THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM: MUSOKE, MULYAGONJA AND MUGENYI, JJA

ELECTION PETITION APPEAL NO. 11 OF 2021

BETTY SENTAMU ..... APPELLANT

VERSUS

1. **SYLVIA NAYEBALE**
2. **ELECTORAL COMMISSION ..... RESPONDENTS**

(Appeal from the Judgment of the High Court of Uganda at Mpigi (Wejuli Wabwire, J) in Election Petition No. 1 of 2021)

JUDGMENT OF THE COURT

A. Introduction

1. Ms. Betty Sentamu ('the Appellant') and Ms. Sylvia Nayebale ('the First Respondent') were candidates in the general election held in Uganda on 14th January, 2021. They both vied for the position of Woman Member of Parliament (MP) for Gomba District.

2. At the conclusion of the election, the Electoral Commission ('the Second Respondent') declared the First Respondent the duly elected Woman MP for Gomba District, having garnered 30,253 votes as against the Appellant's 22,657 votes. That result was subsequently published in the Uganda Gazette of 17th February 2021. Dissatisfied with the election result, the Appellant filed **Election Petition No. 1 of 2021** at the High Court of Uganda sitting at Mpigi ('the Trial Court'), alleging the commission of electoral malpractices by both Respondents.

3. The petition was dismissed by the Trial Court on the basis of a preliminary objection raised by the First Respondent that the petition was not validly before the court, the Appellant having paid filing fees less than what is legally prescribed. Aggrieved with the Trial Court's decision, the Appellant lodged **Election Petition Appeal No. 11 of 2021** in this Court. The Appeal is strongly opposed by the Respondents.

4. At the hearing of the Appeal, Mr. Medard Lubega Ssegona appeared for the Appellant, while the First Respondent was represented by Messrs. Geoffrey Kandeebe Ntambirweki, Ronald Tusingwire and Benon Makumbi. Mr. Geoffrey Kandeebe Ntambirweki also represented the Second Respondent.

B. Factual Background

5. The First Respondent did in paragraph 4(a) of her Answer to the Petition aver that the petition was defective, incompetent, untenable at law and a preliminary objection to that effect would be raised at trial. She reiterated that averment in paragraph 3 of the affidavit in support of the Answer to the Petition. Conversely, in her affidavit in rejoinder, the Appellant attested to having been advised by her lawyers that the petition was properly before the Trial Court.

6. Upon the conclusion of the scheduling conference in the matter, learned Counsel for the First Respondent raised two preliminary objections. First, that contrary to Rule 5(3) of the Parliamentary Elections (Interim Provisions) Rules, SI 141–2, the Appellant had only paid Ushs. 100,000/= upon presentation of the petition. Proof of that fee payment was to be found on Receipt No. 42375045 endorsed on the petition itself. It was learned Counsel's contention that where the law prescribes a standard and a penalty for non-compliance therewith, the penalty must be upheld. Consequently, Rule 5(4) having prescribed the penalty for non-compliance with Rule 5(3), the petition should never have been accepted and should be struck out.

7. Secondly, Mr. Kandebe argued that the jurats in the respective affidavits of Robert Kiyonga, Sekalema Emmanuel, Luyirika Joseph, Ryalikunda Denesi, Nsamba Josamu, Nalubuka Nayila, Kabugo Mathias, Bulesa Jimmy, Kyagera Fred, Nakaweesi Alice, Nalubega Maria, Walakira Richard, Karungi Ibra, Ssemwanga Lawrence and Kalyango Ramadan revealed that the deponents were illiterates that required interpretation of the official language. However, the jurats therein had not depicted the illiterate deponents to have accepted to sign the affidavits as required by section 3 of the pursuant to section 3 of the Illiterates Protection Act, Cap. 78. He further argued that the affidavits of Sejjombwe Posiano, Kakinda Alex, Nassazi Rosemary, Namuwonge Florence, Walugembe Daniel, Nankabirwa Shakira, Selunyigo John, Ssempira Joseph, Mbajjo Thomas, Nakate Gorrret, Serugo Edward and Sebulege Daniel violated sections 1, 2 and 3 of the Illiterates Protection Act in so far as the interpreter did not write his full name and address, neither did they indicate that the deponents had understood the interpretation and accepted to sign.

8. In response, Counsel for the Appellant conceded that only Ushs. 100,000/= had been paid at presentation of the petition. He argued that the anomaly could be rectified under sections 33 of the Judicature Act, Cap. 13 and 98 of the Civil Procedure Act (CPA), Cap. 71, and urged the Trial Court to enlarge the time within which the shortfall of Ushs. 50,000/= due in filing fees could be paid. He invoked Article 28 of the Constitution to argue that the non-payment of the requisite fees had not prejudiced the Respondents in any way given that they had filed their

respective Answers to the Petition and urged the court to determine the petition on its merits.

9. With regard to the second objection, it was argued that there was nothing in the impugned affidavits to show that the deponents did not understand English, recourse only being made to jurats as a preferred commissioning style. This assertion was dismissed in submissions in rejoinder with the contention that there would have been no need for a deponent that is conversant with English to require interpretation of a document written in that language.

10. The Trial Court upheld both preliminary objections. Citing the case of **Wanyoto Lydia Mutende v The Electoral Commission & Another, Miscellaneous Application No. 179 of 2021**, the court held that it had no power to extend time set by an Act of Parliament within which a party to court proceedings may take a prescribed action. It further invoked the authority of **Kubeketerya James v Waira Kyewalabye & Another, Election Petition Appeal No. 97 of 2016**, where this Court held that where rules and timelines for filing court process were couched in mandatory terms, they had to be strictly complied with. Thus, in so far as Rule 5(3) and (4) were couched in mandatory terms, the Appellant having paid fees less than that prescribed therein her petition should never have been accepted. On the other hand, the twenty-eight impugned affidavits were expunged from the court record for offending section 3 of the Illiterates Protection Act given that they had been drafted without instructions from the illiterate deponents. The case of **Mugema Peter v Mudiobole Abedi Nasser, Election Petition Appeal No. 16 of 2016** was cited in support of this position.

