

Before: Hon. Justice Byaruhanga Jesse Rugyema

Background:

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election for Mayor/Chairperson Entebbe Municipality. The Returning Officer of the 2nd Respondent accordingly returned the 1st Respondent as the candidate who had obtained the highest number of votes and declared him as the elected Mayor/Chairperson for Entebbe Municipality in Wakiso District.

- [4] The Petitioner was aggrieved by the outcome of the elections and declaration of the 1st Respondent as the elected Mayor/Chairperson of Entebbe Municipality and opted to challenge the election by petitioning this Court for nullification of the Election of the 1st Respondent. When the Petition came up for hearing, the Respondents successfully objected to the Petition on the ground that the affidavits in support of the Petition offended the law governing affidavit evidence and were incurably defective and ought to be expunged from the record. The Petition was accordingly struck out with costs.
- [5] The Petitioner was aggrieved by the determination of the Election Petition, he appealed to the Court of Appeal against the decision of the trial Judge who had sustained the objections and struck out the Petition with costs to the Respondents.
- [6] The Court of Appeal heard and allowed the Appeal with the following orders, inter alia:
1. ***The Order of the High Court striking out the Appellant's Petition is set aside.***
 2. ***The Election Petition be remitted to the High Court for trial and evidence at the trial shall proceed by summoning***

witnesses of either side under the Civil Procedure Rules in the ordinary way.

3 The witness affidavits shall be treated as witness statements upon witnesses being summoned to appear in the Court to be sworn in to confirm their statements.

4. The witnesses be subjected to cross examination at the option of the opposite party and to re-examination.

[7] During the present retrial of the Petition, this Court complied with and as was guided by, the above orders. The witness affidavits on record were treated as witness statements and the Court allowed cross examination of the witnesses by the parties to the Petition who wished to do so. However, this Court never envisaged such directions from the Court of Appeal for it has always appeared that both the Parliamentary Elections Act and the Rules thereunder envisaged the presentation of evidence through affidavits for expeditious disposal of the Petitions since they are time bound, and if the parties opted for affidavit evidence they would be bound by the rules of the chosen mode. As a result, the hearing of this Petition took painstakingly long to conclude since every deponent had to appear in Court for being sworn in and adoption of his affidavit and then the possible cross examination.

[8] Nevertheless, it is the Petitioners' case however, that in the present disputed elections, he contested with **Kawuma Muhammed, Mutebi Kabwama Nyamayalwo, Muwonge Gerald, Nassuna Olive, Simbwa Kenneth** and **Ruzinda Fabrice** (the 1st Respondent) and the Returning Officer of the 2nd Respondent declared the **1st Respondent** as the elected Chairperson of

Entebbe Municipality who polled **6,703 votes** as against the **Petitioner's** (**5,576 votes**), **Mutebi Michael Kabwere Nyamayalwo** (**6,342 votes**), **Nassuna Olives** (**2,499 votes**), **Kavuma Mohammad** (**521 votes**), **Simbwa Kenneth** (**45 votes**) and **Muwonge Gerald** (**13 votes**) totaling to **21,699** as the total number of valid votes purportedly cast and **21,859** as the total number of votes purportedly counted.

- [9] It is the Petitioner's contention, that he won the Entebbe Municipality Mayoral/Chairperson Elections conducted on the 25/01/2021 with **5,671 votes** other than the 1st Respondent who was declared winner of the said Elections with **6,703 votes** yet he obtained **2,825 votes** and the purported 1st runner up, **Mutebi Michael Kabwema Nyamayalwo** was declared to have obtained **6342 votes** yet he actually obtained **5,257 votes**. That this was contrary to **Ss. 132,135 and 176 of the Local Government Act (LGA)** as amended, as the Returning Officer of the 2nd Respondent falsified and inflated votes in favour of the 1st Respondent in the 10 contested Polling Stations by deliberately making false entries in the tally sheet which affected the votes by reducing the votes obtained by the Petitioner thus the 2nd Respondent's failure to conduct the said election in accordance with the principles laid down in the **Constitution of the Republic of Uganda 1995** (as amended), the **Electoral Commission Act Cap.140** and the **LGA Cap.243** (as amended) affected the result of the election in a substantial manner.

- [10] The Petitioner further contended that:

- (a) Contrary to **S. 12 (1)(b) of the Electoral Commission Act (as amended)**, the 2nd Respondent's official refused to use the Electronic Display System and thereby denied the Petitioner and his agents the opportunity to match results that were being entered for declaration by the Returning Officer at the Tally Centre.
- (b) Contrary to **Ss. 132, 135 and 136 of LGA and S. 12(1)(e),(j) and (p) of the Electoral Commission Act (as amended)**, the Returning Officer of the 2nd Respondent falsified results and made false declarations of votes acquired by the respective candidates in the Entebbe Municipality Mayoral/Chairperson Elections during tallying of results of the election.
- (c) Contrary to **Art. 61(1)(d) of the Constitution of the Republic of Uganda, Ss. 135, 136 and 137 LGA and Ss. 15 and 50 of the Electoral Commission Act**, the 2nd Respondent failed to ascertain, tabulate, declare and gazette the actual results of the Election of Entebbe Municipality Mayoral/Chairperson Elections conducted on the 25/01/2021 with transparency despite notification from the Petitioner by way of a formal complaint.

[11] The Petitioner therefore contended that with the correct tally of results, he was the person who won the Entebbe Municipality Mayoral/Chairperson Elections having polled the majority of **5,671 votes**.

