THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL APPEAL NO. 31 OF 2021

(Arising from Makindye Chief Magistrates Court Misc Application No. 018 of 2021 itself arising from Civil Suit No. 122 of 2021)

SEMATA GEOFREY EDU---------- APPELLANT

VERSUS

1. **NTAMBI FAROUK**
2. **ELECTORAL COMMISSION---------- RESPONDENTS**

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The appellant and the 1st respondent were the only two contestants in the elections conducted by the 2nd respondent on 02/09/2020 for the position of Parish Youth Council Committee Chairperson, Bukasa Parish, Makindye Division, Kampala where the 1st respondent was returned and declared the winner with 63 votes and the appellant with 57 votes.

The appellant was aggrieved and challenged the election results on grounds that the respondent was ineligible to contest in the election since he had attained the age of 30 years. By way of an ordinary plaint, the appellant instituted suit No.122 of 2021 in Chief Magistrates' court of Makindye at Makindye against the respondents to nullify the 1st respondent's election.

When the suit came up for hearing, the 2nd respondent raised a preliminary objection contending that court had no jurisdiction since the plaintiff had allegedly not exhausted the remedies under Section 15 of the Electoral Commission Act. Court upheld the objection and struck out the plaint while advising the appellant to file his complaint before the Electoral Commission.

The appellant filed a complaint against the election to the Electoral Commission as guided by court and the Electoral Commission determined that having declared the 1st respondent as winner, it was *functus official* hence prompting the appellant to file HCMA No.18 of 2021 for review of the decision in Civil suit No. 22 of 2020 and reinstatement of the main suit.

Court granted the review application partially, but dismissed the suit premised on the 1st respondent's objection that the main suit vide Civil Suit No. 22 of 2020 was commenced by an ordinary plaint whereas it ought to have been commenced by a petition.

The appellant being dissatisfied with the dismissal of Misc. Application No. 18 of 2021 filed this appeal on only one ground.

The learned trial Magistrate erred in law and fact when she dismissed the appellant's suit vide Civil suit No. 22 of 2020 on the basis that it had been commenced by ordinary plaint.

The appellant prayed for the appeal to be allowed, the decision and orders of the Magistrate be set aside with costs to the appellant.

At the hearing of the appeal, the appellant was represented by Learned Counsel *Olaa Gabriel* holding brief for *Ambrose Tebyasa* and the 1st respondent was represented *Makorogo Alex* while 2nd respondent was represented by *Kayondo Abubaker.*

In the interest of time the court directed that the matter proceeds by way of written submissions which I have read and considered in this Judgment.

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.

Following the cases of **Pandya vs R [1957] EA 336; Bogere Moses and Another v Uganda Criminal Appeal No.1/1997,** the Supreme Court stated the duty of a first appellate court in **Father Nanensio Begumisa and 3 Others vs Eric Tibebaga SCCA 17/20 (22.6.04)at Mengo from CACA 47/20000 [2004] KALR 236.**

The court observed that the legal obligation on a first appellate court to re-appraise evidence is founded in Common Law, rather than the Rules of Procedure. The court went ahead and stated the legal position as follows:-

"It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."

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 both parties.

The appellant's counsel submitted that the learned trial magistrate erred in law and fact when she sustained an issue of *"whether the applicant's suit commenced by a plaint was properly brought to court or not"*. The trial magistrate ought to have restricted herself to addressing the issues in the review application as the evidence in that application were pleaded in the application and affidavits of the parties and none of the respondents raised the issue in their pleadings.

It ought to be noted from the record that none of the respondents raised the issue challenging the procedure for commencement of the suit by ordinary plaint during the hearing of the main suit when it was dismissed. The 1st respondent only contested the jurisdiction of the trial Magistrate on the review application.

That notwithstanding, we submit that where there is no prescribed procedure to commence a suit which requires trial the best way to do so is through an ordinary plaint.as we shall demonstrate later. Whereas under Section 19 of the Civil Procedure Act it is provided that suits shall be instituted/commenced in a manner prescribed by the Rules, there is no specific procedure that has been prescribed under the National Youth Council Act Cap 319 (as amended) and National Youth Council (Councils and Committees) (Elections) regulations, 2011 made thereunder or any other law for challenging the Parish Youth Council Committee Chairperson Elections. This is not a case where the appellant flouted any prescribed procedure but rather one where he sought to access court for redress in a situation where no particular procedure of instituting a suit had been prescribed.

The appellant's/plaintiff's cause of action in paragraph 4 of his plaint is for nullification of the 1st respondent's election and for a declaration that the plaintiff was the validly nominated and elected candidate for Parish Youth Council

Committee Chairperson, Bukasa Parish, Makindye Division, Kampala. Having been a candidate in the election, the plaintiff had a personal and legitimate grievance against the respondents for failing to comply with and enforce various provisions of the law including the National Youth Council Act Cap 319 (as amended) and National Youth Council (Councils and Committees) (Elections) regulations, 2011 the provisions thereunder when the 1st respondent was permitted to contest in youth elections after he had attained the age of 30 years.

Section 8(3) of the National Youth Council Act, provides ***that "no person shall be eligible to be elected a member of a youth council committee unless he or she has attained the age of eighteen years…"*** Regulation 2 of the National Youth Council (Councils and Committees) (Elections) regulations, 2011 defines youth to mean a person between the age of 18 (eighteen) and 30 (thirty years).

Counsel submit further that it would be absurd and extremely unjust for a court of justice to deny a party an opportunity to access justice when he has demonstrated in his pleadings serious questions that warrant judicial investigation simply because he has commenced an action by ordinary plaint when there is no specified procedure for lodging the complaint.