C. The Appeal

11. The Appellant challenges the Ruling and Orders of the High Court (Wejuli Wabwire, J) dated 30th August 2021 on the following grounds of appeal:

    I. The Learned Trial Judge erred in law and fact when he held that the petition was not validly before court for non-payment of sufficient filing fees and dismissed the same for non-payment of sufficient prescribed fees;

II. *The Learned Trial Judge erred in law and fact when he held that exercising his discretion by allowing the payment of the residual amount* (of) *filing fees on the election petition filed on 11th March, 2021 would amount to extension of time within which to file the petition.*

III. *The Learned Trial Judge erred in law and fact when he held that the Appellant is personally liable for the mistake of her counsel in failing to pay sufficient fees thereby dismissing the petition.*

IV. *The Learned Trial Judge erred in law and fact when he failed to hear and determine the Election Petition on its merits thereby derogating* (from) *the petitioner's right to a fair hearing.*

V. *The Learned Trial Judge erred in law and fact in allowing the Respondents to proceed without the 2nd Respondent complying with the court order granted on 20th August, 2021 for inspection of the biometric voter verification kits (BVVK Machines) used in the Parliamentary Elections held on the 14th day of January, 2021 at the polling stations in Kifampa and Kyayi sub counties in Gomba West Constituency in Gomba District.*

VI. *The Learned Trial Judge erred in law and fact when he struck off and expunged 28 of the affidavits in support of the petition from the record of (sic) contravening section 3 of the Illiterates Protection Act Cap. 78.*

12. The Appellant seeks the following remedies:

I. *The Appeal be allowed.*

II. *The High Court Ruling and Orders made therein, dated the 30th day of August, 2021 be set aside and the Petitioner be allowed to pay the residual filing fees.*

III. *The Election Petition No. 1 of 2021 of the High Court of Uganda at Mpigi be remitted back to the High Court of Uganda at Mpigi for expeditious hearing on its merits.*

IV. *The costs of the appeal be provided for by the Respondents.*

13. The Appellant did on 7th March, 2022 file scheduling conference notes in the matter, while the Respondents only filed their joint scheduling conference notes on 21st March, 2022, a day before the hearing, leaving no time for a written rejoinder thereto. Consequently, whereas the parties' respective scheduling conference notes were adopted as their written submissions, learned Counsel for the Appellant sought and was permitted to make an oral rejoinder to the Respondents' joint

conferencing notes. The parties were, nonetheless, allowed ten minutes each to highlight their adopted written submissions before Counsel for the Appellant made his oral submissions in rejoinder.

14. The Appellant's scheduling conferencing notes addressed *Grounds 1, 2, 3* and *4* together, and concluded with a separate consideration of *Grounds 5* and *6* of the Appeal. For parity, this being the Appellant's case, we propose to determine the Appeal on the same basis.

D. **Determination**

15. The duty of this Court sitting as a first appellate court from a decision of the High Court is encapsulated in Rule 30(1) of the Judicature (Court of Appeal Rules) Directions, SI 13–10 ('the Court of Appeal Rules'). The Court is enjoined to '**re-appraise the evidence and draw inferences of fact**.' In **Banco Arab Espanol v Bank of Uganda, Civil Appeal No. 8 of 1998** (Supreme Court), the duty to re-evaluate the evidence on record was held to be applicable to the re-appraisal of both oral and affidavit evidence save that the trial court's impressions on the demeanour of witnesses would be inapplicable to affidavit evidence.

16. In **Achieng Sarah Opendi & Another v Ochwo Nyakecho Keziah, Election Petition Appeal No. 39 of 2011**, this Court adopted the exposition of the principle in **Father Nasensio Begumisa & Others v Eric Tibebaga, Civil Appeal No. 17 of 2002** (Supreme Court) in the following terms:

> The duty of the first appellate court .... Is to subject the evidence adduced at the trial to a fresh and exhaustive reappraisal, scrutiny and then decide whether or not the learned trial judge came to the correct conclusions, and if not then this court is entitled to reach its own conclusions.

17. It is on that premise that the present Appeal shall be determined.

Grounds 1, 2, 3 & 4: *The Learned Trial Judge erred in law and fact when he held that the petition was not validly before court for non-payment of sufficient filing fees; exercising his discretion by allowing the payment of the residual amount* (of) *filing fees would amount to extension of time within which to file the petition, and the Appellant is personally liable for the mistake of her counsel in failing to pay sufficient fees thereby dismissing the petition; and, in so doing, failed to hear and determine the Election Petition on its merits thereby derogating the petitioner's right to a fair hearing.*

18. Arguing all four grounds of appeal under consideration together, learned Counsel for the Appellant cites the decision in **Yese Ruzimbira v Kimbowa Builders & Construction Ltd (1976) HCB 278**, as well as the provisions of section 97 of the CPA to argue that failure to pay sufficient court fees cannot render a suit a nullity. In that case payment of fees under Rule 6 of the defunct Court Fees, Fines and Deposits Rules was held to be the best course of action for a defaulting party. Section 97 of the CPA, on the other hand, provides as follows:

> **Where the whole or any part of any fees prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom the fee is payable to pay the whole or part, as the case may be, of that court fee; and upon the payment the document, in respect of which the fee is payable, shall have the same force and effect as if the fee had been paid in the first instance**.

19. Mr. Ssegona urges the Court to follow its decision in **Apollo Kantinti v Sitenda Sebalu & 2 Others, Consolidated Election Petition Applications No. 5, 55 & 84 of 2016 (Arising out of Consolidated Election Petition Appeals No. 31 & 33 of 2016)** where the following decision in **Kiiza Besigye v Electoral Commission & Another, Presidential Election Petition No. 1 of 2006** and **Amama Mbabazi & Another v Musinguzi Garuga James, Election Petition Appeal No. 2 of 2002** was supposedly cited with approval:

> Election petitions are important proceedings and court should take a liberal approach to affidavits so that petitions are not defeated on the basis of technicalities. Nonpayment of court fees is a minor procedural error which can be remedied by an

> order to a defaulting party to pay the requisite fees at any stage of the proceedings. The trial court was correct when it over-ruled objections as to the admission of affidavits due to non-payment of fees in their respect.

20. In Counsel's view, the Trial Court should have similarly treated the non-payment of the full court fees to have been a minor error that was curable by ordering the Appellant to pay the requisite fees. The trial judge is faulted for equating that course of action to an extension of statutorily fixed time. We pause here to state forthwith that the decision in **Apollo Kantinti v Sitenda Sebalu & 2 Others** (supra) is completely misrepresented in learned Counsel's submissions above. We return to the correct decision in that case later in this judgment.

21. Be that as it may, urging us to take judicial notice of the fact that it is an advocate that takes an active role in the filing of a petition, Mr. Ssegona cites the decision in **Banco Arabe Espanol v Bank of Uganda** (supra) where it was held:

> A mistake, negligence, oversight or error on the part of counsel should not be visited on the litigant. Such mistake, or as the case may be, constitutes just cause entitling the trial judge to use his discretion so that the matter is considered on its merits.

