

UGANDA / JUDGMENT

Ariko v Omara and Another (Election Petition No. 7 of 2021) [2021] UGHCEP 42 (26 August 2021) [2021] UGHCEP 42

COURT

Election Petitions of Uganda

BEFORE

Okuo-Kajuga, J

CASE / FILE NUMBER

Election Petition No. 7 of 2021

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT SOROTI

ELECTION PETITION NO 007 / 2021

..... PETITIONER ARIKO JOHNNY DE WEST

VERSUS

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OMARA YUVENTINE

1ST RESPONDENT

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THE ELECTORAL COMMISSION

2ND RESPONDENT

BEFORE: Hon. Justice Jane Okuo Kajuga

RULING

Introduction:

The petitioner, Ariko Johnny De West, filed this petition on the 25th of April 2021 challenging the election of the 1st Respondent as the District Chairperson, Abim. The petitioner and the 1st Respondent were the only nominees for the post and elections which were conducted on the 20th of January 2021 returned the 1st Respondent as winner. The results were published in the Uganda Gazette of 12th April 2021

The petition:

The petition is premised on grounds that the 1st Respondent, Omara Yuventine did not qualify for nomination for election as District Chairperson for failure to comply with the mandatory provisions of the law that require a public officer to resign from public office at least ninety (90) days before the nomination day. It alleges that at the time of his nomination on the 28th of September 2020, he was still a serving Captain in the Uganda Peoples Defense Forces. The petition faults the Electoral Commission for acting illegally in nominating the 1st Respondent and proceeding to hold unnecessary elections even after this anomaly had been brought to its attention through written complaints.

The law alleged to have been contravened by the Respondents is Section 4 (4) (a) of the Parliamentary Elections Act, Act No 17 of 2005. From the pleadings and the affidavit in support deposed on the 23rd of April 2021, Section 172 of the Local Governments Act, Cap 243 is relied upon to apply the provisions of the Parliamentary Elections Act. The petitioner contends that the declaration of the 1st Respondent as winner was void ab initio and he seeks the following declarations from Court:

- 1. That the 1st Respondent did not qualify for nomination as a candidate for the position of District Chairperson as he had not resigned from the UPDF within the time required under the law
- 2. That the election and subsequent swearing in of the 1st Respondent is inconsequential and must be set aside.
- 3. That the petitioner is validly elected unopposed

Preliminary Objection

The scheduling conference was held on the 23rd of August 2021 with the following representation:

Okong Innocent for the Petitioner who was present in Court.

Okwii Joseph, Abang Andrew and Obua Hamis for the 1st Respondent.

Natukunda Antonia for the 2nd Respondent.

During the Scheduling Conference, Counsel for the 2nd Respondent raised a preliminary objection regarding the Competence of the Petition before Court.

She submitted as follows:

That the petitioner had no locus to bring the petition under Section 4 (4)(a) of the Parliamentary Elections Act (PEA) as this provision only applies to elections for the post of Member of Parliament and did not apply to the election of Local Council members which is governed by the Local Government Act (LGA).

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She supported her position with the decision of the Court of Appeal in **Election Petition* Appeal No 110/2016 of Bandikubi Boniface Musisi and others Versus Sserwanga William Tom and the Electoral Commission*.

She submitted that the applicable law is Section 116 (5) of the Local Government Act, that the petitioner's failure to bring the petition under the right law in the circumstances of this case was fatal, and that causes of action in election matters are purely statutory and must be pleaded.

Further, she submitted that Section (4) (4) (a) of the Parliamentary Elections Act upon which the petition is based does not apply to officers of the UPDF as they are not public officers within the meaning of the law. She supported her argument with the Constitutional Court's decision in Constitutional Petition No 08 of 2006 of Darlington Sakwa and another Versus Electoral Commission and others.

She argued that following this decision, Article 80 (4) of the Constitution, Section 4 (4) (a) of the Parliamentary Elections Act and Section 116 (5) of the Local Government Act which relate to the resignation of Public officers running for political office, do not apply to officers of the UPDF.

In other words, even if the petition had been brought under Section 116 (5) of the Local Governments Act, the petition would still have been incompetent as the same does not apply to UPDF Officers.

Lastly, that the petition, being entirely premised on the false/misguided understanding that the 1st Respondent was a serving public officer who should have resigned his post prior to his nomination, cannot be sustained.

She invited the court to dismiss the petition summarily with costs as there was no valid cause of action against the Respondents.