The respondent's counsel submitted the appellant never used the right procedure to seek reliefs of such a nature arising out of an election process. The widely known mode of instituting suits seeking reliefs in electoral matters of such nature is by way of filing petitions and accompanying affidavits and not an ordinary suit.

They contended that the rules set the procedure for trials to hear and determine petitions within a given time frame with expedience and it would take a great deal to conclude matters if reliefs were sought by ordinary plaint. Voters must

know with expedience their representatives with certainty hence the essence and strictness of time and legal process that can only be explored via petitions and not ordinary suits.

Analysis

The appellant seemed to challenge the decision of the trial court on the basis that the issue of wrong procedure was never raised by any of the parties. The position of the law is clear that a court should not resolve issues that were never raised by parties without giving them an opportunity to address the same before the court.

In ***Nairobi City Council vs Thabiti Enterprise Limited Civil Appeal No. 264 of 1996 while citing Charles C. Sande v Kenya Cooperative Creameries Ltd Civil Appeal No.154 of 1992.(unreported) Cockar,*** **JA (as he then was), and Omolo and Tunoi JJA**, held that a judge had no power or jurisdiction to decide an issue not raised before him and went on to emphasize that, ***"in our view, the only way to raise issues before a judge is through the pleadings and as far as we are aware, that has always been the legal position."*** Moreover strange results would follow if judicial officers were free to determine issues not raised before them and to which the parties have not been given an opportunity to address court.

However, the court has inherent powers to determine the propriety of proceedings and procedure adopted by the parties to determine the competence of the suit at any stage even when it is not raised as an issue by either of the parties. The issues competence of a suit is not dependent on the any evidence but rather it is a question of law and neither of the parties suffers any prejudice once raised and determined by court on its own motion.

The appellant challenged the decision of the trial court for striking out the plaint as a wrong procedure and she noted as follows; *" The widely known mode of instituting suits of this nature, is undoubtedly by petition……..the suit is dismissed for using a plaint yet there is s statutorily prescribed mode of institution of suits of this nature."*

The National Youth Council Act was enacted to regulate youth activities in Uganda as well as creating leadership through composition of Youth Councils and Youth Committees. The creation of the different organs automatically introduced an element of elections of the different youths in different positions; Village Youth councils; Parish or Ward Youth Councils; Sub-county, Division or Town Youth Councils; County Youth Councils; and District Youth council. It out of this membership that a National Youth Delegates Conference is created which in turn elects representatives of the Youth in Parliament.

Therefore, it is not in dispute that this is an electoral process which ought to be regulated in the same manner like all other elective positions in the country as rightly observed by the learned trial Magistrate. The National Youth Act was enacted in 1993 and the different electoral laws were subsequently enacted and have continuously been undergoing different amendments since 1996 to-date. The electoral legal regime is the same and ought to be interpreted and applied as such in order to ensure harmonious application of the law.

The expression of the intention of Parliament has been expressed in the latter electoral legislations, then the only procedure available for challenging an election petition is by way of a petition and not a plaint. This procedure of a petition to apply to all manner of political elections represents a compromise

between the requirements of the rule of law and legal certainty on the one hand, and of fidelity to the intention of Parliament on the other. The legislative history surrounding the enactment of the National Youth Council Act must be interpreted with modifications by the subsequent Electoral legislations in order to remove any doubt about the manner of challenging Youth Elections in Uganda.

While interpreting a special statute like the Electoral laws, the court must consider the intention of legislature. The reason for this fidelity towards legislative intent is that the Statute has been enacted with specific purpose, which must be measured from the wording of the statute strictly construed.

In the case of *Kones v Republic and Others ex parte Kimani Wanyoike & Others [2006] 2 EA 158* where the Court of Appeal of Kenya noted;

> ***"In filing either their plaint or the judicial review process now under consideration, the clear intention of the parties aggrieved by the action of the Commission was to stop the commission from proceeding with the process of nominating the appellant. If the Commission can be stopped from proceeding with the process of nomination, it can also be stopped from completing the process of elections. That cannot be allowed because if it were allowed, the country may well end up having no members in the National Assembly as there will undoubtedly be interventions by the courts in the process of either electing or nominating members to the National Assembly. Such interventions might become the order of the day if ordinary processes of approaching the court-such as by way of a plaint, originating summons or judicial review- were allowed to take root in the electoral process……***
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> ***The procedure of judicial review, like that of a plaint or any such like procedure is and was not available to the parties aggrieved by the acts or omissions of the commission. The only valid way of challenging the outcome of the electoral process, and for that purpose of nominating members to the National Assembly, is part of the electoral process, is through an election petition as provided in the Constitution and National Assembly and Presidential Elections Act."***

In Uganda there are many elections at every level from village to district and in different categories of Youth, Women, Workers, Disabled, Parliament and Presidential. The general law on elections envisages only one mode or procedure of challenging an outcome of an election by way of Election Petition. This position ensures that undue delay may not be caused in completing the electoral process. Therefore, once an election is over, the aggrieved candidate may pursue the remedy provided under the provisions of the relevant law. Usually, such a remedy is by way of an election petition.

The learned trial magistrate was right to have the plaint struck off since the suit challenging an election was commenced by way of a plaint.

This ground of appeal also fails.

In the final result for the reasons stated herein above this appeal fails and is dismissed. I make no order as to costs.

It is so ordered.

SSEKAANA MUSA
JUDGE
22nd April 2022