

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT LIRA
ELECTION PETITION NO. 004 OF 2016

GEOFFREY OMARA:.....PETITIONER

VERSUS

1. CHARLES ANGIRO GUTOMOI ABACACON

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

BEFORE HON. JUSTICE WILSON MASALU MUSENE

JUDGMENT.

The petitioner Geoffrey Omara brought this petition to challenge the declaration of Charles Angiro Gutomoi Abacacon as the validly elected Member of Parliament for Erute County North Constituency Lira district in the Parliamentary general elections held throughout the country on the 18th day of February 2016. The petitioner, Charles Angiro Gutomoi and two others were candidates for the said parliamentary seat of Erute North. The 2nd respondent Electoral Commission organized and conducted the elections. The 1st respondent was declared winner by the 2nd respondent with 13,334 votes and the petitioner as having 12,506 votes cast in his favour.

According to the electoral commission, the margin between the 1st respondent and the petitioner were 828 votes. However, on 3rd March 2016, the 2nd respondent published in the Uganda Gazette stating that he 1st respondent was winner with **13,334 votes** while in the same publication, the petitioner was stated to have got **13,506 votes**. The effect of the publication was that the petitioner got higher votes than the 1st respondent and yet the 1st respondent was declared as the winner. The petitioner therefore filed this petition asserting that the declaration of the 1st respondent as a winner was contrary to the provisions and principles of the Parliamentary Elections Act 2005, the Electoral Commission Act and the Constitution of Uganda. The petitioner sought the following orders:

a) That the Petitioner having obtained the largest number of votes that is 13,506 was a validly

elected Member of Parliament for Erute County North Constituency.

- b) That the declaration of the 1st respondent by the 2nd respondent as the winner for Erute County North Constituency be annulled.
- c) That the respondent pays costs of the Petition to the petitioner.

The evidence in support of the petition was contained in the Petitioner's affidavit dated 13th March 2016, further evidence was contained in the affidavit of Juk Joel dated 13th May 2016, Omara Bonny dated 13th May 2016 and Opio Tom also dated 13th May 2016.

For the 1st respondent, three affidavits were filed on opposition while the 2nd respondent also filed three affidavits through its Lira District Returning Officer Mr. Ejimu Charles.

During the hearing counsel for the 1st respondent and counsel for 2nd respondent cross examined the Petitioner while counsel for the Petitioner cross examined the 2nd respondent's Returning Officer and thereafter both sides filed written submissions, they are all on record.

In the process, four issues were framed for determination by this court.

1. Whether the Election of the directly elected Member of Parliament for Erute County North Constituency was conducted in accordance with Electoral laws of Uganda.
2. Whether the Publication of the petitioner in the official gazette of 3rd March 2016 with 13,506 votes was done in error.
3. Whether the 2nd respondent was justified in its actions of changing the results in the 15th April 2016 gazette.
4. Remedies available.

DOCUMENTS:

The parties agreed that the documents, list of authorities and list of witnesses were as attached to the petition and the replies thereto respectively. Other authorities were sought to be provided or presented with leave of court.

Mr. Mutiaba for the Petitioner on the 1st issue submitted that the guiding principles behind the laws governing elections is that Elections must be free and fair and should conform to the well set out legal standards. He quoted Article 61 (a) of the Constitution which provides, "The Electoral commission shall have the following functions:

To ensure that regular free and fair elections are held." He emphasized that the Parliamentary Elections in Erute County North were not conducted in conformity with the laws. Counsel pointed out that the handling of the results including entering them in the declaration forms, their tabulation and computation shows errors and deliberate alterations. Mr. Mutiaba for the Petitioner made reference to S.12 of the Electoral Commission Act and S.58 of the Parliamentary Elections Act which mandate the 2nd respondent's Returning Officer to declare the actual winner of the election which was not done to him and instead one who obtained a lesser number of votes than the Petitioner was declared. Counsel for the petitioner also complained of failure by the 2nd respondent's Presiding Officer to sign all the declaration forms citing five polling centers of Okecoyere at Bar Apwo Parish, Lira Sub-County , Te-Keo in Ogur sub-county, Cuk Okiko in Ogur Sub County, Oner N-Z at Anai Parish, Lira sub county and Opwodowot in Aromo sub county. he also quested S. 47 (7) (a) and (b) of the Parliamentary Elections Act, where under the Presiding officer and agents of the candidates failed to sign declaration forms at seven polling stations of Abala P.7 School, Te-Aeme in Agweng sub county, Bishop Church Asili Primary school, St. Victor's Annex Vocational school at Bar Apwo Parish, Telela in Omito Parish, Akor in Ogur Sub County and Ater P.7 School. Counsel for the petitioners also complained of extra votes than the number of people who turned up were cast citing 14 polling centres with a total of 154 extra votes.

