

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CONSOLIDATED

ELECTION APPEAL NO.07 OF 2021

5

AND

ELECTION APPEAL NO.10 OF 2021

**(Arising from High Court Soroti Election Petition No.005 of
2021)**

1. ATTAN OKIA MOSES

10 **2. ELECTORAL COMMISSION::::::::::::::::::::::::::::: APPELLANTS**

VERSUS

ARIKO HERBERT EDMUND OKWORO::::::::::::::::::::: RESPONDENT

CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. MR. JUSTICE STEPHEN MUSOTA, JA

15 **HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JA**

JUDGMENT OF COURT

The two Election Petition Appeals, to wit; No.7 of 2021 lodged by the
Attan Okia Moses and No.10 of 2021 lodged by The Electoral
20 Commission are from the decision of the Hon. Justice Anna B.
Mugenyi delivered at High Court of Uganda at Soroti on 31st day of

August, 2021. By consent of both parties, the two Election Petition Appeals were consolidated.

Background of the Appeals

5 From the outset, we shall adopt the view of the learned trial Judge that for avoidance of doubt, we shall adopt the spelling of “Opilyai” parish as set out in the Gazette and not “Opiyai” or “opiai” referred to severally in the proceedings which are all construed to refer to the same “Opilyai” parish.

10 The 1st appellant and the Respondent were nominated by the 2nd appellant as candidates in the election for Member of Parliament of Soroti City East Constituency held on 14th January 2021. The 2nd Appellant returned and declared the 1st Appellant as the duly elected Member of Parliament for Soroti City East Constituency. The 2nd
15 Appellant published the 1st Appellant in the gazette as the validly elected Member of Parliament for Soroti City East Constituency.

The election results were that the 1st Appellant as winner had polled 7606 votes (48.94%), the Respondent was second with 7167 votes (46.12%), Ekemu Jimmy was third with 379 votes (2.55%), Inachu
20 Sarah Oliver was 4th with 185 votes (1.19%), Elaju James Herbert Yoweri was 5th with 99 votes (0.64%) and Emachu Arnold was 6th with 86 votes (0.55%).

The Respondent who was second in the election did not accept the results of the Election and accordingly challenged the election in High

Court at Soroti through Election Petition No.005 of 2021 claiming that the election had been conducted in a manner inconsistent with the Parliamentary Elections Act, 2005 because it removed the wards/parishes of Opilyai and Aloet from Soroti City East constituency where the same were designated to be by Statutory Instrument. That as a result the election was conducted in an illegally and unconstitutionally constituted Constituency of Soroti City East.

That throughout the campaign season he had participated in the election on the basis that the wards of Opilyai and Aloet were part of Soroti City East Constituency and indeed the 2nd Appellant had approved and administered his campaign schedule on this basis. That the act of eliminating Opilyai and Aloet parishes from Soroti City East constituency was illegal and this illegality was confirmed by the High Court at Soroti. That this illegality together with others severally pleaded in the petition rendered the election a sham and a nullity in the eyes of the law. That the conduct of the election in an illegally and unconstitutionally constituted constituency, especially the registered voters in the impugned wards/parishes of Aloet and Opilyai rendered the elections including computation of results legally and factually flawed for the benefit of the 1st Appellant and to the detriment of the Respondent.

In the Petition at the High Court the Respondent prayed for the following declarations and orders;

- 1. A declaration that no valid election took place in Soroti City East Division Constituency as required by law.*

2. *A declaration that the election conducted in an illegally and incompetently constituted constituency of Soroti City East Division, having excluded the parishes of Aloet and Opilyai was legally inconsequential and liable to be set aside.*

5 **3.** *An order that the declaration of the 1st Respondent (the 1st Appellant in this appeal) as the directly elected Member of Parliament for Soroti City Division East Constituency by the 1st Respondent (The 2nd Appellant in this Appeal) is annulled.*

