THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Buteera, DCJ, Bamugemereereire, Mulyagonja, JJA

ELECTION PETITION APPEAL NO. 41 OF 20221

BETWEEN

ARIKO JOHNNY DE WEST::APPELLANT

AND

1. **OMARA YUVENTINE**
2. **THE ELECTORAL COMMISSION::::::::::::::::::::::::::RESPONDENTS**

(Appeal against the decision of Jane Okuo Kajuga, J., dated 26th August 2021 in Soroti Election Petition No 007 of 2021)

JUDGMENT OF THE COURT

Background

The appellant and the 1st respondent participated in the election for the position of district Chairperson for Abim which was held on 20th January 2021. The 2nd respondent returned the 1st respondent as the candidate with the highest number of votes having garnered 14,417 votes. The appellant was the runner up with 4,809 votes. The 2nd respondent declared the 1st respondent as the winner and the results were published in the Uganda Gazette of 12th April 2021.

The appellant was dissatisfied with the results and he filed a petition to challenge the results in the High Court at Soroti on the ground that the 1st respondent was not qualified to stand for the position because he had not

resigned from his employment in the Uganda Peoples' Defence Forces (UPDF. The appellant alleged that the 1st respondent was a serving member of the UPDF at the rank of Captain.

When the matter came up for hearing before the trial judge, counsel for the 1st respondent raised an objection against the petition on a point of law that it was brought under the wrong provision, section 4 (4) of the Parliamentary Elections Act. He contended that the provision did not apply to the 1st respondent who stood for District Chairperson but it applied only to candidates standing for the position of Member of Parliament.

The trial judge found in favour of the 1st respondent. She held that the petition was incurably defective and dismissed it with costs against the appellant. The appellant was aggrieved by the decision and filed an appeal in this court on the following grounds:

1. The learned trial judge erred in law when she struck out the petition on the ground that it was filed under a wrong law, section 4 (4) (a) of the Parliamentary Elections Act, as amended.
2. The learned trial judge erred in law when she held that the petition is incurably defective and could not be cured under Article 126 (2) (e) of the Constitution.
3. The learned trial judge erred in law when she failed to consider that the nomination of the 1st respondent as a candidate for chairperson, Abim District while still allegedly a serving UPDF soldier contravened the Constitution of Uganda and the Local Governments Act despite the citation of the wrong provisions.
4. The learned trial judge erred in law when she misinterpreted the provisions of section 172 of the Local Governments Act.

5. The learned trial judge erred in law when she failed to determine the issue whether the requirement for public officers to resign under the Local Governments Act applies to members of the UPDF.

The appellant then prayed that this appeal be allowed and that the ruling and orders of the trial judge be set aside. He further prayed that this court enters orders that the petition be remitted to the High Court for hearing on its merits and that the costs of this appeal and the preliminary objection in the lower court be met by the respondents. The respondents opposed the appeal.

Representation

At the hearing of the appeal on 31st March 2021, the appellant was represented by learned counsel, Mr Phillip Mwesigwa. Mr Andrew Obamu, learned counsel, appeared for the 1st respondent while the 2nd respondent was represented by Ms Antonia Natukunda.

The parties all filed conferencing notes before the hearing of the petition. The advocates representing each of them prayed that the court adopts the said conferencing notes as the submissions of the parties. The court adopted the submissions and this appeal has been decided on the basis of written submissions only.

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).**

In view of the fact that the petition before the trial court was dismissed on the basis of a preliminary point of law, we have considered the record of the court in as far as it consists of the submissions of counsel on the preliminary points raised there. It is for that reason that the submissions of the parties on the contested point of law in the lower court are referred to at length in this judgment, as well as the pleadings filed in that court.

The submissions of counsel

The appellant's counsel addressed grounds 1 and 2 of the appeal together. He addressed ground 3 and 5 next, each on its own and then ground 4, on its own. Counsel for the 1st respondent addressed grounds 1 and 2 together, then grounds 3 and 4 together. He addressed ground 5 separately. Counsel for the 2nd respondent addressed grounds 1 and 2 together and then ground 5 separately. She did not indicate in her submissions how grounds 3 and 4 were to be dealt with by this court.

We observed that counsel for the 2nd respondent raised two preliminary objections in her submissions as follows:

1. The memorandum and record of appeal were lodged outside the time lines that are prescribed by rule 29 and 30 (b) of the Parliamentary Elections (Election Petitions) Rules.
2. Grounds 3 and 5 of the appeal are contrary to rule 86 (1) of the Judicature Court of Appeal Rules.

We will consider these objections before we resolve the grounds of appeal, if it is still necessary to do so after considering the 1st ground of appeal, in particular.

