

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
ELECTION PETITION APPEAL NO. 99 OF 2016

(An Appeal arising from the Ruling and Orders of the High Court in Election Petition No.
019 of 2016 sitting at Jinja presided over by Hon. Eva.K.Luswata, J,
dated on 19th October 2016)

WANYAMA GILBERT MACKMOT:.....APPELLANT

VERSUS

1. HISA ALBERT

2. THE ELECTORAL COMMISSION:.....RESPONDENTS

CORAM:

HON. MR. JUSTICE REMMY KASULE, JA

HON. MR. JUSTICE RICHARD BUTEERA, JA

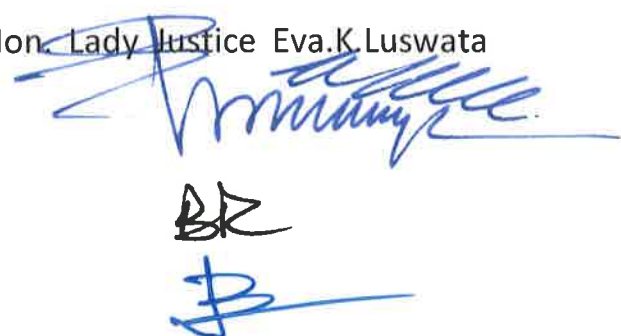
HON. MR. JUSTICE BARISHAKI CHEBORION, JA

JUDGEMENT OF THE COURT

Background

The appellant and the 1st respondent contested for the position of Chairperson, Sigulu Islands sub-county, Bukooli Islands County, Namayingo District. The 1st respondent was declared the winner of the said elections having scored 2,106 votes, the appellant had 2,082 votes.

The appellant filed an Election Petition in the High Court at Jinja and challenged the election results. At the hearing, the 2nd respondent raised a preliminary objection about the competence of the Petition for payment of insufficient court fees of shs.100.000 instead of shs.150.000. Hon. Lady Justice Eva.K.Luswata



upheld the 2nd respondent's preliminary objection and struck the Petition off the record for abuse of Court process and incompetence.

The appellant being dissatisfied with that decision, appealed to this Court on the following grounds as per the Memorandum of Appeal;

- 5 **1. The Learned trial Judge erred in law and fact when she found that the appellant had paid insufficient fees of shs.100.000 at the time of presenting the Petition.**

- 10 **2. The Learned trial Judge erred in law and fact when she found that section 172 of the Local Governments Act imported the applicability of the Parliamentary Elections Act in hearing and determination of the Local Governments Election Petitions.**

- 15 **3. The Learned trial Judge erred in law and fact when she found that payment of money into Court as security contravenes the provisions of Section 7 (2) of the Public Finance and Accountability Act.**

- 20 **4. The Learned trial Judge erred in law and fact to dismiss the Petition after the Court had already conducted an inspection of the ballot box of Buhoba Primary School Polling station.**

The appellant proposed to ask this honourable Court to:

- 25 **(a) To allow the appeal and set aside the ruling and orders of the High Court in Election Petition No.019 of 2016.**

- (b) To order for a retrial on merits of Election Petition No.019 of 2016.**

- 30 **(c) To order the 2nd respondent to pay costs of the appeal.**



Representation

At the hearing of this appeal, the appellant was represented by learned counsel, Mr. Musa Ssekaana.

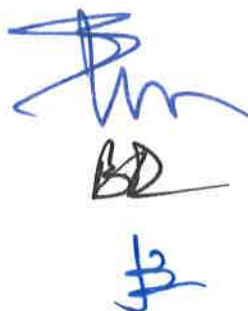
The 1st respondent was represented by learned counsel, Mr. Geoffrey
5 Komakech.

The 2nd respondent was represented by learned counsel, Mr. Amujong Kevin together with Ms. Rose Wakikona.

10 Counsel for all the parties agreed on the following issues for determination by Court:-

1. Whether the learned trial Judge erred in law and fact when she found that the appellant had paid insufficient fees of shs.100.000 at the time of presenting the Petition.
- 15 2. Whether the learned trial Judge erred in law and fact when she found that section 172 of the Local Governments Act imported the applicability of the Parliamentary Elections Act in hearing and determination of the Local Governments Election Petitions.
- 20 3. Whether the learned trial Judge erred in law and fact when she found that payment of money into Court as security contravenes the provisions of section 7 (2) of the Public Finance and Accountability Act.
- 25 4. Whether the learned trial Judge erred in law and fact to dismiss the Petition after the Court had already conducted an inspection of the ballot box of Buhoba Primary School Polling station.

