THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL AT KAMPALA

Coram: Musoke, Mulyagonja & Mugenyi, JJA

CONSOLIDATED ELECTION PETITION APPEALS NO 73 & 74 OF 2021

BETWEEN

1. THE ELECTORAL COMMISSION
2. MUSEVENI WILLIAM } **::::::::::::::::::::::::APPELLANTS**

AND

TUMWESIGYE FRED :: RESPONDENT

{Appeal against the judgment of the Hon. Lady Justice Eva K. Luswata, dated 22nd October 2021 in Mubende Election Petition No. 003 of 2021}

JUDGMENT OF IRENE MULYAGONJA, JA

Introduction

This is an appeal from the decision of the High Court in which the trial judge found that the election of the Member of Parliament for Buwekula South County Constituency in Mubende District did not comply with the laws and principles governing the conduct of elections in Uganda, and that this affected the result in a substantial manner. The trial judge accordingly nullified the election and ordered that fresh elections be held for that position, with costs to the respondent herein.

Background

The 2nd appellant and the respondent together with Ainebyona Ronald contested for the position of Member of Parliament for Buwekula South Constituency in an election that was held by the 1st appellant on 14th January 2021. The 2nd appellant garnered 8,075 votes, while the respondent was runner up with 7,479 votes; Ainebyona Ronald garnered the lowest number of votes. The 1st appellant thus declared the 2nd appellant the victor and he was subsequently gazetted and sworn in as Member of Parliament for Buwekula South Constituency.

The respondent was dissatisfied with the results and so brought a petition to challenge them at the High Court in Mubende. The grounds were that the 2nd appellant and others, with his knowledge and consent committed electoral offences contrary to the Parliamentary Elections Act, for which the 1st appellant was vicariously liable. Further that there was lack of freedom and transparency, unfairness and failure to enforce the provisions of the Parliamentary Elections Act by the 1st appellant. The trial judge found in favour of the respondent and issued the orders referred to above. Being dissatisfied with the decision, the appellants each brought an appeal against the respondent, registered in this court as Election Petition Appeals Nos. 73 and 74 of 2021.

Representation

When the parties appeared for the hearing of the Appeals on 28th March 2022, Eric Sabiti and Godfrey Musinguzi represented the Electoral Commission in **EPA 73 of 2021**, while the appellant in **EPA 74 of 2021** was represented by Abas Nsamba Matovu and Stephen Asiimwe. The respondent in both appeals was represented by Paul Ssebunya and Dominnic Twinamatsiko. By consent of counsel for all the parties, the appeals were consolidated and heard together.

Court directed counsel for the appellants to confer and agree on the relevant grounds of appeal to be determined. On the 31st March 2022, counsel for the appellants combined all the grounds that they had identified before and filed a Consolidated Memorandum of Appeal, with multiple grounds as follows:

1. The learned trial judge erred in law and fact when she failed to properly appraise and evaluate the evidence on record and consequently arrived at wrong conclusions that;

    i) A total number of 2,690 votes were unaccounted for;
    ii) That those were votes which were given to and then cast by voters who were not verified by the polling agents in contravention of section 1 PE Act;
    iii) That the assumption is that 1,512 voters at 6 (six) polling stations were not legally verified yet the votes were counted as part of the final tally of the 3 candidates;
    iv) That the proven defects seriously affected the final result of the election to the extent that the result could no longer reasonably

be said to represent the true will of the majority of voters of Buwekula South Constituency;

v) That the margin between the candidates being small, the evidence leads the court to believe that the 2nd appellant's victory was seriously in doubt.

2. The learned trial judge erred in law and fact by admitting and relying on evidence only adduced during the petitioner's submissions pertaining to the Declaration of Results Forms (DR) and Voters Registers (VR) that had not been pleaded in the petition and proved through affidavit evidence verifying the respondent's petition.

3. The learned trial judge erred in law when she misapplied the law relating to ballot stuffing thereby arriving at a wrong conclusion that the petitioner/respondent had proved that there was ballot stuffing.

4. The learned trial judge erred in law and fact when she held that wrong entries in 19 out of 61 Declaration of Results Forms pointed to deliberate manipulation or reckless negligence that had a significant impact on the final tally.

5. The learned trial judge misdirected herself in law and fact when she overruled an objection/point of law in respect to the respondent's reliance on certified copies of the Voters Registers (VR) where, contrary to the law, no proof of payment of stamp duty was shown thereby making the wrong conclusion to rely on them.

6. The learned trial judge erred in law and fact when she disregarded the 2nd appellant's objections about major parts of the respondent's evidence being hearsay thereby arriving at a wrong decision.

7. The learned trial judge erred in law and in fact when she disregarded the appellants' objections on voters' registers retrieved from ballot boxes on the 9/9/2021 thereby arriving at an erroneous decision.

8. The learned trial judge erred in law and fact when she shifted the burden of proof on to the 1st respondent in respect to the appellant's missing voters' registers where no proof was made and made a finding that there was non-verification of the voters thereby making wrong findings.

9. The trial judge having expunged the petitioner's/respondent's affidavit accompanying the petition failed and/or did not put the remaining evidence to proper scrutiny and by reason of such failure arrived at wrong conclusions.

10. The trial judge erred in law and fact when she made a finding that the appellant (sic) did not prove that 1,512 votes in the impugned 6 polling stations were not verified.

11. The trial judge misdirected herself and arrived at wrong conclusions when she relied on revelations and interlocutory applications than otherwise had been originally pleaded.

12. The trial judge misdirected herself on the law and arrived at wrong a decision when she relied on the material from the ballot boxes.

13. The trial judge misdirected herself on the law when she without conducting a recount of votes, made a finding that a total sum of 2,690 votes was unaccounted for.

14. The trial judge did not evaluate the evidence before her properly and erroneously found/held that there was deliberate manipulation of entries in the Declaration of Results Forms which had a significant impact on the final tally.

15. The trial judge erred in law and fact when she allowed the petitioner/respondent depart from his pleadings hence occasioning a miscarriage of justice.

The appellant prayed that this court allows the appeal and sets aside the orders of the trial judge. The respondent opposed the appeal.

Counsel for the appellants filed their joint written submissions, as directed by court, on 5th March 2022. The respondent's counsel filed a reply on 11th March 2022. The appellants then filed a rejoinder on 19th April 2021. This appeal was thus disposed of on the basis of written submissions only.

The Submissions of counsel

I have considered the submissions of counsel filed in the appeal and the authorities that they cited and supplied to support them. I will not set

out the submissions here but will review them as I dispose of the various grounds of appeal.

However, I note that in their submissions, counsel for the respondent raised a preliminary point of law that grounds 3, 6, 7, 9, 11, 12 and 15 were framed in a manner that was contrary to rule 86 (1) of the Rules of this Court. They prayed that the said grounds of appeal be struck out. I shall therefore address this complaint before I dispose of the rest of the grounds of appeal.

Determination of the preliminary point of law

In their submissions, counsel for the respondents framed an issue whether this court should strike out grounds 3, 6, 7, 9, 11, 12 and 15 of the appeal for offending rule 86 (1) of the Court of Appeal Rules. They specified their complaints as is shown below:

i) Ground 3 did not specify the context under which the trial judge misapplied the law relating to ballot stuffing;
ii) Ground 6 did not specify the parts of the respondent's evidence that was regarded as hearsay;
iii) Ground 7 did not specify the objections raised by the appellants in respect of the voters' registers and the erroneous decision that was made by the trial judge;
iv) Ground 9 did not specify the remaining evidence that the trial judge did not put to proper scrutiny and the wrong conclusion that she arrived at;
v) Ground 11 did not specify the revelations that were unearthed through the interlocutory applications and which specific applications they referred to;
vi) Ground 12 did not specify the wrong decision that the trial judge arrived at, and the specific ballot box among the 61 ballot boxes from the polling stations in Buwekula South Constituency; and finally that,
vii) Ground 15 did not specify how the respondent departed from his pleadings and how the trial judge allowed this.

When these appeals were consolidated on the 28th March 2022, it was with a view to expediting the hearing and conclusion of the two disputes between the parties here. The respondent's advocates did not inform court or bring it to the attention of the appellants that they would raise any preliminary points of law or objections in the appeal. They also did

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not bring up the issue at the scheduling conference that was held before the Registrar of this court earlier on.

I recall that during the proceedings before us on 28th March 2022, the respondent was directed to file his reply to the appellants' submissions by 8th April 2022, but he did not do so. However, the affidavit of service of Bandale Isaac, sworn on 12th April 2022 and filed in this court on the same day, shows that his lawyers, Sebunya Paul & Co Advocates, received the Consolidated Memorandum of Appeal and the appellant's submissions on 5th April 2022. The respondent therefore had ample time to file a reply after service on him of the two documents. But instead of filing submissions in reply by 8th April 2022, the respondent's advocates filed his reply on 11th April 2022.

The appellants' counsel had been given up to the 12th April 2022 to file their rejoinder. Due to the delay occasioned by the respondent, they filed the rejoinder on 19th April 2022. Due to an error in the transmission of documents within the court, we did not get to see the rejoinder until 22nd April 2022.

By letter dated the 12th April 2022, the 2nd appellant's counsel prayed that court considers the appeal without the respondent's reply. However, this court cannot be moved by letter. Court shall instead exercise its jurisdiction according to law and the Court of Appeal Rules to dispose of the preliminary point raised by the respondent.

It is my view that counsel litigating in electoral matters in this court must be aware that the court has a limited time frame within which to dispose of them, according to section 66 (2) of the Parliamentary Elections Act. Delay, even when it goes to the root of the dispute, is therefore not looked on kindly by this court. It has also long been the practice in the courts that preliminary points of law should be raised at the earliest possible opportunity in the course of any proceeding.

I observed that the grounds of appeal in EPA 73 and 74 of 2021 did not change even after the two appeals were consolidated. Further, that the respondent had the Memoranda of Appeal in both appeals as far back as November 2021 when they were filed in this court. It is evident from the Scheduling Memorandum that his advocates did not raise any complaint about the grounds of appeal at that Conference. Neither did they raise any when they appeared before us on 28th March 2022. I am therefore surprised that counsel had the audacity to raise the

preliminary point(s) above after the appellant had filed and served them with their submissions, even after they filed their response 4 days after the date on which this court directed them to do so.

I noted that the respondent, in the alternative, also ably responded to the contested grounds of appeal. Secondly that the preliminary point raised by his advocates was merely on the pleadings and was not intended to dispose of the whole appeal; it was only meant to delimit what this court could or could not consider in the appeal. As a result, I shall draw guidance from rule 2 (2) of the Rules of this court which provides as follows:

> **(2) Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, *to make such orders as may be necessary for attaining the ends of justice* or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, *and shall be exercised to prevent abuse of the process of any court caused by delay.***
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> ***{Emphasis supplied}***

While it is our bounden duty to prevent abuse of the processes of this court by dint of the rule above, it is also our statutory duty to prevent delay in the disposal of electoral disputes, as it is provided for by section 66 (2) of the Parliamentary Elections Act. The latter requires this court to suspend other matters pending before this court, which is prejudicial to the litigants therein, and dispose of electoral appeals expeditiously.

In the circumstances, I will cannot overlook the disobedience by the respondent's advocates to the directives issued by this court to file their submissions in reply by the 8th April 2022. Neither can I entertain the preliminary point raised by the respondent, for the first time in his late submissions, without informing and seeking the leave of this court to do so. This is because it would occasion unnecessary delay in disposing of these two appeals. For those two reasons, the respondent's preliminary point on the impropriety of the grounds of appeal is hereby dismissed.

The Grounds of Appeal

The purpose of our directive to counsel for the appellants to consolidate the Memoranda of Appeal in the two appeals before us was to obviate

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the possibility of each of them advancing the same grounds of appeal in the consolidated pleading leading to prolixity of the same. It was expected counsel to confer with each other and come up with succinct grounds of appeal, not reproduce what was contained in their initial Memoranda of Appeal, *verbatim*.

Unfortunately, counsel seem to have done exactly that. They added the seven grounds of appeal in EPA 73 of 2021 to the eight in EPA 74 of 2021 to make 15 grounds in the consolidated memorandum. The result was to present numerous grounds, some of which were repeated in different words. Ground 1 of the consolidated pleading is a good example which, at the risk of repeating myself but for clarity, was as follows:

> *"1. The learned trial judge erred in law and fact when she failed to properly appraise and evaluate the evidence on record and consequently arrived at wrong conclusions that;*
>
> *i) A total number of 2,690 were unaccounted for;*
>
> *ii) That those were votes which were given to and then cast by voters who were not verified by the polling agents in contravention of section 1 PE Act;*
>
> *iii) That the assumption is that 1,512 voters at 6 (six) polling stations were not legally verified yet the votes were counted as part of the final tally of the 3 candidates;*
>
> *iv) That the proven defects seriously affected the final result of the election to the extent that the result could no longer reasonably be said to represent the true will of the majority of voters of Buwekula South Constituency;*
>
> *v) That the margin between the candidates being small, the evidence leads the court to believe that the 2nd appellant's victory was seriously in doubt."*

I observed that the ground above was ground 1 in EPA 74 of 2021. Further that in framing it, counsel for the 2nd appellant simply lifted parts of the findings of the trial judge from the judgment and converted conclusions reached in the analysis into grounds of appeal. The result after the consolidation, or even before was a repetition of some of the substantive grounds of appeal that were framed. For example, at page 52 of her judgment (page 2310 of the record of appeal) the trial judge made the finding that:

> *"... the proven defects seriously affected the final result of the election to the extent that the result could no longer reasonably be said to represent the true will of the majority of voters of Buwekula South Constituency.*

The margin between the candidates being small, the evidence leads the court to believe that Museveni's victory was seriously in doubt."

Counsel for the 2nd appellant included the findings above in Ground 1 as paragraphs (iv) and (v) thereof. He also framed similar grounds from the findings of the judge at page 48 of her judgment as paragraphs (i), (ii) and (iii) of ground 1. There is not an inkling in ground 1 about how the trial judge erred in law when she made those findings.

I also observed that the complaint in ground 1(i) is the subject of ground 13 of the appeal; while the grievances in ground 1 (ii) and (iii) are the subject of ground 10. Further that the complaints in ground 1 (iv) and (v) are the same as those in grounds 3 and 4 of the Consolidated Memorandum of Appeal.

Rule 86 (1) of the Rules of this court prohibits the filing of memoranda of appeal that are prolix; it requires appellants to set forth their grounds of objection in the Memorandum of Appeal concisely. It is therefore never necessary to state the errors alleged of the trial judge in paragraphs and sub-paragraphs and narrative as the appellants in this appeal did. The grounds should be brief specifying the points which are alleged to have been wrongfully decided; not a rendition or narrative of the findings of the trial judge, which should be reserved for the submissions of counsel. For those reasons, ground 1 in the Consolidated Memorandum of Appeal is hereby struck out for contravening rule 86 (1) of the Rules of this court.

Having done so, I am mindful of the fact that counsel for both parties consolidated the grounds of appeal in their submissions, ostensibly to canvass issues that were similar at the same time. The appellants' counsel stated that they would address grounds 1, 8, 10 and 12 together; grounds 9, 11 and 14 together; grounds 2 and 7 together; and grounds 3, 4 and 13 together. They addressed grounds 5 and 6 separately. Counsel for the respondent planned to respond in similar fashion.

However, I have further carefully considered the remaining grounds in the Consolidated Memorandum of Appeal after striking out ground 1 thereof and find that it will be most expedient to deal with the multiple grounds of appeal according to the main grievances therein as is set out below.

Grounds 2 and 11 will be addressed together, while grounds 3, 6, 8, 9 and 13 will also be addressed together. I shall next address grounds 7, 5 and 12 together, while grounds 5 and 10 will also be addressed together. We I will finally dispose of grounds 4 and 14 together.

Determination of the appeal

Duty of the court

The duty of this court, as a first appellate court, is stated in rule 30 (1) of the Judicature (Court of Appeal Rules) Directions, SI 13-10. It is to re-appraise the whole of the evidence adduced before the trial court in order for it to reach its own conclusions, both on the facts and the law. But in doing so the court should be mindful of the fact that it did not observe and hear the testimonies of the witnesses **(See Kifamunte Henry v. Uganda, SCCA 10 of 1997).**

It is therefore my bounden duty to consider all the evidence that was adduced before and admitted onto the record by the trial court while I resolve the complaints raised by the appellants about the decision. I now proceed to do so.

Grounds 2 and 11

The gist of ground 2 was that the trial judge admitted and relied on the Declaration of Results Forms (DR Forms) and the Voters' Registers (VR) yet the two were neither pleaded in the petition nor proved in the affidavit accompanying the petition; while the complaint in ground 11 was that the judge misdirected herself when she relied on revelations which were not pleaded but obtained through interlocutory applications.

Submissions of counsel

With regard to ground 2, the appellants' counsel submitted that the trial judge relied on the Voters' Register which was neither pleaded in the petition nor alluded to in the affidavits nor identified or tendered in evidence in court during the hearing. Counsel asserted that this was a misapprehension by the court which prejudiced the appellants. Court was referred to rule 15 (1) of the Parliamentary Elections (Interim Provisions) Rules (SI 141-2) hereinafter referred to as the Election Petition Rules, which provides that evidence in election petitions shall be by affidavits read in open court. The appellants' counsel also relied on the decision in **Muyanja Simon v. Kenneth Lubogo & Electoral**

Commission, Court of Appeal Election Petition Appeal No 82 of 2016, where it was held that it is envisaged that the inquiry in an election petition is the observance of the due process of a trial. That the parties, not the court have a duty to adduce evidence.

The appellants' counsel went on to submit that the alleged irregularities in the voters' register only came up in the respondent's final submissions before the trial court. Counsel further asserted that the voters' register was filed and marked after the hearing had closed, because the hearing closed on 14th September 2021 as it is shown at page 489 of the record of appeal, but the voters register was filed and served on the 15th September 2021. The advocates then complained that in the circumstances, the appellants could not seek leave to call any witness to verify whether the booklets that were produced comprised of the genuine register that was used during the polls since availing the register turned into a ballot opening exercise.

Counsel went on to assert that it was established that the ballot boxes which contained the VR were found to have been tampered with. That the VR were only marked by the court but not admitted in evidence. Neither were the appellants given an opportunity to cross examine the deponent on the said piece of evidence. It was finally submitted that the introduction of the VR procured without the participation of the appellants at the stage of the submissions was a tactic to ambush the appellants because it denied them the opportunity to call witnesses to either rebut or confirm the allegations about irregularities in the impugned register. They prayed that ground 2 be allowed.

In their joint submissions filed on 5th April 2022, at page 7 thereof the appellant stated that they would address grounds 9, 11 and 14 *"with other similar grounds."* However, it seems they forgot to indicate where they dealt with these three grounds of appeal; or they did not specifically address them.

In reply to the appellants' submissions on ground 2, counsel for the respondent submitted that the respondent/petitioner *did* plead that the votes that were cast were more than the voters that participated in the election, according to the VR. Further that this confirmed that there was ballot stuffing, multiple voting, pre-ticking of ballots and manipulation of the VR. They added that this confirmed that the appellant No.1 failed to control the distribution and use of ballot papers at polling stations.

Counsel referred us to the petition at page 11 and 12, Vol 1 of the record of appeal.

The respondent's counsel emphasized that not only did the respondent complain about the VR in the petition but he also alluded to it in his affidavit accompanying the petition. The respondent's advocates further contended that the case of **Muyanja Simon** (supra) which the appellants relied upon did not apply to the situation at hand.

Counsel went on to submit that there is no doubt that the petition was served upon the 1st appellant who was the custodian of all election material used during and after the polls. In spite of that, the 1st appellant chose not to rebut the contents of paragraph 13.1.12 of the petition and 14.1.11 of the affidavit accompanying the petition by attaching the relevant VR to her answer to the petition. Section 52 of the Parliamentary Elections Act was referred to in support of this submission.

The respondent's advocates further explained that when the 1st appellant chose not to rebut the allegations in the respondent's petition, the latter was left with no option but to apply for discovery of the Voters' Register. As a result, the 1st appellant availed certified copies of the register to the respondent. Counsel relied on the decision in **Levi Siminyu Makali v. Koyi John Wakule & Others, Kenya High Court Election Petition No. 4 of 2017,** as persuasive authority for the assertion that any documents produced or discovered in an election petition hearing go to proving or disproving the grounds that are already stated in the petition.

The respondent's advocates went on to clarify that the trial court ordered the 1st appellant to avail to the respondent certified copies of the VR for all polling stations in Buwekula South Constituency and the documents were availed pursuant to the order. Further, that the time within which to file and serve the certified copies of the VR was agreed upon by the parties in court as the 15th September 2021. That it was therefore surprising that the appellants now dispute the authenticity of the certified copies of the VR, yet certification was done by officials of the 1st appellant. Our attention was drawn to the fact that the appellants did not raise this objection before the trial court in their submissions and it is being advanced here for the first time.

Similar to the appellants' counsel, the respondent's counsel offered no submissions on grounds 11 of the appeal, obviously because there was nothing to respond to. I therefore came to the conclusion that the appellants abandoned ground 11 of the appeal, and I find so.

