THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO.088 OF 2016

(ARISING FROM HIGH COURT ELECTION PETITION NO.17 OF 2016)

MAGOMBE VINCENT ::APPELLANT

VERSUS

1. **ELECTORAL COMMISSION ::::::::::::::::::::::::::**
2. **MUJASI MASABA BERNARD ELLY ::::::::::::::::** } **RESPONDENTS**

CORAM: HON. MR. JUSTICE ALFONSE OWINY DOLLO, DCJ

HON. LADY JUSTICE ELIZABETH MUSOKE, JA

HON. MR. JUSTICE BARISHAKI CHEBORION, JA

JUDGMENT

Introduction

This Election Petition Appeal is against the Judgment of the Honorable Lady Justice Margaret C. Oguli Ouma delivered on the 30th day of August 2016 in which she nullified the election of the 2nd Respondent as the District Chairperson of Mbale in the Local Government elections held on the 24th of February 2016 and ordered for a bye-election.

Background

The Appellant and the 2nd Respondent contested in the Local Government elections held on 24th February 2016 for the position of District Chairperson, Mbale district. The 1st Respondent declared the 2nd Respondent as the duly elected District Chairperson of Mbale.

The Appellant was dissatisfied with the said result and filed a petition in the High Court at Mbale seeking a number of orders inter alia declarations that the 2nd Respondent was not validly nominated and that the Appellant was the duly elected District Chairperson.

Judgment was given partially in favor of the Appellant. The trial Judge held that in view of the irregularities in the tallying process, it was difficult to declare who had won the election. She therefore ordered for a bye-election and declined to declare the Appellant as the winner of the said election. In respect to the contention over the validity of the 2nd Respondent's nomination, she ruled that the 2nd Respondent was validly nominated. The trial Judge also ordered that each party meets their own costs for the petition.

Grounds of Appeal

The Appellant was dissatisfied with the judgment and immediately preferred an appeal on the following grounds;

1. *The Learned Trial Judge erred in law and in fact when she failed to give an exhaustive scrutiny and proper evaluation of the evidence and legal arguments on the court record thus arriving at a wrong conclusion.*
2. *The Learned Trial Judge erred in law and in fact when she held that at the time of his nomination, the 2nd Respondent held the minimum academic qualification of Advanced Level Certificate of Education.*
3. *The Learned Trial Judge erred in law and in fact when she declined to declare the Appellant as the winner of the Mbale District Local Council V Chairperson Elections.*
4. *The Learned Trial Judge erred in law and in fact when she declined to award costs to the Appellant.*

The 2nd Respondent was also aggrieved with part of the High Court's decision and cross appealed on the following grounds;

1. *The Learned Trial Judge erred in law and in fact when she failed to evaluate the evidence on the record.*
2. *The Learned Trial Judge erred in law and in fact when she declined to allow and consider in evidence declaration forms together with tally sheets in respect of all the polling stations in the District contrary to her Order dated 14th July 2016.*
3. *The learned judge erred in fact and in law when she declined to dismiss the petition with costs.*

During the joint conferencing, the parties agreed that the grounds of appeal and the cross appeal be reduced into the following four issues;

1. *Whether the Learned Trial Judge erred in law and fact when she held that the 2nd Respondent held the requisite minimum academic qualification to contest in the Mbale District Local Council V Chairperson Elections?*
2. *Whether the learned trial judge erred in law and in fact in not automatically declaring the 2nd Respondent as duly elected Mbale District Local Council V Chairperson Elections?*
3. *Whether the learned trial judge erred in law and in fact when she declined to award costs to the Appellant?*
4. *Whether the learned trial judge erred in law and fact when she declined to allow and consider in evidence Declaration of Results Forms other than those relied on by the Petitioner contrary to her order of 14th July 2016.*

Representation

The Appellant was represented by Mr. Ambrose Tebyasa, Mr. Yusuf Mutembulire and Mr. Isaac Nabende. The 1st Respondent was represented by Mr. Nasser Serunjogi, while the 2nd Respondent was represented by Mr. Jude Byamukama and Mr. Arthur Kirumira.

Ruling in Civil Application No.44 of 2017

This appeal came up for hearing together with the above application in which Counsel for the Applicant/2nd Respondent sought this Court's orders to review

the ruling in **Civil Application No.27 of 2017** dismissing an application to adduce additional evidence.

The effect of the order sought by Counsel for the 2nd Respondent in the appeal would have been to allow additional evidence in form of certified Declaration of Results Forms for seven polling stations whose results were allegedly altered in favor of the Appellant and to the prejudice of the 2nd Respondent in the Final Results Tally Sheet.

We heard the application and summarily dismissed it. We promised to give our reasons in the final judgment. The main reason why we declined to review the order of dismissal in Civil Application No.27 of 2017 was that we were not satisfied that the application passed the test for review.