He also submitted on crossings on various declaration forms such as at Bung Polling station in Anai Parish and that the crossings were not even countersigned. He also referred to the affidavits of Juk Joel, Omara Bonny and Opio Tom whereby there were not given declaration forms for verification of results.

Counsel for the petitioner submitted that the wanton actions of the Returning Officer contravenes **S.50 (1) (e) of the Parliamentary**

Elections Act and portrayed a sinister motive of tampering with the declarations forms with a view of justifying the fraud results to bring them in conformity with the gazette results. He concluded on that point that the elections were conducted in accordance with the law.

On the 2nd issue, counsel for the petitioner reiterated that the petitioner was the winner of the elections with 13,506 votes as per the gazette of 3rd March 2016. He challenged the affidavit of Ojok Isaac that it was an error whereby the Petitioner was given 1,000 extra votes and that the documents relied on by Ojok Isaac was signed by one Ejimu Charles and was not a certified of the original. Reference was made to the Case of **Electoral Commission and Another Vs Nambooze Betty Bakireke, Election Petition Appeal No, 1 & 2 of 2007**, where it was held that non certification of the declaration forms and the tally sheet completely destroys the evidential value of those vital documents.

Counsel maintained that there was no tangible evidence to prove that the Petitioner as the winner in the 3rd March 2016 gazette was done in error.

On the 3rd issue of whether the 2nd respondent was justified in changing the results in the 15th April 2016 gazette, counsel submitted that the change in publication of 2nd gazette was done after the petition had been filed in court on 1st April 2016 and that long as the contest was already in court, it was not proper to purport to rectify the same.

He concluded that it an illegality that ought to be condemned and annulled by court. Counsel for the petitioner also submitted on the mathematical computation of the results rendering the publication of the 15th April 2016 questionable.

Both advocates for the 1st respondent and for the 2nd respondent filed replies to the submissions of counsel for the petitioner.

Counsel for the 1st respondent Mr. Makmot Kibwanga submitted that the petitioner has no cause of

action as publication of the gazette comes after elections and it is not one of the grounds for annulling the elections as provided under the Parliamentary Elections Act. He added that S.61 (a) of the Parliamentary Elections Act had not been violated at all. He also added that the petitioner was erroneously stated as having more votes than the 1st respondent and it was the reason he was not declared the winner. Mr. Makmot further submitted that the petition at hand is a legal absurdity and is not covered under the Parliamentary Elections Act.

Secondly, both counsel for the 1st respondent and for 2nd respondent submitted that the presentations of counsel for the petitioner are at variance with the pleadings on record. They reproduced the paragraphs in the petition from paragraph 3 to 10 and paragraphs of the affidavit in support of the petition from paragraph 5 to 10.

Mr. Makmot Kibwanga and Ms. Akware for the 2nd respondent further submitted that the introduction of additional matter in regard to the entry of results, tabulation and computation in the affidavits in rejoinder sworn by Juk Joel, Opio Tom and Bonny required leave of the Court under O.6 r.20 of the Civil Procedure Rules and new matters were introduced outside the Statutory period of 14 days. Their prayer was that the additional affidavits of Juk, Omara and Opio be struck out for noncompliance as it was unauthorized amendment of the petition.

Counsel for the 1st respondent reiterated under issue number one that the process of the election complied with Article 1(4) of the Constitution of Uganda which provides that the people shall express their will on who to govern them through regular free and fair elections of their representative and that the 2nd respondent lived up to the task and its obligations under S.61 (1) of the Parliamentary Elections Act of ensuring that regular free and fair elections were held to the satisfactions of all the candidates.

They added that no candidate raised any issue before he gazetting of the results. Counsel for the 1st respondent added that the declaration of results under S.58 of the Parliamentary Elections Act and S.12 of the Electoral Commission Act was done before the publication of the gazette of

3rd March 2016 and that at the time of the declaration; the petitioner did not raise any issues. Emphasis was that what was done in error by publishing wrong results in the gazette after the correct results were established by the 2nd respondent under S.58 of the Parliamentary Elections Act should not vitiate the elections.

The Advocate of both 1st respondent and 2nd respondent also submitted that much as S.47 (7) (b) (ii) requires that a presiding officer records the facts of refusal or failure or non-signing by agents of candidates, that the provisions following the requirement of the presiding officer to record the facts of refusal or failure states that such refusal or failure does not invalidate the results announced.