Resolution of Ground 2

In order to answer the question whether the appellant offered any pleadings about the VR it is to the pleadings that I must go. In his petition which appeared at pages 5-16, Volume 1 of the record of appeal, in paragraph 13.1.12 of the petition the respondent pleaded thus:

> *"13.1.12 The votes cast as contained in the ballot boxes of all polling stations in Buwekula South Constituency Mubende District are more than the voters that participated in the voting exercise as per the* ***voters' registers for the polling stations*** *which confirms that there was ballot stuffing, multiple voting, pre-ticking of ballots* ***and manipulation of the voters' register which also confirms that the 2nd respondent failed to control the distribution and use of ballot papers at those polling stations*** *and this was contrary to section 12 (1) (b) of the Electoral Commission Act, Cap. 140 and 27 (a) Parliamentary Elections Act, 2005."*
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> ***{Emphasis supplied}***

There is therefore no doubt in my minds that one of the respondent's complaints in the petition was about the manipulation of the VR, or the ballots that were cast without complying with the contents of the VR.

The appellant's counsel complained that there was no affidavit evidence to support this contention, allegedly because the respondent's affidavit accompanying the petition was expunged from the record by the trial judge. I observed that the appellants objected to reliance on the respondent's affidavit on the ground that it contained hearsay evidence and contravened the provisions of Order 19 rule 3 sub rule 1. However, the objection was overruled by the trial judge who considered it from pages 8 to 9 of her judgement, where she observed and ruled as follows:

> *"However, this is an objection that Museveni's counsel should have raised at the inception of the proceedings. Instead, they held onto the objection and admitted that evidence during scheduling of the matter. They even went ahead to engage Tumwesigye in lengthy cross examination on all his evidence, the impugned paragraphs inclusive. The Evidence Act does not strictly apply to affidavit evidence and it would be*

dis judicious (sic) to sever parts of an affidavit, at the tail end of the trial, especially an affidavit whose deponent was subjected to exhaustive cross examination. Museveni's counsel have only themselves to blame.

Further, I note that under Order 19 rr 3 (2), parts of an affidavit need not necessarily be expunged. Instead the Court may consider awarding costs against a party who files an affidavit with matters of hearsay. ***I choose therefore to leave the affidavit intact****. I will consider Tumwesigye's evidence both the pleadings and in Court as a whole. It will be possible then to determine what amounts to hearsay; once that is done, it can be dealt with as evidence evaluated in line with the CPR and Evidence Act.*

The first objection accordingly fails."

{Emphasis supplied}

That being the case, there also remains no doubt that the allegations about manipulation of voters' registers were supported by averments in the respondent's affidavit accompanying the petition, particularly in paragraph 14.1.11. The averments in that paragraph where a replica of the contents of paragraph 13.1.12 of the petition.

In addition, the respondent was cross examined at length regarding the averments in his affidavit in support of the petition. The trial judge mentions it in her ruling, therefore I have no doubt that the court relied upon the relevant parts of the respondent's affidavit in its inquiry.

In conclusion therefore ground 2 of the appeal fails.

Ground 3, 6, 8, 9 and 13

The complaints in these five (5) grounds of appeal are about principles of the law of evidence and how the trial court evaluated it. Ground 3 was a complaint that the trial judge misapplied the law on ballot stuffing and therefore came to the wrong conclusion that it occurred, while ground 6 was the grievance that the trial judge disregarded the 2nd appellant's objections about major parts of the respondent's evidence being hearsay and therefore arrived at a wrong decision based on hearsay evidence. In ground 8 the appellants' complaint was that the trial judge shifted the burden of proof onto the 1st appellant in respect of the alleged missing voters' registers. This ground is related to ground 13 in which the appellants' complaint was that the judge erred when she found that a total of 2,690 votes were unaccounted for, without carrying out a vote recount. In ground 9 the appellants were aggrieved that after the judge expunged the petitioner's affidavit accompanying

the petition, the trial judge did not put the remaining evidence to proper scrutiny and therefore arrived at wrong conclusions.

Regarding the complaint in ground 9, I reproduced the ruling of the trial judge in which she considered the prayer to expunge the respondent's affidavit accompanying his petition and rejected it, at page 17 of this judgment. The complaint that she failed to use the rest of the evidence and properly scrutinise it is therefore not tenable, because she did not expunge the said affidavit. I therefore need not resolve ground 9 because the trial judge made the decision to leave the affidavit accompanying the petition whole.

That being the case ground 9 of the appeal was erroneously framed because it was based on the incorrect fact that the trial judge expunged the affidavit accompanying the petition. I therefore find that ground 9 of the appeal cannot stand; it has to fail.

Having found so, I will now consider the principles relating to hearsay evidence contained in the 2nd appellants' objection before the trial court and whether the trial judge shifted the burden of proof about the missing VR onto the 1st appellants, and if so, whether it was correct to do so, as well as whether the trial judge ought to have ordered a recount of the votes, as it was proposed in ground 13; and whether the trial judge misapplied the law on ballot box stuffing.

Submissions of Counsel

With regard to the contention that the trial judge erroneously denied the 2nd appellant's objection about hearsay evidence in ground 6, the appellant's counsel submitted that paragraphs 11, 12, 13, 14.1.6, 14.1.7, 14.1.8, 14.1.10, 14.1.12.1, 14.1.12.2, 14.1.13, 14.1.13, 14.1.18, 14.1.19 and 14.2, of the respondent's affidavit accompanying the petition offended the provisions of Order 19 rule 3 (1) of the Civil Procedure Rules (CPR) because they amounted to hearsay evidence. The objection was also considered by the trial judge but it was overruled in the manner that I have shown above.

The appellants' advocates went on to submit that Order 19 rule 3 (1) provides that affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except in interlocutory applications. That the stated paragraphs offended this rule and the trial judge erred when she overruled the objection. Counsel relied on the

decision in **Nsubuga Jonah v. Electoral Commission, Election Petition No. 34 of 2011**, and went on to submit that once an illegality is brought to the attention of court it overrides all pleadings. It was also contended for the 2nd appellant that the said objection was raised in time and it was a point of law that this court should reconsider and set aside the findings of the trial judge by expunging the contested paragraphs of the affidavit accompanying the petition.

With regard to the complaint that the trial judge erroneously shifted the burden of proof onto the 1st appellant, counsel for the appellants asserted that the onus is upon the petitioner who seeks the annulment of an election to adduce cogent and credible evidence to prove the grounds that he or she relies upon, to the satisfaction of court. That this burden is fixed at the onset of the trial and unless circumstances change, it remains unchanged. Counsel relied on the decisions of this court in **Freda Nanziri Kase Mubanda v. Mary Babirye Kabanda, Election Petition Appeal No 38 of 2016** and **Paul Mwiru v Igeme Nathan Nabeeta & 2 Others, Election Petition Appeal No 6 of 2011**.

The appellants' counsel went on to submit that unless and until the petitioner discharges the evidential burden an election is presumed valid. Further, that the success of a candidate who has won at an election should not be lightly interfered with, as it was held by the Supreme Court of India in **Jeet Mohinder Singh v. Harmider Singh Jassi, AIR 2000 SC 258**.

Counsel further submitted that it was a misapprehension by the trial judge to shift the burden onto the 1st appellant, when she made the finding that there were no voters' registers at some polling stations when there was no affidavit evidence or testimony in court to prove this fact. That the same principle applies to the finding in her judgement that 2,690 votes were not accounted for, simply because of discrepancies in the voters' register which were explained away by the evidence of DW4.

Regarding the complaint in ground 3 that the trial judge misapplied the law relating to ballot stuffing and so came to a wrong conclusion that the petitioner/respondent proved it, the appellants' counsel offered no submissions at all. It is therefore not surprising that counsel for the respondent also did not address it. I would hold that it was abandoned by the appellants but there is evidence relating to the concept of ballot stuffing before us. I therefore must address it.

The appellants offered no submissions about ground 13, the complaint that the trial judge ought to have ordered for a vote recount before she came to her conclusion that 2,690 votes were unaccounted for. As a result, the respondent did not respond to it either. The appellants therefore appear to have abandoned ground 13 of the appeal.

In reply to the contention that the respondent's affidavit accompanying the petition contained hearsay evidence, counsel for the respondent submitted that this objection was not one of the issues formulated at the scheduling conference for disposal by this court. It was further submitted that according to rule 17 of the Election Petition Rules the applicability of the Civil Procedure Act and the Rules thereunder is subject to the Election Petition Rules, with such modifications as the court may consider in the interests of justice and expediting the proceedings.

Counsel went on to submit that the impugned paragraphs of the affidavit accompanying the petition were not hearsay because the respondent did not state therein that this evidence was sourced from 3rd parties. That rather, the appellants' issue was that this evidence was not corroborated; but uncorroborated evidence is not necessarily hearsay evidence. We were referred to the decision in the often cited case of **Kiiza Besigye v. Museveni Yoweri Kaguta & Another, Supreme Court Presidential Election Petition No 1 of 2001**, for the submission that courts have to adopt a liberal approach when dealing with affidavits in election petitions.

Counsel finally submitted that the impugned paragraphs of the respondent's affidavit accompanying the petition were not part of the relevant evidence that formed the final decision of the trial court. It was then explained that the trial court relied on the contents of paragraph 14.1.11 and 14.1.16. That as a result ground 6 of the appeal lacks merit and should be resolved in the negative.

With regard to the complaint that the trial judge shifted the burden of proof onto the 1st appellant, counsel for the respondent in this court submitted that in the case of **Rehema Tiwuwe Watongola v. Salaamu Musumba, Court of Appeal Election Appeal No. 27 of 2016,** it was held that there must be clear evidence creating doubt in order for the burden of proof to shit from the petitioner to the respondent.

Counsel further referred us to the decision in **Raila Amolo Odinga & Another v. Uhuru Muigai Kenyatta, Kenya Supreme Court Presidential Petition No 1 of 2017,** where that court explored the concept of the shifting burden in such matters. Counsel then went on to submit that though the court in that case held that the legal and evidential burden of establishing facts which will support a party's case is static and remains constant throughout a trial with the plaintiff, depending on the effectiveness with which he or she discharges it, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

The respondent's advocate went further to explain that in the case now before us, the respondent pleaded, in paragraph 13.1.12 of the petition and paragraph 14.1.11 of the affidavit accompanying it, that the number of voters who participated in polling was proved to have been less than the votes that were cast and counted. That this was reflected in the DR Forms and the Return Form for Transmission of Results. Counsel charged that the appellants did not disprove this fact. That similarly, they did not disprove the fact that 6 out of 61 polling stations in the Constituency did not have voters' registers, as it was shown in a table at pages 1974-1979 of the Supplementary Record of Appeal.

Counsel continued that the 1st appellant could have ably responded to the evidence that there were 2,690 votes that were not accounted for and 1,512 unverified voters in her reply to the petition and the affidavit in support thereof, and any other evidence, but she did not do so. That this was especially so because the 1st appellant is the custodian of all materials that were used during the polls. Counsel added that counsel for the 1st appellant did not cross examine the respondent on paragraph 13.1.12 of the petition and paragraph 14.1.11 of his affidavit. Instead, he provided certified copies of the voters' register which were tendered as evidence in court which confirmed the discrepancies. That after this evidence was admitted, the burden of proof shifted to the 1st appellant to prove otherwise.

The respondent's advocates went on to submit that the trial court could not have relied on the testimony of DW4, in cross examination, that the VR and Biometric Voters Verification Kits (BVVK) were used at all polling stations, without corroboration. That DW4 had the opportunity during cross examination to apply for leave to bring these instruments to account for the votes that were alleged not to be accounted for, and

the voters that were not verified before casting their ballots, but this was not done. Counsel asserted that the burden to prove whether voters at the six (6) polling stations were verified was again on the 1st appellant, not the polling agents. That as a result, ground 8 of the appeal should fail.

Resolution of Grounds 3, 6 and 8

Hearsay Evidence

Black's Law Dictionary (9th Edition, West) defines the expression *"hearsay"* thus:

> *"Traditionally, testimony that is given by a witness who relates not what she or he knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness."*

Section 1 of the Evidence Act excludes affidavits from the application of the general rules of evidence in the Act when it provides as follows:

> **"1. Application. This Act shall apply to all judicial proceedings in or before the Supreme Court, the Court of Appeal, the High Court and all courts established under the Magistrates Courts Act, *but not to affidavits presented to any court or officer* nor to proceedings before an arbitrator."**
>
> ***{Emphasis supplied}***

However, Order 19 rule 3 CPR provides for matters to which affidavits shall be confined as follows:

> **"(1) Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated.**
>
> **(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall, unless the court otherwise directs, be paid by the party filing the affidavit."**

The appellants offered very brief submissions on this point. They did not explain why they thought that the statements in the impugned paragraphs of the affidavit amounted to hearsay evidence, yet it appears

that during his cross-examination of the respondent, Mr. Medard Segona laid ground for arguments on this point. I will therefore consider the whereabouts of the respondent on polling day to enable us establish how he came by the information stated in the impugned paragraphs of his affidavit before I arrive at my decision.

At page 2098, Vol. 1 of the record, Mr. Segona asked the respondent to account for his time on polling day. He did so from page 2098 to 2100. He stated that he was at his home before he went to vote at Kinyiga Polling Station. That he left home at about 1.00 pm and went to that station where he cast his ballot when it was approaching 3.00 pm. The respondent further stated that he left the polling station at 3.00 pm and went back to his home. Further that he did not go anywhere else that day apart from Kinyiga Polling Station; not even to the Tally Centre.

I observed that in the impugned paragraphs of the contested affidavit, the respondent made statements as though he was present when the incidents he narrated occurred. He did not state how he got the information that he sought to rely upon, save that in paragraph 20 thereof he states as follows:

> *"I swear this affidavit in support of my petition to this Honourable Court and whatever, (sic) I have stated herein is true to the best of my knowledge and* ***belief*** *save for what I based on information from sources disclosed thereunder."*

There is not a single paragraph in the affidavit in which the respondent disclosed any source of information for his averments. Instead, he details alleged electoral offences that he says took place in multiple polling stations, despite the fact that during the polls he was at his home. In particular, I observed that in paragraph 14.1.13 of his affidavit he complained about changes in the voters' roll regarding the polling stations of various voters as follows:

> *"Contrary to what was reflected on the voters register during (the) display exercise prior to the polling day and without any complaint or permissions from the affected registered voters (me and my family inclusive), some registered voters of Buwekula Constituency Mubende District (me and my family inclusive) were denied voting at polling stations they/ we were attributed to during the voter display exercise and we were on the polling day when we reported for voting exercise asked by the presiding officers of the 2nd respondent to move from one polling station to another checking for our names which made many voters to*

give up because of transport constraints and frustration; this was most prevalent where some voters had to move from Bulima to Kyakadali Catholic Church, Kiranggwa P/S, Maleete Trading Centre, Kalembe Trading Centre to Kayunga areas and these are areas where I have strong support going by the results of the National Resistance Movement Party primaries. ..."

While it is true, according to an exhibit marked **"PW6,"** at page 44, Vol. 4 of the record, that the respondent's designated polling station according to the voter's polling information, was Kalembe TC, when he was cross-examined, he did not narrate how he finally identified and located his changed polling station to Kinyiga, where he cast his ballot. If that was the case, he ought to have stated what he saw at the various stations that he went to before he finally got to Kinyiga where he eventually voted. If his family members told him what they saw or heard, he ought to have disclosed so as he narrated the said events in his accompanying affidavit.

The respondent similarly narrated incidents at various polling stations in paragraphs 14.1.6 to 14.1.10, and 14.1.12 to 14.1.12.2 without stating how and from who he got this information, yet during cross-examination by Mr. Segona, at page 2103 and 2104, Vol 4 of the record, he admits that he got information from his polling agents and voters.

On their part, the respondent's counsel argued that the statements could not have been hearsay because the respondent did not state in any of them that he received the information therein from someone else. I think that in order to redeem their client, perhaps counsel ought to have referred us to the 34 additional affidavits which were struck off the record by the trial judge for failure to comply with the requirements of the Illiterates Protection Act, but they did not do so. I say so because in paragraph 11 of the accompanying affidavit which adverted to additional evidence.

Nonetheless, it needs not be gainsaid that the contested paragraphs of the respondent's accompanying affidavit amounted to hearsay evidence. It also has been long settled that such evidence is not admissible in election petitions. In **Muhindo Rehema v. Winfred Kiiza, Election Petition Appeal No. 29 of 2011**, this court had this to say about similar affidavits:

*"Election petitions are not interlocutory applications and therefore hearsay evidence is not admissible, **Besigye vs. Museveni** (supra). The*

appellant's two affidavits did not disclose the source of information concerning polling stations in Kasese on the polling day. She could not have been everywhere at the same place to witness the process.

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

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

The learned trial judge in this case correctly found that parts of the affidavit contained hearsay evidence. But she decided to leave the affidavit intact and consider the respondent's evidence, the pleadings, and other evidence adduced in court. I assume that her reference to evidence in court in her decision meant the evidence that would come out of cross-examination of the respondent by opposing counsel.

Unfortunately, counsel for the 2nd appellant did not cross examine on the alleged offences, perhaps because there was no evidence left in that regard on the record. He carefully steered clear of the offences and focused on whether or not the respondent in this appeal made any reports to the police about them, and the alleged assault and kidnap of Charles Tumusiime by the supporters of the 2nd appellant. Tumusiime's affidavit was the only additional affidavit in support of the petition that was not expunged from the record.

For the 1st appellant, Mr. Twinamatsiko's focus was on allegations about non-use of the BVVK at several polling stations and the inconsistencies in the DR Forms. He also sought to prove that the respondent did not report the alleged electoral offences to the Electoral Commission. He did not go into the details of the allegations.

In her evaluation of the evidence before court the trial judge, correctly in my opinion, considered the alleged offences, viz: bribery, violence and intimidation, and uttering false, defamatory and sectarian statements. She considered the contents of the respondent's affidavit regarding allegations of bribery, which was not oral but only in his affidavit. However, she discounted it and found that it was not proved due to the absence of cogent evidence because the affidavit of Settabi David who deposed about the alleged incidents was expunged earlier on in the

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proceedings. In addition, the respondent had no proof that he reported the alleged offences to the Police or officials of the Electoral Commission.

With regard to the allegations of violence and intimidation, the trial judge found that the offences were proved. She relied upon averments in the affidavit and the testimony of Charles Tumusiime who adduced evidence that he was attacked by the supporters of the 2nd appellant, and that thereafter his injuries were treated at a health facility. The trial judge found that as he stated in his affidavit and confirmed in cross-examination, his complaint was valid and it was never rebutted. That nonetheless, he did not prove that the violence was from supporters of the 2nd appellant; neither did he prove that it was the same supporters who kidnapped and detained him. She concluded that in order for allegations of violence to succeed to overturn an election, it must be proved to have been widespread, so affecting the result in a substantial manner. She ruled that this standard was not satisfied by the petitioner.

The trial judge also found that the offences of uttering false, defamatory and sectarian statements were also not proved. She observed that save for the statements in the respondent/petitioner's affidavit in support, there was no independent evidence to prove them. Further that the particular statement that was included in his pleadings, that he was a *"State House Agent who is a front for land grabbers in Buwekula South constituency and elsewhere"*, was not supported by other cogent evidence; neither was it proved that as a result of this statement, voters shunned him. Accordingly, the trial judge concluded that the offences were not proved.

However, the judge made findings based on the respondent's affidavit accompanying the petition about inconsistency in ballots recorded by the 1st appellant's officers, and the failure to verify voters using the VR and BVVK. These findings were not based on hearsay evidence because the VR and certified DR Forms were produced in evidence by the respondent after they were certified by the 1st appellant. The two issues are the subject of further grounds of appeal that will be considered later on in this judgment.

In effect, the trial judge followed the decision of the Supreme Court on complaints about hearsay evidence in affidavits in election petitions in **Col. (Rtd) Dr. Besigye Kizza (supra)** where the court set the standard regarding complaints about hearsay evidence in affidavits. Odoki, CJ had this to say about the matter:

"In the present case, the only method of adducing evidence is by affidavits. Many of them have been drawn up in a hurry to comply with time limits for filing pleading and determining the petition. It would cause great injustice to the parties if all the affidavits which did not strictly conform to the rules of procedure were rejected. This is an exceptional case (where) all the relevant evidence that is admissible should be received in court. I shall therefore reject those affidavits, which are based on hearsay evidence only. I shall accept affidavits, which contain both admissible and hearsay evidence but reject the parts which are based on hearsay, and only partes which are based on knowledge will be relied upon. As order 17 r 3 (2) provides the costs of affidavits which contain hearsay matters should be borne by the party filing such affidavits."

The view taken by Tsekoko, JSC (RIP) in his reasoned judgment was not much different when he observed and held that:

"In a petition, like the present, which is presented expeditiously under special rules as those set out in S.1. 2001 No. 13, a petitioner will inevitably including (sic) hearsay matters in the main affidavit accompanying his petition- I am not saying that hearsay should be included deliberately. What I believe happens is that grounds in the petition would most likely be based on information provided, in all probability by his agents or supporters from various parts of the country. The proper course to take during the inquiry, in such circumstances, is to consider the petition and the accompanying affidavit and, unless the affidavit contains obviously scandalous or frivolous matter, finally reject any matters contained in such affidavit as appear not to have been satisfactorily proved unless perhaps the petition does not disclose a cause of action. Alternatively, where time is still available the petitioner should seek leave to correct errors by way of supplementary affidavit. It would be unjust to reject the petitioner's whole affidavit at the beginning of the inquiry. In the result, I do not agree, and in any event, I am not persuaded1 that the accompanying affidavit of the petitioner violated 0.17 Rule 3.

...

In my opinion it would be improper in this petition to strike out wholly affidavits which are found to contain so called hearsay evidence in some parts where the offending parts of the same affidavits can be severed from the rest of the affidavit without rendering the remaining parts meaningless."