Arguments for the 1st Respondent:

Counsel for the 1st Respondent concurred with the submissions of counsel for the 2nd Respondent and added that Section 172 of the Local Governments Act, cited by the petitioner in his pleadings allows for the application of the Presidential Elections Act and the Parliamentary Elections Act only for issues not provided for under the Local Government Act. It was his view that since Section 116 (5) of the Local Government Act covers resignation of public officers prior to nomination for political office, then Section 4 (4)(a) of the Parliamentary Elections Act is inapplicable, as there was no lacuna necessitating application of the Parliamentary Elections Act in the matter before court.

In his considered view, the petition is incurably defective as it is brought under the wrong law.

He called on the Court to dismiss the same with costs.

Reply of Counsel for Petitioner

Counsel for the petitioner disagreed with the proposition that S 116 (5) of the Local Government Act applies to District Chairperson elections. In his considered view, this provision only applies to the election of Councilors. The basis for his belief, as construed by this Court, is that Article 183 of the Constitution equates the office of a District Chairperson to that of a member of Parliament in as far as the requirements for qualification to these posts was similar. Indeed, he submitted that this was the reason for bringing the petition under the Parliamentary Elections Act. Further that S. 172 of the Local Governments Act allows the petitioner to use the Parliamentary Elections Act as a basis for his petition.

He asked Court to consider Section 111 (1) of the Local Government Act as applicable in the instant case and to rule that the petition had correctly been brought under that section.

He cited *Lunyolo Josephine versus Lunyolo Juliet Catherine and the Electoral Commission*, High Court Civil Appeal 35/2012 arising from election petition No 7/2011 to support his contention that the requirement for resignation of public officers running for political office cuts across all public servants contesting for elections, the first respondent inclusive.

He submitted that the officers of UPDF are public officers, required by law to resign before running for political office. He invited the court to consider the pleadings of the 1st Respondent which showed that he had in fact resigned from the UPDF, and that the submissions by his Advocates in court essentially depart from his pleadings, which would render the affidavit in support of the application full of lies.

He invited court to consider *Attorney General versus Maj General David Tinyefuza* Constitutional Appeal No 1/1997 where court dealt with the issue of resignation of members of UPDF. As a member of the UPDF, the 1st Respondent was bound by the Uganda Peoples Defense Forces Act and the UPDF (Conditions of service) (Officers) Regulations that govern resignation from the army.

In his view the decision in the case of **Bandikubi** cited by the 2nd Respondents Counsel was distinguishable as it was in respect of the payment of filing fees and stamp duty and not resignation of public officers.

He argued that election petitions aren't ordinary suits that have to disclose a cause of action. He emphasized that the petition was not brought under the wrong law.

He prayed that the preliminary objection be overruled with costs to the petitioner.

Rejoinder:

The 2nd Respondents counsel submitted that S 116 (5) of the Local Government Act applies to all Local Council elections because it falls under Part X of the Local Governments Act which is headed "Local Government Elections". She pointed out that this section provides for resignation within 30 days before nomination for Local Council elections.

She responded that Section 116 (5) of the Local Governments Act and Section 4 (4) (a) of the Parliamentary Elections Act raise different causes of action and as such, even if court found that the former is applicable, the petitioner would have to file a fresh petition. The illegality in the petition cannot be cured through amendment and that the petitioners case as it stands doesn't cite Section 116 (5) of the Local Government Act and this omission is incurable.

She submitted that the decision in the *Lunyolo Case* is inapplicable in the instant matter as it concerned a police officer and not a member of UPDF, and that there is a distinction between the two.

For the 2nd Respondent in rejoinder, it was stated that the petition is misconstrued in as far as Para 6 (V) thereof refers to the 1st Respondent as a public officer, which he is not.

He cited Article 257 of the Constitution as the authority on who a public officer is and it does not cover the members of UPDF who are "not in civil capacity".

Further, that the pleadings of their client referred to retirement and not resignation and that the two are different.

Further, that Section 111 (1) of the Local Government Act provides for the mode of election and cannot be said to apply as locus for the petition.

The prayer for summary dismissal of the petition and costs awarded to all Respondents Counsel were reiterated.

Resolution of the issues raised:

The preliminary objection raised by the Respondents consists of a point of law that arises from the pleadings of the petitioner. It was my view that the issues raised are capable of disposing of the matter and so I agreed to entertain it before concluding the scheduling Conference as it did not require evidence to enable me determine the same.

