**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT AMPALA**

**ELECTION PETITION APPEAL NO. 29 OF 2011**

*(Arising from Election Petition No. HCT-01-CV-EP-OO4/2011)*

BETWEEN

MUHINDO REHEMA :::::::::::::::::::::::::::::::::::::::::: APPELLANT

AND

1. WINFRED KIIZA
2. THE ELECTORAL COMMISSION:::::::::::::::::::: RESPONDENTS

**CORAM: HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, DCJ**
**HON. JUSTICE A.S. NSHIMYE, JA**
**HON. JUSTICE REMMY KASULE, JA**

**JUDGEMENT OF A.E.N. MPAGI BAHIGEINE, DCJ**

This Election Petition Appeal arises from the judgement and orders of the High Court at Fort Portal, in Election Petition No. 4 of 2011. The appellant, Muhindo Rehema and the 1st respondent, Winfred Kiiza were amongst the candidates who contested for the seat of Woman Member of Parliament for Kasese District, in the country wide general elections held on 18th February, 2011.

At the end of polling, the Electoral Commission, the 2nd respondent, which organized the elections declared the 1st respondent winner of the election, with 92,108 votes, winning by a margin of 1484 over the appellant.

Aggrieved, the appellant petitioned the High Court to annul the election on ground of non-compliance with the electoral laws which affected the results substantially.

The learned trial Judge ruled that although the election was conducted in non-compliance with the ***Electoral laws*** in such a way which affected the results in a substantial manner, she held that

the petition was a nullity on ground that it had not been properly served on the first Respondent, within the prescribed 7 days from the date of issue of **Notice of Presentation of the Petition**. She also excluded vital admissible evidence. Hence this appeal.

The Amended Memorandum of Appeal comprised nine (9) grounds which can be summarized as follows:

1. ***The learned trial judge erred in not setting aside the election of 1st respondent after finding the electoral process did not comply with Electoral laws and the non-compliance substantially affected the results.***

2. ***The learned trial judge erred in law and in fact in finding that the 1st respondent had never been served when de facto the 1st respondent was in possession of the Notice of Presentation of the Petition.***

3. ***The learned trial judge erred in law and in fact by not taking into account the record and orders made on 17th May, 2011 which show that the time for filing and service of documents had been extended and there was no complaint that the orders had not been complied with.***

4. ***The learned trial judge erred in law when she wrongly dismissed the appellant's petition on the ground that the petition was a nullity.***

5. ***The learned trial judge erred in law when she held Article 126(2)(e) of the Constitution to be inapplicable.***

6. ***The learned trial judge erred in law and in fact by not considering whether the alleged failure to serve the Notice of Presentation of the Petition caused injustice or prejudice.***

7/8 ***The learned trial judge erred by improperly striking out evidence, failing to take into account all evidence in reaching her conclusions, and improperly evaluating evidence.***

***9. The learned trial judge erred by ordering the appellant to pay costs to the first respondent despite the finding that there had been non-compliance with the Electoral law that substantially affected the results.***

***Grounds for Cross-Appeal***

The 1st respondent cross-appealed on 4 grounds summarized as follows:

*1.* ***The learned trial judge erred in law and fact when she failed to exclude all hearsay in the Appellant's affidavits.***

***2. The learned trial judge erred in law and in fact by finding that some aspects of the non-compliance had been proved after striking out part of the Appellant's affidavits.***

***3. The learned trial judge erred in law and in fact when she held, without any admissible evidence, that it was proved that the non-compliance affected the results in a substantial manner.***

***4. The learned trial judge erred in law and in fact to deny the Cross-Appellant costs on grounds not supported by admissible evidence.***

Mr. Ngaruye Ruhindi Boniface appeared for the appellant while Mr. Bwirika Richard with Mr. Kwemara Kafuzi were for the 1st respondent.

Mr. Geoffrey Ntambirweki Kandeebe represented the 2nd respondent.

