

WORKSHOP ON ELECTION PETITIONS

HELD AT HOTEL AFRICANA

13th -14TH APRIL, 2011.

TRIAL AND PROCEDURE FOR

ELECTION PETITIONS

(By Hon. Justice V.F. Musoke-Kibuuka).

(1) INTRODUCTION

- (i) This brief paper relates to the trial and procedure for trial of Election Petitions under:-
- PART X, of the Parliamentary Elections Act, Act 17 of 2005.
 - PART X, of the Local Governments Act (Local Government Councils Elections).
- (ii) Petitions arising from the Parliamentary Elections Act are triable only by the High Court. Those arising out of the Local Governments Act are triable partly by the High Court and partly by the Chief Magistrate's Courts.
- Petitions from Election to the position of chairperson of a Local Government Council are triable by the High Court.

- Petitions from Election to the position of Councilor of a Local Government Council, by a Chief Magistrate's court.
- (iii) By hearing and determining Election Petitions, courts of law do no more than engage in the post electoral management process. Because a democratic elections is constituted by a series of legal activities and also because such elections are conducted and engaged in by human beings, with all their perfections and failures, election petitions are invariable in any democratic setting.

(2) JURISDICTION AND RULES OF PROCEDURE FOR HEARING ELECTION PETITIONS

(i) Jurisdiction-

- High Court.
- Article 86 of Constitution.
- Section 60 (1) of the PEA.
- Section 138 (1) of the Local Government Act, (Cap. 243).
- **Chief Magistrate's Courts.**
 - Section 138 (2) of the LGA
 - Section 55 (1) of LGA (for Recount).
- Magistrate's Courts Grade I**
 - Section 168 of LGA (For Petitions relating to Elections at village, Parish and County Levels).

RULES OF PROCEDURE

For the petitions filed in the High Court, under the PEA the Procedure is found in the Parliamentary Elections (Election Petition) Rules – S.1 141-2. The PEA itself also contains some provisions that are largely procedural e.g. section 62 which relates to service of Notice of the petition, section relating to summoning and presentation of witnesses and section 65, regulating withdrawal of election petitions. In addition, the Civil Procedure Rules apply subject to the PEEP by virtue of rule 36 of the PEEPRs.

- (i)** For Petitions filed under S. 68 the Local Governments Act, Cap. 243 (whether in the High Court in a Chief Magistrate’s court, the rules of procedure, are:-
- By virtue of section 143 of LGA, the Civil Procedure Rules.
 - By virtue of section 172 of the PEA (where the Civil Procedure Act have no relevant Provisions, the Parliamentary Elections (Election Petitions) Rules, would probably apply.
- (ii)** It is not quite clear whether the intention of Parliament was to supplement the Civil Procedure Rules with any provision in the Parliamentary Elections (Election Petitions) Rules where the Civil Procedure Rules contain no relevant provision. That is so specify in view of the wording of section 172 of the LGA, which

vests powers of modification to the Electoral Commission, a fact which tends to support the view that the cross legislation in section 172 was intended to be purely for administration purposes by the Electoral commission. On the other hand, Section 9 (1) of the Interpretation Act, Cap. 3, which provides;

“(I) a reference to particular Act shall be constricted as including a reference to that as amended from time to time and to any statutory instrument made under that Act”. Tend to support the opposite view.

Since the Parliamentary Elections (Election Petition) Rules, were made under section 93, of the PEA, a reference to that Act would include them by virtue of section 9 (1) of the Interpretation Act. Clearly Parliament needs to clarify this aspect of the Procedure for determining Election Petitions under the LGA. As Section 172 of the LGA, it leaves strong arguments in either side.

(4) COMPETENCE OF AN ELECTION PETITION

-Three factors may render petition incompetent.

(i) PRESENTATION OF PETITION

Parliamentary – S. 60 (2) of PEA.

- A candidate who lost an election.

