

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT SOROTI
ELECTION PETITION NO. 001 OF 2021**

5 **HON LOKERIS SOLOMON ::::::::::::::::::::::::::::::::::: PETITIONER**

VERSUS

1. **KOMOL EMMANUEL**
10 2. **THE ELECTORAL COMMISSION ::::::::::::::::::::::::::::::::::: RESPONDENTS**

BEFORE: Hon. Justice Isah Serunkuma

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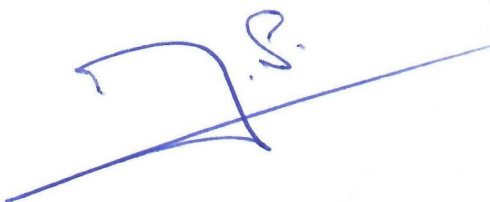
JUDGEMENT

This petition was first heard by the Hon. Lady Justice Anna Mugenyi Bitature who dismissed it with costs in her ruling of 31st August 2021 on a preliminary point of law to the effect that there was no valid petition before court as the petitioner's affidavit accompanying the petition was commissioned by a Commissioner for Oaths whose Practicing Certificate had, at the material time, expired. The petitioner was dissatisfied with the Ruling and appealed to the Court of Appeal in Election Petition Appeal No. 009 of 2021 before their Lordships, Egonda-Ntende, Muzamiru M. Kibeedi, and Monica K. Mugenyi, JJA. The learned Justices of Appeal in their decision delivered on 1st July 2022 faulted the trial court for refusing to invoke Section 14A of the Advocates Act to remedy the alleged defects in the commissioning of the Principal Affidavit. They accordingly allowed the appeal, set aside the orders of the trial court and ordered that the case be remitted back to the High Court for trial before another Judge on its merits.

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The facts of the petition are stated in the decision of the trial Judge and of the Court of Appeal as follows. On 14th January 2021, the second respondent organized elections for directly elected Members of Parliament for Dodoth East County Constituency, Kaabong District where the petitioner, the 1st respondent and two others were candidates in the race. The second respondent returned the first respondent as the

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validly elected Member of Parliament with 7,903 votes, while the petitioner gathered 7,892 votes rendering a winning margin of 11 votes.

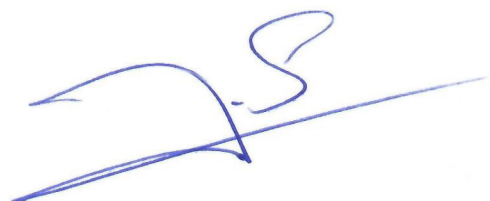
5 The second respondent published the results in the Uganda gazette of 17th February 2021. The petitioner was dissatisfied with the election results and filed this petition on 15th March 2021 in the High Court of Uganda at Soroti against the first and second respondents because there was non-compliance with electoral laws, which affected the result of the election in a substantial manner. In particular, the petitioner alleged that the refusal by the Returning Officer to make a mandatory recount upon being requested
10 to do so in writing; the acts of chasing away persons meant to assist illiterate, blind and disabled voters; the 2nd Respondent's acts of invalidating ballot papers where the voters' choice could be reasonably ascertained, and the acts of closing certain polling stations before or way after four O' clock, all affected the result of the election in a substantial manner. The Petitioner also alleged that the first respondent personally or through his
15 agents with his knowledge and consent or approval, committed illegal practices and electoral offences of bribery and procurement of prohibited persons to vote. In the premises, the petitioner prayed that the election of the first respondent be set aside and a new election ordered.

20 In response, the first respondent averred that the election was conducted in substantial compliance with electoral laws. He denied committing any electoral offence by himself or through any of his agents. The second respondent reiterated that the election was conducted in compliance with electoral laws and contended that any irregularities complained of by the petitioner were not brought to its attention.

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Representation

At the rehearing of the petition on 14th November 2022, the petitioner was represented by Counsel Caleb Alaka and Counsel Fred Kato of M/S Alaka & Co. Advocates. The
1st respondent was represented by counsel Evans Ochieng of M/S Ochieng Associated
30 Advocates, Counsel Ambrose Tebyasa of M/S Tebyasa & Co. Advocates and Counsel



Rodger Mugabi of M/S Gem Advocates, while the 2nd respondent was represented by Counsel Joseph Kyazze, Counsel Antonia Natukunda and Counsel Nasser Serunjogi of M/S Magna Advocates.

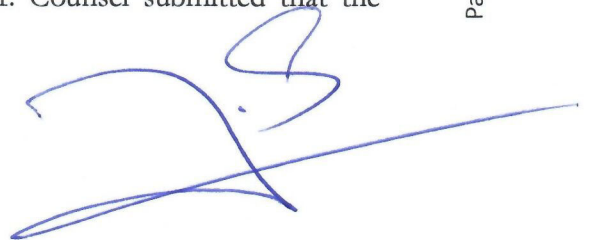
5 At the scheduling of the petition, the parties framed the following issues for determination.

- 1) *Whether the petition is validly and competently before the court.*
- 2) *Whether during the elections for the directly elected Member of Parliament for Dodoth East County Constituency, there was non-compliance with the provisions and principles of the Parliamentary Elections Act.*
- 3) *If so, whether the non-compliance affected the result of the elections in a substantial manner.*
- 4) *Whether the first respondent or his agents with his knowledge, consent and approval, committed any illegal practice or offence under the Parliamentary Elections Act in connection with the Elections.*
- 5) *What remedies are available to the parties.*

20 The Court of Appeal in Election Petition Appeal No. 009 of 2021 resolved issue one therefore this court would only address the remaining issues. The parties filed written submissions, which have been duly considered, by the court.

Petitioner's submissions

25 On issue two and three, learned counsel for the petitioner submitted that there was non-compliance with section 54, 37, 29(2) and 49(2) of the Parliamentary Elections Act, which substantially affected the result of the election. Counsel argued that the second respondent rejected the petitioner's request in writing for a mandatory recount contrary to section 54 of the Parliamentary Elections Act, when there was a vote margin of 11
30 votes between the first respondent and the petitioner. Counsel submitted that the



circumstances of this petition fell under the application of section 54 of the Parliamentary Elections Act where a vote recount is mandatory. He relied on the case of *Rebecca Balwanga Balwana Vs The Electoral Commission & Others; Election Petition No. 047 of 2011*, and *Hon. Achiro Lucy Otim & Electoral Commission vs Kidega Nabinson James; Court of Appeal Election Appeal No. 019 of 2016*.

Secondly, counsel submitted that **annexures D, E, F and G of the 1st respondent's affidavit in support of the Answer to the petition**, which were produced to show that the petitioner did not request for a vote recount on 15th January 2023, derive from hearsay information contained in paragraphs 17-22 of the 1st respondent's affidavit. He added that the said documents contravene section 7(6) of the Parliamentary Elections Act and are unauthentic since no background was laid for their admissibility. Counsel invited court to expunge those documents from the record in line with previous decisions of this Court in *Iwa Richard Okeny Vs Obol George Okot; Misc. Application No, 063 of 2012* and in the case of *Kaggwa Michael Vs Olal Mark & 6 others; High Court Civil Appeal No. 0010 of 2017*.

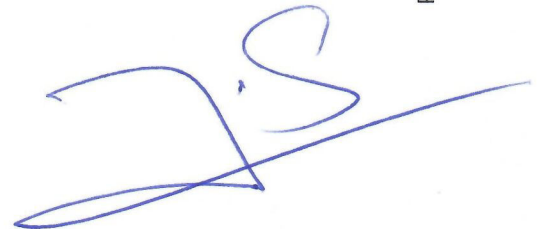
Lastly, on this ground, learned counsel invited this court to disregard the evidence of Mr. Ogwang Julius Ongom, the Returning Officer of Kaabong, contained in his affidavit sworn on 24th March 2021, because he is a dishonest man who deliberately altered the date on the petitioner's letter requesting for a vote recount.

On the second ground of non-compliance with electoral laws, the petitioner's counsel submitted that the second respondent contravened section 37 of the Parliamentary Elections Act when its presiding officers chased away persons meant to assist illiterate, blind and disabled voters who accompanied them with the intention of helping them fix their authorized mark of choice on the ballot paper.

On the third ground, counsel argued that the second respondent violated section 49(2) of the Parliamentary Elections Act when its presiding officers invalidated ballot papers where the voter's choice could be reasonably ascertained. He argued that this explains why there was a large number of invalid votes, totaling to 1,012 invalid votes. Lastly,
5 counsel submitted that the second respondent breached section 29(2) of the Parliamentary Elections Act when its presiding officers closed certain polling stations before four O'clock while in others polling stations, voting was allowed to go on beyond four O'clock.

10 With regard to issue three, learned counsel submitted that the non-compliance with electoral laws affected the result of the election in a substantial manner. He relied on the case of *Amama Mbabazi vs Yoweri Kaguta Museveni; Electoral Commission and A-G; Election Petition No. 001 of 2016* where the Supreme Court held that in assessing the degree of effect of non-compliance on the result of an election, the court
15 must consider the mathematical impact of noncompliance. Counsel submitted that in the instant petition, the non-compliance with sections 54, 37, 49(2) and 29(2) of the Parliamentary Elections Act substantially affected the result of the election.

On issues four and five, learned counsel for the petitioner submitted that the first
20 respondent committed illegal practices and election offences of bribery and procurement of prohibited persons to vote, personally or with his knowledge and consent or approval. Counsel argued that the 1st respondent personally or through his agents with his knowledge and consent or approval bribed voters with money, local brew and other gifts contrary to section 68(1)(7) & (8) of the Parliamentary Elections
25 Act. He further submitted that contrary to section 69 of the Parliamentary Elections Act, the 1st respondent induced or procured persons to vote knowing that they were prohibited from voting. In conclusion, counsel submitted that the petitioner had discharged the burden and standard of proof required by the Parliamentary Elections Act and invited this court to declare that the first respondent was not validly elected.



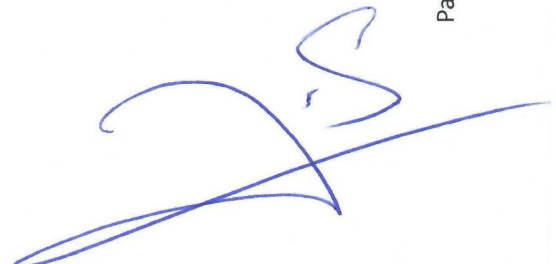
Counsel prayed that the election of the first respondent be set aside and a new election ordered.

First Respondent's submissions in reply

5 Learned counsel for the first respondent submitted that the petitioner requested for a vote recount on 18th January 2021 and not on 15th January 2021 as he alleges. He referred to the evidence in the affidavit of the Returning Officer, Ogwang Julius Ongom, and the police report attached to the affidavit of Chelengat Sylvia, which showed that the petitioner's letter requesting for a vote recount on 15th January was
10 forged. In the premises, counsel invited this court to reject the petitioner's claim that the election was conducted in non-compliance with section 54(1) of the Parliamentary Elections Act.