In our view, there was no glaring error or mistake of law in that ruling to merit review of the same. The Application was, therefore, an appeal in disguise and we agree with the previous ruling of this Court where we held that in view of the Applicant's Cross Appeal, granting the order for additional evidence would have the effect of pre-empting and determining a major aspect of the cross appeal. The Cross Appeal is specifically complaining against the failure of the Trial Judge to admit the Cross Appellant/2nd Respondent's evidence in form of certified Declaration of Results Forms.

We now turn to consideration of the appeal and cross appeal.

Submissions by counsel

When the appeal and cross appeal came up for hearing, the parties were ordered to file written submissions which Counsel for the Appellant and the 2nd Respondent did. Counsel for the 1st Respondent dispensed with filing written submissions and adopted his conferencing notes which he invited court to treat as the 1st Respondent's written submissions.

Submissions of Counsel for the Appellant

Counsel for the Appellant addressed Court in respect of each issue independently. In regard to issue one, Counsel criticized the trial judge's finding that the Appellant had not brought credible evidence to challenge the 2nd Respondent's academic qualifications.

Counsel submitted that the Appellant challenged the nomination of the 2nd Respondent which was based on different names from those on his purported academic documents and which apparently had no explanation to connect him to those documents.

Counsel submitted that the academic document presented by the 2nd Respondent, a verification of results letter, is in the names of Bernard E.W. Mujasi Masaba whereas some of his nomination papers are in the names of Mujasi Masaba Bernard Elly and the others are in the names of Bernard E.M. Mujasi.

It was argued that the head teacher of Mbale Senior Secondary School denied knowledge of a student in the name Bernard E.W. Mujasi-Masaba but admitted knowledge of one Mujasi E. Bernard. Equally, Counsel pointed out that the head teacher cast doubt on the authenticity of the verification letter by disputing the Centre Number indicated there.

In Counsel's view, there was no evidence at the 2nd Respondent's nomination and in court to support his claim that the names Bernard E.W. Mujasi Masaba referred to one and the same person. He contended that the 2nd Respondent's names would as well have belonged to four different individuals.

Counsel maintained that the burden to prove authenticity of the 2nd Respondent's academic credentials lay upon him from the moment the Appellant raised the issue of discrepancies on the nomination papers. In his view, a prima facie case was made out once the discrepancies in the names were pointed out.

In support of his arguments, Counsel relied on ***Abdul Bangirana vs Patrick Mwondha, SC EPA No.9 of 2006***, ***Serunjongi Mukiibi vs Lule Umar Mawiya, SC EPA No.6/2007, Muyanja Mbabali vs Bakerawo Nsubuga EPA No.36 of 2011*** inter alia.

It was also argued that in the event the 2nd Respondent had wished to rely on the names in the verification letter, he should have complied with the procedure under the Registration of Persons Act, 2015 for change of name and

that failure to comply, the nomination of the 2nd Respondent should have been rejected.

This court's decisions in ***Otada Sam Amooti Owor vs Tabani Amin & Another, EPA No.93 of 2016, Bainamatsiko Moses vs Mugisha Samuel & EC, EPA No.96 of 2016*** and ***Wakayima Musoke & Another vs Kasule Sebunya EPA No.50 of 2016*** were cited in support of the proposition that the discrepancy between the 2nd Respondent's name on his nomination papers and the letter of verification evidencing his academic qualifications was sufficient ground to impugn his nomination.

Regarding issue 2, the Appellant argued that the uncontroverted evidence on the court record was to the effect that the principles and provisions relating to the conduct of credible elections were never followed and that the entire election process was conducted in an unfree and unfair environment.

Counsel argued that the 2nd Respondent was nominated in error and should have been disqualified leaving the Appellant as the only candidate in the race who should have been declared the winner on the authority of ***Wakayima Musoke & Another vs Kasule Robert Sebunya***.

Counsel submitted that there was evidence that the 1st Respondent altered results and awarded superior margins to the 2nd Respondent. It was contended that this fact was confirmed by both Respondents and the Trial Judge had held that there was noncompliance with electoral laws on that premise.

It was pointed out that the Respondents admitted that the results obtained by the Appellant in respect of 19 polling stations were altered in favour of the 2nd Respondent. In Counsel's view, an accurate tally of the votes accorded to the Appellant a superior margin of 589 votes over the 2nd Respondent and on the authority of this Court's decision in ***Makatu Augustus vs Weswa David & Another, EPA No.73 of 2016,*** this Court should declare the Appellant as the winner of the election.

Submitting on issue no.3, counsel for the Appellant argued that in view of the provisions of **Section 27(2)** of the Civil Procedure Act and numerous authorities including ***Paul Mwiru vs Hon. Igeme Nathan Nabeta & 2 Ors, EPA No.6 of 2011***, a successful party is entitled to costs and can only be deprived of such costs for good reason.