- A registered voter in the constituency supported by the signatures of not less than 500 registered voters in the constituency.
- **Local Government** – S. 138 (3) of LGA
- A candidate who lost an election
- A registered voter in the constituency supported by not less than 500 registered voters.

(ii) LIMITATION

- **Parliamentary** – S. 60 (3) of PEA
- To be presented within 30 days after the day the result of the election is published in the Gazette.
- Answer –within 10 days from date of service
- Local Government – S. 138 (4)
- Within 14 days after the day on which the results have been notified in the Gazette.

(iii) NON SERVICE OF NOTICE OF PRESENTATION.

- **Parliamentary** – S. 62 of PEA and rule 6 of the Rules service is personal –power of court to order other forms of service (See rule 6 (5) of the PEEPS. Service must be within 7 days after presentation of the Petition. Court may order other forms of service under rule 6 (4). It may also extend time of service under rule 19.

Some Authorities:-

- **Mbabali Jude vs. Electoral Commission, Election Appeal No. 3 of 2006.**
- **Nathan Bwambale vs. Electoral Commission and Hon. Crispus Kiyonga, Fort Portal EP No. 007 of 2006.**
- **Bangirana Anifa Kawooya vs. Kabasi Joy & Kafura, Two Others Masaka Civil Appl. No. 0028 of 2009.**

Local Government Elections S. 141.

- Service is also personal and must be affected within 7 days from the date of the presentation of the Petition.

(3) GROUNDS FOR NULLIFICATION

- (i) **For Parliamentary** – well set out in S. 61 (1) of the PEA: They are only four grounds.
 - That there was non compliance with the provisions of the PEA relating to Elections, if court is satisfied that there has been failure to conduct the election in accordance with the principles laid down in those provisions and the non-compliance and the failure has affected the result in a substantial manner.
 - That a person other than the one elected won the election.
 - That an illegal practice or any other offence under the PEA was committed in connection with the

election by the candidate personally or with his or her knowledge and consent or approval,

- That the candidate was, at the time of his or her election not qualified or was disqualified for election as a Member of Parliament.

- (ii) Standard of proof of the grounds has now been made statutory by Parliament Section 61 (3) of PEA which provides that:-

“Any *ground specified in subsection (1) shall be proved on the basis of a balance of probabilities*”.

- (iii) The amendment appears to put to final rest the long debate as to whether the standard of proof was proof beyond reasonable doubt or proof upon the balance of probabilities. Numerous earlier decisions of the High Court, including the decisions of their Lordships, the Justice of the Supreme Court in **Election Petition No. 1 of 2001 Between Col. (Red) Dr. Besigye Kizza vs. Museveni Yoweri Kaguta** & The Electoral Commission, where their Lordships, while interpreting the provision in the Presidential Elections Act, in **pari material** section as 61 of PEA tended generally to agree that the standard was a balance of probability but much higher than that in the ordinary Civil Suits. Odoki, CJ, for example, agreed with both Lord Deming LJ and Bucknill LJ, 1950 a All E.R, in Bater vs. Bater who invoked the principle that the degree of proof,

though upon the preponderance of probability, should depend on the subject matter. Just as the degree of proof for fraud is higher than that in other civil cases.

In his own words, Odoki, C.S., stated:-

“If the legislature intended to provide that the standard of proof in an election petition shall be beyond reasonable doubt, it would have said so. Since the legislature chose to use the words, “proved to the satisfaction of the court,” it is my view that is the standard of proof required in an election petition of this kind. It is a standard of proof that that is very high because the subject Mater of the Petition is of critical importance to the welfare of the people of Uganda and their democratic governance.

(iv) It does not appear to me that if the courts maintained a higher degree of proof for the grounds in section 61 (1) of the PEA, they would not be second guessing parliament or legislating beyond what parliament enacted in section 61 (3) of PEA. It appears to me to be a matter of the application of the law in an appropriate manner law. The only strong legal argument that can be raised against that would, probably, be the fact that in the case of fraud, where courts have established a higher degree of probability, there is no specific provision of the law equivalent to S. 61 (3) of PEA.

