

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA HOLDEN AT SOROTI  
ELECTION PETITION NO. 007 OF 2021

5 ARIKO JOHNNY DE WEST ..... PETITIONER

VERSUS

1. OMARA YUVENTINE  
10 2. THE ELECTORAL COMMISSION ..... RESPONDENTS

BEFORE: Hon. Justice Isah Serunkuma

JUDGEMENT

15

This petition was first heard by the Hon. Justice Jane Okuo Kajuga who dismissed it in her ruling of 26<sup>th</sup> August 2021 on a preliminary point of law that the petition was brought under the wrong law, namely, Section 4 of the Parliamentary Elections Act, 2005 instead of the Local Governments Act, Cap. 243 that governs local council  
20 elections. The petitioner was dissatisfied with the ruling and appealed to the Court of Appeal in Election Petition Appeal No. 041 of 2022. The learned Justices of Appeal, the Honorable Deputy Chief Justice Richard Buteera, Catherine Bamugemereire and Irene Mulyagonja, JJA in their decision delivered on 19<sup>th</sup> July 2022 found that the trial judge  
25 erred in law when she held that the petition was filed under the wrong law in spite of many other provisions that were cited at the head of the petition. The Court of Appeal accordingly set aside the decision and orders of the trial Judge dismissing the petition with costs and ordered that the petition be returned to this court for hearing on its merits.

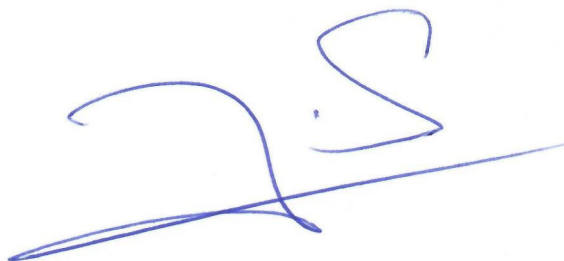


The facts of the petition are stated in the decision of the trial judge and of the court of appeal as follows: The petitioner and the first respondent contested as the only two candidates for the position of district chairperson for Abim in the local council elections organized by the second respondent on 20<sup>th</sup> January 2021. The second respondent  
5 returned the first respondent as the elected candidate with the highest number of votes having garnered 14,417 votes against the petitioner's 4,809 votes. The second respondent declared the first respondent as the winner of the election and the results were published in the Uganda Gazette of 12<sup>th</sup> April 2021. The petitioner being dissatisfied with the outcome of the said elections filed a petition because the first  
10 respondent was not qualified to be nominated for election as district chairperson at the time of nomination between 20<sup>th</sup> September 2020 and 5<sup>th</sup> October 2020. He contended that when the first respondent was nominated on 28<sup>th</sup> September 2020, he had not resigned from his employment in the Uganda Peoples' Defence Forces (UPDF) where he was serving at the rank of Captain. The petitioner prayed that the election of the  
15 first respondent be annulled with effect that the petitioner be declared elected unopposed.

### ***Representation***

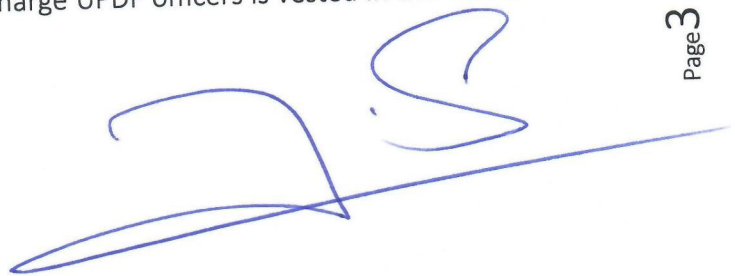
At the rehearing of the petition on 14<sup>th</sup> November 2022, the petitioner was jointly  
20 represented by learned counsel Mr. Judy Byamukama of J. Byamukama & Co. Advocates and learned counsel Innocent Okongo of Kob Advocates. Learned counsel Andrew Obam of Loi Advocates represented the first respondent, while learned counsel Nasser Sserunjoji of Magna Advocates represented the second respondent. The parties had not scheduled the petition by the time it was dismissed on the preliminary objection.  
25 On the date of the rehearing, this court granted the parties leave to file a Joint Scheduling Memorandum, which they did. The parties also filed written submissions, which have been duly considered, by the court.

### ***Submissions of the petitioner***



Learned counsel for the petitioner submitted that the first respondent was unlawfully nominated to contest for the position of district chairperson, Abim district because he was, at the time of nomination on 28<sup>th</sup> September 2020, a serving officer at the rank of Captain in the Uganda Peoples Defence Forces (UPDF). He referred to the evidence of the petitioner showing that the first respondent still drew full monthly salary and allowances from the UPDF service. Counsel submitted that under Article 208(2) of the Constitution, the UPDF is non-partisan and therefore a serving officer who desires to seek political office must first resign his or her position in compliance with section 99 of the UPDF Act, Regulation 31(3) of the Uganda Peoples' Defence Forces (Conditions of Service) (Officers) Regulations S.I No. 307-2 and Regulation 2(f) of the Uganda Peoples' Defence Forces (Discharge) Regulations S.I No. 307-3. Counsel relied on Article 183(2) of the Constitution and section 16(a), (b) and (d) of the Political Parties and Organizations Act, 2005 which proscribes a member of the UPDF from being a member of a political party or holding office in a political party. He contended that contrary to the above laws, the first respondent participated in the NRM Party Primary elections while still an active UPDF officer.