With regard to the contention that the election was conducted in non-compliance with
15 section 37 of the Parliamentary Elections Act, counsel submitted that the petitioner did not personally witness any acts of electoral officers chasing away persons meant to assist the illiterate, blind and disabled voters. Counsel sought to undermine the evidence of the petitioner's witnesses whom he claimed were the petitioner's ardent supporters. He relied on the case of ***Kasta Hussein Bukenya vs. Bukenya Balibaseka Gilbert &***
20 ***Another; Election Petition No. 029 of 2011***, where this court observed that in an election contest motivated by the desire to score political victory to political power, witnesses may easily be attracted to peddling lies. Counsel added that the petitioner or his agents should have raised complaints touching this matter before signing the DR Forms. He referred to the case of ***George Patrick Kassaja Vs Fred Ngobi Gume;***
25 ***Court of Appeal E.P.A. No. 68 of 2016*** for the proposition that once a candidate's agents sign DR Forms without recording any complaint, they confirm and signify that they are satisfied with what transpired at the polling.

Counsel dismissed the petitioner's allegations of non-compliance with section 49 of the
30 Parliamentary Elections Act as hearsay since the petitioner did not mention the polling



stations where the alleged incidents occurred and the electoral officers who treated valid votes as invalid. He further dismissed the evidence of the petitioner's witnesses as lies intended to secure political victory for the petitioner. Counsel submitted that if any valid vote was declared invalid, the petitioner's agents should have raised such complaint before signing the DR forms. In the premises, counsel argued that the petitioner was precluded from raising the complaints now when his agents signed the DR Forms without recording any complaint. He relied on the case of ***Akileng Abu Meric Vs Olirah Peter Musao & E.C; Election Petition No.027 of 2011*** for this proposition.

With regard to the contention that there was non-compliance with section 29(2) of the Parliamentary Elections Act, counsel submitted that the DR Forms relied on by the petitioner to prove this allegation are uncertified and should be rejected. He referred to the decision of the Supreme Court in ***Kakooza John Baptist vs EC & Anor; Supreme Court Election Petition Appeal No. 011 of 2007*** where it was held that DR Forms are public documents and a party who wishes to rely on them must have them certified in accordance with Section 75 and 76 of the Evidence Act. Without certification, such documents cannot prove any fact, which the party seeks to prove.

On issue three, counsel submitted that the petitioner failed to show that any and all of the alleged non-compliance affected the result of the election in a substantial manner. He relied on the case of ***Rehema Muhindo vs Winfred Kiiza Election Petition No. 029 of 2011*** where this court held that non-compliance with electoral laws *per se* is not enough to nullify an election.

Lastly, counsel submitted that the petitioner failed to prove the alleged offences of bribery contrary to section 68 of the Parliamentary Elections Act and procurement of prohibited persons to vote contrary to section 69 of the Parliamentary Elections Act. He submitted that the evidence adduced by the petitioner was partisan, uncorroborated, and contradictory and riddled with intentional lies intended to mislead court. Counsel contended that such evidence should be rejected in line with the decision of court in

the case of *Kirya Grace Wanzala Vs Nelson Lufafa & Electoral Commission; EPA No. 0104 of 2016*. In conclusion, counsel prayed that this court be pleased to dismiss this petition with costs and with a certificate of two counsel.

5 ***Second Respondent's submissions in reply***

Learned counsel for the second respondent reiterated the first respondent's submissions that the petitioner's request for a vote recount was served on the second respondent on 18th January 2021. He referred to the petitioner's letter requesting for a vote recount marked as Annexure C to the second respondent's affidavit in support of the Answer to the petition and an extract page of the Visitor's Book marked as Annexure D to the second respondent's affidavit.

Counsel further submitted that the petitioner's letter requesting a vote recount on 15th January 2021 at the tallying centre was forged. He relied on the case of *Iwa Richard Okeny Vs Obol George Okot; Misc. Application No. 063 of 2012* for the proposition that documentary evidence, like any other evidence, is subject to fabrication and falsification. In the premises, counsel submitted that the petitioner's allegations relating to non-compliance with section 54(1) of the Parliamentary Elections Act were not proved to the standard required in election petitions.

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In reply to the second ground relating to non-compliance with section 37 of the Parliamentary Elections Act, counsel submitted that the deponents of the affidavits which the petitioner sought to rely on did not properly identify themselves as registered voters in their respective polling stations. He argued that conclusive proof of a registered voter is by evidence of the person's name appearing in the National Voters' Register, and not by possession of a National Identity Card. For this position, counsel relied on section 1 of the Parliamentary Elections Act and the case of *Wakayima Musoke & Electoral Commission v Kasule Robert Sebunya; Election Petition Appeal No. 050 of 2016*. He further submitted that the uncertified copies of the

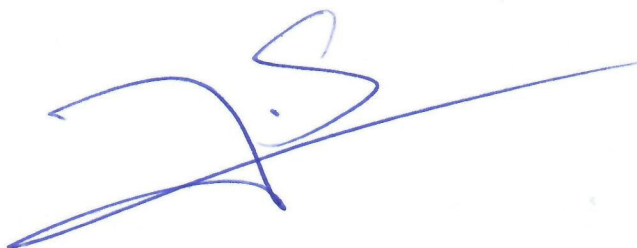


National Voters' Register attached to the affidavits in support of the allegation are inadmissible as far as they contravene section 75 and 76 of the Evidence Act.

On the ground of non-compliance with section 49 of the Parliamentary Elections Act, learned counsel for the 2nd respondent submitted that the deponents of the affidavits to prove this allegation did not properly identify themselves as registered voters who are entitled to vote and to oversee vote counting because they did not attach a certified copy of the National Voters Register. He relied on the case of *Wakayima Musoke & Electoral Commission v Kasule Robert Sebunya, Election Petition Appeal No. 50 of 2016* for this submission.

Further, counsel submitted that the allegations of non-compliance with section 29(2) of the Parliamentary Elections Act with regard to the time of voting were supported by persons who did not properly identify themselves as registered voters by way of a certified copy of the National Voters Register. Counsel submitted that the petitioner did not call any of the persons who were allegedly prevented from voting because the polls were closed before four O' clock. He referred to the case of *Post Bank (U) versus Wandera Masundi; Civil Appeal No.0154 of 2012* for the proposition that failure to call a material witness when no satisfactory explanation is given for the failure to do so draws an adverse inference against the person required producing such a witness.

On issue two, counsel submitted that the allegations of non-compliance with sections 54, 37, 49 and 29 of the Parliamentary Elections Act were not proved to the required standard. In the premises, counsel argued that the petitioner failed to fulfill the requirement for setting aside an election. He relied on the case of *Odo Tayebwa versus Basajjabalaba Nasser; Election Petition Appeal No. 013 of 2011*. In conclusion, counsel submitted that the petitioner had failed to prove the grounds of the petition to the standard of proof required and consequently, this court be pleased to dismiss the petition with costs.



Preliminary Objections

Learned Counsel for the petitioner raised four preliminary objections to the first respondent's affidavits. The first respondent's counsel also raised two preliminary objections to the petitioner's affidavits in support of the petition, and learned counsel for the second respondent raised two preliminary objections to the petition. This court will first determine all the 8 preliminary objections before delving into the merits of the petition.

Petitioner's preliminary objections

On the first preliminary objection, the petitioner's counsel submitted that 16 of the first respondents' affidavits contravene section 7(6) of the Parliamentary Elections Act as far as election officers without prior lawful authorization by the second respondent swore them. The 16 affidavits include the affidavits sworn by: Lokol Augustine (Presiding officer), Namule Lucy (Polling Assistant), Lokolong Ignatius (Presiding officer), Lokut Joseph (Polling Assistant), Lokiru Melkisedek (Presiding officer), Lemukol Luke (Presiding officer), Lokoru Emmanuel Lootan (Presiding officer), Lokiru William (Polling Assistant), Lokapel Joseph (Polling Assistant), Akol Gabriel (Presiding officer), Lodukio Daniel Jackson (Presiding officer), Logyel Sarah (Polling Assistant), Lokelem Peter (Presiding officer), Lomoe Paul (Presiding officer), Nakwang Jane Dida (Polling Assistant) and Nangiro Janet Lochoro (Presiding officer). On the same basis, counsel contested paragraphs 17-22 of the petitioner's affidavit in support of the petition on grounds that the information contained in those paragraphs was given by the Returning Officer of Kaabong without the second respondent's authority. According to counsel, the said election officers could not swear the impugned affidavits or give information relating to the election without authorization by the second respondent. Consequently, counsel submitted that the electoral officers breached their oath of office taken under section 7(4) of the Parliamentary Elections Act. He prayed that the impugned 16 affidavits be expunged from the record and paragraphs 17 to 22 of the 1st Respondents affidavit in support of the Answer to the Petition be severed.

In response to this preliminary objection, the first respondent's counsel submitted that the first respondent and the officers of the second respondent had a duty to rebut the petitioner's allegations that the election was conducted in non-compliance with electoral laws. This is because the petitioner's allegations undermined the integrity of their work and their duty to conduct free and fair elections. Secondly, counsel argued that the petitioner did not produce any evidence to prove that the electoral officers swore the impugned affidavits without the authorization of the second respondent.

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

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

Section 7(6) of the Parliamentary Elections Act, reproduced above, was enacted to preserve the integrity of voting by secret ballot system as the preferred mode of voting at all public elections in Uganda in accordance with Article 68(1) of the Constitution and section 30(1) of the Parliamentary Elections Act. To this effect, this court stated in ***Oloo Paul Vs Dr. Lokii John Baptist & Anor; Election Petition No. 006 of 2021 [2021] UGHCEP 41 at page 10 paragraph 25*** as follows –

I have carefully considered section 7 of the Parliamentary Elections Act that enacts substantive legal requirements. It is clear that the intention of Parliament was the protection of the integrity of the secret ballot. The heading to the section is "Secrecy required of election officers and others". The provisions require that candidates, election officers, clerks, candidate's agents, etc. maintain secrecy of the voting. This is covered under subsections 1-3 and 5. It is a criminal offence to offend the provisions aforementioned.

On the basis of the provisions of section 7(6) of the Parliamentary Elections Act, and the rationale thereof reproduced above, the learned Judge in that case went on to expunge 8 affidavits in issue in that case.

- 5 Similarly, in the case of ***Wanyoto Lydia Mutende Vs Election Commission & Anor; Election Petition No. 002 of 2021 [2021] UGHCEP 13***, this court observed that;

From the title-head, it is quite instructive that election officers intended the provisions to safeguard the secrecy in election matters...

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Therefore, Section 7 (6) PEA is clear enough on the purpose thereof, which is to prevent unauthorized disclosure of information obtained in the course of execution of the duties of election officers to any third party. The election officers are not barred to testifying in court proceedings per se. The law only imposes upon them a duty to obtain the necessary authorization before divulging information to a third party and testifying on the same in court...

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A careful perusal of all the impugned affidavits easily reveals that none of the deponents thereto, attached any authorization from the first Respondent or stated that such authority was sought and obtained from the EC. Clearly, all the impugned affidavits were procured and filed in contravention of Section 7(6) PEA, and such an illegality cannot be condoned by court. The particular affidavits are therefore struck off the record.

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- Lastly, in ***David Abala v Acayo Juliet Lodou and Another; Election Petition 004 of 2021, [2021] UGHCEP 39, at page 16-17***, the court stated that an affidavit sworn
25 contrary to the provisions of section 7(6) of the Parliamentary Elections Act presents an illegality for failure to follow a statutory provision and the court cannot sanction it by allowing the affidavit to stand.

- This court finds no justification to deviate from the current approach of the courts with
30 regard to affidavits, which offend section 7(6) of the Parliamentary Elections Act as

illustrated in the above authorities. In the result, the impugned 16 affidavits deposed by election officers, and divulging information touching the election to the first respondent, are hereby expunged from the record. Further, paragraph 17 of the 1st respondent's affidavit in support of his Answer to the Petition is severed to the extent of the information therein disclosed to the first respondent by the Returning Officer.