The debate is likely to continue upon that account. But the clear position statutory now is that the standard of proof is upon balance of probability.

(v) For petitions under the Local Governments Act, the position does not appear to be different. Section 139 of the LGA sets out the same grounds as S. 61 (1) of the PEA. The only significant omission is the equivalent of S. 61 (3) regarding the standard of proof. This, however, is not surprising, because the rules of procedure applicable to the petitions under the LGA are governed by the Civil Procedure Rules, where the standard of proof is ordinarily well settled to be upon the balance of probability.

(4) TRIAL OF ELECTION PETITIONS

-Under PEA

(i) Time limits:-

- (ii) - S.63 (9) High court has to determine an election Petition before it within 6 months from the time it was lodged in court.
- S. 63 (1), trial is in open Court
- Rule 13 (1) of PEEPRs- expeditions hearing, sitting from day to day, suspending all other business of the court and completing determination not later than 30 days from the date of the commencement of hearing.

(ii) Consolidation of Petitions

- Rule 18, petitions may be consolidated if they have been presented in relation to the same election.

(iii) Evidence

-Rule 15 evidence, by either party, is by affidavits read in open court.

-Deponents of affidavit may, with leave of court, be cross-examined.

This is an area which has raised many concerns and problems of the assessments of the credibility of the deponents of the affidavits considering the fact that deponents are usually ardent supporters of the competing parties.

- Delays in presenting deponents of affidavits cross-examination or making the applications for leave to cross-examine belatedly. Ideally, applications for leave to cross-examine, deponents of the affidavits should be made at the scheduling conference and during the trial, once an affidavit is read out; the cross-examination of the deponent should follow immediately.
- Problems of numbers of affidavits and extended desires to cross-examine the deponents which often may lead to equally extended time of trial and analysis and writing of the judgment-The need to

narrow down grounds or issues and thereby also narrow the volume of affidavits, at the scheduling conference is quite crucial.

- Problems of objections by Counsel to affidavits on grounds such as:-
- That they are nullities for containing hear say evidence of non disclosure of source of information etc.

(iv) Evidence in Petitions under the LGA. Evidence may be viva voce or by affidavit or both.

6. DETERMINING THE GROUNDS FOR SETTING ASIDE AN ELECTION UNDER THE PEA OR LGA.

(i) -Issues are often framed in accordance with the grounds cited. However, not all petitions are drafted in clear terms. Some are presented in a very messy manner with the statutory grounds mixed up or with the prayers not relating to the grounds. In the Petition there is need for the judge or Chief Magistrate to be very sober and to check the petition against the law and guide the parties and counsel at the scheduling conference or even before. Past experience show that election petitions being politically motive, those who draw them up or cause their drawing tend to overstuff them with every incident that might have been witnessed during the election. Some of the material or incidents cited in some petitions may not prima facie, constitute good ground for petitioning. Hence, the need

for the court to persuade parties to narrow down or in obviously deserving cases even to advise them to consider withdrawal.

(iii) GROUND OF NON-COMPLIANCE WITH PROVISIONS OF PEA OR PART X OF LGA.

- This ground is the most commonly invoked ground by election petitioners. It features in over 90% of all elections Petitions after an election. It is the most difficult to try by the court and also the most difficult against which for a petitioner to succeed.
- This ground involves a two step analysis by the court when evaluating the evidence on record.
- First, the court must be satisfied that there was non-compliance with provisions of the PEA or Part X of the LGA and, as a result, there was failure to conduct the election in accordance with the principles laid down in those provisions.
- Secondly, that the non-compliance and failure affected the result of the election in a substantial manner.
- The reason why this ground involves a two-step analysis is that if after the court has considered whether or not there was non-compliance and failure it arrives at the conclusion that there was no such non compliance and failure, or that if any, it was quite negligible, that would be the end of the matter. The ground would not succeed. But if it comes to the conclusion that there

was non-compliance and failure at a significant level, then the court would proceed to the second step of the analysis to determine whether the non-compliance and failure affected the result in a substantial manner.

