

UGANDA / JUDGMENT

Owokubariho v Mushemeza and Anor
(Election Petition No. 14 of 2021)
[2021] UGHC 57 (17 August 2021)
[2021] UGHC 57

COURT
High Court of Uganda

BEFORE
Katwe, Panel Member

CASE / FILE NUMBER
Election Petition No. 14 of 2021

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

ELECTION PETITION NO.014 OF 2021

IN THE MATTER OF THE LOCAL GOVERNMENT ACT CAP 243 (AS AMENDED)

AND

**IN THE MATTER OF THE LOCAL COUNCIL ELECTION FOR DISTRICT
CHAIRPERSON OF KITAGWENDA DISTRICT LOCAL GOVERNMENT DECLARED AND
GAZZETTED ON 12TH DAY OF APRIL 2021.**

OWOKUBARIHO ANANTOLI:.....

VERSUS

- 1. MUSHEMEZA ISMAIL KAMBANDA
- THE INDEPENDENT ELECTORAL $\mathcal{L}$ RESPONDENTS COMMISSION

BEFORE: HON. LADY JUSTICE VICTORIA N. N. KATAMBA

RULING ON PRELIMINARY OBJECTION.

The Petitioner Mr. Owokubariho Anatoli, a registered voter at Kanyegaramire polling station, Kigarama Parish, Kanara Sub County, Kitagwenda District filed this petition on the 26th day of April 2021 following his dissatisfaction with the

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declaration of the 1st Respondent as the District Chairperson of Kitagwenda District in the local government elections that were gazetted on the 12th day of April 2021.

The petition was duly served on the 1st and 2nd Respondents who filed their answer to the petition on 11th May 2021 and 14th May 2021 respectively.

In their response, the Respondents indicated that they would raise preliminary objections regarding the competence of the petition at the earliest opportunity given by court.

When the matter came up for scheduling on the 16th day of August 2021, Counsel Richard Bwiruka represented the petitioner, Mr. Ochieng Evans represented the 1st Respondent and the 2nd Respondent was represented by Mr. Kiriaghe.

When the matter was called, Mr. Evans Ochieng for the 1st Respondent informed the court that he had a preliminary objection to raise affecting the competence of the petition. He emphasized that it is important for this Court to resolve the preliminary objection before proceeding with the hearing of the Petition. This court then directed the parties to file written submissions and serve each other and fixed its ruling for today the 17th day of August 2021 at 3:00pm.

In their joint submissions, Counsel for the 1st & 2nd Respondents raise an objection to the effect that the petition is incompetent before court since it is not supported by 500 signatures of registered voters as required under the law.

Counsel refer this court to section 138(3) of the Local Government's Act, which provides that;

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

(a) A candidate who loses an election; or

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(b) A registered voter in the constituency concerned supported by the signatures of not less than five hundred voters registered in the constituency.

Counsels' submission is that this section is in *parimateria* with section 60(2) (a & b) of the Parliamentary Elections Act and I agree.

The Petitioner in paragraph 1 of his affidavit in support of the Petition and in paragraph 4 of his affidavit in rejoinder indicates that his Petition is supported by 510 signatures of voters from Kitagwenda District. Both Respondents Counsel contend that the Petition is not supported by 510 signatures as purported by the Petitioner and that the number of valid signatures is far less than the number required by the law.

In their analysis counsel categorize these signatures as follows;

- 1. Those names that do not have signatures at all.
- 2. Those names that do not indicate polling stations.
- 3. Those names that do not indicate National Identity cards.
- 4. Where the purported signatures and or thumb mark do not comply with the provisions of the Illiterates' Protection Act.
- 5. Those names with similar and or forged signatures.
- 6. Incomplete names.
- 7. Names that have National ID Numbers ineligible.

Counsel specified the names in the different categories highlighted as follows:

1. Those names that do not have signatures at all.
 - i. Nyabani sub county Name No.30.

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- Kanara Sub County Name No.41Mukanteri Tefania,87 Nyarabashitsi ii. Budesiana
- Buhanda Sub County Name No.20Rwabijungu Israel iii.
- iv. Nyabbani Sub County Name No.5 Tindibasa Geturida, Name No.8 Kyomuhangi Evas
- Nyabani Sub County Name No.18 Nyakato Prona, 38. Nuwamanya E, 41 \$V\$. Nabireba Salon ,44 Tindibasa Geturida,46 Kyomuhangi Scovia

2. Those names that do not indicate polling stations.

- Ntara Sub County Name No.3 Kemirembe Moreen Monica does not i. indicate if that person is a voter and in which polling station.
- ii. Mahoro Sub County Name No.03 Aheebwa Jonan.
- Nyabani Sub County Name No.11 Turyasingura Loyice, 18 Nakato Prona, iii. 36 Tumuhimbise Purisira.

