THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Catherine Bamugemereire, Stephen Musota & Muzamiru M. Kibeedi, JJA)

EPA NO. 6 OF 2020

AKOL ELLEN ODEKE :: APPELLANT

VERSUS

OKODEL UMAR :: RESPONDENT

(Appeal from the Ruling of the High Court of Uganda at Soroti in Miscellaneous Cause No. 0022 of 2020 delivered by Hon. Mr. Justice Wilson Masalu Musene on the 8th day of October, 2020)

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA

This is an appeal from the Ruling of Hon. Mr. Justice Wilson Masalu Musene delivered in favour of the current Respondent on 18.10.2020 of the High Court of Uganda at Soroti.

Background.

At the centre of the legal dispute between the parties are the "different" names that the Appellant has used at the different times and for different purposes in her life journey.

At birth, the Appellant was named "AKOL HELLEN" by her parents. When the Appellant got married to Mr. Martin Odeke in 1988, she added the husband's name, "ODEKE" onto her name and some of her identification documents started bearing the name of "AKOL HELLEN ODEKE" while others bore the name of "AKOL HELLEN". The appellant sat the Ordinary and Advanced Level Certificate Examinations while married but she appears to have used the name of "AKOL HELLEN" during her school days and both the Uganda Certificate of

Education (2007) and the Uganda Advanced Certificate of Education (2009) were issued in the name of "AKOL HELLEN".

Following the enactment of the Registration of Persons Act of 2015, the Appellant registered with the National Identification and Registration Authority (NIRA) as "AKOL HELLEN ODEKE" and was issued the National Identity Card bearing National Identification Number (NIN) CF70021100VA2G. When it came to the National Voters Register, the Appellant registered as "AKOL HELLEN ODEKE" at Kakira Primary School Polling Station in Kakira Parish, Komuge Subcounty, Kachumbala County in Bukedea District under Voter Number 58306938.

The Electoral Commission set the date of 15th and 16th October 2020 for nomination of persons interested in contesting in the Parliamentary Elections which were eventually held on 14th January 2021. The Appellant expressed interest in contesting for the position of Woman Representative in Parliament for Bukedea District. It appears that her lawyers at the time advised her to first "clear the confusion" surrounding her names before presenting her nomination documents. So she caused to be published in the Uganda Gazette of 11th September 2020 a Deed Poll dated 01st September 2020 by which she "wholly renounce[d] and abandon[ed] the use of [her] former name of AKOL HELLEN and in lieu thereof assume[d] the name of AKOL HELLEN ODEKE ... from [01.09.2020] ..."

Thereafter, the Appellant picked the Nomination Papers from the Electoral Commission, started soliciting for the signatures of registered voters to support her nomination as required by the Parliamentary Elections Act, 2005. She even printed her campaign posters.

On 21.09.2020, the Respondent who claimed to be a registered voter in Bukedea District where the Appellant intended to be nominated, filed an application in the High Court of Uganda at Soroti against the Appellant by way of Notice of Motion seeking to restrain the Appellant from being nominated on the ground that she was not a registered voter, had unlawfully changed her names and did not possess the minimum academic qualifications to

stand for the position of Woman Member of Parliament for Bukedea District, vide: Miscellaneous Cause No. 23 of 2020.

The Appellant denied all the claims:

Four issues were set out for determination by the trial court, namely:

1. Whether the Applicant (now Respondent) has Locus Standi to challenge the pending nomination of the Respondent (now Appellant).
2. Whether the names of Akol Hellen and Akol Hellen Odeke refer to the Respondent [now Appellant] as one and the same person.
3. Whether the Respondent [now the Appellant] is a registered voter.
4. Whether there are grounds for the disqualification of the Respondent [now Appellant] from being nominated as a Woman Member of Parliament, Bukedea District.

The trial court answered all the issues in favour of the Applicant [now Respondent] and issued an Order of Injunction restraining the Electoral Commission from accepting the nomination of the Appellant as a Parliamentary Candidate for the Woman Member of Parliament for Bukedea District in the General Elections then slated for 2021.

The trial court also awarded the current Respondent the costs of the Application.

The Appellant was dissatisfied with the decision of the High Court and appealed to this Court.

In the meantime, on 16th October 2020, the Appellant went ahead to present her Nomination Papers to the Returning Officer of Bukedea District. He rejected the same on the account of the Court Order that had been served upon the Commission restraining it from accepting the nomination of the Appellant.

On the same date of 16th October 2020, the Appellant lodged, with the Electoral Commission, a complaint against the refusal by the Bukedea District Returning Officer to nominate her.

The Electoral Commission, after hearing the parties, upheld the decision of the Returning Officer, Bukedea District.