I am fortified by the knowledge that it is trite law that once an objection on a point of law is raised it is to be entertained by Court. The decision in **Mukisa Biscuit Manufacturing Company Versus West End Distributors Ltd** [1969] EA 696 at 700, upheld with approval by the East African Court of Justice in **James Katabazi and 21 others versus the Secretary General of the East African Community and the Attorney General of Uganda** (Ref. No 1/2007) was that preliminary objections raising a pure point of law are argued on the assumption that all the facts pleaded by the adverse party are correct and it cannot be raised if any fact has to be ascertained.

In addition, the Court of Appeal in the case of **Ndaula Ronald Versus Hajji Nadduli Abdul**, Election Petition No 20/2006 held that illegality of an issue is a question of law which can be raised at any time of the proceedings, with or without prior knowledge of the parties.

To that effect, it is also inconsequential whether the respondents in this case indicated in their pleadings that the other party's pleadings are defective and that they would raise an objection at trial. I will therefore proceed to resolve the point of law.

In disposing of the preliminary objection, I have considered the three issues raised for resolution to be the following:

- Whether the petition was brought under the right law?
- 2. If not, whether the defect is curable?
- 3. Whether the law regarding resignation by public officers intending to run for political office applies to the 1st Respondent, an officer of the UPDF?

Issue 1**Whether the petition was brought under the right law?**

I am guided by the decision of the Court of Appeal in **Simon Peter Kinyera versus The Electoral Commission and Taban Idi Amin**, Election Petition Appeal No 3 / 2018) which held that in determining whether or not a petition discloses a cause of action regard is had to the petition itself as a pleading and by assuming that the assertions are true.

The preliminary objection in this case is premised on the following undisputed facts. That the 1st Respondent and the petitioner competed for the post of Chairperson LC5 in Abim District. Both were nominated for the post and elections were conducted which returned the 1st Respondent as the winner. The latter was before his nomination, a serving member of the UPDF at the Rank of Captain. That the petitioner was aggrieved by the outcome of

the election and is convinced that the nomination of the 1st Respondent was improper as he had not tendered his resignation within 90 days as required by law.

The petition is brought under Section 138 of the Local Governments Act (as amended), Section 4 (4) (a) of the Parliamentary Elections Act and Section 172 of the Local Governments Act, among others. It is from the above that the preliminary objection emanates. From the pleadings of the petitioner, it is clear that his case is based on the provisions of the above cited laws.

Section 138 (1) of the Local Governments Act generally provides the remedy for an aggrieved candidate for Chairperson to petition the High Court for an Order that a candidate declared as Chairperson of a Local Government Council was not validly elected. I see no issue emanating from that.

The objection emanates from the reliance of the petitioner on Section 4 (4) (a) of the Parliamentary Elections Act which reads as follows:

'Under the multiparty political system, a public Officer or a person employed in any Government Department or agency of the Government or an employee of a local Government or anybody in which the Government has a controlling interest, who wishes to stand for election as a member of Parliament shall:

- a) In the case of a general election, resign his or her office at least ninety days before
nomination day (emphasis mine)

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The foundational question for this court to resolve is whether the above provision of the Parliamentary Elections Act applies in the circumstances of this case. A plain reading of the text of the provision shows that it applies to the election of members of Parliament with no mention whatsoever of persons wishing to stand for Local Council Office/ District Chairperson.

Having considered the pleadings, and the submissions of counsel for the petitioner, it is clear that his reliance on Section 172 of the Local Governments Act is aimed at bringing the petition under the purview of the Parliamentary Elections Act on the premise that there is no law in respect of resignations of public officers under the Local Government Act.

I hereby reproduce **Section 172 of the Local Government Act** in full hereunder, to enable careful consideration and appreciation of the issue arising from this reliance:

'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,

I have underlined what I consider the salient parts of this provision.

Local Council Elections are governed by the Local Governments Act Part X thereof titled "LOCAL GOVERNMENT COUNCILS ELECTIONS" and provides for the powers of the Electoral Commission to conduct these elections, matters relating to returning officers, the voters register, demarcation of electoral areas, qualifications of candidates, communication of results, polling and voting procedures etc. It also covers the nomination of candidates for local Government elections.

The wording of Section 172 is clear and unambiguous. I am convinced that the power to apply the Presidential Elections Act or the Parliamentary Elections Act to Local Council elections is restricted to scenarios where there is a lacuna in the latter. It is also a preserve of the Electoral Commission.

Justice Egonda Ntende in Election Petition Appeal No 110/2016 of Bandikubi Boniface Musisi and others versus Sserwanga William Tom and another considered the reach of Section 172 of the Local Governments Act. He held as follows:

'On the ordinary reading of the provisions of S 172 it is clear that they are only empowering the Electoral Commission and not any other body to use the Presidential Elections Act and the Parliamentary Elections Act in force to fill any lacunae in the election of local Councils with such modification as the Electoral Commission may deem necessary. Clearly these provisions only assist the Electoral Commission as it is managing elections for local councils and cannot be used as authority for imposing fees imposed by the Parliamentary Elections Act.'