10 **4.** *An order that a fresh election for the position of the directly elected Member of Parliament for Soroti City East Constituency be conducted by the 2nd Respondent in a legally constituted constituency.*

5. *An order that the Respondents pay the costs of the Petition*

15 **6.** *Such other reliefs as available under the Electoral laws as the Court considers just and appropriate under the circumstances.*

The 1st Appellant filed an Answer to the Petition denying the allegations in the Petition and opposing the Petition. He contended that the Petition did not disclose any of the grounds set out in the Parliamentary Elections Act, 2005 for setting aside an election of a member of Parliament. That the election was conducted lawfully and in accordance with the provisions of the Parliamentary Elections Act, relating to Elections, was free and fair and without any grave and/or material irregularities by the 2nd Respondent as alleged in the Petition.

The 2nd Respondent also filed an answer to the Petition and contended that the election was conducted lawfully and in accordance with the provisions of the Parliamentary Elections Act relating to elections, was free and fair and without any grave and/or material irregularities as alleged in the Petition and that there was no disenfranchisement of the voters of Aloet and Opilyai as alleged in the Petition. That the results of the Soroti City East Constituency were tallied in accordance with the new geographical boundaries of Soroti City East constituency as ordered by court and the said Soroti City East constituency was lawfully constituted and elections held therein were legitimate.

The matter proceeded interparty with each party making oral submissions. Only three issues were framed by the trial court for determination, vide;

15 **1.** *Whether the petition is competent?*

2. *Whether the election was conducted in accordance with the Constitution and electoral laws of Uganda; and if there was non-compliance whether non-compliance affected the election in a substantial manner?*

20 **3.** *What remedies are available to the parties?*

The trial Judge answered all issues in favor of the Respondent. The trial Court found that;

a. The petition was competent, properly before court and did not fall within the scope of a constitutional reference as the Respondent wanted the court to believe

5 b. There was gross noncompliance with the provisions of the Parliamentary Elections Act 2015, Electoral Commission Act Cap 140, Local Government Act Cap 243 and the Constitution of the Republic of Uganda.

c. The Petitioner is entitled to remedies

10 In the final result the trial Judge made the following declarations and orders;

1. *No valid election took place in Soroti City East Division Constituency as required by law*
2. *The election conducted in an illegally and incompetently constituted Constituency of Soroti City East Division having excluded the wards/parishes of Aloet and Opilyai was legally inconsequential and a nullity and is set aside.*
3. *The 1st Respondent was not validly elected as the directly elected member of Parliament for Soroti East Division Constituency.*
4. *The declaration of the 1st Respondent as the directly elected member of Parliament for Soroti City East Division Constituency by the 2nd Respondent is hereby annulled.*
5. *A fresh election for the position of directly elected member of Parliament for Soroti City Division Constituency should be*

conducted by the 2nd Respondent in a legally constituted Constituency.

6. The costs of this petition are awarded to the Petitioner and payable by both the 1st and 2nd Respondents.

5 The appellants (Respondents at the High Court) were dissatisfied with the Judgment and decree of the High Court of Uganda at Soroti and lodged the Election Petition Appeals which we consolidated.

The Appeals

10 The Memorandum of Appeal in Election Petition Appeal 07 of 2021, raises the following grounds of appeal;

1. The learned trial Judge erred in law in entertaining the Respondent's Petition to which she had no jurisdiction.
2. The learned trial Judge erred in law and fact in relying on decisions in Soroti High Court Civil Suit No.29 of 2020 and
15 Miscellaneous Application No.03 of 2021, to which High Court lacked original Jurisdiction
3. The learned trial Judge erred in law and fact in holding that the Respondent's Election Petition was competent.
4. The learned trial Judge erred in law and fact in retrospectively
20 applying the ruling in Soroti High Court, Miscellaneous Application No.03 of 2021, to the detriment of the Appellant.
5. The learned trial Judge erred in law and fact in finding that there was non-compliance with the Provisions and Principles of the

