

**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**

**ELECTION PETITION NO. 3 OF 2006**

**HON. BAHINDUKA MARTIN MUGARRA.....PETITIONER**

**V**

**1. GERALD RWEMULIKYA IBANDA**

**2. ELECTORAL COMMISSION.....RESPONDENTS**

**BEFORE HON. LADY JUSTICE H. WOLAYO**

**JUDGMENT**

The petitioner, through his advocates Owen Murangira & Co. Advocates petitioned the High Court to set aside the election of the 1<sup>st</sup> respondent and to declare him as the runner up to the election as the elected Member of Parliament or to order a fresh election.

The grounds of the petition are essentially that

1. The 1<sup>st</sup> respondent was not qualified for election as a member of parliament
2. The 1<sup>st</sup> respondent is not a citizen of Uganda
3. The 1<sup>st</sup> respondent is a Congolese national and holds a voter's card of the Democratic Republic of Congo.
4. The 1<sup>st</sup> respondent entered Uganda in 1993 as a refugee.

In their answers, the 1<sup>st</sup> and 2<sup>nd</sup> respondent denied the allegations by the petitioner and averred that the 1<sup>st</sup> respondent was a citizen of Uganda and he was validly nominated to stand for election.

The 1<sup>st</sup> respondent was represented jointly by ESNafrica Advocates and Acellam Collins & Co. Advocates.

The 2<sup>nd</sup> respondent was represented by Kandebe, Ntambirweki & Co. Advocates.

Both counsel filed written submissions that I have carefully considered.

In **EPA 13 of 2011 Odo Tayebwa and Basajjabalaba & anor, the Court of Appeal** (ulii) reiterated that the burden of proof in an election contest rests

ordinarily upon the contestant to prove to the satisfaction of the court the grounds upon which he relies to get the election nullified ‘.

The standard of proof under section 61(3) of the PEA is on a balance of probabilities.

Two issues were framed for trial

1. Whether the 1<sup>st</sup> respondent was at the time of nomination qualified to contest for Member of Parliament.
2. Whether the petitioner is entitled to the reliefs sought in the petition.

**Whether the 1<sup>st</sup> respondent was at the time of nomination qualified to contest for Member of Parliament.**

It was the case for the petitioner that the 1<sup>st</sup> respondent Rwemulikya is a Congolese national and therefore not qualified to stand for elections. The petitioner rests his case on article 80 (1) (a) of the Constitution which gives qualifications of a member of parliament as citizenship, a registered voter and minimum formal education as Advanced Certificate of Education or equivalent.

While the qualification as a registered voter and minimum formal education are not contested, that the 1<sup>st</sup> respondent is a citizen is strongly challenged by the petitioner.

The petitioner based his case on three categories of evidence, namely, testimonies by affidavit and through cross examination of residents and local leaders of Haibale village where the 1<sup>st</sup> respondent’s father John Kituku says he was born; enumeration of refugees documents; and voters cards allegedly issued by the Democratic Republic of Congo(DRC) to John Kituku and Gerald Rwemulikye.

**Enumeration of refugees evidence**

According to Kahiigwa Edward who also testified in court, he has been a resident of Haibale since 1966 and he knows that in 1993 John Kituku and Rwemulikya were enumerated as refugees fleeing insurgency in Zaire in 1993.

As the general secretary of Haibale LC1, and together with the parish chief and late Onan Byansi, he was tasked by the sub county chief to register refugees who included the 1<sup>st</sup> respondent. According to Kahigwa, John Kituku settled in Rwebisengo sub county and Harukoba.

An examination of the enumeration of refugees document is quite revealing.

There are ten forms and the common factor is that it was the household of Kituku that was enumerated. The form on which information about Kituku was captured was recorded by Byansi Simon while Kahigwa captured information on Rwakarijembe. Byansi records Kituuku as having eight children including Gerald Rwemulikya who was aged ten at the time.

Other information captured include number of cows, amount paid, to whom and balance. If this was a census of refugees in Rwebisengo sub county, the fact that money had to be paid contradicts the objective of the exercise. In answer to court, the evidence of Kahigwa was that landing site owners were charging people who crossed their cattle from Congo to Uganda. The rate varied from 5000/= to 6000/=. It was his evidence that the LCIII thought it wise that they should also get some revenue on the coming of cattle from Congo therefore landing site owners remitted 1000 for each head of cattle crossing to Uganda.