Counsel noted that the 2nd Respondent agrees with the above principle but unfortunately, the trial judge had declined to award costs to the Appellant in what amounted to an abuse of discretion. A prayer was therefore made for costs for two Counsel to be granted.

Regarding issue no.4, counsel for the Appellant emphasized that the Respondents did not plead any irregularity or anomaly unlike the Appellant who complained about alteration of results of 19 polling stations to his prejudice.

Counsel supported the trial Judge's order limiting the admission of certified Declaration of Results Forms to only the 19 polling stations pleaded by the

Appellant and maintained that it would have been departure from pleadings if other results were allowed. They relied on ***Bakaluba Peter vs Nambooze Betty, SC EPA No.4/2009*** and ***Sietco vs Noble Builders (U) Limited, SCCA No.31/1995***.

Lastly, Counsel submitted that there was no evidence that the evidence sought to be adduced by the Respondents could affect the Appellant's case in the lower court since the issue of interchanging of results in favor of the Appellant only came up during submissions.

Counsel therefore supported the Trial Judge's decision to exclude any evidence by the Respondents and prayed that the Cross Appeal be dismissed.

Submissions of Counsel for the 1st Respondent

Counsel opposed the appeal and prayed that the decision of the lower court be affirmed.

On issue no.1, it was argued by Counsel for the 1st Respondent that the Appellant failed to adduce evidence to show that there is another and different person other than the 2nd Respondent entitled to the names in issue. It was submitted that the appellant's submission of merely pointing out the alteration in names and alleging that this amounted to different people does not amount to adducing satisfactory evidence before court.

In counsel's view, the Appellant was blowing trivial differences out of proportion merely to explore the possibility of securing a judicial victory in the absence of tangible evidence of fraud on part of the 2nd Respondent.

In particular, counsel emphasized that the 2nd Respondent did not change his name as alleged but merely altered the order of his name as required by nomination guidelines and that he explained away the suffix "W" during cross examination as having been borrowed from his father's name, "Wamimbi". This evidence, according to Counsel, was uncontroverted.

Counsel relied on the High Court decision in ***Kizito Deo Lukyamuzi vs Kasamba Mathias & Anor, EP No.3 of 2011*** for the proposition that in absence of evidence to show that the change in names was by no means the conduct of a fraudulent person or by one who knows he is a beneficiary of fraud or he has knowingly benefitted from the act, then it would be wrong to visit innocent mistakes on the person.

All in all, Learned Counsel for the 1st Respondent emphasized that the Supreme Court decision in Sserunjogi James Mukiibi vs Lule Umar Mawiya, EPA No.15 of 2006 is distinguishable from the present case, as therein, there was evidence to demonstrate fraudulent intent on part of the successful candidate whose academic qualifications were impeached by the court.

Learned Counsel concluded that the Appellant had failed to demonstrate any fraudulent intent on part of the 2nd Respondent and simply sought to confuse the centre number of the school he attended and his index number issued to

him by Uganda National Examinations Board. In his view, the Appellant had failed to make out a prima facie case against the 2nd Respondent.

Regarding issue No.2, counsel submitted that the Appellant and his witnesses conceded that the alteration of results was inadvertent errors by the 1st Respondent.

He accused the Appellant of selectively picking out results of 19 polling stations and ignoring 6 polling stations where the same errors favored him.

Counsel contended that the error of interchanging of results was done for both parties and that this illegality was brought to the court's attention. He argued that if each party is given the votes he is entitled to, the Respondent would still emerge the winner.

Counsel therefore supported the decision of the Trial Judge and argued that it was correct that the winner of the election could not be determined based on the complaint in only 19 polling stations out of 427 polling stations.

In issue No.3, counsel argued that the decision not to award costs to any of the parties was an exercise of the Trial Judge's discretion which was justified based on the circumstances of the parties. It was submitted that the appellant having failed to succeed wholly in all the reliefs sought, the Trial Judge's decision was justified.

Regarding issue No.4, the matter concerning the 2nd Respondent's Cross Appeal was not addressed by Counsel for the 1st Respondent. Perhaps this is

because he relied on conferencing notes before an issue was framed regarding the Cross Appeal. However, some of his arguments in respect of the 3rd Issue seem to have had the Cross Appeal in mind as he seems to fault the Trial Judge for excluding the certified Declaration of results Forms brought before court for the entire district.

Submissions of Counsel for the 2nd Respondent

On issue No.1, counsel for the 2nd Respondent disagreed with the Appellant's criticism of the Trial Judge's findings. Counsel submitted that the Appellant's evidence in support of the petition to impugn the 2nd Respondent's academic qualifications comprised mere allegations based on conjecture that were insufficient to shift the burden of proof to the 2nd Respondent.