[12] The Respondents on the other hand denied the Petitioner's allegations and contended that the said election was free and fair, the 1st Respondent was rightly elected and declared winner by the

2nd Respondent upon obtaining the highest number of votes **(6,703)** and that the votes cast for each candidate are well reflected in the **Declaration of Results Forms** (DR forms) in the 1st Respondent's possession and in the **Transmission of Results Form** and **Tally Sheet** similar to those that were certified by the 2nd Respondents. That the purported DR Forms relied on by the Petitioner which apparently show that the 1st Respondent's votes as **2,825 votes** rather than **6,703 votes** are not authentic and constitute mere forgeries. That otherwise, the Petitioner's agents signed DR Forms where he had appointed agents and no incident of impersonation, improper distribution of the materials and early closure was reported.

Counsel Legal representation

- [13] The Petitioner was represented by **Mr. Samuel Muyizzi** of **Alaka & Co. Advocates, Kampala** and **Mr. Kenneth Paul Kakande** of **Kizito, Lumu & Co. Advocates, Kampala** both being assisted by **Ms. Lydia Nakyejjwe**, while the 1st Respondent was represented by **Mr. Isaac Ssali Mugerwa**, assisted by **Ms. Gukiina Proscovia** and **Ms. Clare Kahunde**, all of **Ms. Bluebell Legal Advocates, Kampala**. The 2nd Respondent was represented by **Mr. Eric Sabiiti** and **Mr. Hamidu Lugoloobi**, both of the 2nd Respondent's legal department. The Counsel filed their respective written submissions for consideration in the determination of this Petition.

Applicable Law

[14] The present Petition being a matter of the Local Government Council Elections, the applicable laws are the following: **The Constitution of the Republic of Uganda, 1995 (as amended)**, the **Local Government Act (LGA) Cap.243**, **Electoral Commission Act Cap. 140** and the **Evidence Act Cap.6**. Under **S.172 LGA**, the principles relating to the **Presidential Elections Act** and **Parliamentary Elections Act (PEA) 2005** apply to petitions under the Local Government Act. It follows therefore, certain provisions of the Presidential Elections Act and PEA shall be applied in the present Petition.

The burden and standard of proof

[15] It is settled law that the burden to prove the grounds of the Petition lies upon the Petitioner who is required to prove every allegation/ground in the Petition to the satisfaction of the Court on the basis of a balance of probabilities; **S.61(3)** and **S.139 LGA**. See also **Odo Tayebwa Vs. Basajjabalaba Nasser & Anor. E.P.A. No. 13/2021** and **Halima Nakawungu Vs. E.C. & Anor. E.P. No. 002/2011**.

[16] In **Halima Nakawungu**, it was held that:

“The burden to prove the grounds of the Petition is upon the Petitioner. He is the party who averts the existence of certain facts upon which he seeks judgment. In absence or failure to prove those facts, then the Petition fails. The Petitioner, therefore, bears the burden of proof”. See **Sections 101-103 of Evidence Act, Cap.6**.

In **Odo Tayebwa** (Supra), the expression to the “satisfaction of the Court on a balance of probabilities” was interpreted to mean proof that is slightly higher than proof on a preponderance of probabilities but short of proof beyond reasonable doubt. In **Ocen Peter & Anor Vs. Ebil Fred E.P.A. No. 83 of 2016**, it was held that the standard of proof is higher in Election matters than that required in ordinary suits because of the public importance and seriousness of the allegations normally contained in the Petitions.

[17] It follows therefore in this case, the Petitioner has a duty to adduce credible and or cogent evidence to prove the allegations to the stated standard of proof.

[18] During scheduling conferencing the following issues were agreed upon for determination of this Petition:

1. **Whether or not the 1st Respondent was validly declared as winner of the position of the Chairperson/Mayor Entebbe Municipality in the Elections conducted on the 25/01/2021.**
2. **Whether or not the Petitioner won the Elections.**
3. **Whether there are remedies available to the parties.**

Resolution of issues

1. ***Whether or not the 1st Respondent was validly declared as winner of the position of the Chairperson/Mayor Entebbe Municipality in the Elections conducted on the 25/01/2021***

[19] It is the contention of the Petitioner that he contested 10 polling stations for candidates during the Entebbe Municipality Elections of 25/01/2021. These are:

- i Bugonga Boys Primary School (A-J).
- ii Lunyo East Primary School (A-KAS)
- iii Nsamizi Pearl Worth Primary School (MAT-Z)
- iv Katabi Busambaga Playground (A-A)
- v Katabi Busambaga Playground (K-K)
- vi Entebbe Comprehensive (BUT-KAV)
- vii Kiwafu Primary School (NI-Z)
- viii Entebbe Comprehensive (SSEN-Z)
- ix Katabi 40
- x Kiwafu Primary School (K-K)

[20] It is an agreed fact that at **Kiwafu Moslem Primary School (L-M)** no entry of votes was made.

[21] In his bid to prove falsified results and false declarations of the entries of votes, Counsel for the Petitioner submitted briefly as follows:

- (a) That the Petitioner had agents at every polling station including the 10 contested polling stations from the time elections began to the time of closing and at each of the polling stations, the Presiding Officer announced results publicly which were consistent with the Petitioner's Declaration of Results Slip signed by the Presiding officers of those polling stations.

- (b) That the Petitioner's DR Forms have similar serial numbers with other contestants as was confirmed by the Returning officer (**Rw8**) during cross examination and while relying on **Tamale Julius Konde Vs. Ssenkubuge Isaac, E.P. No. 6/2016**, argued that

“ It is apparent there was mismanagement of the process of entering results on the DR Forms because DR Forms with the same serial numbers had different results when only the Presiding Officer has custody of these forms until the moment they are filled, signed, given to agents and a copy sealed in the ballot box and tamper proof envelope”.