In reply to this enumeration exercise, John Kituku in his affidavit explained that during the NRA war, he travelled with his cattle to across the border Congo border for safety while his family remained in Haibale village. He returned in 1991 resettled in Rwebisengo trading centre with his family. It was suggested by counsel for the petitioner in cross examination of Kituku that it was not possible that Kituku fled with his cattle and left his family behind and therefore he was being untruthful.

I find that it highly probable that Kituku left for Congo with his cattle and returned in 1991 which coincided with the alleged enumeration of refugees which also included cows.

It is also worth noting that the letter of the LC 111 Chairman Rwebisengo, Asa Wamara who authorized the exercise is dated 20.6.1996 yet it allegedly took place in 1993. Therefore, this letter cannot be the authority for the 1993 enumeration.

Bagariya Moses who testified as PW 7 in his affidavit deposed that he participated in the enumeration exercise in 1991 together with Mr. Kahigwa. The reference to 1991 is revealing it coincides with the return of Kituku with his cattle from Congo where he had fled to protect them from the UNLA. At the same time, it contradicts Kahigwa's testimony that the enumeration took place in 1993.

A close examination of the enumeration forms show they are not signed by the parish chief although they bear the stamp of the parish chief and the date given is 19.6.93.

The absence of any instruction to carry out a registration of refugees and the clear absence of any other document showing other people were enumerated apart from Kituku casts doubt on the enumeration documents.

The explanation by Kituku that he had to declare his cattle on his return from Congo in 1991 where he had fled with them to save them from being taken by the Uganda army means the alleged exercise was about cattle and raising revenue by landing sites, a fact admitted by Kahigwa.

The ten enumeration forms annexed to the petition were not proved in evidence, firstly because they are photocopies and secondly, as official documents, they ought to have been certified by the official custodian, the sub county chief or LC 111 Chairman of Rwebusengo. An attempt was made to bring ostensibly a set certified by the LC 11 chairperson of Bweramule parish, Rwebisengo sub county but these were certified on 19.6.2015 yet the set annexed to the petition was not certified.

While I permitted the petitioner to produce certified copies, I expected copies certified the day the order to certify was given and not some previous date. In the absence of a current certification, the authenticity of these alleged enumeration forms is questionable.

The list of names and household information attached to Bagariya's affidavit is of no evidential value because the document speaks nothing about the names and neither is it certified.

The Aliens (Registration and Control) Act Cap 61 that commenced on 1.1.1985 was the law regulating aliens in 1993 during the alleged enumeration of refugees by the local authority of Rwebisengo. (This law was repealed by the Refugee Act 21 of 2006)

An alien was defined in section 1(a) as a person who is not a citizen of Uganda.

Under section 2(1), the alien was required to register within 30 days of arrival in Uganda upon which a registration certificate was issued.

Section 5 mandated the Minister to designate any immigration office or police station to be registration centres. (the Refugee regulations 2010 now provide a different procedure)

This means that Local council of Rwebisengo had no legal authority to register refugees in 1993 as claimed by Kahigwa and Bagariya because local councils were not designated registration centres.

This reiterates my finding that no enumeration of refugees took place in 1993 as alleged.

A refugee is defined under both international law and our national law. The **1951 Convention relating to the Status of Refugees in article 1 (2)** defines a refugee as any person

*‘owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country of his former habitual residence as a result of such’.*

The **Refugee Act 21 of 2006** in section 2 adapts the same definition but includes persecution for reasons of sex and failing to conform to discriminatory practices as legitimate grounds for seeking refugee status.

Prior to 2006, a refugee was referred to as an alien and procedures for registration were clearly laid down in the law.

It’s my finding that neither John Kituku nor members of his family were registered as refugees in 1993 as alleged by the petitioner.

### **Evidence of local leaders that Kitutu was a refugee**

This brings me to testimonies of witnesses based on personal knowledge. These are PW1 Zadok Wamara whose evidence is that he is aged 76 years and an elder of Babito and that he knew Kituku’s father as King Insasa Kituku and he had a home in Mitebo Congo as well as Nyanfuka near the border on Congo side. It was his evidence that Kituku came to Uganda in 1992 and bought a house in a place he had forgotten.

The other witnesses were Isingoma David who testified as PW2, Mwamba David who testified as PW3, and Clovis Byaruhanga who testified as PW8. All

these witnesses claim Kituku came to Uganda in between 1991 and 1992 with his wives Kabonesa Jane and Mutesi.

