THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: Remmy Kasule, JA, Richard Buteera, JA and Hellen Obura, JA

ELECTION PETITION APPEAL N0. 75 OF 2016

(Arising from the decision of the High Court of Uganda at Kampala before His Lordship Hon. Justice Joseph Murangira dated 12.08.2016)

TAMALE JULIUS KONDE::APPELLANT

VERSUS

1. **SSENKUBUGE ISAAC**
2. **THE ELECTORAL COMMISSION::::::::::::::::::::::::::::::: RESPONDENTS**

JUDGMENT OF THE COURT

This is an appeal against the decision of Hon. Joseph Murangira, J delivered on 12th August, 2016, in which he upheld the three preliminary objections raised by counsel for the respondents, struck out the uncertified Declaration of Results Forms (DR Forms), expunged the six affidavits in support of the petition and dismissed the appellant's petition.

The background facts of this appeal are that the appellant, the 1st respondent and four others participated in an election conducted by the 2nd respondent for the position of Chairperson Bweyogerere Division, Kira Municipality, Wakiso District, held on 9th March, 2016 wherein the 2nd respondent returned, declared and published the 1st respondent as the validly elected Chairperson with 2188 votes as opposed to the appellant's 1873 votes. Being aggrieved by the outcome of the election and subsequent declaration of the 1st respondent by the 2nd respondent as the validly elected Chairperson of the said Division, the appellant petitioned the High Court of Uganda at Kampala challenging the election on

the grounds that the 2nd respondent failed in its duty to conduct the elections in accordance with the Electoral Commission Act, the Parliamentary Elections Act, and the principles governing elections and that the non-compliance affected the final result of the election in a substantial manner.

Before the scheduling of the petition could be conducted, counsel for the respondents raised preliminary objections that touched on the legality of the affidavits in support of the petition in three aspects. Firstly, that five affidavits in support were filed in court out of time and without the leave of court. Secondly, that some of the annextures to the affidavit of the petitioner in support of the petition were not certified as required by law. Thirdly, that some of the affidavits in support of the petition did not comply with sections 2 and 3 of the Illiterates Protection Act, Cap. 78 and section 1 of the Oaths Act, Cap. 19.

The trial Judge heard the submissions of all the parties on those preliminary points of law, upheld the objections and dismissed the petition on the ground that, having expunged the 6 offending affidavits and the uncertified DR Forms, there was no evidence left on court record in support of the petition and as such it lacked merit.

Being dissatisfied with the trial Judge's decision, the appellant appealed to this Court on the following 9 grounds.

1. *The learned trial Judge erred in law and fact when he held that the Declaration of Results Forms marked Annexures E1, E3, E5, E7, E9, E11, E13, E15, S1, S2 and S3 which were given to the appellant's polling agents at different polling stations had to be certified by Electoral Commission and that their non-certification contravened sections 73 and 76 of the Evidence Act and cannot be admitted in evidence.*

2. *The learned trial Judge erred in law and fact when he held that for any document allegedly issued by Electoral Commission must be confirmed that it was issued by Electoral Commission as genuine and proper by way of certification for any third party to rely on that document as coming from the Electoral Commission (sic).*

3. *The learned trial Judge erred in law and fact when he struck off the record the Declaration of Results forms marked Annexures E1, E3, E5, E7, E9, E11, E13, E15,S1,S2 and S3 for being uncertified by Electoral Commission.*

4. *The learned trial Judge erred in law and fact when he held that the only exception upon which uncertified Declaration of Results Forms could be relied on is only when the Electoral Commission had been given notice to produce the certified copies and it declined to do so (sic).*

5. *The learned trial Judge erred in law and fact when he struck off the court record the affidavits of Chelangati Sylvia, Mwesigwa Deo, Nansasi Angella, Ssebuma Godfrey, Mutumba William and Nagawa Jane for having been filed without leave of Court after the 2nd Respondent had filed its answer to the petition and its supportive affidavit.*

6. *The learned trial Judge erred in law and fact when he struck off the court record the affidavits of Ssebuma Godfrey, Mwesigwa Deo, Mutumba William and Nagawa Jane for non-compliance with the statutory requirements of section 2 and 3 of the Illiterates Protection Act, Cap. 78.*

7. *The learned trial Judge erred in law and fact when he held that the affidavits of Ssebuuma Godfrey, Mwesigwa Deo, Mutumba William and Nagawa Jane did not comply or conform to section 11 of the Oaths Act for lack of a jurat stating that the*

contents of the affidavit or affirmation were read over to the deponent.

