

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

CIVIL APPEAL NO. 37 OF 2020

(ARISING OUT OF ELECTION PETITION NO. 007 OF 2018)

SSEBUGENYI HENRY ::: APPLICANT

VERSUS

1. KAWUKI HADAD

2. ELECTORAL COMMISSION ::: RESPONDENTS

BEFORE HON. JUSTICE MUSA SSEKAANA

JUDGMENT

BACKGROUND

The applicant filed this appeal against the judgement and orders of H/W Gakyaro Allan Mpirwe in Election Petition No. 007 of 2018 of the Chief Magistrates' court of Makindye delivered on the 30th day of June 2020 seeking for orders that;

1. This appeal be allowed and judgement entered for the appellant
2. The orders of the trial court be reviewed and set aside.
3. Costs of the appeal be provided by the respondents.

Aggrieved by the decision of the trial magistrate, the applicant filed this appeal on grounds that;

1. That the learned trial Magistrate erred in law and fact when he found that the election was held in non-compliance with the law which non-compliance substantially affected the results of the election.
2. That the learned trial magistrate erred in law and fact when he failed to evaluate the evidence on record and came to wrong conclusions that the election was held in non-compliance with the law which non-compliance substantially affected the results of the election.
3. That the learned trial magistrate erred in law and fact when he ordered that the 1st respondent be immediately sworn in as the chairperson LC1 of Kabuuma village when he was not the winner of the election.
4. That the learned trial magistrate erred in law and fact when he condemned the appellant in costs.

At the hearing of the appeal, the appellant was represented by Learned Counsel *Abudallah Kiwanuka and Katumba Chrisestom* and the 1st respondent was represented by Learned Counsel *Obam Andrew*. In the interest of time the court directed that the matter proceeds by way of written submissions which were filed by the appellant and the 1st respondent.

The 2nd respondent did not file its written submissions. However, court considered the submissions and evidence on record and had the matter determined.

It is true that the duty of this Court as first appellate court is to re-evaluate evidence and come up with its own conclusion. This position was reiterated by

the Supreme in the case of *Kifamunte Henry v Uganda SCCA No. 10 of 1997*, where it was held that;

“The first appellate court has a duty to review the evidence the evidence of the case and to reconsider the materials before the trial Judge. The appellate Court must make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.”

I have taken the above principles into account as I consider the Appeal. I have considered the record of proceedings of the lower Court and have considered the written submissions of appellant and the 1st respondent since the 2nd respondent never filed submissions.

GROUND 1 & 2

- 1. The learned trial magistrate erred in law and fact when he found that the election was held in non-compliance with the law which non-compliance substantially affected the results of the election.**
- 2. The learned trial magistrate erred in law and fact when he failed to evaluate the evidence on record and came to wrong conclusions that the election was held in non-compliance with the law which non-compliance substantially affected the results of the election.**

Counsel for the applicant submitted that the trial court abdicated its duty when it failed to ascertain the election results as per the declaration form prepared by the 2nd respondent therein. He stated that it is not in dispute that the form was prepared by the 2nd respondent in reflection of the outcome of the election and

the trial court should have considered it first before concluding that the elections were conducted in non-compliance with the laws.

Counsel further stated that from the affidavit of the 2nd respondent's official, it was clearly illustrated that the election went smoothly and in compliance with the electoral laws and no other evidence was produced to controvert it.

It was submitted that had the trial magistrate properly evaluated the evidence regarding the conduct of the election, he would have come to the conclusion that the alleged non-compliance did not in any way help the appellant win the same election and did not affect the results of the election.

It was further stated that the trial magistrate would not have ordered the 1st respondent to be sworn in as the validly elected chairperson yet he had already declared the election to have been conducted in breach of the laws as stated in his judgement.

Counsel stated that the evidence of DW3 and the rest of the respondent's witnesses stated that the election was conducted in compliance with the electoral laws and no evidence suggesting otherwise was provided for court to make its conclusion as it did thereby reaching an erroneous decision.

Counsel relied on section 61 (1) (a) of the Parliamentary Elections Act that provides that an election candidate as a member of parliament shall be set aside on ground, if proved to the satisfaction of the court, that non-compliance with the provisions of the Parliamentary Elections Act relating to the elections, if the court is satisfied that there has been failure to conduct the election in accordance

with the principles laid down in those provisions and that the non-compliance and failure affected the result of the election in a substantial manner.