Submissions on the 1st Preliminary Objection

With regard to the objection that the appeal was filed out of time, counsel for the 2nd respondent submitted that while the decision of the trial court was handed down on 26th August 2021 and the Notice of Appeal filed within the 7 days stipulated by the Election Petition Rules, the memorandum of appeal was filed out of time on the 14th October 2021. She submitted that the record of appeal ought to have been filed within 30 days after filing the memorandum of appeal, before 6th September 2021. Further that the appellant did not apply to extend the time within which to file the memorandum of appeal.

Counsel went on to submit that the memorandum of appeal was filed over one month out of the time within which it ought to have been filed. She relied on the decision of this court in **Ikiror Kevin v Orot Ismael, EPA No 105 of 2016** and **Kasibante Moses v Electoral Commission, Election Petition Application No. 7 of 2012**, for the submission that time lines for the filing of election petitions have been held to be strict by the courts. That in a case where the delay to file the memorandum of appeal was one month, and the record of appeal filed a week out of time, the appellant failed to take a necessary step in the appeal which renders the appeal a nullity.

In reply, counsel for the appellant submitted that it was ironic for counsel for the 2nd respondent to refer to the parameters set in the Parliamentary Elections Act yet the 2nd respondent's counsel objected to the reliance on

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the law relating to Parliamentary Elections in the lower court. He submitted that the correct law for filing election petitions in respect of local government elections is the Judicature (Court of Appeal) Rules. He referred to the decision of this court in **Makatu Augustus v. Wasswa David & Another, EPA No. 73 of 2016** and **Kobwa Herbert v Sebugwawo Tadeo, EPA No 108 of 2016** to support his submissions.

He concluded that the correct provisions to guide the lodging of appeals in this court from the local council election petitions are rules 76 (2), 78 (1) and 83 (1) of the Rules of this court. He prayed that the objection be overruled.

Resolution of the 1st Preliminary Objection

The record of appeal shows that the decision in this matter was handed down by the trial judge on the 26th August 2021. The appellant filed a notice of appeal on the 30th August 2021. He then lodged the memorandum and record of appeal in this court on 14th October 2021.

Section 145 of the LGA provides for appeals from the decisions of the High Court in such matters as follows:

> **145. Appeals.**
>
> **(1) A person aggrieved by the determination of a lower court on hearing an election petition may appeal to the High Court or Court of Appeal against the verdict.**
>
> **(2) The High Court or Court of Appeal in case of a subsequent appeal shall proceed to hear and determine an appeal under this section within three months after the day on which the petition was filed and may, for that purpose, suspend any other matter pending before it.**
>
> **(3) The decision of the Court of Appeal in an appeal under this section shall be final.**

The only period specified in the provision above is the time within which the appeal shall be disposed of which is three months.

This court in **Makatu Agustus** (supra) held that in the absence of specific rules of procedure for filing appeals from decisions of the lower court in local government elections disputes the Rules of this Court shall apply. The same was held in **Kwoba Herbert** (supra). In the latter decision, this court ruled that the Parliamentary Election (Election Petition) Rules do not apply to the filing of appeals in this court from local government election disputes.

The appellant filed his notice of appeal in the High Court on 30th August 2021, 4 days after the decision was handed down and he did so in time. The time specified for filing of appeals in this court in rule 83 (1) of the Rules of this court is 60 days. The appellant therefore lodged his appeal in time because he did so on the 14th October 2021, 45 days after the decision was handed down in the High Court.

We find that the 2nd respondent's first objection to the appeal had no merit and it is hereby overruled.

Submissions on the 2nd Preliminary Objection

In this regard, counsel for the 2nd respondent referred us to rule 86 (1) of the Rules of this Court and submitted that in view of this provision, the appellant had to restrict his grounds on issues that were decided by the lower court. She relied on the decision of this court in **Attorney General v. Florence Baliraine, Court of Appeal Civil Appeal No. 79 of 2003**.

The 2nd respondent's counsel went on to submit that the trial judge did not make any decision on the issues raised in ground 3 and 5 of the

memorandum of appeal. That because the trial court dismissed the appeal on a preliminary objection, it did not matter that the court made no decisions on the points raised in grounds 3 and 5 of the appeal. That in addition, the court specifically declined to address the merits of the case.

Counsel went on to explain that under grounds 3 and 5, the appellant's counsel delved into matters that were not decided by the trial court since they were the merits of the petition that was summarily dismissed. She contended that the appeal had to be restricted to the decision on the preliminary objection which was the point decided by the court. She added that ground 3 and 5 further offended rule 86 of the Rules of this Court in that the appellant failed to state the nature of the order that was sought from this court. She relied on **Katumba Byaruhanga v. Daniel Kiwalabye Musoke, Court of Appeal Civil Appeal No. 02 of 1998** to support her submission.

