THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

ELECTIOC VN PETITION NO.004 OF 2021

IN THE MATTER OF THE PARLIAMENTARY ELECTION ACT, 2005 AS (AMENDED)

AND

IN THE MATTER OF THE PARLIAMENTARY ELECTIONS (ELECTIONS PETITIONS) RULES

AND

IN THE MATTER OF THE PARLIAMENTARY ELECTIONS HELD ON THE 14TH JANUARY, 2021 FOR BUGANGAIZI SOUTH CONSTITUENCY, KAKUMIRO DISTRICT

LUBEGA GEORGE WILLY::::::::::::::::::::::::::::::::::::PETITIONER

VERSUS

1. **TUMWESIGYE JOSEPHAT**
2. **ELECTORAL COMMISSION ::::::::::::::::::::::::::::::RESPONDENTS**

JUDGMENT

BEFORE: HON. MR. JUSTICE ALEX MACKAY AJIJI

5. This is an election petition which was filed by Prof. Lubega George Willy challenging the election of Mr. Tumwesigye Josephat as member of parliament for Bugangaizi South Constituency in the election that was held on 14th day of January, 2021 where the 1st respondent was declared the winner of the election with 12,801 votes while the petitioner returned second with 12,331 votes.

10. Aggrieved and dissatisfied with the outcome of the election, the petitioner filed the instant petition on grounds that it was not conducted in accordance with the principles laid down in the provisions of the Constitution of the Republic of Uganda, the Parliamentary Elections Act and the Electoral Commission Act and that the none compliance affected the results in a substantial manner.

Representation

15. The petitioner was represented by counsel Okello Oryem and Rogers Odyang of M/s Okello Oryem & Co. Advocates and Elau Ochom Advocates and legal consultants. The 1st respondent was represented by counsel Alexander Kibandama and Amos Masiko of M/s Ortus Advocates while the 2nd respondent was represented by counsel Baigana John Paul and Honest Baguma.

20. The 1st respondent in his submissions raised two preliminary objections, the first one is to the effect that the Petition offends the rules governing pleadings as the allegation raised in the Petition are not particularized. The second one is to the effect that the Affidavits in Support of the Petition are incurably defective.

25. On the first preliminary objection, I shall deal with it at the resolution of issues. However, I shall deal with the second preliminary objection now. The meaning of a preliminary objection as alluded to by both the petitioner and the respondents is an objection which consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit.

5. My understanding is that preliminary objections should be based on law and should be raised at the very earliest, in most cases at the beginning of the hearing. In the instant case, the respondents waited until the end of the hearing only to raise the preliminary objections in their written submissions.

10. This to say the least, is an absurdity which does not afford the petitioner a right of reply. Had they raised the objections at the beginning of this trial I would have upheld them and struck out the affidavits mentioned. This not being the case, I therefore disallow the objections. I shall now proceed to analyze and evaluate the issues framed in this petition as stated.

Scheduling

15. On 2nd September, 2021, the parties held a joint scheduling memorandum and agreed on the following issues for determination: -

1. ***Whether the 1st Respondent was at the time of his election qualified to be elected a member of parliament.***

2. ***Whether there was non-compliance with the electoral laws and the principles laid down in the electoral law during the conduct of elections for Bugangaizi South Constituency in the 2021 General elections.***

3. ***If so, whether the non-compliance affected the result of the election in a substantial manner.***

4. ***Whether the Respondents personally or through their agents with their knowledge or consent and approval, committed the alleged electoral offences and illegal acts.***
5. ***Whether the Petitioner is entitled to the remedies sought.***

20. **Section 61 (3) of the Parliamentary Elections Act** as amended explicitly sets the standard of proof in election petitions as proof on a balance of probabilities. It is now settled law that the burden of proof lies with the Petitioner. This was aptly stated in the case of **Kiiza Besigye vs. Yoweri Museveni Kaguta & Anor Election Petition No.1 of 2001**where it was held as follows: - *"In my view the burden of proof in election petitions, as in other civil cases, is settled. It lies on the petitioner to prove his case to the satisfaction of court."*

25. Against this background I shall now proceed to determine the issues in their order on record.

Issue No. 1: *Whether the 1st Respondent was at the time of his election qualified to be elected a member of parliament.*

5. Counsel for the petitioner submitted that the 1st respondent lacked the requisite academic qualifications at the time of his nomination and election. That he presented academic qualifications of a one Tumwesigye Joseph when he himself was Tumwesigye Josephat having declared that he is not Tumwesigye Joseph.