The 4 grounds of Appeal which were the same as the 4 agreed issues were argued separately by all counsel.



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ISSUE NO.1

Whether the learned trial Judge erred in law and fact when she found that the appellant had paid insufficient fees of shs.100.000 at the time of presenting the Petition.

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Submissions of counsel for the appellant

Counsel submitted that the petitioner/appellant presented his Petition at the High Court of Uganda at Jinja and was assessed by the Court cashier who instructed him to pay Court fees of shs.100.000. The appellant duly paid the assessed fees of shs.100.000 in the bank and was later directed by the Court cashier to pay a sum of sh.150.000 as security for costs. Thereafter, the Petition was duly accepted before Court.

He contended that the appellant was not to blame for the mistakes or misrepresentation by the Court staff since he duly paid the amount he was asked to pay on presentation of the Petition.

He contended further that the Election Petitions procedure of the Local Governments do not set out or prescribe any fees payable upon lodgement of a Petition.

Counsel submitted that some Court Clerks and Judicial Officers have been wrongly applying rules governing fees from the Parliamentary Elections Act to Local Government's Elections allegedly by virtue of Section 172 of the Local Governments Act (LGA). According to counsel, applicability of Section 172 of the Local Governments Act is confined to the Electoral Commission (EC).



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Counsel contended that payment of insufficient fees is a technicality that the Court should have solved by ordering the defaulting party to pay sufficient fees rather than striking out the petition and denying justice to the petitioner.

5 Counsel further submitted that the law allows correcting or remedying the issue of non-payment or payment of insufficient fees under Rule 6 of the Judicature (Court fees, Fines and Deposits) Rules SI 13-3.

The trial Judge should have ordered the appellant to pay the correct fees.

Submissions of counsel for the 1st respondent

10 Counsel for the 1st respondent submitted that the petitioner/appellant, in his reply to the preliminary objection admitted that a filing fee of shs.100.000 was paid. Counsel contended that the fees payable in filing an Election Petition are provided for by the Parliamentary Elections (Interim Provisions) Rules SI 141-2 which are subsidiary legislation of the Parliamentary Elections Act. That, Section
15 172 of the LGA imports the applicability of the Parliamentary and Presidential Election laws since the LGA is silent on payment of Court fees

Counsel cited Rule 5 (3) and (4) of the Parliamentary Elections (Interim provisions) Rules, which provides for payment of shs.150.000 as court fees and non-acceptance of a Petition for failure to pay the requisite fees.

20 Counsel submitted that the learned trial Judge came to the right conclusion when she ruled that insufficient fees were paid and was therefore justified when she dismissed the appeal.



Submissions of counsel for the 2nd respondent

Counsel agreed with counsel for the 1st respondent and submitted that Section 172 of the LGA provides for the applicability of the Presidential and Parliamentary Election Acts. He cited Rule 5 (3) and (4) of the Parliamentary Elections (Interim Provisions) Rules which provide for payment of shs.150.000 as the appropriate court fees and the trial Judge was therefore right to strike out the petition for failure to pay the requisite fees.

Counsel contended that the Petitioner had listed the Parliamentary Elections (Interim provisions) Rules in his list of authorities which shows that the Petitioner was aware that the Parliamentary Elections (Interim Provisions) Rules do apply to Local Council Election Petitions.

He contended further that, it has been the practice of this Court to import and use Parliamentary Elections (Interim Provisions) Rules in Election Petitions of Local Council Elections and therefore the trial Judge was correct when she found that insufficient fees were paid by the appellant in the instant Petition.

ISSUE NO.2

Whether the learned trial Judge erred in law and fact when she found that section 172 of the Local Governments Act imported the applicability of the Parliamentary Elections Act in hearing and determination of the Local Governments Election Petitions.

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Submissions of counsel for the appellant

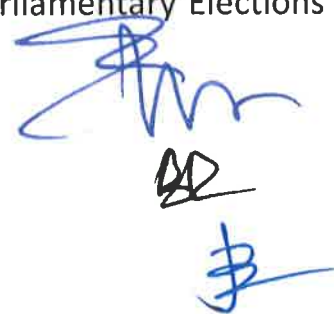
Counsel submitted that the trial Judge erred when she applied Section 172 of the LGA to infer that the provisions of the Parliamentary Elections Act and Parliamentary Elections (Interim provisions) Rules apply to Local Governments Election Petitions. Counsel contended that Section 172 of the LGA only allows the Electoral Commission to apply the Presidential and Parliamentary Elections Acts. According to counsel, the section does not provide for the Courts to apply The Presidential Elections and the Parliamentary Elections Acts to Election Petitions.