That the Uganda Police forensic expert **Chelangat Sylvia** confirmed that the signature on the Petitioner's DR Forms are consistent with those certified by the 2nd Respondent (**P.Exh.12**).

- (c) The Elections of the Mayor, Women Councillors and direct Councillors took place on the same date and at the same time on all the above polling stations thus the Petitioner's contention that he was aware of the number of ballots cast and/or voter turnout as per the 2nd Respondent's tally sheet (**P.Exh.2**) for the election of the Local Government Councillors because both Women representatives and the directly elected Councillors were simultaneously held with the Mayoral Elections on the 25/01/2021. That these were much less and in total contradiction with the results announced at and declared by the 2nd Respondent in the

Mayoral Election though the same correlates with the numbers on the Declaration forms and the Tally Sheet Results of the Petitioner.

- (d) That the declaration forms relied upon by the Petitioner and candidate **Muwonge Gerald** bear similar results and the total number of votes are the same whereas those relied on by the 1st Respondent and the 2nd Respondent are inflated in the 10 contested polling stations yet they were all issued by the 2nd Respondent.
- (e) That the percentage turn up in the uncontested polling stations ranges between **10%** and **40%** (an average of **30%**) which is consistent with the results for the 10 contested polling stations as they appear on the Petitioner's Declaration of Results form. The 1st Respondent's percentage turn up for the 10 contested polling stations have an inflated turn up of **59.2-92.38%**.

[22] That it is therefore apparent and evident that the DR forms for the contested 10 polling stations were inflated and engineered to benefit the 1st Respondent by officers of the Electoral Commission at the level of the entry in the tally sheet sanitized by filling other DR Forms with similar serial numbers to inflate the results of the 1st Respondent by adding **3,878 votes** to the 1st Respondent who had otherwise garnered **2,825 votes** to top up to **6,703 votes** to defeat the Petitioner who had garnered **5,576 votes**. That the entries made by the Returning Officer are not therefore consistent with the figures declared at the polling station.

[23] Counsel invited Court to note that the Petitioner applied for certified copies of the DR Forms but the Electoral Commission was not willing to provide the DR Forms, only to provide DR Forms for the 10 contested polling stations with contradicting entries. The Petitioner under those circumstances relied on the uncertified copies given to the agents at each of the said polling stations. That the Petitioner having enjoyed a right to retain original DR Forms given to his agents, on the balance of probabilities, the Petitioner's DR Forms should be taken as the truthful DR forms on whose basis this Court should use its discretion and declare the Petitioner as the winner of the elections i.e. the duly elected Mayor of Entebbe Municipality.

[24] Counsel for the Respondents on the other hand jointly submitted that the Petitioner lost the election of the Entebbe Mayoral/Chairperson Elections to the 1st Respondent, that he was in fact, not even the runner up but the third in the election. In a bid to prove that the results that were announced by the Returning Officer were neither falsified nor forged, both Counsel submitted further as follows:

- (a) The Petitioner applied for and received certified DR forms from the Electoral Commission but disregarded them and crafted (forged) his own DR forms that contain results that do not tally with those of any other candidate, except one **Muwonge Gerald** (Pw15) who confessed in Court that he did not have agents at several of the contested polling stations. That copies of the certified DR Form were only released upon the Petitioner paying the certification fees.

- (b) That the E.C. Presiding Officers who testified in Court rejected the uncertified DR forms in possession of the Petitioner as false, but the 2nd Respondent provided certified copies of the DR forms which tallied with those of the 1st Respondent and 2 other candidates brought as witnesses for the 1st Respondent (**Rw2** and **Rw3**). That therefore the uncertified DR forms of the Petitioner were therefore an afterthought and not part of the election process.
- (c) That the Petitioner's claim that he won the contest with **5,671 votes** does not mathematically add up if one makes a tally of his own falsified uncertified DR forms. That the same false forms cannot match the figure he allots to the 1st Respondent and the 1st runner up which creates doubt on the authenticity of his claim.
- (d) That the Petitioner's attempt to compare the voter turn up for Councillor Elections simultaneously held with the Mayoral Elections is speculative for it is possible for a voter to vote for Chairperson/Mayor and not vote for Councilor.
- (e) That the transmission of results to the Tally Centre as explained by the Returning Officer (**Rw8**), is that after the Presiding Officer and the agents of different candidates present have appended their respective signatures on all the DR forms, the Presiding Officer gets the original copy and puts it in a tamper proof envelop and seals it in the presence of everybody and then, it is sent to the Tally Centre where it is opened by the Returning Officer in the presence of the

candidates or candidates' agents who tallies the results and then declares a winner.

- (f) Lastly, Counsel concluded that during tallying, a party can Petition for recount to rectify any discrepancies of results. That in this case, the Petitioner blatantly omitted to seek a recount at the Tally Centre for the 10 contested stations since the entire integrity of the election was not in dispute because, if the Petitioner was in possession of DR forms that did not tally with the results that had been announced, he knew that the ballots if counted would have returned the same figures as on the certified DR forms. That otherwise, at the Tally Centre, the Returning Officer's only duty is to open the sealed envelopes with DR forms in the presence of candidates, tally the results and declare the winner. There is no opportunity at the Tally Centre to falsify the results.

Mathematical add up of the results

- [25] Under **Paragraph 4 of the Petition**, it is the Petitioner's case that he won the Entebbe Municipality Mayoral/Chairperson Elections conducted on the 25/01/2021 with **5,671 votes** other than the 1st Respondent who was declared winner of the said election with **6,703 votes** yet he obtained **2,825 votes**. It is the Petitioner's contention that the 1st Respondent's votes were inflated by **3,911** votes to announce him the winner. Here below is a tabulation of the Petitioner's claims as per the contested 10 Polling Stations.