In conclusion, I cannot fault the trial judge for not striking out the respondent's affidavits as containing hearsay evidence. In view of the authorities that I have set out above, it would not only be going against

the principles that have been established by the Supreme Court which are binding on us, but also pointless to grant the appellants' prayer to strike out the offending paragraphs at this point in time. Ground 6 of the appeal therefore must fail.

The shifting burden of proof

The 1st appellant complains that when the trial judge found and held that there were no voters' registers at some polling stations she shifted the burden onto the EC because there was no affidavit evidence to prove this fact. That the same principle applies to the finding that 2,690 votes were not accounted for because the discrepancies in the voters' register were explained away by DW4. It must therefore first be established whether the trial judge indeed shifted the burden onto the 1st appellant when she made the two contested findings in her judgment.

The statement about the votes that were not accounted for by the 1st appellant appears at pages 47-48 of the judgment, pages 2305-2306, Vol. 1 of the record, and was as follows:

> *"A careful perusal of the 53 Voters registers/rolls (Kisenyi and Nsuga excluded) showed glaring discrepancies in the ticked voters on the VR, and the total number of ballot papers counted in each DR forms. (sic) For some polling stations (e.g. Buzooba, Buwumiro, Kayunga, Kagoma, Kibuye Community Centre, Kilenge Dispensary A (N-Z)) the difference ranged from a small 1-7 votes. In others (e.g. Kalembe, Namalewe Life Centre, Bwakago, Mujunwa and Kitovu) differences seen were a high (sic) of 287, 253, 227, 198 and 160 votes, respectively.* ***The result is that a total sum of 2,690 votes was unaccounted for****."*
>
> ***{Emphasis supplied}***

The respondent sought to prove the allegations in paragraphs 13.1.15 to 13.1.17 of the petition in which he complained that EC officials made *"ununiform entries,"* (sic) and *"incorrect entries of the vote tallies"* in the DR Forms and the Return Forms for Transmission of Results. That the said actions of the Presiding and Returning Officers affected the outcome of the election and the final results were based on *"grave numerical inconsistencies."*

In paragraphs 14.1.14 to 14.1.17 of the accompanying affidavit, the respondent averred to the alleged inconsistencies, as well as to the fact that the 1st appellant's Returning Officer failed and/or neglected to record the complaints made by his polling agents at some of the stations

about these entries. He attached copies of the DR Forms for all of the polling stations in respect of which he was given them. However, his advocates singled out those whose contents they thought contravened section 76 (f) of the Parliamentary Elections Act. They then carried out a tally, which they presented to court to show what the respondent complained about. That summary appears at page 2007, Volume 5 of the Consolidated Record of Appeal, within their submissions before the trial court. The impugned polling stations were distinguished from the rest with a blue highlighter and the trial judge relied upon this tally to come to some of her conclusions from the voters' register which she closely examined.

However, the voters' register was not in court at the time that the witness from the Electoral Commission was cross examined about her statement. She was therefore never cross examined about its contents. Instead, counsel for the respondent cross-examined her about some of the DR Forms in which inconsistency in the tally of votes was observed.

It is not clear to us whether the allegations about the discrepancies in the DR Forms pleaded by the respondent were contested by the 1st appellant in her pleadings. This is because the 1st appellant's answer to the petition and its accompanying affidavit were not included in the Consolidated Record of Appeal that was placed before us. In the Index to Volume 1 of the record, the appellant's answer to the petition was indicated as appearing in Item 5 thereof but there was no such document in that volume of the record. Neither could I find it elsewhere.

However, the 1st appellant called Kunihira Christine Fiona, the Returning Officer/District Registrar for Mubende, who testified as DW4. Mr. Twinamatsiko for the respondent cross examined the witness. At page 67 of the printed record (Vol. 4), Ms Kunihira confirmed that as Returning Officer, it was her duty to verify the information contained in the DR Forms before announcing the winning candidate. That it was also the duty of the Returning Officer to confirm the veracity and authenticity of the DR Forms.

Ms. Kunihira agreed that in order to establish the number of people who voted at each polling station, the numbers of men and women who voted are summed up to get the total number of ballots that were cast. Further that the number of ballot papers counted should tally with the number of people who voted at each polling station. Mr. Twinamatsiko then referred her to the DR Form for Gogwa Trading Centre Polling Station.

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She confirmed that 256 females and 200 males voted at that station. However, 457 ballot papers were counted. She explained that the discrepancy was the result of some ballots being spoilt by the voters. She further stated that when the total number of ballots is inserted, it represents all the ballots that were used during the polls at a particular station.

Mr. Twinamatsiko also drew her attention to the DR Form for Namalewe Life Centre Polling Station. She confirmed that according to that Form, 137 women and 138 men voted and the total number of persons that voted was 275. She also said it was true that 400 ballot papers were counted. With regard to Budibaga Polling Station, she admitted that the DR Form showed that 135 women and 134 men cast their votes. That the total of ballot papers counted was 268. Counsel then drew her attention to the crossings in the DR Form. She explained that the EC accounts for crossings by the Presiding Officers countersigning against them. She also observed that at that Polling Station, 175 women and 166 men voted, and that the total number of ballots that were counted was 357.

The witness was also taken through the ballots and voters at Buwuniro and St Joseph Senkulu, Polling Stations, where there were inconsistencies between the number of voters recorded in the DR Forms as having cast ballots, and the total number of ballots that were counted, as reflected in the DR Forms.

Counsel for the first appellant did not seek to redirect this witness in his re-examination about this material point on the discrepancies that were raised in cross examination. Instead, he sought to establish whether any of the candidates complained about the discrepancies in the DR Forms. The witness stated that she got no complaints about this matter whatsoever, from any of the candidates.

It was on the basis of the principles established during cross examination of DW4 that I analysed 17 of the DR Forms for the polling stations that were identified by the respondent's counsel in their submissions. According to my own observations, the summary of the contents of the DR Forms which the 1st appellant provided to the respondent, (**PW7**, at page 45, Vol. 4 of the record), for the 17 polling stations appears below:

Polling Station	Total No.of valid Votes Cast	Total No. of rejected votes	Total No. of ballots counted	Total No. of spoilt ballots	Total No. of ballots issued	Total No. of unused ballots	Total No. of females that voted	Total No of males that voted	Discrepancy between ballots counted and ballots cast
Kibyamirizi A-Z	250	30	280	00	500	220	118	158	04
Gogwa T/C	452	05	457	00	850	393	256	200	01
Namalewe	269	06	400	00	400	125	137	138	125
Budibaga	243	25	268	02	400	130	135	134	-1
Buwuniro	301	04	305	00	500	195	159	147	-1
Lwemigo	418	03	421	00	650	229	227	195	-1
Kirumbi	374	05	379	00	550	171	170	208	1
Kinyiga A	489	72	561	02	850	287	310	253	-2
Kalonga TC	420	36	456	00	800	344	313	143	00
Kijuuya	261	11	270	05	450	173	138	135	-1
Kagoma	345	15	361	00	650	297	162	191	08
St Joseph's Senkulu	114	00	200	00	114	86	64	50	86
Butayunja A-M	352	04	708	00	750	392	144	198	366
Rusiki	366	33	336	02	600	234	195	170	1
Kawumulo	234	02	450	00	450	215	121	116	213
Lukaya	297	22	319	03	500	178	138	164	17
Nsengwe	364	05	369	00	650	281	175	199	-5
Total	5549	278	6540	14	9664	3950	2962	2799	
Total No of votes cast by men and women in the 17 polling stations							5,761		

From the analysis above, there appears to be a discrepancy between the ballots counted and the number of men and women who cast ballots. In cross-examination by counsel for the 2nd appellant, Mr. Asiimwe, DW4 stated that the total number of males and females that voted reflected in the DR Forms did not necessarily reflect the total number of votes attributed to each of the candidates. She also confirmed this when she was re-examined by Mr. Musinguzi for the 1st appellant.

Court sought clarity about this evidence by asking the witness to explain the number of ballots and voters that were reflected in the DR Form for Namalewe Life Centre Polling Station. This was most probably because while the total number of men and women who polled at that station totalled 275, the total number of ballots that was counted, including the valid, rejected, spoilt and the invalid votes totalled 400 ballots, yet the sum total of men and women who cast their ballots was 275.

The witness tried to tally the figures but half way through the process, she admitted that there was confusion in the record in the DR Form. However, the formula was through examining her established by the court. The total number of ballots counted at each polling station had to be equal to the valid votes at that polling station, plus the rejected and spoilt votes. The ballots counted obviously had to be equal to the number of men and women that cast their ballots.

It then becomes clear to us that there were grave discrepancies between the numbers of ballots that were cast and the number of persons said to have cast their ballot papers at the impugned 17 polling stations, as is shown in the above. Interestingly, we also observed that at Budibaga, Buwuniro, Lwengo, Kirumbi, Kinyiga and Nsengwe Polling Stations, there were more men and women that cast their ballots than the number of ballots that were counted by Presiding Officers. This is reflected as a negative discrepancy in my analysis of the contents of the DR Forms.

I further observed that at Kibyamirizi (A-M), Gogwa, Namalewe, Kagoma, St Joseph's Senkulu, Butayunja, Rusiki, Kawumulo and Lukaya, there were more ballots that were counted than the number of females and male voters that cast ballots. Regarding this positive discrepancy, I also observed that Namalewe, St Joseph's Senkulu, Butayunja and Kawumulo Polling Stations were in the lead with discrepancies of 125, 86, 366 and 213 ballots counted more than voters that cast ballots, respectively.

I am concerned about the large margins between the number of voters that cast their ballot and ballots that were counted at the 4 polling stations above. If taken through a scientific calculation, which I have not attempted to do, the margin of error, if it was indeed an error in entering the figures as counsel for the appellants submitted, would be very high. This is because there is a discrepancy of 45.45% between the actual number of persons that cast ballots and the ballots that were counted, 57% for St Joseph's Senkulu, 48% for Butayunja and 57% for Kawumulo Polling Station.

I have already stated that the trial judge tasked DW4, the witness from the Electoral Commission to explain this discrepancy in the figures for Namalewe Life Centre Polling Station but she failed to do so. She gave up during her quick tallying and said there was confusion in the figures. I think she could not have explained the rest of the disparities that I

have pointed out above either, especially the ludicrous negative disparities that there were less ballots counted as recorded in DR Forms for some polling stations than the number of voters that cast ballots.

Going back to the gist of the 1st appellant's complaint in this regard, Black's Law Dictionary (supra) defines *"burden shifting analysis"* as:

> *"A court's scrutiny of a complainant's evidence to determine whether it is sufficient to require the opposing party to present contrary evidence."*

The respondent's counsel in this case drew our attention to the decision of the Supreme Court of Kenya in **Raila Omolo Odinga** (supra) where the court considered the burden and standard of proof in hearing electoral disputes. At paragraphs 198 and 199 of his dissenting opinion, Ndungu, JSC, espoused the decision of the Court in **Raila Odinga & 5 Others v. Independent Electoral and Boundaries Commission & 3 Others, Petition 5 of 2013 [2013] eKLR,** and summarized the principles thus:

> *[198] It is therefore clear that in an election petition the burden of proof at the very onset lies on the petitioner to prove the facts that he alleges. Once the petitioner discharges that burden it shifts to the respondent(s) to rebut the claims made. This decision was cited with affirmation in Munya 2 when the Court stated:*
>
> > *[178][178] One of the grounds for impugning the judgment of the Court of Appeal was that the Court shifted the burden of proof from the petitioner to the 2nd and 3rd respondents, contrary to the holding by this Court in Raila Odinga and Another v. IEBC. Regarding the burden of proof, this Court held that: — ...a petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden. The threshold of proof should in principle,* ***be above the balance of probabilities, though not as high as beyond-reasonable-doubt.*** *Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary. [179] We affirm that this statement represents the legal position regarding the question of burden of proof in election petitions.*
>
> *[199] This Court elaborated on the distinction between the legal burden and the evidentiary burden, noting that the legal burden is the initial burden on the petitioner to prove the facts pleaded in the petition. Once*

the petitioner discharges that legal burden to the standard required, then the burden shifts to the respondent to disprove those claims; that being the evidentiary burden. ***{My emphasis}***

I am mindful of the fact that the statement about the standard of proof emphasised above goes against the accepted standard in Uganda in these matters which is stated in section 61 (3) of the Parliamentary Elections Act; that the standard of proof is on the balance of probabilities.

Save for the clear distinction between the legal burden and the evidential burden, which too is useful in weighing the evidence, the position in **Raila's case** is no different from that which was espoused by the Supreme Court of Uganda in **Col. (Rtd) Dr. Besigye Kizza v Museveni Yoweri Kaguta & Electoral Commission Election Petition No 01 of 2001**, where the court relied on a paragraph from the treatise *Sarkar Law of Evidence,* Vol. 2 14th Edition, (1993 Reprint) at pages 1338-340 as follows:

> *"It appears to me that there can be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient prima facie to establish the case of the party on whom the onus lies. It is not merely a question of weighing feathers on one sides or the other, and saying that if there were two feathers on one side and one on the other that could be sufficient to shift the onus. What is meant is that in the first instance the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence Stoney v Eastbourne RD Council (1927) I Ch. 367, 397)."*

With that in mind, I find that the trial judge made no error when she required the witness for the 1st appellant to clarify the contents of the DR Forms in issue. I therefore cannot fault the finding that the 1st appellant failed to account for the disparities in the votes, though it has been established that the discrepancy in the number of ballots was less than the trial judge found. This, perhaps, could have been because the judge also went into analysing the contests of the voters' rolls which she admitted into evidence. Ground 8 of the appeal therefore fails.

Ballot Stuffing

Taegan Goddard's online political dictionary defines ballot stuffing as follows:

"In politics, 'ballot box stuffing' is a term that refers to the practice of illegally submitting more than one vote in a ballot in which just one vote is actually permitted. The goal of ballot box stuffing is to rig the outcome of an election in favor of one candidate over another.

The term is often synonymous with 'electoral fraud' or 'voting irregularities.' One form of the tactic is leveraging the 'cemetery vote.'"

The law against ballot box stuffing is the principle of 'one-person-one-vote' contained in section 31 of the Parliamentary Elections Act. The provision prohibits each voter from voting more than once in the following terms:

> **"(1) *A person shall not vote or attempt to vote more than once at any election irrespective of the number of offices held by the person relevant to the election*.**
>
> **(2) For the purposes of ensuring that no voter casts a vote more than once, a presiding officer or a polling assistant shall, before issuing a ballot paper, inspect the fingers of any voter in order to ascertain whether or not the voter has been marked with indelible ink in accordance with section 30.**
>
> **(3) The presiding officer or polling assistant, as the case may be, shall refuse to issue a ballot paper to the voter referred to in subsection (2) if the presiding officer or polling assistant has reasonable grounds to believe that the voter has already voted or if the voter refuses to be inspected under that subsection.**
>
> **(4) A person who refuses to be inspected under subsection (2) and votes or attempt to vote commits an offence and is liable on conviction to a fine not exceeding twelve currency points or imprisonment not exceeding six months or both."**
>
> ***{Emphasis supplied}***

I draw particular attention to subsection (1) above, which requires voters to vote only once and observe that in this case, while the total number of ballots that were counted at the 17 polling stations that the respondent complained about was 6,540, the total number of men and women that voted was given in the same DR Forms as 5,761, only. This produces a total discrepancy of 779 ballots against the number of voters that cast ballots. This discrepancy cannot be explained, except by the notion that some voters cast more than one ballot, or that some ballots were placed in the ballot boxes before polling by the voters, or by some other magical trick!

I therefore find that, even without the voters' rolls, the respondent proved that the stuffing of ballot boxes *did* occur in those polling stations whose results reflected more ballot papers counted than men and women who cast their ballots. Save for the figures that the trial judge arrived at using the voters' register which I did not analyse for this purpose, and which are different from my findings, I find that the trial judge made no error when she found that there was ballot box stuffing in the 17 polling stations that were identified by the respondent. I also find that though she did not refer to the law, just as the appellants did not in their submissions, the trial judge made no error of in law either. Ground 3 of the appeal therefore also fails.

I have not comprehensively addressed ground 13, which in my view appears to have been misplaced in this appeal. Although it was abandoned, I am inclined to point out that it is not the number of grounds in an appeal that make it successful but the substance of those grounds.

It is clear to us from the submissions of Mr Asiimwe for the 2nd appellant on 19th September 2021, at pages 1998-1999 of the record, that the 2nd appellant opposed any possibility of having a vote recount. He appeared to ride on the fact that the respondent's earlier application before the Magistrate's Court was denied Mr Asiimwe referred to the failed application and asserted that since it failed, the efforts by the respondent to have the invalid votes produced in evidence was an attempt to bring it back and achieve the recount that was earlier denied to him.

Counsel went on to state that granting an application for the petitioner to have access to invalid votes would require opening the ballot boxes. That his client was not comfortable with that because they were not sure about the security of the ballot boxes since polling day. That for those reasons, the petitioner's application to bring the invalid votes into evidence ought to be denied, especially because the earlier application for a vote recount failed.

For the 1st appellant, Mr Musinguzi, at page 2021 of the record, also drew it to the attention of court that what the petitioner sought to achieve by asking for the invalid votes to be pulled out of the ballot boxes amounted to a vote recount. Further that the application should not be allowed because the petitioner's earlier application for a vote recount was unsuccessful.

Tkon.

The trial judge adjourned the matter to deliver a ruling on the application on 20th September 2021. At page 2026, there appears a record that the ruling was read in open court, but there was no reasoned signed ruling on this matter on the record. Instead, at page 1970 there appears an order that was extracted by Paul Sebunya & Co. Advocates and signed by the trial judge stating that the application for discovery by the petitioner, as against the 2nd respondent, for certified copies of the invalid votes for all polling stations in the constituency was denied.

In view of the contentions of counsel for both appellant before the trial court obviating the possibility of recounting the votes, the appellants could not have desired that the trial judge makes such an order at any point in time. The contentions of counsel were to forestall the exercise of the discretion granted to the High Court under section 65 (5) of the Parliamentary Elections Act to order a recount in circumstances provided for under section subsection (4) thereof.

Ground 13 was therefore properly abandoned by the appellants because it was clearly not in their interests, lest this court orders that the dispute be taken back to the High Court for a recount to be effected. And if that was the case, it would have been the professional as well as the courteous thing for the appellants to do, to inform this court that ground 13 was abandoned.

Grounds 5, 7 and 12

The appellants' complaint in ground 7 was that the trial judge erred when she disregarded the appellants' objections to the use of the voters' registers that were retrieved from the ballot boxes; and that as a result, she reached wrong conclusions. In ground 12, the appellants complain that the trial judge misdirected herself on the law when she relied on and considered the material that was retrieved from the ballot boxes. Ground 5 was related to grounds 7 and 12 in that the appellants complain that the trial judge relied on the said materials contrary to the law because stamp duty was not paid on obtaining certified copies of the voters' rolls.

I deemed it fit to consider the three grounds together because it seems the impugned voters' register and the DR Forms, copies of which were also retrieved from the ballot boxes were the main pieces of evidence that led to the impeachment of the election.

Submissions of counsel

With regard to the use of the voters' register for Buwekula South Constituency, the appellants' counsel drew it to our attention that they objected to its use but were overruled by the trial judge. They allege that an application for discovery which led to the opening of the ballot boxes under the guise of obtaining invalid votes was dismissed, but in spite of that, the ballot boxes were opened. That not only were there no pleadings advanced with respect to the voters' register but there was also no evidence by affidavit in that regard. They further complained that the VRs only came onto the record during the respondent's final submissions. That it was for that reason that they were filed and marked after the hearing was closed.

The appellants' counsel explained that the hearing closed on the 14th September 2021 and thereafter, on 15th September 2021, the VRs were filed in court and served on the 2nd appellant. That the appellants could no longer seek leave to call witnesses to verify whether what was filed were genuine voters' registers used during the polls. They explained that this was because during the process of certification, which turned into a ballot opening exercise, it was discovered that some of the ballot boxes had been tampered with because the seals were broken. Counsel asserted that the appellants objected to use of the contents and this was brought to the attention of the trial judge. They emphasised that this evidence was compromised and as a result, not credible.

Counsel then turned to rule 17 of the Election Petition Rules to support the submission that the procedure ordinarily employed in the disposal of civil cases in High Court was employed in the disposal of the petition. And that therefore, the parties filed a Joint Scheduling Memorandum which was at page 1966, Vol 4 of the record of appeal. Counsel then drew out attention to clause 9.2 and 9.3 thereof in which it was stated that the voters' register was one of the documents which was not admitted by the appellants. That because of this, it was only marked but it was never admitted in evidence. Neither were the appellants given an opportunity to cross examine the respondent on the contents of the same.

Counsel went on to assert that the appellants were denied the opportunity to cross examine the respondent about this document in order for him to reaffirm the imputed irregularities said to be in the voters' register. They concluded that the introduction of the VR which were procured without the participation of the parties and the

superintendence of the court at the final stage of the respondent's submissions amounted to trial by ambush. And that as a result, the appellants could not call any witnesses to rebut or confirm the allegations about irregularities in the VR. Finally, that the trial judge misdirected herself on the law and came to a wrong decision when she relied solely on the VR to come to her conclusions.

With regard to the contention that stamp duty ought to have been paid for the certification of the documents, counsel for the appellants referred us to section 75 of the Evidence Act, which provides for the payment of legal fees on demand of copies of documents held as public documents. Counsel also drew our attention to section 42 of the Stamps Act, which provides that no instrument chargeable with duty shall be admitted in evidence unless the instrument is duly stamped. Counsel then contended that the trial judge misdirected herself on the law when she overruled the appellant's objection to the use of the documents.