3. Those names that do not indicate National Identity cards.

- Mahoro Sub County Name No.03 i.
- Bukurungu T. C & Ntara Sub County Name No.25 Natuhurira Urban ii.

4. Where the purported signatures and or thumb mark do not comply with the provisions of the Illiterates' Protection Act.

- Rwejanza Sub County Name No.6 Katushabe Zonabia. \$\dot{i}\$.
 - Ntara Sub County Name No.4,13,14, 29,35,39,41,44. ii.
 - iii. Bukurungu TC/ sub county Name No.2, 3,4,10,11,13,15,16,19,25,30,36,40,41,47,51,52,53, 65
 - Nyabani Sub County Name No.3,7, 18, 20, 22, iv.
 - Buhanda sub county Name No. 11 \$V\$.
- \$108/2521\$.
- Bukurungu TC & Ntara Sub County Name No.8,12,17. vi.
 - vii. Mahyoro Sub County Name No.4.
 - Bukurungu Sub County Name No.25,28,29 and 32. viii.
 - Nyaban Sub County Name No.12,17 and 19. ix.
 - Nyabbanyi Sub County Name No. 2,6,10. \$X\$.

5. Those names with similar and or forged signatures.

- Kanara Sub County Names No.12,13,14. i.
- 6. Incomplete names
- Rwejanza Sub County. Name No.7 is incomplete and or abbreviated i. Kabatangare J.
- Nyabbanyi Subcounty Name No.38Muwamanya E. ii.
- Bukurungu T/C Name No.12 Turyamureba, 13 Tushemereirwe, 14Ekkatabozi iii.
T,24Aharituhisya,27Tumuhirwe,32Byamukama ,21Bakeihahwenkyi J,46Baganywe.
B,47Tukamushaba J,48Byaruhanga J,58Byamukama D,
- Nyabbani s/c Name No. 20Natukunda M and 26Twinomujuni C. iv.
- Kitagwenda T/C Name No.8Twikirize L ,9Mukundane, \$V\$.
- Kinara Sub County Name No.3 Murangira J. vi.
- Bukurungu T/C & Ntaras County Name No.7Niwaritorana. vii.

- Mahyoro Sub County Name No.5 Ayebazibwe A. viii.
- Bukurungu sub county Name No.32 Natukunda S. ix.

7. NAMES THAT HAVE NATIONAL IDS INELIGIBLE

- Bukurungu Sub County Name 45. Ikatale Didas, No. Mubangizi Vicent. \$i.\$
- Bukurungu TC Name No.7, Turinabo Jackson. ii.
- Kanara Sub County No.26 Monday Martin. iii.

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- iv. Kanara Sub County No.33 Mugisha Ronald, No.57, Kasheija George.
- Bukurungu T/C & Ntara s-county No.30 Kamwenga John. \$V\$.

Both Counsel have invited this court to scrutinize the names on the numbers indicated above as regards illiterates some of whom on the face of the document have either put a thumb mark or have been indicated to be unable to sign as pointed out above. Their submission is that these offend the provisions of Sections 2 and 3 of the Illiterates' Protection Act and that the certificate of translation purportedly indicated below some of the signatures equally do not pass the test of sections 2 and 3 of the Illiterates' Protection Act.

The arguments of Counsel are that there is a standard certificate of translation which indicates a one Mugabe Robert as Commissioner for Oaths/translator.

In the said certificates, the Commissioner for Oaths states that he is conversant with both English and the Runyankore- Rukiga languages and purports to have read and explained to each of the persons signing the petition but he does not indicate who of the persons signing speaks which language and from which language and to which language the said translation was made.

Their argument is that Court cannot from this certificate tell to whom the document was translated into English, to whom the document was translated into Runyankore or to whom the document translated in the Rukiga language. Their submission is that the certificate of translation is incompetent and those names ought to be struck out.

