

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

ELECTION PETITION NO.87 OF 2016

CORAM: HON. MR. JUSTICE S.B.K. KAVUMA, DCJ
HON. MR. JUSTICE RICHARD BUTEERA, JA ✓
HON. MR. JUSTICE BARISHAKI CHEBORION, JA

OKABE PATRICKAPPELLANT

V E R S U S

1. OPIO JOSEPH LINOS
2. ELECTORAL COMMISSION.....RESPONDENTS

JUDGMENT OF THE COURT:

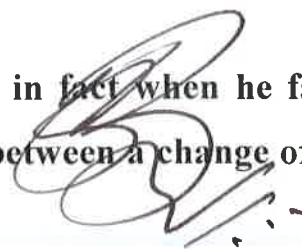
Background facts:

The appellant and respondent were candidates alongside four others in the Elections for Member of Parliament for Serere County, Serere District. The 2nd respondent returned the appellant herein as validly elected.

The 1st respondent filed a Petition in the High Court at Soroti challenging the appellant's victory on the grounds that he did not possess the requisite academic qualifications and was not validly elected in accordance with the Law. The learned trial Judge held that the appellant was not qualified to contest and be elected Member of Parliament and the elections of Serere County Constituency were not carried out in accordance with the Law.

The appellant was dissatisfied with the High Court decision hence this appeal.

He appealed on the following grounds of appeal:-

- 5 1. The learned trial Judge erred in law and in fact in finding and holding that the 2nd respondent reversed the decision of the Returning Officer rejecting the nomination of the 1st respondent to contest for the Serere County Parliamentary seat in the election held on 18/02/2016 (the election).
 - 10 2. The learned trial Judge erred in law and in fact in finding and holding that the 2nd respondent acted within the law when it allegedly nominated the 1st respondent on 15/01/2016 to contest in the election well after the seven (7) days prescribed by Section 16(b) of the Parliamentary Elections Act, 2005 (PEA).
 - 15 3. The learned trial Judge erred in law and in fact in finding and holding that the 1st respondent was validly nominated a candidate for the Serere County Parliamentary seat in the election.
 - 20 4. The learned trial Judge erred in law when he misconstrued, misunderstood and misapplied the word “interchangeably” in relation to the appellant’s names Okabe Patrick and Ochen Oliba Patrick by requiring the appellant to show where the appellant had used the name together.
 - 25 5. The learned trial Judge erred in law and in fact when he failed to understand and appreciate the difference between a change of names and using names interchangeably.
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6. The learned trial Judge erred in law and in fact when he disregarded the appellant's evidence and found and held that the appellant was not using the names Okabe Patrick and Ochen Oliba Patrick interchangeably.

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7. The learned trial Judge erred in law and in fact in finding and holding that the names Ochen Oliba Patrick do not belong to the appellant.

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8. The learned trial Judge erred in law and in fact in finding and holding that there is no nexus between the owner of the name Ochen Oliba Patrick who sat and was awarded the "O" Level Certificate presented by the appellant for nomination and Okabe Patrick, the appellant, who was nominated and elected Member of Parliament for Serere County.

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9. The learned trial Judge erred in law and in fact in finding and holding that the appellant was not qualified to be nominated and elected Member of Parliament for Serere County.

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10. The learned trial Judge erred in law and in fact in finding and holding that the 1st respondent's name and other particulars did not appear on the ballot papers for the election.

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11. The learned trial Judge erred in law and in fact in finding and holding that the 1st respondent and his supporters were disenfranchised and that the 2nd respondent was in breach of Section 61(1)(a) PEA.

12. The learned trial Judge erred in law and in fact in finding and holding that the election for Member of Parliament for Serere County was not carried out in compliance with the law.

13. The learned trial Judge erred in law and in fact when he nullified the election of the appellant as Member of Parliament for Serere County in the absence of any pleading and/or evidence that the alleged non-compliance with the provisions and principles of the electoral laws affected the result of the election for Member of Parliament for Serere County in a substantial manner.

14. The learned trial Judge erred in law and in fact in ordering the appellant to pay one third ($\frac{1}{3}$) of the costs in the High Court.