Moving on to the second preliminary point of law, learned counsel for the petitioner submitted that 22 of the respondent's affidavits offend section 3 of the Illiteracy Protection Act, Cap 78 and the Oaths Act, Cap 19 in so far as they do not indicate the translator's full address. He further argued that the Commissioner for Oaths did not certify that the documents were read and explained in his presence to the deponents, that the deponents understood the language used, and all Annextures explained to them. For this proposition, counsel relied on *Ngoma Ngime Vs EC and Hon. Winnie Byanyima; Election Petition Appeal No. 011 of 2002*, *Mugema Peter Vs Mudiobole Abedi Nasser; Election Petition Appeal No. 016 of 2016* and *Kasaala Growers Cooperative Society Vs Kakooza Jonathan; SCCA No. 019 of 2010*.

In response, learned counsel for the 1st respondent submitted that the omission to indicate the full address on the impugned affidavits is a matter of form which may be cured under Article 126(2)(e) of the Constitution. He relied on the case of *Nakate Lillian Sequiia & Another v Brenda Nabukenya; Consolidated Election Petition Appeals No. 017 & 021 of 2015*, and *Betty Sentamu v Sylvia Nayebele & Anor; Election Petition No. 011 of 2021*, where it was stated that whereas the author of the impugned document in that case did not provide his or her full name and address as required by section 3 of the Illiterates Protection Act, the certification by the Commissioner for Oaths in the jurat, to the effect that he read to, translated and explained the contents of the affidavit to the deponent, coupled with the deponent's signature thereon dispelled any connotations of manipulation of the illiterate deponent in the execution of the affidavit.

Section 3 of the Illiterates Protection Act provides that –

3. Verification of documents written for illiterates

Any person who shall write any document for or at the request or on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her true and full address, and his or her so doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her.

The essence of the above provision is that any person who writes a document on behalf an illiterate person must write his or her full name and full address. In so doing, the person shall imply a statement that he or she was instructed by the illiterate person to write the document and that it correctly represents the instructions given to him or her by the illiterate person. The provisions of section 3 of the Illiterates Protection Act were intended to protect illiterate persons from manipulation.

(See: Asea John Bosco Ozuma vs Tumwesigye Deo Mbabazi & Another; Jinja Election Petition. No 022 of 2016).

According to the record, the 22 affidavits in issue include the affidavits sworn by Loduwon John Bosco, Lokiru Paul sworn, Namule Lucy, Achia Fahad, Lochul Isaac, Aremax Charles Godon, Lotyang Lawrence Chiyo, Lokoru Emmanuel Lootan, Uma Brian, Lowany Gabriel Lochul, Lokiru William Ojel, Lokapel Joseph, Iiko Samuel, Lochokio Meri, Lokure Joseph, Nalibe Richard, Adupa Betty, Chokon Isaac Fedrick, Engor Emmy, Lokelem Peter, Lopeyok Abraham, and Nangiro Janet Lochoro. These affidavits were all certified in the following terms _

CERTIFICATE OF TRANSLATION

I, ILUKOL FRANCIS, being conversant with NGAKARIMOJONG and English languages, do certify that I have read and explained to..... the contents and the meaning of

his Affidavit. He confirmed to me that he understood the contents therein before appending his signature thereto.

.....

ILUKOL FRANCIS

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The petitioner's counsel further contested 5 Supplementary Affidavits in support of the 1st Respondents Answer to the Petition including the affidavits sworn by Chokon Isaac Federick, Lopeyok Abraham, Loumo Silvia, Nalibe Richard and Charik Daniel. These supplementary affidavits were certified in the following terms _

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CERTIFICATE OF TRANSLATION

I, ILUKOL FRANCIS, being conversant with NGAARIMOJONG and English languages, do certify that I have read and explained to..... the contents and the meaning of the Affidavits of Sowa Obadiab Elupot, Engor Steven Loyee and that of Ekopel Lokol. And based on his instructions this affidavits was prepared by the lawyers of Hon Komol based on my interpretation, after which I interpreted the contents to He confirmed to me that he understood the contents herein before appending his signature thereto.

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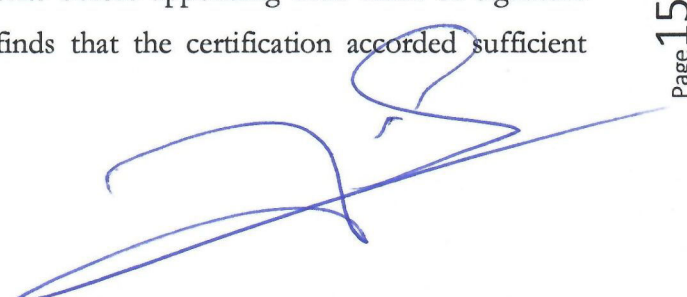
ILUKOL FRANCIS

TRANSLATOR

It appears to me from the certification of the affidavits above that the only information omitted in the certification of the impugned affidavits and supplementary affidavits is the full address of Ilukol Francis, who translated the contents of the affidavits to the illiterate deponents. That notwithstanding, the affidavits indicate the full names and full addresses of counsel who drafted the affidavits and the Commissioner for Oaths. The certifications also contain a statement to the effect that the translator read and explained the contents of the affidavits to the deponents who confirmed to him that they understood the contents of the affidavits before appending their mark or signature thereto. In the premises, this court finds that the certification accorded sufficient

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protection to the illiterate deponents and the omission to state the translator's full address is curable.

5 Learned counsel for the petitioner sought to rely on the case of ***Kasaala Growers Cooperative Society Vs Kakooza Jonathan; SCCA No. 019 of 2010***, however in that case, the defect on the affidavit in issue was the failure to indicate that the contents thereof were interpreted to the deponent in the language he understands and that he in fact understood them or appeared to have understood them. In this court's opinion, the defect in that case was incurably defective and distinguishable from the defect in
10 the present petition.

In ***Abubaker Mashari v Bakunda (U) Ltd & 3 Others; Miscellaneous Application No. 0233 of 2015***, the affidavit in issue did not bear a certificate of translation showing the full names and full address of the deponent's lawyer. It also did not certify that the
15 deponent's lawyer was the author of the document, or that the lawyer fulfilled any of the requirements under section 3 of the Illiterates Protection Act in respect of an illiterate deponent. Consequently, the affidavit was incurably defective and therefore struck off.

20 By contrast, in ***Hon. Ssekikubo & 3 Others Vs Ali & 4 Others; Supreme Court Miscellaneous Application No. 0233 of 2013***, the Supreme Court was prepared to consider it a mere irregularity where the commissioner for Oaths omitted to include in the jurat, the place at which the oath had been taken. The effect of the above authorities is that the matter should be interrogated on a case-by-case basis and where the defect
25 is curable; the court may exercise discretion to sustain the affidavit in line with its duty to administer substantive justice. In the result, this preliminary objection is dismissed.

On the third preliminary objection, counsel submitted that paragraphs 17 to 22 and Annexures D, E, F and G of the 1st respondent's affidavit in support of the Answer to
30 the petition are based on hearsay and contravene Order 19 rules 1 & 3 of the Civil

Procedure Rules. He relied on the case of *Bombay Flour Mills Vs Patel (1962) EA 802 and Abdu Serunjogi Vs Ssekito (1977) HCB 242, Kasirye Zimula Fred Vs Bazigatirawo Kibuuka Francis Amooti & the Electoral Commission; EPA No. 001 of 2016* and the case of *Watenga Godfrey Nabutanyi Vs Modoi Isaac & Electoral Commission; Election Petition No. 016 of 2021 at page 14* where court held that pursuant to Order 19 rule 3(1) of the Civil Procedure Rules, affidavits must be confined to such facts as the deponent is able of his own knowledge to prove. Counsel contended that the information in paragraphs 17-22 of the 1st respondent's affidavits was based on information got from the Returning Officer and not matters within the 1st respondent's knowledge.

In reply, learned counsel for the 1st respondent submitted that information obtained from a person other than the deponent of an affidavit in election petitions is allowed subject to the condition that the deponent discloses the source of his or her information. Counsel relied on the decision of the Court of Appeal in *Cheborot Steven Chemoiko vs Soyekwo Kenneth and Electoral Commission; Election Petition Appeal No.056 of 2016* where it was held that it would suffice to disclose the source of information if the persons alleged to have given such information went ahead to file affidavits in support of the petition giving substance to the relevant allegations.

Order 19 rule 3 of the Civil Procedure Rules provides that –

3. Matters to which affidavits shall be confined.

(1) Affidavits shall be confined to such facts, as the deponent is able of his or her knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, if the grounds thereof are stated.

The above rule essentially proscribes admission of hearsay evidence in line with section 59 of the Evidence Act. Hearsay evidence is inadmissible because it is not the best evidence. Further, the truthfulness and accuracy of the person whose information is

given by another witness cannot be tested by cross-examination. (See *Teper v Reginam* [1952] 2 ALLER 447 at 449).

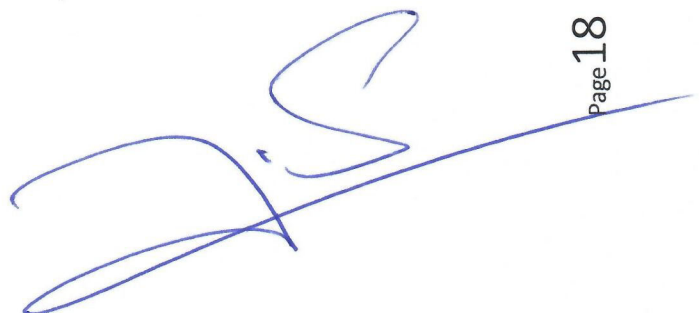
In *Watenga Godfrey Nabutanyi Vs Modoi Isaac & Electoral Commission; Election Petition No. 016 of 2021 [2021] UGHCEP 14* this court stated that it is the position under Order 19 rule 3(1) of the Civil Procedure Rules, that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, and where the deponent swears an affidavit based on information, sources of the information must be disclosed. (See also: *Bombay Flour Mills vs. Patel* [1962] EA 802 and *Abdu Serunjogi vs. Ssekitto* [1977] HCB 242).

The inference drawn from the above authorities is that information will not be presumed to be hearsay where the deponent specifies the source of his or her information. To this end, the Court of Appeal stated in *Cheborot Steven Chemoiko vs Soyekwo Kenneth & Electoral Commission, (Supra)* held that;

"We are satisfied that the appellant disclosed the sources of his information in the petition. The appellant stated in his petition that it was his supporters and agents who were the sources of his information, and the said agents and supporters went ahead to file affidavits in support of the petition giving substance to the issues raised in the petition... the affidavits are considered as part of the pleadings in the Petition..."

We do not accept the trial Judge's finding that the appellant's evidence in that regard was hearsay since the sources of his information were known and their affidavits were filed together with the petition."

The above case is distinguishable from the facts in *Mutembuli Yusuf v Nagwomu Moses Musamba, HC Election Petition No. 3 of 2016* where the petitioner alleged that he had received information, which he believed to be true, but did not disclose the source of his information. It was on that basis that the affidavit of the petitioner in that case was classified as hearsay.



