

5 Patrick Onguti contested for the Aswa County Constituency Member of Parliament seat. At the conclusion of the polling exercise, the 2nd respondent declared the 1st respondent the winning candidate with 16,859 votes while the appellant obtained 5,316 votes. The 1st respondent's name was published in the Uganda Gazette of 3rd March, 2016 as the elected
10 Aswa County Constituency Member of Parliament.

Being dissatisfied with the outcome of the election, the appellant filed a petition in the High Court at Gulu seeking to annul and set aside the election of the 1st respondent. The grounds were that:-

- 15 1. The election was conducted in contravention of electoral and other laws in Uganda.
2. The respondents committed electoral offences and/or carried out illegal practices in the conduct of this election, more specifically:-
 - a) The respondents acted in disregard of a court order issued by Gulu High Court in Miscellaneous Application No. 157 of 2015.
 - 20 b) The 1st respondent held out to be a flag bearer of the Forum for Democratic Change (FDC) Party whereas not.
 - c) The 1st respondent used false statements against the appellant's personal character with the intention of persuading the electorate to abandon the appellant for the 1st respondent.
 - 25 d) The 2nd respondent without any justification and in total contempt of court orders failed to postpone the election when symbols assigned to the candidates were mixed up on the ballot papers.

5 3. The illegal practices mentioned above were committed by the respondents and their agents with the full blessing, knowledge, consent and/or approval of the respondents and as such the respondents were liable for the same.

10 4. The offences and illegal practices by the respondents left a lot to be desired in the election and affected the outcome in a substantial manner.

At the scheduling held at trial, the following issues were agreed upon for determination:

1. Whether or not the petition was properly before this Court.
- 15 2. Whether the election of Member of Parliament for Aswa County Constituency was conducted in compliance with the electoral laws.
3. Whether the 1st respondent personally or through his agents with his knowledge, approval or consent committed any illegal practices or electoral offences.
- 20 4. Whether the respondents disobeyed any Court orders as alleged.
5. Whether if there was non-compliance, it affected the results in a substantial manner.
6. What remedies are available to the parties.

25 The learned trial Judge answered all the above issues in the negative and dismissed the petition with costs to the respondents. The appellant being dissatisfied with the findings of the High Court filed this appeal.

5 The Memorandum of Appeal had the following grounds:-

1. The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on Record and thus came to wrong conclusion conclusions and decisions that;

10 a) Court takes judicial notice that elections were held on 18th February, 2016 and to expect the 2nd Respondent to act on court orders that were mutating all the time, would be most unreasonable.

b) That the 2nd Respondent had no mandate to stop that process through Court Orders.

15 c) That the Court orders in Election Petition No. 004 of 2015 are still subject of further investigations in the Court of Appeal and that court cannot at this stage condemn any of the Respondents to have defied court orders as to do so would tantamount to usurping the powers of the Court of Appeal.

20 d) That none of the respondents could be said to have disobeyed any court orders.

25 e) The 1st respondent is up to now a member of FDC and the Deputy President of the FDC party and that it is difficult to stop such a person from wearing an FDC party t-shirt or using any party symbol while he is executing his duties as a deputy president of a party in any part of the country.

- 5 *f) That the 1st respondent made defamatory statements complained of against the appellant without any malicious or ill motive.*
- 10 *2. The learned trial Judge erred in law and fact when he admitted evidence from the bar and thus came to a wrong conclusion that what Court recorded on 19th May, 2016 as an agreed fact that there was no memorandum of appeal filed by the Respondents in High Court Misc. Cause No. 157 of 2015 was erroneously recorded without the information from Mr. Wandera Ogalo, Counsel for the 1st respondent.*
- 15 *3. The learned trial judge erred in law and fact when he held that this petition is limited to what transpired in the election of the member of parliament for Aswa County Constituency and court would be extending its mandate too far if it decided to take Judicial Notice of what happened at the Court of Appeal after 15th February, 2016.*
- 20 *4. The trial judge erred in law and fact when in his Judgment of 13th June, 2016 he did not put into consideration the submission in the rejoinder.*
- 25 *5. The trial judge erred in law and fact when he failed to initiate a stand-over of the petition to seek guidance from the Court of Appeal after he became convinced that there is a pending matter in Miscellaneous Cause No. 157 of 2015 in that court.*