Counsel for the 1st respondent also challenged the analysis of the Petitioner as far as alleged irregularities in the declaration forms were concerned. The petitioner's counsel had based his arguments on the number of female and male voters, but counsel for the 1st respondent submitted that since voting was by secret ballot, it is not possible to establish how many women cast invalid votes as against men who did the same. He added that the petitioner could not measure the non-compliance with the electoral laws basing on the number of males and females who voted.

Counsel further submitted that the argument that there were extra 153 votes which benefited the 1st respondent was not substantiated particularly since all the candidates were four.

It was further submitted on behalf of the respondents that the author of the Declaration of Results form in the constituency physically testified in court as DW1, Ejimu Charles, the Returning Officer of Lira District. He confirmed that the 1st respondent won the elections with 13,334 votes and the petitioner followed with 12,506 votes that the first publication in the gazette was an error which has since been rectified.

Otherwise, counsel for the 1st respondent concluded that if the petitioner wanted re-calculations of results, then he should have formally applied for leave of court to seek a recount, which in any case could have been done earlier before a Magistrate court as provided under Section 55 of the

Parliamentary Elections Act.

I have generally studied all the pleadings on record and the submissions by all parties. I have also read through the cases cited by the parties and the relevant provisions of the Parliamentary Elections Act, the Electoral Commission Act, and the Regulations and Rules.

I wish to emphasize that the law with regard to burden of proof and standard of proof in Election Petitions is settled. The election of a candidate as a Member of Parliament shall only be set aside on any of the grounds set out in Section 61 of the Parliamentary Elections Act, No.17 of 2005, if proved to the satisfaction of the court. And the duty is on the petitioner who bears the burden of proof.

In Presidential Election Petition No.1 of 2001, Retired Col. Dr. Kiiza Besigye vs Yoweri Kaguta Museveni and Electoral

Commission the Supreme Court justices were unanimous that the burden of proof must lie on the petitioner rather than the respondent as the petitioner is the one who wants Elections to be annulled.

Furthermore, and by virtue of ***Sections 101-102 of the Evidence Act, Cap. 6 Laws of Uganda***, the party who asserts the existence of certain facts on which Judgment is sought to be based and in the absence or failure to prove such facts, such party would fail, is the party that bears the burden of proof.

On the standard of proof, the law is clearly stated under Section 62 (3) of the Parliamentary Elections Act. It reads:- 62(3) Any ground specified in the sub-section (i) shall be proved on the basis of a balance of probabilities.

This is indeed the standard in all civil matters. In ***Miller vs Minister of Pensions [1947] 2 all E.R 372***, it is stated that:-

“It must carry reasonable degree of probability but not so high as required in criminal cases. If the evidence is such that the tribunal can say we think, it is more probable, then it is discharged,

but is the probabilities are equal then it is not.

In Ssebuliba vs Cooperative Bank. [1982] HCB 129, it was

emphasized that whatever evidence is adduced, it must be such as to prove the grounds relied upon to the satisfaction of the court. I only wish to add that it will depend on the circumstances of each case. Bearing the above principles, I shall now proceed to consider the issues one by one.

ISSUE NO.1: WHETHER THE ELECTION FOR THE DIRECTLY ELECTED MEMBER OF PARLIAMENT FOR ERUTE NORTH CONSTITUENCY WAS CONDUCTED IN ACCORDANCE WITH THE ELECTORAL LAWS.

Counsel for the petitioner's emphasis was that while S. 12 of the Electoral Commission Act and S.58 of the Parliamentary Elections Act mandate 2nd respondent's Returning Officer to declare the actual winner of the election, the officer of the 2nd respondent declared 1st respondent when he had lesser votes than the petitioner.

S.58 (1) provides:- *“Each Returning Officer shall, immediately after the addition of votes under subsection (i) of Section 53, declare the Elected candidate who has obtained the largest number of votes by completing a return in the prescribed form.”* Thereafter, the same are to be submitted to the Electoral Commission. However, contrary to what is contained in the Election Petition and the supporting affidavit, counsel for the petitioner went on to submit in details about the Returning Officer's failure to sign the Declaration forms and failure to record the reasons why the agents did not sign on all the declaration forms.

He petitioner cited over ten (10) polling stations where declaration forms were not allegedly signed. Then the petitioner submitted on other fifteen polling centres where there were more number of males and females who voted. Unfortunately for the petitioner, much as the above grounds appeared attractive and supported by evidence, there is no single ground and affidavit in the petition relating to the fact that Declaration of results were not properly computed or that Declaration forms were not signed by agents and Returning Officer or that they were characterized

by a number of cancellations. And as submitted by counsel for the 2nd respondent, the petitioner in his petition did not file any affidavit to show how the 1st respondent benefited from any of the discrepancies that he alleges.

