

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
ELECTION PETITION NO. 09 OF 2021
IN THE MATTER OF LOCAL GOVERNMENT ACT CAP.243

AND

IN THE MATTER OF THE PARLIAMENTARY ELECTION ACT NO.17
OF 2005 (AS AMENDED)

AND

IN THE MATTER OF PARLIAMENTARY ELECTIONS RULES SI 141-2

AND

IN THE MATTER OF LC5 CHAIRPERSON ELECTIONS FOR
KAKUMIRO DISTRICT HELD ON 20TH JANUARY, 2021

KASAANA WASHINGTON KAKEMBO ADYERI :::::::::::PETITIONER

VERSUS

1. SENTAYI SENKUSU JOSEPH

2. ELECTORAL COMMISSION :::::::::::RESPONDENTS

RULING

BEFORE: HON. MR. JUSTICE AJIJI ALEX MACKAY

This petition was brought by Mr. Kasaana Washington Kakembo Adyeri, challenging the nomination and subsequent election of Mr.Sentayi Senkusu Joseph as the LC5 chairperson for Kakumiro District.

In the final result of the election conducted by the 2nd Respondent on the 20th of January, 2021 in which Kasaana Washington Kakembo Adyeri, Katusabe Nicholas, Mukisa Mathew Ntiyaganyi and Sentayi Senkusu Josoehe were candidates, the 2nd respondent declared and published the 1st respondent as the winner and validly elected LC5 Chairperson for Kakumiro District.

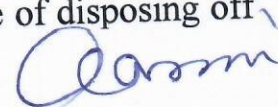
Aggrieved by the nomination, election and the subsequent declaration by the 1st respondent as the validly elected LC5 chairperson of Kakumiro District, the petitioner filed the instant petition challenging the academic qualifications submitted by the 1st respondent to the 2nd respondent at the time of his nomination citing allegations of election mal- practices. The petitioner prayed for declaration and orders, the sum of which is to annul and set aside the election of the 1st respondent and to declare the petitioner who was the 2nd best candidate in the said elections as the duly elected LC5 Chairperson of Kakumiro District.

Representation

The petitioner was represented by Musoke Ibrahim holding brief for Kiwanuka Abudallah from M/s Kiwanuka, Kanyago & Co. Advocate and the respondents were represented by John Paul Baingana from M/s JP Baingana & Associated Advocates.

Preliminary objection

When the petition came up for scheduling, counsel Baingana informed Court that he intended to raise a strong preliminary objection and prayed that he be allowed to file written submissions on the preliminary objection which prayer was granted by this Court. This Court had earlier given guidance and directed both counsel that preliminary objections will only be entertained if they are capable of disposing off the petition.



Submissions by the Respondents

Counsel for the respondents submitted that the preliminary objection is to effect that the petition is incompetent in law for being *res judicata* since the issues alleged by the petitioner for determination before this Court were already adjudicated upon by a Court of competent jurisdiction in 2016. He submitted that the petitioner does not have any other ground other than regarding names and academic qualifications which claims are repeated in the petitioner's affidavit in support of the petition. Counsel for the respondents made reference to paragraph 5 (d),(e) and (f) of the petition in which the petitioner stated that;-

- (d) *"the 1st respondent sat his primary leaving examination, U.C.E and all the other academic awards using the name **SENKUSU JOSEPH** and he could not lawfully and validly be nominated on the Name of **SENTAYI SENKUSU JOSEPH**"*
- (e) *"that the 1st respondent did not at any time legalize the change of his name from **SENKUSU JOSEPH** to **SENTAYI SENKUSU JOSEPH** who is a totally different person"*
- (f) *"that the 1st respondent's academic documents have discrepancies in the names UCE having **SENKUSU JOSEPH** and diploma award having **SENKUSU JOSEPH** and the same could not be relied upon by the 2nd respondent"*

Counsel Baingana further submitted that the issues and matters raised in the petition were long determined in the decision of Electoral Commission of 25th August, 2016 vide LEG 75/79/01 and in Election Petition No.041 of 2016 Ssemanda Apuuli Gerald V. the Electoral Commission and Sentayi Senkusu Joseph in the Judgment of Hon. Lady Justice P. Basaza- Wasswa and as such the matters are *res judicata*.

Counsel cited section 7 of the Civil Procedure Act Cap 71 and the case of **Akuku Ebifania (Administrator of the estate of the late Vubaaka Joan) Vs. Victoria Munia & Anor Civil Appeal No.027 of 2016** for the position that, *"for res judicata*

to apply, the decision in the former suit must also be shown to have concerned a matter that is directly and substantially in issue in the subsequent suit." Counsel Baingana concluded by praying that this Court finds the issue of the 1st respondent's names and academic qualifications as *res judicata*.