In reply, counsel for the respondent submitted that according to the order for discovery dated 19th August 2021, the 1st appellant was ordered to avail certified copies of the voters' register for all polling stations in Buwekula South Constituency. That in view of this, the appellants' submission that the application for discovery was dismissed is unfounded. Counsel added that the appellants did not object to the admission of the VR during the hearing of the application for discovery. Instead their objection which appears at page 2079-2081, Vol 4 of the record was in relation to certification of the DR Forms that were issued to the respondent by the 1st appellant after the polls, on election day. That the respondent had applied to have those certified but instead the 1st appellant availed to him copies of the DR Forms that were in her possession.

Counsel went on to emphasise that the VR were part of the evidence from the onset of the trial. And that consequently, the appellant had the opportunity to submit about them to rebut the assertions of the respondent. That in fact the 1st appellant had the opportunity to produce the same VR as part of her evidence in answer to paragraphs 13.1.12 of the petition and 14.1.11 of the affidavit accompanying it, but she chose not to. Further that the filing and serving of the VR on 15th September 2012 was agreed to by the parties before court; and so were the timelines for the submissions. That as a result, it was a surprise that the appellants now dispute the authenticity of the VR yet it was the 1st appellant that certified copies of the same as a true record. Counsel

went on to point out that the appellants did not challenge the authenticity of the VR before the trial court.

The respondent's counsel further submitted that according to the report about the discovery, at page 1974-1979, Vol 4 of the record, it is evident that only 2 out of 61 ballot boxes had their seals tampered with. And that by implication, the seals were not broken. Further, that the Returning Officer stated that in the course of transferring the boxes, it is a normal occurrence for the seals to break. But in the event that they do they are replaced by the officials present together with police constables. Counsel then asserted that in view of the fact that the officials of the 1st appellant certified the VR that were found in the baliot boxes as authentic, the submission that the same was evidence that was compromised was speculative and devoid of merit.

Counsel further advanced the argument that though the appellants had the opportunity to cross-examine the respondent about the contents of paragraph 14.1.11 of the affidavit accompanying the petition, they did not do so. That in addition, the appellants conceded to the VR being filed in court but they did not bring it to the attention of court that the needed to cross examine the respondent about them. We were referred to page 109 to 110 (2257-2258, Vol 4) of the record for the proceedings at which the appellants agreed to the filing of the VR and the order of the trial judge to that effect.

I observed that counsel for the respondent offered no specific submissions in respect of ground 12, which was that the trial judge ought not to have relied upon any of the materials drawn from the ballot boxes.

However, in respect of ground 5, the respondent's counsel submitted that the complaint about non-payment of legal fees did not form part of the issues agreed upon for trial by the parties at the scheduling conference. That it was raised in the submissions of counsel where the respondent could not produce any evidence to show that the fees required were paid, yet the respondent paid UGX 2,397,600 for the certified copies.

Counsel for the respondent further submitted that the appellants' submission was about non-payment of stamp duty, yet section 75 of the Evidence Act requires payment of legal fees. They further argued that documents which are obtained through discovery under Order 10 rules 12 and 14 CPR are not covered by section 75 of the Evidence Act. They added that where a government entity is a party to a suit in court,

this provision is inapplicable because all parties to suits must readily avail documents in their possession which they intend to rely upon to the other party in the course of the hearing. That as a result, ground 5 lacked merit and should be resolved in the negative.

Resolution of Grounds 5, 7 and 12

Before I dispose of the grounds of appeal above, I note that section 18 of the Electoral Commission Act provides for the compilation of the national voters' register and voter's rolls for each constituency and polling station within the constituency. I shall therefore henceforth refer to the *"voters' roll"* as the correct nomenclature of the document over which the parties hereto disagreed. This is because the 1st appellant could not have produced the whole of the voters' register in respect of a dispute over elections in one constituency.

In order to address ground 7 and 12 comprehensively, it is important that I establish from the proceedings how the ballot boxes came to be opened to retrieve the voters' rolls. This is especially because the appellants claim that there was an application for discovery but the same was dismissed. By implication therefore, there was no court order to open the ballot boxes and therefore, having opened them, the contents thereof should not have been relied upon by the court for that reason, but also because at the opening of the boxes, two of them were discovered to have had their seals tampered with.

The facts relating to the retrieval of materials from the ballot boxes, as deduced from the record are that before filing the petition, on 5th February 2021, the respondent's counsel applied to the 1st appellant to furnish him with the following information: i) Certified copies of the DR Forms; ii) Return Form for Transmission of Results; iii) Certified copy of the Voters' Register for Buwekula South Constituency, and iv) all invalid votes cast in Buwekula South Constituency. The court was informed that the letter was received at the offices of the 1st appellant (EC) on 7th February 2021.

However, the EC did not supply the information requested so the matter came up in the pre-trial proceedings held by the trial judge on the 19th August 2021. Counsel for the EC during the hearing, Mr. Godfrey Musinguzi, undertook to ensure that the documents are availed. However, for the 2nd appellant, Mr. Steven Asiimwe objected to the request to supply the certified copies of invalid votes because it would

require the opening of the ballot boxes. In addition, he brought it to the attention of court that the petitioner applied for a vote recount but his application was dismissed. In view of that, court directed the respondent to make an oral application for discovery.

On the same day, Mr. Paul Sebunya, the respondent's counsel made an oral application for discovery of the invalid votes under Order 10 rule 12 CPR and rule 17 of the Election Petition Rules. Mr. Musinguzi for the 1st appellant objected to the application, among others, for the reason that it was an effort to bring another application for a vote recount which he informed court was dismissed. The matter was adjourned to the 20th August 2021 for the trial judge to deliver her ruling.

The record shows, at page 2026 of Vol 4, that the trial judge delivered her ruling though it is not evident what it was. But in addition, at page 2027 of Vol 4 of the record, the court made the following entry:

> *"1. As ordered by Court, the 2nd respondent should have concluded handing over the documents of (sic) item 1, 2, 3 and 5 of the communication dated 15th February 2021 from Paul Sebunya & Co Advocates to the Electoral Commission. The Electoral Commission should have handed them over by 26/8/2021. ..."*

The trial judge further pointed out that the petitioner should have received the stated documents before the date of his submissions, for the reason that he needed to refer to them. Counsel for the appellants both agreed to these directives.

There appears at page 1970, Volume 4 of the record, a copy of an order signed by the trial judge on the 26th August 2021, extracted by M/s Paul Sebunya & Co, Advocates. Item 1.0 of the order is that the application for discovery against the 2nd respondent for certified copies of all invalid votes from all polling stations in Buwekula South Constituency was denied. It was further ordered that the 2nd respondent shall provide certified copies of the voters' register for all the polling stations in the Constituency, certified copies of the declaration forms which the Electoral Commission received from the Returning Officer of Mubende District for Buwekula South Constituency, certified copies of DR Forms received by the presiding officers at all polling stations in the Constituency, and a certified copy of the Return Form for Transmission of Results for the Constituency.

When the parties next appeared in court on the 31st August 2021, the 1st appellant still had not availed the documents as ordered. Following the complaint by counsel for the respondent about failure or neglect by the 1st appellant to avail the documents, the trial judge directed that pursuant to her order, the documents must be availed to the respondent's lawyers by Friday 3rd August 2021. The parties were directed to confer and generate a Joint Scheduling Memorandum and produce it on 7th September 2021.

During the proceedings on 13th September 2021, Mr. Dominic Twinamatsiko for the petitioner informed court that he received a certified copy of the voters' register on Saturday (11th September 2021) at 3.00 pm. That however, they still sought to have the Electoral Commission certify copies of DR Forms in their client's possession before they could conclude compiling the trial bundle for the hearing. Mr. Medard Segona who appeared with Mr. Abbas Matovu and Mr. Asiimwe Steven for the 2nd appellant objected to the certification of the DR Forms in the possession of the petitioner, the respondent here. They prayed that the trial judge reviews her order dated 26th August 2021 in that regard.

For the Electoral Commission, Mr. Musinguzi complained that there was an order to open the ballot boxes and retrieve certain documents but the order was made contrary to the law. While the ballot boxes could only be opened within 6 months of the polls, the order that was made required the opening of the ballots boxes 8 months thereafter. He prayed that despite the fact that the documents retrieved from the ballot boxes were already certified, they should not be admitted in evidence to support the petition. The reason that he advanced was that the court was misled into granting an order to open the ballot boxes outside the time specified by the law. However, he could not come up with any law to support his argument.

The trial judge took issue with the fact that counsel for the EC did not raise the contention that there was a limited time within which the ballot boxes could be opened. Instead they stood by and witnessed the opening of the boxes and even certified the documents retrieved from them. Mr. Twinamatsiko's response was that it was all done in compliance with a court order. Further that he drew all this to the attention of court at the time the order was made but it was not considered. Asked whether they intended to rely on the material retrieved from the ballot boxes, Mr. Twinamatsiko affirmed that they

did. He further informed court that they still needed to have the DR Forms that were retrieved from the ballot boxes on 10th September 2021 certified by the EC.

Court sought to establish whether there was a court official at the opening of the ballot boxes and whether the boxes were intact. Mr. Twinamatsiko explained that there was an official of court present. That not all the boxes were intact because out of the 61 boxes, two had their seals tampered with. That however, he needed more time before the proceedings so that he could cross-examine the witnesses for the respondents because he had yet to conclude preparation of the trial bundle. He prayed that the matter be adjourned to enable him to prepare the bundle.

For the 2nd appellant, Mr. Segona objected to the admissibility of the documents from the ballot boxes because in his opinion they were all compromised. That even if it was one ballot box that was suspect, the whole process was compromised. He submitted that the respondent ought to have got all his evidence before filing the petition, not the reverse.

The trial judge ruled on the application on the 14th September 2021. She reviewed and corrected her earlier order, by prohibiting the 1st appellant from certifying the DR Forms that were in the possession of the respondent here, obtained on the 9th September 2021. In her ruling, the trial judge clarified that she did not issue any order to open the ballot boxes. That instead, it was the Returning Officer who found it necessary to do so in order to retrieve the voters' rolls. She referred to the report of the Acting Registrar in which he stated that the court ordered that the ballot boxes be opened but this was a mistake on the part of the Registrar.

The trial judge concluded that what was done was not what was ordered by court because beyond obtaining the voters' register, photocopies of all the DR Forms found in the boxes were made and each of counsel present obtained a copy thereof, as was shown in the report of the Acting Registrar. That the exercise devolved from the mere retrieval of documents into inspection, which is a special kind of procedure provided for under Order 10 rule 15 CPR. The judge thus declined the application for the certification of the DR Forms in the possession of the petitioner. Instead she held that the DR Forms in the possession of the

EC, which were received after the polls in a sealed envelope, would suffice for the petitioner to prove his case.

It must now be determined: i) whether it was lawful to open the ballot boxes at the time that the trial judge ordered the 1st appellant to avail the voters' register to the respondent; and ii) whether in the circumstances that I have laid out above, it was lawful for the trial judge to compel the 1st appellant (EC) to avail certified copies of the voters' register to the respondent as she did on 19th August 2021.

The Report of Kaggwa Francis, Acting Registrar, dated 9th September 2021 at pages 1974 to 1979, Volume 4 of the record of appeal, shows that at the opening of ballot boxes before the Deputy Registrar, Stephen Asiimwe stated that the purpose for which they were summoned was to open them to retrieve the register and the DR Forms to have them certified. He raised an issue for the 1st respondent that though the seals which were fixed on the boxes on polling day were orange in colour, the seals on the boxes on the 9th September 2021 were purple in colour.

Bazirake Daniel holding the brief for Sebunya proposed that arguments about the seals be reserved for evidence in court. That since the purpose of the proceedings was to get the required materials out of the boxes for certification, the process should go on. But each of the representatives should receive copies of the documents for endorsement as the ones that were retrieved, as they await certification by the EC.

It was clear from the Report (at page 1974, Vol. 4 of the record) that there were representatives of all the parties to the petition present at the opening of the ballot boxes, though the 1st respondent, now 2nd appellant, was present in person. The Returning Officer for Mubende District who officiated at the poll offered clarification about the seals as follows:

> *"In the course of opening of ballot boxes, it's normal occurrence that seals break in event that the seals are broken they are replaced by the officials present together with police constables, that is all."*

The Acting Registrar then made the following observations:

> *"At the opening of the ballot boxes, we realised that the seals for the two ballot boxes had been tampered with.*

When we opened the ballot boxes, we found three copies of declaration forms that is, the Presidential election, woman Member of Parliament for Mubende District and Buwekula South Member of Parliament.

I am here as the Acting Registrar and I have only authority to carry out the orders made by the Judge in the petition."

The report of the Acting Registrar did not identify the two polling stations whose ballot boxes was tampered with. However, during the proceedings, Mr. Twinamatsiko for the petitioner in the lower court clarified at page 2076, Volume 4 of the record, that the seals of the ballot boxes for Sunga and Kivera Polling Stations were found to be broken. I can only deduce from the extract of the report above, that what the Acting Registrar identified as tampering with the two ballot boxes was the fact that they contained the DR Forms for the Presidential, Woman MP and Buwekula South MP elections.

Nonetheless, the Acting Registrar went on to record the serial numbers of all the seals, both the original and replaced seals, making a total of 61 ballot boxes with seals replaced. This included Sunga and Kivera Polling Stations. He also indicated that 5 polling stations had no voters' rolls preserved in the ballot boxes as follows:

i) Kavule ii) Kabunyonyi iii) Katome iv) Kamusenene and v) Budibaga

Further that the ballot boxes for the following polling stations did not contain copies of DR Forms:

i) Butayunja (A-M); ii) Rwamaboga; iii) Kawumulo; iv) Saka P/S; v) Kyakadali Catholic Church; vi) Lwemigo; vii) Kinyiga A; and viii) Kibyamirizi (N-Z)

At the end of it all the Acting Registrar summarised the proceedings as follows:

"Parties and their respective counsel have duly witnessed opening of the ballot boxes and taken note of some issues herein above observed and copies of voters registers as well as copies of declaration of results forms from the polling stations of Buwekula Constituency in Mubende District have been duly retrieved save for copies missing as herein above indicated, and for purposes of transparency, photocopies have been made and duly endorsed by counsel for the parties, the District Returning Officer of Mubende District and the Acting Deputy Registrar, the said copies have been retained by the petitioner and the 1st Respondent. (sic)

Parties wait for the certified copies from the 2nd Respondent as directed by court." (sic)

There is no doubt that the ballot boxes were opened and resealed with new seals before they were opened to obtain the voters' rolls because according to the report of the officer that presided over the opening, all 61 ballot boxes for Buwekula South Constituency had new seals. The systematic replacement of seals that was recorded by the Acting Registrar could not have been that of a meddler who wanted to change or alter the results inside the boxes, unless such a meddler was within the EC. But there was no such allegation in the entire evidence before the trial court.

However, the fact that the ballot boxes for Sunga and Kivera Polling Stations contained DR Forms for three positions in the General Elections of 14th January 2021 went against the norm set in the Parliamentary Elections Act. Section 52 of the Act provides for the safe keeping of election materials and records as follows:

> **"(1) The returning officer shall be responsible for the safe custody of all the election documents used in the district in connection with an election *until the documents are destroyed in accordance with the directions of the Commission, but the Commission shall not give such directions before the settlement of disputes if any arising from the election*.**
>
> **(2) A returning officer shall, on receipt of each ballot box—**
>
> **(a) take every precaution for its safe custody;**
>
> **(b) examine the seal affixed to the ballot box, with a view to ensuring that the box is properly sealed; and**
>
> **(c) if the box is not in good order, record his or her observations and affix a different seal supplied by the Commission."**

But before that, section 8 (4) (a) of the Act provides for the procedure at the polls for District Woman MP and special interest groups as follows:

> **"The following provisions shall apply to district women representatives and special interest groups referred to in subsection (2)—**
>
> **(a) in the case of the election of district women representatives—**
>
> **i) the election shall be by secret ballot;**
>
> **ii) the election shall be by universal adult suffrage;**

iii) subject to the provisions of this Act, the election of district women representatives may be held on a different day from the day on which the general election of members of Parliament elected directly to represent constituencies under article 78(1)(a) of the Constitution is held;

iv) separate ballot boxes shall be used in respect of the election of district women representatives from those used for the election of members of Parliament directly elected to represent constituencies;

v) the provisions of this Act shall apply with the necessary modifications to the election of district women representatives as they apply to members directly elected to represent constituencies;"

{Emphasis supplied}

In view of the provisions of subsection (4) (a) above, the 1st appellant did not comply with the law when her officials stored the results for three categories of candidates in the two ballot boxes, as it was revealed on 9th September 2021.

Mr. Segona, for the 2nd appellant, asserted and complained before the trial court that the ballot boxes were re-used for other elections and therefore the contents therein could not be relied upon. However, there was no such evidence on the record, save as above. It is also inconceivable that the same ballot boxes could have been re-used. This is because this court takes judicial notice of the generally known fact that the polls for all three categories of representatives in the General Elections of 2021 occurred on the same day, at the same time, on the 14th January 2021.

Mr. Musinguzi advanced the argument that the ballot boxes ought to have been opened after 6 months, only. And that the court order that led to reopening of the boxes after 8 months was contrary to the law. However, he did not provide authority for his submission, in spite of the fact that he promised the trial judge that he would to do so.

However, section 52 of the Parliamentary Elections Act is very clear on this point. The materials used in the polls had to be preserved by law because it was anticipated by the Legislature that there would be disputes after results are declared. For that reason, Parliament provided for the preservation of the materials used, only to be destroyed in accordance with directions of the Commission. However, the

destruction of the materials cannot be done before the settlement of disputes arising from the elections is concluded.

With regard to the trial of petitions in the High Court, section 63 (9) of the Parliamentary Elections Act provides that petitions shall be determined within 6 months of lodgement in that court. I observed that the petition in this dispute was lodged in the High Court on 19th March 2021, while the order to avail the materials to the petitioner was made on the 19th August 2021, though it was extracted and signed by the trial judge on 26th August 2021. However, the order was only extracted because though Mr. Musinguzi for the 1st appellant, on the 19th August 2021, agreed to avail the documents requested for, he failed, refused or neglected to do so. In any event, between the 19th March and 26th August 2021, there was a time lag of 5 months, not 6 months as Mr. Musinguzi wanted the trial court to believe in order to deny the petitioner access to the election materials required to prove his case. I am also of the view that by virtue of section 52 (1) of the Parliamentary Elections Act, there is no limit to the time for opening the ballot boxes, as long as a dispute subsists. The trial judge therefore acted judiciously when she exercised her discretion to order the 1st appellant to produce the materials required by the respondent to prove his case.

As to whether the materials were compromised, as it was asserted for the appellants, I note that according to the report of the Acting Registrar there were two ballot boxes whose contents and seals were found to have been tampered with. In this regard, counsel for the appellants offered no authority for the submissions as to how this court should resolve the matter, save that the appellants did not agree to admission of the evidence from the ballot boxes at the scheduling conference. Further that the materials were brought onto the record at the tail end of the trial and so they could not call further evidence to rebut the evidence therein.

It is clear to us that the 1st appellant was always aware that the respondent intended to adduce the evidence from the ballot boxes, even before the petition was filed. I say so because the respondent applied to court for a vote recount, which was unsuccessful, before he filed his petition in court. Having failed to have the recount done, he requested the 1st appellant to provide him with election materials, including those known to be preserved in the ballot boxes, on 15th March 2021, before he filed his petition in court. I also note that between the 19th August 2021 when Mr. Musinguzi agreed to provide certified copies of the

voters' register and DR Forms to the respondent, and the 14th September 2021, when he closed the case for the 1st appellant, there was a time span of 25 days. When the respondent took the stand for cross examination on 13th September 2021, Mr. Musinguzi cross examined him about the DR Forms and why the BVVK were not used at some polling stations. He could not cross examine him about the voters' registers because he had refused or neglected to provide him with copies thereof.

It was also my observation that counsel for the 1st appellant chose to call only the Presiding Officer in the person of Kunihira Christine Fiona, right from the scheduling conference, as is shown in the memorandum thereof at page 1967, Volume 4 of the record of appeal. Counsel for the 1st appellant also willingly closed their case on the 13th September 2021, without much ado, and they acquiesced in the plan to avail certified copies of the voters' rolls on 15th September 2021.

Going forward, counsel for the appellants did not seek leave to call further evidence to challenge the veracity of the materials that were retrieved from the ballot boxes, yet Ms Kunihira was cross-examined by counsel for the respondent and examined by court on the contents of the DR Forms and Voters' Register. I therefore find that the 1st appellant has only herself to blame for the failure to adduce evidence to rebut what was contained in the DR Forms and VR, if any.

As to whether the whole of the evidence from the ballot boxes was contaminated and therefore unreliable, the Supreme Court was confronted with and had to determine the question whether tampering with ballot boxes would result in overturning an election in **John Baptist Kakooza v. Anthony Iga & Electoral Commission, Election Petition Appeal No 07 of 2007**. The appellant's grievance in that case was that one of the ballot boxes was found to have been opened. The court, per Kanyeihamba, JSC, in the lead judgment found and held, and the rest of the court agreed, that:

> *"There is the evidence of a single box at Kalama polling station which was found open. This irregularity was fully explained by credible witnesses as never intended to alter the cast votes for any of the candidates. I agree with the concurrent findings of the learned trial Judge and the Justices of Appeal that that evidence alone cannot vitiate the election results of the whole constituency.*

However, it must be said that tampering with sealed electoral boxes after the votes have been cast and counted is a serious offence and ought to be condemned. Nevertheless, to vitiate the results, the appellant needs to prove that the phenomenon he complains of had extended beyond one polling station and affected more than one ballot box or was of such nature as to affect the results substantially in the constituency. In my opinion, the appellant has failed to do so."