- 5 **6. The learned trial judge erred in law and fact when he held that the election of the Member of Parliament for Aswa County Constituency, Gulu District was conducted in compliance with the parliamentary elections laws and principle governing the conduct of elections in Uganda.**
- 10 **7. The learned trial judge erred in law and fact when he failed to properly evaluate the evidence of false and defamatory statements on record admittedly made by the 1st respondent against the appellant in person but failed to set aside the election in Aswa County.**
- 15 **8. The trial judge erred in law and fact when he ruled that the 1st respondent did not commit any illegal practices and offences or his agents with his knowledge, consent and approval.**
- 20 **9. The learned trial judge erred in law and fact in awarding costs of the Petition to the Respondents. Sic**

At the scheduling conference, the following issues were agreed upon for determination by this court:-

- 25 **1. Whether the trial Judge erred in law and fact in finding that the election of the 1st respondent was conducted in compliance with electoral laws and court orders.**
- 2. Whether the trial Judge erred in law and fact in finding that the respondent did not commit any illegal practices and electoral offenses.**

5 **3. Whether the trial judge erred in law and fact in dismissing
the Election Petition with costs.**

4. What remedies are available to the parties.

At the hearing of the appeal, the appellant was jointly represented by Mr. Mugoya Martin and Mr. Bikala Rogers, while Mr. Wandera Ogalo
10 represented the 1st respondent and Mr. Isaac Bakayana represented the 2nd respondent.

Counsel for the appellant and the 1st respondent addressed all the issues in a consecutive order, while counsel for the 2nd respondent only addressed issues 1 and 2. We shall address them in the same order.

15 This court, being the first appellate court in the instant case has the duty to subject the evidence on record, as a whole, to a fresh and exhaustive scrutiny and draw its own conclusions of fact. In doing so, court must make due allowance of the fact that it never saw or heard the witnesses give evidence at the trial. **See Pandya v R [1957] EA 336.**

20 Mindful of the above, we now proceed to resolve the controversy between the parties as below.

ISSUE 1

25 *Whether the trial Judge erred in law and fact in finding that the election of the 1st respondent was conducted in compliance with electoral laws and court orders.*

5 Counsel for the appellant submitted that the learned trial Judge erroneously held that the election of the Member of Parliament for Aswa County Constituency was conducted in accordance with the electoral laws and that none of the respondents could be said to have disobeyed any court orders. This, he said, was a grave misdirection and contravention of
10 **Article 61, (1) (a), (b), (f) & (h) of the Constitution of the Republic of Uganda**, and **sections 12 (1), (a), (h), (j) & (p) and 50 of the Election Commission Act**, which provisions give the 2nd respondent powers to manage elections. However, despite being notified of the flaws in the relevant electoral process, the 2nd respondent failed to postpone the
15 election to enable the flaws complained of by the appellant to be rectified; and this substantially affected the outcome of the elections to the detriment of the appellant.

It was counsel's further submission that section 11 of the Parliamentary Elections Act (PEA) provides for nomination of candidates while sub-section
20 2 provides that where a candidate is sponsored by a political party or organization, the nomination paper shall be endorsed and sealed by the political party or organization sponsoring the candidate. Right from the day of nomination, the 2nd respondent was aware of the orders and/or directives of Mutonyi, J given at High Court Gulu on 1st December,
25 2015, directing the appellant and the 1st respondent be nominated as independents, and that the result of Miscellaneous Application No. 157 of 2015 would determine who the FDC flag bearer would be.