Submissions by the Petitioner

In reply, Counsel for the petitioner cited section 7 of the Civil Procedure Act Cap 71 for the doctrine of *res judicata* and submitted that the conditions for the applicability of the doctrine of *res judicata* have been set out in decided cases. Firstly, that matters directly and substantially in issue in subsequent suit must have been substantially in issue in a former suit. He cited the case of **Posiyano Semakula vs Susan Namagala & Others CACA No.2 of 1977**, secondly, the suit must be between the same parties or under whom they or any of them claims and the parties must have been litigating under the same title in the same suit. Counsel relied on the case of **Gokaldas Lixilidas Tanna vs. Sister Rose Muyinza, HCCS No. 707 of 1987**, thirdly, the Court trying the former suit must have been a Court of Competent Jurisdiction to do so, the case of **John William Kahuk & Others vs Personal Representative of Rt. Rev Eric Sabiti (1995) V KALR 79** was cited for the above position. And fourthly, counsel relied on the case of **Lt. David Kabareebe vs. Maj Prosy Nalweyioso CACA No.34 of 2003** for the position that the matters directly and substantially in issue must have been heard and finally determined.

On the test in determining whether a case is barred by the doctrine of *res judicata*, counsel relied on the case of **Kafeero Sentongo vs Shell (U) Ltd. & Uganda Petroleum Co. Ltd CAC Appl. No.50 of 2003** where Court held that, "*in determining whether or not the suit is barred by res judicata, the test is whether the plaintiff in the second suit is trying to bring before the Court in another way in a form of a new cause of action, a transaction which has already been presented*"



before the Court of competent jurisdiction in earlier proceedings which have been adjudicated upon."

Counsel for the Petitioner further submitted that the issues for determination in this petition are not entirely already adjudicated upon by the Court as alleged by the respondents since in the instant petition, issue of election mal-practices are raised and illustrated in paragraph 5 of the petition. That the parties in both petitions are not the same and therefore the requirements for the principle are not satisfied. Counsel concluded with a prayer that the Court finds the point of law misconceived and the same be overruled so that the petition can be heard and determined on merit.

Determination by the Court

The provisions of the law and the principles enunciated in decided cases regarding the doctrine of *res judicata* have ably been referred to by both counsel in their written submissions.

The doctrine of *res judicata* is defined in **Black's Law Dictionary 7th Edition** to mean an issue that has been definitively settled by a judicial decision.

The statutory provision of the doctrine of *res judicata* is found in Section 7 of the Civil Procedure Act Cap 71 which provides as follows; -

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court."

In order for the doctrine of *res judicata* apply, the supreme Court of Uganda in the case of **Manshukhlal & Anor Vs Attorney General & Anor (SCCA No. 20 of**



2002) has summarized the essential ingredients which must be shown to exist as follows;

- (i) *There have to be a former suit or issue decided by a competent court.*
- (ii) *The matter in dispute in the former suit between parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.*
- (iii) *The parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title.*

I am going resolve, each of the elements separately as follows.

- (i) **There have to be a former suit or issue decided by a competent court.**

The common law doctrine of *res judicata* bars re-litigation of cases between the same parties over the same issues determined by a competent Court. The rational is to prevent multiplicity of suit and bring finality to the litigation. In determining the applicability of the doctrine of *res judicata*, the Court is not concerned with the correctness or otherwise of the earlier judgment. All that is necessary to establish is that the Court that heard and decided the former suit was a Court of competent jurisdiction.

The respondents have referred this Court to the decision of Hon. Lady Justice P. Basaza-Wasswa in the case of **SSemanda Apuuli Gerald Vs Electoral Commission and Sentayi Senkusu Joseph Election Petition N0 41 of 2016** on which they hinge their submission that the issues raised in the instant petition were already determined by a competent Court.



This court has carefully read the pleadings of the parties in the instant election petition and the pleadings in the case of **SSemanda Apuuli Gerald Vs Electoral Commission and Sentayi Senkusu Joseph Election Petition N0.41 of 2016** which is attached to the 1st respondent's affidavit in support of his answer to the petition. I have appreciated that indeed that matter was tried and determined by a court of competent jurisdiction.