In the case now before us, two (2) ballot boxes out of 61 were found to have been tampered with by including therein DR Forms for the election of 3 categories of representatives, contrary to section 52 of the Parliamentary Elections Act. It is my opinion that this was an irregularity that was most probably occasioned by officials of the EC. I am also of the firm opinion that results contained in the two (2) ballot boxes were insufficient to affect the whole election in the constituency in a substantial manner. Given that the rest of the material was not contaminated, as the rest of the ballot boxes, though they had been opened before were properly resealed, they could still be used to establish facts about the polls. As a matter of fact, the two polling stations of Kivera and Sunga whose ballot boxes had the seals tampered with were not among those that did not hold DR Forms and VRs.

It is also evident that though the ballot box opening exercise resulted in copies of the DR Forms being photocopied and given to the representatives of all the parties present, the certified copies of DR Forms that were availed to the respondent in this appeal by the 1st appellant, contained in **ExhPW7**, starting at page 45, Volume 4 of the record of appeal, included DR Forms for Butayunja (A-M), Rwamaboga B, Kawumulo, Saka P/S, Kyakadali Catholic Church, Lwemigo, Kinyiga A, and Kibyamirizi (N-Z) Polling Stations, which were not found in the related ballot boxes when they were opened on 9th September 2021. The DR forms employed in the analysis by the court also showed that they were certified by the Secretary for the 1st appellant on 11th March 2021. These could not have been drawn from the ballot boxes that were opened before the Acting Registrar's nominee on 9th September 2021.

In the circumstances, I cannot fault the trial judge for relying on evidence from the voters' register that was obtained on opening the ballot boxes in the presence of the 2nd appellant and the representatives of the rest of the parties to this dispute. Grounds 7 and 12 of the appeal therefore also fail.

With regard to ground 5, the complaint that no stamp duty was paid on the issuance of the certified copies of the DR Forms and the voters' rolls to the respondent, section 1 of the Stamps Act provides for instrument chargeable with stamp duty. A list of instruments then appears in a Schedule to the Act for the purpose of identifying specific instruments.

The documents that were availed to the respondent by the 1st appellant are not included in that schedule. They were therefore not subject to stamp duty at all. Ground 5 of the appeal was just a *'red herring'* thrown into the Memorandum of Appeal to augment the number of complaints against the judgment and distract us from the real issues in the appeal. It therefore must fail.

Grounds 10 & 15

Ground 10 was a complaint that was stated in negative syntax; that the decision of the trial judge that the 1st appellant did not prove that 1,512 voters in 6 polling stations were not verified was erroneous. Stated in a more comprehensible manner, judging from the statement of the trial judge in her judgment in this regard, we are of the view that the grievance may have been better stated thus:

> *"The trial judge erred in fact and law when she found that the 1st appellant failed to prove that 1,512 voters in the 6 polling stations complained about were verified before they cast their votes."*

I observed that though the appellants did not directly address ground 15 of the appeal in their submissions, while addressing ground 10, they adverted to ground 15, which was that the trial judge erred in law and fact when she allowed the petitioner/respondent to depart from his pleadings and so occasioned a miscarriage of justice. I shall therefore address grounds 10 and 15 together.

Submissions of Counsel

The appellants' counsel submitted that though the respondent had agents at all polling stations, not a single agent or registered voter swore an affidavit or testified in court that there were no voters' registers at any of the polling stations. That it was therefore fatal for the court to assume that a total of 1,512 voters at those polling stations were not legally verified. Further, that it was erroneous of the trial judge to conclude, as she did at page 47 of her judgment, that 2,690 votes were unaccounted for, simply because of discrepancies in the ticked voters'

registers. Counsel went on to submit that the testimony of DW4 was that verification of voters was carried out using the BVVK at all polling stations, and that she did not receive any complaints on polling day that the BVVK were missing from any of the stations.

The appellants' counsel further contended that the court's reliance on the VR which were never duly identified and tendered in court was misleading. Further, that by relying on the VR alone, the court was misled because voters were also identified by the BVVK.

Counsel for the appellants went on to point out that in his pleadings, the respondent specifically alleged that there was illegal voting at Kabunyonyi P S. B, Lukaya, Buswabwera, Kirangwa P/S, Kinyiga Dispensary A (A-M), Budibaga Eden P/S, Kibyamirizi, Mujunjwa, Saka, Kisenyi Stores, Nsengwe, Kibuye Community Centre, Busenya P/S B, Rusiki, Kalonga T/C (A-M), Kalonga T/C (N-Z), Bulimi, Muleete T/C and Kyakadali Catholic Church, according to paragraph 14.1.10 of the petition, at page 23 Vol 1, of the record of appeal. That in spite of this, the trial judge, at page 47 of her judgment, considered the voters' rolls for 53 polling stations, contrary to what was pleaded. That by doing so the trial judge allowed the respondent to depart from his pleadings. Counsel added that in considering a petition challenging an election, non-disclosure of polling stations in respect of which the results are challenged renders the petition futile.

Counsel then concluded that because the findings of the trial court were not consistent with the pleadings, and the appellants did not agree to the voters' rolls being used by the respondent in evidence, the respondent engaged in litigation that amounted to a fishing expedition and an ambush on the appellants. That as a result the decisions of the trial judge were erroneous.

In reply, counsel for the respondent submitted that the respondent pled that the number of voters that participated in voting was less than the ballots counted and contained in the ballot boxes, in paragraphs 13.1.12 and 14.1.11 of the petition and the accompanying affidavit, respectively. That the appellant did not dispute this numerical fact, which was displayed in the respondent's submissions.

Counsel further submitted that the appellants did not dispute the fact that 6 polling stations out of the 61 in the Constituency had no voters' rolls on polling day; neither did they call evidence to prove otherwise.

Counsel again referred us to page 2009 of the Supplementary Record of Appeal for the 6 polling stations had no voters' rolls, and emphasised that the total number of votes cast at those polling stations, as computed from the DR Forms was 1,512.

The respondent's advocates went on to submit that the 1st appellant could have ably responded to the contention that some voters were not verified by adducing documentary evidence to prove that it was not so, and by responding to paragraphs 13.1.12 of the petition and 14.1.11 of the accompanying affidavit, but they chose not to do so. It was further contended that the testimony of DW4 that the VR and BVVK were used at all polling stations on polling day was not corroborated, yet the 1st appellant had the opportunity to apply for leave to bring the BVVK to court as proof that the same were indeed used, to verify the 1,512 voters before they cast their votes.

Counsel then concluded that after the discovery process unearthed the fact that 6 polling stations did not have voters' rolls on polling day, the burden to prove that 1,512 voters were verified before they cast their votes shifted to the 1st appellant, but she did not discharge it.

In rejoinder, counsel for the appellant contended that the allegations in paragraphs 13.1.12 of the petition and 14.1.11 of the accompanying affidavit were generalised and referred to all polling stations in Buwekula South Constituency. Further that since the respondent did not have the VR at the time of drafting his petition, the contents of the ballot boxes could have been doctored for the benefit of his claims in the petition. That the reliance of the court on this evidence, which was not tendered in court, and in respect of which the respondent was not cross examined was a grave misdirection by the trial judge. Counsel reiterated that the court allowed the respondent to depart from his pleadings when the trial judge relied on the voters' rolls to come to her decision.

Resolution of Grounds 10 & 15

I already found and held that the trial judge made no error when she admitted the voters' register in evidence in this matter. I shall now consider how she used the evidence that was drawn from it, first, by setting down the decision that she made, as a point of reference. At page 48 of her judgment (page 2306, Vol 4 of the record of appeal) the trial judge found and held thus:

"It was also argued for Tumwesigye and proved that VR for six polling stations were missing from the ballot boxes opened on 9/9/2021. That fact came to the attention of the EC on that date. Even then, no evidence was adduced by them to show that verification of voters at those particular polling stations was done by means other than the VR. Since the VR is confirmed to be the principle (sic) document on which voter verification is done, the assumption is that 1,512 voters at those polling stations were not legally verified yet their votes were counted as part of the final tally of (sic) the three candidates."

The main contentions of the appellants were that: i) the VR were admitted in evidence without the consent of the appellants; ii) the court allowed the respondent to depart from his pleadings because there were no pleadings about the VR in the petition; iii) neither was there evidence from affidavits or witnesses called by the respondent to support these findings; and that iv) the decision of the trial judge was erroneous because it was based on her findings from the VR alone. I will address these issues in the order that I have framed them in order to resolve the two ground of appeal.

With regard to the 1st contention of the appellants, I already found and held that the trial judge made no error when she allowed the VR onto the record of the court. I reached that decision because it was evident, at page 2257, Volume 4 of the record of appeal, that Mr. Assimwe who appeared for the 1st appellant in the proceedings held on the 14th September 2021 did not object to producing the VR, save for complaining about its bulkiness. Neither did counsel for the 2nd appellant in these proceedings. The record shows the following interaction between Mr. Asiimwe and the court:

Mr. Asiimwe: *My Lord the registers, (sic) it is a bulk of documents and I would request my learned friend here to indicate the particular registers where they have issue so that we are saved with (sic) the hustle of going through every page.*

Court: *They will serve you the documents. It is their case to prove because I think once they are making submissions counsel will apply himself to a particular point and then you only have to look at that. It helps of course if he can do it well yes, but I cannot rule on it because I cannot determine how counsel is preparing his case in respect to those documents."*

There is therefore no doubt at all that the appellants agreed to the admission of the voters' rolls for Buwekula South Constituency onto the record of the court.

Turning to the contention that the trial judge allowed the respondent to depart from his pleadings when she allowed the voters' roll onto the record of the court, I am mindful of the provisions of Order 6 rule 7 CPR which prohibit parties from departing from their pleadings in the following terms:

> **7. Departure from previous pleadings.**
>
> **No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading.**

The respondent filed only one petition with no amendment thereto. He filed several affidavits to support it, almost all of which were struck out on technicalities and expunged from the record. The rule above shows that even if he had filed further pleadings in the matter, because his was a petition, it was exempted from the general rule not to depart from previous pleadings. I find that the provision, though not stated to by the appellants, clearly did not apply to this case.

With regard to the contention that the voters' register was not adverted to in the petition and accompanying affidavit, I perused the petition carefully. I found that the respondent made several allegations about the voters' register, and others that would require evidence from it as follows:

> *"13.1.7 The election officers of the 2nd respondent at Kabunyonyi P. S B, Lukaya, Buswabwera, Kirangwa P/S, Kitenga Dispensary A (A-M), Budibaga Eden P/S, Kibyamirizi, Mujunjwa, Saka, Kisenyi Stores, Nsengwa, Kibuye Community Centre, Busenya P/S B, Rusiki Polling Stations allowed underage and **unregistered persons** to cast votes in favour of the 1st respondent which in turn affected the outcome of the elections at those polling stations.*
>
> ...
>
> *13.1.11 The election officers of the 2nd Respondent with the connivance of the 1st respondent's polling agents on the polling day at Kirangwa P/S, Lukaya, Kabunyonyi P.S B, Mujunwa, Kibuye Community Centre, Butayunja Parish, Kibyamirizi Polling Stations pre-ticked votes in favour of the 1st Respondent and*

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thereafter issued those ballot papers to ***unregistered voters*** *who cast them thereby denying genuinely registered voters their right to cast their votes when they had come to voteon an allegation that they had already voted; this was contrary to sections 29 (4) and 34(2), (3) and (5) of the Parliamentary Elections Act 2005 as amended.*

13.1.12 The votes cast as contained in the ballot boxes of all polling stations in Buwekula South Constituency Mubende District are more than the voters that participated in ***the voting exercise as per the voters' registers*** *for the polling stations which confirms that there was* ***ballot stuffing, multiple voting, pre-ticking of ballots and manipulation of the Voter's Register*** *which also confirms that the 2nd Respondent failed to control the distribution and use of ballot papers at those polling stations and this was contrary to sections 12 (1) (b) of the Electoral Commission Act, Cap. 140 and section 27 (a) Parliamentary Elections Act, 2005."*

It is therefore evident that the respondent's petition not only adverted to the voters' register but it specifically referred to it. The court therefore could not have allowed the respondent any departure from his pleadings in the face of the contents of the petition above. Ground 15 of the appeal therefore fails.

With regard to the contention that the allegations in the petition were not supported by affidavit evidence, I observed that the respondent matched the paragraphs of the petition reproduced above in his accompanying affidavit with paragraphs 14.1.7, 14.1.10 and 14.1.11, respectively, which were replicas of the paragraphs in the petition. However, it was established that the respondent could not have gone to all of the polling stations that he named in his affidavit. I therefore found that most of the contents of the affidavit with regard to the allegations in the petition amounted to hearsay evidence which the court could not and did not consider.

However, I note that the respondent also stated thus in paragraph 11 of the same affidavit:

"11. Based on my evidence enumerated above ***and that of other witnesses that have deponed additional affidavits to buttress this petition****, am advised by my lawyers M/s Paul Sebunya & Co. Advocates which advice I believe to be true, that the Parliamentary Electoral process and Elections for Buwekula South Constituency Mubende District was*

conducted and the winner of the same was declared in contravention (of) electoral laws." ***{Emphasis supplied}***

It is the duty of this court to re-evaluate all the evidence before the trial court and come to its own conclusions on the basis of the facts and the law. Therefore, in order to determine whether the allegations about voting by unregistered voters and the failure to use the BVVK by the 1st appellant had any affidavit evidence to support them when the petition was lodged in court, it is to the record that I must go.

The respondent filed 35 additional affidavits to support his petition that were all dated the 19th March 2021, which appeared at pages 291-474, Vol. 1 of the record. They were deposed by voters in the constituency, who were sometimes also the appointed agents of the respondent, and were present at the various polling stations on polling day. I am mindful of the fact that all of 34 affidavits were expunged from the record of the court following an objection that they did not comply with the requirements of the Illiterates Protection Act. Much as they were expunged, it is pertinent to consider the facts deposed to in the affidavits. The deponents, their role in the election and the relevant contents of 17 of the affidavits were as follows:

1. Tibisasa Fred, Resident of Kirangwa Ward and voter at Kirangwa P/S Polling Station stated that he saw Kalyango Joel and Ndikubwimaana Emmanuel, supporters of the 2nd appellant, voting on behalf of unregistered voters;
2. Nakintu Teopista, Polling Assistant at Budibaga Eden Polling Station, stated that she saw the Presiding Officer, Lubega Yosam, allowing unregistered voters to vote at that polling station;
3. Sebuliba Steven, resident of Kyenda village and Polling Agent of the respondent at Kitenga Dispensary N-Z, stated that he saw officials of the 2nd respondent allow the agents and supporters of the 2nd appellant cast votes for Namiyingo Robinah, away in the Middle East and Wamirele Muhammad, deceased;
4. Magezi Badru, voter at Rusiki Polling Station stated that he saw the 2nd appellant's presiding officer at Rusiki Polling Station, Enoch Arekaho, handing over pre-ticked ballots to voters as the voting table; agents of the 1st appellant allow unregistered voters to vote under their watch and supervision; noticed that someone voted for his mother Nakayiza Joweria, deceased;
5. Ssebayiga Josephat, Polling Agent of the respondent at Busenya Polling Station stated that he was denied access to the voters' register and so could not verify if the validly registered voters were the ones voting;

6. Mugerwa Raphael; Polling Agent of the respondent at Butayunja Polling Station, stated that election officials of the 2nd respondent issued 40 voter location slips to one Nasasira Enock at the station and in connivance with Agents and supporters of the 1st respondent, yet voter location slips had been issued earlier;
7. Tumwiine Jamilu, Polling Agent at Kabunyonyi P.S B Polling Station, stated that he witnessed the election officials of the 1st appellant, Presiding Officer Ssempijja Isaac and Supervisor Mwine Simon facilitating voters to vote more than once; and a registered voter at the station was allowed to cast a vote for his son, a student at Gogonya Parents' School;
8. Nakibwoya Kizza Dimitiriya, Electoral Coordinator and Polling Agent for the respondent at Kitenga Polling Health Centre N-Z Polling Station stated that she witnessed the suspension of the Biometric Voter Machine and Register by officials of the 2nd respondent;
9. Tugume Amos, Election Constable of the 1st appellant, Busenya P/S B, stated that he saw an Agent of the 1st respondent, Kaben, smuggling unregistered voters to vote at that polling station, supported by polling officials of the 2nd respondent who just looked on;
10. Kekitanda Margret, voter at Nsengwe Polling Station, stated that she saw election officials of the 1st appellant suspend the use of the Biometric Voter Register, which allowed multiple and underage voting, as well as unregistered voters to vote;
11. Muhanguzi Benefansi, registered voter at Kibyamirizi P.S B stated that he witnessed one Kenneth, a supporter of the 2nd appellant who was allowed by the Presiding Officer to vote for Kizito John, then a prisoner at Kitalya Prison on charges of murder;
12. Kiddawalime Noah, petitioner's Electoral Coordinator in Kitenga Sub-county, stated that the election officers of the 1st appellant did not allow the agents of the petitioner to know the identity of voters who were given ballot papers to vote, which facilitated multiple voting;
13. Nabimanya Nathan, registered voter at Mujunwa Polling station, stated that he voted twice since he was given a voter location slip by the Area Chairperson of Mujunwa Village, Mwesigye Ezekiel, and others on 12th January 2021 by Katongole Rasoor, an agent of the 2nd appellant who gave him a fresh set of voter location slips under the guidance and supervision of election officials of the 1st appellant. He attached two copies of such slips to his affidavit;
14. Begira Robert, Polling Agent of the respondent for Lukaya Polling Station, stated that Mwine Simon, 2nd respondent's supervisor, deliberately allowed voters to vote without verifying them on the voters' register; witnessed the Presiding Officer of the 2nd respondent allow an impersonator vote under the name of Nabukenya Vesta, deceased; and that election officers of the 1st appellant suspended the use of a fully functional Biometric Voter Verification Machine;

15. Nansubuga Florence, Polling Agent at Kisenyi Stores, stated that she witnessed the Polling Agent of the 1st appellant at that station pluck out more than one ballot paper and give them to some voters, so facilitating ballot stuffing; and officers of the 1st appellant at that Polling Station suspend use of a fully functional Biometric Voter Machine.
16. Ngabirano Seleveno, registered voter and Acting Polling Agent for the respondent at Kiveera Polling Station, stated that he witnessed connivance between the agents of the 1st respondent and the 2nd respondent while issuing ballot papers to voters and ballot stuffing.
17. Kato Ivan, Election Police Constable at Budibaga Eden Polling Station, stated that during polling, he noticed that agents of the 2nd appellant were voting multiple times, but when he tried to arrest them, violence ensued causing a standstill in the voting.

According to the averments above, it is clear that there was affidavit evidence on the record to support the respondent's allegations in the petition, but the affidavits were all expunged based on a technicality. Since the decision to expunge them was resisted by counsel for the respondent, but he gave in to it in exchange for the judge in turn expunging additional affidavits filed by the 1st appellant on the basis of the Illiterates Protection Act, I will shall render a legal opinion about the application of that law in this matter specifically, and generally by the courts later on in this judgment.

Ground 15 of the appeal therefore could not be sustained because in view of the pleadings that I analysed above, the respondent could not have departed from his pleadings; neither was it possible for the trial judge to allow him to depart from them. Though the judge expunged the affidavits that the petitioner intended to rely upon to prove the larger part of his case on the basis of the 1st appellant's preliminary objection, there was other evidence that the judge relied upon to find in favour of the respondent. Ground 15 clearly also fails.

As to whether the 1st appellant proved that 1,512 voters in the contested six (6) polling stations were verified, the 1st appellant called DW4, the Returning Officer of Mubende District. We did not have the benefit of reappraising her affidavit in answer to the petition because it was not included in the record of appeal. Nonetheless, a review of the testimony of DW4, Kunihira Christine Fiona, brought us to the conclusions below.

Counsel for the respondent cross examined DW4 about the BVVK and she asserted that they were supposed to be present at all polling stations. She further confirmed that at some polling stations, 5 of them,

the machines failed. That though the BVVK were the recommended mode for verifying voters, they were only a backup plan. There were other methods such as the voters' register/rolls and voter locator slips (VLS). That where the BVVK failed, the EC officials employed the register and the VLS to verify voters.

DW4 also stated that the National Voters' Register is contained in booklets for particular polling stations, the voters' rolls. Further that one could not have the VLS unless they are registered voters because the slips are obtained from the register. She confirmed that in the absence of the register, even where the BVVK fails one is able to vote if she/he has the VLS. That it was therefore true that some voters were allowed to vote on the basis of the VLS only. Further that it was normal for voting to take place in the absence of, and the ticking of the Voters' Register.

During re-examination by Mr. Matovu for the EC, the witness stated that she received some complaints from supervisors about the BVVK. She also stated that the purpose of the BVVK was to verify the VLS. That in the event the BVVK fail, the VLS is verified from the Voters' Register. She clarified that there were about 5 BVVK that failed to work in the whole of Mubende District, not Buwekula South Constituency because in that constituency, she did not get any reports/complaints that the BVVK failed. And that on the whole, voting went on well.