Counsel contended that resignation from the UPDF is through the issuance of a Discharge Certificate that must indicate the army number, name of officer, date of retirement and cause of retirement of the officer. He relied on the case of *Attorney General v Major General David Tinyefuza; Constitutional Appeal No. 001 of 1997 at page 37* for his submission. Counsel argued that the document relied on by the 1<sup>st</sup> respondent to prove his retirement from the UPDF is an internal Memorandum between the Military Assistant, Chief of Defense Forces (CDF) to the Joint Chief of Staff (JCOS) and not a Discharge Certificate prescribed under regulation 31(3) of the Uganda Peoples' Defence Forces (Conditions of Service) (Officers) Regulations. Further, counsel submitted that the Military Assistant – CDF did not have the mandate to discharge the first respondent. The mandate to discharge UPDF officers is vested in the Commission



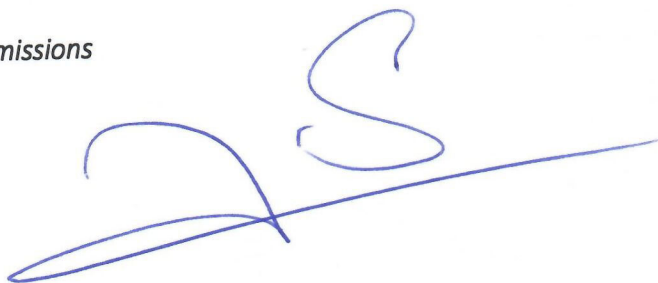


Board under regulation 4(d) of the Uganda Peoples' Defence Forces (Conditions of Service) (Officers) Regulations.

5 The petitioner's counsel further submitted that the first Respondent failed to prove that he retired from the UPDF before his nomination thereby failing to discharge the evidential burden. He relied on the case of *Kamo Enterprises Ltd v Krystalline Salt Limited; SCCA No. 008 of 2018* at page 15 where it was held that judgment may be entered against a party who fails to discharge the evidential burden of proof.

10 Lastly, counsel submitted that the second respondent failed in its statutory duty prescribed under section 15(1) of the Electoral Commission Act, Cap 140 when it refused to hear two pre-polling complaints raised by the petitioner touching the 1<sup>st</sup> respondent's nomination. He relied on the case of *Kasirye Fred v Bazigatirawo Kibuuka Francis Amooti and Anor; Election Petition Appeal No. 001 of 2018 at page 10* where it  
15 was held that the Electoral Commission must resolve all disputes arising prior or during nominations before voting. In the premises, counsel prayed that this court annuls the election of the first respondent and declares the petitioner to be the lawfully nominated and elected winner of the impugned election. For this prayer, counsel relied on the decision of the Court of Appeal in the case of *Wakayima Musoke Nsereko & Electoral  
20 Commission v Sebunya Robert; Election Petition Appeal No. 050 & 102 of 2016 at page 14* where it was held that once a candidate declared as winner of an election is found to have been wrongfully nominated, he must be removed from the scene and results of duly nominated candidates considered with the runner up being the true winner. In the  
25 alternative, counsel prayed that the court sets aside the election and orders a fresh election for Abim District Chairperson. He also prayed that the second respondent meet costs of the petition.

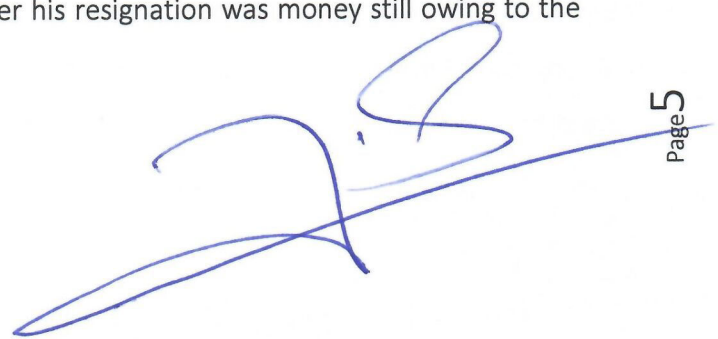
*First Respondent's submissions*





Learned counsel for the first respondent submitted that the dispute regarding the eligibility for nomination of the first respondent ought to have been raised and determined before the polls in accordance with section 15 of the Electoral Commission Act. He relied on the case of *Akol Ellen Odeke v Okodel Umar; Election Petition Appeal*  
5 *No. 006 of 2020* where it was held that the Constitution under Article 61(1)(f) confers original jurisdiction on the Electoral Commission to settle disputes arising before and on polling day. Counsel also relied on the case of *Komakech Christopher & Electoral Commission v Odonga Otto; Consolidated Election Petition No. 002 and 006 of 2021*  
10 where the Court of Appeal held that the right procedure to be followed by an aggrieved party is to first file a complaint for non-qualification at the Electoral Commission and if the party is dissatisfied with the finding of the Electoral Commission, he or she may appeal to the High Court. Counsel submitted that the petitioner ought to have first filed the complaint with the Electoral Commission under Article 61(1) (f) of the Constitution, and then proceeded to appeal to the High Court under Article 64(1) of the Constitution  
15 if he was dissatisfied with the decision of the Electoral Commission. Counsel contended that the petitioner waived his right to complain to the Electoral Commission and to appeal against the decision of the Electoral Commission within the stipulated time and as such, he would be estopped from doing so after the election.

20 In reply to the contention that the first respondent was still a UPDF officer at the time of his nomination, counsel submitted that the first respondent lawfully resigned from the UPDF before his nomination. He contended that the Chief of Defence Forces, being the Chairperson of the Commission Board established under section 20 of the UPDF Act with the mandate to discharge officers, had the authority to determine the petitioner's  
25 resignation. Further, counsel argued that it was common practice by the UPDF to continue paying salaries to its officers after discharge. He further reiterated that the money paid to the first respondent after his resignation was money still owing to the first respondent by the UPDF.



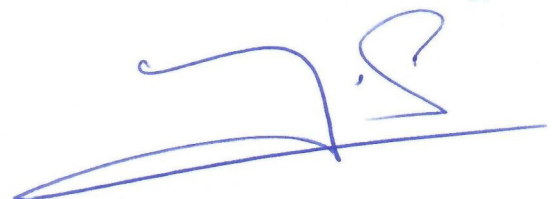
Counsel submitted that regulation 31(3) of the Uganda Peoples' Defence Forces (Conditions of Service) (Officers) Regulations which the petitioner sought to rely on only applies to circumstances where a UPDF officer has reached the age of 50 years and retired from service. Counsel sought to draw a distinction between resignation and voluntary retirement. He relied on the case of Asha *Ram Suryavanshi v Chhattisgarh Gramin Bank (Chhattisgarh High Court) Appeal No. WPS 1692 of 2011* and the decision of the Supreme Court of India in *UCO Bank and others v Sanwar Mal (2004) 4 SCC 412*, where it was held that while an employee may resign at any point in time, the case of retirement requires the employee to attain a certain age or upon completion of qualifying service. In the premises, counsel contended that the provisions of regulation 31(3) of the Uganda Peoples' Defence Forces (Conditions of Service) (Officers) Regulations did not apply to the first respondent who resigned from the service of the UPDF. Counsel contended that the first respondent lawfully resigned from the UPDF on 20<sup>th</sup> June 2020 before his nomination. He referred to the 1<sup>st</sup> respondent's Certificate of Service which he contended complied with all the requirements listed under regulation 31(3) of the Uganda Peoples' Defence Forces (Conditions of Service) (Officers) Regulations.