Parliamentary Elections Act which affected the results in a substantial manner

- 5 **6.** *The learned trial Judge erred in law and fact when she failed to exercise her discretion judiciously by condemning the Appellant to costs.*

The Appellant in Election Petition Appeal No.7 of 2021 proposes that court grants the following orders;

a. *That the appeal be allowed.*

10 **b.** *That the Judgment and orders of the lower court be reversed and set aside.*

c. *That the Appellant be awarded the costs of the court of Appeal and of the Court below.*

The Memorandum of Appeal in Election Petition Appeal No.10 of 2021, raises the following grounds of appeal;

15 **1.** *The learned trial Judge erred in law and fact when she held that the re-constitution of the boundaries of Soroti City West Constituency by removing the two impugned parishes of Aloet and Opiylai from Soroti City East Constituency and placing them in Soroti City West Constituency was done illegally by the*
20 *Appellant.*

2. *The learned trial Judge erred in law when she applied the court order of the High Court in HCMA No.03 of 2021 Ariko Herbert Edmund Okworo versus Antagu Michael Etadu & 5 Others issued on 15th march, 2021 retrospectively and held that the election*

conducted by the Appellant pursuant the Court order dated 26th November, 2020 in HCCS No.0029 of 2020 Enyangu Michael & 4 Others versus Electoral Commission was a nullity.

- 5 **3.** *The Learned trial Judge erred in law and fact when she found that there was no valid election conducted in Soroti City East Constituency as required by law, the same having been conducted in an illegally constituted constituency and were therefore a sham, illegal, null and void ab initio.*
- 10 **4.** *The learned trial Judge erred in law and fact when she found that 5,233 registered voters in the two parishes of Aloet and Opilyai were disenfranchised from the right to vote their leaders.*
- 15 **5.** *The learned trial Judge erred in law and fact when she found that there was non-compliance with the electoral laws by the Appellant in Soroti City East Constituency and that the result of the election was affected in a substantial manner,*
- 6.** *The Learned trial Judge erred in law and fact, when she unfairly and erroneously condemned the Appellant in costs on account of allegedly illegally conducting the elections in Soroti City East Constituency, despite existence of a binding Court Order.*

20 The Appellant in Election Petition Appeal No.10 of 2021 proposes that court grants the following orders;

- a.** *That the appeal be allowed.*

b. *That the Judgment and orders of High Court of Uganda at Soroti in Election Petition No.05 of 2021 be set aside and substituted with an order dismissing the Petition.*

c. *That the respondent pays costs of this appeal and in the lower court.*

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The consolidated Election Petition Appeals give rise to the following issues for determination;

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Issue 1 Whether the reconstitution of the boundaries of Soroti City West Constituency by removing the Parishes of Aloet and Opilyai from Soroti City East Constituency and placing them in Soroti City West Constituency was done illegally?

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Issue 2 Whether the learned trial Judge erred in law when she applied the Court Order of High Court in HCMA No.3 of 2021 Ariko Herbert Edmund Okworo vs Antagu Michael Etadu & 5 Others?

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Issue 3 Whether the learned trial Judge erred in law and fact when she found that there was no valid election conducted in Soroti City East Constituency?

Issue 4 Whether the learned trial Judge erred in law and fact when she found that 5,233 registered voters in the two parishes of Aloet and Opilyai were disenfranchised from the right to vote their leaders?

Issue 5 Whether the learned trial Judge erred in law and fact when she found that there was non-compliance with electoral Laws by the Appellants which affected the election result in a substantial manner?

5 *Issue 6 Whether the learned trial Judge erred in law and fact when she condemned the Appellants in Costs?*

Issue 7 Whether the High Court in Civil Suit No.29 of 2020 and MA No.03 of 2021 lacked the original Jurisdiction to handle the matters?