**Tabulation as per the Petitioner's claims per the uncertified
DR Forms (The contested 10 Polling Stations -P.Exh.4)**

No	Polling Station	Petitioner's votes as Declared by E.C.	1 ST Respondent's votes as declared by E.C.	Obtained votes for Petitioner as claimed by the Petitioner	Obtained votes for the 1 st Responde nt as claimed by the Petitioner
1.	Bugonga Boys Primary School (A-J)	40	300	40	30
2.	Lunyo East Primary School (A-KAS)	41	495	41	20
3.	Nsamizi Pearl Worth Primary School (MAT-Z)	70	578	29	48
4.	Katabi Busembaga Playground (A-A)	65	700	65	18
5.	Katabi Busembaga Playground (K-K)	33	500	147	22
6.	Entebbe Comprehensive (BUT-KAV)	116	141	91	58
7.	Kiwafu Primary School (NI-Z)	101	443	101	43
8.	Entebbe Comprehensive (SSEN-Z)	69	253	69	53
9.	Katabi 40	33	501	33	08
10	Kiwafu Primary School (K-K)	79	356	79	56
		647	4267	695	356

Analysis of the above Tabulation

[26] (1) As per the Petitioner's pleadings, the overall total votes the Petitioner claim the 1st Respondent obtained as announced at the polling stations -**2825**

(2) As per the Petitioner's pleadings, the overall total votes the E.C. declared for the 1st Respondent - 6703

N.B.: The implication is that the 1st Respondent was favoured by E.C. with a total of **3,878 votes** (i.e. E.C. declared votes of **6703** less the alleged actual obtained votes of **2,825**).

- (3) As per the table, the votes the Petitioner claim the E.C. falsely entered/inflated for the 1st Respondent as per their contested 10 polling stations i.e. total number of the 1st Respondent's votes as declared by E.C. (**4267 votes**) less total the 1st Respondent's votes as announced at the polling stations (**356 votes**) = **3911 votes**.

N.B.: Whereas both in his pleadings and evidence, the Petitioner claim that the 1st Respondent was wrongly favoured with **6,703 votes** as declared by E.C., from the tabulation above, the Petitioner's DR forms/the uncertified forms (**P.Exh.4**), imply that the 1st Respondent would have obtained a total of **6,736 votes** (i.e. **3,911** as the allegedly inflated votes plus **2,825 votes**, the actual allegedly obtained votes by the 1st Respondent) and not **6,703 votes** as pleaded by the Petitioner. It therefore follows, as Counsel for the 1st Respondent rightly submitted, the Petitioner's claim does not mathematically add up.

[27] Counsel for the Petitioner however argued that the difference was because the E.C. nullified votes from **Kiwafu Muslim Polling Station (L-M)**.

[28] I find the argument self-defeating because if the nullified votes are included, then the margin from the allegedly announced votes at the polling station widens further by **32 votes** as per the

Petitioner's **Kiwafu Muslim Polling Station (L-M)** DR forms (the uncertified).

- [29] However, in my view, whether the claims of the Petitioner mathematically add up or not, that is not the paramount issue. The main issue for consideration is whether there were false entries /inflation of the results by E.C. in favour of the 1st Respondent thus being given an advantage as against the Petitioner.

Falsification of the Election Results

- [30] According to the Petitioner and as submitted by his Counsel, in accordance with **Ss. 135(1) and 136(4) LGA**, the votes were counted and announced at every polling station immediately after the closing of the polling. The DR forms were signed by the Presiding Officers and the candidates or their agents present, the Presiding Officer there and then announced the results of the voting at the polling stations declaring the elected candidate who obtained the largest number of votes before communicating them to the Returning Officer. That every candidate was entitled to a copy of the DR Forms which copies were given to the candidates and their agents.
- [31] Further, that in the contested 10 polling stations the Presiding Officers announced results publicly which were consistent with the Petitioner's Declaration of results slip signed by the Presiding Officer of those polling stations. That however, at the Tally Centre, the entries made by the Returning Officer were not consistent with the figures declared at the polling station. That it is evident that the DR forms for the contested 10 polling stations

were inflated and engineered to benefit the 1st Respondent by the officers of the E.C. at the level of the entry in the tally sheet.

- [32] On the other hand, the Returning officer, **Musinguzi Robert** (Rw8) explained the process of transmission of results to the Tally Centre. He testified that after the polls, the Presiding Officer in the candidates' presence seals DR forms in a tamper proof envelope and hands over to the supervisor who is doing the collection of the DR forms and takes the sealed envelopes to the Returning Officer at the Tally Centre. Candidates and their agents are allowed at the Tally Centre. The tamper proof envelopes are opened by the Returning Officer in the presence of candidates and or their agents, one envelope at a time and read out the results as they are before submitting that copy or copies to the tally team for scrutiny.
- [33] Further, that when the Returning Officer reads out the results in the presence of the candidates and or their agents, this is when he expects objection if any. If objections are raised at the tally Centre, the E.C. officials organize for the resolution of the complaint/objection by inviting a Presiding Officer in question to confirm what he sees. If that fails to resolve the complaint, then they resort to the ballot box and ascertain from the DR forms in the box. If the complaining party is not satisfied, then the law provides for a recount. The aggrieved party seeks a recount by writing to the Returning Officer who will have to stop further tallying of the results of the particular poll.
- [34] It is the submission of Counsel for the Respondent that the Returning Officer's only duty is to open the sealed envelopes with

DR forms in the presence of candidates and to tally results and declare a winner. There is no opportunity at the Tally Centre to falsify the results. That the process of transfer of results on DR forms were corroborated by the statements of the E.C. supervisors; **Rw10, Rw11, Rw12**, the Assistant District Returning Officer (**Rw9**) and the Presiding Officers; **Rw13-Rw19** whose testimonies were never challenged and therefore their evidence should be deemed unrebutted.