In the present petition, the first respondent disclosed the source of his information in paragraph 17 & 19 of his affidavit in support of the Answer to the Petition as the Returning Officer for Kaabong District. Further, in paragraph 22, the first respondent disclosed his source of information as the Police Examiner Ag. Deputy Director Forensic Services Uganda Police Force, Chelangat Sylvia. I note that the said sources went ahead to file affidavits. The Returning Officer deposed an Affidavit in Support of the second Respondent's Answer to the Petition, while Chelangat Sylvia's affidavit is marked as annexure G to the first respondent's affidavit in support of the Answer to the Petition. Consequently, and based on the authority of the Court of Appeal in *Cheborot Steven Chemoiko vs Soyekwo Kenneth & Electoral Commission (supra)*, paragraphs 17-22 of the 1st respondent's affidavit in support of the Answer to the Petition are not hearsay evidence. Therefore, the third preliminary objection fails and the same is dismissed.

Lastly, counsel submitted that 7 of the 1st respondent's supplementary affidavits are inadmissible because they were filed on 3rd August 2021 about two months after the Petitioner had filed and served his affidavit in rejoinder. The affidavits in issue include affidavits sworn by Chokon Isaac Fredrick, Lopeyok Abraham, Lokol Simon Peter, Nalibe Richard, Liko Samuel, Chiyo Zachary and Komol Emmanuel.

Counsel argued that the respondent should have first sought leave of court or consent of the petitioner to file the impugned supplementary affidavits. He prayed that the 7 supplementary affidavits be struck off in line with the decisions of court in *Prince Kalemera H. Kimera Vs The Kabaka of Buganda and the Buganda Land Board Misc. Application No. 1086 of 2017*, and the case of *Mutembuli Yusuf vs. Nagwomu Moses Musamba & Another; EP Appeal No. 043 of 2016*.

In response, the first respondent's counsel submitted that the courts have always adopted a liberal approach when dealing with affidavits in election matters given the

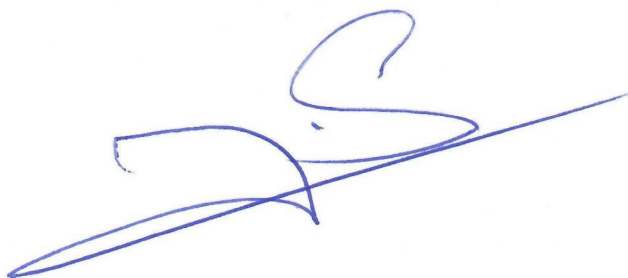
peculiar circumstances it presents. For this submission, counsel relied on the case of ***Mpanga Farouk v Ssenkubuge Isaac & Anor; Election Petition No. 015 of 2021***.

I find it rather ironical that the petitioner faults the 1st respondent for late filing of the
5 impugned supplementary affidavits when he filed 8 more affidavits in support of the
petition on 8th June 2021, the same day when he filed his affidavits in rejoinder. These
include the affidavits sworn by Sowa Obadiah Elupot, Engor Steven Loyee, Lokapel
Paul, Akol Sisto, Lopote Isaac Lodong, Lokiru Isaac Ngoya, Ekope Lokol and Akello
Hellen. I further note that all the 8 affidavits plus the petitioner's affidavits in rejoinder
10 are undated contrary to section 5 of the Commissioner for Oaths Act.

In ***Hon Mr. Justice Remmy Kasule v Jack Sabiti & Others, HCCS No. 0230 of 2006***, this court rejected the first respondent's affidavits in reply in that case because
they were undated. The court ruled that undated affidavits are defective and
15 inadmissible. A more lenient approach to undated affidavits is found in the case of
Saggu v Roadmaster Cycles (U) Ltd [2002] 1 EA 258 where the Court of Appeal of
East Africa took a different view that a defect in the jurat cannot be allowed to vitiate
an affidavit in view of Article 126(2)(e) of the Constitution. I find the latter approach
more persuasive as failure to date an affidavit can hardly be said to occasion an injustice
20 on the opposite party.

In this court's considered opinion, the paramount consideration in an application to
strike off an affidavit is whether the defect complained of occasioned substantial
prejudice to the opposite party. I am fortified in this view by the decision of this court
25 in the case of ***Kuranga Fred Masaba Vs Electoral Commission & Masaba
Muhamood Mutenyo; Election Petition No. 023 of 2021*** where it was stated that -

*It is this court's view that it is trite that election petitions operate under strict time lines however,
court has the discretion to allow affidavits filed out of time if it deems them as relevant. It would
therefore be wrong to disregard considerable affidavit evidence simply because it was filed out of
30 time.'*



Further, in *Nalugo Mary Margaret Sekiziyivu vs Bakaluba Mukasa Peter & Electoral Commission; Election Petition No. 030 of 2011* it was stated that given the nature of election petitions, subsequent affidavits should be allowed and considered as a whole. In the instant petition, the petitioner did not illustrate how the 7 supplementary affidavits prejudiced his case, by introducing new and additional material that the petitioner did not have an opportunity to respond to. The impugned supplementary affidavits were filed before scheduling of the petition implying that the petitioner had the opportunity to respond to any matter raised in the supplementary affidavits. In the absence of evidence showing prejudice to the petitioner, this court is inclined to allow the supplementary affidavits. This preliminary objection is overruled.

First respondent's preliminary objections

Learned counsel for the first respondent raised two preliminary objections.

First, those paragraphs 23, 24, 25, 26, 27, 28, 29, 30 and 31 of the petitioner's affidavit in support of the petition are hearsay and offend Order 9 rule 3(1) of the Civil Procedure Rules. Counsel prayed that those paragraphs be expunged from the record. He relied on the case of *Jonah Nsubuga Vs Electoral Commission & Anor; Election Petition No. 003 of 2011* where it was held that while a candidate is not expected to be present at every polling station, he or she has a duty to disclose the source of information and enlist direct evidence of the agents alleged to have witnessed the acts complained of. Counsel further relied on the case of *Semugoma Kigozi Hamdan v Salim Saad Uhuru & Electoral Commission; CA Election Petition Appeal No. 043 of 2021* for the proposition that failure to disclose the source of information in an affidavit renders the affidavit null and void.

According to Order 19 rule 3(1) of the Civil Procedure Rules, affidavits must be confined to such facts as the deponent is able of his own knowledge to prove. In the present petition, paragraphs 23, 24, 25, 26, 27, 28, 29, 30 and 31 of the petitioner's affidavit in support of the petition contain allegations of non-compliance with section

37, 49 and 29 of the Parliamentary Elections Act and allegations of bribery and procurement of prohibited persons to vote. I will reproduce some of the paragraphs for ease of reference.

5 In paragraph 23, the Petitioner states: -

"That I am aware that the 2nd respondent's presiding officers chased away persons meant to assist illiterate, blind and disabled voters who accompanied the said illiterate, blind and disabled voters to help them fix the authorized mark of choice on the ballot paper."

Paragraph 24: -

10 *"That I am also aware that the 2nd Respondent's Presiding officers treated ballot papers where the voters choice could be reasonably ascertained as invalid"*

Paragraph 28: -

15 *"That I am aware that illegal practices or other offences under the Parliamentary Elections Act were committed in connection with the election by the 1st Respondent, personally or with his knowledge and consent or approval"*

Paragraph 29 and 30: -

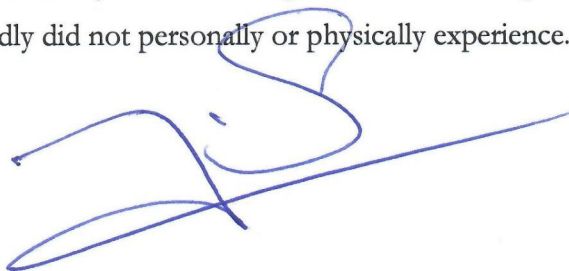
"That I know that the 1st Respondent bribed voters by giving out money, booze and other gifts"
"That I also know that the 1st Respondent and His agents with his knowledge and consent or approval during the election period and with intent directly or indirectly to influence voters to vote for him and to refrain from voting me gave money, local brew and other gifts to voters"

20

Paragraph 31: -

"That I am also aware that the 1st Respondent personally and or through his known agents induced and or procured persons to vote during the election knowing that the persons were prohibited by law from voting at the Election."

25 It is evident from the above paragraphs that the petitioner neither discloses any source of his information nor states any details relating to the several allegations made which the petitioner undisputedly did not personally or physically experience.



In the recent case of *Semugooma Kigozi Hamdan v Salim Saad Uhuru & The Electoral Commission; CA Election Petition No. 013 of 2021, [2021] UGHCCD 114*, the petitioner deposed paragraphs 23,37,38,39, and 40 of his affidavit in support of the petition in the same manner as in the present petition without disclosing the source of his information or furnishing sufficient details for his allegations. This Court held that –

The above impugned paragraphs point to allegations of bribery; however, the petitioner does not mention names of the particular persons who were bribed. It is clear that when statements are made in an affidavit on information and belief the sources of information should be clearly disclosed and the grounds of the belief must be stated with sufficient particularity to enable the court to judge whether it would be safe to act on the deponent's belief. These are but the basic requirements of pleadings and the contents of affidavits and care must be taken to comply with the same.

The petitioner's allegations of bribery are faceless in as far as no particular person is mentioned... Further, the allegations must be described in sufficient detail; questions as to who gave what, to who, at what time and for what purpose have to be shown by the petitioner in his pleadings. The affidavit has to be treated as evidence and, that being so; the rules of evidence must be strictly adhered to. The impugned paragraphs in the affidavit, which are verified as based on information, are, by their very nature, hearsay evidence. In addition, if such averments are the foundation of the case made by the petitioner, the court cannot rely or act upon the same. To do otherwise, would be to ignore the fundamental principles of the rules of evidence.

I find that in the absence of evidence to support this claim, the evidence in the impugned paragraphs referred to above in the petitioner's affidavit is hearsay.

On appeal of that petition to the Court of Appeal in *Semugooma Kigozi Hamdan v Salim Saad Uhuru & The Electoral Commission CA Election Petition Appeal No. 43 of 2021 at 34*, the appellate court upheld the trial Judge's finding that in an

affidavit, sources of information must be clearly disclosed and the grounds of the belief must also be stated with sufficient clarity.

In *Uganda Journalist Safety Committee & others v Attorney General, Constitutional Petition No. 7 of 1997*, it was held that failure to disclose the source of information in an affidavit rendered the entire affidavit null and void. A more liberal approach, which this court is inclined to follow, is given in *Rtd. Col. Kizza Besigye v. Yoweri Museveni Kaguta & the Electoral Commission, Supreme Court Presidential Election No.1 of 2006*, where the court held that the parts of an affidavit which are hearsay and offend provisions of Order 19 rule 3 of the Civil Procedure Rules ought to be severed off without rendering the remaining parts of the affidavit defective or a nullity, and that a defective affidavit is not necessarily a nullity. In the result, and based on the above authorities, this court finds that Paragraphs 23, 24, 25, 26, 27, 28, 29, 30 and 31 of the petitioner's affidavit in support of the petition are hearsay and accordingly severs those paragraphs off his affidavit in support of the petition.

Secondly, the first respondent's counsel raised a preliminary objection to the effect that the petitioner's affidavit contains falsehoods and should be struck off the record. He relied on the case of *Bitaitana v Kamura (1977) HCB 34* and *Anthony Okello v Ojok B'leo & 2 Others, Miscellaneous Application No. 26 of 2006*.