15. The learned trial Judge erred in law and in fact when he failed to properly evaluate the evidence on Court record thereby coming to wrong conclusion and occasioning a miscarriage of justice.

Representation:

At the hearing of this Appeal, the appellant was represented by learned counsel, Mr. Kimuli Moses.

Learned counsel, Mr. Deogratius Odekel Opolot represented the 1st respondent.

Learned counsel, Mr. Sabiti Eric represented the 2nd respondent.

Issues:

The 15 grounds of appeal were, with the agreement of counsel for the parties, condensed into the following 6 issues:

1) Whether the trial Judge erred in law and in fact in finding and holding that the 1st respondent was validly nominated a candidate for the Constituency in the elections. (Grounds 1, 2 and 3).

5

2) Whether the trial Judge erred in law and in fact in finding and holding that the appellant was not validly nominated to contest for the Constituency in the elections and was at the time of his election not qualified as a Member of Parliament for the Constituency. (Grounds 4, 5, 6, 7 and 9).

10

3) Whether the trial Judge erred in law and in fact in finding and holding that the election for Member of Parliament for the Constituency was not carried out in compliance with the law. (Grounds 10, 11 and 12).

15

4) Whether the trial Judge erred in law and in fact when he nullified the election of the appellant as Member of Parliament for Serere County in the absence of any pleading and/or evidence that the alleged non-compliance with the provisions and principles of the electoral laws affected the result of the election for Member of Parliament for Serere County in a substantial manner. (Ground 13).

20

5) Whether the learned trial Judge erred in law and in fact in ordering the appellant to pay one third ($\frac{1}{3}$) of the costs in the High Court. (Ground 14).

25

6) Whether the trial judge failed to properly evaluate the evidence on Court record thereby coming to wrong conclusions and occasioning a miscarriage of justice (Ground 15).

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Issue No.1:

Submissions of counsel for the appellant.

10 Counsel for the appellant submitted that the 1st respondent was not validly nominated to contest as a candidate in the contested elections.

15 According to counsel, the procedure for nomination of a candidate for Parliamentary Elections is outlined in section 11 of the Parliamentary Elections Act (PEA). A candidate is required to be nominated by 2 registered voters appearing in person and tendering to the Returning Officer, among other things, a nomination paper and names and signatures of at least 10 persons who are registered in the pertinent constituency as voters. The nomination of the 1st respondent, counsel argued, was rejected on the ground that the persons supporting the nomination were not registered voters.

20

Counsel for the appellant contended that the 1st respondent claims to have been nominated by the Chairperson of the 2nd respondent by way of an appeal process. He submitted that the said nomination was invalid as it did not comply with the procedure prescribed by Section 8 of the Electoral Commission Act (ECA).

25

Counsel contended further that for the Electoral Commission to sit and take a decision on an appeal against the Returning Officer's rejection of the 1st respondent's nomination, it had to have a quorum of five of its members. The

Commission would take such a decision by consensus or by voting and the Secretary of the Commission would take Minutes.

Counsel submitted that there was no evidence that the 2nd respondent ever sat to consider a complaint of the appellant about the rejection of his nomination by the Returning Officer of Serere Constituency and there was no evidence that the Commission ever held a proper meeting and took a decision nominating the 1st respondent as a candidate for the elections.

Counsel argued further that even if the Commission had sat and taken the decision on 16th January 2016, that decision would be a nullity as the Commission received the complaint on 10th December 2015 and they were obliged by Section 16(b) of the PEA to confirm or reverse the decision of the Returning Officer within seven days from the receipt of the complaint. That 15th January 2016 was 36 days later which is clearly beyond the 7 days prescribed by the Law.

Counsel submitted that, the Commission never invoked its powers under Section 50 of the Election Commissions Act to extend the time for acting beyond the stipulated period of 7 days and, therefore, the trial judge was wrong to have held that the Electoral Commission invoked and acted under Section 50 of the ECA.

Submissions of counsel for the 1st respondent.

Counsel for the 1st respondent submitted that the learned trial judge properly evaluated the evidence and found that the 1st respondent had been validly nominated by the EC.