Whereas the **Bandikubi** case was based on different facts of payment of Court fees, the principle is the same and applies to this case. In this regard I agree with the 2nd Respondents Counsel that it is not distinguishable on the basis of the principle enunciated therein.

I am bound by the above decision by the principle of Stare Decisis.

Having resolved that Section 4 (4) (a) of the Parliamentary Elections Act does not apply to Local Council elections, and that Section 172 of the Local Government Act does not empower the petitioner to apply the provisions of the Parliamentary Elections Act, the issue remaining is whether resignation of public officers contesting for political office is covered under the Local Government Act.

Both the Respondents and the petitioner advance contradictory positions on this, and these were captured in their submissions reproduced herein before.

The Respondents in support of their preliminary objection invited the Court to consider that Section 116 (5) of the Local Governments Act applies to the election of Chairpersons of Local Councils and that Section 4 (4) (a) of the Parliamentary Elections Act cannot therefore be relied upon by the petitioner as a basis for his petition.

Section 116 (5) of the Local Governments Act provides as follows:

'Under the multiparty political system, a public officer, a person employed in any Government Department or agency of the Government, an employee of the Local Government, or an employee of a body in which the government has a controlling interest who wishes to stand for elections to a local council office shall resign his or her office at least thirty days before nomination day in accordance with the procedure of the service or employment to which he or she belongs.'

In determining the true meaning of the above provision, its application to the elections of Chairpersons of Local Councils and discerning what the legislature intended, the rules of statutory interpretation have to be carefully applied. In doing so, I would first apply the literal rule of statutory interpretation and construe the ordinary meaning from the words used and the rules of grammar.

The section provides that any of the stated categories of people who wish to stand for elections "to a local council office" must resign before nomination. The use of the word "a" in the underlined phrase means "any" or "one of many". It does not specify any local government office and refers to them in general.

The question then becomes whether the District Council is "a Local Council Office" within the meaning of the Act. For this consideration, must be paid to the provisions of Sections 1 (h) of the same Act that interprets "local council" to include local Government

councils and administrative unit councils. Section 1 (i) defines local Governments to mean local councils established under Section 3 (2) to (5).

From the reading of the Act, the District Council established under Section 3 (2) (a) is the highest political authority within the area of its jurisdiction and is part of the Local Government Units in an area. The office of the Chairperson of the District therefore is a "local Council Office". The District Council consists of the District Chairperson and other members prescribed under S. 10 (1) (b-g) of the Local Government Act. Any of the offices established under this provision constitutes a local council office.

In light of the foregoing, I agree with the arguments of the 1st and 2nd Respondent that Section 116 (5) applies to the election of District Chairpersons.

It follows therefore that the Local Governments Act has a provision requiring resignation of public officers and officers employed in Government when they desire to seek election to a political office. I also find that S 116 (5) is the provision under which the petitioner ought to have brought this matter.

Counsel for the petitioner's argument that this section does not apply to the election of District Chairpersons is an erroneous position not supported by law. I find Section 116 (1) (a) of the Local Government Act is the only provision in the section that excludes the District Chairperson. It deals with the issue of qualification of members of District Councils. This is understandable as the qualifications for District Chairperson are set out elsewhere in the Act.

I find Section 111 (a) of the Local Government Act not useful in the resolution of the issue before me.

The first issue is accordingly resolved in favor of the Respondents. The law under which the petition is brought is not applicable. The citing of many other legislations in the heading of the petition are not central to the issue and cannot independently support the petition.

Issue 2: Whether the defect in the pleadings is curable.

The 2nd Respondent contends that Section 4 (4) (a) of the Parliamentary Elections Act and Section 116 (5) of the Local Governments Act raise two distinct causes of action. Whereas the first sets ninety (90) days as the least period within which a public Officer standing for member of Parliament would have to resign, the latter prescribes 30 days for those wishing to vie for local council office.

She submitted that failure of the petitioner to file under the right law was fatal as an amendment would not suffice to correct the error. The pleadings all were made in respect of a wrong law.

Counsel for the petitioner did not submit in respect of this ground, neither did he make a request for amendment if court did not find in his favor regarding the first issue. He insisted that he had filed under the right law and invited court to overrule the preliminary objection.