Their evidence when combined simply confirms the fact that Kituku returned to Uganda in 1991/1992 and cattle coming into the country had to be recorded. There was no registration of refugees but rather a record of cattle for purposes of raising revenue by the local authorities.

### **Evidence that the 1<sup>st</sup> respondent possesses a voter's card issued by DRC**

The other evidence relied on by the petitioner were two voter's cards for Kituku and Rwemulikya, photocopies of which were attached to the petition.

I did not have an opportunity to examine critically these cards which were tendered on 25<sup>th</sup> May 2016 when Bahinduka testified. They resurfaced on 6<sup>th</sup> June 2016 but again disappeared because they never found their way to the record. Accusations and counter accusations were leveled by both counsel and as I write this judgment, the duplicate voters cards, are not on record but copies are on record.

The alleged Congolese voter card for Rwemulikya was issued on 28.8.2015 with place of birth as Mitebo, and address as Nyanfuka. The alleged voters card for John Kituku was issued on 10.11.2015.

What strikes me are the dates of issuance when potential candidates were positioning themselves to contest in primaries and in the general election. It is incredible that a potential candidate would dash to DRC to secure a voter's card thereby displaying double standards when elections were round the corner.

In his submissions, counsel for the petitioner submitted that these cards are authentic having been procured through diplomatic channels through the ministry of Foreign Affairs. He submitted that they are copies of duplicate voters cards.

A narration of how the voters' cards were procured and then authenticated is necessary since these cards are an essential aspect of the petitioner's case.

On 31.3.2016, the petitioner wrote to the Uganda Embassy in Kinshasa requesting for verification of the citizenship status of Mr. Rwemulikya. He enclosed a copy of Congolese National Identity Card.

On 22.4.2016, the petitioner wrote to the Ministry of Internal Affairs, Democratic Republic of Congo with the same request.

On 26.4.2016, the Coordinator who appended a signature without revealing a name certified the copy of the ID sent by the petitioner and referring to it as voter's card.

On 25.5.2016, the Permanent Secretary Ministry of Foreign Affairs Uganda, forwarded a top secret communication from the Principal Administrator in the department of Foreign Affairs DRC dated 1.3.2016 confirming that Mr. Rwemulikya is a citizen of DRC and he holds a valid voter's card.

The translated version of the letter reads as follows:

*Top secret*

*To the Chief of station ESO/ Kinshasa*

*Re: Authentication of Mr. Rwemulikya Ibanda Gerard 's Congolese nationality*

*Following the letter from the Ministry of Foreign affairs ref. No. RST /34/100/01 dated 21<sup>st</sup> December 2015, which you forwarded to us, the Department of Foreign Security would like to inform you the following:*

*Mr. Rwemulikya Ibanda Gerard has indeed been identified as a Congolese citizen and the voter's card duplicate which he is holding is valid. (emphasis mine)*

*Principal administrator*

The snag with the contents of this letter is that it indicates that the voter's card is being held by the 1<sup>st</sup> respondent yet it was in the hands of the petitioner. In cross examination, the petitioner testified that he got the card from a friend Winnie Furah who works as a desk officer in the Ministry of Internal Affairs in DRC. The said Winnie Furah who secured the card did not swear an affidavit nor did she appear to testify.

It does not make sense for the petitioner to access a duplicate voters card from a person other than its holder through unofficial channels and then purport to validate the illegality later. In **Makula International Ltd V His Eminence Cardinal Nsubuga & anor (1982) HCB 11** the Court held that once an illegality is brought to the attention of the court, it cannot be overlooked.

The proper procedure for the petitioner to follow would have been to make a direct official request for the DRC to certify that the 1<sup>st</sup> respondent is a DRC national but not first to illegally procure an alleged voter's card and then send it for authentication.

In cross examination of the petitioner, it was suggested by the respondents' counsel that the petitioner deceived court that he graduated from Makerere University in 2012 with a second class upper degree in ICT whereas not. The petitioner did not produce the transcript and certificate as ordered by court.

A letter from the faculty dated 19.9.2008 shows that he was suspended from the university for one academic year for uttering a forged of examination permit.

No amount of letters from DRC authorities will satisfy me that the Voters cards for the 1<sup>st</sup> respondent and his father were lawfully procured in light of the denials by the 1<sup>st</sup> respondent and Mr. John Kituku that they are Congolese nationals. The chances that they are forgeries is highly likely, an inference I make from their disappearance after being exhibited in court and from the letter suspending the petitioner from university for uttering a forged examination permit.