On 30.10.2020 the Appellant filed an appeal against the decision of the Electoral Commission before the High Court of Uganda at Kampala under EPP 008 of 2020 Akol Hellen Odeke Vs Electoral Commission. The said appeal was subsequently withdrawn by the Appellant on 16th November 2020 following the publication in the Uganda Gazette of General Parliamentary Results which indicated that Ms Among Anita Annet had been declared unopposed for the position of District Woman Representative to Parliament of Bukedea District.

Appearances.

When this appeal came up for hearing before this Court the Appellant was represented by Counsel Jude Byamukama while the Respondent was represented by a team of four advocates namely: Counsel Okello Oryem, Counsel Caleb Alaka, Counsel Joseph Kyazze and Counsel Ellisha Bafirawala.

The parties were granted leave to file Written Submissions which I will take into account when considering this appeal.

Counsel Jude Byamukama also made an oral application to be granted leave to amend the Memorandum of Appeal in this matter by adding two prayers thus:

- *"c) A Consequential Order be issued to the Electoral Commission to degazette the declaration of Among Anita Annet as an unopposed candidate for the election for Woman MP Bukedea District and for the Appellant to be duly nominated.*

- *d) A Consequential Order that a fresh nomination exercise and election date be set by the Electoral Commission in respect of the election for Woman MP. Bukedea District."*

The Application was opposed by Counsel for the Respondents. We allowed the Application and undertook to provide the reasons in our judgment.

Reasons for allowing the Application to Amend the Memorandum of Appeal.

Rule 45(2) of the Rules of this Court vest this Court with the discretion to entertain both formal and oral applications for leave to amend any document in the following terms:

> *"The Court may consider an application for leave to amend whether made formally as in sub rule (1) of this rule or informally during the course of proceedings and may dispose of the application or direct that an informal application be made formally".*

The principles that guide this Court in the exercise of its discretion under Rule 45(2) of the Rules of this Court are now settled. As far as is relevant to the instant application, the following were applicable:-

- A Memorandum of Appeal, subject to the interests of justice, is always amenable to amendment see *Uhuru Highway Development Ltd Vs Central Bank of Kenya (2002)1 EA 314 (COA-K)*.
- A Memorandum of Appeal is a pleading like any other and the principles that apply to amendment of pleadings also apply to a Memorandum of Appeal – see *Uhuru Highway Development Ltd* (ibid).
- The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion – *see Halsbury's Laws of England, 4th ed. (re-issue), Vol. 36(1) at paragraph 76*.

- The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it, it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side – see *Halsbury's Laws of England (ibid)*.
- Amendments to pleadings sought before the hearing should, generally speaking, be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs – see *Eastern Bakery Vs Castellino (1958) EA 461*.

In our view, the application satisfied all the above principles. The amendments that the appellant sought to make to the Memorandum of Appeal in the instant application were intended to add only two prayers to the original Memorandum of Appeal, namely:

- *"c) A Consequential Order be issued to the Electoral Commission to degazette the declaration of Among Anita Annet as an unopposed candidate for the election for Woman MP Bukedea District and for the Appellant to be duly nominated.*
- *d) A Consequential Order that a fresh nomination exercise and election date be set by the Electoral Commission in respect of the election for Woman MP. Bukedea District."*

The intended Amended Memorandum of Appeal was filed in court before the hearing date of the appeal and served on the Respondent's counsel. It was intended to cater for the new developments in the case as reflected in the Supplementary Record of Appeal namely, that at the time of the hearing of the appeal the Electoral Commission had already gazette a Woman Member of Parliament for Bukedea District. And the amendment sought to grant an opportunity to this court to effectively adjudicate the dispute and address its mind to the possible remedies available to the Appellant in those circumstances. The amendment was made in good faith and there was no prejudice occasioned to the Respondent.

Accordingly, we allowed the Appellant's oral application to file the Amended Memorandum of Appeal.

I will now proceed to consider the actual appeal.

Grounds of Appeal.

In her Amended Memorandum of Appeal, the Appellant set out 7 Grounds of Appeal, namely:

1. *The learned trial Judge erred in law when he held that the Respondent had the Locus Standi to file Miscellaneous Cause No. 0022 of 2020 against the Appellant.*
2. *The learned trial Judge erred in law when he held that the names AKOL HELLEN and AKOL HELLEN ODEKE do not refer to the same Appellant as one and the same name.*
3. *The learned trial Judge erred in law and in fact when he held that the Appellant was not the person on the Register as Akol Hellen Odeke.*
4. *The learned trial Judge erred in law and fact when he held that the Appellant's advertised Deed Poll was an illegality.*
5. *The learned trial Judge erred in law when he held that the Appellant does not possess requisite academic qualifications for nomination and election under the names AKOL HELLEN ODEKE and AKOL HELLEN.*
6. *The learned trial Judge erred in law when he disregarded the fact that the Appellant had assumed use of the name ODEKE upon marriage to Mr. Martin Odeke.*
7. *The learned trial Judge erred in law when he entertained Miscellaneous Cause No. 22 of 2020 contrary to the Constitution, Parliamentary Elections Act and the Electoral Commission Act.*