Counsel argued that the proper position of the law in regard to the burden of proof was restated in this Court's decision in ***Okello P.Charles Engola & EC vs Ayena Odongo, EPA No.26 &94 of 2016*** to the effect that a Petitioner who claims that a successful candidate does not have the requisite academic qualifications bears the burden, at all material times, to prove the allegations he fronts.

Counsel pointed out that in the said decision of this Court, it was held that an allegation of disparity in names on the academic documents and the nomination papers was not sufficient to impeach the candidate's academic papers.

In particular, Counsel insisted that the Appellant could not have made out a prima facie case against the authenticity of the 2nd Respondent's academic qualifications by simply pointing out disparities between the 2nd Respondent's name on his nomination paper and the academic documents. In his view, this was insufficient to shift the evidential burden of proof.

Counsel also cited this Court's decisions in ***Mutembuli Yusuf vs Nagwomu Moses & EC, EPA No.43 of 2016*** and ***Ninsiima Grace vs Azairwe Dorothy & EC, EPA No.5 of 2016*** for the proposition that interchanging of names cannot affect one's qualifications and that satisfactory evidence must be brought by a Petitioner, beyond a mere discrepancy in names, before the evidential burden of proof shifts to a successful candidate whose academic documents are being challenged.

Counsel for the 2nd Respondent submitted that the use of a deed poll to change names is not necessary where one has not registered their birth under the Registration of Persons Act and that a minor variation between an academic document and the nomination paper must be disregarded.

Counsel emphasized that the Appellant had miserably failed to adduce any cogent evidence to challenge the 2nd Respondent's academic qualifications beyond pointing out a mere disparity in names. Counsel took the view that the Appellant did not succeed in shifting the evidential burden of proof as he relied on mere speculation and conjecture that the student named Mujasi E Bernard

who studied at Mbale Senior Secondary School could not have been the 2nd Respondent.

Counsel argued that the authorities relied on by the Appellant were distinguishable and in respect of different circumstances where cogent evidence was called to impugn academic qualifications which rendered the Appellant's contentions as being without merit.

Regarding issue No.2, counsel supported the Trial Judge's decision declining to declare the Appellant as the winner of the election for District Chairperson, Mbale.

Counsel argued that the decision to declare a Petitioner or any other candidate as winner of an election is based on the discretion of a trial judge and an appellate court should not lightly interfere with the exercise of discretion by a Trial Court unless it is satisfied that there has been some misdirection. He relied on this Court's decisions in ***Musoke Emmanuel vs Kyabaggu Richard & EC, EPA 67 of 2016*** and ***Kezaala Mohammed vs Batambuze Majid & EC, EPA No.66 of 2016*** for the said position.

Counsel argued that the trial judge correctly refused to declare the Appellant as winner of the election on the basis of only 19 polling stations put in evidence. In Counsel's view, there was no proof that the Appellant won the election and his Counsel vigorously opposed all efforts to conduct an accurate retally of all contentious polling stations.

On issue No.3, counsel for the 2nd Respondent agreed with the Appellant's submission to the effect that a successful party should not be arbitrarily denied costs. The point of departure was on whether this principle was correctly applied by the Trial Judge.

In Counsel's view, the 2nd Respondent could not have been condemned to costs by the High Court since the election had been annulled because of non-compliance by the 1st Respondent. He argued that the Appellant should have been ordered to meet some costs on account of the fact that the allegations in his petition regarding the academic qualifications of the 2nd Respondent were dismissed.

Counsel therefore prayed that the Appellant should be required to meet the 2nd Respondent's costs in respect of the unsuccessful limb of his petition as claimed in the Cross Appeal.

Regarding issue No.4, counsel for the 2nd Respondent criticized the Trial Judge's ruling blocking the Respondent from tendering the results of the election in evidence and only permitting certified declaration results forms in respect of the 19 polling stations claimed by the Appellant.

It was contended that the trial Judge erred in law when she declined to admit the evidence on improper tallying of results as a whole and concentrated on balancing the rights of the Appellant against those of the Respondents without taking into account whether the choice of the voters could be ascertained.

Counsel argued that if the 2nd Respondent had been allowed to tender in evidence of the results of polling stations where his own superior winning margin was also altered, it would have demonstrated that the tallying errors did not affect the final result.

Counsel criticized the trial Judge for reversing her ruling allowing the Respondents to admit in evidence results of other polling stations and maintained that she was already *functus officio* and should have let the witness present the Declaration of Results Forms.

Counsel further submitted that the principle in ***Bakaluba Peter vs Nambooze Betty, SC EPA No.4 of 2009*** is to the effect that even where there has been a departure from pleadings, as long as the opposite party has been given fair notice of the case and adduces evidence accordingly and has not suffered injustice, court will not allow irregularity or departure from pleadings to frustrate determination of the case.