With regard to the submission that the second respondent failed to hear the petitioner's pre-polling complaints, counsel submitted that the second respondent exercised its mandate without fault based on the evidence put before it showing that the first respondent had duly resigned from the UPDF. In the premises, counsel prayed that this petition be dismissed with costs and the first respondent be declared to have been duly nominated and elected as the district chairperson for Abim District.

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#### *Second Respondent's submissions*

Learned counsel for the second respondent submitted that the second respondent heard and determined the Petitioner's complaints *inter parties* and resolved that the first Respondent was duly discharged from his duties with the UPDF and was therefore eligible





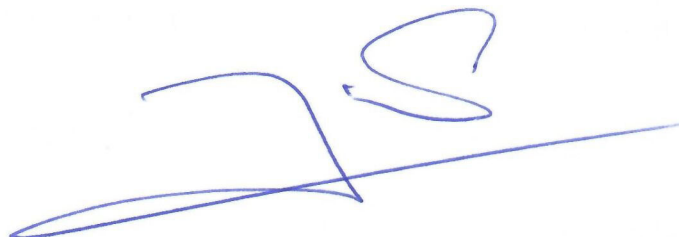
for nomination. Counsel submitted that the petitioner ought to have appealed the decision of the second respondent to the High Court but instead he opted to proceed and contest in the election. In the premises, counsel contended that the petitioner is estopped from raising the same complaint by way of a petition under section 61(d) of the Parliamentary Elections Act after losing the election. For this submission, counsel relied on the case of *Kasirye Zimula Fred V Bazigatirawo; Election Petition Appeal No. 006 of 2020*. Counsel also relied on *Kahumbu V National Bank of Kenya (2003) 2 EA 475* and the case of *Housing Finance Bank Ltd V Edward Musisi; CoA Misc. Application No. 0158 of 2020* for the submission that a court order is valid and binding unless it is appealed against, amended or set aside and any party aggrieved with it or having misgivings about the efficacy of the order has only a remedy in an appeal.

Counsel further submitted that this court has no jurisdiction under *Section 66-64 of the Parliamentary Election Act* to entertain this petition. He relied on the decision of the Court of Appeal in *Grace Nalubega versus Juliet K Suubi Kinyamatama; Election Petition Appeal No. 027 of 2021 para 26-31*, where it was held that a party who failed to pursue remedies against the nomination of a candidate under *Article 61(1) (f) and 64(1) of the Constitution, Section 15 of the Electoral Commission Act and Section 15(a) & (b) of the Parliamentary Elections Act 2005* cannot maintain a petition under section 61(a) & (d) Parliamentary Elections Act where he was aware of the factors that would disqualify the candidate.

20

With regard to the contention that the first respondent was unlawfully nominated, counsel submitted that the issue of continuing to receive salary after one's resignation or discharge does not constitute a sufficient ground for nullifying an election. Counsel relied on *Woboya Vincent vs. Ssasaga Isaiah Johnny; Election Petition Appeal No. 011 of 2016* where the court noted that salary of public servants is paid in arrears and therefore cannot constitute post-retirement payment. He contended that the fact that the first respondent continued to receive payment on his account is not sufficient proof that the first Respondent was still a serving member of the UPDF.

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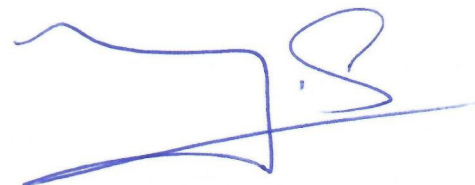


Counsel further submitted that *Regulation 28 (1) of the Uganda Peoples Defence Forces (Conditions of Service) (Officer) Regulations* is the applicable provision in the instant case and not Regulation 31(1), which the petition has relied on. Counsel added that whereas Regulation 28(1) provides for early resignation/ retirement, Regulation 31 relates to  
5 transfer of retiring officers to the reserve forces of the UPDF. Counsel contended that the Service Personnel Particulars Report attached to the Petitioner's affidavit does not amount to a Discharge Certificate, and cannot be construed as conclusive proof of the date of the first Respondent's resignation.

10 Counsel further submitted that under *Section 116(5) of the Local Government Act*, it suffices for the first Respondent to show that he submitted his resignation letter 30 days before nominations. It does not matter whether the acceptance of the resignation is delayed since the first Respondent had no duty to ensure a timely response to his resignation. Counsel relied on *Kasibo Joshua vs Mbogo Kezekia & the Electoral*  
15 *Commission; Election Petition No. 004 of 2011* where it was held that a person should not be held responsible for the delay or failure to respond to a resignation letter. Counsel referred this court to the principles in the case of *Mugema Peter Versus Mudiobole Abed Nasser; EPA No. 030/2011* and *Kubeketerya James vs. Waira Kyewalabye & Electoral Commission; Election Petition Appeal No. 097 of 2016* to the effect that the  
20 court should have regard for the will of the people and should not be quick to annul an election, unless the circumstances of the case deem so. In the premises, counsel prayed that this court declares that the first respondent was lawfully nominated and accordingly dismisses the petition with costs to the respondents.