He further cited the Supreme court case of *Mukasa Anthony Harris v Dr. Bayiga Michael Phillip Election Petition Appeal No. 18 of 2007* where it was held that the phrase “proved to the satisfaction of the court” on a balance of probabilities means that the petitioner must prove the occurrence of a fact to have been more probable than not. Counsel submitted that no evidence was put before court to show that any of the petitioner’s voters had been excluded to favor the appellant or even that the said signing of the forms while in hospital worked in favor of the appellant herein in any way.

The applicant submitted that the learned trial magistrate erred when he concluded that the official of the 1st respondent herein not knowing the total number of voters who were supposed to vote on the day, accepting the DR forms were signed in the hospital all pointed to non-compliance which he did not show how it favored the appellant.

It was submitted that proper voting had gone on until the appellant herein was declared winner that the 1st respondent and his agents tried to disorganize the election as illustrated in his affidavit though he was unsuccessful.

Counsel therefore prayed that this court find that the election was conducted in compliance with the law and that if at all there was non-compliance; the same did not affect the result of the election in a substantial manner nor did it in any way help the appellant herein win the election.

The 1st respondent submitted that the appeal before court is without merit and should be dismissed as the appellant has not demonstrated any ground known at law to warrant interference with the decision of the lower court that had an opportunity to listen to the witnesses.

Counsel further submitted that the decision of court was about failure by the 2nd respondent to conduct the elections according to its mandate under the law and that such failure affected the election in a substantial manner. Counsel stated that it is trite knowledge that the mandate to organize elections is for the 2nd respondent which did not appeal the decision of the court. Counsel therefore submitted that the appellant does not have locus to appeal on behalf of the 2nd respondent and the inclusion of the 2nd respondent in the appeal is a misjoinder.

On ground 1 and 2, the 1st respondent submitted that the trial magistrate rightly evaluated the evidence on record. He stated that the evidence that was led including that of DW4, the presiding officer for the election by his own admission that the election was not conducted in accordance with the law and as such affected the outcome in a substantial manner as the difference in total votes between the appellant and the 1st respondent was only 35 votes.

Counsel relied on section 132(1) of the Local Government's Act that provides that votes cast at every polling station shall be counted at the polling station immediately after the presiding officer declares the polling station closed and votes cast in favor of each candidate shall be recorded separately. He further stated that under section 115 (1) of the Act, the returning officer shall declare elected chairperson the candidate who has obtained the largest number of votes cast.

Counsel submitted that the 1st respondent in his affidavit in support of the petition in para. 4 stated that the 1st respondent was declared winner by the 2nd respondent with 501 votes while in actual sense, he had obtained 349 as per his agents. This was admitted by the returning officer. Counsel submitted that it is trite law that the party is bound by his or her pleadings.

Counsel further relied on section 136(4) of the Local Government Act that provides that the declaration of the results form shall be signed by the presiding officer and the candidates or their agents present who wish to do so and the presiding officer shall there and then announce the results of the voting at that polling station before communicating them to the returning officer. Counsel submitted that Annexure A, the declaration of results form on the pleadings does not reflect the signature of the agents of any of the contestants which is a contravention of the above section.

Counsel submitted that the admission of the presiding officer DW4 stated under cross examination that he never counted the number of legible voters before the election started, never counted the number of election slips used in the election, never ascertained the number of slips that actually remained after elections, never used the declaration of results forms to announce the 1st respondent as winner of the election all point to one then thing as to an election that was conducted outside the law and whose results do not meet the least thresholds for a trusted and reliable election as provided for under the law. Counsel therefore submitted that as a result, the 1st respondent was not validly declared as winner of the election by the 2nd respondent and prayed that the trial court rightly took note of all the illegalities.

Counsel relied on the case of *Col RTD Kiiza Besigye v Yoweri Museveni Petition No. 1 of 2001* where court held that non-compliance affected the result of the election in a substantial manner“ can only mean that the votes a candidate obtained would have been different in a substantial manner if it were not for the non-compliance.