8. *The learned trial Judge erred in law and fact when he dismissed the entire petition on the basis that the striking out and expunging the six affidavits in support of and Declaration of Results Forms marked Es in odd numbers left the petition naked and that the Declaration of Results Forms marked Es in even numbers are not supportive of the petition thereby leaving the petition unsupported by any evidence.*

9. *The learned trial Judge erred in law and fact when he failed to evaluate the evidence on the court record thereby coming to the conclusion that the petition did not have merit thereby dismissing it.*

At the hearing of this appeal, Mr. Katumba Chrisostom appeared for the appellant. Mr. Asuman Nyonyintono appeared for the 1st respondent while Mr. Elison Karuhanga represented the 2nd respondent.

Counsel for the appellant argued grounds 1, 2, 3 and 4 together, ground 5 separately, grounds 6 and 7 together and grounds 8 and 9 together. On grounds 1, 2, 3 and 4, he submitted that the trial Judge erred by striking out the DR Forms yet they are primary evidence as they were issued to the candidate's agent by the Electoral Commission. He argued that the trial Judge should have subjected the DR Forms he struck out to a close scrutiny to verify the appellant's complaint.

On ground 5, counsel submitted that the trial Judge expunged 6 affidavits on the ground that they had been served after the 1st respondent had filed an answer to the petition and without leave. He explained that the petition was filed on 9/5/2016 and the impugned affidavits were filed on 8/7/2016 and 11/7/2016 without leave of court and served on the 1st respondent on 1/8/2016. He conceded that by the time the 2nd respondent was served, he had already filed his reply to the petition on 23/5/2016 but contended that at the time of

filing the impugned affidavits, scheduling had not yet taken place and the filing of evidence had not yet been closed and therefore leave was not necessary. Counsel submitted that these impugned affidavits were not intended to plug holes in the appellant's evidence since they were filed before the 1st respondent had filed his answer to the petition.

On grounds 6 and 7, counsel submitted that all the elements in the Oaths Act were brought out and there was substantial compliance. He argued that although there was no strict compliance, the deviation in the form did not affect the document. He cited section 43 of the Interpretation Act to support his submission. He also referred this Court to the case of ***Bank of Uganda vs Banco Arabe Espanol, Supreme Court Civil Application No. 23 of 1999*** and prayed that this Court takes a liberal approach of this matter in accordance with Article126 (2) (e) of the Constitution.

On grounds 8 and 9, counsel submitted that even after expunging the DR Forms and the affidavits, there still remained the affidavit in support of the petition wherein the appellant alleged falsification of the results in paragraph 6 thereof. Counsel argued that the trial Judge ought to have subjected the petition to a close scrutiny based on that evidence. In conclusion he submitted that the trial Judge erred by dismissing the petition. He prayed that court sets aside the order of dismissal and subjects the evidence to fresh scrutiny and allows this appeal with costs here and in the court below.

In reply, counsel for the 1st respondent prayed to adopt the conferencing notes he had earlier filed in court and in addition, he submitted in regard to grounds 1, 2, 3 and 4 that the appellant had one complaint concerning 8 polling stations in respect of which he applied and obtained certified copies of the DR Forms from the Electoral Commission. However, instead of relying on those DR Forms, the appellant brought unknown DR Forms and he wanted the elections to be nullified on that basis. Counsel cited Article 61 of the Constitution and sections 50 and 51 of the Parliamentary Elections Act to support his submission that it is the Electoral Commission that has custody of the original DR Forms

and therefore could certify copies thereof.