10 *Issues 8 Whether or not the learned trial Judge erred in law and fact in holding that the Respondent's Petition was competent?*

Representations/appearances

At the hearing of the appeal, Mr. Joseph Kyazze appeared for the 2nd Appellant, Mr. Julius Galisonga and Mr. Richard Okalany appeared for the 1st Appellant, Mr. Kirunda Robert and Mr. Simon Peter Waiswa appeared for the Respondent.

On 31st March 2022 the parties appeared before the court and prayed we adopt their conferencing notes as submissions which the court did. We have considered the said submissions in determination of the grounds of this appeal.

Duty of First Appellate Court

Under S. 66 (3) of the Parliamentary Elections Act, it is provided that;

***“Notwithstanding section 6 of the Judicature Act, the
Decisions of the Court of Appeal pertaining to
Parliamentary elections petitions shall be final”***

This being a first and last appeal it is important that we state the
5 duty of this Court as a last appellate court. The role of this court as
a first and last appellate court is laid down under **Rule 30(1) of the
Judicature (Court of Appeal Rules) Directions** which provides that;

***“30. Power to reappraise evidence and to take
additional evidence.***

10 ***(1) On any appeal from a decision of the High Court
acting in the exercise of its original jurisdiction, the
court may—***

***(a) Reappraise the evidence and draw inferences of
fact; and***

15 ***(b).....***

This Court is therefore obliged to reappraise the inferences of fact
drawn by the trial court.

In the case of **Kifamunte Henry v. Uganda Criminal Appeal No. 10
of 1997** the Supreme Court had this to say on the duty of a first
20 appellate court;

***“We agree that on a first appeal, from a conviction by
a Judge the appellant is entitled to have the appellate***

*Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses. However there may be other circumstances quite apart from the manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen. See *Pandya v. R* [1957] EA 336, *Okeno v. Republic* [1972] EA 32 and *Charles Bitwire v. Uganda Supreme Court Criminal Appeal No. 23 of 1985* at page 5.*

Furthermore, even where a trial Court has erred, the appellate Court will interfere where the error has occasioned a miscarriage of justice..."

In Banco Arabe Espanol Vs. Bank of Uganda Supreme Court Civil Appeal No.8 of 1998 the Supreme Court of Uganda applied the Kifamunte standard in a civil matter. Therefore, the duty of a first and last appellate court is to review the evidence of the case and to reconsider the materials before the trial Judge then make its own conclusion.

These principles were further stated in the case of **Father Nasensio Begumisa & 3 Others V. Eric Tibebaga, Supreme Court Civil Appeal No. 17 of 2002**, 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 correct conclusions, and if not then this court is entitled to reach its own conclusions. We shall consider the above principles in determining this appeal.

Consideration of the Appeal

We shall deal with the issues in the order in which we identified them.

Burden and Standard of Proof in Election Petition Cases

In election Petition Cases the burden of proof is cast on the Petitioner to prove the assertions to the satisfaction of the court that the irregularities or malpractices or non-compliance with the provisions and principles laid down in the relevant laws were or is committed and that they or it affected the results of the election in a substantial manner in the election petition. The evidence must be cogent, strong, and credible. The standard of proof is on a balance of probabilities.

In a recent decision of **Paul Mwiru v. Hon. Igeme Nabeta & Others- Election Petition Appeal No. 06 of 2011** this court held:

5 ***“Section 61(3) of the PEA sets the standard of proof in parliamentary election petitions. The burden of proof lies on the petitioner to prove the allegations in the petition and the standard of proof required is proof on a balance of probabilities. The provision of this subsection was settled by the Supreme Court in the case of Mukasa Harris v Dr Lulume Bayiga (supra) when it upheld the interpretation given to the subsection by this court and the High Court.”***

10

Issue 1 Whether the reconstitution of the boundaries of Soroti City West Constituency by removing the Parishes of Aloet and Opiylai from Soroti City East Constituency and placing them in Soroti City West Constituency was done illegally?

