

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA
HCT-O5-CV-EP-01-2006
(EP -028-2006 OF HIGH COURT KAMPALA)

KAMUGISHA STEPHENPETITIONER

VS

1. ELECTORAL COMMISSION1ST RESPONDENT

2. NDYANABO DIDAS MUKASA2ND RESPONDENT

BEFORE: THE HON. MR. JUSTICE P K MUGAMBA

JUDGMENT

Kamugisha Stephen, the Petitioner, herein contests not only the results declared by the First Respondent but also the irregular manner he alleges the First Respondent conducted the election at the Polling Station in issue.

It is his contention that were it not for the irregularities the result would have been different and he would have emerged winner rather than the runner up he was declared to be. The petitioner joins the second Respondent as having been party to the events that led to what he alleges was declaration of the wrong result.

It is common ground Local Council elections for Chairpersons L.C.III were held countrywide on 10th March 2006 and that the seat of L.C.III Chairperson for Muko Sub County, Kabale District, was contested by four candidates, namely Kamugisha Stephen, Ndyanabo Didas Mukasa (the second Respondent), Bitungwamagara Aron as well as Muhigwa Robertson. Exactly what result was announced at the Polling Station of Ikamiro I is disputed. Be that as it may, on 12th March 2006 the result contested in this Petition was announced by the Returning Officer. At the time the Petitioner protested that the correct result from Ikamiro I Polling Station was that in the document the petitioner had with him and not that contained in the document the Returning Officer had used in the tally. The said protest was made verbally. Despite the advice of the Returning Officer to the Petitioner to express his concern in writing no document was submitted

in that behalf on the occasion. Yet section 15 (1) of the Electoral Commission Act, Cap 140 of the Laws of Uganda relevantly provides:

‘Any complaint submitted in writing alleging any irregularity with any aspect of the electoral process at any stage, if not satisfactorily resolved at a lower level of authority, shall be examined and decided by the Commission, and where the irregularity is confirmed, the Commission shall take necessary action to correct the irregularity and any effects it may have caused.’

The Petitioner sought recourse in the Court of the Chief Magistrate, Kabale, where the matter was dismissed. This Petition is a sequel to the saga.

There is no dispute the distribution of votes for Ikamiro 1 Polling Station as announced by the Returning Officer and as used in the final tally was:

Bitungwamagara Aron	Nil
Kamugisha Robertson	135
Muhigwa Robertson	Nil
Ndyanabo Mukasa	600
Invalid	Nil.

On the other hand the document containing the result the Petitioner maintains is correct, the document the Petitioner says was given to him by his polling agents, the very document he showed to the Returning Officer on the occasion earlier related to is Exhibit P.1. It shows the following outcome from the voting:

Bitungwamagara Aron	20
Kamugisha Stephen	253
Muhigwa Robertson	02
Ndyanabo Mukasa	456
Invalid	Nil

There is evidence, which is not contested, that on the occasion the Petitioner took his matter to the Court of the Chief Magistrate he was given, at his request, a photocopy of the Declaration of Results Form, Form EC 9, for Ikamiro 1 Polling Station. The result therein is similar to what was earlier announced by the Returning Officer. The Petitioner questions the authenticity of that form and its contents given that the photocopy does not bear any serial number on its top right hand corner as ought to be the case. For the record serial number 014560 in red colour appears on the document Exhibit P.1 and another document I shall advert to later.

At the hearing the petitioner was represented by Mr. Richard Mwebembezi, the First Respondent was represented by Ms Christine Kahwa, while Messrs Wilfred Murumba and Mwene-Kahima appeared for the Second Respondent. Affidavits filed by the respective parties were admitted in evidence and the parties named some of the deponents for cross examination. In this respect the side of the petitioner sought to cross examine the following:

1. Byarugaba Milton
2. Twinomujuni Silverio
3. Byabasheija Expedito
4. Turamyomwe Bruno
5. Kamugisha Innocent
6. Tweshengyereze Scovia
7. Ahimbisibwe Siriyako
8. Mbabazi Christopher

On their part counsel for the Respondents sought to cross examine the following:

1. Kamugisha Stephen
2. Ndamira John
3. Byamukama Erimiya
4. Besigye Alexander
5. Asimwe Prevato

At the hearing however the side of the Petitioner did not cross examine Ahimbisibwe Siriyako and Mbabazi Christopher. Instead they called for and cross examined the Second Respondent and

Idi Kahwa, the Returning Officer. Their effort to cross examine Tweshengyereze Scovia was abortive as her evidence was not adverse to the case of the petitioner and as such she was not eligible for cross examination. She was discharged.

The following issues were agreed:

1. Whether the election at Ikamiro 1 Polling Station was conducted in non-compliance with the provision and principles of the electoral laws.
2. If so, whether the non-compliance affected the results of the election of the L.C. III Chairperson Muko Sub County in a substantial manner.
3. Whether the parties are entitled to the remedies sought.