The Appellant prayed for the following remedies:

a) *The Appeal be allowed and the ruling of the trial court be set aside.*
b) *The Respondent meets the costs of this Appeal and the Lower Court.*

c) *A Consequential Order be issued to the Electoral Commission to degazette the declaration of Among Anita Annet as an unopposed candidate for the election for Woman MP Bukedea District and for the Appellant to be duly nominated.*

d) *A Consequential Order that a fresh nomination exercise and election date be set by the Electoral Commission in respect of the election for Woman MP. Bukedea District.*

In her Submissions, the Appellant combined grounds 1 & 7 , then grounds 2, 3, 4 and 6 jointly. She then argued ground 5 separately. I will also adopt the same order.

Power of Court.

As a first Appellate Court, the duty of this Court in an appeal of this nature is to re-evaluate the evidence before the Trial Court and draw its own inferences of fact while making allowance for the fact that it did not have the opportunity enjoyed by the Trial Court of seeing or hearing the witnesses. **See Rule 30(1) of the Judicature (Court of Appeal) Rules S.I 13-10, Pandya Vs R [1957] EA 336, The Executive Director of National Environmental Management Authority (NEMA) Vs Solid State Limited, Supreme Court Civil Appeal No.15 of 2015(unreported).**

It is with the above principles in mind that I now proceed to analyse the grounds of appeal in the order in which they were presented by the parties.

Grounds 1 & 7.

Grounds 1 & 7 are couched as follows:-

Ground 1 – *The learned trial Judge erred in law when he held that the Respondent had locus standi to file Miscellaneous Cause No. 0022 of 2020 against the Appellant.*

Ground 7 – *The learned trial Judge erred in law when he entertained Miscellaneous Cause No. 0022 of 2020 contrary to the Constitution, Parliamentary Elections Act and the Electoral Commission Act.*

Counsel for the Appellant stated that he submitted on Grounds 1 & 7 jointly because they involve a review and discussion of the same legal framework.

Counsel submitted that that the Respondent did not have Locus Standi to challenge the nomination of the appellant as a Parliamentary candidate in so far as he did not furnish court with the requisite evidence to prove that he was himself a registered voter. That even then, submitted counsel, the right to challenge the nomination was exercisable only after the nomination process has been concluded and not before. For this submission, counsel relied on section 15 of the Parliamentary Elections Act.

Counsel further argued that the procedure and appropriate forum for handling nomination complaints is the Returning Officer or the Electoral Commission and that the High Court did not have jurisdiction to entertain the said complaints except by way of appeal from the decision of the Electoral Commission. For this submission, counsel relied on Articles 61(1)(f) & 64(1) of the Constitution, Section 15(a) & (b) of the Parliamentary Elections Act, and Section 15 of the Electoral Commission Act.

Counsel further referred us to the Lead Judgment of Prof. Tibatemwa – Ekirikubinza, JSC in ***Supreme Court Civil Appeal No. 12 of 2004 URA Vs Rabbo Enterprises***, which was unanimously adopted by the other Justices of the Supreme Court, to the effect that the "unlimited original jurisdiction" conferred upon the High Court by Article 139 of the Constitution is subject to the other provisions of the Constitution which provide for original jurisdiction of other quasi-judicial bodies such as the Tax Appeals Tribunal under Article 152.

Counsel for the Respondent disagreed.

As far as the question of *locus standi* is concerned, counsel for the Respondents submitted that Counsel for the Appellant cannot be seen to challenge the Respondent's locus on appeal when she never challenged the same in the trial court, whether by way of Affidavit or Submissions.

The above notwithstanding, Counsel for the Respondent submitted that the trial court extensively addressed its mind to the question of ***locus standi*** and rightly concluded that the Respondent had locus standi in so far as he was a registered voter in Bukedea District and also had a civic duty under Article 38(1) of the Constitution to institute the court proceedings the way he did.

As regards ground 7, counsel for the Respondent objected to it as being a new matter which was being raised for the first time on appeal. Nevertheless, Counsel submitted that the High Court had unlimited original jurisdiction to entertain the dispute by virtue of Article 139(1) of the Constitution, Section 14 and 33 of the Judicature Act, Section 36 of the Registration of Persons Act and Section 98 of the Civil Procedure Act.

Counsel further submitted that the jurisdiction of the Electoral Commission related only to post nomination complaints and not pre-nomination violations of the Constitution or the Registration of Persons Act. Above all, there was no law that could prevent access to the High Court by a party aggrieved with the electoral process. For this submission counsel relied upon the authority of Kabagambe Asol & Others Vs Electoral Commission & Dr. Kizza Besigye, Constitutional Petition No. 1 of 2006.