25 *Petitioner's submissions in rejoinder*

In rejoinder, learned counsel for the petitioner reiterated that the petitioner filed a complaint with the second respondent, which the second respondent did not hear or determine. He reiterated that the first respondent could not, on his own accord, resign from the UPDF since there is a specific procedure prescribed by section 66 of the UPDF





Act and upheld by the Supreme Court in *Attorney General v Major General David Tinyefuza; SCCA No. 001 of 1997, at page 38*. Counsel further submitted that section 116(5) of the Local Government Act envisages a procedure for resignation according to the service or employment of an officer who wishes to stand for election to a Local  
5 Government Council office.

Counsel reiterated that the claim that the first respondent received salary arrears and not salary was not pleaded but raised in the respondents' submissions. He invited court to disregard this explanation. Learned Counsel for the petitioner further pointed out  
10 that the respondents' evidence regarding the first respondent's date of retirement is contradictory and unreliable. He submitted that while the first respondent averred that he was discharged on 20<sup>th</sup> June 2020, the first respondent's Personnel Service Report shows that he left the UPDF on 6<sup>th</sup> October 2020, and the second respondent claims that the first respondent resigned on 28<sup>th</sup> June 2020.

15 Lastly, counsel contended that while the second respondent claimed that it heard and determined the petitioner's complaints, it did not adduce any proof in form of minutes of its sitting or a ruling containing its decision contrary to section 8 of the Electoral Commission Act. In the absence of any proof of its sitting, the petitioner maintained  
20 that the second respondent refused to hear and determine its complaints touching the nomination of the first respondent. Counsel argued that the petitioner could not have appealed when there was no decision passed by the second respondent. He reiterated that the petitioner led credible evidence to discharge the onus of proof required and was therefore entitled to the prayers sought in the petition.

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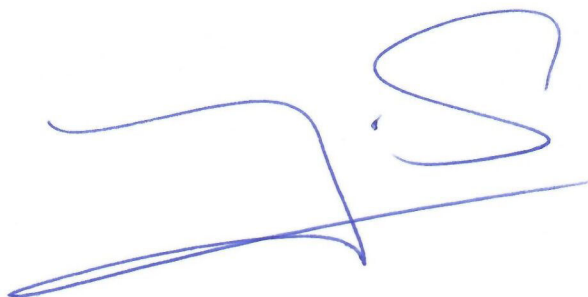
### *Court's analysis*

I have carefully considered the pleadings, written submissions of both parties and authorities cited. The respondents raised a preliminary point of law that this court will first resolve before delving into the merits of the petition. Learned counsel for the



respondents submitted that this court did not have jurisdiction to hear and determine this petition as a matter of first instance on grounds that the dispute in question, namely the nomination of the 1<sup>st</sup> respondent, formed the crux of the petitioner's pre-polling complaint made to the second respondent, the Electoral Commission. Counsel  
5 contended that pre-polling complaints ought to first be made to the Electoral Commission under Article 64(1) (f) of the Constitution and section 15 of the Electoral Commission Act and can only be entertained by this court as an appeal from the decision of the Electoral Commission. He contended that in matters of pre-polling complaints, the High Court only has jurisdiction as an appellate court in appeals from  
10 the decisions of the Electoral Commission. To support this submission, counsel relied on the case of *Akol Ellen Odeke v Okodel Umar; Election Petition Appeal No. 006 of 2020* and *Kasirye Zimula Fred v Bazigatirawo; Election Petition Appeal No. 006 of 2020*. He argued that the petitioner, having waived his right to appeal against the decision of the Electoral Commission was estopped from raising the same pre-polling complaint by way  
15 of a petition filed in the High Court.

This petition was filed under Article 183(2)(a), 180(2)(a), 61(a)(b)(f) and 62 of the Constitution, section 15 of the Electoral Commission Act, section 111-115, **138, 139**, 141, 142, 143 and 172 of the Local Government Act (as amended), section 4(4)(a) of  
20 the Parliamentary Elections Act, 2005 (as amended) and section 16(2) of the Political Parties and Organizations Act. **Section 138(1) of the Local Government Act** provides that an aggrieved candidate for chairperson may petition the High Court for an order that a candidate declared elected as chairperson of a local government council was not validly elected. One of the grounds for filing a petition under section 138(1) above is where an  
25 aggrieved party claims that the respondent was at the time of his or her election not qualified or was disqualified from election. According to **section 139(d) of the Local Government Act**, this ground, if proved to the satisfaction of the court warrants the setting aside of an election.






The present petition falls well within the provisions of section 138(1) and 139(d) of the Local Government Act because the petitioner seeks to challenge the election of the first respondent on grounds that he was not qualified for nomination as District Chairperson for Abim district. On this basis, I do not agree with counsel for the respondents that this court does not have jurisdiction to hear the petition. I am guided in my finding by the decision of the learned Justices of the Court of Appeal in *Ariko Johnny De West v Omara Yuventine & Electoral Commission; Election Petition Appeal No. 041 of 2021 at page 28 para. 1 – 4* where it was held that the High Court had jurisdiction to entertain this petition brought under section 138 and 139 of the Local Government Act and section 16 of the Political Parties and Organizations Act. I am further fortified in this finding by several cases where this court has heard and determined petitions of a similar nature such as the case of *Magombe Vincent v the Electoral Commission & Namugali Wamatabu Cassim; Election Petition No. 019 of 2021 [2021] UGHCEP 19* where this court determined an election petition filed under section 138(1) of the Local Government Act challenging the election of the respondent in that case who was elected District Chairperson for Mbale City in the general election conducted on 20<sup>th</sup> January 2021. In the result, the preliminary point of law fails and the court shall proceed to determine the merits of the petition.

The parties framed three issues for determination in their Joint Scheduling Memorandum, namely

1. Whether the first respondent was lawfully nominated to contest for the position of District Chairperson, Abim.
2. Whether the second respondent determined the petitioner's pre-polling complaints regarding the validity of the first respondent's nomination.
3. Whether the petitioner is entitled to the remedies sought.