He also relied on sections 73 and 76 of the Evidence Act and the case of ***John Baptist Kakooza vs Electoral Commission & Yiga Anthony, Supreme Court Election Petition Appeal No. 11 of 2007*** to support his arguments that the uncertified DR Forms produced by the appellant, being public documents, could not be admitted in evidence. He further submitted that in the event that this Court finds that the affidavits were wrongly expunged, the remedy would be to refer this matter back for trial using the expunged evidence.

On ground 5, counsel submitted that these affidavits were filed early but they were not served on the 1st respondent until 1/8/2016 after he had filed his answer to the petition and the matter had been fixed for scheduling. He added that even when the petition was advertised, these affidavits were never advertised for the 1st respondent to know the complaint and respond to it. He referred this Court to the case of ***Samuel Mayanja vs Uganda Revenue Authority, HCT-00-CC-MC-0017-2005*** where it was held that leave is required before a further affidavit is filed. He prayed that the decision of the trial court expunging those affidavits be upheld.

On grounds 6 and 7, counsel submitted that the requirement for a jurat is not a matter of form but a requirement of the law under the Illiterates Protection Act (IPA) which had to be complied with.

As regards grounds 8 and 9, counsel submitted that the 1st respondent never moved court for this remedy. It was only in the wisdom of the trial court that he dismissed the petition. He prayed that the appeal be dismissed but in the event this court allows the appeal, the 1st respondent should not be condemned in costs.

For the 2nd respondent, counsel submitted on grounds 6 and 7 that there was total non-compliance with the Oaths Act. He contended that the form of the jurat under the Oaths Act requires the 3rd person who is reading the affidavit to the deponent to do so in the presence

of the Commissioner for Oaths. He argued that in this case, there is no indication that it was done. The gist of the IPA is that the illiterate must instruct the person drawing the document and it must be ensured that the content reflect the instructions given by the person drawing the document reading it back to the illiterate. He relied on the case of ***Sitenda Sebalu vs Sam. K. Njuba & anor, Election Petition Appeal No. 26 of 2007*** for the position that in interpreting a statute, court must look at the intention of the framers of that provision. Counsel contended that the trial Judge was right to strike out the affidavits not properly executed.

On ground 5, counsel associated himself with the submissions of counsel for the 1st respondent that no leave was obtained to file and serve those affidavits and thus the trial Judge was right in expunging them from the record.

On ground 1, counsel submitted that the 2nd appellant had not addressed court on the issue raised in this ground in the lower court, but he hastened to add that, even if the trial Judge had disregarded the results in the DR Forms certified by the Electoral Commission and considered the uncertified ones by the appellant, he (the appellant) would still lose the election by a margin of 4 votes. He prayed that the appeal be dismissed with costs to the 2nd respondent.

In rejoinder, counsel for the appellant submitted that section 136 (c) of the Local Governments Act (LGA) requires the Electoral Commission to provide copies of the DR Forms to the candidate's agents and that is what they produced in Court to enable court investigate the complaint of falsification, forgery and election malpractice.

On the issue of inadmissibility of the uncertified DR Forms, counsel submitted that the other 4 Justices of the Supreme Court did not agree with the decision of Kanyeihamba, JSC in ***John Baptist Kakooza vs Electoral Commission & Yiga Anthony*** (supra), and they allowed ground 3. He invited court to follow that majority decision and hold that

uncertified DR Forms are admissible.

Regarding the expunged affidavits, counsel submitted that court can allow filing of affidavit and service thereof before scheduling. He added that while it is true the affidavits were not advertised, the purpose of advertisement is to notify the respondent and it is incumbent upon him to get the document from the court file. He prayed that, because of the peculiar nature and importance of this case, court allows the affidavits.

As regards the issue of the IPA and schedules to the Oaths Act, counsel submitted that there was substantial compliance as the affidavits show that they were read, interpreted and signed before the Commissioner for Oaths. He added that if the 1st respondent wanted more information, he would have cross examined the deponents.