I will first deal with the objections raised about grounds 1 & 7 before delving into consideration of the substance of the said grounds.

Resolution of the objections to grounds 1 & 7

It is now settled that an appellate court has discretion to allow a new point to be taken on appeal especially where the "new point" is critical to the effective resolution of the dispute. Mulenga, JSC (RIP) in Dr. Paul Kawanga Ssemogerere & Another Vs A.G, Constitutional Appeal No. 1 of 2000 put it succinctly thus:

> *"... much as it is highly desirable that issues (both of law and fact) raised for consideration by an appellate court should have been considered by the lower court, I am not aware of any law that precludes an appellate court from considering a legal*

issue which was not considered by the lower court, when the answer to the issue would affect the result of the appeal."

A close review of the record of the lower court indicates the issue of locus standi of the respondent to challenge the pending nomination of the Appellant was set out in the Respondent's submissions for resolution by the trial court as issue No. 1. The Appellant's advocates at the time neither responded to it nor indicated that they had abandoned it. Nevertheless, the trial court went ahead to comprehensively address it in its Ruling.

On appeal, the Appellant engaged new advocates who took issue with the trial court's resolution of the issue of the locus standi of the Respondent. As such, it is not a new point arising at the appellate stage. It was largely a point of law which the trial court was entitled to resolve with or without the response of the appellant once properly set out for it to resolve. Accordingly, the Respondent's objection to ground 1 of the appeal is rejected.

As regards ground 7, it is clearly a new point which is being raised for the first time at the appellate stage. So the question that arises is whether this court should exercise its discretion and entertain it.

Ground 7 seeks to have this court resolve the question of the "Unlimited original jurisdiction" of the High Court in respect of pre-nomination complaints and disputes. This is a novel point of law and the justice of this case and public interest dictate that it is resolved on its merits. Accordingly, the Respondent's objection to ground 7 is rejected.

I will now proceed to resolve the substantive arguments about grounds 1 & 7.

Resolution of the substance of grounds 1 & 7

As I have already stated, the Appellants joined grounds 1 & 7 in her submissions allegedly because they involve a review and discussion of the same legal framework. But I will start with analysis of ground 7 since its results have a direct bearing on ground 1 and the other grounds of appeal.

The crux of the Appellant's submissions on ground 7 is that the High court does not have the "original jurisdiction" mandate to hear and determine complaints regarding validity of nominations and other election related complaints arising before and during polling. That such mandate is vested in the Electoral Commission and that the High Court is vested only with appellate jurisdiction over decisions made by the Electoral Commission.

The respondent disagreed.

It is true that jurisdiction is a creature of statute. The original jurisdiction of the High Court and the Electoral Commission in respect of election related disputes arising before and during polling emanates from the Constitution of the Republic of Uganda, 1995. As such, it is important to set out all the provisions of the Constitution which have a bearing on the resolution of the issue of the mandate of both Constitutional bodies in order to effectively determine the scope of the "unlimited original jurisdiction" of the High Court. This is in accordance with the cardinal rule of constitutional interpretation to the effect that in interpreting the Constitution the entire Constitution must be read as an integrated whole with no particular provision destroying the other but each sustaining the other so as to promote harmony of the Constitution - see Dr. Paul K. Semogerere and 2 others Vs. A.G, Constitutional Appeal No. 1 of 2002.

The following provisions of the Constitution have a bearing on the mandate of the Electoral Commission and the High Court with regard to disputes arising before and during polling day:

- Article 61(1)(f) – one of the Constitutional functions of the Electoral Commission is "to hear and determine Election Complaints arising before and during polling".
- Article 64(1) – "Any person aggrieved by a decision of the Electoral Commission in respect of any of the complaints referred to in article 61(1)(f) of this Constitution may appeal to the High Court".

- Article 139(1) – "The High Court shall, **subject to the provisions of this Constitution**, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law". [*Emphasis added*]

The Supreme Court of Uganda in *URA Vs Rabbo Enterprises (U) Ltd & Anor, SCCA No. 12 of 2004* had occasion to consider at great length the scope of the "unlimited original jurisdiction" of the High Court in respect of settling tax disputes in light of Article 152(3) of the Constitution which required Parliament to make laws to establish tax tribunals for the purposes of settling tax disputes. In the leading judgment of the Hon. Justice Dr. Prof. Lilian Tibatemwa - Ekirikubiza, JSC, with the concurrence of other Justices of the Supreme Court, stated as follows:

