

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
ELECTION APPEAL NO.17 OF 2020

KAJUMBA PATRICK----- PETITIONER

VERSUS

1. ELECTORAL COMMISSION

2. TUHAIRWE ALONE TURAHI-----RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

This is an appeal by way of Petition, in which the Petitioner, Kajumba Patrick, is challenging the decision of the 1st respondent refusing to denominate the 2nd respondent for the position of Chairperson LC V Isingiro District, on grounds that;

(a) Mr Tuhairwe Alone Turahi is not a registered voter anywhere in Uganda and his name does not appear anywhere on the National voters register.

The 1st respondent heard the petition and made a decision that was contained in a letter dated 24th November, 2020 communicated by the Chairperson of the Respondent, Justice Byabakama Mugenyi Simon to the complainant-Kajumba Patrick copied in to the Returning Officer and the 2nd respondent.

The 1st respondent observed that;

- 1) Tuhairwe Aaron Turahi enrolled for issuance of the National Identity Card on 1st July, 2014.
- 2) The National Identification and registration Authority(NIRA) rectified/changed the particulars of Tuhairwe Aaron Turahi to Tuhairwe Alone Turahi

It was the Commission's finding that according to NIRA records, Candidate Tuhairwe Alone Turahi of National Identification Number CM96062105WW6L is registered with National Identification and Registration Authority and his information is reflected in both the National Identification Register and the National Voters' Register. Accordingly, the decision of the Returning Officer, Isingiro District nominating Candidate Tuhairwe Alone Turahi was upheld.

The petitioner was represented by *Mr. Ntambirweki Kandebe and Mr. Luwum Adoch* while the 1st respondent was represented by *Mr. Sabiiti Eric* and the 2nd respondent was represented by *Mr. Byamugisha Gabriel, Mr. Kamukama David and Nkambo Geoffrey*.

The only issues for courts determination is:

1. *Whether the 2nd respondent was qualified for nomination as a candidate for the post of Chairperson Local Council V- Isingiro District in the 2020/2021 General Elections?*
2. *What remedies are available?*

Preliminary points of law

(1st Objection)

The petitioner's counsel challenged the affidavit in reply by the 1st respondent for not complying with rule 7 SI 141-1 that requires attaching any notes of the evidence taken and documents relied upon.

Secondly, the affidavit is challenged for being commissioned by a person who is an officer of the Commission's legal department and that he was in attendance at the hearing on 16th October 2020 in his capacity as Deputy Head-Legal Department.

The 1st respondent contended that the Mr Kugonza Enoch had no interest in the matter before the commission.

Analysis

It is not disputed that Mr. Kugonza Enoch is part of the Commission as the Deputy Head of Legal department and was part of the commission that took a decision in this matter which is subject of this appeal.

The provisions of **Section 4 of The Commissioners for Oath (Advocates) Act, Cap 5** are mandatory and provides as below -

“4. Powers of a commissioner for Oaths.

A commissioner for oath may, by virtue of his or her Commission, in any part of Uganda administer any Oath or take any affidavit for purposes of any court or matter in Uganda including matters ecclesiastical matters relating to the registration of any instrument, whether under an Act or otherwise and take any bail or recognizance in or for the purpose of any civil proceedings in the High Court or any Magistrates court except that a Commissioner for Oaths shall not exercise any powers given by this section in any proceedings or matter in which he or she is an advocate for any of the parties to the proceedings or concerned in the matter or a clerk to any such advocate or in which he or she is interested.

The powers of a commissioner for oaths are special powers that are exercisable in accordance with the law. The provision prohibits a commissioner from administering an oath in matters he is interested in. It is clear that Mr. Kugonza as an employee of the 1st respondent would by law be interested in any matter involving the Electoral Commission and especially so where they are challenging its decision. It was therefore illegal to have the documents commissioned by him.

The affidavit in reply is therefore struck off for that reason. I wish to note further the petitioner’s counsel has cited the case of **Fatuma Nakatudde & Anor vs Makerere University, Misc. Application No 175 of 2019**, Hon. Justice Musa Ssekaana held that:

“The provisions of Section 4 of the Commissioner for Oaths (Advocates) Act are mandatory and an affidavit commissioned in Contravention of those provisions is not merely an irregularity but a matter that goes to the root of legality of the affidavit in issue. Once an issue of illegality arises Court cannot close its eyes to it”. (Underlining for emphasis)

I have noted with greatest concern and respect that what is cited above was not the holding verbatim of the court or its decision but rather submission of counsel

for the applicant in that matter. Counsel should not confuse submissions with decisions of court.

2nd Objection

Secondly, the petitioner has also challenged the affidavit of the 1st respondent contending that it does not attach any notes of the evidence taken before it at the time of the hearing contrary to Rule 7(1)(f) of the Parliamentary Elections(Interim Provisions)(Appeals to the High Court from Commission)Rules.

Analysis

I find merit in this preliminary objection and also take judicial notice of this fact that in all matters that have been filed by the Electoral Commission, it has not been attaching any notes of the evidence taken at the time of its hearing of the complaint made to the commission.

The purpose of such notes of evidence is to guide the court handling the petition on what transpired and what formed the basis of decision made by Electoral Commission. It acts like a record of Appeal since the nature of the petition is an Appeal and is solely premised on the determination by the Electoral Commission.