10. That the 1st respondent lacked minimum academic qualifications since the document was not his and he presented a wrong document, a statutory declaration purporting to verify his name instead of a deed poll. Further that the documents presented by the 1st respondent do not belong to him, they belong to a one Tumwesigye Joseph. Counsel also submitted that the said statutory declaration itself had two different names "Josepha" and "Josephat" therefore marred with errors that could not rectify a purported error.

15. **Article 80 (1) of the Constitution of the Republic of Uganda and Section 4 (1) of the Parliamentary Election Act, Cap. 17 of 2005** set out the requirements which one ought to fulfil in order to qualify to be a member of parliament as follows: -

(1)"A person is qualified to be a member of parliament if that person –

a) Is a citizen of Uganda;

b) Is a registered voter; and

c) Has completed a minimum formal education of Advanced Level Standard or its equivalent which shall be established in a manner and at a time prescribed by parliament by law.

20. The 1st respondent fulfils the requirements (a) and (b) above, the point of contention however, rests on requirement (c).

25. The petitioner has argued that 1st respondent lacked minimum academic qualifications since the document he submitted for nomination was not his and that he presented a statutory declaration purporting to verify his name instead of a deed poll.

5. The 1st respondent's academic qualifications were set out in annextures TJ-6, TJ-7, TJ-8, and TJ-9 of his affidavit in reply to the petition. The qualifications include; *a Uganda Certificate of Education, Hoima Town Hall C/o Duhaga Senior Secondary School, a mature Entry Certificate from Bugema University, 2003, a Bachelors Degree of Arts from Bugema University, 2007*, and *a Masters of Arts in Education from Bugema University, 2009*.

10. With the exception of (UCE) which bears the name "Tumwesigye Joseph", all the other above academic documents bear the name "Tumwesigye Josephat".

15. From the outset, it is gainful to note that both a Deed Poll and a Statutory Declaration are legally recognized and valid documents used to perform official acts in relation to names. The effective difference between a Deed Poll and a Statutory Declaration is when and how the two documents are used.

A Deed Poll is applicable when relinquishing your old name and adopting your chosen new name, along with several other details such your address and the date

20. of your official name change while a Statutory Declaration is applicable in cases of correction of misspelling or misprinting of names. See the case of **Ninsiima Grace *versus* Azairwe Nshaija Kabaraitsya and the Electoral Commission Election Petition Appeal No.5 of 2016.**

25. In the instant case, I have carefully read through and analyzed the impugned UCE certificate and come to the considered view that the discrepancies in the 1st respondent's names in his UCE certificate with that in his other academic documents i.e "Tumwesigye Joseph" and "Tumwesigye Josephat" respectively, was as result of misspelling and mistyping committed in his UCE certificate. Therefore, I find that the 1st respondent has never changed his name from Tumwesigye Josephat to Tumwesigye Joseph to warrant the use of a Deed Poll.

5. Be that as it may, the petitioner himself did not lodge a complaint to the Electoral Commission on the issue of the 1st respondent's academic documents. However, it was three of his "supporters" namely; Tugume James, Twinomujuni Patrick and Ngabirano Alex who complained to the Electoral Commission and the matter was resolved in favour of the 1st respondent. No appeal was filed by either the petitioner or his three supporters mentioned above against that decision.

10. The right procedure is that, if the petitioner and the three supporters were dissatisfied with the outcome of the decision of the Electoral Commission, the remedy was for them to appeal to the High Court. This is the import of section 45 of the Electoral Commission Act Cap 140 read together with Article 64 of the Constitution of the Republic of Uganda. As it is therefore, the decision of the Electoral Commission remains binding and cannot be challenged at this stage. Put differently, the petitioner is estopped from raising the same complaint before Court

15. Furthermore, under section 106 of the Evidence Act Cap 6, the burden of proof was on the petitioner to prove that the said UCE Certificate belonged to someone else

other than "Tumwesigye Josephat", the 1st respondent in this Petition, neither the petitioner nor the three persons who complied about this UCE Certificate produce any other person whom they purport to be the owner of the said UCE Certificate.