22. In his oral highlights, Mr. Ssegona emphasized that the litigant had entrusted the matter to a lawyer that is deemed to know the fees payable by law. He nonetheless argued that whereas that undoubtedly was a mistake of the advocate, the court that made the assessment of fees, issued the assessment form and received the petition did share some of the blame.

23. Conversely, it is learned Respondent Counsel's contention on *Ground 1* of the Appeal that the trial judge rightly found that Rule 5(3) of the Parliamentary Elections (Interim Provisions) Rules is couched in mandatory terms, the penalty prescribed for the non-compliance therewith in Rule 5(4) being non-acceptance of the petition. To that extent, the failure by the Appellant to pay the requisite Ushs. 150,000/= was rightly held by the trial judge to have rendered the petition null and void.

24. With regard to *Ground 2*, it is argued that there were no special circumstances pleaded or proved before the Trial Court to warrant the extension of time, therefore the position that was propounded by the Supreme Court in **Sitenda Sebalu v Sam**

K. Njuba & Another, Election Appeal No. 26 of 2007 is inapplicable to this case. In oral highlights, Mr. Kandeebe opined that whereas courts have power to extend time under Rule 19 of the Parliamentary Elections (Interim Provisions) Rules, there must be special circumstances to warrant such extension. In his view, no such circumstances had been established before the Trial Court and the attempt by opposite counsel to formulate such circumstances from the Bar was not tenable.

25. Contesting learned Appellant Counsel's reliance on the Judicature (Court Fees, Fines and Deposit) Rules, SI 13–3, as cited in **Yese Ruzmbira v Kimbowa Builders & Construction Ltd** (supra) and **Apollo Kantinti v Sitenda Sebalu & 2 Others** (supra); it is opined that the filing fees payable for petitions brought under the Parliamentary Elections Act, 2005 are governed by Rule 5(3) of the Parliamentary Elections (Interim Provisions) Rules and not either the CPA or the Judicature (Court Fees, Fines and Deposits) Rules. Mr. Kandeebe cites **Raphael Baku & Another v Attorney General, Constitutional Appeal No. 1 of 2005** in support of the proposition that the more specific statute would take precedence over the general statute unless there is legislative intent to the contrary. In that case, it was observed that '**the Parliamentary Elections Act which is a specific legislation about elections would take precedence over the Judicature Act in matters of jurisdiction relating to election petitions**.'

26. It is proposed that there is no basis for *Ground 3* of the Appeal as no finding was made by the Trial Court that the Appellant's advocate was responsible for the payment of the requisite filing fees or that the Appellant herself was responsible for the mistakes of her advocate in that regard.

27. In terms of *Ground 4*, it is the contention that the petition in this case having been rendered a nullity on account of non-payment of court fees, there was no petition to hear and/ or determine. Counsel for the First Respondent supported the Trial Court's decision to strike out the petition on the authority of **Kubeketerya James v Waira Kyewalabye & Another** (supra), where it was held that '**election petitions have to be handled expeditiously; the rules and timelines set for filing proceedings are couched in mandatory terms, and they must be strictly interpreted and adhered to**.' In his view, the fact that the petition had been

received by the court did not negate its illegality and as was held in **Makula International Limited v His Eminence Cardinal Nsubuga & Another, Civil Appeal No. 4 of 1981** (Supreme Court), such illegality once brought to the court's attention overrode all questions of pleading, including any admission made in respect thereof. The Court was also referred to the definition of an illegality in **Uganda Taxi Operators & Drivers Association v URA, Civil Appeal No. 52 of 2021** (Supreme Court), which re-echoes the decision in **Makula International Limited v His Eminence Cardinal Nsubuga & Another** (supra).

28. By way of Reply, Counsel for the Appellant maintained that far from submitting from the Bar, there was ample evidence on record that the petition had been drawn and filed by M/s Imperium Advocates. He invited the Court to note that the filing fees receipt stamp was endorsed by the lower court itself as depicted in its Ruling at page 769 of the Record of Appeal. Mr. Ssegona further asserted that, contrary to the submissions of opposite counsel, Counsel for the Appellant did seek an extension of time before the Trial Court to enable him pay the shortfall on the requisite fees. This too is depicted in the lower court's Ruling.

29. On its part, the Trial Court rendered itself as follows at pages 6 – 8 of its Ruling:

> ***In the instant case, the time appointed for filing is set by the Parliamentary Elections Act S 60(3) of which provides that every election petition shall be filed within 30 days from the date of publication of the results in the Gazette. R. 5(4) of the Parliamentary Election Rules provides that if Sub-rule 3, which prescribed the fees payable for filing an election petition, is not complied with, the Petition shall not be accepted. .... Rules 5(3) and (4) of the Parliamentary Elections Rules is couched in mandatory terms by the use of the word "shall" in both sub rules. It requires that a fee of Ugx 150,000/= is paid by a Petitioner or his Advocates upon presentation of a Petition and that if the fee is not paid, the Petition shall not be accepted. If the Court were to exercise its powers and mandate under S. 98 of the CPA and 33 of the Judicature Act, as prayed by the Petitioner, and allow the Petitioner to pay the residual amount, that would amount to extension of the time within which the Petition is filed. This Court has no mandate to enlarge the time within which to file election petitions, as the time line is enacted by the Act. Having paid Ugx 100,000/=, an amount less than the stipulated fee, the instant Petition ought not to have been accepted. This preliminary objection is accordingly upheld.***

30. We have carefully considered the parties' rival submissions on the issues under consideration. It is common ground that the Appellant paid Ushs. 100,000/= upon presentation of the petition, rather than Ushs. 150,000/= as prescribed under Rule 5(3) of the Parliamentary Elections (Interim Provisions) Rules. To that extent the petition was indeed improperly before the Trial Court.

31. However, inherent within *Ground 1* of the Appeal is the question as to whether the Trial Court rightly dismissed the petition for non-payment of the prescribed court fees. Stated differently, whether the court's hands were so tied in as far as the payment of the shortfall on fees was concerned that the only course of action available to it was to dismiss the petition. We think not. Section 97 of the CPA is abundantly clear on this. It succinctly provides for judicial discretion to allow the person by whom the fee is payable to pay the shortfall on the court fees due whereupon **'the document, in respect of which the fee is payable, shall have the same force and effect as if the fee had been paid in the first instance**.' This was the approach adopted in **Apollo Kantinti v Sitenda Sebalu & 2 Others** (supra) where this Court approbated the observation in **Amama Mbabazi & Another v Musinguzi Garuga James** (supra) that '**justice should not be obstructed by a mere non-payment of court fees, a minor procedural error, which he** (the trial judge) **even has the power to extend**.'

