

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
AT MBALE**

***PARLIAMENTARY ELECTION PETITION NO 0020/2011***

**WADADA ROGERS .....PETITIONER**

***VRS***

**SASAGA ROGERS JOHNNY.....1<sup>ST</sup> RESPONDENT**

**ELECTORAL COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**BEFORE: THE HON MR. JUSTICE PAUL MUGAMBA**

**JUDGMENT**

Wadada Rogers, referred to in this judgment as the petitioner, lodged a petition against Sasaga Isaiah Johnny, referred to as the first respondent, and the Uganda Electoral Commission, related to as the second respondent, challenging results of the parliamentary elections for Budadiri County East Constituency in Sironko District. Those elections were held on 1<sup>st</sup> February 2011 and attracted several other contestants besides the petitioner and the first respondent. Essentially results declared by the second respondent on 19<sup>th</sup> February 2011 showed the first respondent as the winner with 15380 votes and the petitioner as runner up with 12094 votes. On the 11<sup>th</sup> April, 2011 a petition as lodged in the registry of the High Court at Mbale in the wake of the *Uganda Gazette* publication of 7<sup>th</sup> March 2011. The publication gave the status at the polls under consideration.

Upon being filed the petition was registered as HCT-04-CV-EP-NO 0020 of 2011. In short election Petition No. 20 of 2011. It was accompanied by five affidavits. The petition had however been filed out of time and was never served on the proposed respondents. Needless to say, S. 60 (3) of the Parliamentary Elections Act, Act 17 of 2005, states that every election petition shall be filed within thirty days after the day on which the result of the election is published by the Commission in the Gazette. Doubtless when the filing was done on 11<sup>th</sup> April, 2011, the act was done outside the statutory period. So it was that on 10<sup>th</sup> May 2011 the petitioner by chamber summons (Misc. application No 0067 of 2011) applied to this court for grant of extension of time vide rule 19 of the Parliamentary Elections (Election Petitions) Rules, S. I 141-2. That application was not successful owing to a defect in the affidavit sworn in its support. That affidavit was not dated so it was struck out as incompetent. Next the petitioner on 18<sup>th</sup> May 2011 filed a similar application by Chamber summons. It was miscellaneous application No. 0074 of 2011. The orders sought:

- “ a) The applicant be granted an extension of time within which to file his petition and the proceeding documents
- b) Notice of presentation of election petition be filed and issued against the Respondents
- c) Costs of this application be in the cause”

This application was successful and court ordered the applicant to file the petition in issue within two days of the date of the ruling and to serve the Notice of Presentation on the respondents expeditiously. Indeed on the day of the ruling itself the applicant did serve the Notice of Presentation on the respondents herein. What he did not do was to file a fresh petition. It is in view of the applicant's

disinclination or reluctance to file a petition following an order made in answer to his application that the respondents sought a preliminary objection to the hearing of the petition. Court however prevailed on them to abide the time of judgment.

I proceed to give reasons for that course of action.

It cannot be contested that this matter is registered as Election Petition No. 20 of 2011, a number initially entered on 11<sup>th</sup> April, 2011. The Notice of Presentation served on the respondents related to Election Petition No 20 of 2011. At the time of service of the Petition and Notice of Presentation on the respondents the court registry suffered the documents filed on 11<sup>th</sup> April 2011 be augmented by that filed on 23<sup>rd</sup> May 2011 to serve as Petition and Notice of Presentation of Petition. The documents were duly served on and eventually answered by the respondents. The disquiet of the respondents is premised on the realization no fresh registration of a petition happened. I must observe that the court registry acted as midwife in this instance. I note also that the respondents do not allege any prejudice resulted from the missteps. In the circumstances I look at the bigger picture and the balance of convenience which point to the resolution of the disputed elections in the knowledge that what mistakes are involved are curable under rule 26 of the Parliamentary Elections (Election Petition) Rules. It provides;

*“ No proceedings upon a petition shall be defeated by any formal objections or by the miscarriage of any notice or any other document sent by the registrar to any party to the petition.”*

Let me add also that any decision to proceed with the hearing is further premised on the fact that all necessary steps were taken by the parties involved when they filed their pleadings preparatory to the hearing of the petition. Respectfully, I

decline to be detained by the concerns of both respondents pertaining to formalities. When Article 126 (2) was put in our Constitution I am sure the framers had a scenario such as this in mind. I let the merits of the petition take centre stage.

Various reasons were given in the petition to challenge the results. They were that:

- i) It was carried out in a way that did not comply with the law.
- ii) Voters were bribed to vote the wrong way
- iii) Voters were intimidated
- iv) Harassment and electoral violence
- v) Defamatory and false statements
- vi) Obstructing and interfering with the presiding officer in the exercise of his duty including arrest of the officer.