[35] In this case, the Returning Officer (**Rw8**) testified that he received from the collection center properly sealed results of the contested 10 polling stations in the tamper proof envelopes provided by the 2nd Respondent, opened, announced and tallied them in the presence of candidates' agents present at the District Tally Centre. That the results of the polling stations were not inflated and the declared results reflected the will of the people of Entebbe Municipality.

[36] The onus is on the Petitioner to prove that the results were falsified and or inflated. It is noted that once voting is completed, the ballot box is filled with items such as a copy of the **signed DR forms**, the **ballot papers received by each candidate** (tied in separate bundles and other various kinds of ballot papers (invalid, spoilt, unused), the Voters' roll used and the **Report Book** and sealed with a seal provided for that purpose by the E.C. and together with the tamper proof envelope containing copies of the DR forms are delivered to the Returning Officer at the Tally Centre (see **S.136 LGA**). The essence of the contents of the ballot box would be to determine which copy of the 2 DR forms presented

was genuine in case of a complaint regarding discrepancies of the results from the polling station as compared to those announced at the tally Centre. **S.53 of the Parliamentary Elections Act** directs the Returning Officer to refer to the **Report book** and **Ballot box** for purposes of verifying and declaring the right results. This meant that the contents of the ballot box are necessary in resolving a discrepancy that may arise.

- [37] **S.15 of the Electoral Commission Act** gives the E.C. power to resolve complaints. It provides that:

“(1) Any complaint submitted in writing alleging any irregularity with any aspect of the electoral process at any stage, if not satisfactorily resolved at a lower level of authority, shall be examined and decided by the Commission; and where the irregularity is confirmed the commission shall take necessary action to correct the irregularity and any defects it may have caused”

The implication of this Section is that the E.C. lower level authority i.e. the Polling and Returning Officers are vested with power to resolve complaints raised at any stage of the electoral process. The rationale of this provision is to empower the commission to expeditiously deal with any complaints administratively *in situ*.

- [38] In my view, the Commission can only exercise this power if the candidate or his/her agent present at the tallying Centre raises any complaint relating to the conduct of the election and as correctly stated in evidence by **Rw8**, the Returning Officer would be in position to resolve any complaint raised, if the contents of

the tamper proof envelope which contains the DR forms containing the results has a problem, for example, where either the DR forms are missing therein or where the results as reflected on the DR form obtained from the envelope has results which are different from those announced at the polling stations or there is an allegation of it having been compromised and or tampered with by referring to the official **Report Book** and or by opening the **ballot box** to ascertain results from the DR forms in the box. If the complaining party is not satisfied, then may invoke a recount provision by way of a written complaint where by the Returning Officer would have to stop further tallying of the results of the particular poll, if they are valid grounds for a recount.

[39] In this case, there is no evidence at all as alleged by the Petitioner, that he and or his agents were at the Tally Centre. It is alleged in the Petitioner's affidavit in support/witness statement, that the Petitioner and his agents were chased away from accessing the Tally Centre by the Special Forces of UPDF and or Military or Police but none of his witnesses, from **Pw2-Pw21** alluded to any such incident! In fact, **Muwonge Gerald** (Pw15) who participated in the Mayoral race and **Pw16-Pw21** who participated in the election of Councillors, none in their evidence alluded to any incident or the involvement of military or police in the electoral process/exercise.

[40] The Petitioner's claims therefore that he and his agents were denied access to the Tally Centre is in the premises found to be a mere after thought and therefore not an available proved ground for the Petitioner to cause the upset of the election in question.

[41] There is however no express provision in any of the applicable laws that provides for an aggrieved party in the electoral process to raise a complaint at the stage of declaration of results at the Tally Centre. Nevertheless, in this case, it is my view that **S.15** of the **Election Commission Act** envisages complaints at any stage and therefore, the Petitioner was not prohibited to raise any complaint he deemed necessary in the circumstances. The Petitioner having failed to raise any complaint during the polling, counting and there and then at the declaration of results at the tally Centre to enable the E.C. “lower level authority” entertain and correct any irregularity or any defect it may have caused, he lost that opportunity where the Returning Officer would have attended to the complaint at that stage. This however is not to say that the Petitioner was estopped from raising a complaint at a later stage or filing a Petition. It is the Petitioner’s right under **S.138 LGA**, as an aggrieved candidate for Chairperson to petition the High Court. It is well settled that statutory rights cannot be lost by the invocation of the doctrine of estoppel; **Griffiths Vs. Davies [1943] KB 618** and **Income Tax Commissioner Vs. A.K. (1964) E.A. 648**.

[42] Indeed, the Petitioner subsequently raised a written complaint to the E.C. (**P.Exhs. 6 and 7**) after 2 days of the declaration of the results regarding irregular results declared at the tally Centre. This is understandably justified in view of the fact that the Petitioner had to first gather evidence to support his complaint/claims. In this complaint (**P.Exh.6**) the E.C. did not bother to take any necessary action with the view to correct the alleged irregularities (**P.Exh.7**), hence this Petition.

i. Alleged Compromise of the tamper proof envelope

[43] The tamper proof envelope is supplied by the E.C. to the Presiding Officer at polling stations for safe transmission of the sealed copies of the DR forms duly signed by the Presiding Officers to the Returning Officer at the Tally Centre who opens it in the presence of all the candidates or agents of their choices and declare the results as per each candidate (**Ss. 50 & 53 PEA**), see also the provisions of **Ss. 135 & 136 LGA**.