Counsel further faulted the said list of signatures in support of the Election Petition on the premise that the Petitioner did not attach any copies of the voter's register or voters roll or even copies of National ID Cards of the alleged supporters of the Petition and that there is no proof that the entire list is of registered voters,

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They relied on the authority of **NAMUJJU DIONIZIA CISSY & THE ELECTORAL COMMISSION V MARTIN KIZITO SSERWANGA ELECTION PETITION APPEAL NO.62 OF 2016** in which the Court of Appeal emphasized the need for proof that the 500 signatories are in fact registered voters in the concerned constituency and the case of **TIKEN FRANCIS & CHELIMO NELSON KAPROKUTO V ELECTORAL COMMISSION AND ORS HCT-04-CV-EP-0001-2012** in which the Hon. Mr. Justice Stephen Musota as he then was struck the Petition out for being incompetent for failing to raise the 500 signatures required by law to buttress their position.

Counsel's submission is that the cases of *Tikens* and *Namujju* (supra) are on all fours with the current case with the facts at hand. On all fours describes a previous case with facts that are substantially similar to the case in issue. It establishes effective legal precedent because it deals with nearly indistinguishable facts and issues.

For the reasons stated above, both Counsel for the ¹st and ²nd Respondent pray that this court finds the petition invalid and strike out the same with costs to the Respondents.

In their response to the Preliminary Objection, Counsel for the Petitioner argued as follows:

That under the law a preliminary objection is raised as a point of law not evidence.

Counsel cited **GUNYA COMPANY LIMITED VERSUS ATTORNEY GENERAL DEFENDANT CIVIL SUIT NO. 031 OF 2011** citing with approval the case of **MUKISA BISCUIT MANUFACTURING CO. LTD V. WEST END DISTRIBUTORS LTD [1969] EA 696**, **THE ATTORNEY GENERAL V. MAJOR GENERAL DAVID TINYEFUNZA, S. C. CONSTITUTIONAL APPEAL NO.1 OF 1997** and extracted the following holdings:

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It was held that Under Order 6 rules 28 and 29 of The Civil Procedure Rules, a point of law may be set down for hearing and disposed of at any time before the hearing. If it substantially disposes of the whole suit, or of any distinct cause of action, ground of defence, setoff, counterclaim, or reply therein, the court may thereupon dismiss the suit or make such other order in the suit as may be just.

A preliminary objection should consist of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit.

The aim of a preliminary objection is to save the time of the Court and of the parties by not going into the merits of a suit because there is a point of law that *will dispose of the matter summarily.*

A preliminary objection must raise a point of law based on ascertained facts and not evidence. It should be a matter that is capable of determination based only on examination of the pleadings without reference to any evidence.

Even when such a matter is raised, the Court may defer its ruling on the objection until after the hearing of the suit or petition. Such a deferment may be made where it is necessary to hear some or the entire evidence to enable the Court to decide whether a cause of action is disclosed or not.

I think that it is a matter of discretion of the Court as regards when to make a ruling on the objection.

It is trite that preliminary objections draw a distinction between the merits of the suit and the subject matter of the objection. An objection should bear the character of matter that can be dealt with immediately without touching the merits, or involving parties in argument of the merits of the case. It should relate to a matter

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which can be disposed of by the Court at an early stage without examination of the merits. It should therefore be based on pure points of law or on ascertained, undisputed facts and any reasonable inferences that may be drawn from those facts.

Objections should be sustained only in cases which the facts on which they are based are clear and free from doubt. Where an objection is inextricably linked to facts that are disputed or have to be proved during the trial, then it goes to the merits of the suit and it should be joined to the merits.

When considering a preliminary objection, the court will not accept as true conclusions of law, unwarranted inferences from the facts, argumentative allegations, or expressions of opinion. The court will not decide as part of a preliminary objection, facts that require analysis beyond the pleadings.

The court should not reach a determination based upon its view of the controverted facts, but must resolve the dispute by receiving evidence thereon.

I have carefully perused the petition and attendant documents as well as the submissions of Counsel and will consider them in making my ruling. In fact, I associate myself with the definition of a preliminary objection in *Gunya* (supra) and the intention and basis for which they may be made as laid out therein.