The appellant complained that the Electoral Commission was to allocate him the symbols and colors of FDC following final court's orders in

5 Miscellaneous Application No. 157 of 2015, but it did not. Counsel relied on
Bashaija Kazoora Joseph vs. Electoral Commission & Another,
Mbarara HCT Election Petition No. 004 of 2011, to state that the law
on parliamentary elections was not limited to the Parliamentary Elections
Act but also extended to orders of court which have the force of law in
10 governing elections. The learned trial Judge was therefore wrong to hold
that the 2nd respondent was not obliged to halt and/or extend the time of
elections in Aswa County basing on mutating court orders. A court order
had to be obeyed. Counsel relied on **Amama Mbabazi vs. Yoweri .K.**
Museveni & 2 Others, Presidential Election Petition No. 01 of
15 **2016,** and section 50 of the Election Commission Act, to state that the
Electoral Commission had powers to extend time for doing an act.”

The appellant contended that although there was a stay of execution, it
was premised on the conditional filing of a Memorandum of Appeal in the
Court of Appeal by the 1st respondent by the 15th day of February,
20 2016. This was not done by that date, and therefore the stay of execution
had lapsed. He was therefore entitled to be registered as FDC Flag bearer
by the 2nd respondent who failed to do so. Hence there was non-
compliance with the electoral laws and court orders during the election of
Member of Parliament for Aswa Constituency

25 In reply, counsel for the 1st respondent invited court to take judicial notice
of Miscellaneous Application No. 67 of 2016 which is pending in the registry
of the High Court at Gulu wherein the appellant made an application
seeking to commit the 1st respondent and the Chairman of the Electoral
Commission to prison for disobedience of court orders. The said application

5 was yet to be determined and so the appellant was yet to prove that the respondents had disobeyed court orders. He could not, therefore, set aside this election on the ground that court orders were disobeyed without proving it.

Counsel relied on **Megha Industries (U) Ltd versus Conform Uganda**
10 **Limited High Court Miscellaneous Cause No. 43 of 2014** for the proposition that the remedy for disobedience of court orders was imprisonment, fine or damages, and not setting aside an election. He further relied on **Col (RTD) Dr. Kiiza Besigye versus Museveni Yoweri Kaguta and Electoral Commission Election Petition No. 1 of**
15 **2001** to state that only the offences specified under section 61 of the Parliamentary Elections Act for offences that could lead to the setting aside of an election. Counsel also relied on **Sitenda Sebalu versus The Secretary General of East African Community** (supra) where it was held that to prove contempt of court, the complainant must prove that
20 there was a court order, the potential contemnor knew about the order; there was ability to comply and failure to comply; which four elements had not been proved in this case.

It was further submitted that if there was any disobedience whatsoever, it was for one day since the order of stay of execution is alleged to have
25 lapsed on 15th February, 2016 and the election was on 18th February 2016. However, that there was no evidence of disobedience of that order. The 1st respondent had no knowledge of the order and could therefore not be held to have disobeyed the same. The presence of his lawyer in court was not

5 enough to clarify to him what he could do or not do in relation to the order.

In his reply, counsel for the 2nd respondent relied on section 61 (1) (a) of the Parliamentary Elections Act, to state that non-compliance had to be with the provisions of the Parliamentary Elections Act. He submitted that
10 the appellant had a duty to point out a provision within the Parliamentary Elections Act which had not been complied with. He did not cite any. According to the order issued by Mutonyi J, on 1st December, 2016, both the appellant and the 1st respondent were to be nominated as independent candidates for the seat of Aswa County Member of Parliament, and this is
15 what the 2nd respondent did. The second order in Miscellaneous Application No. 157 of 2015 dated 18th December, 2016 from the High Court of Uganda at Gulu meant that the appellant's nomination as an independent candidate on 1st December was in effect set aside notwithstanding that the order came from the same court. More so, the 1st respondent had applied
20 for and was granted stay of execution of the orders in Miscellaneous Application No. 157 of 2015 to last until 15th January, 2016. And although the 2nd respondent was not a party in this matter, nonetheless they were constantly served with court documents from the High Court and Court of Appeal to nominate and denominate a candidate and yet, the electoral
25 process had to continue. It was therefore not possible for the 2nd respondent to continue changing the nomination status of the candidates. More so on the eve of the general elections.