Counsel also relied on this Court's decision in ***Mbagadhi Fredrick & EC vs Dr. Frank Nabwiso, EPAs No.14 & 16 of 2011*** for the proposition that the role of an election court is not restricted to balancing the rights of opposing parties but must also take into account the rights of the voters to have their choice ascertained and enforced without allowing technicalities to get in the way of substantive justice.

In Counsel's view, if the trial Judge had been alive to this position of the law, she would have allowed the Respondents to adduce evidence to prove that the errors of alteration of results also benefitted the Appellant who was awarded winning margins in respect of some polling stations that he had lost.

Counsel therefore prayed that this Court either orders a retrial of this issue in the lower court or conducts a recount. In his view, the need to determine the 2nd Respondent's complaints in regard to tallying errors that affected him "cries out loud" and is a plea for justice.

Rejoinder by Counsel for the Appellant

In a brief rejoinder, Counsel for the Appellant contended that it was only the 2nd Respondent who could explain the discrepancies on his academic papers and that the authorities cited by Counsel for the 2nd Respondent were distinguishable.

Counsel contended that the results of all the other polling stations in the district were not in issue save for the 19 polling stations pleaded in the Appellant's petition in the lower court. Counsel reiterated the prayer that the Appellant be declared the winner of the election as the Trial Judge had not exercised her discretion properly when she declined to declare him.

Counsel contended that the 2nd Respondent was not entitled to any costs because the High Court had nullified the election on grounds of non-compliance with electoral laws that he had benefited from.

Counsel also supported the Trial Judge's decision to exclude the 2nd Respondent's evidence since it would have amounted to a departure from his pleadings and such evidence was therefore inadmissible.

Court's consideration

We have perused the Record of Appeal and the judgment of the lower court. We have also considered the written submissions of counsel for all parties and the authorities that were availed to Court for which we are grateful.

This being a first Appeal, our duty as rightly submitted by Counsel for the Appellant is to reappraise the evidence and reach our own conclusions. Rule 30 of the Judicature (Court of Appeal Rules) Directions gives this Court power to reappraise evidence and to take additional evidence.

In their written arguments, Counsel for the Appellant and the 2nd Respondent agree that the standard of proof in election petitions arising out of local council elections is proof to the satisfaction of court in accordance with **Section 139 of the Local Governments Act**.

The definition of the phrase ***"to the satisfaction of the court"*** was settled by the Supreme Court in ***Presidential Election Petition No.1 of 2001 Kizza Besigye vs Yoweri Museveni*** which adopted the House of Lords proposition in ***Blyth vs Blyth 1966 AC 643*** that it means, ***"the Court must be satisfied to the extent that the Court is without being left in any state of reasonable doubt."***

This Court, in ***Makatu Augustus vs Weswa David & EC, EPA No.73 of 2016,*** restated the same position. **See the Judgment of Remmy Kasule JA.** We agree with the concerns of our brother Justice that there is an urgent need for legislative reform in regard to the Local Government Act's provisions on election related matters especially adjudication of disputes.

It is clearly odd and rather unlikely that Parliament could have intended to set a higher standard of proof in election petitions of matters arising out of local council elections as opposed to parliamentary election petitions. At it were, the standard of proof in election petitions arising out of local council elections is beyond reasonable doubt.

We shall bear the provisions of Rule 30 of the Rules of this Court and case law on the standard of proof in mind while resolving this Appeal. We shall resolve the issues in the similar manner in which the parties submitted on the same.

The Appellant contends under issue 1 that the 2nd Respondent did not possess academic qualifications to satisfy eligibility to contest as district chairperson.

The academic document presented by the 2nd Respondent, a letter issued by Uganda National Examinations Board in verification of his results, is in the names of Bernard E.W. Mujasi-Masaba whereas some of his nomination papers are in the names of Mujasi Masaba Bernard Elly and the others are in the names of Bernard E.M. Mujasi.

In Counsel's view, these discrepancies raised a prima facie case against the authenticity of the 2nd Respondent's academic qualifications and he did not discharge the burden to affirm their accuracy and reliability.

The Appellant relied on his affidavit to dispute the 2nd Respondent's qualifications. He contended that although the nominated candidate was Mujasi Masaba Bernard Elly, the declaration in Form EC 2 belonged to Bernard E.M. Mujasi who is not the 2nd Respondent.

A letter addressed to the Appellant's advocates from Mbale Senior Secondary School was also put in evidence. The headmaster of the said school indicated that a student under the name "Mujasi E. Bernard" studied there in 1966 and 1967 according to a class register. He referred the Appellant's advocates to Uganda National Examinations Board for further assistance.

In his affidavit evidence before court, the 2nd Respondent stated that he attained the minimum level of education being a holder of a Uganda Advanced Certificate of Education.

He added that he has always been known by the names Mujasi Masaba Bernard Elly and that during the nomination exercise, he submitted documents using the said names save for abbreviations of "E" and "M" which refer to the names "Elly" and "Masaba".