On the alleged losing of the election by the appellant, counsel submitted that the evidence should have been scrutinized since the appellant stated in paragraph 9 of the petition, page 13 of the record that he would have won the election.

The duty of this Court as a first appellate court is to re-evaluate all the evidence on record and come to its own conclusions as was held in the case of ***Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997***. With the above duty in mind, we have carefully studied the court record and considered the submissions of counsel. We shall consider the grounds in the order set out by counsel for the appellant.

In regard to grounds 1, 2, 3 and 4 by which the appellant faults the trial Judge for striking out the DR Forms, we find it pertinent to reproduce the decision of the trial Judge at page 250 paragraph 2, lines 4-19 where he stated thus:

> *"The elections are important matters in our electoral process. Hence, it is not all about the entries in the DR Forms alone, but the whole document (DR Form) must be owned by the Electoral Commission. Thus, the authorship of the said impugned annextures*

(Es in odd numbers) is in doubt. It is not enough for counsel for the petitioner to state that the impugned annextures are from Electoral Commission to prove authorship of the impugned Dr Forms. Therefore non-certification of the impugned documents/annextures confirms two points:

(i) Their originality is suspect.

(ii) Electoral Commission is right to disown them because they are unknown to it.

Wherefore, I agree with the submissions by Counsel for the 1st respondent on the 1st preliminary objection. The said impugned annexures DR Forms which are uncertified are struck out and expunged from the Court record. In the result the 1st preliminary objection is answered in the affirmative..."

The trial Judge stated further in his conclusion in the last paragraph at page 258 and at page 259 as follows;

"...In closing and in consideration of the submissions by the counsel for the parties, the law cited and relied on by me in this case hereinabove in this judgment, the three preliminary objections I uphold, the strucking out and expunging the six (6) affidavits in support of the petition and the documents (DR Forms) marked Es in odd numbers left the petition naked. The remaining annexures (DR Forms marked Es in even numbers) attached to the affidavit of the petition are documents the petitioner is contesting. In other words the said DR Forms marked Es in even numbers are not supportive of this petition. In essence, there is no evidence left on the court record in support of the petition. In that regard, therefore, this petition lacks merit..." (Sic).

We note that the appellant had attached two sets of DR Forms to his affidavit in support of the petition but the trial Judge struck out one set on the ground that they are public documents that were not certified and therefore they could not be admitted in evidence. The trial Judge found that the other set which was certified was not supportive of the

petition. His findings were based on sections 73 and 76 of the Evidence Act.

We have had the opportunity of carefully perusing the petition that the appellant had presented to court and the complaints contained in paragraph 6 thereof. The appellant complained that duly completed and signed DR Forms in respect of 8 polling stations were issued to his agents at the polling stations but when he later obtained certified copies of the DR Forms from the Electoral Commissions he discovered that the results in those DR Forms were altered to give the 1st respondent more votes than what he had polled at each of the 8 polling stations, fresh DR Forms other than what his agents had signed were filled with those altered results and the signatures of his agents were forged.

In effect, the appellant's complaint was that the DR Forms whose contents were declared as the valid results at each of those 8 polling stations were not the same ones that were used to enter the final results in the tally sheets. He listed those 8 polling stations as Bukasa (NAT-Z) at St. James C.O.U polling station, Kito A Mandela College School (L-NAK) polling station, Namataba (A-A) polling station, Bweyogerere Health Centre II (NAL-N)-Kireka Main polling station, Namataba (ND-SH) polling station, Kirinya Main (N-Z) at Kirinya C.O.U polling station, Kito A (M-NAM) at Kirinya C.O.U polling station, and Hassan Tourabi I (A-K) polling station.

To support the above complaints, the appellant attached two sets of DR Forms to his affidavit in support of the petition. One set marked Es with odd numbers which he claims were the authentic DR Forms that were signed by the presiding officers and his agents at each of those 8 polling stations and the certified copies of DR Forms obtained from the Electoral Commission which he alleged contained altered results.