Counsel referred court to the gazette of the results where the appellant obtained 5,316 votes and the 1st respondent got 16,859 votes and

5 submitted that the appellant had not shown that the difference in votes
was occasioned by the frequent change of orders of court or any
compromise in the election. He concluded that the appellant had not
shown that non-compliance affected the quality of the election in a
substantial manner and prayed that court be pleased to dismiss the
10 petition.

We have carefully considered the record, and the submissions of counsel
on either side. We have also looked at the laws and authorities relied upon.
The grounds for setting aside an election are specified under **Section 61**
of the Parliamentary Elections Act. It provides that:

15 **61. Grounds for setting aside election.**

*1) The election of a candidate as a member of Parliament shall
only be set aside on any of the following grounds if proved to
the satisfaction of the court:-*

20 *a) non-compliance with the provisions of this Act relating
to elections, if the court is satisfied that there has been
failure to conduct the election in accordance with the
principles laid down in those provisions and that the
noncompliance and the failure affected the result of the
election in a substantial manner;*

25 *b) that a person other than the one elected won the
election;*

*c) that an illegal practice or any other offence under this
Act was committed in connection with the election by*

5 *the candidates personally or with his or her knowledge,
consent or approval;*
d) *that the candidate was at the time of his or her election
not qualified or was disqualified for election as a
Member of Parliament. "*

10 We also agree with the decision in **Bashaija Kazoora Joseph versus.
Electoral Commission & Anor** (supra) that the law on parliamentary
elections is not limited to the Parliamentary Elections Act but extends to
orders of court which have the force of law in governing elections. The 1st
order in High Court Miscellaneous Cause No. 157 of 2015 issued on 1st
15 December, 2015, was inter alia, as follows:

*2. That both Acire Christopher and Okumu Reagan should be
nominated as candidates for the parliamentary seat of Aswa
County as Section 11(1) of the Parliamentary Elections Act, 2005
does not bar the applicant from being nominated.*

20 *3. That the outcome of the main application will determine the
flag bearer of the 2nd respondent.*

On the 18th December, 2015, Miscellaneous Application No. 157 of 2015
was concluded with orders that:

25 *1. The applicant is the duly nominated FDC Flag bearer for
Aswa County Member of Parliament. The National
Independent Electoral Commission is directed to allocate him
the symbols and colour of FDC party as provided under
section 17 of the Parliamentary Election Act.*

5 **2. A declaration that the 3^d respondent Hon. Reagan Okumu was not nominated in accordance with the electoral guidelines of FDC party and the provisions of the Republic of Uganda.**

10 **3. The 1st and 2nd respondents are directed to rescind the decision declaring the 3^d respondent as the flag bearer because the declaration was ultravires its party constitution and electoral guidelines making it null and void.**

These were to be implemented by the 2nd respondent. They were however, stayed by the Court of Appeal on 29th December 2015 and later by a
15 subsequent order of 4th February, 2016. The order read:

1. The Gulu High Court Order in Miscellaneous Application No. 157 of 2015 be and is hereby stayed.

2. The applicants do file the Memorandum of Appeal on or before the 15th day of February, 2016 failure of which this Order will lapse.

20 In his letter to the Chairman Electoral Commission dated 16th February, 2016, (Annexure "AAAG"), the appellant pointed out that the 1st respondent had not filed a Memorandum of Appeal as directed by the court on 4th February, 2016, by 15th February, 2016, in which case there was no
25 longer any stay of execution.

It was a finding of the learned trial Judge that although an agreed fact had been recorded that there was no Memorandum of Appeal, learned counsel for the 1st respondent had clarified to court that the 1st respondent had paid

5 court fees and then presented the Memorandum of Appeal for filing in time, but the Registrar of the Court of Appeal had rejected the documents for lack of the Record of Appeal.