To substantiate on the alleged falsehoods, counsel contended that while the petitioner stated in his affidavit that he was personally present at the tally centre, the Returning Officer stated that the petitioner was never personally present at the tally centre but was represented by his agent, Dr. Ngiro Walter. Counsel argued that while the petitioner claimed to have written to the Returning Officer requesting for a vote recount on 15th January 2021, the Returning Officer states in his affidavit that the letter was served on him on 18th January 2021.

In this court's considered opinion, this ground of objection requires evaluation of the evidence adduced by both parties. It is trite law that a preliminary objection raises a pure point of law that is argued on the assumption that all facts pleaded by the other side are correct. Therefore, a preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. *See Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd [1969] EA 696.*

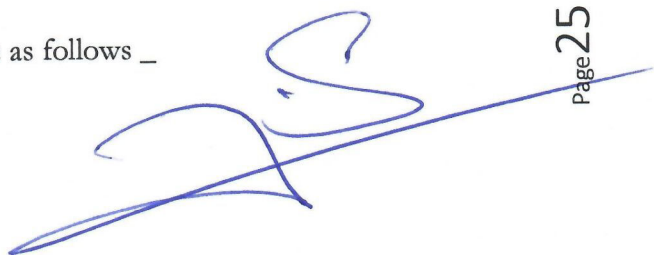
In the result, I find that this preliminary objection forms the substance of the parties' claims on the merits of the petition, specifically, with regard to the petitioner's allegation that the Returning Officer refused to conduct a mandatory vote recount when the petitioner requested for the same in writing on 15th January 2021. The court will examine the evidence adduced by both parties and make a finding on whether or not the petitioner wrote and served the request for a vote recount on 15th January 2021 or 18th January 2021. The preliminary objection is dismissed.

15

Second respondent's preliminary objections

Learned counsel for the 2nd respondent objected to certain documents attached to the affidavits in support of the petition including, Declaration Forms marked as Annexure F & G of the affidavit in support of the petition and Annexure C of the affidavit deposited by Komol Peter; extracts of the National Voters Register attached to several affidavits in support of the petition; Return Form for Transmission of Results marked as Annexure A of the affidavit in support of the petition; and Result Tally Sheets marked as Annexure D of the affidavit in support of the petition. Counsel argued that the Electoral Commission in compliance with section 75 & 76 of the Evidence Act did not certify the said documents. He relied on *Kakooza John Baptist Versus Electoral Commission & Anor; Supreme Court EPA No. 011 of 2007* and *Mashate Magomu Peter V Electoral Commission & Anor; COA EPA No. 047 of 2006 at pg 20 and 21.*

30 Section 75 and 76 of the Evidence Act provide as follows _



75. Certified copies of public documents

5 Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees for the copy, together with a certificate written at the foot of the copy that it is a true copy of that document or part of the document, as the case may be, and the certificate shall be dated and subscribed by the officer with his or her name and official title, and shall be sealed whenever the officer is authorised by law to make use of a seal, and the copies so certified shall be called certified copies.

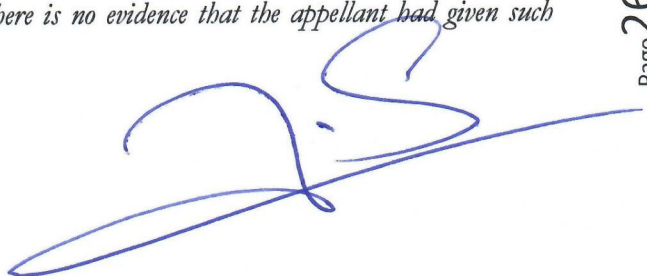
10 Explanation — any officer who, by the ordinary course of his or her official duty, is authorised to deliver such copies, shall be deemed to have the custody of those documents within the meaning of this section.

76. Proof of documents by production of certified copies

Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies

15 The gist of section 75 & 76 of the Evidence Act reproduced above is that any person who wishes to produce proof of the contents of a public document shall demand for certified copies of the public documents to be relied on from the relevant public officer in custody of the public document upon payment of a prescribed fee. In **Kakooza John Baptist versus Electoral Commission & Anor. (Supra)** at page 9, the Supreme
20 Court held that —

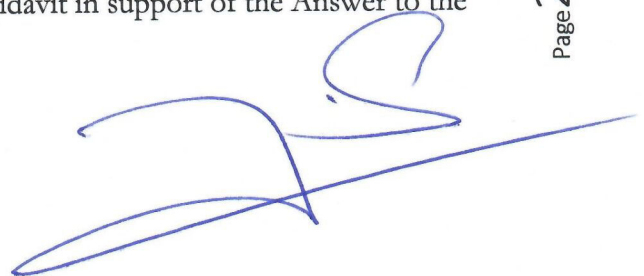
25 “A non-certified DR Form cannot be validated by the mere fact that it is annexed to an affidavit. A DR Form is a public document within the meaning of section 73(a) (ii) of the Evidence Act. It requires certification if it is to be presented as authentic and valid document in evidence... the appellant could have provided the uncertified copies of the DR Forms if he had given notice to the Electoral Commission to produce copies of all the declaration forms from the sub-county but it failed to do so. There is no evidence that the appellant had given such notice...



In my opinion therefore, the courts below cannot be faulted for holding that the uncertified copies of DR Forms annexed to the affidavit of the appellant were inadmissible.”

Further, in ***Mashate Magomu Peter vs. Electoral Commission & Anor; (Supra)*** at
5 **page 20**, the Court of Appeal followed the position that DR Forms are public
documents and a party wishing to rely on them ought to have them certified as per
section 75 ad 76 of the Evidence Act. Without certification, such documents cannot
prove any fact they seek to prove. The court added that the exception to this rule lies
in section 64(1) of the Evidence Act, which refers to a scenario where the party seeking
10 to rely on uncertified DR Forms gave notice to the party in possession of the originals
requesting for certification and they refused or failed to do as requested. On proving
this, the court accepts the uncertified copies. In ***Wanyoto Lydia Mutende v Electoral
Commission and Another (Supra)***, this court rightly held that the provisions of
section 75 and 76 of the Evidence Act also apply to the extract of the National Voters’
15 Register and tally sheet, being public documents in the meaning prescribed by section
73(a)(ii) of the Evidence Act.

In the present petition, the petitioner deposed under paragraph 17 & 18 of his affidavit
in rejoinder that he requested for certified copies of the DR Forms from the 2nd
20 respondent through his lawyers and paid the requisite fees. The petitioner attached a
letter dated 3rd February 2021 purportedly requesting for certified copies of the DR
Forms and marked annexure B to his affidavit in rejoinder. I note that the petitioner
did not attach proof of payment of the requisite fees for certification, which he claims
to have paid. Further, while the petitioner claims to have certified DR Forms annexed
25 as C2, D2, E2, and G2 to the petitioner’s affidavit in rejoinder, the said annexures
contain the Returning Officer’s stamp and the Electoral Commission’s stamp. They do
not bear a stamp of the Secretary Electoral Commission indicating the date of
certification, signature of the certifying officer and a statement to the effect that they
are certified true copies, as is the case with the certified DR Forms marked as annexure
30 E1, E2, E3, E4 & E5 of the 2nd respondent’s affidavit in support of the Answer to the



Petition. More still, none of the DR Forms attached to the petition (collectively marked as annexure F & G of the petitioner's principal affidavit) is certified.

5 In addition, the Return Form for Transmission of Results (Annexure A of the principal affidavit in support of the petition), the Results Tally Sheet (Annexure D of the petitioner's principal affidavit) and extracts of the National Voters' Register annexed to the affidavits of Keno Marko, Nangiro Joseph, Lakong Bibiana, Lokel Vicky, Nmuya Lokure, Ngoya Gabriel Lotyang, Nangolle Christine, Komol Peter, Akaal Regina, Longora Madellena, Sowa Obadiah Elupot, Engor Steven Loyee, Lokapel Paul, Lopote
10 Isaac Lodong and Ekopel Lokol are all uncertified by the 2nd respondent. In the result, the above-mentioned DR Forms, Return Form for Transmission of Results, Result Tally Sheets and extracts of the National Voters Register are inadmissible for failure to comply with section 75 and 76 of the Evidence Act and the same are expunged from the record.

15

On the second preliminary objection, learned counsel for the second respondent contended that the petitioner filed 8 more affidavits on 8th June 2021 after he had filed his affidavit in rejoinder, and after the respondents had already filed their pleadings on 25th March 2021 and 16th April 2021. This denied the second respondent an opportunity
20 to respond to the impugned affidavits. Counsel further submitted that the petitioner ought to have first sought leave of court or consent of the second respondent before filing additional affidavits. For this proposition, counsel relied on the case of *Mutembuli Yusuf Vs Nagwomu Moses Musamba & Anor (Supra)* and prayed that the impugned affidavits be struck off the record. The impugned affidavits include the
25 affidavits sworn by Angor Steven Loyee, Sowa Obadiah Elupot, Lokapel Paul, Akol Sisto, Lopote Isaac Lodong, Lokiru Isaac Ngoya, Ekope Lokol and Akello Hellen. According to the record, all the 8 affidavits were filed on 8th June 2021. This is the same date when the petitioner filed his affidavit in rejoinder.

As this court has already found, the courts have adopted a lenient approach to admission of affidavits in election petitions in light of the significant importance of election petitions and the rather short timelines, which may not afford a party adequate time to gather evidence and file the same within the stipulated timelines. To this effect,
5 in the case of ***Tamale Julius Konde v. Ssenkubuge Isaac & Electoral Commission; Election Petition No. 075 of 2016***, the court stated that;

10 *"Since it is sometimes practically not possible to file all the affidavits in support of the petition at the same time as the petition. As long as the additional affidavits are filed before the scheduling conference is conducted, it's usually acceptable as no prejudice would be occasioned to the Respondent even if no leave of court is obtained."*

This court maintains the view that the paramount consideration is whether affidavits filed out of time had the effect of occasioning injustice or prejudice to the opposite party. In the present petition, the second respondent did not specifically point out which aspects of the impugned affidavits that the second respondent did not have an
15 opportunity to respond to. I further note that counsel did not elaborate on how the impugned affidavits prejudiced the second respondent. In the result, this court declines to strike off the impugned affidavits and the preliminary objection is dismissed.

Court's analysis of the merits of the petition

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Burden and Standard of Proof

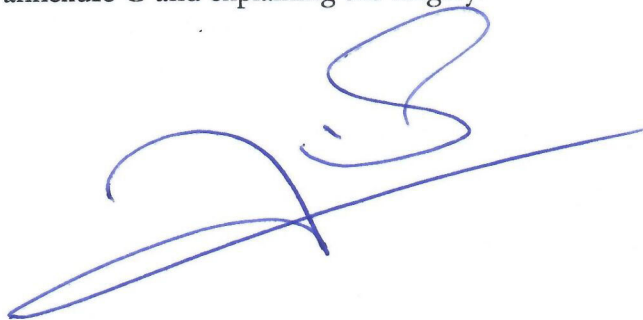
In elections petitions, the burden of proof lies on the petitioner to prove the grounds of the petition based on a balance of probabilities. To discharge this onus, the petitioner is required to adduce credible, cogent evidence to the satisfaction of court. The evidence
25 must be free from contradictions, truthful and compelling. (See **Section 101-103 Evidence Act, Section 61(3) of the Parliamentary Elections Act; *Paul Mwiru v Hon Igeme Nabeta & others (Supra)***).