According to counsel, the EC derived its power from Section 15 of the ECA when it handled the complaint of the 1st respondent. The EC also relied on its powers

under Section 50 of the ECA to enlarge the time to attend to the 1st respondent's complaint beyond 7 days.

Submissions of counsel for the 2nd respondent.

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Counsel for the 2nd respondent submitted that the Electoral Commission was a nominal party to the proceedings and should therefore not be condemned to costs. While admitting that there was no-compliance, that this did not affect the result of the election which declared the appellant the winner with 58.8% of the votes
10 cast.

Courts Resolution of Issue No.1:

Section 60(2) of the PEA provides for the persons who may file an Election
15 Petition under the Act.

It provides:-

“60. Who may present Election Petition?

(1).....

20

(2) An election petition may be filed by any of the following persons-

(a) a candidate who loses an election.

(b) a registered voter in the constituency concerned supported by the signatures of not less than five hundred voters' registered in the constituency in a manner prescribed by regulations.”

25

What is contested in this Election Petition Appeal is whether the appellant was a candidate in the contested elections in issue.



The learned trial judge considered the issue and resolved it as below:



5 “It is not in dispute that the petitioner submitted his application for nomination to the Returning Officer and was slated for nomination on 3rd December 2015. It is also not in dispute that his nomination was rejected by the Returning Officer ostensibly because the people who had supported his nomination were not registered voters. Upon rejection the petitioner, on 9th December 2015 lodged a complaint with the Electoral Commission. This was in accordance with Section 16(b) PEA. The section provides:

10 16. *‘Where a nomination paper of a person has been rejected or has been regarded as void by virtue of Section 13*

a).

15 b). *the person shall have the right to complain against the decision to the Commission within seven days from the date of rejection and the Commission may confirm or reverse the decision of the Returning Officer within seven days from the receipt of the complaint.’*

20 It is evident that the petitioner lodged his complaint within the timeline prescribed by law. It is further evident that the Commission reversed the decision of the Returning Officer and nominated the petitioner on 15th January 2016 well after the seven days prescribed by Section 16(b) PEA. In my view the Electoral Commission acted within the law since Section 50 of the Electoral Commissions act vests in the Commission special powers to enlarge time.

25 Further the 1st respondent took issue with the fact that the petitioner stated in his evidence that he appeared before the Chairman and two members of the Commission when the decision to nominate him was made.

According to the 1st respondent the decision should have been made by the full Commission. However I agree with the counsel for the petitioner that Section 8(5) ECA empowers the Commission to act notwithstanding the absence of a member of the Commission. Accordingly the decision to nominate the petitioner under Section 16(b) PEA was within the law.

It is therefore my finding that the petitioner was validly nominated candidate for election for Member of Parliament for Serere County. Issue one is therefore answered in the affirmative.”

We now proceed to consider as a first appellant Court whether on the available evidence and the law the learned trial judge was correct to hold as he did that the 1st respondent was properly nominated by the Electoral Commission as a candidate for Serere Constituency.

It is not contested that the 1st respondent was not nominated by the Returning Officer of Serere Constituency. His nomination was rejected because his supporters were not registered voters.

The learned trial Judge held that the Electoral Commission nominated the respondent in exercise of the Commission's power under section 15(1) of the Electoral Commission Act.

Was the said nomination proper as held by the learned trial Judge?

The issue of an appeal to the Commission over a decision of the Returning Officer of Serere arose at the trial during the cross-examination of Ms. Dora Nagirinya

Kayondo, a Lawyer for the Electoral Commission and we quote from the Court record at page 328:-

5 **“Kimuli: In case of an appeal by a person aggrieved by a decision to be nominated who would handle that appeal, to whom does he appeal?”**

Kayondo: He appeals to the Commission, the Commission includes 5 Commissioners, the Chair and the Deputy Chair, so it would be the Commission sitting as a quasi-judicial body that would listen to that appeal and then decide.

10 **Kamuli: Would you know how decision would be made by the Commission sitting as a quasi-judicial body?**

Kayondo: No I wouldn't.”

15 The lawyer for the Commission was right when she stated that the it would take the decision as a quasi-judicial body since it would, in that capacity, be resolving a dispute.