> *"Article 139(1) of the Constitution provides that the High Court shall, subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law.*
>
> *My understanding of the above constitutional provision is that the High Court exercises its unlimited jurisdiction subject to other provisions of the Constitution. One such provision envisaged in Article 139(1) is Article 152(3) of the Constitution which provides for Tax Appeals Tribunals.*
>
> *The establishment of Tax Tribunals is rooted in the Constitution – Article 152(3) of the Constitution – which not only gives name to these quasi – judicial tribunals but also envisages their establishment through an Act of Parliament. The Article also specifically empowers the said entities to handle taxation disputes.*
>
> *It is in line with this that Parliament enacted the Tax Appeals Tribunal Act ...*
>
> *... I respectfully disagree with the holding of the Court of Appeal that a litigant can choose whether to take a tax matter to the High Court as a Court of first instance or to the Tax Appeals Tribunal. It must be noted that under Section 3 of the Tax Appeals Tribunal Act, a person is not qualified to be appointed Chairperson of a Tribunal unless he or she is qualified to be appointed a Judge of the High Court. Furthermore, under Section 30, a person cannot be appointed a Registrar of the Tax Tribunal if she or he is not qualified to be a Registrar of the High Court. I opine that it would be bizarre that our legal regime would give power to an individual to choose where to lodge a complaint by offering choices between institutions equally qualified to handle the matter."*

Much as the decision in *URA Vs Rabbo Enterprises* (above) was dealing with settlement of tax related disputes, it is equally applicable to the determination of the scope of the "unlimited original jurisdiction" of the High Court in respect of Election related disputes arising before and on polling day with the necessary modifications. I opine that the "unlimited original jurisdiction" conferred upon the High Court by Article 139(1) of the Constitution is, first and foremost, subject to Article 61(1)(f) of the Constitution. The import of this is that the mandate to hear and determine election complaints arising before and during polling as a "court" of first instance is vested in the Electoral Commission.

Article 139(1) of the Constitution is also subject to Article 64(1) of the Constitution which expressly vests the High Court with jurisdiction to hear appeals from decisions of the Electoral Commission made pursuant to Article 61(1)(f) of the Constitution.

Accordingly, it is my finding that the High Court sitting at Soroti did not have jurisdiction to hear and determine the Respondent's application as a court of first instance.

Counsel for the Respondent submitted that the application was brought under Article 139(1) of the Constitution, Section 14 and 33 of the Judicature Act, Section 36 of the Registration of Persons Act and Section 98 of the Civil Procedure Act, the sum total of which is to confer jurisdiction on the High Court to grant such orders as merit the interest of justice.

I have already analysed the scope of the "unlimited original jurisdiction" of the High Court under Article 139(1) of the Constitution and held that it is subject to the other provisions of the Constitution like Article 61(1)(f) which confers original jurisdiction to the Electoral Commission to settle election related disputes arising before and on polling day. It is also subject to Article 64(1) of the Constitution which expressly confers the High Court with appellate jurisdiction in respect of election dispute decisions made by the Electoral Commission under Article 61(1)(f). It could not have been the intention of the framers of the Constitution to confer both original and appellate jurisdiction to the same institution (High

Court) in respect of the same subject matter of settling election related disputes arising before and on polling day.

As for S.13 of the Judicature Act, cap 13, it provides under subsection (1) as follows:-

> *"The High Court shall, subject to the Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution or this Act or another law". [Emphasis added]*

The above Section cannot be a basis for the jurisdiction of the High Court as a court of first instance in election related disputes like the instant one. The section expressly states that it is "subject to the Constitution". This implies that the limitations as to the "unlimited original jurisdiction" of the High Court which the Constitution itself provides for as already discussed in this judgment are reinforced and consolidated by Section 13 of the Judicature Act.

The same observations can be made about S.33 of the Judicature Act which is couched in the following terms:-

> *"The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided". [Emphasis added]*

My understanding of the above provision is that it comes into play only after the dispute in issue is properly before the High Court. The Section cannot be used to confer jurisdiction onto the High Court where it had none at the time of commencement of the action or suit or where a matter was for some other reason not properly brought before the High Court.

On the other hand, Section 36 of The Registration of Persons Act No. 4 of 2015 provides for the procedure to be followed by a person who wishes to change his or her name. It is silent on the question of jurisdiction of the High Court. Above all, in the context of the dispute between the parties in this particular matter, the substance of the complaint against the appellant was to the effect that she had illegally changed her name which disqualified her

from nomination and contesting as a candidate for Woman Member of Parliament for Bukedea District. This, for all intents and purposes, drew the dispute from a simple standalone name change dispute and took it to the realm of an election related dispute whose resolution was set by Article 61(1)(f) of the Constitution to be within the mandate of the Electoral Commission.

In the result, ground No. 7 succeeds. The High Court sitting at Soroti had no jurisdiction to entertain Miscellaneous Cause No. 0022 of 2020 as a court of first instance.