Issue No. 2:

Whether during the elections for the directly elected Member of Parliament for Dodoth East County Constituency, there was none - compliance with the provisions and principles of the Parliamentary Elections Act.

5 The crux of the petitioner's contention under issue two is that there was non-compliance with sections 54, 37, 49 and 29 of the Parliamentary Elections Act. The petitioner contended that the second respondent rejected the petitioner's request in writing for a vote recount contrary to section 54 of the Parliamentary Elections Act, which makes it mandatory to conduct a vote recount in circumstances where the vote
10 margin between the winning candidate and runner up is less than fifty. According to paragraph 14-21 of the petitioner's affidavit in support of the petition, the petitioner states that immediately upon completion of the vote counting on 15th January 2021, he wrote to the Returning Officer requesting for a vote recount. He stated that the request was received by the Returning who acknowledged receipt thereof by appending his
15 signature and the stamp of the second Respondent. The petitioner attached the letter requesting for a vote recount to his principal affidavit and marked it annexure C.

On the other hand, the first respondent denied the petitioner's claim under paragraph 17 & 18 of his principal affidavit and contended that the petitioner requested for a vote
20 recount on 18th January 2021, three days after declaration of the results. The first respondent contended that the petitioner's letter purportedly requesting a vote recount on 15th January 2021 was a forgery. To prove this contention, the first respondent attached a letter written by his lawyers complaining about the petitioner's forgery and marked it annexure E. He also attached a police report marked annexure F showing
25 that the signatures of the Returning Officer and the stamp of the 2nd respondent showing the date of acknowledgement of receipt as 15th January 2021, were forged. Furthermore, the first respondent attached an affidavit of a handwriting expert, Chelangat Sylvia, marked annexure G and explaining the forgery.



Secondly, the 1st respondent's counsel submitted that the petitioner was not prejudiced since the Chief Magistrate of Kotido entertained his application for a vote recount in *Hon Lokeris Samson v Electoral Commission; Misc. Application No. 002 of 2021*. The first respondent attached the said application to his principal affidavit as annexure H.

In further reply to the allegation, the second respondent contended in paragraph 17-19 of the 2nd respondent's affidavit in support of the 2nd respondent's Answer to the Petition sworn by the Returning Officer, Ogwang Julius Ongom that the petitioner was never present at the tally centre on 15th January when the results were announced. He deposed that the petitioner's agent, Eko Patrick came to his office on 18th January 2021 to serve him with a copy of the request for a mandatory vote recount. To prove this, he attached a copy of the said letter and extract of the Visitor's Book, which were marked annexures C and D, respectively, to the first respondent's principal affidavit.

Section 54 of the Parliamentary Elections Act provides that: -

54. Cases of mandatory recount

1) *Where, after the official addition of the votes—*

- a) *there is an equality of votes between two or more candidates obtaining the highest number of votes; or*
- b) *the number of votes separating the candidate receiving the highest number of votes and any other candidate is less than fifty, the returning officer shall, if requested in writing by a candidate, a candidates' agent or a voter registered to vote in the constituency, in the presence of a senior police officer recount the votes after giving a written notice of the intention to recount to all interested parties.*


2) *Where a recount under this section results in an equality of votes among two or more candidates obtaining the highest number of votes, a runoff election shall be held involving only the candidates with equal votes; and the election shall take place not later than thirty days from the date of the recount.*

The gist of section 54(1)(b) of the Parliamentary Elections Act, in particular, is that where the vote margin between the candidate with the highest number of votes and the runner up candidate is less than 50, and the runner up candidate requests for a recount in writing, it is mandatory for the Returning Officer to conduct a vote recount in the presence of a senior police officer, after giving a notice of the intention to do so to all interested parties. (See: *Balwanga Balwana v Electoral Commission & 2 Others*, (Supra).

In the present petition, the first respondent obtained 7,903 votes, while the petitioner, being the runner up, gathered 7,892 votes thereby rendering a winning margin of 11 votes. Therefore, the facts fell well within the application of section 54(1) (b) of the Parliamentary Elections Act which prescribes a vote margin of less than 50 votes. The cause of disagreement is whether the petitioner, indeed wrote to the second respondent requesting for a vote recount on 15th January 2021 when the result of the election was announced and the Returning Officer refused to do so but instead declared the first respondent as the winner of the election.

Section 61(1) & (3) of the Parliamentary Elections Act requires the petitioner to prove the grounds of the petition based on a balance of probabilities. This means that the petitioner must prove that it is more likely than not that his version of the facts is right. In the leading authority of *Miller v Minister of Pensions* [1947] 2 ALL ER 372, Lord Denning in an attempt to elaborate on the meaning of 'balance of probability' rightly remarked that the standard is discharged if evidence produced is such that the court would think it more probable than not that the claimant's version of the facts is right. If the probabilities are equal, the standard is not discharged. See also *Dr. Vincent Karuhanga T/A Friends Polyclinic vs National Insurance Corporation and Uganda Revenue Authority* [2008] HCB 151).

By application of the above principles to the instant petition, this court finds the respondents' evidence overwhelming or at the very least, sufficient to rebut the



petitioner's version of facts thereby rendering the probabilities equal. The first respondent adduced a letter marked annexure D of his principal affidavit bearing a stamp, which shows that the Returning Officer received the petitioner's request for a vote recount on 18th January 2021 and not 15th January 2021 as the petitioner claims.

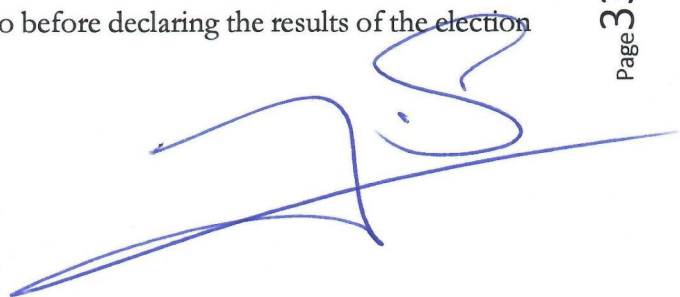
5 This letter was corroborated by an extract of the Returning Officer's Visitors' Book marked annexure D of the 2nd respondent's principal affidavit showing that the petitioner's agent, Eko Patrick visited the Returning Officer on 18th January 2021 with the purpose of obtaining the Returning Officer's signature on the letter requesting for a vote recount.

10

On the other hand, the evidential value of the petitioner's letter showing that he requested for a vote recount on 15th January 2021 (annexure C of the petitioner's principal affidavit in support of the petition) was undermined by a police report marked annexure F of the 1st respondent's principal affidavit and the affidavit of the
15 handwriting expert, Chelangat Sylvia, marked annexure G of the 1st respondent's principal affidavit, which both showed that the petitioner's letter purportedly requesting for a vote recount on 15th January 2021 was forged. In light of this challenge, the petitioner ought to have adduced separate and additional evidence to tilt the scale of probabilities in his favour.

20

Furthermore, this court wonders why the petitioner made no mention whatsoever of the 2nd respondent's refusal to conduct a vote recount on 15th January 2021, in his application for a vote recount filed in the Chief Magistrates Court of Kotido on 18th January 2021 vide *Misc. Application No. 002 of 2021; Hon Lokeris Samson v the*
25 *Electoral Commission*. The application is marked Annexure E to the main affidavit in support of the petition. Under grounds 2 & 3 of that application, the petitioner narrated that the Returning Officer declared the 1st respondent winner of the election on 15th January 2021. The petitioner went on to furnish details touching the vote margin but did not include a crucial detail that the Returning Officer had refused to conduct a
30 vote recount when he was requested to do so before declaring the results of the election

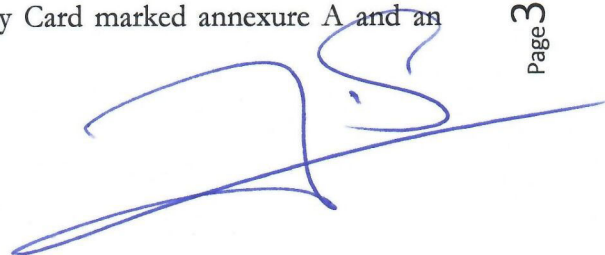


on 15th January 2021. The only logical explanation for this omission is that the petitioner did not request for a vote recount on 15th January 2021, and having been overtaken by events, and therefore out of the application of section 54(1) (b) of the Parliamentary Elections Act, his only available relief was to apply for a vote recount before the Chief
5 Magistrates Court under section 55(1) of the Parliamentary Elections Act. Evidently, this option is available where the Returning Officer has declared the candidate with the highest votes as the elected candidate. (*See: Byanyima Winnie v Ngoma Ngime, (Supra)*).

10 In the absence of additional evidence to clarify on the petitioner's version of facts, this court is unable to make the finding that it is more probable than not that the petitioner's version of facts is right. In the result, I find that the petitioner failed to discharge the required standard of proof to show that the Returning Officer refused to conduct a
15 vote recount when he was requested in writing to so by the petitioner on 15th January 2021.

On ground two of issue two, the petitioner contended that the second respondent contravened section 37 of the Parliamentary Elections Act when its presiding officers chased away persons who were meant to assist illiterate, blind or disabled voters. This
20 contention is pleaded in Paragraph 23 of the petitioner's affidavit in support of the petition which this court has severed from the petitioner's affidavit on grounds that it is hearsay and contravenes Order 19 rule 3(1) of the Civil Procedure Rules, in so far as the petitioner did not indicate the source of his information nor furnish details to substantiate the allegation.

25 The petitioner adduced additional evidence to support this contention through the affidavits sworn by Namuye Lokure, Ngoya Gabriel Lotyang, Lokiru Issac Ngoya, Lokong Bibiana and Akaal Regina. Namuye Lokure stated in his affidavit that he was a registered voter in Lolelia Primary School polling station. To prove his capacity as a
30 voter, he attached a copy of his National Identity Card marked annexure A and an



extract of the National Voters Register marked annexure B. This court notes that the said extract of the National Voters Registered is not certified as required under section 75 and 76 of the Evidence Act. It is therefore inadmissible in line with the decision of the Supreme Court in *Kakooza John Baptist vs EC & Anor Supreme Court Election Petition Appeal No. 11 of 2007*. Consequently, without a certified copy of the National Voters Register, the witness would be left with his National Identity card, which will not suffice to prove that he is a registered voter.

In *Wakayima Musoke & Electoral Commission v Kasule Robert Sebunya (Supra)*, the Court of Appeal held that by virtue of section 1 of the Parliamentary Elections Act, conclusive proof of a registered voter is by evidence of a person's name appearing in the National Voter's Register and not possession of a national identity card. (See also *Hon Otada Sam Amooti Owor v Taban Idi Amin, Election Petition Appeal No. 093 of 2016*).