10 According to counsel, it is clear that Parliament never intended to impose fees or security for costs on Local Government's Petitioners as none were expressly provided for.

Counsel further contended that, if there is a lacuna in the law on the Court fees payable by Local Governments Elections Petitioners, then it should be the Parliament to address the lacuna and not the Courts.

Submissions of counsel for the 1st respondent

Counsel for the 1st respondent submitted that the trial Judge correctly applied Section 172 of the LGA and rightly applied the provisions of the Parliamentary Elections Act and the Rules made thereunder. He contended that the Petitioner in his Petition imported the Parliamentary Elections Act 17 of 2005 in their heading of the petition they filed in court and also listed the Parliamentary Elections (Interim Provisions) Rules SI 141-2 as authority that was to be relied upon. The petitioner thus conceded that the Parliamentary Elections Act was applicable to Local Governments Elections.

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He submitted that section 172 of the LGA is very clear that where the Act is silent on any issue then the Presidential Elections Act and Parliamentary Elections Act shall apply.

5 **Submissions of counsel for the 2nd respondent**

Counsel for the 2nd respondent agreed with counsel for the 1st respondent and submitted that Section 172 of the LGA indeed imports the applicability of the Parliamentary Elections Act. He further submitted that the trial Judge correctly held that Section 172 could come into play to cover the lacuna by directing the
10 Petitioner to apply the Parliamentary Elections Act.

ISSUE NO.3

**Whether the learned trial Judge erred in law and fact when she found that payment of money into Court as security contravenes the provisions of section
15 7 (2) of the Public Finance and Accountability Act.**

Submissions of counsel for the appellant

Counsel submitted that the money paid into Court as security for costs is not governed by the Public Finance and Accountability Act.

20 Counsel contended that the trial Judge erred when she held that payments of security for costs should be made to the consolidated fund as per the Public Finance and Accountability Act, and the money paid as security for costs should be paid to the bank. According to counsel, the money paid to Court as security

for costs, is paid in the specific Court and does not have to be paid to the consolidated fund.

Submissions of counsel for the 1st respondent

- 5 Counsel submitted that the trial Judge did not find that the payment made by the appellant as security for costs, contravened the provisions of Section 7 (2) of the Public Finance and Accountability Act. He submitted that the trial Judge found that the payment ought not to have been deposited in Court but should have been paid into the bank.
- 10 Counsel submitted that the trial Judge found that it was not clear why the appellant made the payment of shs.150.000 security for costs directly to the Court Deputy Registrar, who had no authority to receive the payment rather than to pay the cashier to deposit the money in the bank.

15 **Submissions of counsel for the 2nd respondent**

- Counsel agreed with counsel for the 1st appellant and submitted that the trial Judge never made any finding to the effect that payment of money into Court as security for costs contravened the Provisions of Section 7 (2) of the Public Finance and Accountability Act.
- 20 Counsel submitted that the trial Judge clearly pointed out that, the payment of shs.150,000 as security for costs, directly to the Court Deputy Registrar was made contrary to the law and according to counsel, the payment of Court fees and security for costs ought to have been paid, in accordance with Section 7 (2) of the Public Finance and Accountability Act.

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ISSUE NO.4

The Learned trial Judge erred in law and fact to dismiss the Petition after the Court had already conducted an inspection of the ballot box of Buhoba Primary School Polling station.

5 **Submissions of counsel for the appellant**

Counsel submitted that the learned trial Judge ordered for discovery and the ballot box which was the major contention of the Petition was duly examined in Court.

According to counsel, the trial Judge having ordered for discovery, which
10 discovery was conducted, should have proceeded with the trial of the petition and concluded it. She should not have terminated the trial on a technicality and stifle justice, contrary to Article 126 (2) (e) of the Constitution of the Republic of Uganda when there was already a report by the Deputy Registrar who had conducted the exercise of inspecting the Ballot Box.

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Submissions of counsel for the 1st respondent

Counsel for the 1st and 2nd respondents submitted that the trial Judge cannot be faulted for dismissing the Petition after the inspection. That, on the 29th of September 2016, the appellant was put on notice that the 2nd respondent
20 intended to raise a preliminary objection as to the validity of the Petition in Court. The order for inspection was made on the 10th of October 2016 and the inspection took place on the 13th of October 2016.

According to counsel, the appellant is estopped from raising inspection as a bar
25 to the objection, as he was notified earlier about the said objection. Counsel submitted that, it is trite law that matters of illegality can be raised at any time,

and once brought to the attention of the Court, illegality overrides questions of pleadings, including admissions. He cited *Makula International vs. His Eminence Cardinal Nsubuga and Anor, CACA No.4 of 1981* and *National Union of Clerical Commercial and Technical Employees vs. National Insurance Corporation, SCCA No.7 of 1993*, on the proposition that the main suit cannot proceed before an objection is ruled upon.