AFFECTING THE RESULT IN A SUBSTANTIA MANNER.

This is the statutory judicial test for setting aside an election under S. 61 (1) (a) of PEA. It has attracted long and quite intensive Judicial debate as to how to apply it. The current position is to be found in the reasons for the decisions by their Lordships the Justice of the Supreme Court in the **Col. (Red) Dr. Besigye Kizza, And Museveni Yoweri Kaguta and The Electoral Commission**, referred to earlier in this paper. To put it simply, the non compliance and failure would be said to effect the results in a substantial manner if the evidence obtained by the court during the trial of the Petition raises some significant probability that if it were not for the non-compliance and failure, the election could have been won by a candidate other than the one who won it.

(iv) GROUND THAT A PERSON OTHER THAN THE ONE ELECTED WON THE ELECTION-(S.61 (1) (b) of PEA & 139 (b) of LGA.

- This ground almost exclusively involves numbers of votes polled by each candidate. It is resolved by a recounting of the votes polled by each candidate or those that were rejected or spoilt. The High Court, under S.

63 (5) of the PEA, may order a recount of the votes upon its own motion. I shall say a word or two about conducting a recount towards the end of this paper.

(v) **GROUND THAT AN ILLEGAL PRACTICE OR ANY OTHER OFFENCE UNDER THE PEA WAS COMMITTED.**

- Illegal practices are set out in Section 68, 69 70 and 71 of the PEA and Sections 147 and 148 of the LGA. Offences are equally listed in provisions in either Act.
- The important point to remember that in deciding whether or not an illegal practice or election offence has been committed, the court is not conducting a criminal trial. The decision is reached upon the balance of probabilities.
- It is also important to note that if the allegation is made against another person other than the candidate, the evidence must show that the Commission was with both the knowledge and consent or approval of the candidate.

(iv) **GROUND THAT CANDIDATE WAS NOT QUALIFIED TO ELECTION.**

- under PEA- the relevant provision in section 4 of PEA, which sets out the qualification and disqualification for candidates for members of Parliament
- Under LGA- the relevant provision is section 111 (3), 3(a), 3 (b), 3 (c), 3(d) and 111(4)

7. CONDUCTING A RECOUNT DURING A TRIAL.

- The PEA provides for three types of recounts of votes:-
- A mandatory one under S. 54 of the PEA.
- One under S. 55 of PEA ordered by the Chief Magistrate.
- One that may be ordered by the High Court, during a trial of an election Petition, under S. 63 (5) of PEA.

- THE LGA also provides under S. 142 (4) for court to order a recount of votes during the hearing of a petition either by the High Court or a Chief Magistrate's Court.
- It would appear that a Chief Magistrate's court does not possess jurisdiction to order a recount in an election conducted under the LGA. The LGA has no provision equivalent to S. 55 of the PEA. The only provision that could incorporate the provisions of section 55 into Part X, of the LGA is section 172 of the LGA. But that section seems to give only administrative powers to the Electoral Commission, in conduct elections and not jurisdiction to Courts of Law. Jurisdiction to courts cannot either be given by the Electoral Commission nor can it merely be assumed by the courts.

That, area too requires parliamentary intervention.

A judicial recount has to be conducted as a court process presided over by the Chief Magistrate or the judge, as the case may be. Before conducting the recount and during the recount the court must ascertain the following conditions:-

- That all the boxes have been secured intact since the elections.

- That the seal on them are the seals that were applied when they were last sealed by the presiding officer or the returning officer

- When opened that all the contents that ought to be in each box are there and intact

- That the ballots to be recounted fall within the serial number that EC sent to the particular Constituency.

- That a ballot paper is treated as rejected or invalid only when the mark of choice placed upon it by the voter cannot be the basis for ascertaining the choice of the voter.