In paragraph 7 and 8 of the appellant's affidavit in support of the petition, he averred that according to the DR Forms given to his agents, he had polled a total of 2,071 votes and the 1st respondents had polled a total of 1,877 votes. By those number of votes, the appellant

contended, he emerged the winner of the election but the DR Forms which the 2nd respondent altered in collusion with the 1st respondent indicated that the 1st respondent had obtained 2,188 votes against his 1,873 thus making the 1st respondent the winner of the election.

The trial Judge dismissed the petition on preliminary points of law without carefully addressing his mind to the nature of the complaint. It was his finding that the DR Forms being a public document could not be admitted in evidence without certification by the 2nd respondent.

The Supreme Court had opportunity to consider the issue of admissibility of uncertified DR Forms in ***John Baptist Kakooza vs Electoral Commission & Yiga Anthony*** (supra). Kanyeihamba, JSC who wrote the lead judgment in that case had agreed with the opinion of this Court which upheld the decision of the trial court that uncertified DR Forms annexed to the affidavit of the appellant were inadmissible as evidence. However, Mulenga, JSC (RIP) and Katureebe, JSC (as he then was) wrote dissenting judgments on that point and Odoki, CJ (as he then was) concurred with them. The import of the majority decision on that point was that there are exceptional circumstances under which uncertified DR Forms can be admitted in evidence pursuant to sections 64 (1) (a) and 65 of the Evidence Act.

The instant case being an election matter, the above contentions by the appellant raise very serious allegations that go to the root of the election itself as they cast doubt in the vote tallying process. Given the peculiar nature of the appellant's complaint, it would defeat logic to expect the appellant to get certified copies of the impugned DR Forms from the 2nd respondent whom he is accusing of altering the results in collusion with the 1st respondent.

To our minds, the appellant's complaint presented an exceptional circumstance where uncertified DR Forms should have been admitted in evidence for purposes of facilitating inquiry by the court into the alleged alteration of the results. That way, the court would have

been able to compare the two sets of the DR Forms and would have made a finding on whether there was any alteration or not.

In view of the foregoing, it is our finding that much as section 76 of the Evidence Act provides for proof of public documents by production of the original or certified copies thereof, the trial Judge erred in dismissing the petition at a preliminary stage on the ground that it was unsupported. In our considered view, this was a matter that needed to be determined on the merits after a thorough scrutiny of the two sets of documents adduced by the petitioner in evidence. In the premises, grounds 1, 2, 3 and 4 are answered in the affirmative.

With regard to ground 5, counsel for the appellant conceded that the additional affidavits in support of the petition were filed without the leave of court, and moreover after the 2nd respondent had already filed his answer to the petition. However, it was contended that since the matter had not yet been scheduled and the filing of evidence had not yet been closed, it was not necessary to obtain leave before filing the additional affidavits in support of the petition.

The petition was filed under the Local Governments Act (LGA) which gives the timeframe for filing the petition. Section 138 (4) thereof provides that an election petition shall be filed within fourteen days after the day on which the results of the election have been notified by the Electoral Commission in the Gazette. Section 142 (2) of the LGA also provides for expeditious hearing of the petition as a matter of priority. It states thus:

> *"The High Court or chief magistrate shall proceed to hear and determine the petition within three months after the day on which the petition was filed and may, for that purpose, suspend any other matter pending before court.*

We note that in the instant case the petition was filed in time on 9th May 2016 with only one affidavit in support sworn by the appellant. Six additional affidavits in support were later

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filed as follows; 4 of them on 8th July 2016, 1 on 11th July 2016 and the last one on 22nd July 2016. This was long after the 2nd respondent had been served with the petition and its answer thereto filed. However, we note that the 1st respondent had not yet been served with the petition for the reasons stated in the affidavit in support of the application for extension of time within which to serve and an order for substituted service, namely; that the appellant and the process server had failed to trace the whereabouts of the 1st respondent to effect personal service of court process on him.