32. With respect, we are disinclined to abide the position that we understood Mr. Kandeebe to advance, that a statute of general application such as the CPA would not take precedence over the more specific statutes that address electoral disputes. The implication therein is that the provisions of the Parliamentary Elections (Interim Provisions) Rules would take precedence over those in the CPA with regard to electoral disputes. That position is untenable for the ensuing reasons.

33. Undoubtedly, the Parliamentary Elections Act is the most specific piece of legislation on parliamentary electoral disputes. However, it is not the only statute applicable thereto. In **Sitenda Sebalu v Sam K. Njuba & Another** (supra), while considering a party's non-compliance with the mandatory provisions of section 62 of that Act, the Supreme Court deduced the intention of the legislature in that

statute to have been two-fold: on the one hand, the timely disposal of electoral disputes in the public interest and, correspondingly, the determination of electoral malpractices on their merits. To that end, it was observed:

> The purpose and intention of the legislature was to ensure, in the public interest, that disputes concerning election of people's representatives are resolved without undue delay. In our view, however, that was not the only purpose and intention of the legislature. It cannot be gainsaid that the purpose of the legislature in setting up an elaborate system for judicial inquiry into alleged electoral malpractices, and for setting aside election results found from such inquiry to be flawed on defined grounds, was to ensure, equally in the public interest, that such allegations are subjected to fair trial and determined on merit. *(our emphasis)*

34. The apex court then held that the legislature could not have intended the exclusion of judicial discretion yet in section 93 of the Parliamentary Elections Act it had sanctioned the formulation of procedural rules to guide the courts (including this Court) in their determination of electoral disputes. *See section 93(1) and 2(a) of the Act.*

35. The Parliamentary Elections Act and indeed the Parliamentary Elections (Interim Provisions) Rules enacted thereunder[1] are silent on the exercise of judicial discretion in curing the anomaly of non-payment or partial payment of court fees. However, in so far as Rule 17 of the Parliamentary Elections (Interim Provisions) Rules adopts the practice and procedure of the '**Civil Procedure Act and any Rules made under that Act**', section 97 of the CPA would be directly applicable to election petitions. That legal provision unequivocally grants courts the discretion to allow a party that has not paid an applicable fee or has only paid a part thereof to make good on the shortfall.

36. We thus find that the Trial Court did have the discretion to allow the Appellant to pay the shortfall on the prescribed court fees and erred in obviating that discretionary duty. Section 97 of the CPA provides that '**upon the payment the document, in respect of which the fee is payable, shall have the same force**

[1] Although the Parliamentary Elections (Interim Provisions) Rules were formulated under the Parliamentary Elections (Interim Provisions) Statute that has since been repealed, they were saved under under section 101(3) of the Parliamentary Elections Act, 2005.

and effect as if the fee had been paid in the first instance.' To that extent, there would have been no extension of time for filing the petition as the outstanding fees would have been deemed to have been paid upon presentation of the petition, and the petition would stand duly validated.

37. We are satisfied, therefore, that although the petition was indeed improperly before the Trial Court given the non-payment of the requisite court fees; the trial judge wrongly dismissed it on that basis without exercising the judicial discretion available to him under section 97 of the CPA. We would therefore partially allow *Ground 1* of the Appeal but wholly resolve *Ground 2* in the affirmative. Having so held, we find that the Trial Court failed to hear and determine **Election Petition No. 1 of 2021** (filed at Mpigi High Court) and thus flouted the Appellant's right to a fair hearing on its merits as propounded in **Sitenda Sebalu v Sam K. Njuba & Another** (supra). Accordingly, *Ground 4* of the Appeal is allowed. With regard to *Ground 3*, upon careful consideration of the Trial Court's Ruling, we would agree with the proposition that there is no basis for that ground of appeal as no finding was made by the trial judge that the Appellant was personally liable for the purported mistake of her advocate. That ground of appeal is therefore struck out.

Grounds 5: *The Learned Trial Judge erred in law and fact in allowing the Respondents to proceed without the 2nd Respondent complying with the court order granted on 20th August, 2021 for inspection of the biometric voter verification kits (BVVK Machines) used in the Parliamentary Elections held on the 14th day of January, 2021 at the polling stations in Kifampa and Kyayi sub counties in Gomba West Constituency in Gomba District.*

38. Under this ground of appeal, we understand learned Counsel for the Appellant to fault the Trial Court for entertaining the First Respondent's preliminary objections without the Second Respondent complying with a court order granted on 20th August, 2021 for inspection of the biometric voter verification kits (BVVK Machines) used at the polling stations in Kifampa and Kyayi sub counties in Gomba West Constituency. That was the only action taken towards the hearing of the petition by the Trial Court. The Court is urged to follow the decision in **Hadkinson v**

Hadkinson (1952) All ER 566 that '**a party who knows of an order whether null or valid, regular or irregular, cannot be permitted to disobey it**.' The case of **Hon Sitenda Sebalu v Secretary General of the East African Community, EACJ Ref. No. 8 of 2012** is also cited in support of the proposition that a court judgment if undischarged must be obeyed.

39. In response, Counsel for the First Respondent opines that this ground of appeal has no basis given that the Trial Court did not make any finding on the BVVK machines in the Ruling that is the subject of this Appeal. In his view, that issue would only have been relevant if he had raised an objection in respect of the said machines before the lower court, but he did not.

40. As observed earlier in this judgment, Rule 17 of the Parliamentary Elections (Interim Provisions) Rules does recognize the applicability of the Civil Procedure Rules (CPR) to the determination of election petitions. Order 6 rules 28 and 29 of the CPR provide as follows on points of law:

> 28. Points of law may be raised by pleading.
>
> **Any party shall be entitled to raise by his or her pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing**.
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> 29. Disposal of suit.
>
> **If, in the opinion of the court, the decision of the point of law substantially disposes of the whole suit, or of any distinct cause of action, ground of defence, setoff, counterclaim, or reply therein, the court may thereupon dismiss the suit or make such other order in the suit as may be just**.

41. In the instant case, the First Respondent raised a point of law in paragraph 4(a) of her Answer to the Petition that '**the petition is defective, incompetent, untenable at law and at the time of hearing of this petition, the 1st Respondent shall raise a preliminary objection that the same be stuck out with costs**.'