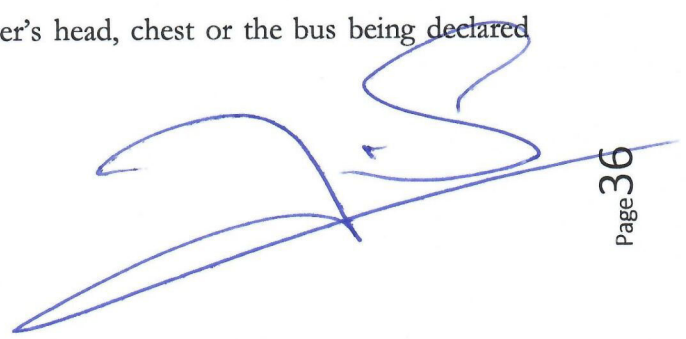
This court further finds that the extracts of the National Voters Register annexed to the affidavits of Ngoya Gabriel Lotyang as Annexure B thereof, Lokiru Isaac Ngoya as Annexure A thereof, Lokong Bibiana as Annexure B thereof and Akaal Regina as Annexure B thereof, are all uncertified contrary to section 75 and 76 of the Evidence Act. Those extracts are therefore inadmissible. The overall effect of the defects in the documents of the said witnesses is that the petitioner cannot rely on their affidavits to prove allegations of non-compliance with section 37 of the Parliamentary Elections Act. This is because their evidence does not prove that they are registered voters who could have voted for the petitioner but for the unlawful conduct of the second respondent's presiding officers who allegedly chased away persons meant to assist them to vote. In the result, this ground fails.

On the third ground, the petitioner alleged under paragraph 24 of his affidavit in support of the petition that the 2nd respondent's presiding officers treated ballot papers where the voter's choice could be reasonably ascertained as invalid contrary to section

49 of the Parliamentary Elections Act. This court-severed paragraph 24 of the petitioner's affidavit in support of the petition on grounds that it is hearsay as far as it does not disclose the source of information or state details to substantiate the allegation. The petitioner produced additional evidence on this ground contained in the affidavits
5 of Macara Lokure, Alinga Dominic, Lowot Simon, Adupa Paulino and Malo Paul Roberts.

Macara Lokure stated under paragraph 2 of his affidavit that he is an ardent supporter of the petitioner, and in paragraph 7, he stated that he saw that 15 ballot papers on
10 which the thumb mark was either on the bus, or the head or slightly outside the last box on the ballot paper in the petitioner's column being declared invalid by the 1st respondent's presiding officer. Alinga Dominic stated under paragraph 2 of his affidavit that he was a mobilizer for the petitioner in the contested election. In paragraph 6 of his affidavit, he stated that he saw around 18 valid votes of the petitioner being declared
15 invalid by the presiding officer of the second respondent at Loperu ECD centre polling station.

Lowot Simon stated under paragraph 2 & 3 of his affidavit that he was an agent of the petitioner at Loteteleit Fal centre polling station where he saw the presiding officer
20 declare 40 of the petitioner's votes invalid on the ground that the thumbprints had been put on the bus, chest and head of the petitioner's picture. Adupa Paulino stated under paragraph 2 & 4 of his affidavit that he was a mobiliser for the petitioner at Lolelia primary school polling station where he saw 13 valid votes of the petitioner declared invalid because the voters thumb printed the bus, chest and head of the petitioner's
25 picture. Lastly, Malo Paul Roberts stated that he was a polling agent of the petitioner at Lopeeru ECD centre polling station where he saw 18 ballot papers, which had an authorized mark of choice on the petitioner's head, chest or the bus being declared invalid by the presiding officer.



This court notes that all the five witnesses whose affidavits the petitioner wishes to rely on are the petitioner's agents, ardent supporters and mobilizers. The courts have observed that in election petitions, there is a high propensity for witnesses to peddle lies in order to score political victory for their candidates. In **Muwanga Kivumbi vs.**

5 **Electoral Commission & Anor; Election Petition No. 18 of 2011[2011] UGHCEP**

4 the court held that: _

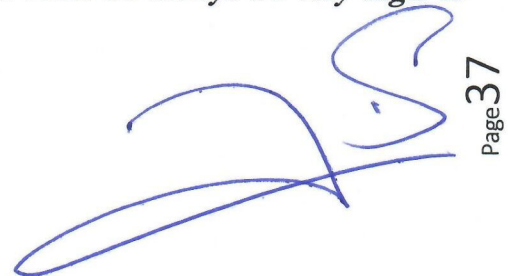
10 *"The court cannot be oblivious of the distinctive characteristic of election petitions in this country that witness on either side, are often persons who were ardent supporters during the actual election contest of the party, for which they are appearing as witnesses. They can, therefore, be motivated by the continued desire to score victory to the political prize (power) which is at stake through the judicial process in these matters as well. They can, no doubt, be tempted to peddle lies in order to achieve that ultimate objective. Thus, judicial inquiry conducted during the trial of an election petition ought to be quite diligent and sober."*

15

Further, in **Kasta Hussein Bukenya vs. Bukenya Balibaseka Gilbert and Another (Supra)** the court held that –

20 *"An election contest, motivated by the desire to score political victory to political power, witnesses may easily be attracted to peddling lies. That it is peculiarly characteristic of election petitions, which witnesses for a party in an election petition, unlike in civil suits, often those who were ardent supporters of that party during the election contest. They possess a very high propensity and desire to propel success for him or her. Thus, the trial of an election petition calls for judicious inquiry that is not only diligent but also quite sober. No court shall set aside an election of a Member of Parliament unless it has before it substantial and cogent evidence compelling it to do so. It must be evidence relating directly to the allegation in issue. Court would often not act upon the evidence of a single witness unless it is highly compelling. It would look for corroborative evidence. All this goes to emphasize the degree of probability which must be always be very high to necessitate court to act on it."*

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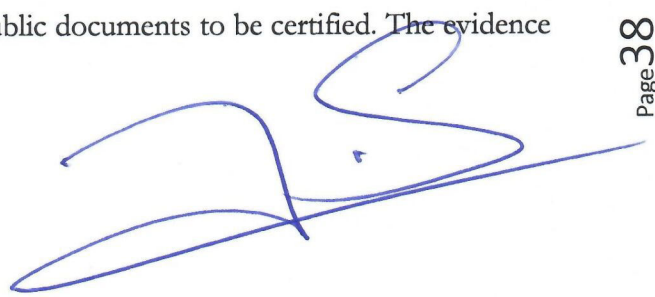


(See also: Mbayo Jacob Robert vs. Electoral Commission & Talonsya Sinani, Election Petition Appeal No. 007 of 2006, and Opio John vs. Electoral Commission & Ogolla Jack; Election Petition No.0019 of 2006)

5 In view of the above caution, this court cannot rely solely on the evidence of the 5 witnesses owing to the nature of their relationship with the petitioner which renders them susceptible to peddling lies. The petitioner ought to have adduced additional evidence directly relating to the acts of non-compliance complained of, so as to corroborate the evidence given by the 5 witnesses. I am fortified in my view by the decision of the Court of Appeal in the case of *Kirya Grace Wanzala Vs Nelson*
10 *Lufafa & Electoral Commission; Election Petition Appeal No. 0104 of 2016* where it was held that in an election petition, the uncorroborated evidence of a partisan witness should not be relied on. In the absence of such additional, direct and cogent evidence to corroborate the evidence given by the petitioner's witnesses, this court finds that the petitioner failed to prove this ground to the required standard of proof.

15 On the fourth ground under issue two, the petitioner contended under paragraph 25 & 26 of his principal affidavit that the second respondent closed certain polling stations before four O'clock while in other stations voting was allowed to go on beyond four O'clock contrary to section 29(2) of the Parliamentary Elections Act. Paragraph 25 &
20 26 of the petitioner's principal affidavit were severed by this court for being hearsay on grounds that the petitioner did not disclose the sources of his information in those paragraphs.

Secondly, the petitioner relied on uncertified DR Forms collectively marked as
25 Annexure F to prove that polling in some stations closed before four O'clock. He further relied on another set of uncertified DR Forms collectively marked as Annexure G to prove that voting in certain stations carried on after four O' clock. These DR Forms have been expunged from the record for non- compliance with section 75 and 76 of the Evidence Act which requires public documents to be certified. The evidence



in the DR Forms collectively marked, as annexure, F & G will therefore not be considered.

5 The petitioner also relied on the affidavits of his campaign agent, Lopote Isaac Lodong who stated in paragraph 1, 2 & 4 of his affidavit that he is a campaign agent of the petitioner at Karongo Rock Tree Shade polling station where he saw the presiding officer close polling at 2:00pm, thereby depriving the petitioner of 5 voters who had come to vote the petitioner. He attached an uncertified copy of an extract of the National Voters Register and marked the same annexure A.

10

This court finds that the said Voters Register is inadmissible for want of certification per section 75 & 76 of the Evidence Act. Consequently, the witness failed to prove that the said 5 people were registered voters. Further, the court notes that the deponent, being a campaign agent and supporter of the petitioner, is susceptible to peddling lies to secure political victory for the petitioner. The petitioner also relied on the affidavit of Komol Peter who stated under paragraph 4 & 5 of his affidavit that he is a mobiliser and staunch supporter of the petitioner at Lopetun Ebul shade polling station where voting was closed at 2:40pm thereby depriving the petitioner of 16 voters that he had mobilized to vote for the petitioner. He attached an uncertified DR Form and Voters Register to prove his claims. This court finds the uncertified DR Form and Voters Register inadmissible for want of certification in accordance with section 75 & 76 of the Evidence Act. Consequently, this witness failed to prove that the said 16 people were indeed registered voters. Secondly, the witness, being a mobilizer and ardent supporter of the petitioner is susceptible to peddling lies to secure political victory for the petitioner. For instance, in paragraph 6 of his affidavit, he mentioned Lowany Gabriel as one of the 16 voters whom he had mobilized to vote the petitioner, however, the said Lowany Gabriel swore an affidavit in support of the 1st respondent's Answer to the Petition in which he stated under paragraph 5 that on the polling day, he was away at Acacia shade polling station carrying out his duties as a polling assistant and did

25



not get time to go and vote at his polling station called Lopetum Ebal tree shade polling station.

5 Lastly, the petitioner relied on the affidavit of Lokel Vicky who stated in paragraph 1 and 2 of her affidavit that she is a polling agent and staunch supporter of the petitioner. This court cannot solely rely on her evidence because of the nature of her relationship with the petitioner, which renders her susceptible to peddling lies. In the result, this court finds that the petitioner failed to discharge the standard required to prove this ground of the petition.

10

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

15 According to Section 61(1) (a) of the Parliamentary Elections Act, it is not enough to allege non-compliance with electoral laws, the petitioner must illustrate that the non-compliance affected the result of the election in a substantial manner. (See: ***Amama Mbabazi vs Yoweri Kaguta Museveni, Electoral Commission and The Attorney General; Election No. 001 of 2016 at page 41 – 43***).

20 In the instant petition, the petitioner failed to prove to the required standard, any of the grounds of non-compliance with electoral laws alleged under issue two. It is therefore not necessary to resolve issue three.

25 ***Issue No. 4: Whether the first respondent or his agents with his knowledge consent and approval, committed any illegal practice or offence under the Parliamentary Elections Act in connection with the Elections.***

The petitioner alleged that the first respondent committed the electoral offences of bribery contrary to section 68(1) (7) & (8) of the Parliamentary Elections Act and inducement of prohibited persons to vote contrary to section 69 of the Parliamentary

Elections Act. To prove the allegation of bribery, the petitioner relied on the affidavit of Sowa Obadiah Elupot, Ekope Lokol and Engoru Steven Loyee.