20. Since the petitioner failed to discharge that burden of proof, I can safely conclude that the said documents belong to the one and only Tumwesigye Josephat, the 1st respondent in this Petition. See the case of **Mulindwa Isaac Sozi versus Lugudde Katwe Elizabeth Election Petiton Appeal No.14 of 2016.** Where the Court of Appeal held that "*...the burden of proving that the academic qualifications which the appellant produced for nomination belonged to someone else who lived in the village as alleged by the Petitioner (respondent on Appeal) was on her. The petitioner did not produce the alleged owner of those qualifications. From the evidence on record -including her own words- the petitioner did not know that alleged other person. This was a serious flaw on her part.*"

Similarly, the petitioner in this Petition did not know or produce that alleged other person.

Issue two: *Whether there was non-compliance with the electoral laws and the principles laid down in the electoral law during the conduct of elections for Bugangaizi South Constituency in the 2021 General elections.*

25. The gist of the petitioner's case on this issue is that there was making of wrongful returns contrary to section 78 (a), (e) and (g) of the Parliamentary Elections Act through wrongful invalidation of votes, making false records of results at the polling stations.

5. That there were several irregularities in conducting the elections which was not in accordance with the laid down procedures. For example, his agents were made to sign empty declaration forms before vote counting, there was delay in remitting the counted results, the known supporters of the petitioners were given pre ticked ballot

papers, there was canvasing for votes near polling stations, making wrong marks on ballot papers and that there was improper destruction of ballot papers.

10. Further, that there was breach of fairness by the 1st respondent where the 1st respondent's daughter monitored the elections amidst protests in the areas of Birembo Sub county and Igaza Town Council.

15. The 1st respondent contended that the elections of member of parliament for Bugangaizi South Constituency were conducted in accordance with the principles laid down in the provisions of the Parliamentary Elections Act and other relevant Electoral Laws.

This issue is broad and multifaceted. As such, I shall resolve it under distinct sub headings as below: -

(i) Allegations of non-compliance with the electoral laws

20. The allegations of non-compliance with the electoral laws and the principles laid down in the electoral law during the conduct of elections for Bugangaizi South

Constituency in the 2021 General elections were covered by the Petitioner in his affidavit in support of the Petition which I have carefully perused through. I hold the view that the allegations of non-compliance made by the petitioner are general without giving particulars of the same. This offends the rules governing pleadings under Order 6 Rule 1 of the Civil Procedure Rules. In the case of **Rtd. Col. Dr. Kizza Besigye versus Yoweri Kaguta Museveni Election Petition & Anor No. 1 of 2006** Odoki CJ as he then was stated that: - "*There were many other allegations of non-compliance contained in various affidavits but which were not particularized in the petition. It can be safely assumed that these allegations did not form part of the complaints raised in the petition.*"

25. Also in the case of **Ocen Peter and The Electoral Commission v. Ebil Fred, Election Petition Appeal No.083 of 2016** court stated that where the Petitioner doesn't plead the necessary and material particulars in the petition contrary to Order 6 Rule 1 and 3 of the Civil Procedure Rules the petition is incompetent.

5. Counsel for the petitioner in their submissions in rejoinder to the respondents on this very issue, submitted that in election petitions, pleadings do not stop at a petition but include the affidavit in support of the petition in which to them contain particulars of all the allegations in accordance with Order 6 Rule 1 of the CPR.

10. However, during cross examination of the Petitioner by counsel Masiko, specifically on paragraph 6 and 7 of his affidavit in support of the petition, on whether the allegations of non-compliance with electoral laws had been particularized, the petitioner admitted that they were not. Therefore, counsel for the petitioner cannot come round in rejoinder to distort what is already on record.

15. Based on the above, I find that the Petition did not comply with Order 6 Rule 1 and 3 of the Civil Procedure Rules in as far as the petitioner did not particularize the allegation of non-compliance in his petition and affidavit in support of his petition.

(ii) Allegations of tricking the Petitioner's polling agents to sign empty Declaration of Results Forms (DR forms)

20. The Petitioner stated in paragraph 14 of his affidavit in support of the Petition that his polling agents were tricked into signing empty DR forms with the intention to falsify results later on.