[44] In the instant case, it is the Petitioner's case that the results declared and released at the Tally Centre were different from those that were announced at the polling stations, that they were inflated in favour of the 1st Respondent.

[45] In this case, since the Returning Officer was purporting to announce results on DR forms obtained from the tamper proof envelope, according to the Petitioner, the implication is that the tamper proof envelope was compromised and or tampered with and thereby, the results on the DR forms were altered in favour of the 1st Respondent. However, as already observed, none of the Petitioner's witnesses; **Pw2-Pw21** attended the Tallying Centers to witness the opening of the tamper proof envelopes. The Petitioner's agents; **Pw2-Pw15** who testified as regards the results which were announced at the contested 10 polling stations cannot entirely be relied on as they are naturally partisan. They are biased in favour of their candidate, **Amoru & Anor Vs. Okello Okello, EPA No. 39 & 95/2016**.

[46] On the other hand, the Respondents rebutted the Petitioner's evidence through **Nassuna Olive** (Pw2) and **Simbwa Kenneth**

(Rw3) both who contested and participated in the election of the Mayor/Chairperson, Entebbe Municipality but lost. Then the evidence of **Musinguzi Tolbert** (Rw8) who was the Returning Officer, **Muzungu Samuel** (Rw13), **Kato Shafik** (Rw18), **Nazeba Jimmy** (Rw19) and **Namugambwa Winnie** (Rw20) all who were Presiding Officers at their respective contested 10 polling stations and lastly **Muwonge Sulaiman** (Rw11) and **Basemera Betty** (Rw12) who were E.C. Parish Supervisors who testified categorically that the results announced at the polling stations were the same results declared at the Tally Centre and therefore the tamper proof envelope was never compromised. I definitely approached their evidence with a lot of caution since they are the very people who actually participated in the election, I nevertheless found their evidence more credible than that of the Petitioner's agents. Besides, the visual comparison of the 2 sets of the forms i.e. the Petitioner's DR forms (uncertified) and 2nd Respondent's DR forms (certified) support the Respondent's version. The certified DR forms were duly endorsed by the candidate's agents and the Presiding Officers signifying that they reflect the correct result of what transpired at the polling station, see **Babu Edward Francis Vs. E.C. and Anor EP No. 10/2002**.

- [47] For Court to find that the results which were declared at the tally Centre by the Returning Officer are false, the Petitioner has to adduce credible cogent evidence demonstrating that the tamper proof envelope containing the sealed (DR) forms was opened not in accordance with the law and that therefore its contents had then compromised. In this case, there is no credible cogent evidence that the contents of the tamper proof envelope were

compromised. The evidence adduced by the Petitioner's agents and other witnesses was merely hearsay from the Petitioner as none was present at the tallying centre when the envelope was opened.

[48] Hearsay evidence cannot be relied upon by the Court to substitute any allegation as true; **Runumi Mwesigye Francis Vs. The Returning Officer E.C. & Anor E.P. No. 2/2002**. This Court is not satisfied that the hearsay evidence adduced by the Petitioner regarding tampering with the results at the tally centre meets the required standard of proof set for on Election Petition. The available evidence falls too short of being the "credible and cogent" requirement to set aside an election.

ii. **Inconsistencies and Contradictions**

[49] In his pleadings under paragraph 4 ii (b) and (c) respectively, the Petitioner stated as follows:

"(b) At Nsamizi Pearl Worth Primary School (MAT-Z) polling station, your Petitioner obtained 70 votes which was declared at the polling station and on declaration of results forms duly endorsed by the Presiding Officer and signed by all agents of the candidates but the Returning Officer of the 2nd Respondent made reduced entry and declared 29 votes for the Petitioner.

(c) At Entebbe Comprehensive (BUT -KAU) polling station, your Petitioner obtained 116 votes which was declared at the polling station and on the Declaration of results forms duly endorsed by the Presiding Officer and signed by all the agents

of the candidates but the Returning Officer of the 2nd Respondent made a reduced entry and declared 91 votes for the Petitioner”.

[50] During cross examination, the Petitioner conceded that actually, his rightful obtained votes were **29** from **Nsamizi Pearl Worth (MAT-Z)** but was given more **41 votes** totaling to **70 votes** while at **Entebbe Comprehensive (BUT-KAV)** he obtained **91 votes** but he was given more **25 votes** totaling to **116 voters** as both reflected in his DR (uncertified) which he relies on as reflecting the correct results. There was therefore no reduction of the Petitioner's votes as he pleaded but an increment. The results of his cross examination is a total contradiction of his pleadings in **paragraph 4(ii)(b) and (c)** where he claims that his votes were instead reduced.

[51] It is apparent that in this particular case, the Petitioner is approbating and reprobating in that he wants to take the benefit of the results from the impugned certified DR forms as regards the 2 polling stations where he was given more votes than those on his DR forms (uncertified) obtained from his agents and reject the results of other polling stations from the same certified DR forms of the E.C. duly endorsed by his agents where they do not favour him. The Petitioner cannot be seen to challenge the results from certified DR forms of the E.C. of which he at the same time want to obtain advantage of, yet the entry contradicts the uncertified DR forms which he is relying on. For the principle that one cannot approbate and reprobate at the same time, in **Seruwagi Kavuma Vs. Barclays Bank (U) Ltd H.C.M.A. No. 634/2010**, it was

held that this is based on the doctrine of election, that nobody can accept and reject the same instrument and that a party cannot say at one time that a transaction is valid and thereby obtain some advantage from it to which it could only be entitled on the footing that it is valid and then turn around and say it is void for purposes of securing some other advantage. In **Nehawu Obo Tumuna Vs. Commissioner for Conciliation Mediation and Arbitration & Ors** Case No. PI 15/08 (S. Africa)

“no person can be allowed to take up two positions inconsistent with one another, or as it is commonly expressed, “to blow hot and cold” to approbate and reprobate”.