The effect of this finding is that the orders made by the High Court were a nullity. To use the language of Words and Phrases Legally Defined, Vol. 3 at page 13 *"... where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing"*.

This finding alone fully disposes of ground 1 and all the other grounds of appeal.

Remedies.

In the Amended Memorandum of Appeal, the Appellant sought the following remedies:

a) *The appeal be allowed and the Ruling of the trial court be set aside.*
b) *The Respondent meets the costs of this appeal and the lower court.*
c) *Consequential Order be issued to the Electoral Commission to degazette the declaration of Among Anita Annet as an unopposed candidate for the election of Woman Member of Parliament, Bukedea District and for the Appellant to be duly nominated.*
d) *A Consequential Order that a fresh nomination exercise and election date be set by the Electoral Commission in respect of the election for Woman Member of Parliament, Bukedea District.*

I will deal with each remedy in the order set out in the Amended Memorandum of Appeal.

a) **Remedy No. (a) - Appeal be allowed**.

Remedy No. (a) appears to be the logical consequence of the finding of this court declaring the Ruling of the trial Court to be a nullity.

Accordingly, the appeal is allowed and the Ruling and orders of the trial Court are hereby set aside.

b) Remedy No. (b) - Costs.

In his submissions, counsel for the Appellant prayed for the costs of the appeal and the lower court.

The Respondent opposed the prayer.

It is trite that the award of costs is discretionary. In the instant matter, the basis of the appeal succeeding was that the High Court did not have original jurisdiction to try the dispute in this matter. This ground was never raised before the High Court. It was first raised before us at the appellate stage. If it had been raised before the High Court, perhaps the lower Court would have acted differently and this appeal rendered unnecessary. Accordingly, justice dictates that the Appellant is awarded only the costs of the appeal and denied the costs in the lower Court for not having been vigilant enough to raise the issue of jurisdiction at the earliest opportunity during the trial proceedings in the lower court. I am alive to the fact that the appropriate person to raise the question of jurisdiction was the appellant's advocate during the trial stage. However, choice of which advocate is fit for a particular legal task at the given time is a matter wholly within the power of the client. So ultimately the consequences of the choice made come back to the client.

c) Consequential Orders (c) and (d).

In her submissions, the Appellant stated that following the disqualification of the Appellant from nomination on account of the erroneous Ruling of the trial Court, a one Among Annet

Anita was declared unopposed candidate for the election of the Woman Member of Parliament for Bukedea District and subsequently gazetted on the 03rd November 2020 by the Electoral Commission. The Appellant accordingly prayed that we invoke Rule 2(2) of the Judicature (Court of Appeal Rules) to issue a Consequential Order to the Electoral Commission to degazette the said unopposed candidate and conduct fresh nominations and elections.

The Respondent opposed the grant of the Consequential Orders by this Court. Counsel submitted that Court cannot exercise discretion under Rule 2(2) of the Court of Appeal Rules to grant an order the jurisdiction of which is vested by statute in the High Court either pursuant to an appeal under Article 64 of the Constitution and Section 15 of the Electoral Commission Act, or pursuant to an Election Petition under Sections 60-64 of Parliamentary Elections Act, where the elected leader is made party. Otherwise, the Consequential Orders would be tantamount to condemning parties unheard. For these submissions, counsel relied on Byanyima Winnie Vs Ngoma Ngime, High Court Civil Revision No. 9 of 2001; Kafeero Sekitoleko Robert Vs Mugambe Joseph High Court Election Petition No. 006 of 2011 and Carolyn Turyatemba & others Vs Attorney General, Constitutional Petition No. 15 of 2006.

Rule 2(2) of Rules of this Court provides as follows:

> *"Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the Court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process by any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent abuse of the process of any Court caused by delay".*

My understanding of the above Rule is that it gives this Court very wide inherent powers entitling us to make any orders that may be necessary for purposes of achieving justice and preventing abuse of the court process.

The question is whether those powers can be stretched to the extent of allowing this court to grant a remedy which affects even non-parties to this appeal, especially Hon. Among who

has already been gazetted by the Electoral Commission as an unopposed Woman Member of Parliament for Bukedea.

The Constitutional Court in *Constitutional Petition No. 15 of 2006 Caroline Turyatemba & others Vs A.G & Electoral Commission* when faced with a situation where the Petitioners sought orders the effect of which was to affect even non-parties to the suit declined to grant the said remedies as *"to do so, would be to condemn such third parties without having availed them a fair hearing, which act would be contrary to Article 28 of the Constitution"*.

It is my holding that Rule 2(2) of the Rules of this Court is no license for this court to make orders which would be tantamount to a breach of Constitutionally guaranteed rights, especially the non-derogable right to fair hearing as enshrined in Articles 28 & 44(c) of the constitution.

Accordingly, I would decline to exercise the inherent powers of this court to grant the Consequential Orders sought by the Appellant.