It was also not in dispute that the issue as to whether there was a Memorandum of Appeal or not was subject to Miscellaneous Application
10 No. 073 of 2016, which was yet to be resolved.

Our perusal of the court record indicates that apart from the letter from the appellant to the respondents indicating that the stay of execution had lapsed, there is nothing from the Court of Appeal to clarify on whether or not the stay had lapsed.

15 The appellant's complaint against the 2nd respondent is that in utter disregard of court orders, they failed to register him as flag bearer for FDC, and also failed to postpone the elections in order to allow for orderly elections bearing in mind that the order of stay was alleged to have lapsed only 2 days to the elections.

20 It is our view that the 2nd respondent having not been a party to the suit could not act on instructions from the appellant, even if the court order of 4th February, 2016 was conditional upon filing of the Memorandum of Appeal by the 1st respondent. It is only the court which could confirm the position on the court record as at 15th February 2016 and not just a letter
25 from the appellant. Without such confirmation from the court, the 2nd respondent could not be expected to act on the advice of the appellant. The 2nd respondent could not be faulted for not acting according to the appellant's wishes, not backed by any court document.

5 The learned trial Judge in his Judgment at page 26-27 had this to say:

"The final orders of the trial Judge made on 18th December, 2015 had and could only be implemented by the 2nd respondent and they were stayed by the Court of Appeal on 29th December, 2015 and also by a subsequent order of 4th February, 2016.

10 *Court has read an argument by Counsel for the Petitioner to the effect that since the 1st Respondent did not file a Memorandum of Appeal as directed by Court on 4th February, 2016 then on 15th February, 2016 there was no stay of execution.*

15 *With all due respect to Counsel for the Petitioner, this Petition is limited to what transpired in the election of the Member of Parliament for Aswa County Constituency and Court would be extending its mandate too far if it decided to probe what happened at the Court of Appeal from 15th February, 2016.*

20 *Court takes judicial notice that elections were held on 18th February, 2016 and to expect the 2nd respondent to act on Court Orders that were mutating all the time, would be most unreasonable. Until court receives a final order as to what happened in the Court of Appeal, it is my finding that all issues relating to Gulu High Court Miscellaneous Application No. 157 of*
25 *2015 are still pending in the Court of Appeal.*

The case of Byanyima Winnie vs. Ngoma Ngime & The Electoral Commission High Court Civil Revision No. 009 of 2001 is relevant here, once the electoral process was set in motion by nominations

5 *of the Petitioner and the 1st respondent, it was difficult to stop that process through Court Orders, more so when there was no conclusive order from the Appellate Court."*

He concluded on page 28 as follows:

10 *"Since the whole issue about non-compliance of the electoral laws in this Petition is centered around the alleged defiance of Court Orders, Court finds that non-compliance with the electoral laws was not proved to the satisfaction of this Court in this Petition."*

We find ourselves unable to fault the trial Judge, in his reasoning above. The first issue is therefore answered in the negative.

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ISSUE 2:

Whether the trial Judge erred in law and fact in finding that the respondent did not commit any illegal practices and/or electoral offenses.

20 The appellant complained that the learned trial Judge erred when he ruled that the appellant did not prove such malicious intention on the part of the 1st respondent, who had uttered false statements and so no electoral offence had been proved to that extent. He referred to the ingredients of the offence of uttering false statements under section 73 of the Parliamentary Elections Act which he said did not include an ingredient of
25 malicious intent as held by the learned trial Judge.

Counsel for the appellant submitted that the statements complained of in the lower court and in this court to wit; the appellant stole money and that

5 he belonged to the NRM party meant that he was untrustworthy and could therefore not be trusted by the people of Aswa County who are majorly FDC. And since the 1st respondent had admitted having made the statements complained of, and it was wrong for the trial judge to hold that during campaigns, even brothers from the same party like the FDC Party undergo
10 some degree of mental stress and certain utterances could therefore be made against opponents. This holding was a deletion of section 73 of the Parliamentary Elections Act since such mental stress during campaigns was the mischief behind the creation of the offence therein.