Following the above case law, counsel contended that, the order for inspection, could not stop the Court from making its findings on the validity of the Petition.

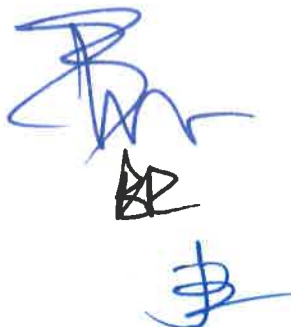
10 **Resolution by the Court**

We have considered the Record of Appeal, the Judgment of the lower Court, submissions of counsel for all parties and the authorities availed to court for which we are grateful to all counsel.

15 We find it necessary to resolve grounds 1 and 2 of the appeal together, since they relate to the same matter of the applicability of the Parliamentary Elections laws by virtue of Section 172 of the LGA. Grounds 3 and 4 of the appeal will be resolved separately.

Resolution of issues 1 and 2

20 At the commencement of the hearing of the Petition, the 2nd respondent raised preliminary objections about the competence of the Petition. According to counsel for the 2nd respondent, the petitioner, paid insufficient Court fees of shs.100.000/= instead of shs.150.000/= prescribed by the Parliamentary Elections (Interim Provision) Rules SI 141-2.



The learned trial Judge found that the petitioner, paid insufficient fees of shs.100,000/= when the prescribed fees that should have been paid is shs.150,000/= as provided by Rule 5(3) of the Parliamentary Elections (Interim Provision) Rules SI 141-2.

5 According to the trial Judge, Rule 5(3) of the Parliamentary Elections (Interim Provisions) Rules is applicable to Local Governments Elections by virtue of Section 172 of the LGA.

Resolution of this issue is dependent on whether The Parliamentary Elections (Interim Provisions) Rules S1 141-2 are applicable to Local Council Election
10 Petitions by virtue of section 172 of the LGA.

Section 172 of the LGA provides:-

15 **“For any issue not provided for under this Part of the Act, the Presidential Elections Act and the Parliamentary Elections Act in force shall apply to the elections of Local Councils with such modifications as may be deemed necessary by the Electoral Commission.”** (The underlining is ours for emphasis).

We find that wording of the provisions of Section 172 above quoted clear. The Presidential Elections Act and Parliamentary Elections Act in force shall apply to the elections of Local Councils with such modifications as may be deemed
20 necessary by the Electoral Commission.

The two above stated Acts are applicable to the conduct of elections and clearly the legislature did not intend to apply the two Acts to other matters other than the conduct of elections. That is the rationale for enabling the Electoral Commission which is the institution in charge of conducting the elections to

make any modifications that the Commission may deem necessary when conducting Elections of Local Councils.

In our view, Petitions and payment of court fees are not matters of conducting Elections of Local Councils. These matters relate to adjudication of disputes after the elections. They are handled by the courts and not the Electoral Commission which conducts elections. Therefore Section 172 of the LGA does not apply the provisions of the Presidential Elections Act and the Parliamentary Elections Act to payment of fees in petitions filed in respect of elections disputes over Local Government Elections.

In our view, the Local Governments Act does set out any provisions on court fees payable by a petitioner upon lodgement of a Petition. There being no specific rules for payment of fees in respect of the Local Governments Election Petitions the learned Judge should have relied on the provisions of the Judicature (Court fees) Rules Statutory Instrument 13-1 made under section 48 (1)(d) of the Act to determine the amount of court fees payable.

We find that the trial Judge erred when she relied on Section 172 of the LGA to apply the Parliamentary Elections laws to payment of fees in Local Governments Election Petitions and holding that the appellant paid insufficient fees. We fault the trial Judge on that finding.

Issues Nos. 1 and 2 of the appeal are answered in affirmative.

Resolution of issue 3

The petitioner paid shs.150,000 as security for costs which payment was acknowledgment by a receipt dated 6/5/2016 signed by Akeru Daniel, the Deputy Registrar, High Court-Jinja.