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The reason why the learned trial Judge found that the reconstitution of the constituency was illegal is at pages 6-21.

The learned trial Judge relied on the laws applicable to the Parliamentary Elections vide; ***Sections 2(1) of the Parliamentary Elections Act No.17 of 2005, Articles 61, 1(4), 59, 179 of the Constitution of the Republic of Uganda, Section 61(a) of the Parliamentary Elections Act, Section 19(3) of the Electoral Commission Act Cap 140 and Section 7(2)&(7) of the Local Governments Act Cap 243*** to find that the Statutory instrument

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published in the Uganda Gazette of 13th November, 2020 notified the public through the Minister responsible for Local Government with approval of Parliament that the Composition of Soroti East Division was as follows;

- 5 1. Eastern Municipal Division
2. Northern Municipal Division
3. Opuyo Parish
4. Acetgwen Parish
- 5. Opilyai Parish**
- 10 **6. Aloet Parish**
7. Otatai Parish

That therefore the Electoral Commission had no powers to distort the composition of the Soroti City East Constituency by removing Opilyai Parish and Aloet Parish which had 1,337 voters and 3,896 voters
15 respectively and placing them in Soroti City West Constituency where the said voters did not belong. Further that the use of the Court order in Civil Suit No.029 of 2020 could not be considered because the court overturned its decision and declared that the change in constituencies was illegal and void.

20 The learned trial Judge relied on ***Macfoy vs United Africa Co. Ltd [1961] 3 All ER 1169*** where it was held by Lord Denning that;

“if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order to set it

5 *aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.*”

10 The learned trial Judge following the precedent of Lord Denning and the laws cited found that the Elections in Soroti East Constituency in January, 2021 were done in an illegally constituted Constituency and were accordingly a sham, illegal and void in as far as noncompliance with the electoral laws by the Electoral Commission is concerned. That the elections were therefore nullity *ab initio*.

15 Further the learned trial Judge found that the court order in issue whereas in itself was valid and the Electoral Commission relied on it to conduct the election, it was later reviewed and found to have been issued in error and accordingly set aside. That therefore all the actions taken based on that order including the election effectively became a nullity, void, illegal and had to collapse accordingly.

20 We find no fault with the Judge’s reasoning and *ratio decidendi* on this issue. The trial Judge made it clear that once something on which an action is based is found to be null, illegal and void then that which was based on it cannot stand.

25 The reasons of the 1st Appellant (Attan Okia Moses) as to why he claims the trial Judge erred in this finding is because the election was conducted based on a decision of the High Court in HCCS 029

of 2020 which had been made before the election and yet the Judge relied on the subsequent decision in MA 03 of 2021 which was made after the election to find that the Election was a nullity. Clearly this reason given by the appellants does not at all weaken the reasoning of the trial Judge. An illegality was brought before her, she was duty bound to consider it which she did and we agree with her reasoning on the matter.

On the other hand, the Electoral Commission argues that under Article 31 and 61 of the Constitution they have the powers and mandate to demarcate constituencies and determine their boundaries. That this was the decision in the case of **Eddie Kwizera vs Attorney General Constitutional Petition No. 20 of 2018**. Whereas the Electoral Commission pleads power to demarcate and determine boundaries of Constituency with approval of parliament, they did not demonstrate that they followed this procedure in the Election under dispute. The Constitutional Court emphasized that any election conducted outside the precincts of that which parliament has approved is void *ab initio*. **See Eddie Kwizera (supra)**.

We are therefore inclined to agree with the findings and decision of the trial Judge that the reconstitution of the boundaries of Soroti West City constituency by removing the parishes of Aloet and Opilyai from Soroti East constituency and placing them in Soroti City West constituency was done illegally. We answer issue 1 in the affirmative.

