THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT SOROTI

ELECTION PETITION NO 004 OF 2021

ABALA DAVID :::::::::::::::::::::::::::::::::::::: **PETITIONER**

VERSUS

ACAYO JULIET LODOU **1st RESPONDENT**

ELECTORAL COMMISSION :::::::::::::::::::::::::::::::::::::: **2nd RESPONDENT**

BEFORE: HON. LADY JUSTICE JANE OKUO KAJUGA

RULING

Introduction

On 14th of January 2021, elections were held for the post of directly elected Member of Parliament for Ngora County Constituency. Five contestants including the petitioner and the 1st respondent contested for the seat. The 2nd Respondent returned the 1st Respondent as validly elected with 9,517 votes and gazetted her as the winner on the 17th of February 2021. The petitioner garnered 9,226 votes and came second in the race with a narrow margin of 291 votes.

Being dissatisfied with the outcome, the petitioner filed this petition in his capacity as a candidate who lost an election, contending that the 2nd respondent had conducted the election in contravention of the principles and provisions of electoral laws, and that there were illegal practices committed in the election process.

The petition was accompanied by the supporting affidavit of the petitioner and twenty-five (25) other affidavits.

When the matter came up for hearing, Counsel for the 1st Respondent raised a preliminary point of law in respect to the competence of the petitioner's 25 affidavits and applied for them to be struck off. Since the objection related to a matter of law I took the decision to entertain it rather than frame an issue for determination in the final judgement. My reasoning was that it may be futile to proceed to hear, cross examine witnesses and then evaluate evidence that does not meet the legal test for competence of affidavits.

Representation

Okello Oryem Alfred, Joseph Kyazze, Evans Ochieng and Namigadde Sandra appeared for the 1st Respondent. They were later joined by Halid Salim and Amio Doreen.

Wetaka Patrick and Katuntu Gilda appeared for the 2nd Respondent

Phillip Engulu appeared for the petitioner

Both the Petitioner and the 1st Respondent were in court

1st Respondent submissions

Counsel Kyazze submitted that the 25 affidavits did not satisfy the legal test of validity/competence and that the objection he was raising went to the root, the effect of which would be to strike them all off.

Odeke John Charles: There were two limbs to the objection to this affidavit. First, that it was deponed by a presiding officer who was appointed by the 2nd respondent, with no averment that authority to share information was granted nor any authorisation by the employer to that effect attached. This is in contravention of Section 7 of the

Parliamentary Elections Act. He supported his argument with the ruling of this very court in Oloo Paul versus Dr Lokii John Baptist and another, Election Petition No 6/2021.

Secondly he submitted that the jurat shows the affidavit was deponed by an illiterate yet the deponent is a presiding officer. One of the qualifications for the post is that one should be able to read and write in English since the job entails dealing with documents. His contention was that it could therefore not have been the deponent who appeared before the Commissioner for oaths as the person who appeared was stated to be an illiterate. Further, the commissioner for oaths does not indicate whether the person is a male or female and the use of the words "he or she" in the jurat show doubt in his mind as to whether it was a male or female who appeared before him.

Okanyun Anthony Bernard: Counsel for the 1st Respondent submitted that the deponent was to his knowledge an Advocate, yet the affidavit reflects that it was deponed by an illiterate. Further, that the commissioner for oaths uses "he or she" in the jurat in reference to the deponent, thus creating doubt as to who appeared before him. He contends that Okanyun could not have possibly appeared before the commissioner as an illiterate. This was a material falsehood that called for the affidavit to be struck out. He relied on the authority of **J B Kakooza Versus Electoral Commission** cited with approval by Justice Batema in the case of **Dr Bayiga Michael Phillip Lulume vs Mutebi David Ronnie and Electoral Commission Election Petition No 14 of 2016.**

Onyait John Robert: The objection to this affidavit stemmed from paragraph 4 therein where the deponent claims to have signed the DR Form attached as Annexure "A". In the considered view of counsel, the signature on this annexure varied from the signature of the deponent on the affidavit. He submitted that where there are two apparently inconsistent signatures the affidavit cannot stand. Secondly, that the document he

purports to sign (annexure A) is written in english and he understood its contents. The document is thus prima facie proof that he is literate. In the jurat however, the person who appeared before the commissioner for oaths was illiterate. He submitted that the person who appeared could then not possibly have been the deponent.