- (ii) **That matter in dispute in the former suit between parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.**

With regards to the preliminary objection being *res judicata*, counsel for the 1st respondent referred this Court to paragraph 5 (d), (e) and (f) of the petition as shown below;

- (d) *"the 1st respondent sat his primary leaving examination, UCE and all the other academic awards using the name **SENKUSU JOSEPH** and he could not lawfully and validly be nominated on the name of **SENTAYI SENKUSU JOSEPH**"*
- (e) *"that the 1st respondent did not at any time legalize the change of his name from **SENKUSU JOSEPH** to **SENTAYI SENKUSU JOSEPH** who is a totally different person"*
- (f) *"that the 1st respondent's academic documents have discrepancies in the names UCE having **SENKUSU JOSEPH** and diploma award having **SENKUSU JOSEPH** and the same could not be relied upon by the 2nd respondent."*

In answer to the petition, the 1st respondent stated that all matters raised in the petition above were duly determined. As such the matters are *res judicata*. He further stated that the petition does not have any other ground other than that regarding

names and academic qualifications. I would like to reproduce the proceedings which led to my learned sister Hon. Lady Justice P. Basaza- Wasswa making her decision in the earlier **SSemanda Apuuli Gerald Vs Electoral Commission and Sentayi Senkusu Joseph Election Petition N0.41 of 2016** and I quote;

*"In the present case, the 2nd respondent adopted the name **Senkuusu** at the age of 18 years, assuming that the version he added the name in 1984 is the correct one, there is nothing on record to demonstrate that his name was registered at birth and that therefore the failure by his parents to apply to register the change of name was in breach of law. She concluded thus, for those reasons and for the reason that there is no evidence that the 2nd respondent is not one and the same person he claims to be, I reject the petitioner's claim that the 2nd respondent is not linked to the results he claims are his."*

In regard to academic qualifications the judgment of the Hon. Lady Justice P. Basaza- Wasswa at page 19 from para 27 she found *"that as it maybe, the question that I must address now is, could the 2nd respondent's failure to pass primary seven in 1983 have been a legal impediment to his attaining UCE or a diploma in LGHR? My answer is no"*

On page 30 she finds thus "this court reiterated its holding in the PLE scenario and in his UCE scenario like the entry in O'level after PLE, the attainment of UCE was properly legitimate"

On paragraph 31 she finds thus "I find that like the UCE qualifications, the authenticity of the 2nd respondent's diploma in LGHR is not in dispute. Both qualifications were admitted in evidence as part of EXBX8 and the original documents were duly presented to Court."

In conclusion, I thereof find that the same issues that have been raised in this petition are fundamentally the same with what was dealt with Hon. Lady Justice P. Basaza-

Wasswa in SSemanda Apuuli Gerald Vs Electoral Commission and Sentayi Senkusu Joseph Election Petition N0.41 of 2016.

- (iii) That the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title.

The petitioner submitted that for *res judicata* to suffice, the parties in the present case must have been the same with those in the previous suit they further refer to the judgment of Hon. Lady Justice P. Basaza- Wasswa that it was evident that the parties in both petitions are not the same and therefore the requirements for the principle of *res judicata* are not satisfied.

I do not agree with the above submission, the general principles of *res judicata* require that the earlier decision should have been between the “**same parties**”, their “**successors in interest**” or their “**privies.**”

What constitutes a party as a privy to another was considered in **Lotta v. Tanaki and others [2003] 2 EA 556**. Where the Court of Appeal held that a person does not have to be formerly enjoined in a suit, but will be deemed to claim under the person litigating **if he has a common interest in the subject matter of the suit.** [Emphasis mine].

Consequently, the rights claimed by the litigants in the previous suit appear to be identical with the ones claimed to the ones claimed in the subsequent suit.

I find that the petitioner in Election Petition No. 41 of 2016 together with the instant Petitioner in Election Petition No. 9 of 2021 have the same common interest in the 1st respondent's names and academic qualifications.

With regard to the submission by Counsel for the Petitioner to the effect that the issues for determination in this petition are not entirely already adjudicated upon by



the Court as alleged by the respondents since in the instant petition, issue of election mal-practices are raised and illustrated in paragraph 5 of the petition.

I have carefully perused through the petition. From my reading, I note that entire petition is premised on the issue of names and academic qualifications. The issue of election mal-practice alluded to by counsel for the petitioner only appears on paragraph 5 of the petition. Even in the affidavit in support of the petition sworn by the petitioner, the petitioner dwells entirely on the issue of names and academic qualifications. There is no elaboration in the issue of mal practice in the petition. A mere mention of an allegation without any elaboration or substantiation, does not attract litigation under the petition.

In light of the foregoing, the objection raised by the respondents' counsel bears merit and is hereby upheld with costs to the Respondents.

The consequence of this is that the 1st respondent remains the elected LC5 Chairperson for Kakumiro District.

Dated this 10th day of September, 2021 at Masindi High Court.




AJI ALEX MACKAY

JUDGE