Issue 2 Whether the learned trial Judge erred in law when she applied the Court Order of High Court in HCMA No.3 of 2021 Ariko Herbert Edmund Okworo vs Antagu Michael Etadu & 5 Others?

5 The trial Judge dealt with this issue while addressing the matter of legality of the election which we have already analysed above in resolving Issue 1.

It is not in dispute, in the instant Appeal, that Parliament placed the parishes of Opilyai and Aloet in Soroti City East Division. It is also
10 not in dispute that on polling day, for the purposes of the impugned election, the two parishes were placed in Soroti City West Division. This was contrary to what Parliament had directed, and what had been gazetted in the Uganda Gazette notice of 13th November 2020. For all intents and purposes, therefore, the election of Soroti City
15 East Division was conducted without the two parishes that had been so provided for by Parliamentary mandate. It cannot be said to have been the election Parliament intended **since there is NO such a constituency called Soroti City East Division WITHOUT Aloet and Opilyai Parishes.**

20 Faced with such a glaring illegality coupled with a court order emphasizing that the illegality existed, our view is that the Trial Judge was right to rely on the decision in MA 03 of 2021. The Trial Judge also heard evidence of how the illegality affected the voters.

When the Appellants' witnesses were cross-examined and re-
25 examined, they revealed that when they got to the polling stations,

they were handed ballot papers that did not bear the names of the candidate they had wanted to vote for but “*they found names and photos of strange people*”. They were then informed that those candidates had been placed in Soroti City West Division. **For that**
5 **reason, they were unable to vote.** This evidence was not controverted.

Instructive is the decision of ***Macfoy vs United Africa Co. Ltd [1961] 3 All ER 1169*** where it was held by Lord Denning that; “*if an act is void, then it is in law a nullity. It is not only bad, but incurably*
10 *bad. There is no need for an order to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.*”

15 An illegality was brought to the attention of the trial Judge and she could not just ignore it. It is now settled law that an illegality once brought to the attention of the court overrides all matters of pleading. Therefore, the trial Judge had to apply the decision in MA 03 of 2021 because it brought to her attention the illegality in the election. We
20 therefore find that the trial Judge did not err in relying on the decision and court order in MA 03 of 2021. ***See Macfoy v. United Africa co. Ltd. (supra)***

For the reasons we have given we resolve issue 2 in the negative.

Issue 3 Whether the learned trial Judge erred in law and fact when she found that there was no valid election conducted in Soroti City East Constituency?

5 Given our findings in resolving issues 1 and 2 above we find no basis to fault the trial Judge for finding that the election was not valid. The election having been entirely conducted in a constituency not lawfully constituted could not stand.

We reiterate the holding in ***Macfoy vs United Africa Co. Ltd [1961] 3 All ER 1169*** where it was held by Lord Denning that; “*if an act is*
10 *void, then it is in law a nullity. It is not only bad, but incurably bad... And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.*”

15 We therefore find that the learned trial Judge did not err in finding that that there was no valid election conducted in Soroti City East Constituency.

We accordingly answer issue 3 in the negative.

Issue 4 Whether the learned trial Judge erred in law and fact when she found that 5,233 registered voters in the two parishes of Aloet and Opilyai were disenfranchised from the right to vote their leaders?

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The Appellants’ witnesses who were cross examined and re-examined revealed that when they got to the polling stations, they were handed ballot papers that did not bear the names of the candidate they had

wanted to vote for but “*they found names and photos of strange people*”. They were then informed that those candidates had been placed in Soroti City West Division. **For that reason, they were unable to vote.** This evidence was not controverted. The Appellants
5 contend that the trial Judge erred in finding as she did, that the election was thereby substantially affected.

The learned trial Judge further found that the conduct of the Electoral Commission denied the voters of Opilyai and Aloet Parishes the opportunity to choose their members of Parliament and that the
10 failure of these voters to vote deprived the Respondent of the possibility of winning at least 430 votes out of 5233 potential voters, which could have tipped the margin.