The 2nd Respondent further stated in his affidavit that the names "Bernard E.W.Mujasi Masaba" and "Mujasi Masaba Bernard Elly" refer to only one person and that is himself. He further clarified in the said affidavit in support of his answer to the petition that the abbreviations "E" and "W" referred to the names "Elly Wamimbi".

At the hearing, the 2nd Respondent further stated that the name "Wamimbi" belonged to his father and he had added it on his names as a way of honoring him. He explained that because of having many names, he omits it from some of his documents.

The 1st Respondent, on the one hand, relied on the affidavit of the Returning Officer who nominated the 2nd Respondent. He disputed the averments of the Appellant and stated that the person nominated was the 2nd Respondent.

He added that the 2nd Respondent used initials of some of his names on the nomination papers because his full name could not fit on the space provided. He maintained that changing the pattern of names did not make the 2nd Respondent a different person altogether.

The trial judge, in her judgment, held that variation of names is not a factor that invalidates nomination. Secondly, she held that interchanging of names did not affect or prejudice the voter as they knew who they intended to vote for.

In regard to academic qualifications, the trial judge held that the Appellant did not bring credible evidence to challenge the 2nd Respondent's academic

qualifications. She found that the head master's letter was not brought in good faith and consequently, the 2nd Respondent was qualified to stand.

We already stated that the burden of proof lay on the Appellant. He was required to prove this allegation to the satisfaction of the Court in accordance with Section139 of the Local Governments Act. The evidence brought to challenge the 2nd Respondent's academic qualifications consisted of alleged variations in the entries of his name on nomination papers and the letter of the headmaster of Mbale Senior Secondary School.

We adopt this Court's reasoning in ***Okello Charles Engola & Electoral Commission vs Ayena Odongo, EPA No.26 & 94 of 2016*** where it was held that a Petitioner who claims that a successful candidate does not have requisite academic qualifications bears the burden, at all times, to prove this allegation.

Similarly, this Court in ***Mutembuli Yusuf vs Nagwomu Moses, EPA No.43 of 2016*** held that writing of the same name in a different order cannot affect ones' qualifications and that alone cannot constitute proof of invalidity. Further, the Court held that addition of a name does not amount to change of a name.

We emphasized that more evidence, beyond a discrepancy in names, must be adduced to prove that a person who sat and obtained certain academic qualifications is not the same person nominated for an election. We found that such evidence is insufficient to shift the evidential burden. This position was

also approved in Ninsiima Grace vs Azairwe Dorothy & Electoral Commission, EPA 05 of 2016 and Mulindwa Isaac Ssozi vs Lugudde Katwe Elizabeth, EPA No.14 of 2016.

In light of the firm position of the law, we are in agreement with the trial judge that the Appellant did not adduce any credible evidence to impugn the 2nd Respondent's academic qualifications. The Appellant had the burden to prove that some other person owned the qualifications claimed by the 2nd Respondent or at least, that the institutions which issued the qualifications had disowned or recalled them. None of such evidence was forthcoming.

The 2nd Respondent ably explained that he had added letter "W" to his names in honor of his father "Wamimbi". The rest of the alleged disparities in his name were a result of abbreviating some of his names. Usage of abbreviations and interchanging of order of names does not amount to change of name.

The Appellant failed to discharge the burden of proof to the satisfaction of the Court and the evidence he brought was rather insufficient to shift the evidential burden to the 2nd Respondent. We do not agree that merely pointing out disparities arising out of abbreviations or addition of a prefix were sufficient to shift the burden. That would create an absurdity in law as the authorities cited have ably explained.

We also take judicial notice of the fact that usage of a father's name alongside one's names is a widespread practice and that alone cannot amount to change of name.

The 2nd Respondent did not change his name and was not required to comply with provisions of the Registration of Births and Deaths Act as only names registered there could be changed in accordance with the said repealed law.

Lastly, the case against the 2nd Respondent was not that he was not a registered voter. This distinguishes the authorities that Counsel for the Appellant labored to rely on to claim that we find that the Appellant was not a registered voter. That was not the case set up and in any event, there was sufficient proof on record that the 2nd Respondent was a registered voter in his full name Elly Bernard Mujasi Masaba.

Consequently, we answer this issue in the negative and dismiss the ground of appeal against the 2nd Respondent's nomination and uphold the decision of the Trial Court that he was qualified to stand for the office of District Chairperson.

On issues no.2 and 3, the Appellant faults the Trial Judge for not declaring him outright winner of the election for District Chairperson, Mbale. He was also dissatisfied with the order that each party meets their own costs for the petition.

In his view, once the results of the 19 polling stations where his winning margins were erroneously awarded to the 2nd Respondent are corrected and adjusted within the final Results Tally Sheet, he emerges winner of the election.