Counsel for the 1st respondent was of a different view. He submitted that
15 **section 73** of the **Parliamentary Elections Act** was in *parimateria* with **section 69** of the **Presidential Elections Act** which has been given interpretation by the Supreme Court of Uganda in **Dr. Kiiza Besigye versus Kaguta Museveni and Electoral Commission Election Petition No. 001 of 2006** where it was held that the petitioner had to set out verbatim
20 the defamation, there must be grounds for believing that the statements which are being made are not true and that any party had the freedom to reply to accusations made against him and correct wrong accusations created by the other party.

The 2nd respondent did not reply to this issue as it referred to the 1st
25 respondent.

We have considered the submission of learned Counsel on this point.

5 **Parts XI and XII of the Parliamentary Elections Act No. 17 of 2005**
deal with illegal practices and offences. Section 73 provides interalia as
follows:

73. False statements concerning character of candidates

10 *1) A person who, before or during an election for the purpose of
effecting or preventing the election of a candidate, makes or
publishes or causes to be made or published by words
whether written or spoken, or by song in relation to the
personal character of a candidate, a statement which is false_*

15 *a) Which he or she knows or has reason to believe to be false;
or*

*b) In respect of which he or she is reckless whether it is true or
false,*

20 *commits an offence and is liable on conviction to a fine not
exceeding twelve currency points or imprisonment not exceeding
six months or both.*

*2) This Section does not take away the right of a person to sue
for defamation of character.*

25 In Rtd. Col. Dr. Kiiza Besigye versus Electoral Commission and Y.K.
Museveni Presidential Election No. 001 of 2006, Odoki CJ as he then
was stated:

*"I accept the submission of Dr. Byamugisha that charges in the
petition relating to false, malicious or defamatory statements were
defectively framed as they did not set out verbatim the statements*

5 *complained of in the petition. Words take their meaning from the
context or background and if the context or background is not
provided or a full statement not produced, their malicious or
defamatory effect may not be easy to discover. The particulars of
the statement also enable the respondent or defendant to know
10 what case he or she has to meet or defend."*

We have looked at the Petition filed at the High Court. Paragraph 4 (v) of
the Petition states as follows:

15 *"(v) That the 1st respondent contrary to section 73 of the Act made
such false statements at Kolukeno village, Jengtong sub village,
Pabwoparis, at Dwol village, Lailiya parish all found in Bungatira
sub county, Aswa county in Gulu District, he further made
similar utterances during a press conference at Northern
Uganda Media Association (NUMEC) during campaign rallies
concerning the character of the Petitioner (see annexures to
20 the Affidavits of Ojok Eric, Adong Scovia, Lubangakene Moris,
Odongopiny Samuel and Okidi George accompanying the
petition together with all the annexures attached thereto)*

25 *a) That your humble petitioner is struggling that court has given
him the key, and warned the electorate to be aware that court
does not elect leaders for a party, but rather parties elect their
own leaders.*

- 5 ***b) That your petitioner is heavily indebted in life, he has been stealing people of their savings in a micro finance and he is no arrested, and is an NRM mole who keeps writing to President Museveni to bail him out with money and protection from the long arm of the law.***
- 10 ***c) That your petitioner is not educated and he is a stupid man who has no regard to the poor yet he was also a useless poor man, and goes bragging that he enabled women in Gulu to wear petty courts.***
- 15 ***d) That your petitioner and his wife are witch doctors who practice witch craft, and they have both failed to manage each other, how can a man whose wife has been taken over by a bodaboda rider be entrusted with leadership of a full constituency.***
- 20 ***e) That people should not vote for your petitioner because he is not a member of the Forum for Democratic Change but a top enemy of FDC who is simply tying himself on the party, yet he is an NRM mole who is hiding in FDC, Always seen at Acholi inn with known NRM leaders, and pretending to be hiding in the FDC umbrella whose campaigns were being financed by the NRM and Brig. Otema using money sent by Muhozi in***
- 25 ***December, 2015.***
- f) That your petitioner is not a voter in Aswa County constituency but a voter in Gulu Municipality and I have evidence to that effect, he is now formal/official***