25. The petitioner contends that RE3 admitted signing a document which was an empty DR form during cross examination then again turned round to deny it. It ought to be noted that counsel for the Petitioner had tricked the witness to identify a so called blank DR form which later turned out to have been photocopied one side only without contents on the other side (blank without content) and when the witness

realized this, he denied signing a form without content. This particular document was rejected by Court and so the counsel for the petitioner cannot therefore rely on it to prove his case.

5. In totality, I find that there is no evidence to prove the existence of empty DR forms that had been signed by the polling agents of the petitioner.

10. Furthermore, I agree with the submission of the 1st and 2nd respondents that all the polling agents of the petitioner signed the DR forms in their respective polling stations without any negative comment and neither did they lodge any complaint with the 2nd respondent regarding the alleged non-compliance.

15. In the case of **Hon. Oboth Markson Jacob versus Dr. Otiam Otaala Emmanuel Election Petition Appeal No. 38 of 2011**. Court considered the effect of signing Declaration of Results Forms by Polling Agents on behalf of candidates without raising any complaints to the Presiding Officer and the Court held that such Declaration of Results Forms are valid and binding on the candidates and the candidate is estopped from challenging its contents.

20. This position was reaffirmed in **Mbaghadi Fredrick & Anor versus Dr. Nabwiso Frank Wilberforce Election Petition Appeal No. 14 & 16 of 2011** and **George Patrick Kassaja versus Fredrick Ngobi Gume and the Electoral Commission Court of Appeal Election Petition Appeal No. 68 of 2016**

25. The Petitioner himself admitted during cross examination that he did not report any of the alleged incidences of non-compliance to the Electoral Commission or Police. Much as the Petitioner highlights in various affidavits where the deponents allege incidents of non-compliance, they did not bother to report those incidents to any lawful authority or even the Electoral Commission. It is not enough to swear an affidavit saying that there were irregularities.

5. The question is, what did the deponent of this affidavit or the candidate or his agent do? There is no report anywhere nor any reference to any police station alluding to the petitioner or his agent having complained about the irregularities. The law clearly provides channels through which an aggrieved candidate, or his agent can lodge a complaint against any irregularities with any aspect of the electoral process under section 46 and 48 of the Parliamentary Elections Act and section 15 of the Electoral Commissions Act. My observation is that neither the petitioner nor his agents utilized this channels.

(iii) Allegation of voter bribery and intimidation

10. The Petitioner in his submissions pleaded bribery of voters in form of money and other gifts. He listed a few affidavits which to him particularize bribery either by the 1st respondent or his agents. For example, affidavits No. 27, 38, 39, 21, 58, 26 to corroborate incidences of voter bribery at different places and affidavit No. 56 and 59 to prove Buramagi SDA Church.

15. Bribery is a very serious electoral offence and prohibited under Section 68(1) of The Parliamentary Elections Act with the effect of leading to the setting aside of the entire election, if proved to the satisfaction of Court.

20. In the case of **Hellen Adoa and Electoral Commission versus Alaso Alice Election Petition Appeal No. 57 of 2016**. The Court of Appeal was of the view that given the gravity of the offence of bribery in Elections, it is necessary that a person said to have committed the offence and those said to have been bribed be clearly identified and such evidence corroborated.

25. Even then such allegations have to be evaluated with a lot of caution because witnesses can go out of their way to tell lies in support of their candidate. When the petitioner was asked as to whether he had mentioned and identified the names of the people that had participated in the above acts, he answered in the negative. This

being a grave electoral offence, it is not enough for the petitioner to merely allege that voters were given money as a bribe. The receiver of such money must be clearly named and identified, he or she must also be a voter and the money must be to influence him or her to vote.

5. In the Case of **Kabuusu Moses Wagaba versus Lwanga Timothy & Electotal Commision Election Petition No. 0015 Of 2011** Court held that a voter's register must be attached to show that the person bribed was a voter.

10. I therefore expected the petitioner to extract and annex a page of the register on which each of the deponents appear. Nonetheless, the Petitioner under paragraph 24 of his affidavit in support of the petition, alleges that his polling agents were stationed at Buramagi SDA Church in Igayaza Town Council Polling Station and that they identified a one Kabahalira William, an agent of the 1st respondent giving money to voters who had lined up to vote at the polling station and a photograph to that effect was attached.