 The Supreme Court has had occasion to state the law on how a quasi-judicial institution should perform its duties in **Constitutional Petition No.46 of 2001**
20 **Sam Kuteesa and 2 Others versus The Attorney General** when it was concerned with how The Inspectorate of Government would perform its functions, it held:

25 **“It is a fact that the Inspectorate of Government by the nature of its responsibilities exercises judicial or quasi-judicial powers while carrying out its duties. To that extent we find as relevant to this case, the words considered in the South African case of *South Gauteng High Court, Johannesburg: Radio Pulpit vs. Chairperson of the Council of the Independent Africa and Another (09/19114) 2011 ZAP JHC 83 (8 March 2011)* when the Court held that:**

‘When several persons are appointed to exercise judicial powers, then in the absence of provision to the contrary, they must all act together; there can be only one adjudication, and that must be the adjudication of the entire body, and the same rule would apply whenever a number of individuals were empowered by the statute to deal with any matter as one body; the action taken would have to be the joint action of all of them for otherwise they would not be acting in accordance with the provisions of the statute.’

The Electoral Commission was bound to handle the 1st respondent appeal as a Commission.

In that capacity the Electoral Commission would be bound to follow the procedure set in Section 8 of the Electoral Commission Act which provides:-

“8. Procedure of the Commission.

- (1) Every decision of the commission shall, as far as possible, be by consensus.
- (2) Where on any matter consensus cannot be obtained, the matter shall be decided by voting; and the matter shall be taken to have been decided if supported by the votes of a majority of all the members of the Commission.
- (3) In any vote under subsection (2), each member of the Commission shall have one vote, and none shall have a casting vote.
- (4) The quorum of the Commission at any meeting shall be five.
- (5) The Commission may act notwithstanding the absence of any member or any vacancy in the office of a member.
- (6) The secretary shall cause to be recorded minutes of all proceedings of the Commission

(7) The Secretary shall have custody of the minutes of the Commission.

(8) Subject to this Act the Constitution, the Commission may regulate its own procedure.”



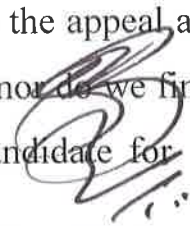
5 In the instant case, since Section 8 of the ECA prescribes a procedure, it would have been appropriate for the trial judge to examine whether that procedure was followed in the handling of the 1st respondents’ appeal to the EC and whether it acted as a Commission.

10 We have perused the record to establish whether from the evidence on before us the set procedure was followed.

As provided by Section 8 of the ECA, the EC would have to sit as a Commission. It would take its decision by consensus failing which it would be taken by voting
15 and its decision would then be that of the majority. The Commission would only sit as a Commission with a quorum of 5 members.

What is available on record as evidence of the decision of the Commission is an endorsement at the top right hand corner of annexure ‘E’ with an alleged signature
20 of the Commission Chairperson. There are no Minutes of the Commission proceedings for that day which is a requirement of Section 8(6).

In the circumstances of the instant Appeal, we do not find any evidence that the Electoral Commission ever sat as a Commission to Consider the appeal against
25 the decision of the Returning Officer of Serere Constituency nor do we find that the Commission ever nominated the 1st respondent as a candidate for Serere Constituency.



The trial judge found that the Commission had taken the decision to nominate the 1st respondent on 16th January 2016. Would that nomination be in valid?

Section 16(b) of the PEA provides:-

“16. Right to complain to the Commission upon rejection of nomination paper

.....

(a) The returning officer shall forthwith notify the person of the decision giving reasons for the decision; and

(b) The person shall have the right to complain against the decision to the Commission within seven days from the date of rejection and the Commission may confirm or reverse the decision of the returning officer within seven days from the receipt of the complaint.

15 The decision has to be taken within 7 days. The endorsement on annexure ‘E’ is dated 15th January 2016. 36 days later which is clearly beyond the 7 days prescribed by Section 16(b) of the PEA.

20 The learned trial Judge held that the Electoral Commission applied Section 50 of the ECA when it nominated the 1st respondent.

We produce the provisions of Section 50 of the said Act.