The issue for determination by this court is whether or not the list of voters supporting the petition was compiled in accordance with the law and if not, whether it should be expunged from the record and the petition struck off with costs.

In his submissions, Mr. Bwiruka points out that the names of voters whose names are indicated on the lists are in total 516 and not 510 as pleaded. This is a clear

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departure from his pleadings. Order 6 r 7 of the Civil Procedure Rules prohibits departure from pleadings by the parties and the court.

Parties are bound by what they say in their pleadings which form the record.

In the case of Captain Harry Gandy versus Caspair Air Charter Ltd. (1956) 23 EACA 139, SIR Ronald Sinclair said:

"The object of pleadings is of course, to ensure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that *of his opponent."*

(Refer also to Jani Properties Ltd vs. Dar-es-Salaam City Council [1966] EA 281.

For this reason, the original number of 510 signatures as pleaded shall be maintained. Before delving into the evaluation of the evidence on record, I will restate the provisions of S.138 of the Local Governments Act here below:

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

- (c) A candidate who loses an election; or
- (d) A registered voter in the constituency concerned supported by the signatures of not less than five hundred voters registered in the constituency.

This is the premise upon which the Preliminary Objection was raised by the 1st and 2nd Respondent's Counsel. Their arguments are that not only are the signatures less than the number required by law but that the signatures are also defective.

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The Petition is supported by a list of 510 counter signed names.

In agreement with both Respondents Counsel a perusal of the lists indicates that:

- $\mathbf{I}$. There are 11 names on the list that bear no signature.
- Π There are five names that do not indicate the voter's polling station.
- $\mathbf{III}$. There are two signatures that do not have supporting National Identity cards
- IV. There are ten names that do not comply with the provisions of the Illiterates Protection Act.
- V . There are eleven names that are incomplete
- VI. There are names whose supporting identification documents are ineligible.

The particulars of each category were set out by Respondents Counsel and indeed my perusal of the record shows it to be true.

There are indeed forty-four (44) signatures that are defective as described above.

Then there are those signatures of illiterate voters that Respondents Counsels contend offend the Illiterate Protection Act.

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"No person shall write the name of an illiterate by way of a signature to any document unless such illiterate shall have first appended his mark thereto: and every person who so writes the name of the illiterate shall also write on the document his own true full name and address as witness, and his so doing shall imply a statement that he wrote the name of the illiterate by way of signature after the illiterate had appended his mark, and that he was instructed so to write by the illiterate, and that prior to the illiterate appending his mark the document was read over and explained *to the illiterate.*"

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The duties that a witness has towards the illiterate are clearly outlined in this enactment.

S.3 of the illiterate Protection Act provides that:

"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 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."

The duties that a witness has towards the illiterate are clearly outlined in Section 2 of the Illiterate Protection Act, Cap 79.

There is a clear intention in the above enactments that a person who writes the document on behalf of the illiterate must append at the end of such a document a kind of "certificate" consisting of that person's full names and full address and certifying that that person was the writer of the document; that he wrote the document on the instructions of the illiterate and in fact, that he read the document over to the illiterate or that he explained to the illiterate the contents of the document and that, the illiterate as a result of the explanation understood the contents of the document.

The import of Section 3 of the Illiterate Protection Act is to ensure that documents which are purportedly written for and on the instructions of illiterate persons are understood by them if they are to be bound by their contents. (see Abdalla Faraj $\frac{17}{\alpha}$)

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Odimbe & Co. Advocates HCCS no.962 of 1986 per Ntabgoba P. J as he then was)

In the instant case, there are persons who appended their thumbprints to the list of voters supporting the petition. In the Certificate of Translation, the Commissioner for Oaths, Mugabe Robert indicated generally at the end of each list as follows:

"I the undersigned, being conversant in both English and Runyankore-Rukiga *languages, hereby confirm that I read over and explained the contents of this* Document to each of the persons signing this document and each of the said persons endorsed this document, well knowing its contents, to confirm their support for the petition against the NOMINATION, AND THE DECLARATION \$OF\$ MUSHHEMEZA ISMAIL KAMBANDA \$AS\$ UNOPPOSED, FOR THE CHAIRPERSON OF KITAGWENDA DISTRICT LOCAL COUNCIL 5."

Counsel for the Petitioner's contention is that the Petitioner duly complied with the legal requirement for all the registered voters whose names appeared on the list supporting the petition who did not understand English and there is a jurat of Mugabe Robert.