42. By virtue of Order 6 rule 28, the Trial Court had the option of disposing of the preliminary point of law '**at or after the hearing**.' In the event, the First Respondent raised two preliminary objections and the trial judge elected to hear them at the onset of the hearing rather than thereafter or at the end thereof. We cannot fault him for that as that choice of procedure was legally tenable and well within his discretion. Indeed, in **Major General D. Tinyefuza v Attorney General, Constitutional Appeal No 1 of 1997**, the Supreme Court had occasion to address the disposal of preliminary objections. The learned Chief Justice Wambuzi (as he then was) observed that in principle a preliminary objection should be disposed of as a preliminary matter, a principle that reflected the majority position of the court. In addition, his lordship Oder, JSC clarified the import of the current Order 6 rule 28 of the CPR as follows:

> In my view, the effect of the rules under Order 6 referred to appears to be this: the defendant in a suit or the respondent in a petition may raise a preliminary objection before or at the commencement of the hearing of the suit or petition that the plaint or petition discloses no cause of action. After hearing arguments (if any) from both parties the court may make a ruling at that stage upholding or rejecting the preliminary objection. The court may also defer the ruling on the objection until after the hearing of the suit or petition. Such a deferment may be made where it is necessary to hear some or the entire evidence to enable the court to decide whether a cause of action is disclosed or not. I think it is a matter of discretion of the court as regards when to make a ruling on the objection. No hard and fast rule can and should be laid to fetter the court's discretion. The exercise of the discretion must, in my view depend on the facts and circumstances of each case. (our emphasis)

43. It thus becomes abundantly clear that the Trial Court in this case acted well within the confines of the law in entertaining the First Respondent's preliminary objections at the onset of the hearing as preliminary matters. In our considered view, that course of action did not in any way negate the Appellant's right to pursue its legal interests in the Trial Court's Order of 20th August 2021. The substratum of that Order is reproduced below:

IT IS HEREBY ORDERED THAT:

1. *The Petitioner be allowed to inspect the BVVK machines used in the Parliamentary Election held on the 14th day of January 2021 at the polling stations in Kifampa and Kyayi sub counties in Gomba West County.*
2. *The said inspection be conducted within 3 working days (23rd to 25th August, 2021) of the week following the failure of the mediation proceedings.*
3. *The costs be in the cause.*

44. A brief background to the Order is pertinent. On 18th August, 2021 the Trial Court ruled as follows on the issue of inspection of the BVVK machines:

> ***In the interests of and for the ends of justice and to ensure fair and just disposable (sic) of the petition this court in exercise of its mandate under section 98 of the CPA, section 33 of the Judicature Act and Rule 17 of the Parliamentary Election Rules and Order 18 of the CPR, grants the Petitioner leave and the 2nd Respondent is ordered to enable the Petitioner inspect the BVVK machines used in respect of Kifampa and Kyai sub-counties. The inspection will take place on the 3rd working day of the week following the conclusion of the mediation, should mediation efforts fail. The costs associated with the inspection shall be in the cause. I so order.***

45. The trial judge further ruled:

> ***Remember I have given you a mention date when you will update court on the mediation, so that will inform what else will happen in case depending on the outcome of the mediation. ... So we adjourn to Friday 20th August 2021 at 8.30am.***

46. There is no indication on the Record of what transpired on 20th August 2021. However, at the scheduling conference of 27th August 2021 Counsel for the Appellant reported that the Second Respondent had not complied with the court's order for inspection of the BVVK machines therefore he intended to raise it as a preliminary point of law. The trial judge ruled that the primary objection that the court would commence with was that on the competence of the petition. We cannot fault him on that as that preliminary objection did have the potential to dispose of the petition conclusively. Indeed, upon listening to the parties on that objection, the trial judge dismissed the petition therefore any pending objections were overtaken by events.

47. However, this Court having reversed the Trial Court's decision in its consideration of the preceding grounds of appeal, any outstanding points of law would in effect be revived. The Appellant would be at liberty to pursue its right to inspect the BVVK machines. In any event, we would resolve *Ground 5* of the Appeal in the negative.

Grounds 6: *The Learned Trial Judge erred in law and fact when he struck off and expunged 28 of the affidavits in support of the petition from the record of (sic) contravening section 3 of the Illiterates Protection Act Cap. 78.*

48. Learned Counsel for the Appellant faults the Trial Court for imposing a strict interpretation of section 3 of the Illiterates Protection Act on the impugned affidavits. He urged the Court to adopt the supposedly more liberal approach in **Kasaala Growers Co-operative Society v Jonathan Kakooza & Another, Civil Application No. 19 of 2010** (Supreme Court, Single Judge) where it was held (per Okello, JSC):

> Section 3 of the Illiterates Protection Act (Cap) 78 of the Laws of Uganda 2000 enjoins any person who writes a document for or at the request or on behalf of an illiterate person to write in the jurat of the said document his/ her true and full address. This shall imply the he/ she was instructed to write the document by the person for whom it purports to have been written and it fully and correctly represents his/ her instructions and to state therein that it was read over and explained to him or her who appeared to have understood it.

49. Reproducing a specimen jurat adopted in the instant case, it is argued that the stamp of the Commissioner for Oaths clearly depicts his name and address.

50. Reference is made to the case of **Sodzedo Akutuye and Others vs. Adjoa Nyakoah and Others (2018) GHASC 31** (Supreme Court of Ghana), to advance the notion that section 3 of the Illiterate Protection Act is '*a partial shield rather than a total sword*'. Learned Counsel's construction of those cases is that the presence of the interpretation clause creates only a rebuttable presumption that the document is the deed of the illiterate person and, in the alternative, mere absence of a jurat clause cannot per se vitiate the deed of an illiterate person without any tangible evidence that he/ she did not understand the contents.

51. In his view, on the authority of **Zabrama v Segbedzi (1991) 2 GLR 221**, as cited with approval in **Sodzedo Akutuye and Others vs. Adjoa Nyakoah and Others** (supra), the question as to whether or not an illiterate person fully understood the contents of a document before executing it is a question of fact to be determined by the evidence on record. In that case, the court observed:

> The presence of an interpretation clause in a document was not conclusive of the fact, neither was it a *sine qua non*. It was still possible for an illiterate to lead evidence outside the document to show that despite the said interpretation clause, he was not made fully aware of the contents of the document to which he made his mark.