Other affidavits affected by the same argument are those deponed by Odongo Sam, Oyile Sam, Okiria Gilbert, Omoding John, Olinga Silver, Ekau Simon Peter, Otim Stephen, Adeke Hellen Beatrice, Aguti Stella, Eleliat Charles, Ogali Paul, Okuna Geoffrey Milton, Okelo John Moses, Ocwi Lawrence, Otim Julius, Ogwang George Ronald, Okwalinga Silver, Ekwaraun Vincent, Okebesi George William, Ochae Joseph and Onyait Pius.

Counsel pointed out that in all these affidavits, the deponents attached documents they claimed to have signed in English language raising a presumption that they are literate. The persons who appeared before the commissioner for oaths were all illiterate and the commissioner could not ascertain whether they were male or female. He argued that if they had indeed appeared before him he would have been able to tell if they were male or female, and even if the document he was working with was a standard format, he should have been able to cross out one.

Counsel submitted that the above affidavits all infringed legal principles as set out hereunder:

1. That physical appearance before a commissioner for oaths is a requirement of the law and can be inferred from the jurat.
2. That the commissioner for oaths must identify the deponents, whether male or female, illiterate or literate and must then administer the oath. It is not a mere stamping exercise required of the commissioner. It is a mandatory requirement of the law

3. That the identity/ integrity of a deponent goes to the root and substance of the affidavit and it is not a mere technicality.

He submitted that this court, though not an expert, is empowered to compare signatures on affidavits and documents which the deponent claims to bear his correct signature. If found to bear a variance, then court should strike it off.

Finally, that the objections raised demonstrated non-compliance with the provisions of the Oaths Act.

Counsel Evans Ochieng further drew the courts attention to the first paragraphs in all the impugned affidavits which show the gender of the deponent. He argued that if the commissioner for oaths or translator actually translated a document where the deponent claims to be male or female, then he ought not to have been confused in the jurat as to whether the person was male or female. This apparent confusion can only lead to the conclusion that the deponent did not appear before the commissioner for oaths.

He submitted that the court relies on the translator to be satisfied that the deponent understood the contents of the document. Where the translator leaves room for doubt then court cannot conclude that the deponent appeared before them. In his view this is the reason why there are advocates who are said to have deponed as illiterates. He relied on the authority in **Julius Galisonga versus Hon Abdu Katuntu**, Election Petition No 13/2021 where the trial Judge rejected affidavits where the translator used "he or she" in reference to the deponent.

He asked the court to note that when Ocuna was asked if he was an inspector of schools he replied in English, thus demonstrating that he was literate.

He submitted that the affidavits were incurably defective.

Lastly, Counsel Okello Oryem Alfred submitted that the principle of severance does not apply in the case before court, and that it cannot therefore be relied upon to save or remedy the impugned affidavits. This is because the principle can't be applied to the jurat of an affidavit. Once the jurat is severed, then the document ceases to be an affidavit and is incapable of supporting the petition.

They prayed that court finds all the 25 affidavits incompetent and strike them out.

2nd Respondents submission

Counsel Wetaka Patrick for the 2nd Respondent agreed with the submissions made for the 1st Respondent that the affidavits were incurably defective and he prayed for court to strike them out.

Reply by the petitioner

Counsel Engulu Phillip addressed two angles of the preliminary points of law raised. In respect of the affidavits stated to have differing signatures from other documents owned by the deponents in the same affidavit and annexed thereto, he submitted that there are no variances at all. He made the same argument for the affidavits of Onyait John Roberts, Odong Sam, Oile Sam, Okiria Gilbert, Olinga Silvia, Otim Stephen, Adeke Beatrice, Aguti Stella Rose, Eleliet Charles, Ogali Paul, Okello John Moses, Ocwii Lawrence, Otim Julius, Ogwang Ronald, Okwalinga Silver, Ekwaraun Vincent, Okebesi George William, Ocae Joseph and Onyait Pius. He prayed that Court disregards the preliminary objection in that regard.