This finding was based mainly on the fact that the Respondent had
15 pleaded that Opilyai and Aloet Parishes were his major strongholds. This averment had not been controverted or even rebutted by any evidence or in cross-examination. The settled position of the law is that such evidence is deemed to be admitted. It was therefore more probable than not, that the Respondent would have garnered those
20 votes. Quantitatively, the margin was too narrow to not be affected by the result. Qualitatively, once the trial court determined that the election did not pass the constitutional test as set out in the **Eddie Kwizera decision (supra)**, the election could not be allowed to stand.

25 The learned trial Judge rightly defined the term disenfranchisement as per Blacks’s Law Dictionary where at page 16 she stated that it

means to be deprived of the right to vote. This definition was relied upon in the case of **Chebrot Stephen versus Kenneth and Electoral Commission. Election Petition No,12 of 2016**. The trial Judge also considered the **Supreme Court Case of Rtd Dr. Kiiza Besigye versus Kaguta Museveni and another Election Petition No.1 of 2001** where it was held that The Constitution of Uganda guarantees the right to vote for every citizen above 18 years. Legally, the voters in the impugned two parishes/wards were disenfranchised.

10 We agree with the findings of the trial Judge and accordingly answer issue 4 in the negative.

Issue 5 Whether the learned trial Judge erred in law and fact when she found that there was non-compliance with electoral Laws by the Appellants which affected the election result in a substantial manner?

Our resolution of the first four issues above demonstrate that all the laws relating to demarcation of constituencies and election boundaries are matters of Election law. It follows therefore that if an action taken under those relevant laws is found to have been not only illegal but also null and void *ab initio*, then a finding ought to be made that there was noncompliance with Election Laws. Therefore, the learned trial Judge did not err in this finding.

We accordingly answer issue 5 in the negative.

Issue 6 Whether the learned trial Judge erred in law and fact when she condemned the Appellants in Costs?

We agree with the submissions of the appellants on this issue. The Judge dealt with the question of costs at the end of the Judgement.

5 In one sentence, she stated thus;

“The Costs of this Petition are awarded to the petitioner and payable by both the 1st and 2nd Respondent”

10 She did not explain why she found it necessary to award costs and why the costs had to be paid by the Appellants (Respondents to the Petition)

15 The award of costs against the Attan Okia Moses who was never a party to the Civil Suit No.29 of 2020 and MA 03 of 2021 which reviewed the election boundaries appears unfair. The illegalities were never the responsibility or a result of the actions of the said Okia. We therefore find that the learned trial Judge unfairly condemned Attan Okia Moses to pay costs of the Petition.

20 On the part of the Electoral Commission, it was also unfair to award costs against them because they were only acting in compliance with a court decision and order when they conducted the elections as they did. We also agree with their submission that costs are not intended to punish the unsuccessful litigant but rather to enable the successful litigant recover to the extent reasonably possible the

normal expenses incurred in the conduct of their case; **per Campbell vs Pollock (1927) AC 732.**

We would accordingly answer this issue in the positive and hold that the learned trial Judge erred in law and fact when she condemned the appellants in costs given the circumstances of this case.

Issue 7 Whether the High Court in Civil Suit No.29 of 2020 and MA No.03 of 2021 lacked the original Jurisdiction to handle the matters?

Whereas we agree with the Electoral Commission that the procedure for the decisions in MA 03 of 2021 and HCCS 29 of 2020 appears to have been flawed as pointed out by the Electoral Commission, the Judge did not need the decisions and court orders to conclude that there was an illegality committed in the boundaries of the Constituencies for the Election.