Eight affidavits were received in evidence in support of the petition and were exhibited as follows:

PI affidavit of Wadada Rogers dated 7/4/2011

PII affidavit of Wolufu Gimei dated 7/4/2011

PIII affidavit of Apollo Namutagi dated 7/4/2011

PIV affidavit of Simbatta Gerald dated 7/4/2011

PV affidavit of Nakisa Peter Madaya dated 7/4/2011

PVI affidavit of Massa Kassimu dated 13/6/2011

PVII affidavit of Musaalo Joseph dated 13/6/2011

PVIII counter affidavit of Henry Kalulu dated 13/6/2011

In addition Massa Kassimu (PWI), Nakisa Peter Madaya (PW2), Simbatta Gerald (PW3), Henry Kalulu (PW4), Apollo Namutagi (PW5) and Rogers Wadada (PW6) were cross examined on their affidavits.

The first respondent relied on the affidavits exhibited as follows:

R2 affidavit of Sassaga Isaiah Johnny

R3 affidavit of Henry Kalulu

R4 affidavit of Gimei Emmanuel

R5 affidavit of Charles Mafabi

R6 affidavit of Makweta Mafuko Phamau.

The second respondent relied on the affidavit of Badru Kiggundu, Exhibit RRI and that of Beine Robert, Exhibit RR2. In addition Beine Robert (RRW1), Gimei Emmanuel (RRW2), Charles Mafabi (RRW3), Makweta Mafuko Phamau (RRW4) and Sassaga Isaiah Johnny (RRW5) were cross examined.

At the scheduling conference the following facts were agreed;

- 1 That elections for Budadiri County East Constituency were held on 18th February 2011 and that the Petitioner contested with Buliba James Wamboga, Kasoola Mike, Muzenze Robert, Woniala David and Sassaga Isaiah Johnny.
- 2 The petitioner garnered 12094 votes as against the 1<sup>st</sup> respondent Sassaga Isaiah Johnny who garnered 15380 votes upon which he was declared winner and Member of Parliament for Budadiri County East Constituency.
- 3 The results for Budadiri County East Constituency were gazetted on the 7<sup>th</sup> March 2011.

- 4 The Petitioner never withdrew from the race and contested until the end
- 5 The petitioner was not a civil servant at the time he was nominated to contest as a candidate for Budadiri County East Constituency.

Also agreed at the conference were the following issues:

1. Whether there was non-compliance with the provisions of the Constitution, the Parliamentary Elections Act and the Electoral Commission Act in the conduct of the 2011 elections for Budadiri County East Constituency
2. If 1 above is answered in the affirmative, whether such non-compliance with the said laws and principles affected the results of the elections in a substantial manner
3. Whether the alleged illegal practices and or electoral offences were committed by the 1st respondent personally or by his agent with his knowledge, consent and approval in Budadiri County East Constituency.
4. Whether the petitioner is entitled to the reliefs sought

When a petition is lodged it behooves the petitioner to prove the allegations espoused. The burden of proof lies on the petitioner. Section 61 (3) of the Parliamentary Elections Act provides that proof of any grounds for setting aside the election of a person declared as a member of Parliament shall be on a balance of probabilities. This determination is arrived at by court after the grounds have been so proved to the satisfaction of the court. This court must therefore be satisfied first that the necessary preponderance has been attained before it can declare proof of any allegation.

There is allegation that the elections were carried out in a way that did not comply with the law. It is alleged that the presiding officer at Sigwa Polling station was arrested and that upon his arrest all voting material was taken away. It was urged that in the premises no genuine results were declared from Sigwa Polling Station. The Returning Officer, Beine Robert in his evidence admitted the presiding officer had indeed been arrested but that afterwards fresh voting commenced. Beine said voting went on without incident afterwards and that the ballots which had been cast earlier were not included in the final tally. No evidence was adduced that the fresh voting excluded anyone. The inference from the evidence of Beine is that when voting commenced afresh no one was left out in the subsequent voting. This is driven home by the fact that contrary to the allegations by the petitioner who said results were not received from Sigwa polling station those results were in fact received. No basis is laid by the petitioner for the allegation that the arrest of the presiding officer at Sigwa was a malpractice. It is contained in the affidavit of Beine that the arrest of the presiding officer at Sigwa and his replacement followed an incident of ballot stuffing. The presiding officer must have been held to account and as such I do not find his arrest and replacement in any way a malpractice. The stuffed ballots could not correctly be counted and this underlines the reason for fresh voting.

The petitioner alleges also that a ballot box from Mbatta Polling Station with its contents were found dumped in a bush in Butandiga sub county. What is interesting is the evidence of the Returning officer, Beine Robert who in his affidavit paragraph 18 said:

*“That I am not aware about the dumping of the ballot box for Mbatta Polling Station however of results for the said polling*

*station for all categories of elections held on 18/2/2011 have never been found”*

Admittedly the manner in which the affidavit was drafted is amateurish and does not do credit to the draftsman let alone to the deponent whose evidence in the matter we can only guess at. My conclusion on the matter is that results from Mbatta polling station were never received and this is non-compliance with the electoral law.