*Burden and standard of proof*



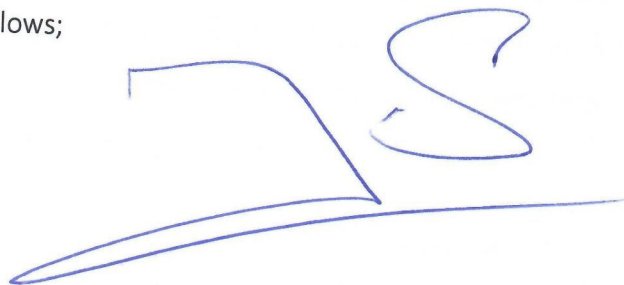
In the hearing of Local Government Council elections, **Section 143 of the Local Government Act** mandates this court to apply the powers and rules of procedure applicable in ordinary civil actions by a court of law. In ordinary civil actions, the burden of proof lies on the petitioner who has the onus to prove the allegations raised in his  
5 petition to the required standard of proof on a balance of probability. (**Section 101(1) and 102 of the Evidence Act, Cap. 6, the case of *Mwiru Paul v Hon. Igeme Nabeta & others; Election Petition Appeal No. 006 of 2011; Mukasa Anthony Harris v Dr. Michael Lulume Bayiga; Election Petition Appeal No. 018 of 2007, CA***)

Therefore, it is the petitioner in this case who bears the burden of proving all allegations  
10 raised against the respondents to the satisfaction of this court. The petitioner is required to adduce cogent, convincing and compelling evidence to prove his allegation that the first respondent was not qualified for nomination as district chairperson, Abim district at the time of nomination and that the second respondent failed or refused to entertain his pre-polling complaints contrary to its statutory duty. (**See: *Matsiko Winifred Komuhangi v Babihuga J. Winnie; Election Petition Appeal No. 009 of 2002.***)  
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**Issue 1: Whether the first respondent was lawfully nominated to contest for the position of District Chairperson, Abim.**

20 The crux of the petitioner's claim under issue one is that the first respondent was unlawfully nominated to contest for the position of District Chairperson, Abim district because he had not resigned or retired from the UPDF by the time of his nomination. On the other hand, the respondents contended that the first respondent was duly  
25 nominated by the second respondent having properly or legally resigned from the UPDF before nomination. According to **Section 99 of the Uganda Peoples' Defence Forces Act, 2005** a UPDF officer who wishes to seek political office must first resign or retire from the UPDF. The section provides as follows;

99. Political office





*A serving officer or militant who desires to seek political office shall first resign or retire from the Defence Forces according to regulations made by the Minister.*

My understanding of the above provision is that any member of the UPDF who wishes to contest for a political office must first resign or retire in a manner prescribed by Regulations made by the Minister responsible for defence. The Regulations made by the Minister include the Uganda Peoples' Defence Forces (Conditions of Service) (Officers) Regulations S.I No. 307-2 and the Uganda Peoples' Defence Forces (Discharge) Regulations S.I No. 307-3. Section 99 of the UPDF Act is in tandem with section 16(1) of the Political Parties and Organizations Act, 2005 that proscribes members of the UPDF from participating in political party activities. It provides that: -

*16. Certain persons not to participate in political party or political organization activities.*

*(1) A member of the Uganda Peoples Defence Forces, the Uganda Police Force, the Uganda Police Force, the Uganda Prisons Service or a public officer or a traditional or cultural leader or a person employed in a company wholly owned by the government shall not -*

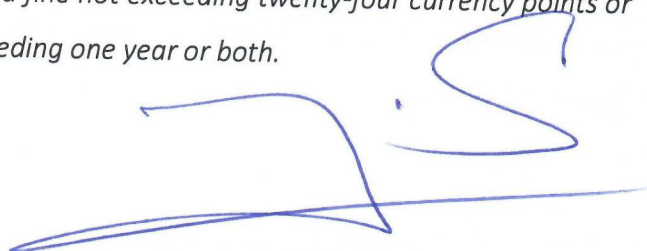
*(a) Be a founder, promoter or other member of a political party or organization;*

*(b) Hold office in a political party or organization;*

*(c) Speak in public or publish anything involving matters of political party or organization controversy; or*

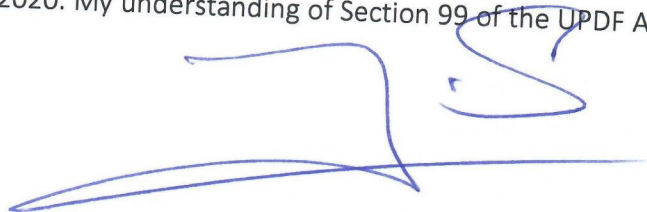
*(d) Engage in canvassing in support of a political party or organization or of a candidate standing for public election sponsored by a political party or organization.*

*(2) Any person who contravenes subsection (1) commits an offence and is liable on conviction, to a fine not exceeding twenty-four currency points or imprisonment not exceeding one year or both.*



The rationale for the prohibition in section 99 of the UPDF Act and section 16 of the of the Political Parties and Organizations Act may be traced under **Article 208(2) of the Constitution of the Republic of Uganda** which provides that the Uganda Peoples' Defence Forces shall be **non-partisan**, national in character, patriotic, professional, disciplined, productive and subordinate to the civilian authority as established under this Constitution. The requirement to resign from public office or government employment before contesting for a political office is also intended to level the playing field and minimize or eliminate unfair advantage. In the case of *Eddie Kwizera v Attorney General; Constitutional Petition No. 014 of 2005, page 8*, the Constitutional Court while determining a dispute made under Article 80(4) of the Constitution and Section 4(4)(a) of the Parliamentary Elections Act, which are *in pari materia* with section 99 of the UPDF Act, held that the provisions were enacted to level the playing field in an attempt to ensure free and fair elections provided for under Article 1(4) of the Constitution. The court observed that the political class, who are the main players in the electoral playing field, are better equipped or facilitated by the state than any other ordinary applicant, thereby requiring them to first resign office before contesting for any national elective position. This proposition was maintained by this court in *Emorut Simon Peter v Akurut Violet Adome & Electoral Commission; HCEP No. 002 of 2016, page 15-16*, where David Wangutsi, J emphasized that Article 80(4) of the Constitution was intended to eliminate those that would take advantage of government resources to campaign as against those who are not in such employment. (See also: *Darlington Sakwa & Anor v The Electoral Commission & 44 Ors.; Constitutional Petition No.008 of 2006, Mukasa Kikonyogo, JA at page 16*.

