeking nomination was not qualified for election under section 4;*
- (d) the person seeking nomination has been duly nominated for election for another constituency for which the poll has not taken place; or*
- (e) the person has not complied with the provisions of section 4".*

The Affidavits in support of the Petition were also stated to violate sections 1, 2 and 3 of the Illiterates Protection Act. The full names and addresses of the persons who drafted the Affidavits and the Lawyer who commissioned them were not stated. Counsel invited the court to strike the Affidavits off the record.

It was further contended that the Voters Roll presented with the Petition should be struck off the court record for want of certification by the Election Commission. Counsel urged the court to strike the Voters Roll off the record.

Response to the Objections.

It was contended for the Petitioner that he was a validly nominated candidate whose Petition raises matters of bribery, intimidation of voters and disenfranchisement which merited to be inquired into by the court.

Counsel argued that the nomination paper with the impugned signatures is filed in triplicate and the one delivered to the 2nd Respondent was duly signed by ten nominators. The court was referred to the Declaration of Candidate Form on which the Returning Officer did not state that the Petitioner was not duly nominated. This was flaunted as the evidence to prove that the nomination paper had ten signatures as opposed to the one annexed to the Petition with nine.

Counsel urged the court to entertain evidence to prove the contention that what was submitted to the 2nd Respondent was signed by ten persons supporting the nomination of the Petitioner.

The Answer to the Petition filed by the 2nd Respondent was also pointed out to show that the candidacy of the Petitioner was admitted. Counsel argued that this is a pleading binding on the 2nd Respondent who cannot turn around to claim that the nomination was not valid. I was invited to disregard the objection relating to the alleged invalid nomination of the Petitioner.

In regard to the Affidavits in support of the Petition, Counsel submitted that the provisions of the Illiterates Protection Act have to be read together with the Commissioners for Oaths (Advocates) Act. It was argued that the Court cannot assume that the deponents of the Affidavits do not own the contents therein before they appeared as witnesses in court.

Mr. Kandebe argued in reply that Elections are about margins and numbers. The missing signature on the nomination form invalidated the candidacy of the Petitioner and this can only be proved by the annexures to the Petition and not any other evidence. I was invited to strike out the Petition with a Certificate of Costs for two Counsel.

Consideration and Decision.

I have considered the able submissions of counsel for both sides and read the case law cited in support of the respective positions. I find it imperative to observe that the 1st Respondent indicated in the Answer to the Petition that the Petition was incompetent and untenable at law as the Petitioner was not a lawful candidate at the election and cannot bring a Petition.

The Petitioner was thus put on notice about what was to be raised and had all the time since 29th March 2021 to introduce what he claims to be a nomination form with all the ten signatures of persons supporting his nomination. Counsel for the Petitioner did not use the time to request for a certified copy from the 2nd respondent and/or issue a Notice to produce the same document from the 2nd Respondent.

Given that nomination papers are filled in duplicate, the implication is that what the Petitioner retained is what he used for this Petition. It shows ten names and nine signatures of the persons who supported his nomination. It is attached to the Affidavit sworn by the Petitioner hence it is evidence before the court binding on the Petitioner.

Counsel for the Petitioner argued that the 2nd Respondent did not state any reason to show that the Petitioner was not validly nominated in the Declaration of nominated persons form executed by the returning officer. It was further argued that an admission that the Petitioner was a candidate was made in the Answer to the Petition.

I was urged to disregard the contentions of Counsel for the Respondents and inquire into the issues concerning the election raised by the Petitioner.

The 2nd Respondent admitted to various contentions in the Petition including the fact that the Petitioner was a candidate who polled 7,500 votes. That did not validate the candidacy of the Petitioner which can only be determined by whether he fulfilled all the requirements to be nominated as such. The validity of the Petitioner's candidacy was also not an agreed fact in the scheduling memorandum filed by Counsel.

If the Legislature had intended that failure to acquire ten names and signatures of persons supporting a candidate's nomination would not void the nomination, it should have expressly stated so in the Act.



Section 11(1)(C) of the Parliamentary Elections Act provides:-

"Nomination of a candidate shall be made on nomination day by two registered voters appearing in person tendering to the returning officer the following-

(a).....

(b).....

(c) *The names and signatures of a minimum of ten persons who are registered voters in the constituency where the person seeks nomination as a candidate supporting the nomination and each of the persons so signing shall state in the nomination paper his or her village, occupation and personal voter registration number;*

The Petitioner met all other requirements but the nomination paper he submitted to the 2nd Respondent was not signed by Akankwasa Samosi Nelson. Ten names but only nine signatures were submitted to the 2nd Respondent. This is contrary to section 11(1) (C) of the Act which is couched in mandatory terms and is not merely directory. It expressly sets out the consequences of the failure to meet the conditions set out.

The failure by the person to affix his signature on the nomination paper further implies that the village of residence, occupation and personal voter registration details attributed to the said person could not be relied on by the 2nd Respondent. I regard this to have been an oversight on the part of the 2nd Respondent but which cannot be swept under the carpet. It is an illegality brought to the attention of the court and has to be accordingly handled as such.

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On account of the Petitioner's failure to raise the ten names and signatures of persons supporting his nomination, he was not duly



nominated for the Kashongi County Constituency. The purported nomination was void in terms of section 13 of the Act and all the subsequent actions including his candidacy were a nullity.

The Petitioner lacks the locus standi to challenge the results of the election held on 14th January 2021 since he was not a validly nominated candidate for Kashongi County Constituency.

In **Martin Kizito Serwanga V Namujju Dionizia Cissy & Electoral Commission. EPA No.005 of 2016** which is binding on this court, the Court of Appeal set aside a decision of the High Court in which the trial Judge departed from the decision in **Wanambwa Milton V Wanjusi Wasieba & EC. EPA No.1/2005**. The court in Wanambwa's Appeal held that failure to raise 5 of the required 500 signatures invalidated the Petition filed to challenge results.

In Namujju's case (supra) the trial Judge had proceeded to hear an election Petition with 469 of the required 500 signatures. The judgment was set aside by the Court of Appeal which further pointed out that it is the duty of a Court to try to get at the real intention of the legislature by carefully attending to whole scope of the statute under scrutiny.

I find merit in the Preliminary Objection regarding the invalidity of the Petition and do not find it necessary to canvass the rest of the objections raised. The Petition is struck out for invalidity since the Petitioner was not a validly nominated candidate. Costs will be paid to the Respondents.

Counsel for the Respondents invited court to grant a certificate of costs for two Counsel. Ordinarily, a winning party has to be awarded costs under section 27 of the Civil Procedure Act. A certificate of costs for two counsel has to be applied for with justification by Counsel which was not done in this case.

It is normally based on factors out of the normal in usual litigation like the complexity of the case or the voluminous nature of the pleadings involved and the work it entailed to represent the winning party. What was before me was not unlike other election petitions. A few election malpractices at a few polling stations were raised. The Petition was not argued up the end but has been determined on a preliminary objection. I do not find this to be a proper case for the award of a certificate for two counsel.



Moses Kazibwe Kawumi

Judge

31st August 2021