I have carefully considered the petition and the accompanying affidavit. In Paragraphs 5 and 6 of the petition it is stated that the 1st Respondent did not resign his position as required by Section 4 (4) (a) of the parliamentary elections Act and that he should have resigned at least ninety days before. This is the crux of the case and the pleadings.

I have already found that the petition was brought under the wrong law. It is the accepted position of the courts that citing a wrong law or even citing none does not necessarily invalidate the pleadings. The test is whether the substance of the case is clear on the pleadings and the opposite party is not prejudiced thereby. See *Gold Beverages U Ltd Versus Muhangura and another*, Civil Division Misc. Application 674/2019.

In the case of *Ocen Peter and Electoral Commission versus Ebil Fred* (Election Appeal No 83/2016) court found that the use of the acronym PEA instead of Parliamentary Elections Act could not have misled a reasonable person or Advocate. In that case, instead of quoting Act No '17 of 2005' on the petition it was written 'Cap 17 Laws of Uganda' Court found the error not to be fatal since the appellants had fully understood that the petition was brought under Act 17 of 2005.

In this case, can the failure to bring the petition under the proper law be regarded as a mere matter of form or technicality remediable under Article 126 (2) (e) of the **Constitution**? I think not.

I am convinced that quoting the wrong section of the law in this case cannot be cured simply by inserting the proper law as the character or substance of the petition before Court would be affected significantly. For comparison, I hereby reproduce the two sections

S 4 (4) (a) of the Parliamentary Elections Act reads as follows:

'Under the multiparty political system, a public officer or a person employed in any government department or agency of the government or an employee of the local government or anybody in which the government has a controlling interest, who wishes to stand for election as a member of parliament shall in the case of a general election, resign his or her office at least ninety days before nomination day'

On the other hand, Section 116 (5) of the Local Governments Act reads as follows:

'Under the multi-party political system, a public officer, a person employed in any Government department or agency of the government, an employee of the Local Council or an employee of a body in which government has a controlling interest, who wishes to stand for election to a local Council office shall resign his or her office at least thirty days before nomination day in accordance with the procedure for the service or employment to which he or she belongs.'

In my considered view the two provisions are different. If it was the case that they were exactly the same, then the error in this case could have been cured through amendment. Court may have been inclined to employ Article 126 (2) (e) of the Constitution to this matter. In this case, I am convinced the matter before court may have been substantially different if the requirement for resignation within 30 days was what was pleaded.

As stated by Counsel for the 1st Respondent, I am fortified in this position by the Supreme Court's observation in Civil Application No 52 of 1995, UTEX industries Ltd Versus the Attorney General that Article 126 (2) (e) of the constitution is not a magic wand in the hands of defaulting litigants. It cannot be relied upon to remedy all errors.

In All Sisters Co Ltd versus Guangzhou Tiger Head Battery, High Court Misc. Application No 307 of 2011 (arising from Civil Suit No 128 of 2010) Justice Madrama held that the intention of Article 126 (2) (e) of the Constitution is 'to ensure that substantial justice is done and that parties are not blocked by matters of form. To a large measure the question of whether a rule or law is of fundamental nature in the circumstances of the case or not has been left to the judgement of the Court.'

In the circumstances of this case, I find it impossible to exercise my discretion in any other way, than to find the petition incurably defective. An election petition brought under the wrong law cannot stand. Ikiror Versus Orot Election Petition 8/2016)

In light of the forgoing, I do not find it necessary to determine the issue of whether the requirement for public officers to resign under the Parliamentary Elections Act and the Local Government Act applies to members of the UPDF.

I accordingly uphold the preliminary objection as regards its reliance on the wrong law, and dismiss the petition.

As regards the prayers for costs, I am mindful that costs follow the event unless for good reason the court orders otherwise. In making its decision on costs, a court must consider several factors. This includes balancing the principle of compensating a successful litigant and thereby letting justice take its course and the principle that poor litigants should not be discouraged from accessing justice through the award of exorbitant costs. *Kizza Besigye Versus Museveni Yoweri Kaguta*, Supreme Court Presidential Election Petition 1/2001

In the case of *Ocen Peter and Electoral Commission versus Ebil Fred Election Petition Appeal No 83/2016*, the court of appeal declined to award costs because the petition in High Court was not totally unmeritorious the problem being sufficiency of evidence. In order to promote reconciliation, they found it appropriate that each party bears its own costs.

I too, in the circumstances of this case find it inappropriate to order costs considering that it was the cardinal duty of counsel to ensure that the petition was brought under the right law.

All parties shall bear their own costs.

Jane Okuo Kajuga

Judge of the High Court

Delivered at Soroti

26.8.2021

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