Counsel submitted that DW4 in cross examination stated that he did not know the total number of voters that took part in the election yet he was legally required to know the number of voters before he could start the voting. Such omission is grave and makes the process susceptible to abuse and fraud as one cannot be in talk about the total votes scored when the number of voters that took place in an election are not known before and after the election took place.

Counsel submitted that as such, the results that where even reflected in the declaration of results form that was manufactured and came into existence so many hours after the election was conducted and results declared cannot be trusted and upheld by this honorable court.

Counsel therefore submitted that the Electoral commission which organized the election has not appealed against the decision and finding of the trial court and thus grounds 1 and 2 should of the appeal should be dismissed.

In rejoinder to the 1st respondent's contention that he had no locus before this court, the appellant submitted that any party dissatisfied with the trial court's decision logged this appeal on his behalf and since the trial in the court below brought out fact that the Election commission was responsible in a rather significant way for much of what went wrong at this election and was necessary

to be added as a respondent. He stated that to do otherwise would be to condemn the electoral commission in its absence during prosecution of this appeal. (See; *Oboth Marksons Jacob vs Dr. Otiam Otaala Emmanuel Election Appeal No. 38 of 2011.*)

On grounds 1 and 2, the appellant submitted in rejoinder that the trial court abdicated its duty when it failed to ascertain the election results as per the declaration of result form prepared by the 2nd respondent herein which the only exhibit tendered in court. Counsel stated that the trial court should have considered the form first before concluding that the elections were conducted in non-compliance with the laws.

He submitted that the trial magistrate erred in law and fact when he held that the elections were held in non-compliance with the laws which itself affected the results in a substantial manner without relying on any sort of evidence to support this finding and in total disregard of the appellant's evidence that the elections moved on smoothly.

Counsel submitted that the trial court rightly took note of all the irregularities and came to a right conclusion to nullify the election.

The appellant submitted that his contention is that the trial court as submitted by counsel for the 1st respondent after finding that the election was conducted in non-compliance with the electoral laws went overboard and directed that the 1st respondent be sworn in as the validly elected chairperson out of an election which it had found to have been conducted in non-compliance with the laws.

Counsel also submitted that the trial magistrate erred in law and fact when he failed to illustrate how the said non-compliance helped the appellant herein win the said election before reaching an erroneous decision that kicked the appellant out of office.

Analysis

Issues 1 and 2 shall be resolved by this court together accordingly.

It is now settled law that the burden of proof in election petitions lies with the petitioner. This was aptly stated in the case of **Mbowe vs. Eliufoo (1967) EA 240** where George CJ held as follows: **“In my view it is clear that the burden of proof must be on the petitioner rather than the respondent because it is he who seeks to have this election declared void.”**

I do respectfully share this view. This position has since been affirmed by Odoki CJ, who in **Kiiza Besigye vs. Yoweri Museveni Kaguta & Anor Election Petition No.1 of 2001** held: **“In my view the burden of proof in election a petition, as in other civil cases, is settled. It lies on the petitioner to prove his case to the satisfaction of court.”**

Against this background I now proceed to the determination of the issues. I shall address them in their order of record.

The electoral process in Kabuuma village was not conducted in compliance with the provisions and principles of the Constitution of the Republic of Uganda, the Electoral Commission Act and the Local Government Act. The **trial learned magistrate rightly found that there was incompetence, amateurish conduct of this election and as such lack of transparency and fairness by the 2nd respondent by its agent, the presiding officer DW4, Mr. Ssendikawa Godfrey**

who during cross examination accepted that he never knew the number of voters that were to vote, the number of voter slips before and those that remained after voting. He also never signed the declaration forms on the polling date as these were taken to him in hospital to which he transferred the results from a rough paper without any witnessing of either the candidates or their agents.

Section 136 of the Local Government Act is instructive on the manner with which results forms should be handled during an election. This was never complied with by the 2nd respondent's agent, the returning officer that handled the election.

Further, **Article 61(1) of the Constitution** enjoins the Electoral Commission to organize, conduct and supervise free and elections. **Article 68(2), (3) and (4)** outlines the gist of post-voting procedure in the conduction of an election, and specifically provides for the counting of ballot papers by presiding officers; the presence of candidates either in person or through agents during the voting and counting process, as well as at the point of ascertaining the results of the poll; and the signing of a declaration (form) by presiding officers, candidates or their agents attesting to the results of a given polling station.