Having established as I have that the 1<sup>st</sup> respondent was required to resign or retire from the UPDF before contesting for district chairperson in accordance with section 99 of the UPDF Act, the question before this court is whether, as a matter of fact, the 1<sup>st</sup> respondent resigned from the UPDF in a manner envisaged by the UPDF Act before his nomination on 28<sup>th</sup> September 2020. My understanding of Section 99 of the UPDF Act





is that resignation or retirement from the UPDF must be done in a manner prescribed by the Regulations made by the Minister of Defense. The UPDF Act and Regulations, namely, the Uganda Peoples' Defence Forces (Conditions of Service) (Officers) Regulations S.I No. 307-2 and the Uganda Peoples' Defence Forces (Discharge) Regulations S.I No. 307-3 set out the procedure for resignation to be followed, including the necessary documentation, mode of application, and the forum or authority responsible.

Section 66 of the UPDF Act prescribes the manner of resignation as follows: -

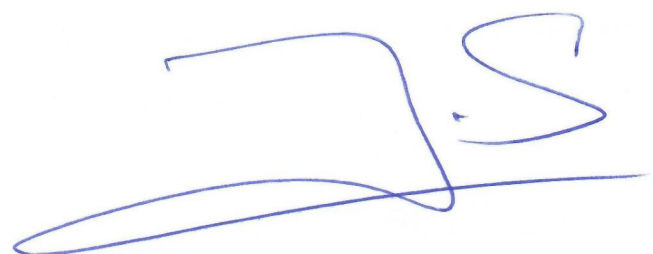
- 10        *66. Resignation of commission*
- (1) An officer may in writing tender the resignation of his or her commission to the Board but shall not, unless otherwise ordered by the Chief of Defence Forces, be relieved of the duties of his or her appointment until he or she has received notification, in writing, of the approval of his or her resignation by the Board.*
- 15        *(2) The Board shall notify an officer of its decision on his or her commission within ninety days after receipt of his or her application, and the approval of an application to resign the commission shall not be unreasonably withheld.*

In line with section 66 above, Regulation 28(1) of the Uganda Peoples' Defence Forces (Conditions of Service) (Officers) Regulations provides further that;

- 20        *28. Resignation and retirement.*
- (1) The board may permit any officer to resign his commission in writing at any stage in his service or to retire on pension after a minimum of thirteen years of reckonable service.*
- 25        It is evident from the provisions above that the forum or authority responsible for discharging UPDF officers is the Board. According to section 2 of the UPDF Act, the Board referred to under Section 66(1) of the UPDF Act is the Commission Board established by section 20 of the UPDF Act, and Regulation 3(1) of the Uganda Peoples' Defence Forces (Conditions of Service) (Officers) Regulations. Therefore, the

Commission Board is the appropriate forum or authority to which an application for resignation from the UPDF may be made. I am not persuaded by the submission of counsel for the 1<sup>st</sup> respondent that the Chief of Defence Forces, to whom the 1<sup>st</sup> respondent's application for resignation was addressed, is the right authority to  
5 determine the application since he serves as the Chairperson of the Commission Board per section 20(1)(a) of the UPDF Act. If the legislators had intended so, they would have expressly vested that mandate in the Chief of Defence Forces under section 66 of the UPDF Act. The only mandate vested in the Chief of Defences Forces under section 66(1) of the UPDF Act is the power to relieve an officer who has applied for resignation or  
10 retirement of his duties pending the decision of the Commission Board. Thus, where the Chief of Defence Forces has granted no such relief, the applicant for resignation or retirement must continue performing his or her duties until he or she has received notification in writing of the approval of his or her resignation by the Commission Board.

15 The Supreme Court exhaustively guided on the effect of addressing a resignation letter to a wrong person or authority in the case of *Wasike Stephen Mugeni v Aggrey Awori Siriyoyi; Supreme Court Election Petition Appeal No. 005 of 2007*. The appellant in that case contested for Samia Bugwe North Parliamentary Constituency, Busia District in the 2006 national elections. Prior to the elections, he was employed as Town Treasurer of  
20 Busia Town Council. He addressed his resignation letter to the Town Clerk, Busia Town Council, instead of addressing and delivering it to the District Service Commission, which was his appointing authority according to Section 55(1) of the Local Government Act. The respondent challenged his nomination on grounds that he was not a qualified person for nomination to contest for the Parliamentary election seat because by the  
25 date of nomination, he had not effectively resigned his office of Town Treasurer as required by law. The Supreme Court held that the effect of addressing a resignation letter to a wrong authority is that at the time of nomination, the person is deemed to have not effectively resigned his position and therefore, does not qualify nomination to





contest in the election as a Member of Parliament. (See also; *Abbot George Ouma v Electoral Commission & Anor; High Court Election Petition No. 005 of 2011*).

The timeline for resignation is prescribed by **Section 116(5) of the Local Government Act** which provides that any person employed in any government agency or department who wishes to stand for election to a local government office is required to resign at least 30 days before the nomination day in accordance with the procedure of the service to which he or she belongs. I do not agree with learned counsel for the second respondent's submission that it suffices for the first respondent to show that he submitted his resignation letter 30 days before nomination, regardless of whether the acceptance of the resignation is delayed. Section 66(1) of the UPDF Act and section 116(5) of the Local Government Act prescribe in terms of resignation or retirement before nomination. The timeline prescribed is for resignation or retirement and not for an application to resign or retire. The essence of the provision is that the candidate must have resigned or retired from the UPDF by the time of his or her nomination. In my view, resignation is effective and deemed complete if the application was made to the authorized person or body, using the prescribed form or instrument, and the application has been accepted or approved in writing, in accordance with the prescribed procedure. This is fortified by Section 66(1) UPDF Act which provides that the officer *'shall not, unless otherwise ordered by the Chief of Defence Forces, be relieved of the duties of his or her appointment until he or she has received notification, in writing, of the approval of his or her resignation by the Board.'*