Regarding the jurat, he submitted that a mere glance at an affidavit or document cannot help the court ascertain whether a person is illiterate or not. He submitted that the

question of whether a person is illiterate or not is a question of fact which would necessitate the person to appear before court to determine the issue.

In his considered view, the affidavits in this case had legal jargon, thus the deponents fell within the definition of illiterates in the Illiterates Protection Act. It was upon the deponent to tell the commissioner for oaths which language they understand best.

He submitted that the commissioners use of "he or she" in the jurat in reference to the deponent was not an error that goes to the root and is curable by court. Further, that it was too early for court to suspect that the deponent did not appear before the commissioner for oaths, and the matter should proceed to cross examination of witnesses before the issue is determined by court.

He submitted that all the authorities cited by counsel for the 1st Respondent are distinguishable from the circumstances of this case. In the **Dr Bayiga Lulume case** (supra) the difference was between the signatures on the affidavit and the national Identity card unlike the present case. In the **Oloo Paul** case (supra) the court was dealing with interpreters that did not provide their address, unlike the current case and in **Mayanja Simon Lutaaya** case (supra) the principle was that court should exercise caution in the comparison of signatures because it lacks expertise in that area.

In the alternative but without prejudice to the previous submissions, he prayed that if court found the jurat wanting, it should sever the certificate and allow the affidavits to stand. In support of his case he relied on the authority of **Dr Kizza Besigye versus Yoweri Museveni**, Presidential Election Petition No 1/2001 that an affidavit should not be rejected in its entirety if there are parts that conform. The defective parts should be severed.

He prayed that Court dismisses the objections, allows the affidavits and proceed to trial.

Rejoinder by 1st respondent

It was lastly submitted that the petitioner had conceded that the affidavits of Bernard Okanyun Anthony, Odeke John Charles and Okuna Milton were incurably defective as he had not addressed the objection raised regarding their competence.

Court was invited to use its microscopic eye to compare the varying signatures by looking at the significant features in the impugned signatures.

There was no need for evidence to determine whether the deponents actually appeared before the commissioner for oaths or not. It was apparent from the documents that they had not.

Only a defective affidavit can contain legal jargon, as the law requires that affidavits must contain matters of fact and not law.

He / she reference in the jurat is not a minor thing and the prayer for the court to correct the same is tantamount to recommissioning an affidavit where the deponents have not appeared before the court.

The decision in the Dr Kizza Besigye case (supra) is not correctly cited as it is distinguishable from the facts of the case. In that case the supreme court was dealing with affidavits that contained information whose source was not disclosed. The decision in **Plan Virginia Mugyenyi vs Hon Tumwesigye Elioda and Electoral Commission Election petition No 1/2018** is clear that you can't sever where the affidavit is incurably defective.

Once the certificate is severed, then nothing remains.

Lastly, that if the translation demonstrates that the commissioner and the translator did not interact with the witness, the court must reject the affidavit

Resolution by court

Rule 15 of the Parliamentary Elections (Interim Provisions) Rules, SI 141-2 provides that all evidence at trial in election petitions in the High Court shall be by way of affidavit read in open court. Even the cross examination of deponents by the opposite party is subject to leave of court under sub rule 2. It is not automatic.

The foregoing provisions underscore the importance to be attached to the evidence on affidavits, which are the written statements of witnesses confirmed as truthful by the swearing of an oath administered by a commissioner for oaths or other authorised persons. Statutory law has been enacted to guide the recording of evidence on affidavits, its receipt by courts and evaluation of such evidence. There is also a robust body of case law that has interpreted these provisions. These are all meant to ensure that the evidence contained therein is trustworthy. This is the purpose for the oath and the importance of the affidavits, so they must be taken seriously. In this I am in agreement with Justice Andrew Bashaija who stated in the **Plan Virginia Mugyenyi case** (supra) as follows:

"in election petitions evidence is by way of affidavit. It is therefore important that the affidavit evidence which is the examination in chief of a witness and is relied upon by court should be properly taken with the seriousness it deserves in terms of honesty and sincerity just like oral evidence is done".