Turning to the record, it indicates that the petition was filed in the High Court on 23rd March, 2011. The appellant applied for substituted service from the Chief Magistrate's Court of Fort Portal, which order was granted on 29th March, 2011.

The 1st respondent however submitted/filed her answer well within time, and yet still objected, in her answer, to a failure by the appellant to properly serve the notice.

As regards the issue whether failure to serve the petition properly on the 1st respondent nullifies the petition, Mr. Ngaruye pointed out that though the trial judge found that the Electoral Commission had failed to comply with the electoral law in such a way as to substantially affect

the results, but because the appellant had failed to serve the 1st respondent with the notice appropriately, she erroneously found the petition to be a nullity and dismissed the case. The appellant was condemned in costs to the 1st respondent but the 2nd respondent was not awarded any costs.

***Section 62 of the Parliamentary Elections Act (PEA) No. 17 of 2005,*** stipulates:

> ***"Notice in writing of the presentation of petition accompanied by a copy of the petition shall, within seven days after the filing of the petition, be served by the petition on the respondent or respondents, as the case may be."***

***Rule 5(5)*** provides:

> **(5)** ***Immediately upon presentation of the petition, the petitioner shall serve a copy of the petition on the commission and on any other respondent.***

Mr. Ngaruye submitted that despite the above, the decision of the High Court was erroneous. The learned trial judge having evaluated the evidence which was by affidavit, oral together with the submissions by counsel ruled that there was non compliance with the electoral laws which affected the results. She, however, unexpectedly dismissed the petition on ground that it was a nullity due to non service of the notice of presentation. This was a gross error. The petition should have been allowed, citing ***Mukasa Anthony Harris vs. Dr. Bayiga Michael L. Lulume, Election Petition Appeal (SC) No. 18 of 2007; and Election Petition Appeal (SC) No. 26 of 2007, Sitenda Sebalu vs. Sam K. Njuba and the Electoral Commission.*** Learned Counsel submitted that failure to serve the 1st respondent personally within the prescribed 7 days did not render the petition a nullity and if it does not cause injustice the petition cannot be dismissed.

In counsel's view no injustice was caused. Learned counsel prayed court to allow grounds 1-6 of the Amended Memorandum of Appeal.

The respondents who opposed this position argued that failure to serve the notice on a person as prescribed by the law nullifies the entire petition, and that the authorities cited by Mr. Ngaruye were distinguishable in that service of the Notice within seven (7) days is mandatory. Further,

the order issued by the Magistrate was void, for lack of jurisdiction as Rule 24 requires such interlocutory orders in Election Petitions to be made by judges of the High Court.

Learned Counsel pointed out that where a court exercises a jurisdiction it does not possess, its decision amounts to nothing, therefore the order to effect service in another manner was a nullity.

Learned Counsel prayed court to uphold the holding of the trial judge.

In interpreting the meaning and application of the provision regarding service of notice, the Supreme Court noted in ***Sitenda Sebalu vs. Sam K. Njuba – SC Election Petition Appeal No. 26 of 2007*** (supra) that in addition to ensuring the resolution of matters without untimely delay,

***"it cannot be gainsaid that the purpose and intention of the legislature in setting up an elaborate system for judicial inquiry into alleged electoral malpractices …. was to ensure, equally in the public interest, that such allegations are subjected to fair trial and are determined on merit".***

The court noted also that these two interests must be balanced, and one cannot be sought at the expense of the other.

Further, in ***Mukasa Anthony Harris v Bayiga Michael Philip Lulume SC Election Petition Appeal No. 18 of 2007***, (supra) the court ruled that the service of process requirement was directory rather than mandatory, and that failure so to do, especially where no injustice or prejudice was caused would be a mere irregularity that did not vitiate the proceedings.