I observed that the cross examination of DW4 about the polling process and the results in Buwekula South Constituency was general. Counsel for the respondent did not cross examine her about the absence of voters' rolls at any of the 5 polling stations of Kavule, Kabunyonyi, Katome, Kamusenene, and Budibaga, yet both the respondent and DW4 were present at the opening of the ballot boxes where this was established. Mr. Asimmwe, who was also present, did not seek any answers from DW4 as to why the 5 voters' rolls were not preserved in the ballot boxes.

I will henceforth refer to 5 polling station as the number that did not have voters' rolls instead of 6 stations, as was the case in the judgment appealed from because in the table which counsel for the respondent computed the figures of voters that were not verified, they stated that there were 6 polling stations, including Lwangire. However, the Registrar's Report about the opening of the ballot boxes on 9th

September 2021 did not name Lwangire as one of the polling stations with a missing voters' rolls.

Section 34 of the Parliamentary Elections Act, as amended by Act 12 of 2010, provides for the procedure for handing ballot papers to voters as follows:

> **34. Procedure for handing ballot paper to voter**
>
> **(1) A voter wishing to obtain a ballot paper, for the purpose of voting, shall produce his or her voters' card to the presiding officer or polling assistant at the table under paragraph (a) of subsection (5) of section 30.**
>
> **(2) If the presiding officer or polling assistant is satisfied that the voter's name and number indicated in the voter's card correspond to the voter's name and number in the voter's register for the polling station, he or she shall issue a ballot paper to the voter.**
>
> **(3) Where a person does not have a voter's card but is able to prove to the presiding officer or polling assistant that his or her name and photograph are on the voter's register, the presiding officer or polling assistant shall issue him or her with a ballot paper;**
>
> **(a) Where a person has a voter's card and his or her name appears on the register but the photograph does not appear on the register, the presiding officer or polling assistant shall issue him or her with a ballot paper.**
>
> **(4) The presiding officer or polling assistant shall place a tick against the voter's name in the voters' roll for the polling station.**
>
> **(5) Subject to section 39, a person shall not be permitted to vote at a polling station unless the person's name appears in the voter's roll for that polling station.**
>
> **(a) A person who contravenes subsection (5) commits an offence and is liable on conviction to a fine not exceeding twenty-four currency points or imprisonment not exceeding one year or both.**

Subsection (1) above implies that a registered voter **must** have a voters' card. By virtue of subsection (2) the information in the voters' card must correspond with that in the voters' register/roll. By dint of subsection (3), a voter **shall** only be issued with a ballot paper if their name and photograph appear in the voters' register/roll, even if they do not carry a voters' card.

According to subsection (4) of section 34, it is mandatory for the presiding officer to place a tick in the register against the name of the voter to whom the presiding officer has issued a ballot paper. Exceptions to this provision are created in section 39 of the Parliamentary Elections Act which provides for *"factors which may not prevent a person from voting"* as follows:

> **(1) The claim of a person to vote at any election shall not be rejected by reason only—**
>
> **(a) that one of the person's names has been omitted from the voters' register or from the voters' roll;**
>
> **(b) or of the entry in the voters' register or in the voters' roll of a wrong village or of a wrongly spelt name, if, in the opinion of the presiding officer, the person is sufficiently identified.**
>
> **(2) The claim of a female voter to vote at any polling station shall not be rejected by reason only that she has changed her surname by reason of marriage and that the change has not been reflected in the voters' register or the voters' roll for the polling station.**

The Electoral Commission introduced the use of the Biometric Voter Verification System (BVVS) before the 2021 general elections in order to ensure more efficient verification of voters that had been entered in the Voters' Register. Therefore, DW4 claimed that the BVVK, the kit that goes with the BVVS is supposed to contain information from the register and was used as an alternative to the voters' register and rolls, or as an aid for accessing information from the Register. And that it was not possible for a voter to have a Voter Location Slip, also drawn from the BVVS without their name appearing in the Register.

However, Part III of the Electronic Transactions Act which facilitates E-Government, in section 22 thereof, provides as follows:

> **22. Electronic filing and issuing of documents.**
>
> **Where a law provides that a public body may—**
>
> **(a) accept the filing of a document or requires that a document be created or retained;**
>
> **(b) issue a permit, licence or an approval; or**
>
> **(c) provide for the making of a payment, the public body may,**
>
> **(i) accept the document to be filed, created or retained in the form of a data message;**
>
> **(ii) issue the permit, licence or approval in electronic form; or**

(iii) make or receive payment by electronic means.

{Emphasis supplied}

Contrary to section 22, I found no statute, or even Regulations in place that empower the 1st appellant to keep the voters' register and rolls as e-documents. Section 18 of the Electoral Commission Act still provides for the creation of a physical voters' register for Uganda and voters' rolls for constituencies and polling stations. It has never been amended to state that the voters' register and rolls so created shall also be kept as e-documents.

It is also apparent from the circumstances of this case that though the EC used the BVVS and therefore the BVVK at some polling stations during the polls held on 14th January 2021, it appears not to have had the means to adduce the use of, or specific components of the BVVS or the BVVK as evidence in court. This is because adducing the BVVK in evidence would have required the 1st appellant to first prove, according to section 8 (2) of the Electronic Transactions Act, the authenticity of the system and that the electronic records therein are what the EC claims them to be.

Therefore, in the absence of any evidence to contradict the analysis that was done by counsel for the respondent (page 2009, Vol 5 of the record), based on the physical voters' register books/rolls and the DR Forms availed by the 1st appellant to the respondent (**ExhPW7**), the trial judge accepted the evidence and the submissions that 1,512 voters were never verified. I see no reason to disagree with her findings save that having deducted the number of voters from Lwangire Polling Station who were 184, the figure comes down to 1,328 voters not verified.

I came to this finding because the 1st appellant did not disprove the allegations that some of the voters were not verified before they voted. Instead DW4, at page 2228, Volume 4 of the record, admitted that it was normal for polling to take place at a particular polling station without ticking off the voters on the voters' register. Further that though the BVVK were used to verify voters, they were only a backup strategy. The voters' register was the main document required to be used for verifying voters and the VLS were extracted from the said register using the BVVS.

I therefore find that in view of the evidence before the court, the trial judge made no error when she found that the 1st appellant did not

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disprove the fact that a substantial number of voters were not verified according to provisions of the Parliamentary Elections Act.

Ground 10 of the appeal therefore also fails.

Grounds 4 and 14

The appellants' complaint in ground 4 was that the trial judge erred in law and fact when she held that wrong entries in 19 out of 61 DR Forms pointed to deliberate manipulation or reckless negligence that had a significant impact on the final tally. Ground 14 was couched in similar terms save that in this ground the appellants complained that the judge did not evaluate the evidence properly and so erroneously found/held that there was deliberate manipulation of entries in the DR Forms which had a significant impact on the final tally. The repetition, as I already observed, stemmed from the failure of counsel for the appellants to discuss the contents of their memoranda of appeal before they drafted and filed the consolidated memorandum of appeal.

The basis of the two grounds seems to be the conclusion of the trial judge at pages 52-53 of her judgment, where she stated that:

> *"Again, wrong entries in 19 out of 61 DR forms that pointed to deliberate manipulation or reckless negligence, had a significant impact on the final tally. Going by the decision of Justice Katurebe in the Amama Mbabazi case (supra), the proven defects seriously affected the final result of the election to the extent that the result could no longer reasonably be said to represent the true will of the majority of voters of Buwekula South Constituency. The margin between the candidates being small, the evidence leads the court to believe that Museveni's victory was seriously in doubt. Thus, employing both the quantitative and qualitative test, the noncompliance did affect the results of the election, substantially."*

My analysis of the DR Forms that were availed to the respondent established that there were wrong entries made in 17 of them. Similar to the trial judge, I cannot tell whether the wrong entries that appeared in the 17 DR Forms that I analysed were deliberate or just negligent mistakes. Neither can I tell whether they were procured by any of the candidates vying for office in the election.

Nonetheless, this was not the only glitch in the polls in Buwekula South Constituency on 14th January 2021. Similar to the trial judge, I established that the 1st appellant failed to prove that all the voters at

the 5 Polling Stations of Kavule, Kabunyonyi, Katome, Kamusenene, and Budibaga were legally verified before they cast their votes. According to the analysis of the voters' rolls for those 5 Stations, 1,328 voters were not verified. It is therefore not known whether they were registered voters or just persons who were brought to the 5 polling stations to cast ballots.

As a result, I find that grave anomalies were found to have occurred at 21 out of 61 Polling Station in the Buwekula South Constituency because the Polling Station at Budibaga suffered both anomalies. Therefore, save for the differences in the number of voters and polling stations that were stated in her judgment which differs from my findings, the trial judge made no error when she held that the anomalies that were alleged by the respondent significantly affected the results in the polls.

Grounds 4 and 14 of the appeal therefore also fail.

Remedies

The appellants prayed that this court allows the appeal and sets the decision of the trial judge aside with costs to the appellants. In view of the overwhelming evidence re-appraised, even in spite of the 34 additional affidavits that were expunged from the record, I find that this appeal cannot succeed.

However, I have not been able to establish whether the 2nd appellant participated in bringing the anomalies that I observed above to pass. What is clear to us is that the 1st appellant failed to carry out her duty imposed by section 12 (1) (j) of the Electoral Commission Act to ensure that all election officers comply with the provisions of the Act and the Parliamentary Elections Act. The Electoral Commission also did not come up to the expectations of citizens in Buwekula South Constituency that are imposed upon her by Article 61 of the Constitution.

But before I take leave of this appeal, I am inclined to express an opinion about 2 legal issues that were not appealed against but which deserve serious consideration: (i) the use of the Biometric Voters' Verification System and Kits (the BVVS and BVVK) used in the 2021 General Elections and (ii) the manner in which the Illiterates Protection Act was employed to expunge affidavit evidence from the record during the

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disposal of this dispute, vis-à-vis previous decisions of this court and the Supreme Court on how to deal with affidavits said to be defective.

Biometric Voters' Verification System and Kits

With regard to the BVVS & Kits, it is expected that the use of Information Technology to manage the processes of government will reduce the occurrence of fraud and corruption. It is indeed laudable that the EC introduced the use of the BVVS and BVVK in the 2021 Elections. However, they were employed contrary to the Electronics Transaction Act. I therefore call upon the Electoral Commission, or other appropriate body, to move Parliament to amend the Electoral Commissions Act and make provision for the use of Information Technology, or to enact an appropriate law for that purpose, as it is required by section 22 of the Electronic Transactions Act.

The Illiterates Protection Act

The Illiterates Protection Act is based on the principle of *non-est factum* (not my deed) which operates to protect illiterate persons from liability in respect of documents or contracts mistakenly executed by them. The principle connotes that a document executed by a person in ignorance or by mistake cannot be held against that person. The defence of *non-est factum* carried with it a legal implication that a written agreement is void because the person that is sought to comply with its covenants was mistaken about its character or content when they signed it, or that they signed what was radically different from what they intended to sign (**Foster v Mackinnon (1869) LR 4 CP 704**).

I observed that the respondent's witnesses' additional affidavits, whose contents were relevant to ground 15 in this appeal and which I laid out at pages 55-57 of this judgment, were one half of the total of 34 of such affidavits that were expunged. Further that this was done because counsel for the 1st appellant agreed that they too would take the consequences of non-compliance with the Illiterates Protection Act, if their affidavits failed to meet the requirements thereof.

In reply to the 2nd appellant's objection, counsel for the respondent in this appeal proposed that the deponents of the affidavits filed by the respondent be summoned and cross-examined as to whether they were illiterates, but this was not considered by the court. The trial judge then

struck out and expunged 34 and 17 additional affidavits filled by the respondent and the 2nd appellant, respectively.

The decision of the trial judge on the matter appears at pages 2133-2137, Vol. 4 of the record of appeal, and the crucial parts that I am minded to comment about were as follows:

> *"I have addressed my mind to submissions of both counsel. This matter seems to have already been decided by the Supreme Court in her decision of* ***Kasaala Growers Co-op Society*** *(supra). In my previous decision of* ***Abubaker Machari*** *(also quoted) I did find that the jurat should contain the full name and the address of the person who purports to make the translation. There must have been good reason for it, to the extent that even the mode of the jurat was highlighted in another Act, the Oaths Act, in which the requirement was given of what the jurat should look like. There must have been good reason for this so that the court knows that the person who in fact authored the document is properly identified. An affidavit is evidence brought into court and as Mr Segona argued, ordinarily it would be a properly certified advocate and no other person, to prepare any document for the court.* ***Though other third parties can prepare any documents for another, for purposes of a suit in court, I would expect an Advocate to have made the translation, as one duly instructed.***
>
> *Therefore, it is important that such an advocate is known, their addresses are given and the fact that they are duly instructed and that the deponent understood the language into which the translation was being made.*
>
> *It would be too much to ask a court to confirm whether a person understood the affidavit through cross examination because that would be opening pre-trial proceedings unnecessarily. Knowing that election petitions must be decided in a limited period of time, it is too much to ask for all those who swore affidavits to be brought before court for cross examination yet the law was clear on how translation should be made, which is a pre-trial activity.*
>
> *All counsel have conceded that without the proper jurat, the affidavits cannot stand. I therefore move to allow the application made by counsel from either side.* ***If there is a mistake which had not been noted before, the court cannot stand such an illegality to stay****."*
>
> ***{Emphasis supplied}***

The decisions of this court on affidavits deposed by illiterate persons appear to present different and inconsistent positions on this subject. This leaves the lower courts with no *clear* authority to follow when they

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are confronted with arguments about affidavits subject to the Illiterates Protection Act, which come in different permutations, alleged to be defective. I will review some of them here to demonstrate my concern.

Section 3 of the Illiterates Protection Act has many facets and it provides as follows:

> **1. 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.**

This court in **Rehema Muhindo v. Winfred Kiiza & Electoral Commission, Election Petition Appeal No. 29 of 2011** considered a situation in which the trial judge in an election petition excluded eight (8) affidavits offered in rejoinder to that of the Chairperson of the Electoral Commission. The reason for exclusion was that the trial judge was concerned that the affidavits failed to indicate that the contents had been read back and explained to the deponents who were all illiterate. And that as a result, both the Oaths Act and the Illiterates Protection Act were not complied with. The trial judge found non-compliance to be fatal and declined to rely on the said affidavits.

This court found that the allegations in the said affidavits had their basis in the averments of the main affidavit to which the rejoinder was offered, and they were specific to the allegations in that affidavit. The allegations were therefore before the court in some other evidence even if the affidavits were excluded, yet the trial judge excluded all that information. Mpagi Bahigeine, DCJ, as she then was, therefore found and held, Nshimye and Kasule, JJA concurring, that:

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

in Election Petitions, considering the tight time schedule under which they have to be compiled, unless the omission is material going to the root or the substance of the affidavit.

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

In **Kizza Besigye v. Museveni Yoweri Kaguta** (supra) the Supreme Court considered the effect of expunging numerous additional affidavits that were deposed to support the petition. The court did not specifically refer to affidavits deposed by persons who are subject to the Illiterates Protection Act, but the court (per Odoki, CJ) had this to say about contestations over alleged defective affidavits:

"From the authorities I have cited there is a general trend towards taking a liberal approach in dealing with defective affidavits. This is in line with the constitutional directive enacted in article 126 of the Constitution that the courts should administer substantive justice without undue regard to technicalities. Rules of procedure should be used as handmaidens of justice but not to defeat it."

The majority of the court agreed on this issue, but I note that the discussion arose from affidavits said to contain hearsay evidence. The dicta above may not, in my view, relate to affidavits subject to the provisions of the Illiterates Protection Act.

The oft cited decision of the Supreme Court on affidavits subject to the Illiterates Protection Act is **Kasaala Growers Cooperative Society v. Jonathan Kakooza & Another, SC Civil Application No 19 of 2010**. It is the authority that the trial judge in this matter relied upon to come to her decision. In that application, Okello, JSC sitting as a single justice considered an affidavit deposed by a litigant who was illiterate in the English Language but literate in Luganda, which had no certification at all that the contents had been explained to the deponent in the language that he understood.

The learned jurist observed that there is a general trend towards taking a liberal approach towards defective affidavits in the spirit of Article 126 of the Constitution. However, he came to the following conclusion about the circumstances in that case:

"However, a distinction must be drawn between a defective affidavit and failure to comply with a statutory requirement. A defective affidavit is,

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for example, where the deponent did not sign or date the affidavit. Failure to comply with a statutory requirement is where a requirement of a statute is not complied with. In my view, the latter is fatal."

Okello, JSC then affirmed the decision of this court in **Ngoma-Ngime v. Winfred Byanyima & Electoral Commission, EPA No 11 of 2002**, in which it was held, in respect of an affidavit that did not contain a *jurat* stating that the contents therein had been explained to the deponent in a language that he understood and he appeared to understand them, that:

> *"Under the Oaths Act ... an affidavit sworn or affirmed by an illiterate person before a Commissioner for Oaths or any other person authorised to administer an oath is obliged to include a jurat at the end of the affidavit or affirmation stating that the contents of the affidavit or affirmation was read over to the deponent. The jurat has to state that the deponent appeared to have understood the same. To me this is not a matter of form. ... it is a matter of substance. The contents of an affidavit or affirmation and annexures attached must be explained and understood by the deponent. This is the protection that was envisaged."*

As I already pointed out above, affidavits sworn to by illiterate persons come in different variations. In this case, I observed that all of the additional affidavits filed by the respondent *did* contain a *jurat* in which one Kibeedi Isaac stated that he was the translator. They were also stated to have been drawn and filed by M/s Paul Sebunya & Co. Advocates of 2nd Floor Colline House, Plot 4 Pilkington Road Kampala. Kibeedi certified that he translated the contents before the affidavits were commissioned by Munyaneza Daniel Bazirake, Advocate and Commissioner for Oaths.

I further noted that in the affidavit of Ngabirano Selevano (page 470-471 of the record) Kibedi stated that he was a Lawyer by profession. However, he was not the person who drafted the affidavits and wrote the deponent's names on them, for that was clearly M/s Paul Sebunya & Co. Advocates, the advocates of the respondent here and in the trial court. As a result, the case of **Kasaala Growers (supra)** which the trial judge based her decision upon clearly did not apply to the affidavits in this case.

This court considered the challenge to affidavits deposed by illiterate witnesses in the more recent case of **Nakate Lilian Segujja & EC v. Nabukenya Brenda, EPA Nos 17 & 21 of 2016**. In that case, the court

considered the question whether the certification in the jurat by the interpreter of the contents of the affidavit, and not by the Commissioner for Oaths who endorsed the *jurat* by commissioning the affidavit, rendered it fatally defective for flouting the intentions of Parliament.

This court found that in that case, the affidavit had two *jurats*, one by the interpreter and the other by the translator. The circumstances were therefore similar to those in this case. With regard to the interpretation of the contents, the court then held thus:

> *"Second, where the interpretation of the contents of the affidavit is done by a third party, as is provided for in the First Schedule to the Oaths Act, it presupposes that it was the third party, and not the Commissioner for Oaths, who was conversant with the language the deponent understood. Hence, pursuant to the safeguard provided in the 1st Schedule to the Oaths Act, the interpreter is better placed, than the Commissioner for Oaths, to certify in the jurat that following the interpretation, the deponent appeared to understand the contents of the affidavit.*
>
> *We are therefore satisfied that the certification of the jurat by the interpreter, instead of the Commissioner for Oaths as provided for in Form B of the First Schedule to the Act, should be considered unsubstantial deviation; which never seriously flouted the intentions of the Legislature. We believe that where a Commissioner for Oaths administers an oath in an affidavit to a deponent after a third party instead of the Commissioner for Oaths, has effectively interpreted contents of the affidavit to the deponent to his or her understanding, the affidavit should not be regarded as irredeemably defective and be rejected. Parliament could not have intended that such insubstantial deviation from the statutory provision should suffer such a consequence."*

It therefore needs not be gainsaid that the expunged affidavits were consistent with the standard that was set by this court in **Nakate Lilian Segujja's** case, as to the requirements of the Oaths Act and the Illiterates Protection Act.

Elsewhere, the Supreme Court of Nigeria had occasion to consider the import of section 3 of the Illiterates Protection Act of Nigeria, which is a statute *in pari materia* and in similar terms with the Act in Uganda, in **Olusala Fatunbi & Another v. Ebenezer O. Olanloye & 3 Others [2004] 12 NWLR Part 887, at page 229.** Pats-Acholanu, JSC, delivering the main judgment, with which the rest of the court agreed had this to say:

"It needs be emphasized that the provision in section 3 (supra) is intended for the protection of the illiterate person. Essentially it is equally to trace the whereabouts of the maker of the statement. Care must be taken that we do not put in the intendment of that provision what is not intended to accomplish. It is to ensure that what is stated there reflects what the illiterate person has stated and intended to be correctly put in such a document, and he is the only person to complain if that is not the case. Thus in Edokpolo & Co. Ltd. v. Ohenhen (1994) 7 NWLR (Pt.358) 511 at 534, the Supreme Court, per Iguh J.S.C, held;

> *'It ought also to be noted that section 3 of that law only raises or provides certain presumptions of law in respect of a document prepared at the request, on behalf, or in the name of an illiterate by any person who shall write on such document, his own name as the writer thereof and his address. The purpose of the said provisions under section 3 of the law is also to ensure, in furtherance to the said protection of illiterates, that the writer of such a document is identified or traced.'*

Implicit in that section is that where there exists a doubt or a denial as to the correct statements that were made by the illiterates, the writer will be traced to show whether the content of the document represents the veracity of what the illiterate asserts. In other words, the protection singularly ensures (sic) only to the illiterate. See Djukpan v. Orovuyoube (1967) 1 All NLR 134 at 140 and Anyabunsi v. Ugwunze (1995) 6 NWLR (Pt. 401) 255 at 272."