[52] It follows therefore that in the instant case, the Petitioner cannot be seen to challenge the results from the certified DR forms of the E.C. (**R.Exh.B1-10**) of which he at the same time want to obtain advantage of entries that favour him yet contradict those on his DR forms (uncertified) which he claims contain the correct results. This Court is in the premises entitled to observe that such inconsistencies and contradiction should be resolved in favor of the Respondents, that there is no evidence adduced to prove that the results on the copies of the certified DR forms of E.C. were falsified.

iii. **Reliance on Uncertified DR Forms**

[53] Counsel for the Petitioner invited Court to note that the Petitioner applied to the E.C. for certified copies of the DR forms but the E.C. was not willing to provide the forms and when they did, he found that they were tallying with his copies save for the contested 10 polling stations and 2 others; **Kiwafu Moslem P/S (L-M)** and

Entebbe Comprehensive (NSU-SSEM). As a result, the Petitioner opted to rely on the uncertified copies of the DR forms which were given to the agents at each of the said polling stations.

- [54] It should be noted that no evidence was adduced by the Petitioner as regards any claim or complaint touching both **Kiwafu Moslem Primary School (L-M)** and **Entebbe Comprehensive (NSU-SSEM)**. No evidence was adduced that the results of **Kiwafu Moslem Primary School (L-M)** were wrongly cancelled or that the cancellation benefited either party to the disadvantage of the other or that if the **47 votes** claimed by the Petitioner at this station are included on the Tally sheet he emerges the winner.
- [55] Though the Petitioner pleaded this fact of refusal by the E.C. to avail him certified copies and attached copies of his application for the same (**P.Exhs.8&9**) dated 28/01/2021 and 03/05/2021 respectively, it is the contention of the Respondents that they provided the certified copies but the Petitioner chose to attach/rely on DR forms whose source is alien and therefore not authentic.
- [56] The Petitioner relied upon secondary evidence of DR forms of the contested 10 polling stations given to his agents while the Respondents relied upon primary evidence of DR forms delivered in the tamper proof envelopes to the Returning Officer.
- [57] The position of the law is that documents have to be proved by primary evidence except as provided in **S.64 of the Evidence Act, Cap.6** which is to the effect that a party wishing to rely on uncertified documents is required to give notice to the party in possession of the original. Declaration of results forms are public

documents. A party who wishes to rely on them has to have the certified in accordance with **Sections 75 and 76 of the Evidence Act**. Without such certification, such documents cannot prove any fact which they seek to prove; **Kakooza John Baptist Vs. E.C. & Anor. E.P.A. No. 11/2007 (S.C.)**. The exception in **S.64(1) of the Evidence Act** refer to a scenario where the party seeking to rely on uncertified Declaration of Results (DR) forms gives notice to the party in possession of the originals requesting for certification and they refuse or fail to do as requested. On proving this, the Court will accept the uncertified copies of the DR forms; **Mashate Magomu Peter Vs. E.C. & Anor E.P.A. No. 477/2016 (CA)**.

[58] In the instant case, the Respondents defended themselves that it is when payment of fees for certification was made to the 2nd Respondent that the certified copies were availed. Indeed, the Petitioner has not adduced any evidence in form of any receipt that he made payments of the certification fees to the 2nd Respondent at the time he was allegedly denied the certified copies of the DR forms.

[59] Nevertheless, it is apparent on record that the Petitioner was eventually availed the requested for certified copies of DR forms. He relied on them to prove that they were inconsistent with the copies that were given to his agents. The Respondents on the other hand vehemently refer to the Petitioner's DR forms (uncertified) being relied on by the Petitioner as forged (Nasser product) which are not authentic.

iv. **Examination of each of the certified copies of the DR forms (R.Exhs. B1-10)**

[60] In the first instance, there is nowhere in the Petitioner's pleadings, apart from claiming that the E.C. made false entries of the results, he expressly or impliedly pleads that the signatures on the certified copies of the DR forms are not of his agents and or that they are forged.

[61] All the Petitioner's agents of the contested 10 polling stations; **Kawuki Athem** (Pw2) for Kiwafu Primary School (N-K), **Nakyejjwa Sarah** (Pw3) for Bugongo Boys Primary School (A-J), **Nambwese Betty** (Pw5) for Lunyo East Primary School (A-KAS), **Orishaba Joshua** (Pw6) for Nsamizi Pearl Worth (MAT-Z), **Kasule Brenda** (Pw7) for Katabi Busambaga Playground (k-k), **Nansubuga Doreen Janet** (Pw8) for Kiwafu Primary School (NI-Z), **Ssenoga Ibraheem** (Pw9) for Entebbe Comprehensive SS (SSEN-Z), **Katalemwa John Baptist Ssenyonjo** (Pw10) and **Beinomugisha Faridah** (Pw11) for Katabi 40 polling station, in their respective supplementary affidavit/witness statements none categorically denied his or her signature as appears on the respective attached copies of the certified DR forms that were provided by E.C.