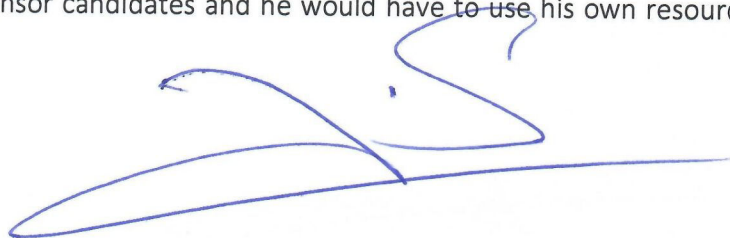
I am further persuaded by the decision of the Supreme Court in *Attorney General v Major General David Tinyefuza, Constitutional Appeal No. 001 of 1997 at page 38*, where it was held that: -

*"Therefore, for an officer to resign or leave the armed forces, the officer cannot do so at will or without the formalities and procedures as prescribed by law being complied with. It certainly would be a matter of great danger to the national*

*security, if it were ever to be held by anyone or authority that members and officers of the Uganda Peoples' Defence Forces could resign or be removed at will and anyhow outside the law.'*

In the present petition, the petitioner claims that the first respondent did not qualify  
5 for nomination and election as the district chairperson because by the time of his nomination on 28<sup>th</sup> September 2020, he had not resigned from the UPDF. To support his claim, the petitioner adduced the 1<sup>st</sup> respondent's Personal Particulars Report (Annexure A), the 1<sup>st</sup> respondent's bank statement dated 27<sup>th</sup> April 2021 and 3 pay slips showing that the 1<sup>st</sup> respondent received full monthly salaries for the months of July,  
10 August and September, 2020 (Annexures B, C & D). In opposition of the petition, the first respondent averred that he was duly nominated and elected having lawfully resigned from the UPDF and obtained a Discharge Certificate on 20<sup>th</sup> June 2020 before his nomination on 28<sup>th</sup> June 2020.

15 According to the evidence on record, the first respondent wrote to the Chief of Defence Forces on 6<sup>th</sup> June 2020 under reference No. UPDF/KRTS/2A announcing his bid to stand for election as a Member of Parliament for Labwor Constituency in Abim district in the 2021 elections. It appears the first respondent changed his mind and later decided to stand for district chairperson of Abim. On 10<sup>th</sup> June 2020, the Military Assistant – Chief  
20 of Defence Forces wrote back to the first respondent under reference No. UPDF/CDF/570/A asking him to clarify whether he was not time barred and whether he was seeking retirement from the UPDF. The first respondent replied in a letter dated 18<sup>th</sup> June 2020 under reference No. UPDF/KRTS/2A indicating that he was not time barred. He further requested for early retirement by 25<sup>th</sup> June 2020 to enable him  
25 comply with the deadline for registration, which was 29<sup>th</sup> June 2020. On 20<sup>th</sup> June 2020, under reference No. UPDF/CDF/505/A, the Military Assistant – Chief of Defence Forces wrote a memorandum to the Joint Chief of Staff (JCOS) indicating that the Chief of Defence Forces had allowed discharge, but the 1<sup>st</sup> respondent should be informed that the UPDF does not sponsor candidates and he would have to use his own resources.





This court notes that while the 1<sup>st</sup> respondent averred in paragraph 7 of his Answer to the Petition and paragraph 4 of his Affidavit in support thereof, that he obtained a Discharge Certificate from the Chief of Defence Forces and attached the same as Annexure A, what is on record appears to be a Certificate of Service of Serial No.  
5 0000058.

The above evidence does not prove that the first respondent resigned or retired from the UPDF before his nomination in accordance with the procedure prescribed by section 66 of the UPDF Act. The petitioner adduced cogent evidence showing that the  
10 first respondent continued to receive monthly salaries post his alleged discharge on 28<sup>th</sup> June 2020, including payments for July, August and September 2020 deposited to his Stanbic bank Account No. 9030003567817 as reflected on his bank statement on 29<sup>th</sup> July 2020 and 28<sup>th</sup> August 2020. I do not accept the argument of the 2<sup>nd</sup> respondent's counsel that the issue of continuing to receive salary after one's resignation is not  
15 sufficient ground to nullify an election because salaries of public servants are paid in arrears and therefore do not constitute post-retirement payment. The respondents did not plead, let alone prove that the alleged payments for July, August and September 2020 were salary arrears. Further, in the case of *Woboya Vincent v Ssasaga Isaiah Johnny; Election Petition Appeal No. 011 of 2016*, which counsel for the respondent  
20 sought to rely on for his submission, the court distinguished between salary and terminal benefits. While receipt of a salary after alleged resignation or retirement may suggest that the officer did not resign, terminal benefits support the fact of resignation or retirement. Therefore, counsel's submission is untenable in the circumstances of the present petition where the first respondent continued to receive salary for the months  
25 of July, August and September 2020 after his alleged resignation or retirement from the UPDF on 28<sup>th</sup> June 2020. I note that the first respondent's Service Personnel Particulars Report indicates 6<sup>th</sup> October 2020 as the end date for his service. This explains why he continued to receive salary for the months before October 2020. Besides, if the Chief of Defence Forces discharged the first respondent, such discharge was unlawfully done



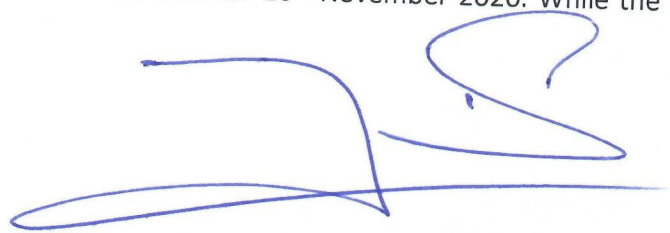
in contravention of the provisions of section 66 of the UPDF Act and this court cannot sanction such illegality. (See *Makula International v His Eminence Cardinal Emmanuel Nsubuga & another* [1982] HCB 12).

5 In the absence of a communication, in writing, from the Commission Board addressed to the 1<sup>st</sup> respondent notifying him of the Board's approval of his application to resign, this court is unable to find that the 1<sup>st</sup> respondent was duly nominated to contest for district chairperson of Abim district. In the result, this court finds that the first respondent was unlawfully nominated and elected district chairperson of Abim in the  
10 general election conducted by the second respondent on 20<sup>th</sup> January 2021.