Section 50 of the Electoral Commission Act.

Special powers of the commission.

25 (1) Where, during the course of an election, it appears to the commission that by reason of any mistake, miscalculation, emergency or unusual or unforeseen circumstances any of the provisions of this Act or any law relating to the election, other than

the Constitution, does not accord with the exigencies of the situation, the commission may, by particular or general instructions, extend the time for doing any act, increase the number of election officers or polling stations or otherwise adapt any of those provisions as may be required to achieve the purposes of this Act or that law to such extent as the Commission considers necessary to meet the exigencies of the situation.

(2) For the avoidance of doubt, this section applies to the whole electoral process, including all steps taken for the purposes of the election and includes nomination.

(3) The Commission shall, in exercising the special powers under this section, inform all political parties and organisations and independent candidates of any action taken.

The Supreme Court had occasion to consider and state the law on application of Section 50 of the ECA in the case of **Joy Kabatsi and Another versus Anifa Kwooya**, Justice Tsekooko, JSC held:

“Subsection (1) of the section indicates that the section is applicable where there is any of the following factors:

- A mistake
- Miscalculation
- Emergency or
- Unusual or unforeseen circumstances.”

In the same case Justice Mulenga JSC held:

“Clearly, this is not a general or residual provision to be applied *post facto* in order to cure or validate non-compliance with provisions of

the Act or other law relating to elections. It is a provision that empowers the Electoral Commission to modify a provision of the Act or other law relating to elections, other than the Constitution, subject to the conditions set out in the section. The main thrust of the conditions is that under the stipulated circumstances the Commission has to give particular or general instructions adapting the provisions in question to the circumstances. In other words, the Commission has to actually invoke the section and not be deemed to have done so from its failure to comply with the law in question.”

We do not find an iota of evidence on record to indicate that the Electoral Commission in the instant case ever invoked Section 50 of the ECA. We do not find either that there was justification for the application of the said Section in the circumstances of the instant case. If the learned trial Judge had properly evaluated the evidence on record, we are sure he would have come to the same conclusion as we do.

For the reasons stated above, we find that the 1st respondent was neither nominated by the Returning Officer for Serere Constituency nor by the Electoral Commission as a candidate for Parliamentary Elections in the said Constituency.

Under Section 60 of the PEA only two categories of persons can petition in Parliamentary Election;

(1) Under Section 60(a) a candidate or

(2) Under Section 60(b) a voter registered in the constituency whose petition would be supported by the signatures of not less than 500 registered voters from the Constituency in issue. The 1st respondent never petitioned as a voter.

He petitioned as a candidate which we have found he was never nominated to be.

He therefore, did not qualify to petition under Section 60 of the Parliamentary Elections Act.

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In the result, we find that there was no proper Petition before the learned trial Judge to handle. We so find and hold. We resolve issue No.1 in the negative.

Our finding that there was no proper Petition before the trial Court wholly
10 disposes of the instant Appeal. There is no need to consider the other grounds of the appeal. The cross-appeal would only arise if there had been a Petition worth the trial Court's consideration. Having found that there was no proper petition, the cross-appeal had no basis and therefore, lapsed *ab initio*.

15 In the final result, we allow the appeal and dismiss the cross-appeal.

The decision of the trial court is hereby quashed and set aside.

We find that the appellant remains the validly elected Member of Parliament for
20 Serere Constituency.

The costs of this Appeal, of the cross-appeal and those of the trial Court shall be borne by the 1st respondent. We so order.

25 Dated at Kampala.....this day of.....2017.

30 Hon. Justice S.B.K. KAVUMA
DEPUTY CHIEF JUSTICE

Richard Buteera

Hon. Justice Richard Buteera

JUSTICE OF APPEAL

5

Barishaki Cheborion

10 Hon. Justice Barishaki Cheborion

JUSTICE OF APPEAL

15

8/5/2017

Kimuli Stores for Appellant.

Appellant present.

20 Ochokei Opolwa for Respondents

Sabrihi for 2nd Respondent

2 Respondent present.

Wafabaza & Nyomintono for Cross Respondent.

Ce. Judgment read in Court.

[Signature]
[Signature]