An essential legal requirement in the making of affidavits is that the deponent must appear before the commissioner for oaths physically. The Commissioner for Oaths (Advocates) Act, Rule 7 of the schedule provides that;

"A commissioner before taking an oath must satisfy himself or herself that the person named as the deponent and the person before him or her are the same and that the person is outwardly in a fit state to understand what he or she is doing"

This position of the law is fortified in several cases, including **Kakooza John Baptist versus Electoral Commission and another** Election Petition Appeal No 11/2007 where the supreme court criticised the practise where affidavits are not made before a commissioner for oaths. The court observed that *"the deponent of an affidavit must take oath and sign before the commissioner for oaths as required by law. A commissioner who commissions an affidavit without seeing a deponent cannot say that the affidavit was taken or made before him or her nor can he state truly in the jurat or attestation at what place or time the affidavit was taken or made. Equally the deponent cannot claim to have taken or made the affidavit before the commissioner for oaths. Courts have therefore held that failure to comply with this mandatory requirement renders the affidavit incurably defective and must be struck out"*

In the case of **Kasala Growers cooperative society versus Kakooza Jonathan and another**, SCCA No 19/2010, Justice G M Okello (as he then was) drew a distinction between defective affidavits and those that fail to comply with a statutory requirement. He stated thus, *"A distinction must be made between a defective affidavit and failure to comply with a statutory requirement. A defective affidavit is where for example, the deponent did not sign or date the affidavit. Failure to comply with a statutory requirement is where a requirement of a statute is not complied with. In my view the latter is fatal."*

Generally, there are defects in affidavits that can be remedied. I am however convinced that where the affidavit does not comply with the statutory requirement of the law requiring the deponent to appear personally before the commissioner for oaths, then it is fatally defective. Whether a deponent actually appeared before the commissioner for oaths or not, is a matter of substance and not form and it goes to the root of the affidavit. Such an affidavit cannot be remedied and must be struck out.

The inference of whether the deponent appeared before the commissioner for oaths can be drawn from the jurat or the particulars of the documents itself. The document should

speak for itself. Where it speaks clearly that the deponent could not have appeared before the commissioner for Oaths, then there is no need for the deponent to be called for cross examination. It may also arise or be confirmed through cross examination.

In the instant case, the preliminary points of law raised cover different aspects of alleged illegality, all of which the respondents claim point to the fact that most of the deponents did not appear before the commissioner for oaths.

Literate deponents making oaths as illiterates

In the instant case, the 1st respondent argues that the jurat for 25 impugned affidavits show that the deponents were illiterates. I have carefully read through the same and found the jurat similar. They read as follows:

"Sworn at Soroti this 15th day of March 2021 before me, I having first truly distinctly and audibly read over the contents of this affidavit to the deponent he or she being illiterate and explained the nature and the content of the exhibits in the affidavit in the Ateso language and the deponent appeared perfectly to understand the same before making his or her mark, thumbprint or signature thereto in my presence"

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Commissioner for Oaths

The commissioner for oaths affirms in the above jurat that the person who appeared before him is an illiterate and that the contents of the affidavit were read to him or her in another language that he or she understands.

The question before court is whether the deponents were illiterates within the meaning of Section 1 (b) of the illiterates Protection Act Cap 78 which provides that "illiterate means, in any relation to a document, a person who is unable to read and understand the script or language in which the document is written and explained.

The affidavits are written in English, hence from the face of it, the deponents could not read or understand English.

The affected affidavits are 23 in number. They are deponed by Olupot Richard, Onyait John Robert, Odongo Sam, Okiria Gilbert, Oile Sam, Adeke Hellen Beatrice, Aguti Stella, Omoding John, Olinga Silver, Eleliat Charles, Ogali Paul, Okanyum Anthony Bernard, Okuna Geoffrey Milton, Ekau Simon Peter, Okello John Moses, Ocwi Lawrence, Otim Julius, Ogwang George Ronald, Okwalinga Silver, Ekwaraun Vincent, Okebesi George William, Ochae Joseph, Otim Stephen and Onyait Pius. The court has ascertained that all the above deponents claim to have been polling agents at the various polling stations and tallying agents at the tally centre.