The law and practice is very clear that parties are bound by their pleadings. I am therefore inclined to agree with both learned counsels for the respondents that learned counsel for the petitioner departed from his pleadings; where his ground of the petition is that he had the highest number of votes being 13,506 and 2nd respondent did not declare him winner. But that instead, declared the 1st respondent winner with a total number of votes of 13,334 as published in the gazette.

In his petition, the petitioner does not refer to any unsigned declaration forms by the presiding officer or his agents or the discrepancies mentioned in the written submissions. The Rule against departure from pleadings is stipulated under **0.6 r.7 of the Civil Procedure Rules**.

In Herbert vs Vaughan [1971] 3 All ER 122, it was held:- “No departure from causes of action set out in the plaint, the plaintiff must not set up in his reply a non-cause of action which is not raised in the plaint

The Supreme Court also discussed the principle of non-departure from pleadings in ***Tuliga Chemical Industries vs Viola***

Bamuseede T/A Tripple Enterprise Supreme Court Civil Appeal No. 16 of 2004. Kanyeihamba, JSC as he then was, emphasized that the rule that parties are bound by the pleadings has remained the same.

This court therefore finds and holds that the petitioner and his counsel cannot be allowed, under the cover of the 1st issue to bring in new matters that were neither in the petition nor supporting affidavit of the petitioner as pointed out.

Counsel for the petitioner even relied on Section 44 of the Parliamentary Elections Act, and ye that section provides for limitation of campaign period and on display of emblems.

And even Section 47 (7) (d) of the PEA states that non-signing of the Declaration forms or not recording reasons for such non-signing does not by itself invalidate the results announced.

Furthermore, S.47 (7) (e) of PEA states that the absence of the candidate or his agent while announcing the results does not by itself invalidate the results announced. And since the agents of the petitioner signed the five Declaration forms that had not been signed by the presiding officer, the petitioner is bound by the actions of his agents.

In the circumstances, the case of *Ka.kooza John vs Electoral Commission and Yiga Anthony, Supreme Court Election Petition No.11 of 2007* was quoted by counsel for the petitioner out of context as his agents signed the declaration forms complained of.

In Babu Edward Francis vs Electoral Commission and Erias Lukwago, High Court Election Petition No.10 of 2006, Justice Stella Amoko as she then was held:-

“When an a.gent signs a declaration form, he is confirming the truth of what is contained in the declaration form. He in confirming to his principal that this is the correct results of what transpired at the polling station. The candidate in particular is estopped from challenging the contents of the form because he is the appointing authority of the agent.”

As already held, a complaint now on the basis of declaration forms in an afterthought as the petitioner was represented at the polling stations complained by his agents and his bound by the outcome of the election.

Even S.50 (4) provides:-

“The declaration of results referred to in sub section (i) shall be signed by the presiding officer and the candidates or their a.gents as are present and wish to do so, and the presiding officer shall there and then, announce the results at the polling station before communicating to the Returning Officer. ”

Since the signing by agents is not mandatory as the choice is theirs, then the seven declaration forms which the petitioner alleged were not signed by his agents cannot be expunged.

During cross examination on that particular issue in court, the Returning Officer gave reasons why the declaration of results may not have been signed by candidate's agents as follows: -

- (i) That the agent may not have been deployed by the petitioner.
- (ii) That the agent may have decided to leave before the counting of votes.
- (iii) That the agent might have refused to sign.

In such circumstances, I find and hold that it would be unfair to blame the 1st or 2nd respondent for any negligent actions of the petitioner's agents and expunging seven polling stations from the total number of votes cast and would cause confusion considering that there **were four candidates who were** contesting for the parliamentary seat of Erute County North Constituency.

I further hold that as the petitioner had agents and did not complain at the time, his prayer now that there were 15 polling stations with extra votes cannot stand, in any case, there is no proof by affidavit or otherwise that the extra votes did not go to other candidates inclusive other than the 1st respondent.

I have also studied the 1st respondent's affidavit in opposition to additional evidence in rejoinder dated 24/4/2016 paragraph 7 of the affidavit reads:-

“7. That with leave of court, in specific reply 1(f), (g), (h) and (i), it is not true that the petitioner did not have representatives when the results were tallied and declared.

The petitioner's official agents and accredited agents were all present. All the declared results were acceptable to the petitioner and his agents and accepted defeat and announced the acceptance through Q.FM Radio and Radio Unity (See Annexures „A' and „B' for transcripts of the news and news bytes.”