The petitioner alleges that he received the results of the election two weeks after the winner was declared, saying that was infringement of his rights. Peering at the record I observe that the documents filed by the petitioner with court bear the stamp of the Returning Officer Sironko District and the signature of the Returning Officer, namely Beine. Those documents are dated 21<sup>st</sup> February 2011. Lest we forget the elections were held on 18<sup>th</sup> February 2011 and there is the denial by Beine of any inordinate delay to contend with. In sum there is no evidence to support the claim by the petitioner that he evinced no co-operation from the second respondent in general or from Beine in particular. In this connection there is no basis for the claim by the petitioner that the second respondent falsified his results in favour of the first respondent.

The only non-compliance with the electoral laws I note is the disappearance of the results of voting at Mbatta Polling Station. It is not even shown how many voters there were at the station. It was never ascertained that the votes from Mbatta Polling Station said not to have been accounted for would all have been cast in favour of the petitioner. Given the difference in votes gathered by the petitioner and those cast in favour of the first respondent in the entire constituency it is not



likely the missing votes would have affected the number of votes cast in favour of the petitioner to the extent that he gathered more votes than the 1<sup>st</sup> respondent. As a matter of fact no polling station had 1000 registered voters. That number is what most parishes had. By any stretch of imagination Mbatta, a polling station, could not have exceeded 1000 registered voters. Even if they had all voted they would have made no difference numerically. What is more that non-compliance is isolated, and did not affect voting elsewhere. My answer to the second issue therefore is in the negative.

There is then issue 3. The petition cites electoral malpractices on the part of the 1<sup>st</sup> respondent. This is supported by evidence in affidavit PI, PV and PVI where it is alleged that on election day there was a scuffle involving the 1<sup>st</sup> respondent on one hand and supporters of the petitioner on the other. While the 1<sup>st</sup> respondent does not deny a confrontation took place both sides agree the matter is with police. I should add that each side alleges the other precipitated the fight. Neither side admits responsibility for the event. Since the matter is with Police for investigation and possible prosecution it is early days yet to determine who it was responsible for generating the fight. Certainly this court cannot pronounce itself on this at the moment. Be that as it may, there is no evidence adduced of wide spread violence. It was an isolated incident thankfully.

Section 73 of the Parliamentary Elections Act renders making of false statements concerning the character of candidates an election offence. In the petition it is alleged that the first respondent, a relative of the petitioner, made false allegations against the petitioner designed to make the petitioner unpopular with the electorate. The petition alleges that the first respondent stated that the petitioner was a 'Musinde' (uncircumcised) a term derogatory amongst the Bagishu, that the

petitioner had a Munyankole father and was therefore not a pure Mugishu, that the petitioner had become indigent and had made an agreement for sale of his house. The agreement which was false was exhibited at Bumulisha and Bumalimba sub counties for all to see. It was alleged also that first respondent claimed that the petitioner was out of the race for election as a member of parliament because he had been disqualified by the Electoral commission on account of not having resigned his civil service position. The 1<sup>st</sup> respondent denied ever having made the statements attributed to him.

More allegations made by the petitioner were of the 1<sup>st</sup> respondent bribing agents of the petitioner with shs 50,000/= to surrender Declaration of Results forms. There was the allegation that the 1<sup>st</sup> respondent drove around the constituency distributing money and that he had used items such as money footballs, hoes, alcohol and food to bribe voters. All these allegations were not substantiated. One occasion quoted was when the first respondent accosted a meeting of NRM supporters. According to the evidence in affidavit PIV he gave those present shs 100,000/= for their lunch. Someone else by the names Irene Nambafu received the money for later application. No evidence was adduced from the said Nambafu while the deponent of PIV denies having had any part of the money, saying it was for the youth. Of course the 1<sup>st</sup> respondent denies the allegation

The petitioner alleged also that the 1<sup>st</sup> respondent made a statement to the effect that NRM was handing out money to people to vote for it, implying that people should not vote before they received such money. There was no evidence given that the first respondent made such a statement.

As regards the third issue, I have related to the fight said to have taken place between the 1<sup>st</sup> respondent and supporters of the petitioner and said it was premature to make any ruling on it since it is contested and is a subject of investigation by Police. However concerning other allegations against the 1<sup>st</sup> respondent I find them unsupported by evidence. I would therefore say concerning issue 3 that the alleged illegal practices and or electoral offences have not been proved to have been committed by the 1<sup>st</sup> respondent personally or by his agents with his knowledge, consent and approval.

In the result, I find nothing in the evidence available to warrant the over turn of the results of the election of Member of Parliament for Budadiri County East Constituency. This petition fails and is dismissed with costs.

**Paul Mugamba**

**Judge**

**18<sup>th</sup> August 2011**