We agree with the Appellant's argument that on proper computation and adjustment of results in issue, Court has jurisdiction and the discretion to declare the rightfully elected candidate of any election. This Court exercised its

discretion in ***Makatu Augustus vs Weswa David & EC, EPA No.73 of 2016*** to declare the Appellant as the validly elected candidate.

In the peculiar circumstances of this matter, the Trial Judge acknowledged that the Appellant's winning margin in 19 polling stations had been altered to his prejudice and to the benefit of the 2nd Respondent. However, she declined to declare the Appellant the winning candidate on grounds that she had also considered the remaining polling stations as well as the complaint by Counsel for the 2nd Respondent that the latter also suffered the alteration of his results in respect of 6 polling stations.

The Trial Judge ruled that it was difficult to determine the eventual winner in light of the altered results in the 19 polling stations and the complaints, albeit brought at the level of submissions, that the 2nd Respondent had also suffered alteration of results in 6 polling stations.

To this extent, we are unable to fault the exercise of discretion by the Trial Judge in ordering a bye-election instead of declaring an outright winner. She gave her reasons which we have found to be sound and legitimate. At this point, we have no reason to interfere with her discretion. We find that the decision of ***Kezaala Mohammed vs Batambuze Majid, EPA No.66 of 2016*** applies.

Consequently, we answer this issue in the negative and dismiss the corresponding ground of appeal. The Trial Judge was well within her proper

exercise of discretion when she declined to announce the Appellant as overall winner.

Similarly, although the Trial Judge did not justify her order on costs, the same is not manifestly illegal. The Appellant was only partially successful in the matter. Secondly, the 2nd Respondent was not at fault according to the Trial Judge.

Thirdly, the 1st Respondent conceded to the errors of alteration of results and insisted that they were not the result of a deliberate process to prejudice the Appellant.

The trial judge's order on costs was therefore not manifestly illegal or a wrongful exercise of discretion. We therefore answer this issue on costs in the negative.

Regarding issue No.4, the 2nd Respondent in his Cross Appeal, faults the Trial Judge for denying him an opportunity to present evidence of results from polling stations where his winning margins were also erroneously awarded to the Appellant in the Final Results Tally Sheet.

We have reviewed the record of proceedings and noted that early in the proceedings, the Respondents sought to adduce evidence in form of Declaration of Results Forms. On 14th July 2016, the 2nd Respondent applied for summons to the Secretary of the 1st Respondent to be required to appear before court with certified declaration of results forms for the entire Mbale district in respect of the election for district chairperson.

After lengthy submissions by both parties, the Trial Judge ruled in favor of summoning the Secretary of the 1st Respondent to testify and bring along documentary evidence in form of certified Declaration of Results Forms for the entire district in respect of the election for district chairperson. The Secretary of the 1st Respondent delegated one Umaru Kiyimba who came to court on 21st July 2016.

Counsel for the Appellant vigorously opposed the attempt by Umaru Kiyimba to testify but the Trial Judge overruled his objection and allowed the witness to testify. In a strange twist of events, when the witness attempted to exhibit declaration of results forms for the entire district, Counsel for the Appellant objected yet again.

Counsel for the Appellant raised the same objections, couched in different language, which had been overruled on 14th July 2016 when leave was granted for the Secretary of the 1st Respondent to testify and bring along certified DR forms.

Strangely, the Trial Judge sustained Counsel for the Appellant's objection and disallowed the 1st Respondent's witness, Umaru Kiyimba, from exhibiting the Declaration of Results Forms for the entire district save for the 19 polling stations pleaded by the Appellant.

In effect, the Trial Judge literally allowed the Appellant to take control of the proceedings and determine which materials were relevant for the Court. The

Appellant's justification for this approach was that the Respondents were bound by their pleadings.

In Counsel's view, the Respondents had not pleaded that the 2nd Respondent was equally affected by the errors of alteration of results in the Final Results Tally sheet. Consequently, Counsel for the Appellant maintained that the Respondents could not be allowed to introduce any documentary evidence touching the results in evidence.

In his final submissions, Counsel for the 2nd Respondent maintained that the 2nd Respondent had also been affected by the alterations. He resorted to unorthodox methods of attaching copies of Declaration of Results Forms to his submissions to buttress his point. This was irregular and certainly, the Trial Judge was justified to disregard them.

However, the Trial Judge, in her judgement did take note of the consistent complaint that the 2nd Respondent had also been affected by the errors of alteration.

We also note the spirited, albeit unsuccessful attempts, by Counsel for the 2nd Respondent to adduce additional evidence in form of the results of certain polling stations prior to hearing of this appeal.

We are of the view that when this matter was first brought to the lower court's attention, the Trial Judge should have exercised her discretion differently in light of the requirements of Article 126(2) (e) of the Constitution which enjoins courts to administer substantive justice without undue regard to technicalities.

In our view, the objection by Counsel for the Appellant that the Respondents' failure to plead any Declaration of Results Forms meant that they were estopped from relying on them is simply a technicality and not a requirement of any written law.