The court has also considered the averments in each of those affidavits and have noted that they show that the deponents have the capacity to read and write the english language. In paragraphs 3, 4 and 5 of the affidavits of the polling agents, the deponents aver that there is a correct version of the DR Form on which correct results were entered and which they witnessed. They confirm that they appended their signatures against their names and identify the annexures on which they do not dispute their signatures. The deponents then indicate that they were later shown DR Forms indicating different results and bearing their forged signatures. I am satisfied that the capacity of the deponents to read and tell the differences on the DR Forms, being documents written in the english language demonstrates their capacity to read and understand the english language. This is the language in which the affidavits in question are written. The deponents are able to state therein with confidence that the contents of the DR Forms are different.

The deponents who were tallying agents eg Okanyum Anthony Bernard also demonstrate in their averments their capacity to read, and understand the english

language from their interpretation of results on DR Forms and other electoral materials written in english.

The affidavit of Odeke John Charles, a presiding officer also falls in this bracket.

I am further convinced of the literacy of the deponents by the nature of the duties that presiding officers and polling agents are required by law to perform under sections 34 of the Electoral Commission Act, Part VIII of the Parliamentary Elections Act which regulates voting and voting procedure, and Part IX on counting of votes and announcing of results.

The contention of the 1st respondent is that above cited deponents were not illiterate as affirmed by the commissioner for oaths. I find merit in this assertion. The 1st Respondents point is made stronger by the fact that one of the deponents, Okanyum Anthony Bernard was established by this court to be an Advocate, attired accordingly and sitted in court during the proceedings.

The question therefore is whether the literate deponents of the impugned affidavits could have been the ones who appeared before the commissioner for oaths in person, and could be the people that the commissioner for oaths affirms in the jurat to be illiterate within the meaning of the illiterates protection act. I do not think so.

What is more disturbing to this Court is the fact of the deliberate falsehoods or untruthfulness clearly evident in these affidavits. The documents before court tell a lie in themselves. It is inconceivable in this day and age that an advocate or other literate person would proceed to swear an affidavit as an illiterate. In the reply of counsel for the petitioner to the submissions, this issue was not addressed satisfactorily. I find it a difficult explanation to swallow, that the otherwise literate deponents were classified as illiterate because of the legal jargon in the affidavits. I have gone through all the impugned affidavits and find no legal jargon at all. To the contrary, they contain facts

produced in plain english language. I see no benefit to this untruthfulness, and having considered all angles, can only arrive at the conclusion that the deponents whose names appear on the affidavits are not the ones that appeared before the commissioner for oaths.

Counsel for the 1st Respondents submitted that use of the terms "he or she" by the commissioner for oaths in the jurat, in reference to the deponents' gender is further proof that the deponents did not appear before him. I am convinced that in the circumstances of this case, failure of the commissioner for oaths to tell clearly whether the person who appeared before him as deponent was male or female, strengthens the finding that the deponents of the impugned affidavits did not appear before him. In a circumstance where the affidavit is proper and the only problem is the reference to "he or she" in the jurat, this court could have been inclined to take a liberal approach and have the defect corrected, as prayed for by counsel for the petitioner. In this case, it strengthens the case for the 1st respondent and goes to the root. The affidavits breach a mandatory provision of the law.

Differing signatures (identity of the deponent)

This court finds the decision of the Court of Appeal in the case of **Muyanja Simon Lutaaya versus Kenneth Lubogo** Election Petition Appeal No 82/2016 instructive on how courts should approach the question of differing signatures in matters of election petitions. In that case the court was handling an appeal where the trial Judge had struck out 23 affidavits where the signatures thereon differed from those on their national Identity cards. He had, after listening to the submissions of counsel found that the differences in the signatures were so obvious to the naked eye that the only logical conclusion was that they belonged to different people.

The court of appeal agreed with him and held that the identity of a deponent is extremely important. It further held that in this case, the signatures were so different that they fell in the category of matters that were obvious to the Court.