Whether or not elections, particularly those of L.C. III Chairperson at Ikamiro 1 Polling Station, were conducted in non-compliance with the provision and principles of the electoral laws is a determination made with a view to the laws relevant to the issue. I have in mind the Constitution of Uganda, the Electoral Commission Act, Cap 140 of the Laws of Uganda and the Local Government Act, cap. 243 of the Laws of Uganda.

Paragraphs 3 and 4 of the Petition are relevant to this matter. They read:

‘3. AND Your Petitioner states that the 1st Respondent, and the Election Officials under him, knowingly and negligently conducted or caused to be conducted the Polling and Tallying process in non-compliance with the provisions of Local Government Act cap 243 of 1997 (sic), the Parliamentary Elections Act No. 17 of 2005, the Electoral Commission Act, cap 140, the Commission’s Guidelines made there under, such that the Election was not conducted in accordance with the principles laid therein, and the Guidelines, and that such non-compliance affected the result of the Election in a substantial manner, which led to the 2nd Respondent to be declared the winner instead of the petitioner and in particular but without prejudice to the generality of the foregoing:

(i) Knowingly and/or negligently making a false Declaration of Results at Ikamiro 1 Polling Station where the following results:

a. Bitungwamagara Aron	20 votes
b. Kamugisha Stephen (The Petitioner)	253 votes
c. Muhirwa Robertson	02 votes
d. Ndyanabo Didas Mukasa (The 2 Respondent)	456 votes
e. Invalid	4 votes

But instead declared and or tallied the following false results:

a. Bitungwamagara Aron	Nil
b. Kamugisha Stephen (The Petitioner)	135 votes
c. Muhirwa Robertson	Nil
d. Ndyanabo Didas Mukasa (The Respondent)	600 votes
e. Invalid	Nil

(iii) Knowingly and/or negligently wrongly tallying the results thereby depriving the Petitioner of his victory with a margin of 58 votes.

(iv) Failure to prevent tampering of the results by the polling officials.

4. AND Your Petitioner states that the 2nd Respondent and/or his agents/supporters, knowingly and/or negligently connived with the election officials to tamper with or make a false Declaration of Results that made him to be declared winner.’

Needless to say the Respondents deny the above allegations leveled against them.

Section 139 of the Local Governments Act relevantly reads:

‘The election of a candidate as a chairperson or a member of a council shall only be set aside on any of the following grounds if proved to the satisfaction of the court —

(a) That there was failure to conduct the election in accordance with the provisions of this part of the Act and that the noncompliance and failure affected the result of the election in a substantial manner;

(b) That a person other than the one elected purportedly won the election;

(c)

(d).....

It behoves the Petitioner, the party making the allegations, to prove those allegations to court's satisfaction. This is the import of sections 100 and 103 of the Evidence Act, cap 43 of the Laws of Uganda, which provisions were driven home by Oder JSC, of good memory, in Election Petition No. 1 of 2001 Col. (Rtd) Dr. Kiiza Besigye vs Museveni Yoweri & Anor when His Lordship noted that with regard to the burden of proof it is the petitioner who has to prove, to the satisfaction of the court, the grounds on which the Election should be nullified. The burden does not shift, he stated. With that in mind I turn to paragraphs 3 and 4 of the Petition laid out above. Regarding paragraph 4, with respect, I find no evidence led pointing to the alleged connivance or at all. Consequently I do not find that proved by the Petitioner.

Paragraph 3 on the other hand relates to the manner in which the election was conducted which is said to have been in non-compliance with the electoral law and the Commission's Guidelines. The paragraph revolves around the result that was announced which the Petitioner asserts was not correct. This brings to mind section 139 (b) of the Local Governments Act herein quoted above. In evidence three documents were related to in search for the authentic Declaration of Results Form, EC 9, for Ikamiro 1 Polling Station. The Petitioner proffered Exhibit P.1 in evidence. The details are at a tangent with the result officially announced by the First Respondent. Attached to the Petition is annexure 'C'. This was for unknown reasons not exhibited though it was referred to by the parties in contention. Suffice it to say the said annexure is a photocopy of a Declaration of Results Form and the result apparent thereon is similar to the result which was announced by the First Respondent. There is also Exhibit R.1 proffered by the First Respondent in order to vindicate the authenticity of annexure 'C'. As the authenticity of the annexure was questioned the First Respondent produced the document annexure 'C' was allegedly copied from by photocopy. That document, alleged to be the original, was tendered and admitted in evidence on that score. It is common ground the photocopy annexure 'C' was issued to the Petitioner by the First Respondent and that it bore no