52. In the same vein, in the earlier case of **Kwaku Bamfi Adomako & Another v Opanin Kofi Duodu & Others (2011) GHASC 38** the Ghanaian Supreme Court held as follows (per Wood, CJ):

> The courts must not make a fetish of the presence or otherwise of a jurat on executed documents. To hold otherwise, without a single exception, is to open the floodgates to stark injustice. Admittedly, the presence of a jurat may be presumptive of the facts alleged in the document, including the jurat. But that presumption is rebuttable, it is not conclusive. The clear object of the Illiterates Protection Ordinance, Cap 262 (1951 Rev.) is to protect illiterates for whom a document was made against unscrupulous opponents and their fraudulent claims; those who may want to take advantage of their illiteracy to bind them to an executed document detrimental to their interests. At the same time, the Ordinance cannot and must not be permitted to be used as a subterfuge or cloak by illiterates against innocent persons. Conversely, notwithstanding the absence of a jurat, the illiterate person who fully appreciates the full contents of the freely executed document, but feigns ignorance about the contents of the disputed document, so as to escape legal responsibilities flowing therefrom, will not obtain relief. As noted, the presence of a jurat at best raises a rebuttable presumption only, not an irrebuttable one. Thus, any evidence which will demonstrate that the illiterate knew and understood the contents of the disputed document, that is the thumb printed or marked document, as the case may be, should settle the issue in favour of the opponent. In other words, in any action, it should be possible for the one seeking to enforce the contents of the disputed document to show that despite the absence of a jurat, the illiterate clearly understood and appreciated fully the contents of the document he or she marked or thumb printed.

53. In Mr. Ssegona's view, the Trial Court could have summoned the deponents of the impugned affidavits under section 63(4) of the Parliamentary Elections Act, as was

done in ***Protazio Begumisa v Wilfred Nuwagaba & Another, Election Petition No. 1 of 2021*** (Kabale High Court). He urged the Court to re-think the purpose of the Illiterates Protection Act of Uganda in view of the cited Ghanaian authorities.

54. Conversely, the learned Counsel for the First Respondent supports the decision of the Trial Court that it had neither been proved that the impugned affidavits had been authorized by the deponents nor was it established in the jurats thereof that the illiterates had executed them willingly. It is argued that the Ghanaian authorities cited in support of the Appellant's case were not binding upon this Court, it being proposed that whereas the requirement of a jurat on a document executed by an illiterate might merely be a matter of practice in Ghana, not so in Uganda. Mr. Kandeebe asserted that the requirement for a certificate of translation and a jurat was a statutory requirement under section 3 of the Illiterates Protection Act of Uganda. He argued that the decision in **Kasaala Growers Co-operative Society v Jonathan Kakooza & Another** (supra) that section 3 of the Illiterates Act was couched in mandatory terms, and was binding on this Court under the doctrine of *stare decesis*. He urged this Court to find that the Trial Court rightly expunged the impugned affidavits from the court record.

55. By way of Reply, Mr. Ssegona proposed that the **Kasaala Growers Co-operative Society** case was being quoted out of context. In his view, that case underscores the mandatory obligation to protect illiterates but does not advocate the use of the statute as a sword to defeat the illiterate or negate recourse to evidence in deference to the exclusivity of the jurat. He reiterated his prayers that the Appeal be allowed in the terms sought.

56. On its part, the Trial Court rendered itself as follows:

> ***In the instant case, upon perusal of the Affidavits of Robert Kiyingi, Sekalema Emmanuel, Luyirika Joseph, Ryalikunda Denesi, Nsamba Josamu, Nalubuka Nayila, Kabugo Mathias, Bulesa Jimmy, Kyagera Fred, Nakaweesi Alice, Nalubega Maria, Walakira Richard, Karungi Ibra, Ssemwanga Lawrence, Kalyango Ramadan, Sejjombwe Posiano, Kakinda Alex, Nassazi Rosemary, Namuwonge Florence, Walugembe Daniel, Nankabirwa Shakira, Selunyigo John, Ssempira Joseph, Mbajjo Thomas, Nakate Gorrret, Serugo Edward and Sebulege Daniel, I find no evidence to prove that the said Affidavits were drafted at the***

instruction of the above listed deponents. The jurats of the Affidavits in question do not show that the illiterates signing had accepted to sign. Faced with a similar situation in the case of *Mubiru Eliphaz v Kiviri Tumwehe Geoffrey & the Electoral Commission, EP 3 of 2021*, ***this Court struck out several Affidavits for the reason that they offended the Illiterates Protection Act, Cap. 78. In that case, this Court held that the Affidavits violated the provisions of S. 3 of the Illiterates Protection Act and that a mere statement by the Commissioner for Oaths that the Affidavits were read over and explained to the deponents did not suffice to bring them in conformity with the requirements of the Act nor does the proclamation of the Commissioner's proficiency in Luganda and English fill in for the Statutory prescription. Premised on the foregoing, this preliminary objection is upheld and the Affidavits of Robert Kiyingi, Sekalema Emmanuel, Luyirika Joseph, Ryalikunda Denesi, Nsamba Josamu, Nalubuka Nayila, Kabugo Mathias, Bulesa Jimmy, Kyagera Fred, Nakaweesi Alice, Nalubega Maria, Walakira Richard, Karungi Ibra, Ssemwanga Lawrence, Kalyango Ramadan, Sejjombwe Posiano, Kakinda Alex, Nassazi Rosemary, Namuwonge Florence, Walugembe Daniel, Nankabirwa Shakira, Selunyigo John, Ssempira Joseph, Mbajjo Thomas, Nakate Gorrret, Serugo Edward and Sebulege Daniel are accordingly struck off and expunged from the record.***

57. In so holding, the Trial Court did also make reference to the decisions in **Abubaker Mashari v Bakunda (U) Ltd & Others, Miscellaneous Application No. 233 of 2013** (High Court) and **Mugema Peter v Mudiobole Abedi Nasser, Election Petition Appeal No. 16 of 2016** (Court of Appeal).

58. We carefully considered the parties' rival submissions on the issue of section 3 of the Illiterates Protection Act. We do agree with Mr. Kandeebe that the Ghanaian authorities cited by opposite Counsel are but persuasive to this Court in the face of specific statutory provisions and binding authorities on the subject. Simply stated, the doctrine of *stare decisis* hinges on the Latin interpretation of the phrase *stare decisis* that literally means '**to stand by things decided**.' Black's Law Dictionary introduces the jurist dimension to that simple Latin meaning to define *stare decisis* as '**to stand by things decided, and not to disturb settled points**.'[2]

59. *Stare decisis* in that context may be applied 'vertically', where the decision of a higher court is binding upon lower courts, and the higher court may reverse or

[2] Black's Law Dictionary, 8th Edition (1st Reprint), 2004, p. 1443.

overturn the decisions of lower courts. It may also be applied 'horizontally' such that '**precedent set in one court is binding upon all other courts of similar ranking. Occasionally the higher courts (Court of Appeal and Supreme Court) may find an exceptional reason to depart from their own decisions**.' See *Stone, Christopher, '**The doctrine of judicial precedent with special reference to the cases involving seriously ill new born infants'**, November 2009*.[3] In the same literature[4], it is proposed that courts address precedent as follows:

> Where similarity exists to the prevailing conditions the precedent may be *followed*; where there is little similarity the material facts of the case must be *distinguished* in order to set the precedent aside. The *ratio decidendi* is central to this process, for it identifies the material facts upon which the judgment is based and is indicative of the scope of application of the precedent to subsequent cases.