5 Section 68 of the Parliamentary Elections Act prescribes the electoral offence of bribery in the following terms –

68. Bribery

- 1) *A person who, either before or during an election with intent, either directly or indirectly to influence another person to vote or to refrain from voting for any candidate, gives or provides or causes to be given or provided any money, gift or other consideration to that*
10 *other person, commits the offence of bribery and is liable on conviction to a fine not exceeding seventy two currency points or imprisonment not exceeding three years or both.*
- 2) *A person who receives any money, gift or other consideration under subsection (1) also commits the offence under that subsection.*
- 3) *Subsection (1) does not apply in respect of the provision of refreshments or food -*
15 *(a) offered by a candidate or candidate's agent who provides refreshments or food as an election expense at a candidates' campaign planning and organization meeting; or*
(b) Offered by any person other than a candidate or a candidate's agent who, at his or her own expense provides the refreshments or food at a candidates' campaign
20 *planning and organization meeting.*
- 4) *An offence under subsection (1) shall be an illegal practice.*
- 5) *Every candidate or candidate's agent who, by himself or herself or any other person, directly or indirectly, before the close of polls on polling day offers, procures or provides or promises to procure or provide any alcoholic beverage to any person commits an illegal practice.*

25 In ***Kiiza Besigye vs Yoweri K. Museveni; S.C Election Petition Appeal No. 001 of 2001***, the Supreme Court outlined the ingredients of bribery as follows.

- 1) Money, a gift or other consideration was given to a voter.
- 2) A candidate or his agent with his knowledge and consent or approval gave the
30 gift.

3) The gift was given to induce a voter to vote for the candidate or refrain from voting another candidate.

(See also; Mathina Bwambale vs. Crispus Kiyonga and the Electoral Commission; Election Petition No.007 of 2007)

5

To prove the above ingredients, the petitioner relied on the evidence of **Sowa Obadiah Elupot**, one of his campaign agents, who stated in paragraph 4 & 5 of his affidavit that while at Nariwogum Epie Tree Shade Polling station, he saw two agents of the 1st Respondent, Lopeyok Abraham and Choken Issac Fredrick, who were talking to voters in the queue and that on moving closer, he saw the said Lopeyok Abraham giving a 5000/= note to a one Ekope Lokol, a registered voter, and heard him tell the said Ekope Lokol to vote for the 1st Respondent. He further stated that he saw Choken Isaac give a police officer by the name Ochaya 6000/=. The witness added that he reported a case of bribery to Loyoro police under SD REF 09/14/2021 which saw officer Ochaya searched and found in possession of the 6000/= received from Choken Isaac. This evidence falls short of the required standard of proof for five reasons;

First, the deponent is a campaign agent of the petitioner and therefore susceptible to peddling lies. His evidence must be corroborated by independent cogent evidence. Secondly, the deponent did not prove that the offenders, Lopeyok Abraham and Choken Issac Fredrick are indeed agents of the first respondent. He ought to have attached an appointment letter or other evidence showing that the two offenders were agents of the first respondent in order to attribute their acts to the first respondent. Thirdly, the deponent did not prove that the receiver of the bribe, Ekope Lokol, is a registered voter. This is because he attached an uncertified Voters Register, which is inadmissible per section 75 & 76 of the Evidence Act.

Further, the deponent failed to show that the said Lopeyok Abraham and Choken Issac Fredrick were acting with the knowledge and consent or approval of the 1st respondent. Lastly, the witness did not attach proof of that he filed the bribery case which he claimed

was referenced under SD REF 09/14/2021. Further, **Engor Steven Loyee**, who was the petitioner's polling agent at Epie Tree shade polling station purported to corroborate the testimony of Sowa Obadiah Elupot. However, being a partisan witness, his testimony required corroboration itself and could not therefore purport to corroborate other evidence. (See *R vs. Baskerville [1916] 2 KB 658*).

The petitioner also sought to rely on the affidavit of **Ekope Lokol** who stated that he received a bribe of 5,000/= from Lopeyok Abraham and Choken Issac Fredrick in consideration for voting the first respondent. This witness did not prove that he is a registered voter. The Voters Register attached to his affidavit is inadmissible for want of certification in compliance with section 75 & 76 of the Evidence Act. Further, the petitioner relied on the evidence of **Lokapel Paul** his polling agent at Kotirae Primary School Polling station, who stated in paragraph 5 of his affidavit that he saw Lokol Simon and Lukutae Abdirashid handing over 5,000/= to Anguria Taoia and Logel Paul and telling them to vote for the 1st Respondent. This witness did not prove that Lokol Simon and Lukutae Abdirashid were agents of the first respondent. He ought to have adduced an appointment letter to that effect. Secondly, the witness did not show that the said agents were acting with the knowledge and consent or approval of the first respondent. Thirdly, the witness did not show that the recipients of the money, namely, Anguria Taoia and Logel Paul were registered voters. The Voters Register submitted by the witness was uncertified and therefore inadmissible.

The petitioner relied on the affidavit of **Akol Sisto**, who stated in her affidavit at paragraphs, 2, 3 and 4 that she saw Lochola Johnson, the 1st Respondent's known agent and supporter giving money, 2000/= to Nakiru Cecilia and Alinga Dominic, with the request that they vote for the 1st Respondent. The evidence of Akello Hellen, a registered voter at Lopeeru Johnson ECD Centre Polling station, apparently corroborated this evidence. Just like the other witness, Akol Sisto and Allen did not prove that the recipients of the money, namely, Nakiru Cecilia and Alinga Dominic, were registered voters by tendering a certified copy of the National Voters Register.

They also did not prove that Lochola Johnson was indeed an agent of the first respondent or that he was acting with the knowledge and consent or approval of the first respondent.

5 Lastly, the petitioner sought to rely on the evidence of **Lokiru Isaac Ngoya**, who stated that a one Lengamoe John Bosco, an agent of the 1st Respondent, gave a bribe of 5000/= and kwete, (a local brew) to people in the polling queue, asking them to vote the 1st Respondent. This evidence does not prove that registered voters were bribed with the knowledge and consent or approval of the respondent. In the case of **Kamba**
10 **Saleh Moses vs. Hon. Namuyangu Jennifer; Election Petition Appeal No. 027 of 2011**, court held that the standard of proof in allegations of voter bribery is slightly higher than that of ordinary balance of probabilities and it must be to the satisfaction of court. Further, the petitioner has to prove that the people bribed were voters, and if agents did the bribery, it was done with the knowledge and consent or approval of the
15 respondent, with the intention of inducing them to vote the respondent or not to vote the petitioner. This court finds that the petitioner failed to prove the allegations of the offence of bribery against the first respondent to the satisfaction of court.

The petitioner further alleged that the first respondent committed the electoral offence
20 of procurement of prohibited persons to vote contrary to section 69 of the Parliamentary Elections Act. To prove this allegation, the petitioner relied on the affidavit of Keno Marko who stated in paragraph 4 & 5 of his affidavit that he is a staunch supporter of the petitioner and that he saw uniformed soldiers voting multiple times at his polling station, Toroi Mission West Catholic church polling station. This
25 witness did not mention any of the soldiers who voted multiple times or that the first respondent procured the said soldiers to vote contrary to section 69 of the Parliamentary Elections Act. Further, the witness being a partisan witness who is susceptible to peddling lies for purposes of ensuring the petitioner's political victory, this court cannot rely solely on his affidavit. In this regard, the court is guided by the
30 position in **Kirya Grace Wanzala Vs Nelson Lufafa & Electoral Commission;**

Election Petition Appeal No. 0104 of 2016 where it was held that in an election petition, the uncorroborated evidence of a partisan witness should not be relied on. In the result, this court finds that the petitioner failed to prove the offence of procurement of prohibited persons to vote contrary to section 69 of the Parliamentary Elections Act.

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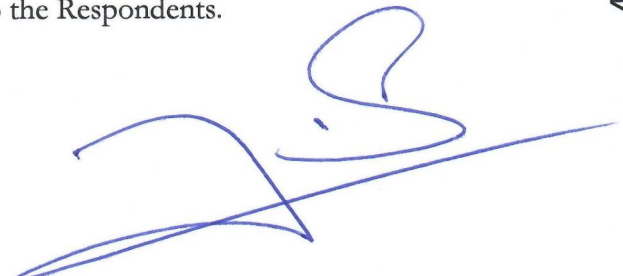
Issue No. 5

What remedies are available to the parties.

According to the record of pleadings, the petitioner prayed for a declaration that the first respondent was not validly elected, and an order that the election of the first
10 respondent be set aside and a new election be ordered. He also prayed for costs of the petition. On the other hand, the respondents prayed that the petition be dismissed with costs.

Section 61(1)(a) & (b) of the Parliamentary Elections Act provides that the election of
15 candidate as a Member of Parliament shall only be set aside on the grounds of non-compliance with the Parliamentary Elections Act if the court is satisfied that there has been a failure to conduct the election in accordance with the principles laid down in the Act and that non-compliance affected the result of the election in a substantial manner, or if it is proved to the satisfaction of court that an illegal practice or electoral offence
20 was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval.

Section 63(4)(a)(b) & (c) of the Parliamentary Elections Act further provides that after due inquiry, the court hearing an election petition may dismiss the petition or declare
25 that a candidate other than the candidate declared elected was validly elected; or set aside the election and order a new election. In the present petition, the petitioner has failed to prove to the satisfaction of court that there was non-compliance with the Parliamentary Elections Act and that the first respondent committed the electoral offences of bribery and procurement of prohibited persons to vote. In the result, this
30 petition fails and is dismissed with costs to the Respondents.



Certificate of two counsel

Counsel for the first respondent prayed for a certificate of two counsel on the basis that the petition was quite involving and the second respondent instructed and retained the legal services of three law firms. For this proposition, counsel relied on the case of ***Mutembuli Yusuf Vs Nagwomu Musamba (Supra)***.

Rule 41 (1) of The Advocates (Remuneration and Taxation of Costs) Rules, S.I. 267-4, provides as follows;

10

The costs of more than one advocate may be allowed on the basis hereafter provided in causes or matters in which the judge at the trial or on delivery of judgment shall have certified under his or her hand that more than one advocate was reasonable and proper, having regard, in the case of a plaintiff, to the amount recovered or paid in settlement or the relief awarded or the nature, importance or difficulty of the case and, in the case of a defendant, having regard to the amount sued for or the relief claimed or the nature, importance or difficulty of the case.

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(See also: The Electoral Commission v Kidega Nabinon James, High Court Civil Appeal No. 076 of 2016).

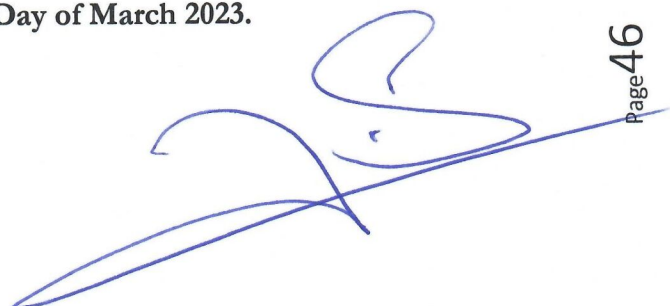
This court agrees that the circumstances of the case justify the award of a certificate of two counsel. Therefore, the 1st respondent is awarded a certificate of complicity for two counsel premised on the volume of work involved in this petition and the substantial amount of research in drafting submissions and preparation of pleadings including several affidavits and compilation of evidence. Further, the record shows that lawyers represented the first respondent from three law firms, namely M/S Ochieng Associated Advocates and Solicitors, Tebyasa & Co. Advocates and Gem Advocates.

25

It is so ordered.

Dated and Delivered at Soroti this 9th Day of March 2023.

30





Isah Serunkuma
JUDGE