The Trial Judge should have exercised her discretion and admitted the certified Declaration of Results Forms that the 2nd Respondents wished to rely on. She would have rendered substantive justice to both parties.

Besides, the decision of this Court in ***Mbaghadi Fredrick & EC vs Nabwiso Frank, EPAs No.14 & 16 of 2011***, already settled a similar dispute and specifically held that in an election dispute, the role of court is not confined to balancing the rights and merits of opposing parties. Court must consider whether a valid election was held in regard to the rights of the voters.

Consequently, an election court has a duty to uphold the will of the voters provided there is sufficient material to establish the truth of the matter. An election court should avoid an approach of a civil court trying a private dispute between two persons.

In addition, the principle flowing from the Supreme Court decision of ***Bakaluba Peter vs Nambooze Betty, SC EPA No.4 of 2009***, is that even where there is a departure from pleadings, as long as the opposite party has fair notice of the case he has to answer and does answer it and adduces evidence accordingly and has not suffered injustice, court should not allow complaints over departure from pleadings to frustrate the case.

In this matter, adducing in evidence the results of other polling stations could not have occasioned any prejudice or injustice to the Appellant. The ultimate test is ascertaining the voters' choice and that cannot prejudice the Appellant.

On the contrary, denying the Respondents an opportunity to demonstrate whether the 2nd Respondent was equally affected by the computation errors had a higher likelihood of leading to a miscarriage of justice.

The appellant's case is that he won the election based on correction of errors in the 19 polling stations where both parties agree that his winning margins were inadvertently swapped in the final tally sheet. We have failed to appreciate why the Appellant is strongly opposed to adducing of evidence that tends to show that he was also a beneficiary of the same errors.

The Trial Judge should have allowed the 2nd Respondent to adduce in evidence results of polling stations where he alleged that his winning margin was equally swapped to the appellant's favor. This dispute was about ascertaining the voters' will and correcting all arithmetic errors in the final results tally sheet. Consequently, we answer this issue in the affirmative.

The Corresponding ground of appeal in the 2nd Respondent's Cross Appeal succeeds. The judgment of the lower court, as a result of our finding, cannot be upheld and must be set aside. The order to nullify the election of the 2nd Respondent and organize a bye-election is equally set aside.

The justice of this case requires that the 2nd Respondent should be given opportunity to tender in evidence the results of polling stations whose final figures in the final results tally sheet he disputes. We are therefore ordering a retrial strictly with regard only to this aspect of the petition.

In regard to costs, we note that part of the Appellant's petition that we have sent back for retrial raises arguable issues. On the other hand, part of his petition relating to the alleged lack of academic qualifications on part of the 2nd Respondent was unsuccessful both in the High Court and this Court. We therefore think that it is only fair that the Appellant should meet some of the 2nd Respondent's costs in defending this aspect of the petition.

In regard to the 1st Respondent, we have a different view. The 1st Respondent's officers at the District Tally Centre negligently handled the tallying of final results leading to this petition and now the retrial. Consequently, the 1st Respondent is not entitled to any costs.

In conclusion, taking the above considerations in account, we now make the following orders;

1. The Appeal substantially fails and is hereby dismissed.
2. The Cross Appeal is hereby allowed in part.
3. The orders of the High Court nullifying the 2nd Respondent's election as district chairperson and ordering a bye-election are hereby set aside.
4. The Petition against the 2nd Respondent's election is hereby remitted back to the lower court for a retrial before a different Judge and shall be

strictly restricted to determining the issues of whether the irregular tallying of results at the District Tally Centre affected the final result and determining which candidate, upon correction of all the tallying errors, obtained the highest number of votes.

5. The Court presiding over the retrial shall admit in evidence any valid Declaration of Results Forms that the Cross Appellant/2nd Respondent wishes to rely on.

6. The Appellant shall meet one-third of the Cross Appellant/ 2nd Respondent's costs in this court and the court below.

7. As between the Appellant and the 1st Respondent, each party shall meet their own costs in this court and the court below.

We so order

Dated at Kampala this.....1st.....day of .....June.....2018

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HON.MR.JUSTICE ALFONSE OWINY DOLLO, DCJ
DEPUTY CHIEF JUSTICE

.....

HON.LADY JUSTICE ELIZABETH MUSOKE, JA
JUSTICE OF APPEAL

.....

HON.MR.JUSTICE BARISHAKI CHEBORION, JA
JUSTICE OF APPEAL

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1/6/2018

Ambrose Tibyaga together with

Nsereko for the Appellant

Isaac

Appellant is in court

Brian Kirunira for the 2nd Respondent

2nd Respondent is absent

Natukunda Antonia for the 1st Resp

de Melissa Nansereko

Tibyaga: for Court we

are ready to receive the

Court

Court: Court in court

to be parties by