Conclusion.

In conclusion, I would declare and order as follows:

1. The appeal is allowed.
2. The Ruling of the Trial Court is set aside.
3. The Appellant is granted the costs of the appeal.
4. Each party shall bear its own costs of the High court.
5. The Consequential Orders are denied.

Dated, Signed and delivered at Kampala this 18th day March of 2021.

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Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram of Justices of Appeal: Catherine Bamugemereire, Stephen Musota & Muzamiru M. Kibeedi)

Election Petition Appeal No. 6 of 2020

AKOL ELLEN ODEKE :: APPELLANT

VERSUS

OKODEL UMAR ::RESPONDENT

(Appeal from the Ruling of the High Court of Uganda at Soroti in Miscellaneous Cause No. 0022 of 2020 delivered on the 8th day of October, 2020 by Wilson Masalu Musene J)

Judgment of Lady Justice Catherine Bamugemereire

I have read in draft the Judgment of Muzamir Kibeedi JA and I agree with his findings in the main. The facts of this Appeal have been set out in the lead Judgment and I need not repeat them here.

However, I would like to take a granular look at Issues No. 2 and No. 4. They state as below:

> 2. **Whether the names of Akol Hellen and Akol Hellen Odeke refer to the Respondent [now Appellant] as one and the same person.**

4. **Whether there are grounds for the disqualification of the Respondent [now Appellant] from being nominated as a Woman Member of Parliament, Bukedea District.**

This Appeal arises out of an application which was filed in the High Court in Soroti in which the Trial Court made several declarations but I will pin point a few:

c) **That the Respondent, now Appellant does not qualify for nomination for the position of woman Member of Parliament of Bukedea District**

d) **That an order of injunction restraining the electoral commission from accepting the nomination of the Respondent/ Appellant as a Parliamentary Candidate for the Woman Member of Parliament for Bukedea District for the forthcoming (read, just concluded) election …2021.**

Indeed the above declarations are in tandem with and are co-related to the above grounds of appeal. This application raises quite serious constitutional issues which in my view would have merited a Constitutional Reference in order for them to be properly and finally resolved. The first one is whether the Registration of Person's Act 2015 contravenes Article 33(4) of the Constitution when it places an

extra burden on married women. Along that conundrum I would include election laws which require married women to change their names by deed poll in order to prove their identity.

The above notwithstanding I wish to note that this appeal was disposed of by determining issue No. 1 alone. I wish to add that I would have heard issue No. 2 in the affirmative. I find that the names of Akol Hellen and Akol Hellen Odeke refer to the Respondent [now Appellant] as one and the same person. The question of names is an extremely subjective matter and trial courts ought to be cautious in rushing to conclusions especially if the hurried conclusion precipitates a miscarriage of justice of such immense proportions. The affidavit and documents of the Appellant were straight forward and simple. When the Appellant got married she added her husband' names. When she went to school she used her maiden names. The issue in Court was not whether the Appellant got into a marriage before she went to school. The phenomenon of married

women returning to school is not uncommon. Therefore in absence of any other person claiming such names I would have expected the trial court to take judicial notice of UNEB UCE and UACE documents to that effect. This an Application and not a petition questioning the Appellant's education I had also expected the trial court to take judicial notice of the marriage certificate of the Appellant which gives rise to her adding the name Odeke to her particulars. Judicial notice allows a well-known or authoritatively attested fact to be produced as evidence without having to prove them, as they cannot reasonably be doubted. Judicial notice is taken upon the request of a party that submits the fact. From time to time Court do take Judicial notice of certain notorious facts or circumstances such as was the case in **Rashid Mario v Kamoikon Court of Appeal Civil Appeal No. 162 of 2015** and in **Nyeko Smith and 2 Others v AG Supreme Court Appeal No. 1 of 2016.**

Names a central part of the identity of a person. In unsophisticated societies such as ours, names will denote the sex of a person. In a more elaborate way, a married woman may take up the name of her husband upon marriage and this too denotes a change of status on her part which should be recognised ***in rem***. A curious issue worth noting is that the Electoral Commission announces a roadmap for general once every five years. Only a few individuals offer themselves to stand for these elections and even fewer women do so. It is therefore not every Akol Hellen Odeke or Odeke Akol Hellen that will offer themselves to contest in a particular election. This Court held in **Mutembuli Yusuf v Nagwomu Moses Musamba v EC Election Appeal No. 43 of 2016** that interchanging names or changing their order does not in itself make a certificate invalid and does not mean change the qualifications denoted by such a certificate. In the **Mutembuli case** (supra) the this court equally referred to **Rtd Col Dr. Kizza Besigye v Yoweri Museveni Election Petition No. 1**

of 2001 in which the issue of name-placement, or order of names was raised as an issue. This same issue continued to beleaguer the same parties in **Election Petition No. 1 of 2006 of also in Election Petition No. 1 of 2011**. The issue of how names are ordered has been well-articulated in the above election petitions to the effect that the order of names does not go to the root of any particular petition unless cogent proof is shown that indeed a person is not whom they claim to be. In Shakepeare's Romeo and Juliet Juliet was quoted to have stated; "What's in a **name**? That which we call a **rose**, by any other **Name would smell** as sweet."