The Court of Appeal of Nigeria relied on the decision in **Fatunbi v. Olanloye** (supra) in its more recent decision in **Alhaji Modu Musa & Another v. Kaka Gana (Trader) (2021) LPELR-55156 (CA),** and came to the conclusion that even an affidavit that does not contain the illiterates' *jurat* is still effective and should not be annulled by court, when it held thus:

"In fact, I make bold to say it is not correct to say that once a document made by an illiterate who does not comply with the Illiterates Protection law is inadmissible will be taking it too far. The absence of illiterate (sic) jurat will not for all-purposes make the document null and void. If non-compliance will benefit the illiterate who does not complain, a Court should not be worried for the illiterate. In fact, no person, not even the Court should drink any medication for the sickness of an illiterate who does not care about the sickness. The apex Court in Wilson & Anor vs Oshin & Ors (2000) 6 SC (part III) 1, made this position clear in these words: 'I entirely agree that absence of jurat in a document signed by an illiterate does not render the document null and void. A jurat is for the protection of the illiterate and cannot be used against his interest.'"

I am persuaded that this is a sound and comprehensive interpretation of the purpose and the application of section 3 of the of the Illiterates Protection Act. It is clearly the writer of the document that it is intended to trance, not the translator thereof. I also note that the Illiterates Protection Act does not provide for any consequences where the person that drafts the document for the illiterate person fails to comply with it. It is therefore erroneous for courts to impose consequences where they are not. (See **Sitenda Sebalu v. Sam K. Njuba, SC EPA No. No 26 of 2007)**

It is also pertinent to point out that the Oaths Act provides for specific oaths for affidavits in its schedule. Form B thereof has the form of jurat for an affidavit where the Commissioner for Oaths has read over the affidavit for a deponent who is either blind or illiterate, and another where a third person reads the affidavit to the deponent who is illiterate or blind. Both forms require the reader to explain the contents of the affidavit to the deponent in a language that he or she understands. The latter does not require the reader to sign the affidavit; it must be signed by the Commissioner for Oaths.

Therefore, at the very least, the trial judge ought to have allowed the appellants here to cross examine the deponents of the impugned affidavits, had their contention been that according to the deponents themselves, the averments therein were not what the dependents stated on oath. The trial judge therefore should not have expunged the affidavits on the basis of complaints by counsel for the appellants, and in the absence of the illiterate deponents thereof because doing so was clearly contrary to their sworn interests.

I also hold the view that the disposal of election petitions on the basis of discarding affidavit evidence on technicalities where the Rules provide that evidence shall be by affidavit only, does not only prejudice litigants. It also engenders witnesses to have limited or no faith at all in a judicial system which seems to be efficient at disposing of disputes in electoral matters on technicalities and excluding vital evidence on that basis. As a result, the whole of the electoral process stands discredited.

Trial judges ought to weigh their decisions on affidavits that are challenged in these matters carefully. They also ought to consider the provisions of section 64 of the Parliamentary Elections Act, which provides that witnesses may be summoned and sworn in, in the same manner as witnesses may be summoned in other civil proceedings.

Therefore, if the judge be minded to expunge affidavit evidence on technicalities, they ought then to summon the witnesses in order for them to dispose of the substance of disputes, as is required by Article 126 (2) (e) of the Constitution.

Conclusion

This appeal substantially fails and I would uphold the orders of the trial judge with costs to the respondent here in the court below. However, in view of the fact that the anomalies in the election were very much the result of errors and shortcomings of the Electoral Commission, I would order that each party bears their own costs in this appeal.

It is so ordered.

Dated at Kampala this 08th Day of June 2022.

Irene Mulyagonja

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM: MUSOKE, MULYAGONJA AND MUGENYI, JJA

CONSOLIDATED ELECTION PETITION APPEAL NO. 73 & 74 OF 2021

(Arising from Election Petition No. 3 of 2021)

1. **ELECTORAL COMMISSION**
2. **WILLIAM MUSEVENI ..... APPELLANTS**

VERSUS

FRED TUMWESIGYE ..... RESPONDENT

(Appeal from the Judgment of the High Court of Uganda holden at Mubende (Luswata, J) in Election Petition No. 3 of 2021)

JUDGMENT OF MONICA K. MUGENYI, JA

A. Introduction

1. I have had the benefit of reading in draft the lead Judgment of my sister, Hon. Lady Justice Irene Mulyagonja, JA in the present Appeal. I would respectfully depart from the conclusion arrived at therein that the Appeal be dismissed for the reasons I shall endeavour to highlight in this judgment.

2. The factual background to the Appeal, as well as the summation of the parties' respective cases and court appearances are well articulated in the lead judgment, and shall not be reproduced in detail here. In a nutshell, it is the contention of the Electoral Commission ('the First Appellant') and Mr. William Museveni ('the Second Appellant') that the High Court sitting at Mubende ('the Trial Court') erred in setting aside the election of the Second Appellant as the Member of Parliament for Buwekula South Constituency in Mubende District.

3. Dissatisfied with the trial court's judgment, the Appellants lodged this now Consolidated Appeal proffering fifteen grounds of appeal as reproduced below:

    1. *The Learned Trial Judge erred in law and fact when she failed to properly appraise and evaluate the evidence on record and consequently arrived at wrong conclusions that;*
        - *(i) A total number of 2,690 votes were unaccounted for.*
        - *(ii) That those were votes which were given to and then cast by voters who were not verified by the polling agents in contravention of Section 1 PE Act.*
        - *(iii) That the assumption that 1,512 voters at 6 (six) polling stations were not legally verified yet their votes were counted as part of the final tally of the three candidates.*
        - *(iv) That the proven defects seriously affected the final result of the election to the extent that the result could no longer reasonably be said to represent the true will of the majority of voters of Buwekula South Constituency.*
        - *(v) That the margin between the candidates being small, the evidence leads the court to believe that the 2nd Appellant's victory was seriously in doubt.*

    2. *The Learned Trial Judge erred in law and fact by admitting and relying on evidence only adduced during the petitioner's submissions pertaining to the Declaration of Results forms (DR) and Voter Registers (VR) that had not been pleaded in the petition and proved through affidavit evidence verifying the Respondent's petition.*

3. *The Learned Trial Judge erred in law when she misapplied the law relating to ballot stuffing thereby arriving at a wrong conclusion that the Petitioner/ Respondent had proved that there was ballot stuffing.*
4. *The Learned Trial Judge erred in law and fact when she held that wrong entries in 19 out of 61 Declaration of Results forms (DR) pointed to deliberate manipulation or reckless negligence that had a significant impact on the final tally.*
5. *The Learned Trial Judge misdirected herself at law and fact when she over-ruled an objection/ point of law in respect of the Respondent's reliance on certified copies of the Voters Registers (VR) where, contrary to the law, no proof of stamp duty was shown thereby making a wrong conclusion to rely on them.*
6. *The Learned Trial Judge erred in law and fact when she disregarded the 2nd Appellant's objections about major parts of the Respondent's evidence being hearsay thereby arriving at a wrong decision.*
7. *The Learned Trial Judge erred in law and fact when she disregarded the Appellants' objections on Voters' Registers retrieved from ballot boxes on the 09/09/2021 thereby arriving at an erroneous decision.*
8. *The Learned Trial Judge erred in law and fact when she shifted the burden of proof onto the 1st Respondent* (Appellant) *in respect of the alleged missing Voters' Registers where no proof was made and made a finding that there was non-verification of the voters thereby making wrong findings.*
9. *The Learned Trial Judge having expunged the Petitioner/ Respondent's Affidavits accompanying the Petition failed and/ or did not put the remaining evidence to proper scrutiny and by reason of such failure arrived at wrong conclusions.*
10. *The Trial Judge erred in law and fact when she made a finding that the* (1st) *Appellant did not prove that 1,512 voters in the impugned six Polling Stations were not verified.*
11. *The Learned Trial Judge misdirected herself and arrived at wrong conclusions when she relied on revelations unearthed through interlocutory application than otherwise had been originally pleaded.*
12. *The Learned Trial Judge misdirected herself on the law and arrived at wrong conclusions when she relied and considered the material from the Ballot Box.*
13. *The Learned Trial Judge misdirected herself on the law when she without conducting a recount of votes, made a finding that a total sum of 2,690 votes was unaccounted for.*
14. *The Trial Judge did not evaluate the evidence before her properly and erroneously found/ held that there was deliberate manipulation of entries in the Declaration of Results Forms which had a significant impact on the final tally.*
15. *The trial judge erred in law and in fact when she allowed the Petitioner/ Respondent depart from his pleadings hence occasioning a miscarriage of justice.*

4. The Appellants seek the following remedies:

(a) *An order setting aside and reversing the judgment of the High Court.*

(b) *This appeal be allowed with costs in this Court and the court below.*

(c) *A declaration that the 2nd Appellant is a lawfully elected member of parliament for Buwekula South Constituency.*

(d) *Any further reliefs as this honourable Court deems fit.*

B. **Determination**

5. Rule 36 of the Parliamentary Elections (Interim Provisions) Rules, SI 141–2 adapts to election petition appeals '**any rules regulating the procedure and practice on appeal from decisions of the High Court to the Court of Appeal in civil matters**.' 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 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. This duty does similarly apply to election petition appeals before the Court. Thus, in **Achieng Sarah Opendi & Another v Ochwo Nyakecho Keziah, Election Petition Appeal No. 39 of 2011**, the Court adopted the exposition of the same 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.

6. Meanwhile, the standard of proof in parliamentary election petitions is encapsulated in section 61(3) of the Parliamentary Elections Act, 2005 as follows:

> **Any ground specified in subsection (1) shall be proved on the balance of probabilities.**

7. That statutory provision was in **Nanziri Kase Mubanda v Mary Babirye Kabanda, Election Petition Appeal No. 38 of 2016** construed by this Court to confer a different standard of proof on parliamentary election petitions as opposed to presidential election petitions, the applicable standard in parliamentary election petitions being satisfaction of the court by balance of probabilities. It is on that premise that the present Appeal shall be determined.

8. Turning to the grounds of appeal, it is observed that the Appellants did not directly address *Grounds 3, 9, 11* and *14* of the Appeal in their consolidated written submissions. However, the contestations on ballot stuffing raised in *Ground 3* were canvassed within their submissions on *Grounds 4* and *13* of the Appeal, while *Ground 14* was subsumed within the Appellants' arguments under *Grounds 1, 8, 10* and *12* thereof. The Appellants argued Grounds 2 and 7 together, followed by Grounds 1, 8, 10 and 12 together as well, as were *Grounds 3, 4* and *13*, and concluded with the separate consideration of *Grounds 5* and *6*.

9. It must be stated from the outset, however, that I do agree with the decision in the lead judgment to strike out *Ground 1* of the Appeal for the reasons advanced therein, therefore it shall not be considered in this judgment either. Meanwhile, *Grounds 2, 8* and *15* raise procedural points of law that, in my view, could dispose of the entire Appeal. It is for that reason that I propose to address them on preliminary basis. Given that they were canvassed by the Appellants alongside *Ground 7*, on the one hand, and *Grounds 10* and *12*, on the other hand; those grounds of appeal shall be considered together.

Grounds 2 & 7: Reliance on evidence *only adduced during submissions; Declaration of Results Forms and Voters Registers that were neither pleaded nor proved, and Voters Registers retrieved from unsealed ballot boxes.*

10. Under *Grounds 2* and *7*, the trial court is basically faulted for relying on a voters' register that was admitted onto the record after close of the hearing of the petition. It is argued that the register was not pleaded in the petition nor alluded to in the affidavits in support thereof, or admitted in evidence during the hearing of the petition. Rather, it was one of the documents the admission of which had been

contested by the Appellants at the pre-trial scheduling conference. It is further argued that the ballot boxes containing the impugned register were during the certification process found to have been tampered with and the seals thereof broken thus compromising the credibility of registers. The Appellants make reference in that regard to the trial judge's interlocutory decision in which she dismissed an application for discovery in respect of invalid votes.

11. The lead judgment correctly finds that issues arising from the voters' registers and declaration of results forms were pleaded in the petition. However, it seems to me that the main bone of contention in both grounds of appeal is the reliance by the Trial Court on evidence by way of voters' registers that was only adduced at the stage of submissions, after close of the hearing.

12. The record of appeal does in paragraph 9.2 of the Joint Scheduling Memorandum confirm that the certified copies of the voter register were not admitted documents before the Trial Court. Secondly, the Trial Court's record of proceedings reveals that although the Respondent had already received the contested register as at 13th September 2021, his advocate complained at the hearing on that date that he had not received certified Declaration of Results forms and was thus still compiling his trial bundle. He therefore sought additional time to file his trial bundle. Conversely, opposite Counsel opposed the inclusion in documents for admission material the integrity of which had been compromised on account of the unsealed ballot boxes. The Trial Court reserved its ruling on the matter but ordered for the cross examination of the Respondent's witness to commence. This cross examination ensued between pages 2082 – 2131 of the record of appeal. The trial judge did, nonetheless, defer the closure of the Appellant's case until she had delivered her reserved ruling on the credibility of the evidence found in the ballot boxes that had been opened. Upon delivery of the ruling when the matter next came up for hearing, cross examination ensued on the Appellants' witnesses with Mr. Twinamatsiko, Counsel for the Respondent undertaking the cross examination on the Respondent's behalf.

13. I am duly aware that Rule 17 of the Parliamentary Elections (Interim Provisions) Rules, SI 142-2 adapts the Civil Procedure Rules (CPR) to the hearing of election

petitions. Order 18 rule 2 of the CPR is instructive on the conduct of hearings in civil proceedings. It reads as follows:

> **(1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his or her case and produce his or her evidence in support of the issues which he or she is bound to prove.**
>
> **(2) The other party shall then state his or her case and produce his or her evidence, if any, and may then address the court generally on the whole case.**
>
> **(3) The party beginning may then reply generally on the whole case; except that in cases in which evidence is tendered by the party beginning only he or she shall have no right to reply.**

14. The Respondent in this case had the right to begin under Order 18 rule 1 of the CPR. The Appellants having indicated their intention to cross examine him only, upon conclusion of that cross examination the Respondent's case would have had to be closed prior to the commencement of the Appellants' respective cases. That is the import of Order 18 rule 2(1) and (2) of the CPR. Indeed, in this case, upon conclusion of the Respondent's cross examination, cross examination ensued in respect of the Appellants' witnesses. Clearly, therefore, the Respondent had at that point closed his case. Once the cross examination of the Appellants' witnesses by the Respondent's advocate had been concluded, submissions ensued as provided for in Order 18 rule 2(3) of the CPR. It was at that point, however, that the Trial Court directed the Respondent to file the certified registers in this matter.

15. This, with utmost respect, was irregular procedure. The Respondent having closed its case without presenting the certified Voters Register, it was improperly admitted at the stage of submissions at the behest of the court. The fact that the Appellants did not at the time object to the procedure adopted by the trial judge would not, in my view, negate the duty upon a trial court to follow due process as laid down in our civil procedure rules. Courts (and not litigants) bear the primary duty to direct their proceedings in accordance with laid down procedural rules. Borrowing from the practice under English law, *Blackstone's Civil Practice (2005), p. 448, para. 42.1* posits as follows:

> Ultimate responsibility for the control of litigation should move from the litigants and their advisers to the court. Under the (English) CPR, the legal profession is intended to perform its traditional adversarial role in a managed environment governed by the courts.

16. I am aware of the proposition in *Halsbury's laws of England, Vol. 16(2), p.8, para. 1058* that '**parties to litigation who have continued the proceedings with knowledge of an irregularity of which they might have availed themselves are stopped from afterwards setting it up**.' However, clearly that proposition was inapplicable to the Appellants in this case, the trial judge's directions in the matter having come at the tail end of the adjudication process.

17. I therefore find that the Trial Court did err in law by admitting in evidence voters' registers that were adduced in evidence at the stage of the Respondent's written submissions. *Ground 2* of the Appeal would thus succeed.

18. Under *Ground 7*, it is argued that the credibility of the voters' register retrieved from the ballot boxes on 9th September 2021 had been compromised. The trial court addressed the issue as follows:

> ***The exercise to open the 61 sealed ballot boxes of the constituency was conducted on 9/8/21 before the Chief Magistrate Mubende .... It is reported that at the opening of the boxes, it was found that seals of two had been tampered with. ... The Chief Magistrate confirmed that seal of the boxes for the Kisenyi Store PS in Bugonza Parish, Kitenga Sub County and Sunga PS, Kabyuma Parish, Kalonga Sub County had been broken. None the less, no objection was raised against that discovery and the exercise was begun and was completed. According to the Magistrate's report, eight boxes had no DR forms and six had no VT[1]. I will assume then that 55 VR*** (voters registers) ***were found intact, retrieved photocopied and then certified by the EC with no contest. ... More important, the EC who readily agreed and did certify all 55 VR, which were then admitted as Tumwesigye's evidence, must have done so after confirming their authenticity. Going by Kakooza JB's case, save for those of Kiseyi and Nsunga polling stations, the exercise was not contaminated to the extent that those documents are unreliable or even inadmissible. ... For the above reasons, I am constrained to reject the third objection. I will retain on the record all the 55 certified copies***

[1] Described at p. 2269 of the record of appeal as 'voter registers retrieved during the exercise of opening the sealed ballot boxes on 9/9/21.

of VR as part of Tumwesigye's evidence, to be considered using the burden of proof expected of election petitions.

19. This rendition of what transpired on that day is borne out by the evidence on record. Therefore, of the sixty-one boxes that were presented for opening; two of the boxes had their seals tampered with and six of them contained no voters' registers. As can be gleaned from its decision above, the trial court retained on the court record the voters' registers retrieved from fifty-five ballot boxes (less the six boxes that contained no registers). However, of the fifty-five ballot boxes the admitted on the court record, the trial judge disregarded the contents of the two unsealed boxes from Kisenyi and Nsuga polling stations in arriving at her conclusion that the election had been riddled by ballot stuffing. *See paragraph 99 of the Trial Court's judgment*. I would not fault the trial judge on this as the compromised credibility of the two boxes would not necessarily extend to all the other fifty-three boxes that had their seals intact. *See* ***John Baptist Kakooza v Electoral Commission & Another, Election Petition Appeal No. 11 of 2007***. I would therefore resolve *Ground 7* of the Appeal in the negative.

Grounds 8, 10, 12 & 15: *Shifting evidential burden; material from ballot boxes, and departure from pleadings*

20. The decision that there was ballot stuffing and the making of false returns contrary to sections 77 and 78(a) of the Parliamentary Elections Act, 2005 was made on the basis of the following findings by the Trial Court. First, discrepancies between the ticked voters captured in the fifty-three voters' registers *vis a vis* the total number of ballot papers counted in each Declaration of Results form. The Trial Court adjudged the alleged discrepancies to translate into votes that were unaccounted for and computed them at 2,690 votes. In arriving at that figure of supposedly unaccounted votes, the trial judge considered the alleged discrepancies in eleven polling stations. The court rendered itself as follows:

> ***A careful consideration of the 53 voter registers/ rolls (Kisenyi and Nsuga excluded) showed glaring discrepancies in the ticked voters on the VR, and the total number of ballot papers counted in each DR form. For some polling stations (eg Buzooba, Buwumiro, Kayunga, Kagoma, kibuye Community Centre, Kilenge Dispensary A (N-Z) the difference ranged from a small 1 – 7 votes. In others (eg***

Kalembe, Namalerwe Life Centre, Bwakugo, Mujunwa and Kitovu) differences seen were as high of 287, 253, 227, 198 and 160 votes respectively. The result is that a total sum of *2690 votes* ***was unaccounted for. It may well be that no confirmation is present that those extra votes went to either candidate, or Museveni specifically. However, those were votes which were given to and then cast by voters who were not verified by the polling agents in contravention of Section 1 PE Act. That would be an illegal introduction and inclusion of those votes in the final tally for each candidate; a classic case of vote stuffing. I say so because the Court of Appeal has in an earlier decision considered unexplained votes cast (over and beyond the registered voters) as evidence of ballot stuffing.*** *See Ninsiima Boaz Kasirabo v EC EP Appeal No. 55/ 2016.* (my emphasis)

21. The second premise for the Trial Court's finding on ballot stuffing was that there was no evidence from the First Appellant that the verification of voters at those particular eleven polling stations had been done by means other than the voters' register and, since the said register is the principal basis for voter verification, the assumption was that 1,512 voters at those polling stations were not legally verified to vote yet their votes had been included in the final tally of results for the three candidates.

22. Thirdly, the Trial Court was of the view that '***by failing to verify voters against the VR at the six polling stations*** (the ballot boxes of which contained no register), ***allowing unregistered voters to cast the vote, entering falsified data into the DR forms, failing to secure the VR by placing it into the six ballot boxes, there was serious mismanagement of the poll, the vote and its tally at 59 polling stations***.'

23. The foregoing findings are contested under *Grounds 8, 10* and *12* of the Appeal, the Trial Court being faulted for shifting the burden of proof in respect of the voters' register to the First Appellant. It is argued that the burden of proof in election petitions lies with the petitioner, who is required to prove non-conformity with the electoral laws to the required standard, and that burden of proof remains unchanged. Reference in that regard was made to **Freda Nanziri Kase Mubanda v Mary Babirye Kabanda & Another, Election Appeal No. 38 of 2016**. The decision of the Supreme Court of India in **Jeet Mohinger Singh v Harminder**

Singh Jassi, AIR 2000 SC 258, was also cited in support of the proposition that unless a petitioner discharges his/ her evidential burden of proof, an election is presumed to have been valid. In that case it was observed that '**the success of a candidate who has won at an election should not be lightly interfered with ... Any person seeking such interference must strictly conform to the requirements of the law**.'