60. Some jurisdictions draw a distinction between the vertical and horizontal application of *stare decisis* as highlighted above, referring to the former as judicial precedent and the latter as *stare decisis*. Thus, in *Mason, Anthony, '**The Nature of the Judicial Process and Judicial Decision-Making**'*,[5] it is opined:

> The obligation of a court to follow decisions of a higher court in the same hierarchy of courts (precedent) and, subject to a qualification to be mentioned, the obligation of a court to stand by its earlier decisions (*stare decisis*), have been central elements in the common law system. Precedent and *stare decesis* contribute to certainty, consistency and predictability in the law.

61. The same author qualifies that position with the recognition that a court is not bound to follow one of its decisions which it holds to be wrong, but should not lightly depart from its earlier decisions in the absence of compelling circumstances. To that end, he cites **Queensland v Commonwealth (1977) 139 CLR[6] 585 at 599** where it was observed:

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[3] Published at https://www.medicalandlegal.co.uk
[4] Ibid.
[5] Published in *Sheard, Ruth (Editor), '**A Matter of Judgment: Judicial decision-making and judgment writing**', Judicial Commission of New South Wales, 2003, p. 9*.
[6] Commonwealth Law Reports

> It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a justice may give effect to his own opinions in preference to an earlier decision of the Court.

62. Even then, quoting *Dixon, Owen, '**Concerning Judicial Method**'*[7], judges should not depart from settled principle to give effect to their subjective opinion '*in the name of justice or of social necessity or of social convenience.*'

63. We respectfully agree with the foregoing opinions. On that premise, therefore, it is to an interrogation of the applicable statutory provisions and precedents that we now turn. To begin with, we note that the Trial Court *inter alia* relied on the High Court decisions in **Mubiru Eliphaz v Kiviri Tumwehe Geoffrey & Another** (supra) and **Abubaker Mashari v Bakunda (U) Ltd & Others** (supra) in deciding as it did. This Court is not bound by the decisions in both those cases. Having perused the decisions for any persuasive value per chance, we are not persuaded by the principles advanced therein and decline to adopt them.

64. In the matter before us, the Trial Court struck out the impugned affidavits on account of absence of proof that they had been drafted upon the deponents' instructions, the jurats therein not depicting that they had accepted to sign them. Section 3 of the Illiterates Protection Act, which was the legal provision invoked by the Trial Court, provides as follows:

> Verification of documents written for illiterates
>
> **Any person who shall write any document for or at the request, on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her true and full address, and his or her so doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her**.

65. That legal provision does address the question raised in the trial judge's Ruling as to whether the impugned affidavits had been drafted on the instruction of the deponents, given the jurats' purported omission of any acceptance by the

[7] (1956) 39 Australian Law Journal, 468 at 469.

deponents to sign the affidavits. Two elements emanate from the literal interpretation thereof. First, it places a mandatory obligation upon any person that writes a document for, at the request or on behalf of, or in the name of an illiterate person to state in the same document his/ her correct and full name and address. According to **Kasaala Growers Co-operative Society v Jonathan Kakooza & Another** (supra), that full name and address should be stated in the jurat of such document.

66. The second aspect to section 3 of the Illiterates Protection Act is that provision of such draft-person's full name and address shall imply that '**he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her**.' In other words, there is a presumption that s/he had instructions from the illiterate to write the document; the document fully and correctly represents such illiterate's instructions, and it was read and explained to him or her. That is the literal construction of that legal provision, and any construction to the contrary would be *per incuriam* to the extent of the contradiction. The extensively cross-referenced **Kasaala Growers Co-operative Society v Jonathan Kakooza & Another** (supra) largely re-echoes the provisions of section 3 of the Illiterates Protection Act.

67. With specific regard to affidavits, however, section 1 of the Oaths Act, Cap. 19 prescribes the different oaths to be taken by different categories of people as delineated in the First Schedule to that Act. Form B in respect of oaths for affidavits of illiterate deponents includes provision for a jurat whereby a Commissioner for Oaths (or a third party, as the case may be) attests to having read and explained or translated the contents of the affidavit. The Form reads as follows:

> ***Form of jurat (where the commissioner has read the affidavit to deponent)***
>
> *Sworn at _____ in the district of _____ this _____ day of _____, 20_____, before me, I having first truly, distinctly and audibly read over the contents of this affidavit to the deponent he (or she) being blind or illiterate and explained the nature and contents of the exhibits referred to in the affidavit in the _____ language. The deponent appeared perfectly to understand the same and made his (or her) mark (or signature) thereto in my presence.*
>
> *Commissioner for Oaths*

68. The sum effect of section 3 of the Illiterates Protection Act, read together with section 1 of the Oaths Act (specifically Form B in respect of jurats for affidavits of illiterates), is to create processes in respect of two functions: the drafting of the affidavit and the translation or explanation thereof. In **Mugema Peter v Mudiobole Abedi Nasser** (supra), section 3 of the Illiterates Protection Act was held to specifically address the preparation of an affidavit not its translation, the Court observing that "**preparation' and 'translation' are two different things and one cannot be held to suffice for the other**.'

69. Meanwhile, in **Nakate Lillian Segujja & Another v Brenda Nabukenya, Consolidated Election Petition Appeals No. 17 & 21 of 2016** (unreported), the Court of Appeal departed (rightly so, in our view) from the earlier position advanced in **Mugema Peter v Mudiobole Abedi Nasser, Election Petition Appeal No. 30 of 2011** that the lack of a jurat or certificate of translation are procedural transgressions that cannot stop the court from administering substantive justice. In the **Nakate Lillian Segujja** case, the Court held that the requirement of indicating a Jurat certifying that the applicable laws have been complied with in deponing an affidavit is not merely a matter of form; it is an indispensable matter of substance, but the manner of its certification and the person that certifies it are matters of form. This Court thus upheld the principles in the Illiterates Protection Act and the Oaths Act that an illiterate person's affidavit should contain the full name and address of the person that drafts the affidavit, as well as a jurat on the translation or explanation of the document to the illiterate deponent.