This was not followed during this election by the 2nd respondent as stated during his cross examination before the trial court.

It was the appellant's submission that the declaration form prepared by the 2nd respondent in reflection of the outcome of the election should have been considered by the trial court. I find that this form was considered by the magistrate court which rightly found that it was filled in noncompliance of the

electoral laws and as such, the said results could not be allowed by the court. I therefore find that the trial magistrate was right in holding that election was held in non-compliance with the law which substantially affected the results of the election.

I must state from the onset that the question of substantiality of non-compliance stipulated in electoral laws recognizes that no election can be impeccable and totally free of any mistakes. This observation was similarly made in Kiiza Besigye vs Electoral Commission & Yoweri Kaguta Museveni Presidential (supra), where Odoki CJ held:

“The point to emphasize is that section 59(6) of the Presidential Elections Act anticipates that some non-compliances or irregularities of the law or principles may occur during an election, but an election should not be annulled unless they have affected it in a substantial manner..” This is echoed by Byamugisha JA in Ngoma Ngime vs Electoral Commission & Anor Election Petition Appeal No. 11 of 2002, where she states:

“An election is a highly charged exercise. The presiding officers have to count the votes cast and declare the results immediately after the close of the poll. In a situation like that mistakes are bound to occur.”

Nonetheless, the gravity and extensiveness of the mistakes made would determine the substantiality of the non-compliance complained of. In Morgan vs Simpson & Another [1974] 3 All ER 722 at 728 Lord Denning addressed the substantiality question as follows:

“I suggest that the law can be stated in these prepositions:

- 1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. *(emphasis mine)***
- 2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election.**
- 3. But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election is vitiated.**

The first preposition addresses the overall quality of an election regardless of the numerical effect thereof which was the situation under which this appeal/ case was brought.

After a careful review of all the evidence on record, I do find that the election in Kabuuma village was substantially in non-compliance with prevailing electoral laws with also breach of the election principles of fairness as exhibited by the 2nd respondent.

I do therefore answer grounds 1 and 2 in the negative.

Issue 3

The learned trial magistrate erred in law and fact when he ordered that the 1st respondent be immediately sworn in as the chairperson LC1 of Kabuuma village when he was not the winner of the election.

Submissions

Counsel for the appellant that the trial magistrate erred in law and fact when he ordered that the 1st respondent herein be immediately sworn in as the validly elected chairperson of Kabuuma when he was not the winner of the election which election he had found to have been conducted in total breach of the electoral laws.

Counsel stated that having found that the entire process was void since there was no transparency and compliance with the law, the trial magistrate was erroneous in allowing the petitioner in the trial court to benefit from what he had already declared null, void and illegal as he did. He stated that the magistrate ought to have ordered a fresh election having found that the non-compliance affected the results of the election in a substantial manner and also that the person who had actually won the election was not the successful party in the trial court.

He submitted that had the learned trial magistrate properly evaluated the evidence on record, he would have come to the conclusion that the election be set aside and orders a fresh one to be conducted. Counsel relied on the case of *Makula International v His Eminence Cardinal Nsubuga & Anor* [1989] HCB 11 and *Neptune Noratan Bhatia v Crane Bank Ltd* CACA No. 75 of 2006 where

court noted that once an illegality is brought to the attention of the court, it cannot be ignored. He further stated that once an illegality is brought to the attention of court, none of the parties can benefit from it (see; Re Milton Obote Foundation & Re An Application [1997] HCB 79.

Counsel therefore invited this court to find that the trial magistrate was in error having found that the entire election was conducted in non-compliance with the electoral laws and then order that the 1st respondent herein to be sworn in as the validly elected chairperson of Kabuuna without any basis court properly guided on the facts and principles of law cannot sanction what is illegal.

Counsel for the 1st respondent submitted that the appellant apart from being aggrieved by the finding of the trial magistrate has not demonstrated to court that the trial magistrate acted outside the law or his mandate. Counsel stated that the trial magistrate was justified in making the finding and orders as the same was based on the evidence adduced on record, the pleadings of the petitioner who asked to be declared because he had indeed won the election but the presiding officer had instead declared the appellant winner.