The application was heard and granted and the 1st respondent was served by advertising the notice of presentation of the petition in the New Vision newspaper of 18th July 2016. By that date 5 of the 6 additional affidavits in support were already filed and the 1st respondent's answer to the petition and the affidavit in support of it which were filed on 28th July 2016 could have specifically responded to the allegations made in those affidavits but he chose not to.

For the 2nd respondent, it is true that it had already filed its answer to the petition at the time the additional affidavits were filed and no efforts were made to serve them on it and as such it did not have the opportunity to specifically respond to the allegations made therein.

In their submissions on the preliminary points of law, both respondents contended that their right to a fair hearing was infringed by the appellant's late filing of the additional affidavits thereby denying them opportunity to respond to the allegations made therein. While the complaint of the 2nd respondent who had already filed its answer to the petition is justified, we do not accept that the right to a fair hearing of the 1st appellant who opted not to respond to the allegations in the additional affidavits that were already on court record was infringed.

We are alive to the fact that affidavit in support contains evidence that supports the allegations in the petition so as to give the respondent opportunity to respond to those

allegations. Therefore, the petition must be filed together with the supporting affidavit. Indeed the appellant's petition was filed together with his affidavit in support with two sets of the DR Forms attached as annextures to substantiate the allegations. The source of the uncertified DR Forms were named in both the petition and the affidavit in support as the appellant's agents. The 6 additional affidavits that were filed later were deposed by those agents.

Courts have always adopted a liberal approach when dealing with affidavits in election matters given the peculiar circumstances it presents. First of all, elections are matters of great public interest, secondly, the statutory time frame for filing election petitions is quite short and thirdly, evidence has to be gathered from a wide spectrum of people, including candidate's agents, voters and sometimes polling assistants and in this case, from the entire division. The evidence gathered has to be assessed for probative value before it is reduced into affidavits which are then commissioned and filed in court.

It is our firm view, based on the above factors, that it is sometimes practically not possible to file all the affidavits in support of the petition at the same time with the petition. As long as the additional affidavits are filed before the scheduling conference is conducted it is usually acceptable as no prejudice would be occasioned to the respondents even if no leave of court is obtained. We have observed this practice at the Supreme Court in presidential election petitions. This is because, it is during the scheduling conference that all loopholes in the pleadings are plugged, issues for trial and the authorities to be relied on are agreed upon, and the matter set down for hearing.

However, where it becomes necessary to file additional affidavits after the scheduling conference, then the party desiring to do so has to seek the leave of court, in which case, the court assesses the nature of the additional evidence to be adduced and determines whether or not it will prejudice the adverse party's case.

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In view of the above practice and in the circumstances of this case, we find that the filing of the additional affidavits by the appellant without the leave of court did not occasion any injustice to the respondents who could have still filed their reply to those affidavits as the matter had not yet been scheduled. We are fortified in our decision by Article 126 (2) (e) of the Constitution which enjoins this Court to administer substantive justice without undue regard to technicalities.

In the premises, it is our finding that the trial Judge erred when he struck out the appellant's additional affidavits on the ground that they were filed without leave after the 2nd appellant had already filed its answer to the petition. It is our considered view that instead of striking out the additional affidavits, the trial Judge should have, in the interest of substantive justice pursuant to Article 126 (2) (e) of the Constitution, directed service of the additional affidavits on the 2nd respondent and given it opportunity to respond to the allegations raised therein if it so wished. That way, the concern that the respondents were denied the right to a fair hearing would have been taken care of.

In conclusion, we find merit in the appellant's complaint as contained in ground 5 of the appeal which we allow.

On grounds 6 and 7 regarding the IPA and the Oaths Act, it was argued by the respondents that there was total non-compliance by the appellant. We shall reproduce the said provisions for purposes of clarity.

Sections 2 and 3 of the Illiterates Protection Act provide as follows;

"2. Verification of signature of illiterates.

