

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MPIGI
HCT-15-CV-EP-003 OF 2021

MUBIRU ELIPHAZ.....PETITIONER

VERSUS

1. KIVIIRI TUMWEHE GEOFREY

2. THE ELECTORAL COMMISSION.....RESPONDENTS

RULING

BEFORE: HON. JUSTICE RICHARD WEJULI WABWIRE

At close of the scheduling conference of this Petition the Respondents raised three points of law which this Court decided to resolve upfront before proceeding to hearing of the Petition on the merits.

Background.

The Petitioner and the 1st Respondent contested for the position of L.C V Chairman Gomba District.

The Petitioner was declared 2nd and the 1st Respondent 1st, by the 2nd Respondent, in the outcome of the election.

The Petitioner filed this Petition to challenge the outcome of the election.

Counsel for the 1st Respondent raised a point of law in respect of the Affidavit in support of the Petition deposed by the Petitioner, that paragraph 2 of Affidavit in support is hearsay and should for that matter be expunged
5 from the Court record.

Counsel submitted that paragraph 2 of the Petitioners Affidavit in support of the Petition offends O. 19 r. 3 (1) and (2) Civil Procedure Rules by deposing to facts without disclosing the source of information and should therefore be severed or expunged from the record .

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Under the impugned paragraph 7, the deponent states that he was informed by his agents at various polling stations about the fact of persons who have since died, appearing on the National Voters Register and who therefore could not have voted having died before the polling date.

15 The Deponent/Petitioner does not disclose his source of information in the paragraph.

The Petitioner swore to evidence in respect of Kyamulangwa Polling station, Lwaweba Polling station, Kashanga Polling station and Bogole Primary School Polling station.

20 The 1st Respondent's Counsel prayed that paragraph 7 (a)-(d) be removed from the affidavit in support and that this should apply to any resultant

affidavits in support , in respect of the allegation of dead persons appearing on the National Voter's Registers sworn by any other witnesses.

Counsel for the Petitioner conceded to the preliminary objection raised and it is accordingly upheld.

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The 2nd preliminary objection was raised by Counsel for the 2nd Respondent. He contended that paragraph 4.1 and 4.2 of the Petition offends O. 6 r 3 of the Civil Procedure Rules for not particularizing the allegations of connivance that are pleaded in the said paragraph 4.1-4.2. In those
10 paragraphs the Petitioner made allegations that the 2nd Respondents official connived with the 1st Respondent and his agents to forge and alter the results of the declaration forms.

Counsel contended that no particulars of the alleged connivance which is akin to fraud, forgery or impersonation were pleaded, which therefore offends
15 O. 6 r 1 & 3 of the Civil Procedure Rules. That Paragraph 4.1 and 4.2 does not for example indicate the date when and which of the 2nd Respondent's Officers participated in the alleged connivance with Agents of the 1st Respondent, nor does it name the person said to have been impersonated.

20 That the omission of those particulars denies the 2nd Respondent a fair hearing in so far as the case against them is not fully pleaded in the impugned paragraphs of the Petitioner.

He prayed that the Petition be struck off the record for being incompetent in so far as it offends O. 6 r. 3 of the Civil Procedure Rules, by omitting to plead the particulars of the allegations of connivance as required.

5 In reply, Counsel for the Petitioner submitted that the Petition complied with rule 4 (8) of the Parliamentary Elections Rules, (Form A in Schedule to the Rules). He contended that S.172 Local Government Act allows the usage of the Parliamentary Elections Act and the Presidential Elections Act which provide for the Form that the Petition should take as indicated in the schedule to the Rules formulated thereunder. He made the argument that
10 based on the Form prescribed under the said Acts and Rules, the Petitioner's Affidavit in support mentions the documents which were forged and altered and that the Affidavit evidence on record brings out the particulars required by the law and these are stated in paragraph 4.1 and 4.2 . That the Petitioner complied with the format provided by the law and was therefore
15 proper and rightly before Court.

In rejoinder, the 2nd Respondents Counsel contended that the Affidavit in support, which contains evidence , does not do away with the requirement and obligation to plead particulars in the Petition and further, that the Parliamentary Elections Rules do not take away the obligation to comply
20 with O. 6 r 3 of the Civil Procedure Rules.

Resolution.

To resolve this issue, it became imperative to determine whether the Parliamentary Election Act and Rules from which the Petitioner contends to

have derived the mandate to coach and present or style the Petition in the manner that they did are indeed applicable to a Petition of this nature.

S. 143 (1) Local Government Act provides that in hearing of a Petition, the powers of Court and the rules of procedure shall be those, which apply to a
5 civil action in a Court of Law. While S. 172 provides that;

“For any issue not provided for under this part of the Act, the Presidential Election Act and the Parliamentary Elections Act in part shall apply to the election of Local Councils with such modifications as may be deemed necessary by the Electoral Commission.”

10 The “plain meaning rule of interpretation of statutes” dictates that statutes be interpreted using the ordinary meaning of the language of the statute unless the statute defines some of its terms otherwise.