The trial Judge in her decision held:-

5 *“Secondly, the payment, if it was made, contravenes the provisions of the Treasury Accounting Instructions 2003, created under Section 7[2] of the Public Finance and Accountability Act, which makes provisions for compilation, management and safety of public monies and resources of Government...*

10 *The accounting officer of this court is the Deputy Registrar [appointed as a sub-accounting officer]. However for matters of revenue collection, each court has a designated cashier, who is empowered to make assessments of, inter alia, filing fees of court actions to be paid as Non-Tax Revenue [NTR]. All assessments made are to be paid in full into a designated bank. Any other payment cannot qualify to be a payment*
15 *duly made to the Government of Uganda. I know counsel for the petitioner is aware of that fact because, in making the payment of Shs.100.000/=, he followed that procedure and a receipt was duly issued by the Diamond Trust Bank, George Street Branch.*

20 *It is not clear why the payment of Shs.150,000/= was made directly to court purportedly on behalf of the Deputy Registrar of the court. Even if it were so made, that officer has no authority to receive payments in cash, at the court. Whether or not that payment was smuggled into court subsequent to filing the petition as suspected by 2nd respondent’s counsel, would not matter. It is a payment unknown and contrary to law...”*

(The underling is for our emphasis)

The trial Judge clearly referred to the security of costs payment as one that contravened the provisions in the Treasury Accounting Instructions 2003, created under Section 7[2] of the Public Finance and Accountability Act.

Section 7[2] provides:-

5 **"7. Designation, powers and duties of the Accountant General**

(2) Subject to this Act, the Accounting General shall be responsible for the-

(a) Compilation and management of the accounts of Government;

(b) Custody and safety of public money;

10 ***(c) Resources of government; and***

for that purpose, the Accountant-General may give general instructions to the accounting officers which are consistent with this Act, or any regulations or instructions issued under it."

15 We have established that the Accountant General made Treasury Accounting Instructions 2003 under the authority of section 7 of the Public Finance and Accountability Act 2003. They were issued in October 2004.

20 There are 859 Accounting Instructions. Chapter III of the Instructions is on collection of Government revenue and instructions 48 to 82 deal with collection of revenue. Chapter VIII is on management and security of public money. We have perused those provisions of the Treasury Accounting Instructions. Clearly Banking Government revenue is recommended but there are also provisions for receipt of cash and the issuing of receipts for money received. The receipt of
25 cash is not prohibited.

 We have not found the instructions that were contravened by the appellant when he was allowed to pay cash at the Court and a receipt was issued to him.

30 The trial Judge did not indicate in her Judgment which provisions of the Treasury Accounting Instructions 2003 were contravened. The trial Judge should have

stated clearly which instructions were contravened if there was any. We have found none.

We therefore find for issue No.3 of the Appeal in the affirmative.

5 We do not find it necessary to proceed with the consideration of issue No.4/ground 4 in view of our resolutions of issues/grounds 1, 2 and 3 above.

It is our finding that the petitioner/appellant paid court fees of shs.100,000/= as directed by court staff. He also paid shs.150,000/= as security for costs and the Deputy Registrar of the Court issued him with a receipt.

10 A party that has come to Court for Justice should be facilitated to have access to court and to have his case heard.

We agree with counsel for the appellant that it would be a great injustice to use a technicality (non-payment of sufficient fees), to defeat the petitioner's right to access justice because of the confusion or a mistake of court officials.

15 The Law governing court fees which is The Judicature (Court fees, fines and deposits) Rules S1 13-3 provides a remedy when insufficient court fees are paid.

Rule 6 of the rules provides:-

20 **"No document.....; but if any such document is through mistake or inadvertence received, filed or used in any court without the proper fees for it having been paid, the court may, if it thinks fit, order that such fees as it may direct be paid on that document, and upon the fees being paid, the document, and every proceeding relative to it, shall be as valid as if the proper fees had been paid in the first instance."**

25 In the instant case, the trial Judge ought to have applied the provision above quoted in order not to defeat Justice by striking out the petition.



In the result, we allow the appeal and set aside the ruling and orders of the trial court whereby the court struck out the election petition for abuse of court process and being incompetent. We make orders as follows:-

(1) The petitioner is to pay the balance of the correct court fees as assessed by the Registrar, High Court Jinja, for lodgement of the petition under the Judicature (Court fees, fines and deposits) Rules S1 13-43. The payment shall be made within a period of 15 (fifteen) days from the date of the assessment of the said fees by the Registrar, High Court, Jinja.

(2) The petition is to be heard afresh before another Judge of the High Court.

(3) The parties are to bear their own costs in this appeal and in the lower court given the fact that it was the court officials who were mistaken in the assessment of fees which led to the situation leading up to this appeal.

We so order.

Dated at Kampala.....18th.....this day of.....September.....2017.


.....
Hon. Justice Remmy Kasule
JUSTICE OF APPEAL


.....
Hon. Justice Richard Buteera
JUSTICE OF APPEAL


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Hon. Justice Barishaki Cheborion
JUSTICE OF APPEAL