**Issue 2: Whether the second respondent determined the petitioner's pre-polling complaints regarding the validity of the first respondent's nomination.**

The petitioner claims that he filed two pre-polling complaints with the second  
15 respondent, which refused or failed to hear and determine the complaints in accordance with its statutory duty prescribed by section 15 of the Electoral Commission Act. To support his claim, the petitioner attached copies of the complaints marked as **Annexures E and F to his affidavit in support of the petition.** On the other hand, the second respondent contended that it heard and determined the petitioner's  
20 complaints.

According to the record, Annexure E is a complaint letter dated 3<sup>rd</sup> November 2020 under reference No. JB/AR/11/20 filed with and received by the second respondent on 3<sup>rd</sup> November 2020. Annexure F is another complaint dated 9<sup>th</sup> November 2020 under  
25 reference No. A00/OA/2020 also filed with and received by the second respondent on 11<sup>th</sup> November 2020. The second respondent duly received the two complaints and by its letter dated 15<sup>th</sup> November 2020 under reference No. LEG 75/79/01, it requested the Returning Officer, Abim Electoral district, to furnish a report on the complaints before the date of hearing which was scheduled for 16<sup>th</sup> November 2020. While the





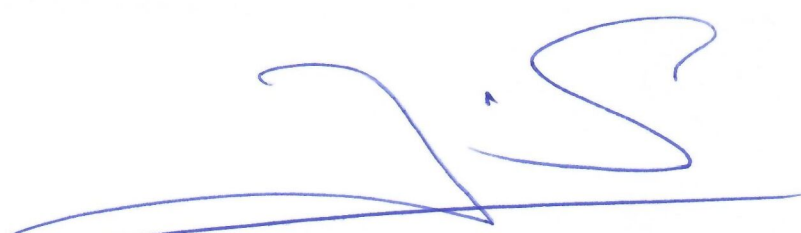
second respondent heard the complaints on 16<sup>th</sup> November 2020, there is no evidence to show that the second respondent determined the complaints by way of delivering a decision in writing. It is for this reason that the first respondent wrote to the second respondent on 29<sup>th</sup> January 2021 under reference No. A00/OA/2020 demanding a communication of its decision. In light of the above evidence, the evidential burden shifted to the second respondent to prove that it delivered a decision on the petitioner's complaints. (See Section 103 Evidence Act, and the case of *Kamo Enterprises Limited v Krystalline Salt Limited*; SCCA No. 08 of 2018).

The second respondent averred under paragraph 5(b) of its Answer to the petition and paragraph 9 of the affidavit in support thereof that it heard and determined the complaints *inter parties*; however, it did not adduce proof of its decision. In the premises, this court finds that the second respondent failed or refused to determine the petitioner's pre-polling complaints regarding the validity of the first respondent's nomination, contrary to its statutory duty prescribed by section of the Electoral Commission Act.

### Issue 3: Whether the petitioner is entitled to the remedies sought.

The petitioner sought the following declarations and orders:

1. That the first respondent was not qualified for nomination as a candidate for the position of district chairperson, as he had not resigned from the UPDF within the time required under the law and therefore, the said nomination is invalid, canceled.
2. That the first respondent was not duly elected but the petitioner is entitled to be declared duly elected.
3. That the petitioner is validly elected unopposed as district chairperson of Abim district for the period 2021-2026.



4. The declaration by the 2<sup>nd</sup> respondent that the 1<sup>st</sup> respondent is the duly elected district chairperson of Abim District and subsequent swearing of the 1<sup>st</sup> respondent as district chairperson Abim is inconsequential and be set aside.
5. That the petitioner is awarded general damages for untold suffering, mental and physical torture, inconveniences and serious financial loss.
6. The respondents pay costs of this petition to the petitioner.
7. Such other remedy available under the electoral laws as the court considers just and appropriate.

10 **Section 139(1) (d) of the Local Government Act** provides that the election of a candidate as a chairperson shall only be set aside if proved to the satisfaction of the court that the candidate was at the time of his election not qualified for election. From the analysis of court in the present petition, the first respondent was at the time of his election not qualified for election.

15 Learned counsel for the second respondent cautioned this court to hesitate in nullifying the first respondent's election because of the significance of such orders with regard to the expression of the will of the people. He relied on *Karokora Katono Zedekia v Electoral Commission & Kagonyera Mondo; Election Petition No. 002 of 2001*, where it was held  
20 that setting aside an election is a very grave subject matter that the courts should only act on it in instances where the grounds of the petition are proved at a very high degree of probability. While I agree with counsel that the courts should not be quick to annul an election, I am mindful that it is equally in the interest of a democratic state that elections are conducted according to established electoral laws. This forms the bedrock  
25 of the principle of a free and fair elections espoused under Article 1(4) of the Constitution. In this court's opinion, where sufficient grounds for setting aside an election have been proved, the courts should not shy away from setting aside an election on account of the significance of its orders.





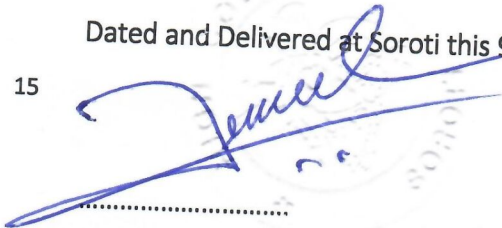
In the result, having found and held that the first respondent was unlawfully nominated and that all the issues are answered in favour of the petitioner, this petition is hereby allowed. The election of the first respondent, Omara Yuventine as district chairperson for Abim district is nullified, and the district chairperson seat for Abim district is hereby  
5 declared vacant.

It is further ordered that the second respondent, the Electoral Commission, conduct fresh elections for Abim district chairperson as soon as possible. Lastly, this court awards costs of this petition to the petitioner, Ariko Johnny De West that shall be met  
10 jointly and severally by the respondents.

It is so ordered.

Dated and Delivered at Soroti this 9<sup>th</sup> Day of March 2023.

15



Isah Serunkuma

JUDGE