The Court applied ***Article 126(2) (e)*** of the Constitution which specifically provides; ***"Substantive justice shall be administered without undue regard to technicalities."***

The fact that service was not effected exactly as provided is a mere technicality given that the 1st respondent showed no prejudice or inconvenience suffered as a result and still she filed a timely answer to the petition. Coupled with the foregoing, allowing the petition to move forward serves both the aims of the legislature and prevents untimely delay so as to answer the desired decision on the merit of the petition – see ***Sebalu v Sitenda*** (supra). Since there was no prejudice occasioned by non service of the petition, there was no strong argument dictating the dismissal of the petition on a technicality, as the learned judge was disposed to do.

Secondly to determine the petition to be a nullity punishes not only the appellant but the voters as well. Although the appellant sought the order from the wrong court, had the Magistrate properly declined to exercise jurisdiction, time would still have remained to effect service of notice.

The learned trial judge curiously omitted to appreciate this.

I find pertinent the holding in ***Regina vs. Soneji and another (2005)*** UKHL 49 cited in ***Sebalu's*** case, that,

***"…. The emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can be fairly taken to have intended total invalidity."***

It could not be so in this case

On this ground alone the appeal would succeed.

I next turn to the ***Admissibility/weighing of Evidence Grounds 7-8 of appeal; 1-3 of Cross Appeal.***

The issue here is whether the trial judge properly admitted and excluded evidence. The record indicates that the trial judge excluded eight affidavits offered in rejoinder of Dr. Badru Kiggundu's affidavit, supporting the reply of the 2nd respondent, because the affidavits failed to indicate that the deponents had been read and explained and that they understood the contents of Dr. Badru Kiggundu's affidavit. The Judge was concerned that both the Oaths Act and the Illiterates Protection Act had not been complied with. These deponents were Malambo John, Janet Tumusabe, Biira Esteri, Biira Janet, Catherine Muhangana Nabalenzi, Jimmy Kahangamire, Nella Mbusa and Vincent Kabinga, all illiterates.

The learned trial judge found the non-compliance with the Acts to be fatal and declined to rely on the said affidavits. I note, however, that the averments in these affidavits are specific as to the events occurring on 18th February 2011 as each deponent witnessed them.

The deponents therein are individually specific concerning allegations of Dr. Kiggundu's affidavit which they were responding to. The malpractices they were deponing to include campaigning on polling day, bribery of voters and misleading agents to sign DR forms, which

Dr. Kiggundu disputed having occurred. The allegations as to these malpractices were thus before the court by some other evidence even when the eight affidavits were to be excluded. Yet the learned trial judge disregarded all this information.

The deponents to the excluded affidavits all conclude:

> ***"And I swear this affidavit in rejoinder to disprove the contents of the affidavit of Engineer Dr. Badru M. Kiggundu that election were conducted in accordance with the provisions of the law, and in compliance with the principles in those provisions, and to disprove his assertion …, and what I have stated hereinabove is true and correct to the best of my knowledge."***

I would agree with Mr. Ngaruye that Mr. Ntamibirweki would have applied to cross-examine the deponents if he felt that their averments were doubtful. The averments displayed knowledge of what was in Dr. Kiggundu's affidavit thus alleviating the concern that they had not been read or explained to each one of them. This led to an inference that the contents of Dr. Kiggundu's affidavit had been read and explained to each one of them. It has been held by the Supreme Court in ***Col. Dr. Kiiza Besigye vs. Yoweri Kaguta Museveni No. 1 of 2001, Presidential Election Petition*** that the court should take a liberal view of affidavits in Election Petitions, considering the tight time schedule under which they have to be compiled, unless the omission is material going to the root of the substance of the affidavit.

The learned trial judge was thus not justified in excluding them with the exception of one by Thembo K. Stephen who did not appear for cross examination when required so to do.