The fact that these cards went missing after making a fleeting appearance in court and in light of the unsatisfactory explanation on how he came to be in possession of the same, I accept the 1<sup>st</sup> respondent's denial that he knows nothing about this card.

Under these circumstances, there is no credible evidence that the 1<sup>st</sup> respondent is a citizen of Congo.

The 1<sup>st</sup> respondent 's exhibited his Ugandan passport that showed he had never travelled to DRC and does not possess voters' cards issued by the DRC. Mr. Kituku also denied being the holder of a duplicate voter's card exhibited in court and then made to disappear.



The 1<sup>st</sup> respondent's case is that he is a citizen of Uganda with valid passport, national ID, and a birth certificate, originals of which were exhibited in court and which were certified correct by the relevant issuing authorities vide letters.

His father John Kituku who testified as RW 3 in his affidavit deposed that

He is a citizen of Uganda by birth. He was born on 1.1.1942 at Haibale, Bweramule, Rwebisongo sub county in Ntoroko district to Daudi Kituku and Kabitano Esteri. It was his evidence that he currently resides at Harukoba village, Harukoba parish, Rwebisengo sub county.

It was suggested by counsel for the petitioner that because Kituku's father Daudi Kituku Alijangira and mother Esteri were buried in Mitebo in DRC, John Kituku is a Congolese. It was John Kituku's evidence that at the time of his father's death, the border was very fluid and Mitebo was part of Uganda until a border was imposed and it fell on the DRC side. It was his evidence that his father had two homes, one in Haibale and another in Mitebo across river Semiliki. I have no reason to doubt this explanation which is a historical fact that borders were imposed long before independence.

With respect to tribe, he is a Mutuku, one of the ethnic communities recognized in the Third Schedule to the Constitution as having been in existence within the borders of Uganda as at 1.2.1926.

Kituku deposed that he belongs to the Babito clan and he was informed by his parents that their parents migrated from Bunyoro in the early 1800 before the demarcation of the present Uganda /Congo border and settled in Haibale, on the eastern bank of Semliki river.

John Kituku deposed that he has lived in Uganda all his life and purchased land in diverse places, and carried out business. He produced original combined produce receipt and credit notes issued on 31.1.63; and original land purchase agreements dated 7.4.62, 20.8.66, and 8.12.72.

He also produced original receipt for membership fee for Butuku cattle market Cooperative Society Ltd issued on 23.6.90; provisional driving permit issued 31.7.62 and 4<sup>th</sup> May 63; a driving permit issued on 12.6.91; permits issued under the Emergency powers to reside in the Gombolola of Bubukwanga dated 27.10.64; and graduated tax assessment forms for 1961 and 1963 among other documents that tend to prove that he has lived in Uganda all his life. Indeed, John Kituku registered as a voter in 1993 at Rwebisingo parish. All this evidence

demonstrates that John Kituuku is a law abiding person, who not only paid his taxes but also carried out business, acquired property, and progressively adopted a modern life style by securing a driving permit as far back as 1961.

Counsel for the petitioner did not make any submissions on these documents but opted to focus on the impugned voters' cards, testimonies of local leaders, and the contested enumeration of refugees in 1993.

I have already analyzed this evidence and arrived at the conclusion that it is largely wanting. As for the testimonies of residents, this is their word against Kitutu who has ably demonstrated that he has strong attachment to Uganda as evidenced by the documents he produced.

Counsel for the petitioner also dwelt at length on the fact that one of Kituku's sons, Albert Rutahaba is a chief in DRC and that therefore this is evidence that Kituku is a Congolese. Neither the 1<sup>st</sup> respondent nor his father nor their witnesses deny this fact. Mr. Kituku explained that his son was in paid employment in DRC, he was a public servant serving the people of DRC.

This court takes judicial notice that there are many Ugandans working in the diaspora and some are employed by local governments in foreign countries. This does not render them stateless.

I therefore find that this piece of evidence does not negate the fact that John Kituku has been in Uganda since he was born in 1942.

Counsel for the petitioner also took issue with the variance between the date of birth in Kituku's old passport that expired on 17.10.99 where the date of birth is 21.7.40 and the current passport where the date of birth is 1.1.42.

Whether he was born in 1940 or 1942, the fact remains that he was born in Uganda in the early 1940s.