15. However, Court will at the earliest opportunity find that none of the petitioner's agents mentioned who took the photograph. The petitioner himself upon being crossed examined by the counsel for the 1st respondent did not mention who took the photograph, using which gadget, the date the picture was taken, and the place it was taken.

20. The petitioner's witness PW7 who swore affidavit number 21 in support of the petitioner's case stated under paragraph 9 and 10 that a one Kabahalira Willam went on the line where the people were standing and started giving out money, that he phoned Amos Birungi the chairperson of their campaign team and informed him about what was going on and that he advised him to report to the presiding officer and take photographs of any interesting events.

25. However, upon cross examination he said he used Amos Birungi's phone to take photographs. On being asked as to whether he reported the matter to the presiding officer he said he did not and neither did he tell Amos Birungi.

5. PW7 and PW8 upon being cross examined contradicted themselves in that PW7 said he took the photograph and handed it to the lawyer whereas PW8 say he was given the photograph to take to the lawyer by PW7. This goes to the truthfulness of both witnesses and as such none of them can be believed by this Court

10. The 1st respondent in his submissions on this point stated that it was the evidence of PW12 (the Police Officer, Batumbaya Simon) that he was the officer in charge electoral and political offences in Kakumiro District and he told Court during cross examination that other than the complaint about the 1st respondent's academic documents he did not receive any other complaints about the election of the Bugangaizi South Constituency, Member of Parliament. The 1st respondent therefore stated that the petitioner has not adduced any cogent evidence to prove that there was non-compliance during the election.

15. The 2nd respondent in his submissions under paragraph 17 denied any electoral offences being committed by the 1st respondent. The 2nd respondent's returning officer brought out this in paragraphs 18, 19, 20, 22 and 23 of his affidavit. The 2nd respondent further stated none of the said mal practices were brought to the attention of the 2nd respondents' returning officer and therefore, he prayed for Court to find that there were no electoral offences and illegal practice committed by the 2nd respondent personally or through his agents.

20. Equally so, I find that there is no evidence that any of this electoral offences and illegal acts were reported or proved.

25. Concerning the alleged intimidation there was no evidence adduced in proof of this allegation as none of the persons allegedly intimidated and harassed reported to the police or to any authority.

(iv) Allegations of monitoring of elections by the 1st respondent's daughter

5. The Petitioner further argued that there was breach of fairness by the 2nd respondent contrary to section 12(1) (e) of the Electoral Commission Act as the 1st respondent's daughter monitored the elections.

10. During cross examination of the 1st respondent by counsel Odyang on the identity and relationship of Tugume Tumwesigye, he admitted that she was his daughter and that she was indeed an election supervisor at Birembo Sub county and Igayaza Town Council however, when asked as whether she had resigned or not. He responded; "she has stepped aside for a moment for particularly that election."

Also during cross examination of the petitioner by counsel Baguma on the identity and relationship of Lubega Judith Naiga to the petitioner. He confirmed to Court that she was his daughter and that she was the one who signed the declaration forms and approved what had transpired at Bugonda Primary school polling station.

15. From my observation, I find that both parties deployed their daughters to serve in key places at various polling stations during and after the election.

20. In a partisan election such as this one, it is extremely against the spirit of fairness for candidates to deploy their children or close relatives to play key election roles at polling stations on their behalf since such individuals have a conflict of interest. That a side, the 1st respondent's daughter having stepped aside before the election ceased to exert any influence worth of consideration on the election officials or voters.

(v) Allegations of defamation

25. Allegations of defamation were stated under paragraph 29 and 38 of the Petitioner's affidavit in support of the Petition in which he alleges that the respondent through his agents with his knowledge and consent during elections made and published on *Emambya Fm* statements to the effect that he is a murderer, he beat people and grabbed their land.