Therefore, the Electoral Commission must always file or attach any notes of the evidence and the proceedings taken at the time of hearing in order to assist the high Court in proper and effective determination of the dispute by way of an appeal.

3rd Objection

The 1st respondent raised a preliminary point of law in their affidavit in reply contending that this court does not have jurisdiction to entertain the appeal since the grounds required constitutional Interpretation.

In their submissions they did not address this objection and I take it that they realised it was useless and or wastage of court's valuable time.

This court notes that advocates should distinguish application of Constitutional Provisions and interpretation of Constitutional provisions. Every court of law has a

duty to apply the constitutional provisions and not every application of constitutional provision would necessarily involve interpretation of such constitutional provision. In the case of **Mbabali Jude vs Edward Sekandi, Constitutional Petition Number 28 of 2012 at page 6**. Justice Remmy Kasule of the Constitutional Court in the lead judgment held that:

“The issue that calls for interpretation of the Constitution by the Constitutional Court must involve and show that there is an apparent conflict with the Constitution. The Constitutionality of a statute must be brought forth for determination.... There is however a difference between the Constitutional Court interpreting a provision of the Constitution as stated above and any other Court of law applying a particular provision of the Constitution to a particular set of facts to a case that is being determined by that Court”.

Whether the 2nd respondent was qualified for nomination as a candidate for the post of Chairperson Local Council V- Isingiro District in the 2020/2021 General Elections?

The petitioner’s main challenge to the 2nd respondent’s nomination was premised on the fact that he is not a registered voter and or his name does not appear on the national register.

In his complaint to the Electoral Commission the petitioner contended that ***“When I checked the national voters register, both the electronic and physical copy, I found that Tuhairwe Alone Turahi is not a registered voter anywhere in Uganda and his name does not appear anywhere on the National Voters Register.”***

The Electoral Commission finding after due enquiry found that Tuhairwe Aaron Turahi enrolled for the issuance of the National Identity Card on 1st July, 2014. Secondly, the National Identification and Registration Authority rectified/changed the particulars of Tuhairwe Aaron Turahi to Tuhairwe Alone.

The 2nd respondent submitted that, both the records at NIRA and the Electoral Commission reflect the 2nd Respondent as a registered voter with the corrections he made towards his national identification information. It was his contention that

on the date of nomination, the 2nd Respondent's particulars with the 1st Respondent were as reflected in the voter slip and that the authenticity of the voter slip is not being challenged.

Analysis

The petitioner's complaint against the nomination of the 2nd respondent was speculative in nature and was not supported by any cogent evidence. He made an assertion of fact which he failed to prove before the commission. ***“that the 2nd respondent is not a registered voter.”***

The Electoral Commission in its enquiry wrote a letter dated 19th October 2020 to Executive Director, National Identification and Registration Authority requesting for data and record of Tuhairwe Alone Turahi.

The letter was responded to in a letter dated 22nd October, 2020 and it was noted;

“This is to inform you that Tuhairwe Alone Turahi with the national Identification number CM96062105WW6L, registered with the National Identification and Registration Authority and his information is reflected in the National Identification Register. Attached are his copies of certified extract, enrolment form, change of particular forms, statutory declaration and academic copies (UACE and UCE)”

The 2nd respondent in his reply to the petition has attached his voter information set out in a voter slip in the names of Tuhairwe Alone Turahi, a copy of the national Identity card in the same names and a letter dated 25th September 2020 from National Identification and Registration Authority.

When the petitioner was confronted with such credible evidence of the 2nd respondent being a registered voter and thus his complaint collapsing without any merit, he has now resorted to looking for errors in the documents presented at NIRA and thus changing his case from not being a registered voter to wrongful change of name, the statutory declaration not being sworn by a competent person and the 2nd respondent not being a resident of Isingiro district.

The courts have been instructive on the importance of National Identity Card and a person's name appearing on the register. In the case of **Kasirye Zzimula Fred vs Bazigattirawo Kibuuka Francis & Anor, Election Petition Appeal No 01 of 2018**, the Justices of Appeal held that:

“A National identity Card may be proof that the holder is the person whose name appears on the register. Without the holders name appearing on the National voters register the National Identity Card is useless for purposes of an election”.

In absence of any evidence to the contrary which the petitioner failed to adduce, the 2nd respondent is a duly registered voter and was therefore lawfully and properly nominated to stand for the position of LC V Isingiro District.

This court has also noted that petitioner has tried to change the case from not being a registered voter to not being a resident of Isingiro district. This was not a ground conversed by the Electoral Commission and the same cannot be a subject of this petition. He cannot introduce new grounds of challenge at the appellate level and prima facie they are equally devoid of any merit.

Article 64(1) of the Constitution provides;

Any person aggrieved by a decision of the Electoral Commission in respect of any of the complaints referred to in article 61(1)(f) of this Constitution may appeal to the High Court.

Section 15(2) of the Electoral Commission Act provides;

An Appeal shall lie to the High Court against a decision of the commission confirming or rejecting the existence of an irregularity.

This means that the court hears this petition as an appeal and new grounds cannot be smuggled into the petition which is an appeal against the decision of the Electoral Commission.

In the final result this Petition fails and dismissed with costs to the respondents.

SSEKAANA MUSA

JUDGE

4th/01/2021