serial number. Consequently the issue for resolution is as to which of the documents is authentic and bears the correct result. I must add here that there was no evidence from any of the parties tending to show doctoring of the documents by anyone. Given this scenario court dispatched Exhibit P.1, Annexure 'C' as well as Exhibit R.1 to the Scientific Aids Laboratory, Police Headquarters, Kampala for necessary analysis to determine whether or not the questioned signatures on the documents in issue were written by the same author and to show whether entries on the respective forms were of questioned origin. The analysis was duly made and a report was tendered to court as court Exhibit 1 after the Government Analyst, Mr. Apollo Mutashwera Ntarirwa, had testified as court witness number one (CW1). According to the witness he 'intercompared' the three documents sent him. In his opinion the name of the Presiding Officer, his signature and the entries at the top to the left of the three documents were all written together when the original form from which the photocopy was made and the carbon copy (Exhibit P.1) was below the original form. He stated further that the signatures/names of the candidates' agents save for Ndamira on the forms suggest that the entries were made while Exhibit P.1 was under the original form with a carbon paper in between. He opined also that the rest of the entries to the middle of the forms, being the figures and number of votes in words were written at different time(s) from the entries mentioned above. When the witness was asked why the serial number is not reflected in annexure 'C', the photocopy, he said he did not know the reason but added that after the process of photocopying the serial number may not appear on the copy owing to a defect in the machine or where for purposes of fraud a piece of paper is put around the information intended to be omitted. He observed however that some colours do not emerge from certain photocopiers. For the record I note again that on both Exhibit P.1 and Exhibit P.1 the serial number is the only material printed in red on the form. Looking at Exhibit P.1 the expert noted that some words are carbon copies of the original as stated earlier but that other matter was later added in ink such as the figure 678. From the above evidence I note that Exhibit P.1 is the original form on top while Exhibit P1 was partly filled as a carbon copy of the original. Details of the votes were added later as observed by the expert. This is apparent on Exhibit R.1 where the ink used to insert the result differs from that used to print details such as names and signatures. If P.1 is the form which was on top and which was the form which was filled in with details of votes later with the use of ink then the details in the carbon copy which Exhibit P.1 was should have been in carbon reflecting what is contained in the form on top. For

arguments sake let us assume the figures were separately entered on the forms without recourse to carbon paper. Then the figures in Exhibit P.1 would be in ink necessitating no carbon. The figures showing votes in Exhibit P.1 are mainly in carbon. It begs the question where the form supposedly on top of Exhibit P.1 when the vote results were entered can be found. The burden is on the Petitioner to show there was a form above the carbon copy on top of Exhibit P.1 when the entry of votes cast was made. Also mysterious is the origin of the name Ndamira on Exhibit P.1. It does not appear on Exhibit P.1. If details of other names save Ndamira were a result of the carbon paper between Exhibit P.1 and Exhibit P.1 then that name must have also been added later. The expert found this addition to be an anomaly. Indeed evidence from witnesses such as Turamyomwe Bruno the Presiding officer, Byabasheija Expedito, Christopher Mbabazi and Ahimbisibwe Siriyako is to the effect Ndamira John left soon after he voted and was not available to sign on the Declaration of Results Form on behalf of the Petitioner. Another matter to ponder in connection with Exhibit P.1 is the arithmetic. Assuming the votes cast are as shown in Exhibit P.1 where all candidates obtained votes, the given result would not make sense where Bitungwamagara Aron and Muhirwa Robertson openly admit they received no votes. If they had got any votes they would most certainly have made mention of them as would their agents. They did not and their respective evidence was never challenged. In any event going by the votes shown in Exhibit P.1 which the Petitioner relies on, the number of votes cast is 678. On the assumption the allocation in Exhibit P.1 is correct the correct total should read 731. The anomaly has not been explained. I should observe however that even Exhibit P.1 has its failing. When giving the total number of votes received at the Polling Station it gives the figure as 735 instead 800 which should be the correct total. However the saving grace is that while the figure reads 735, like total number of votes cast, the words on the side do appropriately read 'eight hundred', suggesting most probably a slip of the pen.

The Petitioner has not proved Exhibit R.1 was in any way tampered with. It is the copy which was in the custody of the Returning Officer. No rival document has been produced to supercede its authenticity. Exhibit P.1 on the other hand is copy of Exhibit R.1 which was doctored. The added details observed by the Government Analytical expert are not authentic. The document as a whole is rendered not authentic by the later additions and it is one which cannot be relied on to

prove anything let alone the result of an election. Ingenious as its fabrication was meant to be it has been rendered a useless sheet of paper.

Given the above findings concerning the Declaration of Results form and my earlier findings regarding alleged non-compliance with the provisions and principles of Electoral laws no evidence exists of noncompliance as envisaged in the first issue. There is no evidence of breach of any other provision of S. 139 of the Local Government Act either.

Having made the determination I have concerning the first issue, to make any finding on the second issue would be moot as any suggestion of such has been negated.

Ultimately this Petition fails and is dismissed with costs.

P. K. Mugamba

Judge

18th July 2008