The learned trial Judge relied on the laws applicable to the Parliamentary Elections vide; ***Sections 2(1) of the Parliamentary Elections Act No.17 of 2005, Articles 61, 1(4), 59, 179 of the Constitution of the Republic of Uganda, Section 61(a) of the Parliamentary Elections Act, Section 19(3) of the Electoral Commission Act Cap 140 and Section 7(2)&(7) of the Local Governments Act Cap 243*** to find that the Statutory instrument published in the Uganda Gazette of 13th November, 2020 notified the public through the Minister responsible for Local Government with approval of Parliament that the Composition of Soroti East Division was as follows;

1. Eastern Municipal Division
2. Nothern Municipal Devision
3. Opuyo Parish
4. Acetgwen Parish

5 **5. Opilyai Parish**

6. Aloet Parish

 7. Otatai Parish

That therefore the Electoral Commission had no powers to distort the composition of the Soroti City East Constituency by removing Opilyai
10 Parish and Aloet Parish which had 1,337 voters and 3,896 voters respectively and placing them in Soroti City West Constituency where the said voters did not belong. Further that the use of the Court order in Civil Suit No.029 of 2020 could not be considered because the court overturned its decision and declared that the change in
15 constituencies was illegal and void.

The learned trial Judge relied on often cited **Macfoy vs United Africa Co. Ltd [1961] 3 All ER 1169** where it was held by Lord Denning that;

20 *“if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court to declare it to be so. And every proceeding which is founded*

on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

Therefore, far from what the Electoral Commission claims the Judge’s
5 decision was not entirely based on the court orders and findings in
the previously filed and decided cases on the matter of boundaries of
the constituency.

We would accordingly find that this issue is inconsequential and
could have no bearing on the decision of the trial Judge.

10 ***Issues 8 Whether or not the learned trial Judge erred in law
and fact in holding that the Respondent’s Petition was
competent?***

The competence of the Petition was adjudicated upon in the
Judgment as issue 1 of the Judgment of the trial Judge. The reasons
15 for finding merit in the Petition was that it did not fall in the category
of cases for constitutional reference as the Appellants (Respondents
to the Petition wished the court to find). The learned trial Judge relied
on ***Osotraco Limited vs Attorney General HCCS 1380 of 1986***
where it was held that where the question is simply the construing of
20 existing law with such modifications, adaptations, qualifications and
exceptions as to bring such law into conformity with the Constitution
this may be determined by the court before which such question
arises.

The Appellants/Respondents to the Petition at High Court had raised a preliminary objection that the question in the Petition was whether some parishes were supposed to fall in constituency "A" as opposed to Constituency "B". That this is outside the Parliamentary Elections Act Section 61 thereof. That questions of demarcations of Constituencies are constitutional matters which the Constitution only delegates to the Electoral Commission under the Electoral Commission Act. That any non-compliance with these does not and cannot found a Petition. That an Election cannot be set aside except for any of the reasons expressly provided for under the section of the Parliamentary Elections Act.

We do not agree with the appellants that the Petition or this Election Petition Appeals raises any matters for constitutional interpretation. A mere mention of the subject matter of the Petition does not make it a matter for constitutional interpretation.

We would accordingly answer issue 8 in negative

Conclusion

Having resolved all issues in favour of the respondent save for the issue on costs, the appeal partially succeeds and we would allow this appeal with the following orders;

- a. This appeal partly succeeds on the issue on award of costs
- b. The appeal fails on all other grounds of appeal.

- c. The Judgment, Decree and orders entered against the Appellants by the Learned trial Judge save for the award of costs are confirmed and upheld.
- d. Fresh elections for the position of directly elected Member of Parliament for Soroti City East constituency be conducted by the 2nd Appellant in a legally constituted constituency.
- e. The order of award of costs is set aside and substituted with an order that each party to the petition bears its own costs.
- f. Each party shall bear its own costs of this appeal.

10 We so order.

15 Dated this 24th day of May 2022.



Cheborion Barishaki


JUSTICE OF APPEAL

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Stephen Musota

JUSTICE OF APPEAL


Christopher Gashirabake
JUSTICE OF APPEAL

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