The Court of Appeal stated as follows:

"It is important that the identity of a deponent to an affidavit is not in doubt. *The trial Judge is faulted for not having called a handwriting expert. We agree that courts should act with caution and call for handwriting experts evidence when handling issues of handwriting evidence."*

My understanding of the decision is that the court has the power to compare writings and decide a matter. Where the differences are obvious to the naked eye, the court may not require a handwriting expert and may proceed to find the affidavit unreliable and attach no probative value to it. Where however, the differences are not so obvious, then a handwriting expert should be called in to assist the court arrive at a decision.

The question therefore, is whether in the circumstances of this case, the differences in the signatures of the deponents on the affidavits and their accepted signatures on documents attached to the same are so obvious to the naked eye, as to permit this court to decide the matter. The affidavits that fall under this category are Onyait John Robert, Odongo Sam, Oile Sam, Okiria Gilbert, Omoding John, Olinga Silver, Ekau Simon Peter, Otim Stephen, Adeke Hellen, Aguti Stella, Eleliat Charles, Ogaili Paul, Okuna Geoffrey Milton, Okello John Moses, Ocwii Lawrence, Otim Julius, Ogwang George Ronald, Okwalinga Silver, Ekwaraun Vincent, Okebesi George William, Ochae Joseph, Onyait Pius.

Whereas the 1st respondents case is that the differences can be seen by the court, the petitioner's case is that there is no variation in signatures.

I have carefully considered the documents before me. I am unable to find the differences as obvious and thus prefer to exercise caution and not determine the matter without expert input. The fact that the 1st respondent in his rejoinder invited this court to apply its "microscopic eye" and pay attention to the "significant features" of the varying signatures is to me a confirmation that an expert would be required.

This ground fails.

Deponent who is an election official

Section 7 (6) of the Parliamentary Elections Act provides as follows:

"An election Officer who without lawful authority reveals to any person any matter that has come to his or her knowledge or notice as a result of his or her appointment commits an offense and is liable to a fine not exceeding twenty-four currency points or imprisonment not exceeding one year or both"

The second limb of the objection to the affidavit of Odeke John Charles is that he swore an affidavit in his capacity as presiding officer of the electoral commission, contrary to the above provisions of the law.

I have considered all arguments by 1st Respondents counsel. Though there was no reply to the same by the petitioner, that does not absolve the court of its duty to evaluate the same and render its decision thereafter.

There is no doubt that a presiding officer is an election official within the meaning of section 1 of the Parliamentary Elections Act. I have carefully considered the averments in the affidavits and I am satisfied that the matters therein came to the deponent's knowledge as a result of his appointment. The requirement of Section 7 (6) therefore is that he must have secured lawful authority to divulge that information. As correctly

pointed out for the 1st Respondent there is no averment to show that such authority was secured and or no attachment containing such lawful authority was made.

It is my considered view that the affidavit presents an illegality for failure to follow a statutory provision and this court cannot sanction it by allowing the affidavit to stand. My ruling in a similar matter of Oloo Paul versus Dr Lokii John Baptiste in Election Petition No 6/2021 is relevant, and there is no legal justification to depart from it.

I find the impugned affidavit incompetent on this ground too.

REMEDIES AVAILABLE

I have already found all the impugned affidavits as incompetent on the first ground I resolved hereinbefore.

Counsel for the petitioner has submitted in detail requesting the court to sever the offending jurat in the impugned affidavits if it is inclined to find them defective. On the other hand, the 1st respondents position is that the doctrine of severance does not apply in the circumstances, and that there are no remedies available.

The court is required to sever the relevant parts of an affidavit in unique circumstances. In **Odo Tayebwa versus Gordon Kakuuna Arinda and the Electoral Commission** the court of Appeal held that in the proper case, and depending on the circumstances before the court, the court has the discretion to sever and reject those parts of an affidavit that are defective or superfluous and consider and rely on the proper parts. These situations in my view include where the affidavits contain hearsay evidence in part, and where the deponent does not indicate the source of some of the information.

In the circumstances of this case, I agree with the respondents that severance of the jurat cannot be a remedy. Once the jurat is severed, there is in essence no affidavit before the court.

I find that there is no remedy available in this case. The defect in the affidavit goes to the root and is incurably defective.

The preliminary objection hence succeeds. The impugned affidavits are all struck off.

It is so ordered.

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Jane Okuo Kajuga

Judge

14/09/2021