5. However, the petitioner did not particularize the kind of words that were said and the language that was used. A petitioner must set out the complete statements alleged to be defamatory since the words derive meaning from context or background, if such context or background is not provided or a full statement not provided then their defamatory effect may be difficult to discover. Such particulars allow the respondents to know what case they have to defend. **See Rtd. Col. Dr. Kiiza Besigye Electoral Commission and YK Museveni Presidential Election Petition No.1 0f 2006**

10. Furthermore, none of the affidavits in support of the petition gave the particulars of the words used to defame him.

15. Section 73 (1) and (2) of the Parliamentary Elections Act provides that a petitioner must set out the statements alleged to be false, malicious or defamatory. In the case of **Christopher Achire versus Regan Okumu and Electoral Commission Court of Appeal Election Appeal No. 9 of 2015.** In which the appellant did not set out the alleged defamatory statements verbatim as required. Court held that: - *"it was not enough to attach full speeches even if they were accompanied by their translation. He should have set out the alleged defamatory statements accompanied by translations from langi to English by an authorized translator. The failure in this regard rendered the claims unsustainable."*

20. Similarly, in the instant case, the language used was Lunyoro and the translation for that recording to English was not produced in Court. This therefore renders this claim unsustainable.

(vi) Allegations of canvassing for votes on election day

25. The petitioner pleaded that 1st respondent canvassed votes on the election day Contrary to section 81 of the Parliamentary Elections Act and cited affidavit No. 56 in which it was stated that a one Rwakakara Apollo distributed money to voters on 14th January, 2021.

5. In reply to the above allegation, the 1st respondent submitted that the affidavit does not give any nexus between a one Rwakakara Apollo and the 1st Respondent or mention the vicinity where the alleged canvassing of votes took place.

I agree with the 1st Respondent's submissions, I therefore find that there is no evidence to prove this allegation to the satisfaction of Court.

(vii) Allegations of undue influence

10. The Petitioner cited allegations of undue influence by the 1st respondent and his supporters in a few polling stations for instance in Kyebando T/C, Rwamalenge Church P/S affidavits No. 54, 57, 22, 1, 40, 41, on 9/01/2021 and 10/01/2021 at Kabati village affidavit No.55, on 14/01/202 Bwanswa Community Hall affidavit No.89 and 43, on 14/01/2021 at Buramagi SDA at Igayaza Town Council Affidavit No.26, on 10/01/2021 in Kisengwe Affidavit No.34, on 5/01/2021 in Kyemengo Village Affidavit No.28 and a few others.

15. In this few polling stations there were said to be mal practices. However, none of these mal practices were reported. No acts of intimidation, undue influence, threats, injury or violence were reported or got known to the authorities especially the

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police who were responsible for ensuring that there was law and order during the election period.

20. No wonder, PW12, the police officer Batumbya Simon who was in charge of electoral and political offences at Kakumiro District in cross examination stated that he did not receive any complaints of electoral and political nature apart from the complaint regarding the 1st respondent's academic documents. This is where the answer lies in respect of this issue.

Issue No. 3: *If so, whether the non-compliance affected the result of the election in a substantial manner.*

Issue No. 4: *Whether the Respondents personally or through their agents with their knowledge or consent and approval, committed the alleged electoral offences and illegal acts.*

25. Issue number 3 and 4 are intertwined to the resolution of issue number 2. Having resolved issue number 2 exhaustively in the negative, I therefore find that issue number 3 has been rendered redundant.

5. In the same vein, the petitioner under issue number 4 raises allegations of bribery, undue influence, and canvassing for votes on election day. These same issues have been handled in the resolution of issue number 2 to the effect that none of those allegations were proved to the satisfaction of Court.

Issue No. 5: *Whether the Petitioner is entitled to the remedies sought.*

10. The petitioner has failed to prove to the satisfaction of court that the 1st respondent committed electoral offences or illegal acts in person or that the electoral offences and illegal acts were committed by his agents with his knowledge, consent or approval. Neither has he proved that the offences were committed by the respondents jointly to the benefit of the 1st respondent.

15. In the final analysis therefore, the petition is incompetent and is hereby dismissed under section 63(4)(a) of Parliamentary Election Act, 2005 as (Amended) with costs to the 1st and 2nd respondents accordingly.

20. I therefore uphold the 1st respondent as the duly elected member of parliament for Bugangaizi South Constituency in the 2021 General elections.

Dated this 28th day of September, 2021 at Masindi High Court.

ALEX MACKAY AJIJI

JUDGE