Kituku was supported by elders of the Babito clan. These include Constance Karusoke who testified as RW2, Sabiti Eric who testified as RW4, Buhanga Assa who testified as RW5 among others.

Some claimed he was born in Mitebo. I find their testimony guesswork and intended to portray the 1st respondent as having his origins in DRC whereas not. John Kituku admits his father had a home in Mitebo Congo as well as in Haibale in Uganda which does not mean his father was not a Ugandan.

With respect to the 1<sup>st</sup> respondent, his evidence that he is the son of John Kituku as attested to not only by his witnesses referred to above but also by a birth certificate issued by the sub county chief of Rwebisongo on 26.2.2006 is unchallenged. This same certificate was tendered in evidence by the petitioner but as proof that it was obtained for the purpose for sitting 'O' level exams only. The petitioner's witness Karamaji John confirmed he issued the certificate to John Kituku for that purpose.

What is crucial is both the respondents and the petitioner agree that it is a genuine birth certificate proving that the 1<sup>st</sup> respondent was born on 12.12.85 to John Kituku and Kasemire Esparance Ibanda.

I find as a fact that John Kituku was born in Haibale, Rwebusengo in Uganda in 1942 and his son the 1<sup>st</sup> respondent was born in Rwebisengo, Ntoroko sub county on 12.12.85.

### **The law on citizenship**

Counsel for the respondents reproduced relevant law regulating citizenship and I am grateful for their research.

The regulatory framework for citizenship includes **the Constitution, Uganda Citizenship and Immigration Control Act and the Registration of Persons Act 4 of 2015.**

Under article 10(a) of the **Constitution,**

*Article 9: Every person who on the commencement of this Constitution is a citizen of Uganda shall continue to be such a citizen.*

*Article 10 (a): Every person born in Uganda one of whose parents or grandparents is or was a member of any of the indigenous communities existing and residing within the borders of Uganda as at the first day of February 1926 and set out in the Third Schedule to this Constitution, and*

*Article 10(b) every person born in or outside Uganda one of whose parents or grandparents was at the time of birth of that person a citizen of Uganda by birth.*

John Kituku was born on 1.1.1942 at Haibale, Bweramule, Rwebisongo sub county in Ntoroko district to Daudi Kituku and Kabitano Esteri. This implies that he was a citizen of Uganda as far back as 1942, a status conferred by article 7 (a) of the

Uganda Constitution of 1962, having been born in Uganda prior to independence to Ugandan citizens. John Kituku demonstrated that he has lived in Uganda continuously since he was born, acquired property and had children.

By operation of the 1995 Constitution, John Kituku is a citizen of Uganda and therefore the 1<sup>st</sup> respondent his son, is automatically a citizen of Uganda by birth and descent.

**Section 30 of the Uganda Citizenship and Immigration Control Act** provides that national identity cards shall be issued only to Uganda citizens. By section 54 (1) (a) of the **Registration of Persons Act**, it is compulsory for all citizens to register under the Act. Under section 60 (2) of the same Act,

*Where any enactment requires a person to prove citizenship, the production of the unique national identification number shall be prima facie evidence of citizenship*

The 1<sup>st</sup> respondent produced an original national identity card and a letter from the issuing office confirming his registration. After reviewing all the evidence produced by both sides, I find that the identity card is conclusive evidence that the 1<sup>st</sup> respondent is a Uganda citizen.

With respect to the passport, section 39 of the Citizenship and Immigration Control Act provides that every citizen shall be entitled to a passport. The 1<sup>st</sup> respondent is in possession of Uganda passport which is further evidence that he is a citizen of Uganda.

From the foregoing, the petitioner who had a duty to prove his case on a balance of probabilities has failed to discharge that burden.

In the circumstances I dismiss this petition and make the following orders:

a) the 1<sup>st</sup> respondent is a citizen of Uganda and was therefore lawfully nominated for the position of MP for Ntoroko constituency and lawfully declared as winner in the election.

b) a permanent injunction shall issue restraining the petitioner and his agents from claiming that the 1<sup>st</sup> respondent is a Congolese national or a citizen of the Democratic Republic of Congo.

c) the petitioner shall pay the 1<sup>st</sup> and 2<sup>nd</sup> respondent costs of the petition.

**DATED AT FORT PORTAL THIS 15<sup>TH</sup> DAY OF AUGUST 2016.**

**HON. LADY JUSTICE HENRIETTA WOLAYO**