The Q. FM news of 22nd February 2016 are attached where under Omara wished his successor well and pledged his commitment towards the development of Erute North County.

All in all, and notwithstanding the findings and ruling of this court that the petitioner departed from

his pleadings in his detailed submissions which is not acceptable by this court, there was at the same time no proof to the satisfaction of this court about the allegations raised by the petitioner under issue No.1. I accordingly find and hold that the conduct of Elections was free and fair and reflected the will of the people of Erute County North. Issue No. 1 is therefore resolved in the positive.

ISSUE NO.2: WHETHER THE PUBLICATION OF THE PETITIONER IN THE OFFICIAL GAZETTE OF THE 3RD MARCH 2016 WAS DONE IN ERROR.

Whereas the petitioner vehemently maintains both in the petition and supportive affidavit that he was the winner of the election with

13,506 votes as per gazette Notice of 3rd March 2016, the 2nd respondent avers that the publication was done in error.

It was the 2nd respondent's case that to rectify the error, a corrigendum was issued and a new gazette of 15th April 2016 shows the rectified and corrected results whereby the petitioner is reflected with 12,506 votes and the 1st respondent 13,334 votes. Counsel for the 1st respondent reiterated that despite the error in the figures published, the 1st respondent was still the winner with 13,334 votes.

Whereas the petitioner in his submissions is opposed to the declaration form annexed as D' on the certified, I find that the same bears the stamp and signature of the Chief Magistrate as certified. The document marked as Annexure 'C' also bears the certification from the Electoral Commission signed by Mr. Ejimu Charles.

Furthermore, the 2nd respondent owned the document during cross examination and it was admitted in open court. On pages 16 and 17 of the transcribed copy of the proceedings, Mr. Ejimu Charles confirmed during cross examination by counsel for the petitioner that the rectification in the 2nd gazette of 15th April 2016 is a true reflection of the final results of Erute North Constituency. And the rectification was in figures under section 58 of the PEA, the Returning Officer is mandated to declare and complete a return. Both Annexures 'B' and 'C1' to the additional affidavit show that the 1st respondent scored 13,334 total votes and the petitioner scored 12,506 total votes. Those are

the documents recognized under sections 47 and 58 of the PEA to reflect true results.

And as already noted, the petitioner and his agents together with other candidates were present at the polling station and the tally centre when the Returning Officer declared 1st respondent winner with 13,334 and petitioner 12,506 and the petitioner did not make any complaint till the publication, then this court finds and hold that the petitioner's intentions are to benefit from the typographical error made in the gazette. This court cannot allow that as the results on the ground as announced were different. I accordingly find and hold that the publication in the gazette of 3rd March 2016 was done in error. The second issue is resolved in the affirmative.

ISSUE NO.3: WHETHER THE 2ND RESPONDENT WAS JUSTIFIED IN ITS ACTION OF CHALLENGING RESULTS IN THE 15TH APRIL 2016 GAZETTE.

Having resolved the 2nd issue in the affirmative, then I find that the 3rd issue is automatic. It is the duty of the 2nd respondent under S.59 (i) of the PEA to publish the final results of an election in the gazette. That duty is also reflected in the constitution and the Electoral Commission Act. **Section 12 (1) (p) of the Electoral Commission Act Cap 140** mandates the Electoral Commission to discharge its functions in any way necessary for the carrying out of the purposes of the Act. In my view that includes publications of the correct results and correcting typographical errors made on the gazette. Much as counsel for the petitioner maintains that the rectification or change in result was after filing of the petition, I am inclined to agree with the submission of counsel for the 1st respondent and counsel for the 2nd respondent that the 2nd respondent owes a duty to the public and not the petitioner alone to correct the error made in a document of National importance as the gazette.

In my view, the correction in the gazette was not only made for the benefit of candidates who took part in the election, but also for public who voted and who were entitled to know their leader whom they had elected. In any case the notices in both publications were consistent on declaring the 1st respondent winner and did not at any one time publish the petitioner winner. So the 3rd issue is resolved in the affirmative.

ISSUE NO.4: REMEDIES.

In my view what I have discussed and outlined, I find and hold there is no proof to the satisfaction of this court to warrant setting aside the election of Erute County North Constituency. The petition is accordingly dismissed. As to costs, the same shall be awarded to 1st respondent only. Since it was the 2nd respondent who made the error in question, they cannot be allowed to benefit from their own error, though corrected. The 2nd respondent will therefore meet their own costs.

HON. JUSTICE WILSON MASALU MUSENE JUDGE

13/6/2016 .