Counsel also submitted that under section 64 (4) (b) of the Parliamentary Elections Act which is an applicable law in the instant petition, a judicial officer after due inquiry of an election petition may declare that a candidate other than the one declared was validly elected.

It was submitted that the above section gives court the judicial discretion to declare that some other person other than the one declared by the Electoral commission was validly elected and this is what the trial magistrate did.

The 1st respondent prayed that court dismisses this ground of appeal.

The appellant reiterated its submission in rejoinder as to the trial magistrate declaring the 1st respondent as the winner having held that the election was held in contravention of the law. Counsel submitted that after the magistrate nullified the election, he had no discretion to direct that the petitioner be sworn in as the validly elected chairperson from an election he had already declared illegal, null and void and this was done ultravires his discretion since the entire election was tainted with irregularities as per his judgement.

Court's Analysis

The principles of free and fair elections, vote by secret ballot and universal suffrage are contained in the Election Act and the Constitution. The overriding principle in my view is that the election must be free and fair. The principles of freedom and fairness were laid down in the case of **AG v Kabourou (1995) 2 LRC 757** which emphasized that there must be laws put in place that promote conditions of freedom and fairness. An election must be free, fair and transparent. It must be conducted in accordance with the law and procedure laid down by Parliament. Further, the result of the election must be based on the majority of the votes cast.

Elections are the highest expression of the general will. They symbolize the right of the people to be governed only with their consent. The people have a right to make and unmake a government. **Article 21 of the Universal Declaration of Human Rights 1948** provides; *"The will of the people shall be the basis of the*

authority of government: this will be expressed in periodic and genuine elections which shall be held by secret vote or by equivalent free voting procedures."

Article 25 of the UN Covenant on Civil and Political Rights 1966 is in the same terms. The two articles also recognize the rights of everyone "to take part in the government of this country directly or through freely chosen representatives."

Our Constitution incorporates those principles in **Article 1 (4)** which states; *"The people shall express their will and consent on who shall govern them and how they should be governed through regular free and fair elections of their representatives or through referenda."*

An election is the mechanism whereby the choices of a political culture are known. These choices should be expressed in ways which protect the rights of the individual and ensure that each vote cast is counted and reported properly. An electoral process which fails to ensure the fundamental rights of citizens before and after the election is flawed.

Looking at the evidence and record of appeal, I note that the trial magistrate court held that indeed the election was held in non-compliance with the law which substantially affected the results of the election. Having held so, it was wrong for the same court to declare the 1st respondent as a validly elected LC1 Chairperson of the same election that was in non-compliance with the law. As stated above, if the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated irrespective of whether the result was affected or not.

I therefore find that the learned trial magistrate erred in law and fact when he ordered that the 1st respondent be immediately sworn in as the chairperson of LC1 Kabuuma village when the election was non-compliant with the electoral laws.

Therefore, ground 3 is answered in the affirmative.

4. The learned trial magistrate erred in law and fact when he condemned the appellant in costs.

As to this ground, it is well settled that costs follow the event unless the court orders otherwise for good reason. The discretion accorded to the court to deny successful party costs of litigation must be exercised judicially and for good cause. Costs are an indemnity to compensate the successful litigant the expenses incurred during the litigation.

In awarding costs, the courts must balance the principle that justice must take its course by compensating the successful litigant against the principle of not discouraging poor litigants from accessing justice through award of exorbitant costs. In reaching this decision, the trial court must have been guided by several considerations and acted under its discretionary power. This being an election petition the trial court must be guided by the level of participation of a party in the wrong doing.

Where a party is not to blame for the non-compliance it would be very unfair to condemn such a party to pay costs merely because he/she was the accidental beneficiary of the noncompliance. This was a proper case whose circumstances

warranted the exercise of discretion in not awarding costs against the applicant who was not to blame for any wrongdoing.

This ground of Appeal succeeds.

This court therefore makes the following orders as to the appeal;

1. The appeal is allowed in part.
2. The order as to the 1st respondent being sworn in as the LC1 of Kabuuma village set aside and the 2nd respondent is ordered to conduct a by-election for the village LC1 Chairperson. The 1st respondent must immediately vacate the office which he is occupying illegally.
3. Each party shall bear its own costs in this court and in the lower court.

I so order.

SSEKAANA MUSA

JUDGE

18th December 2020