5 ***parliamentary candidate for NRM in Aswa County and he was
not going to vote for himself.***

The alleged defamatory statements were not spelt out verbatim as required in defamatory claims. The charges relating to false malicious or defamatory statements were therefore defectively framed. The appellant just attached
10 the full speeches and their translation and then expected court to decipher out the defamatory statements from the exhibited speeches. The evidence of the witnesses who stated that they heard the defamatory words, that is to say, PW2 Lubangakene Morris, and PW3, Adong Scovia, does not cure the defects. The alleged defamatory statements ought to have been stated
15 verbatim and in the Langi language in which they were made. The translation thereof in English to Langi from an authorized translator would then follow each statement.

We find that failure by the appellant to abide by the above vital requirements rendered that claims unsustainable.

20 We agree with the learned trial Judge that the appellant could pursue other/further legal actions provided for under **section 73(2)** of the Parliamentary Elections Act.

The appellant complained further that that the 1st respondent under the watch of the 2nd respondent, contravened the provisions of section 17 of
25 the Parliamentary Elections Act. When he campaigned using a party symbol yet he was not the flag bearer. In his Judgment on this issue the learned trial Judge had this to say:

5 ***"As earlier noted, this case rotates about the Court Orders and as observed by Court these matters are still pending in the Court of Appeal.***

However, upon careful perusal of the evidence surrounding this alleged crime, Court finds that the 1st Respondent is the Deputy
10 ***President of the FDC Party which is a National Party. It is therefore difficult to stop such a person from wearing an FDC Party T-shirt or using any party symbol while he is executing his duties as Deputy President of a party in any part of Uganda.***

Court finds that no offence was proved to have been committed
15 ***by the 1st Respondent in contravention of section 17 of the Parliamentary Elections Act."***

We noted that the appellant and the 1st respondent both appeared as independent candidates with their respective symbols, none of which was the FDC Party Symbol. We have also earlier found that there was no order
20 or statement from the Court of Appeal regarding the status of the stay of execution vis-à-vis the alleged failure by the 1st respondent to fulfill the condition of filing a Memorandum of Appeal. The lapse of the stay of execution. The lapse of the stay of execution had to be confirmed by the said court, failing which the appellant could not seek to enforce for
25 execution of the orders under Miscellaneous Application No. 157 of 2015. The basis for the complaint herein was therefore lacking.

We further agree with the learned trial Judge that the 1st respondent being an FDC Deputy President could not be stopped from using the party

5 symbol as long as he did not portray himself as the flag bearer of the party which he was not. The respondent did not refer to any provision of the law which was contravened. We find nothing in sections 17, and 61(c) or Part XII, of the Parliamentary Elections Act that was contravened.

We, therefore, cannot fault the learned trial Judge in his finding that no
10 electoral offences were proved to have been committed by the 1st respondent personally or through his agents. We resolve the 2nd issue in the negative.

ISSUE 3:

15 *Whether the trial judge erred in law and fact in dismissing the Election Petition with costs.*

The appellant's counsel submitted that the award or non-award of costs is a matter of judicial discretion. The circumstances giving rise to the petition were purely on failure and non-compliance with orders that were granted
20 prior to the elections and therefore, it was not the appellant's doing that these orders were not complied with.

It was submitted that whereas it was brought to the attention of the trial judge that the 2nd respondent had defied court orders and declarations arising from the Judicial Review case wherein the appellant had been
25 declared as the legitimate flag bearer for FDC, the trial judge found that the said orders were still subject to further litigation in the Court of Appeal. Counsel referred to **Hon. Mayende Stephen Dede vs Ochieng Peter Patrick, Court of Appeal Election Petition Application No. 33 of**

5 **2012**, where it was held that the applicant who had been the successful party had not complied with the Assistant Registrar's order when he did not file a reference to a single judge after his own counsel had applied for it, and so court found that the applicant had contributed to the confusion.