The learned trial judge also excluded a number of paragraphs from the appellant's two affidavits on grounds of being hearsay. ***Order 19 Rule 3*** of the ***Civil Procedure Rules*** provides that affidavits can only include facts that

> ***"the deponent is able of his own knowledge to prove, except in interlocutory applications".***

Election petitions are not interlocutory applications and therefore hearsay evidence is not admissible, ***Besigye vs. Museveni*** (supra). The appellant's two affidavits did not disclose the source of information concerning polling stations in Kasese on the polling day. She could not have been everywhere at the same place to witness the process.

The trial judge properly excluded evidence from the appellant's two affidavits that regarded events which took place in her absence, and could not therefore "prove of her own knowledge."

In these cases the candidates rely on the appointed agents and as such should have included that specific source of information in the affidavits or else file separate affidavits from the agents who witnessed the occurrences. The learned trial judge cannot be faulted over this aspect of the matter.

The next issue is whether the trial judge properly weighed the evidence. The burden of proof lies on the person bringing the action, in this case the appellant and proof is on the basis of a balance of probabilities. – ***Section 61(3) of the Parliamentary Elections Act, 2005.*** It is now well established that given the public importance of parliamentary and other elections the degree of proof is relatively higher than the one required in ordinary civil suits though lower than beyond reasonable doubt. ***See Supreme Court Election Petition Appeal No. 18 of 2007: (supra) Mukasa Anthony Harris vs Dr. Bayiga Michael Lulume.***

Given the trial judge's ability to witness the testimonies of witnesses and evaluate their evidence first-hand, appellate courts are always inclined to give due deference to the trial judge's findings unless the contrary is proved. In this respect even with the affidavit evidence and additional testimony, the appellant has not succeeded in establishing any illegal conduct on the part of the 1st respondent, to the court's satisfaction.

Concerning the actions of the Electoral Commission, the trial court properly found it to have acted in a non-compliant manner in several areas. First, the officials invalidated several votes that according to election standards were cast validly. To sum it all up the Election officials did not know their role, or if they did, preferred to act in a contrary manner. Under ***Section 12 of the Electoral Commission Act,*** the Electoral Commission has a duty to ensure compliance by all election officers and candidates with the provisions of the Act or any other law. As long as the intent of the voter can be reasonably ascertained, the vote is deemed to be valid according to ***Section 49(2) of the Parliamentary Elections Act***. The number of votes invalidated was estimated at 6,841. Although some of these votes were categorized as invalid, the evidence suggests a high number were in fact validly cast votes.

The Constitution requires regular free and fair elections. This casts the burden on the ***Electoral Commission*** to ensure that voters cast their votes to be counted accurately and that each person who comes out to vote has her/his vote counted and the choice made known.

Secondly, the 2nd respondent failed to treat the necessary paperwork in a manner that ensures transparency and fairness of the elections.

The Declaration of Results forms are more than a mere formality, but a check on the system that prevents fraud and ensures propriety. See ***Dr. Frederick Nabwiso vs. Mbaghadhi Nkayi Election Petition Appeal No. 14 of 2011.***

The presiding officers at 17 polling stations failed to properly certify the results of the election, thus throwing into doubt a total of 6,585 votes which could not form the basis for determining the results of an election.

Along with the failure to properly certify the results, polling station officials failed to properly account for all of the ballot papers used at their stations as noted by the trial judge. For example, at Kamanga Polling Station, there was a discrepancy of 100 ballot papers. This reflects gross non compliance with the electoral law.

It is well settled that non-compliance with electoral law per se, however, is not enough to overturn an election. Rather the non-compliance must be so significant as to substantially affect the results of the election – ***Section 61(1) PEA. 2005***. While the learned judge considered the effect of each category of non-compliance individually, with respect she should have assessed the effect of non-compliance as against the entire process of the election as was stated by Odoki, Chief Justice:

***"In order to assess the effect, the court has to evaluate the whole process of the election." –***

***Besigye vs. Museveni*** (supra). In that case the Justices of the Supreme Court used both the qualitative and quantitative approaches. The quantitative approach takes a numerical approach to determining whether the non-compliance significantly affected the results. In this case, at least 13,426 votes (over 7%) have been rendered doubtful where the margin of victory was only 1,484 votes (less than 1%). Under the quantitative test, therefore the non-compliance appears to have affected the results substantially.