He then submits that it is only the affected person who can raise the fact that he/she is an illiterate for him/her to enjoy protection under the Illiterates Persons Act and in this case it would be the registered voters on the list.

In one breath, Counsel admits that there are Illiterates on the list and that the requirements of the law were duly complied with. In another, he contends that only the voters on the list can state that they are illiterate or not. Counsel cannot approbate and reprobate. The Petitioner either complied with the requirements of the law in the Illiterate Protection Act or he did not.

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I am therefore in agreement with Respondents Counsels submissions. The certificate of translation does not indicate what language the illiterate speaks and to which language the Commissioner for Oaths/Translator was translating. It is one omnibus certificate intended to apply to each and every illiterate who signed the list. It is difficult to discern which person was conversant in either Runyankore or Rukiga. This court is therefore not convinced that each illiterate understood the contents of what they were signing or that they appended their thumbprints against their respective names.

I do not agree with Mr. Bwiruka's submission that the Petitioner duly complied with the law and that the jurat of Mr. Mugabe Robert is sufficient. As a result, the 48 signatures that do not comply with the provisions of Sections 2 and 3 of the Illiterate Persons Act are hereby removed from the list.

In determining election petitions, the Courts must bear in mind that such petitions are not ordinary suits where a party is enforcing a right that accrues to him as a person. It is an exercise which involves the determination of the constitutional rights of many people. The procedures set down to be followed are therefore, special and must be followed strictly and failure by a party to comply should not be taken lightly. Section \$138(3)(d)\$ enacts a substantive legal requirement and noncompliance is not a mere technicality.

Also noteworthy is the fact that election petitions are treated with urgency so that those who are aggrieved are attended to and the country returns to normal. The time limits and numbers stipulated in the law are intended to bring electioneering to an end.

By going ahead to consider the Petition in the absence of the 500 required supporting signatures, this court will be acting in error. The facts on which the objection is based

are, in my opinion, clear and free from doubt. There are decided cases in which petitions were struck out for lack of the number of signatures required by law. One of them is the Tiken Francis case cited above. I would offend the principle of **stare* decisis* if I departed from these precedents. I am therefore bound by the doctrine of precedents.

The other argument raised by both Respondent Counsels is that the Petitioner did not attach any copies of the voters' register or voters roll or even copies of National I. D cards. Their contention is that there is no proof that the entire list is of registered voters.

In the case of Hon Otada Sam Amooti Awori versus Taban Iddi Amin & **Electoral Commission Epa No. 93 Of 2016**, the Court of Appeal held that it is not enough to merely aver that the name in issue is in the register, the petitioner has to extract the relevant page of the register and present it in evidence.

The Petitioner in this case provided no proof that the signatures supporting his petition are signatures of voters. There is no extract of the Voters Register in respect to these voters nor are there National Identification documents relating to the said. Besides, the Court cannot determine that the said signatories are signatures. registered to vote in the parishes indicated. He should have appended copies of the voters register to confirm that these are indeed voters in those parishes.

The case of Simon Peter Kinyera Versus Electoral Commission and Taban Idi Amin Election Petition Appeal No. 03 of 2018. Also supports this position.

In that case the petitioner did not attach his voter's card or extract a relevant page of the register and only 69 of out of the requisite 500 supporting signatures had voter's cards. They did not attach the relevant extract or extract showing their registration in the National Voters Register. Court held that on that basis the petitioner had no

proof that he fulfilled the criteria of being a registered voter and his petition being supported by 500 signatures of registered voters.

The Petitioner in this case was duty bound to support petition with 500 signatures as required by law and to ensure that the persons who appended their signatures did so in compliance with the law.

When this court deducts the 44 signatures that are invalid and the 48 signatures of the illiterates that do not comply with the requirements of the Illiterates Protection Act, there are 92 invalid signatures in total. This would bring the number of signatures in support of the petition to 418 which is below the statutory requirement of 500 signatures in Section 138(3)(d) of the Local Governments Act.

I therefore sustain the preliminary objection raised by both the 1st and 2nd Respondents Counsel.

The Petition is hereby struck out with costs to the Respondents.

I so order.

Dated at Fort Portal this 17th day of August, 2021.

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Sgd: Victoria N. N. Katamba.

Judge

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