24. The Appellants further challenge the Trial Court's findings that verification of voters was not done at six polling stations leaving 1,512 voters at those polling stations unverified, and that 2,690 votes were unaccounted for and cast by voters that had not been verified by the polling agents in accordance with section 1 of the Parliamentary Elections Act. It is argued that all the candidates to the election had agents at all the polling stations but no single agent or registered voter deponed an affidavit in support of the petition alleging that there were no voters' registers at any polling station. This allegation is opined to have only arisen in the Respondent's final submissions. In addition, it is argued that the discrepancies in the ticked voters on the voters' registers were very well explained by DW4, who clarified that voter verification had been done by VT and BVVT machines at all polling stations and there had been no complaint at any of the polling stations.

25. It is thus proposed that the trial court's reliance on an impugned voters' register that was never properly adduced in evidence is misleading in so far as the evidence on record is that at some of the said polling stations voters were verified by voter verification machines and not necessarily the voters' register. It is opined to be untrue, therefore, that 2,690 votes were unaccounted for and unverified voters had voted as that conclusion was not supported by any affidavit evidence. The trial court is faulted for its assumption that since no voters' registers had been found in the ballot boxes of six polling stations, the voters at the said stations were never verified.

26. Furthermore, in an apparent reference to the question of departure from pleadings raised under *Ground 15* of the Appeal, the Appellants take issue with the fact that although the Respondent had pleaded illegal voting at eighteen polling stations, the trial court considered registers of fifty-three polling stations, making findings on

eleven polling stations that had not been pleaded in the petition. The Appellants opine that the nature of the judicial inquiry in election petitions should be as was espoused in **Kiiza Besigye v Yoweri Kaguta Museveni, Presidential Election Petition No. 1 of 2006** (per Odoki, CJ) that '**the Court is not required to make a general inquiry into the Presidential Election as if it were a Commission of Inquiry but to determine the issues and complaints**.' It is thus argued that a petitioner is bound by and limited to his pleadings.

27. Conversely, Counsel for the Respondent support the trial court's conclusion that the First Appellant did not bother to explain the discrepancies observed in the evidence on record, arguing that DW4's evidence was not corroborated by any other witness. The cases of **Rehema Tiwuwe Watongola v Salaamu Musumba, Election Petition Appeal No. 27 of 2016** and **Raila Amolo Odinga & Another v Uhuru Muigai Kenyatta, Presidential Election Petition No. 1 of 2017** (Kenya Supreme Court) were cited in support of the Respondent's case.

28. The burden of proof in civil proceedings is outlined in section 102 of the Evidence Act. It lies with '**that person who would fail if no evidence at all were given by either side**.' Accordingly, it is now well established law that the burden of proof in election petitions lies with the petitioner, who is required to prove non-conformity with the electoral laws to the required standard. *See* ***Freda Nanziri Kase Mubanda v Mary Babirye Kabanda & Another*** *(supra)*. Consequently, in this case, the Respondent bore the burden of proof of the Appellants' non-conformity with the applicable electoral laws so as to warrant the remedies sought by him against them. As was aptly observed in **Jeet Mohinger Singh v Harminder Singh Jassi** (supra), '**the success of a candidate who has won at an election should not be lightly interfered with**' therefore, to my mind, the basic tenets of law and procedure must be strictly observed in the adjudication of election disputes.

29. I am alive, nonetheless, to the provisions of section 103 of the Evidence Act that places the burden of proof as to any particular fact '**on that person who wishes the court to believe in its existence**.' This principle is re-echoed in *Halsbury's Laws of England, Civil Procedure, Vol. 12 (2020), para. 698* which posits that in respect of a particular allegation the burden of proof lies upon the party for whom

the substantiation of that particular allegation is an essential component of his or her case. This legal position resonates with the provisions of section 101(1) of the Evidence Act that '**whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he or she asserts must prove those facts**.'

30. Thus, whereas the burden of proof in any proceedings (legal burden) would, in accordance with section 102 of the Evidence Act, lie with the party who would fail if no evidence at all was adduced by either side; the evidential burden (or the burden of adducing evidence) would shift to the opposite party where the party bearing the legal burden adduces evidence tending to prove his claim. As has been compellingly proposed, '**the other party may in response wish to raise an issue** (in rebuttal) **and must then bear the evidential burden in respect of all material facts**.' *See* Halsbury's Laws of England, Civil Procedure, Vol. 12 (2020), para. 699.

31. The notion of a shifting evidential burden was espoused in **Col (Rtd) Dr. Besigye Kizza v Yoweri Kaguta Museveni & Another, Presidential Election Petition No. 1 of 2001** as follows (per Odoki, CJ):

> As far as the shifting of the burden of adducing evidence is concerned it is stated in Sarkar's Law of Evidence Vol. 2, 14th Ed, 1993 Reprint, 1997, pages 1338 – 1340 as follows:
>
> > 'It appears to me that there can be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient *prima facie* to establish the case of the party on whom the onus lies ... what is meant is that in the first instance the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence.'

32. In **Raila Amolo Odinga & Another v Uhuru Muigai Kenyatta** (supra), the same notion was espoused as follows:

> It follows therefore that once the Court is satisfied that the Petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the

election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/ her allegations of breach, then the burden shifts and behoves the respondent to adduce evidence to prove compliance with the law.

33. In the instant case, therefore, the Respondent bore the evidentiary burden to adduce 'factual' evidence to prove his allegation of non-compliance with the electoral laws, whereupon the burden would shift to the Appellants to prove compliance therewith. The question is, did the Respondent discharge the onus of proof upon him?

34. As observed earlier herein, the Trial Court determined the petition on the basis of ballot stuffing and the making of false returns contrary to sections 77 and 78(a) of the Parliamentary Elections Act. All the other affidavits sworn in support of the Respondent's case having been expunged by the Trial Court, only two affidavits remained on record in support of the petition – the Respondent's and Charles Tumusiime's affidavits. Between those two affidavits the only evidence adduced in support of the allegation of ballot stuffing is to be found in paragraph 14.1.11 of the Respondent's affidavit at page 23 of volume 1 of the record of appeal. It states:

> *The votes cast as contained in the ballot boxes of all polling stations in Buwekula South Constituency Mubende District are more than the voters that participated in the voting exercise as per the voters' registers for the polling stations which confirms that there was ballot stuffing ...*

35. On the other hand, the Respondent's evidence on making false returns is to be found in paragraphs 14.1.14 – 14.1.16 of his affidavit at page 25 of the record of appeal. They read as follows:

> *14.1.14* *The 2nd Respondent's presiding officers at Bulima, Kibuye Comm. Center, Nsengwe, Kirumbi P. S, Butayunja (A – M), Kawumula Kayunga Kivera Rwamaboga Bushenya P/S B Kijuuya, Butayunja (A – M) Kirumbi Pri. Sch, Lwemigo, Buwuniro, Kinyinga A Kalonga Trading Centre (A – M), Budibaga Eden Katoma, Budibaga, Googwa trading centre Kibyamirizi, Kagoma, Kifuufu-Kamusenene, Lukaya, Kawumulo, Nsengwa polling stations made ununiform entries of votes tallies on the Declaration of Results forms.*

*(**attached hereto are copies of the Declaration forms from the 2nd Respondent to the Petitioner marked as 'PW7' and Declaration forms from the returning officer of the 2nd Respondent to the Petitioner marked as 'PW8' for analysis of the information enumerated in the paragraphs above**)*

14.1.15 *The 2nd Respondent's returning officers made incorrect entries of the vote tallies in respect to invalid votes on the Return Form for transmission of results for Buwekula South Constituency Mubende District by 100 votes.*

14.1.16 *The actions of the presiding officers and returning officers of making incorrect and inconsistent entries on the stated Declaration forms and Return Form for the transmission of results affected the outcome of the election because the final results were based on grave numerical inconsistencies.*

36. The only 'factual' evidence of the alleged false returns is contained in the copies of DR forms attached under paragraph 14.1.14 as 'PW7' and 'PW8'. I return to a detailed interrogation of those two exhibits later in this judgment.

37. Paragraph 14.1.15, on the other hand, contains bare statements that are not backed by any iota of 'factual' evidence. Therefore, the conclusion in paragraph 14.1.16 similarly remains unsubstantiated with regard to the allegation in the preceding paragraph. I am mindful of the fact that the Respondent had at that point requested for the Transmission of Results form from the First Appellant. However, that does not assuage the fact that non-factual allegations were peddled in his pleadings then the documentation to support them were sought from the First Appellant. There is no mention in the introductory averment to the foregoing pleadings to suggest that the Respondent's polling agents had advised him about the allegations he peddled so as to justify his attesting to them as he awaited to be provided with the documentation sought from the Second Appellant. By way of introduction, paragraph 14.1 simply states that '***the 2nd Respondent failed to take appropriate measures to ensure that the electoral process in Buwekula South Constituency was conducted under conditions of freedom and fairness when:-***' It does become apparent, therefore, that there was no factual

evidence on record with regard to paragraphs 14.1.15 and related aspects of 14.1.16. The Respondent was clearly on a fishing expedition.

38. In any event, neither the contents of the Declaration of Results forms admitted on the record as Exhibits P7 and P8 and attested to in paragraph 14.1.14 nor the Transmission of Results forms referred to in paragraphs 14.1.15 and 14.1.16 would appear to have formed the basis for the Trial Court's decision on the petition. Rather, the trial judge relied on data from polling stations that had neither been pleaded in the petition nor attested to in the affidavit evidence in support thereof, in deciding the petition as she did. The pleadings aptly illustrate this point.

39. In paragraph 13.1.15 of the petition it is averred that '***contrary to section 50 of the Parliamentary Elections Act, 2005, the 2nd Respondent's presiding officers at Bulima, Kibuye Comm. Center, Nsengwe, Kirumbi P. S, Butayunja (A – M), Kawumula Kayunga Kivera Rwamaboga Bushenya P/S B polling stations made un-uniform entries of votes tallies on the Declaration of Results forms***.' The affidavit evidence in support of that pleading adds to the list of impugned polling stations the following stations – Kijuuya, Kirumbi Pri. Sch, Lwemigo, Buwuniro, Kinyinga A Kalonga Trading Centre (A – M), Budibaga Eden Katoma, Budibaga, Googwa trading centre Kibyamirizi, Kagoma, Kifuufu-Kamusenene, Lukaya, Kawumulo, Nsengwa polling stations. *See the polling stations listed in paragraph 14.1.14 of the Respondent's affidavit.*

40. Only Bulima, Kibuye Comm. Center, Nsengwe, Kirumbi P. S, Butayunja (A – M), Kivera, Rwamaboga and Bushenya P/S B polling stations as pleaded are duly supported by Declaration of Results forms that are included in Exhibit P7, while Kayunga polling station is supported by a Declaration of Results form included in Exhibit P8. Therefore, any contestations in respect of Kijuuya, Lwemigo, Buwuniro, Kinyinga A Kalonga Trading Centre (A – M), Budibaga Eden Katoma, Budibaga, Googwa trading centre Kibyamirizi, Kagoma, Kifuufu-Kamusenene, Lukaya and Kawumulo were not pleaded in the petition but Declaration of Results forms in respect thereof were introduced in the affidavit evidence under the same Exhibit P7. Similarly, any allegations in respect of Kirumbi Primary School polling station

were not pleaded but the Appellant purported to adduce evidence in support thereof by way of a Declaration of Results form included in Exhibit P8.

41. In so far as they pertain to matters that were not pleaded, the Declaration of Results forms in respect of polling stations that were simply introduced under affidavit evidence would be irrelevant to the determination of the petition. In the absence of an amendment to the petition, the fact that the additional polling stations were not pleaded in the petition would render their introduction in the affidavits a clear departure from the Respondent's pleadings. It might perhaps be conceivable that in so far as the Appellants were on notice as to the polling stations in contention since they had been cited in the affidavits, this is an anomaly that an appellate court might disregard. Not so, however, with the departure from those pleadings and affidavits by the trial court in its determination of a matter, as transpired in this case.

42. In arriving at the figure of 2,690 votes as unaccounted for, the Trial Court departs from both the pleadings and the affidavit evidence on record. Of the eleven polling stations considered by the trial judge in arriving at that figure, only Buwumiro, Kayunga, Kagoma and Kibuye Community Centre polling stations were pleaded and/ or alluded to in the Respondent's affidavit evidence. Moreover, it is the Trial Court's finding that the discrepancies in those particular polling stations only ranged between 1 – 7 votes. Even then, Buwumiro and Kagoma polling stations were not pleaded in the petition and the evidence in respect thereof would therefore be irrelevant.

43. It thus becomes abundantly clear that the bulk of votes that make up the figure of 2,690 would have been from polling stations that were never pleaded or even referred to in the affidavits. The net effect of this is that the Appellants were indicted by the Trial Court on the basis of material that they were never put to their defence about. In so far as the electoral processes in those polling stations were never challenged in the Respondent's pleadings, the Appellants were never given a chance to respond to any alleged legal infractions by pleadings and explain them by the presentation of relevant evidence. With the greatest respect, this is a

travesty of justice and clearly flouts the dictates of a fair trial and right to a fair hearing inherent in Article 28(1) of the Constitution.

44. In **Captain Harry Gandy v Caspair Air Charter Ltd (1956) 23 EACA 139**, the purpose of pleadings was espoused as follows:

> The object of pleadings is of course to ensure that both parties shall know what are the points in issue between them so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent.

45. This position is further clarified in **Interfreight Forwarders (U) Ltd v EADB, Civil Appeal No. 33 of 1992** as follows (per Oder, JSC):

> The system of pleadings is necessary in litigation. It operates to define and deliver it with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. .... Thus issues are formed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof of the case so set and covered by the issues framed therein. A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not so set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings. *(my emphasis)*

46. That position was endorsed in the more recent case of **Fangmin v Belex Tours & Travel, Civil Appeal No. 6 of 2013** (Supreme Court), where pleadings were held to '**define and deliver clarity and precision of the real matters in controversy between the parties, upon which they can prepare and deliver their respective cases and upon which the court will be called upon to adjudicate between them**.'

47. Hence, in **Hon. Dr. Margaret Zziwa vs. The Secretary of the East African Community, EACJ Appeal No. 2 of 2017**, the duty upon courts to determine cases within the ambit of the pleadings was espoused as follows:

> It is trite law that parties are bound by their pleadings, that no relief will be granted by a court unless it is founded on the pleadings, and that it is not open to the Court to base a decision on an un-pleaded issue.

48. Abiding the foregoing decisions, I am respectfully unable to uphold a decision by the Trial Court that is clearly premised on a case that was never set up by the Respondent, and therefore the Appellants were never in a position to respond to. This finding directly resolves *Grounds 8, 12* and *15* in the affirmative. Furthermore, in so far as the Respondent fell short on discharging the onus upon him to adduce factual evidence of the alleged non-compliance, the Trial Court erred in shifting the evidential burden to the First Appellant with regard to the allegedly unverified voters discerned from polling stations that were not in contention. Needless to say, the evidential burden in respect of un-pleaded claims could not have shifted to the Appellants. Consequently, *Ground 10* of the Appeal would similarly succeed.

49. In any event, the miscarriage of justice inherent in the indictment of a party unheard would have the effect of unravelling the Trial Court's decision in its entirety. It certainly renders it an exercise in futility for this Court to delve into *Grounds 3, 4* and *13* of the Appeal that are so inextricably interwoven with material from polling stations that were never pleaded by the Respondent.

50. In the result, I find that the Respondent fell short on the onus upon him to establish the 'factual' evidence of his claims of non-compliance as against the Appellants, so as to shift the evidential burden to them to prove their compliance with applicable electoral laws. The evidential burden could not have shifted to the Appellants in the absence of clear and concise pleadings of the nature of the claims against them. To that extent, the Respondent failed to discharge the burden of proof upon him to prove his case as pleaded to the required standard, and cannot be permitted to succeed on a case that he did not plead. I would therefore allow this Appeal, reverse the judgment and orders of the Trial Court and uphold the Second Appellant as the validly elected Member of Parliament for Buwekula South Constituency.

51. Before taking leave of this Appeal, however, I wish to briefly address the issue of hearsay evidence as raised in *Ground 6* thereof. The question of hearsay had

been raised as a point of law in submissions. The trial court *inter alia* rendered itself as follows:

> ***I note that under Order 19 rr 3(2), parts of an affidavit need not necessarily be expunged. Instead the Court may consider awarding costs against a party who files an affidavit with matters of hearsay. I choose therefore to leave the affidavit intact. I will consider Tumwesigye's evidence both the pleadings and in Court as a whole. It will be possible then to determine what amounts to hearsay; once that is done, it can be dealt with as evidence evaluated in line with the CPR and Evidence Act.***

52. It seems to me that the Trial Court's interpretation of Order 19 rule 3(2) of the CPR is, with respect, misconceived. In my judgment, the correct interpretation of that rule would be derived from a proper context of rule (1). Order 19 rule 3(1) categorically restricts affidavits in substantive matters (as opposed to interlocutory applications) to '**such facts as the deponent is able on his or her own knowledge to prove**', that is, facts within the deponent's knowledge. A court faced with an affidavit that offends that rule ought to make a determination as to whether to expunge the entire affidavit or sever the offensive parts thereof. Once a determination of hearsay has been made, then the costs arising from the court's decision shall be defrayed by the court in accordance with Order 19 rule 3(2). I would be most hesitant therefore to adopt the Trial Court's view that the court was at liberty to choose whether to sever the offensive parts or ignore them and condemn the party that had filed the offending affidavit in costs. That does not appear to me to reflect the proper import of Order 19 rule 3(1) and (2) of the CPR.

53. Rather, particularly with specific regard to electoral disputes, I would respectfully abide the approach espoused in **Col (Rtd) Dr. Besigye Kizza v Yoweri Kaguta Museveni & Another** (supra) where affidavits that were wholly based on hearsay were rejected in their entirety, while those that were only partially based on hearsay were admitted but the offensive hearsay evidence was expunged therefrom. It was observed (per Odoki, CJ):

> In the present case, the only method of adducing evidence is by affidavits. Many of them have been drawn up in a hurry to comply with time limits for filing pleading and determining the petition. It would cause great injustice to the parties if all the affidavits

which did not strictly conform to the rules of procedure were rejected. This is an exceptional case (where) all the relevant evidence that is admissible should be received in court. I shall therefore reject those affidavits, which are based on hearsay evidence only. I shall accept affidavits, which contain both admissible and hearsay evidence but reject the parts which are based on hearsay, and only parts which are based on knowledge will be relied upon. As order 17 r 3 (2) provides the costs of affidavits which contain hearsay matters should be borne by the party filing such affidavits.

Conclusion

54. Rule 27 of the Parliamentary Elections (Interim Provisions) Rules gives the High Court discretion in the determination of costs in election petitions. It reads as follows:

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

55. That Rule is instructive on how costs in election petition appeals may similarly be addressed. I am also cognizant of the general rule that costs should follow the event unless the court for good reason decides otherwise. *See section 27(2) of the Civil Procedure Act.*

56. Considering that this Appeal has been determined on the basis of a procedural error occasioned by the Trial Court, I would depart from the general rule on costs and order each party to bear its own costs.

57. The upshot of this judgment is that this Appeal would stand upheld with the following orders:

    I. The judgment and decree of the High Court of Mubende in **Election Petition No. 3 of 2021** is hereby set aside.

    II. Each party to bear its own costs.

I would so order.

Dated and delivered at Kampala this 8th **Day of** 3rd **2022.**

Monica K. Mugenyi

Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CONSOLIDATED ELECTION PETITION APPEALS NOS. 73 AND 74 OF 2021

1. ELECTORAL COMMISSION
2. MUSEVENI WILLIAM::APPELLANTS

VERSUS

TUMWESIGYE FRED::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mubende before Luswata, J. dated the 22nd day of October, 2021 in Election Petition No. 003 of 2021)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE IRENE MULYAGONJA, JA
HON. LADY JUSTICE MONICA MUGENYI, JA

JUDGMENT OF ELIZABETH MUSOKE, JA

I have had the advantage of reading in draft the respective judgments of my learned sisters Mulyagonja and Mugenyi, JJA. In my view, Mugenyi, JA correctly finds that the learned trial Judge based her decision on unpleaded matters and improperly admitted evidence.

Therefore, I agree entirely with the judgment of Mugenyi, JA, and, for the reasons she has given therein, I too would allow the consolidated appeals and make the orders she has proposed. Like Mugenyi, JA, I too, would differ from the opposite conclusions that Mulyagonja, JA reaches in her draft. I only wish to add that the order for the respective parties to bear its own costs is justified because the respondent's Petition was not wholly unmeritorious, and raised issues that required determination by the trial Court.

Accordingly, the Court, by majority decision (Musoke and Mugenyi, JJA; Mulyagonja, JA dissenting), allows the consolidated appeals and makes the following declarations and orders:

a) The judgment and decree of the learned trial Judge is set aside and substituted with an order dismissing the respondent's Petition against the appellants.

b) The election of the 2nd appellant as Member of Parliament for Buwekula South Constituency in Mubende District is upheld.

c) The Court orders that each party shall bear its own costs, both in this Court and in the Court below.

It is so ordered.

Dated at Kampala this ..... day of.....2022.

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Elizabeth Musoke

Justice of Appeal