Guided by this rule, the meaning this Court lends to the Provisions of S. 143 and S. 172 of the Local Government Act is that the mandate granted under
15 these provisions is only limited to conduct of election and does not transcend into Election Petitions.

Faced with the very same question in the case of **Wanyama Gilbert Mackmot v Hisa Albert and Electoral Commission**, Election Petition Appeal 99/2016, the Court of Appeal stated as follows:

20 *“...the Legislature did not intend to apply the two Acts(Parliamentary Elections Act and Presidential Elections Rule) to other matters other than the conduct of elections....in our view , Petitions and payment of fees are not matters of conducting elections of Local*

Councils. Those matters relate to adjudication of disputes after the elections. Therefore S. 172 Local Government Act does not apply to the provisions of Parliamentary Elections Act."

5 The trial Court was faulted for applying the Parliamentary Elections Act in a Local Council Election Petition.

In the instant case, having relied on the Parliamentary Elections Act to coach his pleadings under Paragraphs 4.1 and 4.2 of the Petition, the Petitioner offended O. 6 r. 3 of the Civil Procedure Rules for reasons that the Parliamentary Elections Act and the Rules thereunder do not apply to
10 Local Council Election Petitions, of which the instant application is one.

The Respondents preliminary objection is upheld and I accordingly order that paragraphs 4.1 and 4.2 of the Petition are severed from the Petition and expunged from the record.

Counsel for the 2nd Respondent raised a further preliminary objection that
15 some of the affidavits in support of the Petition offended the law relating to illiterate persons. (The illiterates Protection Act Cap 78). The impugned Affidavits are the ones deposed by:

- a) Ssekate Adrian
- b) Nakibuka Hafiswa
- 20 c) Ntale Jamilu
- d) Ryalikunda Denes Denesi.

Counsel faulted the Affidavit for not stating from what language the translation was made and that the name of the person who wrote the

Affidavits on behalf of the illiterate deponents is not indicated as required by the law. He contended that the Affidavits offended Section 2 r 3 of the Illiterates Protection Act.

5 Counsel for the 1st Respondent associated himself with the submissions by the 2nd Respondent's Counsel but also added that the Affidavits offended the Oaths Act as well.

The Petitioner's Counsel contended that the Affidavits complied with the Oaths Act and with the Illiterates Protection Act which, he submitted that,
10 complimented each other. He cited the case of **Nakato Segayi & Electoral Commission vs Nabukenya Brenda , Election Petition 17 and 21 /2016** which I have taken into consideration.

He also contended that the disclosure in the Jurat that the Commissioner of Oaths was fluent in Luganda and English, which is the official language of
15 Court (English) sufficed to resolve the requirement of indicating the language of translation and to therefore conform to the requirements of the Illiterates Protection Act and the Oaths Act.

I have carefully considered the submissions by Counsel and have also
20 addressed myself to the provisions of the Illiterates (Protection Act and the Oaths Act in the context of the objection raised by the Respondents and the reply by the Petitioner. I have also had the benefit of scrutinizing the impugned Affidavits and of reading the decision of the appeal court it he

case of **Mugume Peter vs Mudiobole Abedi Nasser Election Petition Application 16/2016** which was cited and provided by the Respondents.

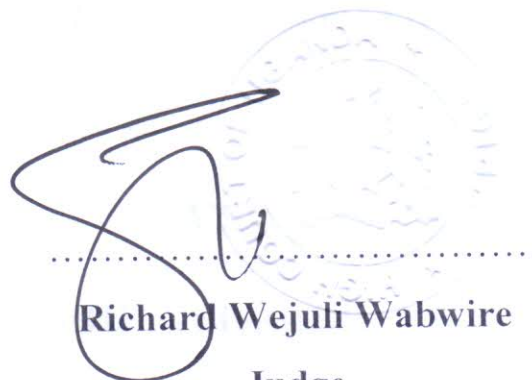
The conclusions arrived at by their Lordships in that case is very instructive
5 in matters of Affidavits deposed by Illiterates. They held, among others, that:

“ Without evidence to prove that the affidavits were drafted at the instruction of the deponents, we are unable to find that what went wrong was a matter of mere form and not substance....We are
10 therefore persuaded that the impugned 23 affidavits should have been expunged from the record.”

Similarly in the 4 affidavits in question in the instant case, there is no evidence to prove that the said affidavits were drafted at the instruction of
15 the 4 deponents. In my view, the affidavits violated S. 3 of the Illiterates Protection Act. A mere statement by the Commissioner of Oaths that the affidavits were read over and explained to the deponents does not suffice to bring them in conformity with the requirements of the Act nor does the proclamation of the Commissioner's proficiency in Luganda and English
20 fill in for the Statutory prescription.

The preliminary objection is upheld and the Affidavits of Nakibuka Hasifwa, Ntale Jamilu, Ryalikuda, Denes Denesi and Ssekate Adrian are accordingly struck off and expunged from the record.

5 I so order.



Richard Wejuli Wabwire

Judge

26/08/2021

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