> *No person shall write the name of an illiterate by way of signature to any document unless such illiterate shall have first appended his or her mark to it; and any person*

who so writes the name of the illiterate shall also write on the document his or her own true and full name and address as witness, ***and his or her so doing shall imply*** *a statement that he or she wrote the name of the illiterate by way of signature after the illiterate had appended his or her mark, and that he or she was instructed so to write by the illiterate and that prior to the illiterate appending his or her mark, the document was read over and explained to the illiterate. (Emphasis added).*

3. Verification of documents written for illiterates.

Any person who shall write any document for or at the request, on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her true and full address, ***and his or her so doing shall imply*** *a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her. (Emphasis added)"*

On the other hand section 1 of the Oaths Act provides as follows;

"1. Oaths to be taken.

The oaths which shall be taken as occasion shall demand shall be the oaths set out in the First Schedule to this Act."

The oaths set out in the 1st Schedule to the Act is as follows:

" *Form of Jurat*

(Where the commissioner has read the affidavit to deponent)

*Sworn at*_____*in the district of*

_____*this*_____*day of*_____,

*20*_____, *before me, I having first truly, distinctively and audibly read over the contents of this affidavit to the deponent he (or she) being blind or illiterate and explained the nature and contents of the exhibits referred to in the affidavit in the* _____*language. The deponent appeared perfectly to understand the same and made his (or her) mark (or signature) thereto in my presence.*

_____

Commissioner for Oaths"

" *Form of Jurat*

(Where a third party has read the affidavit to deponent)

*Sworn at*_____*in the district of*

_____*this*____*day of*_____,

*20*_____, *before me, and I certify that this affidavit was read over in my presence to the deponent he (or she) being blind or illiterate and the nature and contents of the exhibits referred to in the affidavit explained to him (or her) in the* _____*language. The deponent appeared perfectly to understand the same and made his (or her) mark (or signature) thereto in my presence.*

Commissioner for Oaths"

We note that the IPA does not provide any specific form for the verification but it emphasizes the fact that any person who writes the name of the illiterate or document for or at the request, on behalf or in the name of any illiterate and writes his or her own true and full name and address as witness and by so doing it is implied that he has done so after the illiterate had appended his or her mark, and that he or she was instructed so to write by the illiterate and that prior to the illiterate appending his or her mark, the document was read over and explained to the illiterate.

In his finding on this issue, the trial Judge stated at page 255 paragraphs 13-20 of the record of proceedings as follows;

> *"The certification on the impugned affidavits does not indicate that Mpenje Nathan wrote the document. It does not indicate that Mpenje Nathan received instructions from the deponents/illiterate persons to write the affidavit (s) in question. This would indicate that the said illiterate persons were manipulated by Mpenje Nathan, the literate person.*
>
> *Certainly, therefore, the impugned affidavits do not comply with the statutory requirements as enshrined in sections 2 and 3 of the Illiterates Protection Act..."*

Upon a careful perusal of the certification in the impugned affidavits, with due respect, we hold a different view from that of the trial Judge. We find that the certification by Mpenje Nathan passes the test under sections 2 and 3 of the Illiterates Protection Act which stipulates that by him writing the name of the deponents of the affidavits and also writing on the document his own true and full name and address as witness, his so doing implies

that he did so after the deponents had appended their marks on their respective affidavits and that he was instructed so to write by the deponents and that prior to the deponents appending their respective marks, the document was read over and explained to each of them.

In the circumstances, we do not see the basis of the trial Judge's conclusion that the illiterate persons who deposed the affidavits were manipulated by Mpenje Nathan, the literate person. In conclusion therefore, we find that there was compliance with the said provisions of sections 2 and 3 of the IPA.

The respondents also alleged that there was non-compliance with the Oaths Act. Section 1 of the Oaths Act requires oaths to be taken in accordance with the 1st Schedule to the Act which provides for a specific *jurat* to be followed. Counsel for the respondent submitted that the form of the *jurat* under the Oaths Act requires the 3rd person who is reading the affidavit to the deponent to do so in the presence of the Commissioner for Oaths. We are alive to the purpose of the Act which seeks to protect the illiterate/blind person.