Before I take leave of this matter let me state here that there is an increasing practice by administrative bodies, and the Electoral Commission of Uganda is no exception, to require persons to place their names in particular order.

As already noted above over time names reflect identity. Identity evolves around arrangement and order in which names appear and

are intricately linked. In some societies people have similar names and in order to establish and lock in identity other criteria has been established. The rules around names involve the concept of first name, middle name, if any, and a surname or family name. Where necessary other criteria such as date of birth are introduced or a unique identifier number are applied in order to distinguish individuals who may share similar names. In Uganda we have been unable to establish a coherent and uniform standard of ascertaining identity.

Schools have adopted the tradition of last name first order. Public Service appears to have adopted a similar approach. The Registration of Person's Act emphasizes a National Identification Number. The same order as Public Service was embraced by the National Identification and Registration Authority (NIRA) with the only difference being the use of a unique national identifier the NIN. The

same situation obtains with the Electoral Commission since it draws its data from NIRA.

On the other hand international practice is based on the concept of a clear demarcation. First name and last name are clearly distinguishable even if they appeared in no particular order. A time has come for Uganda to clearly harmonize the Ugandan name protocol with international standards. One example of international standard setting is the International Civil Aviation Organisation (ICAO) which was an organisation formed after a convention in Chicago formed the Convention on International Civil Aviation in 1944. As a result the ICAO has the ability to set standards for Aviation Authorities in all areas Aviation including Passport Standards. It should be noted however that the stipulations ICAO standards contain but never supersede the primacy of national regulatory requirements. It is always the local, national regulations which are enforced in, and by, sovereign states, and which must be legally

adhered to by air operators making use of applicable airspace and airports.

It is therefore incumbent on us as a society to ensure that the issue of standardisation of names is sorted out once and for all, the way it happen with passports.

The expected order of names keeps changing much to chagrin, pain and economic loss of poor students or pensioners. In this case this type of name requirement has had the effect of disqualifying an otherwise for and proper candidate for the position of Woman Member of Parliament for Bukedea District. Moreover is type of requirement does not meet international standards. For example students in schools in Uganda appear to be required to state their names starting with surnames first, first names in the middle and middle names last. This is completely convoluted and does not meet international standards. As a result many of these Ugandans do not know what is a First or Given name, what is a middle name and what

is a family, last or surname. It is unfortunate that as a country we have allowed such poor practices to take root.

I find that indeed this case disturbing on many fronts since if the court had applied it's mind to the facts before it would have found that if indeed there were discrepancies as to the change in order or names or in the names themselves, these were minor and were not deliberate lies intended to deceive or to commit a fraud. The explanation was perfectly reasonable and plausible. The Appellant got married and added her husband's name to her maiden name. When this woman went to school she used given names also known as maiden names. These explanations should not be too complex in fact they are quite simple and regular. I find therefore that the Appellant was who she claimed to be and there was no fraud to be imputed on her names or her certificates.

Regarding the last issue **whether there are grounds for the disqualification of the Respondent [now Appellant] from being**

nominated as a Woman Member of Parliament, Bukedea District; I find that there was no ground for the Electoral Commission to have disqualified the Respondent from being nominated as a Woman Member of Parliament, Bukedea District.

I have already found that there was no discrepancy warranting such an debauched decision and there was no fraud, and therefore non should be imputed on the names of the Appellant. In the result, I find that it was erroneous for the trial Judge to find as he did. The decision of the trial Judge led to the Appellant getting disqualified in a most bizarre manner.

In the main, agree with the final orders of Muzamiru Kibeedi JA.

Signed this ....18th.... Day of May.... 2021

Catherine Bamugemereire
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGAANDA AT KAMPALA

ELECTION PETITION APPEAL NO. 6 OF 2020

AKOL HELLEN ODEKE:: APPELLANT

VERSUS

OKODEL UMAR ::: RESPONDENT

(Arising from the decision of the High Court at Soroti before Masalu Musene, J in Miscellaneous Cause No. 0022 of 2020)

CORAM: HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

I had the benefit of reading in draft the judgment prepared by my learned brother Justice Muzamiru Mutangula Kibeedi, JA.

I concur with the reasoning and orders he has proposed.

Dated at Kampala this.....18th.....day of .....March.....2021

.....

Stephen Musota

JUSTICE OF APPEAL