[62] On the other hand, the Respondents' witnesses; **Agaba Enock** (Rw15) who was the Presiding Officer at Nsamizi Pearl Worth Primary School (MAT-2), **Muzungu Samuel** (Rw13) who was the Presiding Officer at Entebbe Comprehensive SS (BUT-KAV), **Kibuuka John** (Rw14) who was the Presiding Officer of Katabi Busabaga Playground (A-A), **Nakawuka Dimitiri** (Rw16) who was the Presiding Officer of Entebbe Comprehensive SS (SSEN-Z) and

Nazeza Jimmy (Rw19) who was the Presiding Officer at Katabi Busabaga Playground (K-K), each categorically denied their purported signatures on the Petitioner's DR forms (uncertified).

[63] It is however only **Nakyejjwa Sarah** (Pw3), **Kasule Brenda** (Pw7) and **Katalemwa John Baptist** (Pw10) who in their supplementary Affidavits/witness statements claimed that page 2 of the certified DR forms of the E.C. which bore no certification stamp was "super imposed as a copy of the originals whereas not".

[64] I find this claim devoid of merit because the original DR forms that were provided by the E.C. in Court did not bear out this allegation. The omission by the E.C. to place a certification stamp on the next page of the DR form is not fatal since the 1st page which show the votes cast to each candidate is duly certified, unless the candidates' agents and the Presiding Officers are contesting their purported signatures on the next page that lack a certification stamp. I find this to had been a mere unintended human omission considering the fact that there are always numerous DR forms that need to be stamped certified in a limited time.

[65] In the premises, where the Petitioner's witnesses are found not to have denied their respective signatures on the copies of the certified DR forms yet the purported signatures of the Presiding Officers on the Petitioner's copies of DR forms (uncertified) are categorically denied by the Respondents leads credence to the Respondents that it is not certain as to the source of the Petitioner's uncertified DR forms. The authenticity of the Petitioner's uncertified DR forms is not attested and therefore this

Court cannot find them as reflecting the true results of the polls in question.

- [66] The 2 reports of the Police Forensic Handwriting Expert, **Ms. Chelangat Sylvia** (Court witness), **P.Exh. 12** appeared to support both the Petitioner's and Respondents' case. She appeared to have been swayed by either party who made request for examination and comparison of the questioned documents and the given specimen signatures. She failed to appear in Court for cross examination to substantiate and clarify on the issues raised by her reports. The Respondents rejected the Petitioner's uncertified copies of the DR forms). The Petitioner's witnesses themselves did not categorically deny their respective signatures on the copies of certified DR forms. As a result of the foregoing, I am inclined to reject **Chelangat's** expert 2 opinion reports which are inconsistent with each other and therefore tend to create confusion which neither party could clarify. In **Dhalay Vs. Republic [1996] eKLR 514 (CAK)**

".....It is now trite law that while the Courts must give proper respect to the opinion of experts, such opinions are not, as it were binding on the Courts Such evidence must be considered along with all other available evidence, and if there is proper and cogent basis for rejecting the expert opinion, the Court would be perfectly entitled to do so"

- [67] The 2 expert reports fell victim of the above shortcomings and cannot be relied upon as cogent proof of falsification of the certified copies of the DR forms in view of the fact that the candidate's agents' and Presiding officers' signatures thereon

were never denied. The implication is that the certified DR forms were authentic and I find them so.

- [68] There were also claims by the Petitioner regarding the voter turn up percentages at the contested 10 polling stations in comparison with the other polling stations and that the votes cast during the Councillor elections conducted on the same date in the contested 10 polling stations were consistent with the Petitioner's DR forms but contradicted the certified E.C. DR forms. I find this argument merely hypothetical and more of a speculation than being empirically evidential based.
- [69] In elections, persons have different motives and preferences which can explain the variances of the alleged percentages. The voters at one station could not all vote in all categories. This can further be explained by the weather of the day i.e. the rain that affected the contested 10 polling stations. Such cannot be a satisfactory ground to overturn the elections and thereby shatter the will of the people.
- [70] As regards the non-electronic display of the election results by the E.C, Counsel for the Respondents explained that the Electronic Display System is not part of the election materials envisaged under the electoral laws but was a mere tool that was introduced intended to enable smooth election process. Indeed, the electronic display system is not listed anywhere in the applicable electoral laws as one of the election materials and therefore in the absence of any evidence to the contrary, I find that it was not mandatory for the E.C. to use the Electronic Display System and

therefore its failure to apply it cannot be a ground to set aside an election.

- [71] For the foregoing various reasons given, I find that there is no cogent evidence that was adduced by the Petitioner to prove that there was falsified entries of results in the tally sheet and declaration of falsified results. As a result, I find that the 1st issue is found in the affirmative in favour of the 1st Respondent. The 1st Respondent was validly declared as winner of the position of the Chairperson/Mayor Entebbe Municipality in the elections conducted on the 25/01/2021. The 2nd issue is found in the negative. The Petitioner did not win the elections. There is no evidence that the Petitioner won the Elections with **5,671** votes as against the 1st Respondent votes of **6,703**.

Issue No. 3: What are the remedies available to the parties

- [72] The Petitioner has failed to prove his allegations in the Petition to the required standard and degree of proof. It was the Petitioner's case that the contest was limited to the results from the 10 polling stations, he has not proved to the satisfaction of Court that what was declared at those contested 10 polling stations is different from what was actually returned and declared by the E.C. As a result, I find that the 1st Respondent was validly elected.
- [73] This Petition fails and it is accordingly dismissed with costs to the Respondents as the successful litigants under **S.27(2) of the Civil Procedure Act**. It is declared that the 1st Respondent **Rulinda**

Fabrice Brad was validly elected as the Mayor/Chairperson in the Entebbe Municipality Election.

Dated at Kampala this 20th day of **April, 2023**.

.....
Byaruhanga Jesse Ruggyema
JUDGE