It was the further submission of counsel that he had written a letter to the
10 2nd respondent notifying them of the lapse of the court order staying earlier orders and he also wrote another letter making complaints about the failure of the 2nd respondent to comply with the orders served. Further, the 1st respondent admitted campaigning as the FDC Flag bearer and Mr. Obete the 2nd respondent's witness, deponed in his affidavit in reply that he
15 nominated the respondent as the FDC Flag bearer and yet all the other relevant communications from the 2nd respondent indicated that the 1st respondent was nominated as an independent candidate.

Counsel for the appellant therefore contended that in the circumstances there was a lot of confusion in the conduct of the election, and imposing
20 costs on the appellant would in itself hinder intending litigants from pursuing such reliefs in the future for fear of costs.

In reply counsel for the 2nd respondent submitted that costs follow the event. He referred court to Rule 27 of the Parliamentary Election Petition Rules which provides that all costs of and incidental to the petition shall be
25 borne by the parties to the petition in such a manner and such proportions as the court may determine. He submitted that the appellant had not shown that discretion was wrongly exercised in awarding costs and so this

5 court could not interfere with the discretion of the trial court on the issue of costs.

Normally an appellate court will not interfere with the exercise of discretion unless it is shown that wrong principles were followed by taking into account an irrelevant factor or failing to take into account a relevant factor.

10 In **Software Distributors (Africa) Ltd & Another versus Kambaho Perez Civil Appeal No. 007 of 2006** this court said:

"We agree with the statement of the law as cited by both counsel that an appellate court will not interfere with the exercise of discretion by a lower court unless it is clearly shown that the exercise was not judicious or wrong principles were followed. If there are grounds to support the exercise by the trial judge of the discretion he or she purports to exercise the question of sufficiency of those grounds for this purpose is entirely a matter for the trial judge to decide, and the appellate court will not interfere with the discretion. It is immaterial that the appellate court would have exercised its discretion differently."

In election matters, the court in determining who should bear the costs of an election, is guided by **Rule 27** of the **Parliamentary Petitions Rules S.I 141-2** which states:

25 *"All costs of and incidental to the presentation of the petition shall be defrayed by the parties in such manner and in such proportions as the court may determine."*

5 However, we are aware that petitions are matters of national and/or political importance and court should bear this in mind while awarding costs. We agree with Bamwine J (as he then was) who, in **Kadama Mwogezaddembe versus Gagawala Wambuzi Election Petition No. 002 of 2001** held:

10 *"There is another dimension to such petitions; the quest for better conduct of elections in future... Keeping quiet over weaknesses in the electoral process for fear of heavy penalties by way of costs in the event of losing the petition, would serve to undermine the very foundation and spirit of good governance."*

15 In the present case, we are not persuaded that there are any pertinent issues raised by the appellant both in the Petition and the appeal that required judicial consideration. We find no reason to interfere with the Judge's discretion in the award of costs as he did. This issue is accordingly answered in the negative.

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ISSUE 4:

What are the available remedies?

In the event, owing to our finding that the appellant has failed to prove all the grounds of appeal, we dismiss the appeal accordingly, with costs to the
25 respondents here and in the court below.

We so order

5 Dated at Kampala this 16th day of August, 2017

Richard Buteera

RICHARD BUTEERA, JA

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F. M. S. Egonda Ntende

F. M. S. EGONDA NTENDE, JA

15

Elizabeth Musoke

ELIZABETH MUSOKE, JA

16/8/2017

Peter Dulongo for 2nd Respondent,

Roger Bikale for Appellant,

Mulongo also holding brief for

Wander Ogallo for 1st Respondent

Ann C/c

Parties absent

Cl; Judgment read in Court.

[Signature]