On the other hand, the qualitative approach looks at the overall process of the election especially the transparency of registration, chaos at polling stations, voter information, the process of counting, tallying, and declaring the results; and the ability of each voter to cast their vote. Under this approach, the Electoral Commission failed to properly count, tally, and declare the winner, in addition to its improper invalidation of votes. Considering the effect of both modes of assessment (qualitative and quantitative) the court is satisfied that the results of the election were substantially affected by failure of the Electoral Commission to conduct the elections properly under either the qualitative or quantitative approach.

The learned trial judge therefore ought to have allowed the petition.

***Costs – Ground 9 of Appeal; 4 of Cross Appeal***

It is trite costs follow the event unless, for other reasons, the court orders otherwise. ***Makula International Ltd vs. His Eminence Cardinal Nsubuga & Anor. (1982) HCB 11.***

The appellant has prevailed in her objection to the election. No malpractice has been established and or proved against the 1st respondent. Therefore the Electoral Commission should bear all costs here and below. It failed to conduct the elections in accordance with its mandate under the Constitution and electoral laws. The non-compliance substantially effected the election which is now overturned and new elections ordered.

The Cross Appeal is dismissed; the Electoral Commission shall bear the costs of the proceedings on appeal and those in the court below. I would so order.

Since my Lords, A. Nshimye and R. Kasule JJA, both agree the appeal succeeds with orders that the election of the 1st respondent is hereby set aside and fresh elections ordered for the seat of Woman Member of Parliament for Kasese District.

Dated this …**11th** … day of …**June**… **2012**

A.E.N. Mpagi Bahigeine
**DEPUTY CHIEF JUSTICE**

**JUDGMENT OF A.S.NSHIMYE, JA**

I have had the benefit of reading in draft the lead judgment of my Lord A.E.N.Mpagi-Bahigeine, DCJ.

I agree with her evaluation of evidence and conclusions together with the orders she has proposed.

Dated this …**11th** …day of …**June**…**2012**

A.S.NSHIMYE
JUSTICE OF APPEAL

**JUDGEMENT OF REMMY.K. KASULE, JA**

I have had the benefit of reading the draft of the lead judgement prepared by my Lord the Honourable Deputy Chief Justice, A.E.N. Mpagi-Bahigeine.

I entirely agree with the way the Hon. Deputy Chief Justice has dealt with the issue of the meaning and application of the provisions of the law regarding service of Notice of Presentation of an Election Petition.

The previous Court of Appeal decision in **ELECTION PETITION APPEAL NO.2 OF 1999: BESWERI LUBUYE KIBUUKA VS ELECTORAL COMMISSION & ANOTHER** whereby the court held as regards failure to serve such notice that:-

**"It shows that, as a matter of fact, there could not be said to be a petition since no notice of presentation of the petition had been given to the second Respondent as enjoined by section 142 of the Local Government Act. The illegality surely cannot be waived by the second Respondent's answer that was filed in protest and much later than the time stipulated. It is obvious that the petition was a nullity. I accordingly dismiss the petition with costs.",** has to

be regarded as overruled by the Supreme Court decisions of **MUKASA ANTHONY HARRIS V BAYIGA MICHAEL PHILIP LULUME: ELECTION PETITION APPEAL NO.18 OF 2007** and **SITENDA SEBALU VS SAM.K. NJUBA, ELECTION PETITION APPEAL NO.26 OF 2007,** on this issue.

I too agree with my Lord that this appeal succeeds with the result that the election of the 1st respondent be set aside and a bye election be held for the seat of Woman Member of Parliament, Kasese District.

I also concur with the Order of my Lord as regards costs.

Dated at Kampala this…**11th**…day of …**June**…..**2012.**

Remmy.K. Kasule
**JUSTICE OF APPEAL**