This Court considered this matter in the case of ***Hon. Lillian Nakatte Segujja and anor vs Nabukenya Brenda (supra)*** where the learned justices stated at page 29-30 that;

> *"We note that while the inclusion of a jurat in an affidavit is an indispensable matter of substance, the manner of certification or the person who does it is a matter of form; hence, it is provided for under 'Form B' of the Schedule to the Act; which is an Appendix to the Act. By the Commissioner for Oaths administering the oath, after the certification by the third party interpreter that the affidavit was interpreted to the deponent, the Commissioner for Oaths attests in proof of the fact that such interpretation, though not done by him or her, was in fact done to his or her knowledge and satisfaction. Therefore, the Commissioning of the affidavit by the Commissioner for Oaths, serves as a certification too.*

We are therefore satisfied that the certification of the jurat by the interpreter, instead of the Commissioner for Oaths as provided for in Form B of the first schedule to the Act, should be considered an insubstantial deviation; which never seriously flouted the intention of the Legislature. We believe that where a Commissioner for Oaths administers an oath in an affidavit to a deponent after a third party instead of the Commissioner for Oaths, has effectively interpreted the contents of the affidavit to the deponent to his or her understanding, the affidavit should not be regarded as irredeemably defective as to be rejected. Parliament could not have intended that such an insubstantial deviation from the statutory provision should suffer such a consequence."

We adopt that same reasoning and hold that much as the form in the 1st Schedule to the Oaths Act was not strictly complied with in the instant case, the mischief sought to be addressed by that form was well taken care of by the certifications done in accordance with sections 2 and 3 of the IPA which primarily seek to achieve the same goal. The trial Judge should have also taken a similar view in keeping with the spirit of Article 126 (2) (e) of the Constitution. In this regard, it was held in ***Saggu vs Roadmaster Cycles (U) Ltd, [2002] 1 EA 258*** that a defect in a *jurat* or any irregularity in form of the affidavit cannot be allowed to vitiate an affidavit in view of Article 126 (2) (e) of the Constitution.

We also find fortification in the decision in ***Nanjibhai Prabhudas & Co. Ltd vs Standard Bank Ltd. [1968] E.A 670***, Sir Charles Newbold, P stated thus;

"The Courts should not treat any incorrect act as a nullity, with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a fundamental nature. Matters of procedure are not normally of a fundamental nature."

We were also guided by section 43 of the ***Interpretation Act*** which provides thus:

"Where any form is prescribed by any Act, an instrument or document which purports

to be in such form shall not be void by reason of any deviation from that form which does not affect the substance of the instrument or document or which is not calculated to mislead."

In the result, we find that the trial Judge erred when he struck out the 6 affidavits on the ground that they did not comply with section 1 of the Oaths Act as there was no jurat attached indicating that either the Commissioner for Oaths or a third party read over the contents of the affidavits and explained to the illiterates in the language they understood. In the premise, grounds 6 and 7 succeed.

With regard to grounds 8 and 9, it is our considered opinion that they were covered and disposed of during our determination of grounds 1, 2, 3 and 4 and we find no reason to repeat them here.

In conclusion, we find merit in all the grounds of this appeal and thus allow the appeal. We set aside the order dismissing the appellant's petition and order a full trial of the same before another Judge of the High Court. We award to the appellant the costs of this appeal and those of the proceedings in the court below that gave rise to this appeal.

We so order.

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

.....

Hon. Justice Remmy Kasule

JUSTICE OF APPEAL

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Hon. Justice Richard Buteera

JUSTICE OF APPEAL

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Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL

EPP No. 75/16

TAMALE JULIUS KONDE

V

SENKUBUGE ISAAC & ANOTHER

- Amin - ct clerk.
- Katumba christom for the appellant in court.
- Appellant and his respondent and his counsel are absent.
we ready for a judgment.
Judgment delivered in open court.

5/12/17