70. In the instant case, the jurat in the presumably illiterate deponents' affidavits appears as reflected in this specimen sample:

> *I, TIMOTHY TWIKIRIZE, a Commissioner for Oaths, being fluent in English and Luganda do hereby certify that I have read to, translated and explained the contents of this Affidavit to the deponent, KIYINGI ROBERT who understood its contents and signed BEFORE ME:*
>
> *COMMISSIONER FOR OATHS*

71. Affixed on the title, Commissioner for Oaths, is a stamp bearing the full name and address of the said Commissioner, as well as his signature. It is not apparent from the face of the document who drafted the sample affidavit as that person's full name

and address are not provided, as required by section 3 of the Illiterates Protection Act. The effect of this omission would have been to negate the presumption that instructions were given by the illiterate person to have an affidavit drafted for him/ her in the terms encapsulated therein. However, the certification by the Commissioner for Oaths in the jurat, to the effect that he read to, translated and explained the contents of the affidavit to the deponent, coupled with the deponent's signature thereon, would dispel any connotations of the manipulation of the illiterate deponent in the execution of the affidavit. Although the jurat is not in the form prescribed in the sample Form reproduced earlier in this judgment, we would abide the observation in **Nakate Lillian Segujja & Another v Brenda Nabukenya** (supra) that the manner of its certification is a matter of form not substance and would not negate the certification contained in the sample jurat.

72. We draw further inspiration on the issue of defective jurats from this Court's decision in **Rehema Muhindo v Winifred Kiiza, Election Petition Appeal No. 2 of 2011**, where affidavits that had omitted an averment that the deponents had been read to and explained the contents of an affidavit they sought to rebut, were held by the trial court to have offended the Oaths Act and Illiterates Protection Act. On appeal, this Court followed the Supreme Court's decision in **Col. Dr. Kiiza Besigye vs. Yoweri Kaguta Museveni No. 1 of 2001, Presidential Election Petition** that advocated a liberal view of affidavits in election petitions owing to the tight time lines under which they have to be compiled '**unless the omission is material going to the root of the substance of the affidavit**.' On that premise, the Court of Appeal held that the trial judge was not justified in excluding the impugned affidavits, with the exception of one where the deponent did not appear for cross examination when required to do so. We find no reason to depart from the liberal approach to affidavits in election petitions that was advanced in that case.

73. As we take leave of this issue, we are constrained to pronounce ourselves on the persuasive Ghanaian Supreme Court authorities that were cited before us given the similarities between section 3 of Ghana's Illiterates' Protection Act and its Ugandan equivalent, both of which do (as per their long titles) provide for the

protection of illiterates. Section 3 of the Ghanaian Act is reproduced in **Sodzedo Akutuye and Others vs. Adjoa Nyakoah and Other** (supra) as follows:

> Conditions for persons writing letters for illiterates
>
> **A person writing a letter or any other document for or at the request of an illiterate person, whether gratuitously or for a reward, shall**
>
> (a) **Clearly and correctly read over and explain the letter or document or cause it to be read over and explained to the illiterate person,**
>
> (b) **Cause the illiterate person to sign or make a mark at the foot of the letter or the other document or to touch the pen with which the mark is made at the foot of the letter or the other document,**
>
> (c) **Clearly write the full name and address of the writer on the letter or the other document as writer of it, and**
>
> (d) **State on the letter or the other document the nature and amount of the reward charged or taken by the writer for writing the letter or the other document, and shall give a receipt for the reward and keep the counterfoil of the receipt to be produced at the request of any of the officers named in section 5 ...**

74. Clauses (a), (b) and (c) of that section would appear to reflect the import of section 3 of Uganda's Illiterates Protection Act, read together with the Oaths Act. Nonetheless, the Ghanaian Supreme Court did in **Kwaku Bamfi Adomako & Another v Opanin Kofi Duodu & Others** (supra) recognize that a jurat in itself offers only but a presumptive protection to an illiterate person. In the absence of a jurat, therefore, it allowed the calling of evidence to prove that the illiterate in question fully appreciated the contents of a document in contention. It most compellingly held:

> In other words, in any action, it should be possible for the one seeking to enforce the contents of the disputed document to show that despite the absence of a jurat, the illiterate clearly understood and appreciated fully the contents of the document he or she marked or thumb printed.

75. We are respectfully persuaded by that judicial approach. Particularly in so far as it resonates with the call in **Sitenda Sebalu v Sam K. Njuba & Another** (supra) for courts to strike a balance between the expedient disposal of electoral disputes and ensuring a fair trial on the merits of the case. With the greatest respect, we find that the Trial Court in the instant case could have called the illiterate deponents of the impugned affidavits to establish their consent to the drafting of the affidavits in

the terms delineated therein, rather than strike them out for non-compliance with section 3 of the Illiterates Protection Act yet the substance of such consent had been covered in the jurat. In the result, we would allow *Ground 6* of this Appeal.

Conclusion

76. The duty of a first appellate court is to subject the evidence adduced at the trial to a fresh and exhaustive reappraisal, scrutiny and then decide whether or not the learned trial judge came to the correct conclusions and, if not, then this court is entitled to reach its own conclusions. *See* ***Achieng Sarah Opendi & Another v Ochwo Nyakecho Keziah*** *(supra).*

77. This Court having reached the conclusion that the Trial Court obviated the discretion granted it under section 97 of the CPA to allow the Appellant to pay the shortfall on the prescribed court fees, we would exercise our discretion under that legal provision to allow the Appellant to pay the residual sum of court fees due.

78. The upshot of this judgment is that the Appellant having succeeded in three of the five grounds of Appeal considered, and partially succeeded in one of the grounds, the Appeal substantially succeeds. The Appeal is therefore allowed with the following orders:

    I. The Ruling of the High Court dated 30th August, 2021 in **Election Petition No. 1 of 2021** of the High Court of Uganda at Mpigi, and the Orders made therein, are hereby set aside.

    II. The Appellant is hereby allowed to pay the sum of Ushs. 50,000/=, being the outstanding court fees due upon the presentation of **Election Petition No. 1 of 2021** filed in the High Court of Uganda at Mpigi.

    III. **Election Petition No. 1 of 2021** is remitted back to the High Court of Uganda at Mpigi forthwith for trial on its merits before a different judge.

    IV. Each party to bear its own costs.

It is so ordered.

Irene.

Dated and delivered at Kampala this 25th day of April, 2022.

Elizabeth Musoke
JUSTICE OF APPEAL

Irene Mulyagonja
JUSTICE OF APPEAL

Monica K. Mugenyi
JUSTICE OF APPEAL