She continued that the appellant is disingenuously trying to have the merits of the appeal determined by this court on appeal yet this court is not a trial court. She prayed that ground 3 and 5 be struck out for offending rule 86 (1) of the Rules of this Court and for introducing new matters on appeal that were not specifically decided by the trial court.

In reply, counsel for the appellant submitted that grounds 3 and 5 challenge the *ratio decidendi* in the decision of the trial court and are specific to the points that were wrongly decided. He referred us to the decision in **Sukuton Ali v Augustine Kapkwonyongo & 2 Others, Civil Appeal No. 117 of 2012**, where it was held that in order for a ground of appeal to pass the test that it does not offend rule 86 (1) of the Rules of this Court, it has to demonstrate that the appellant is challenging a holding, *ratio decidendi*, and that the grounds specify the points that are

alleged to have been wrongly decided. That in addition, it has to be shown that the grounds will not allow the appellant to go on a fishing expedition to the prejudice of the respondent.

Counsel went on to submit that grounds 3 and 5 do not offend rule 86 (1) of the Rules of this Court because they are specific on what the appellant desires to be investigated/reappraised by this court. That in addition, the grounds do not prejudice the respondent. Further that the orders that are sought from the court are also clear in the memorandum of appeal.

He concluded that in the absence of evidence that the two grounds of appeal are too general or that they are prejudicial to the 2nd respondent and will send the parties on a fishing expedition, grounds 3 and 5 do not offend ruled 86 (1) of the Rules of this Court and ought to be decided by this court. He prayed that the preliminary objection be overruled.

Resolution of the 2nd Preliminary Objection

Rule 86 (1) of the Rules of this Court provides that:

> **(1) A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongfully decided, and the nature of the order which it is proposed to ask the court to make.**

For purposes of our analysis we shall lay out grounds 3 and 5 of the memorandum of appeal again; they were as follows:

> *3.The learned trial judge erred in law when she struck out the petition on the ground that it was filed under a wrong law, section 4 (4) (a) of the Parliamentary Elections Act as amended.*

5. The learned trial judge erred in law when she failed to consider that the nomination of the 1st respondent as a candidate for chairperson, Abim District while still allegedly a serving UPDF soldier contravened the Constitution of Uganda and the Local Governments Act despite the citation of the wrong provisions."

With regard to ground 3, it is clear that the trial judge did indeed strike out the petition for having been filed under section 4 (4) of the Parliamentary Elections Act. The trial judge framed 3 issues, the first of which was whether the petition was brought under the right law. At page 11 of her ruling the trial judge stated thus:

> *"The first issue is accordingly resolved in favour of the respondents.* ***The law under which the petition is brought is not applicable.*** *The citing of many other legislations is the heading of the petition are not central to the issue and cannot independently support the petition."*
>
> ***{Emphasis was supplied}***

It is also our view that the contents of ground 3 were concise and stated the wrong decision that the appellant wanted this court to address in the ruling of the trial judge. We further observed that the remedy that the appellant sought was specifically stated in the memorandum of appeal, in the proposed orders that the appellant sought. He sought to set aside the decision above which led to dismissal of the whole of the petition; and for this court to order that the petition be heard on its merits.

With regard to ground 5, the appellant's complaint is that the trial judge did not address her mind to the main question to be decided in the petition, which was that the alleged infraction of the 1st respondent was contrary to the law: provisions of the Constitution and the LGA. Although the ground does not have a specific finding in the ruling of the trial judge, it refers to the effect of her decision. When she found that the error of citing a wrong

provision in the petition could not be cured, she dismissed the whole of the petition, regardless of the fact that within it, an illegality was pleaded.

We therefore find that ground 5 was a corollary of ground 2 of the petition. It did not introduce any new matter and we deemed it fit to determine it together with ground 2 and all the other grounds, except ground 4; It followed the complaint about the decision of the trial judge's refusal to apply Article 126 (2) (e) of the Constitution to cure the defect and thereafter hear the petition.

We therefore do not think that ground 5 of the appeal, though separate from ground 2, amounted to raising a question that was not decided upon by the trial court. We find that it did not offend rule 86 (1) of the Rules of this Court and the objection is hereby overruled.

Determination of the Appeal

We have considered the submissions of all counsel in this appeal and the authorities that they cited in support of their submissions. We have in addition considered further authorities that were not cited by counsel but which we deemed to be relevant for the determination of the issues raised in the appeal. We did not deem it necessary to reproduce the submissions of counsel in this court here for they were basically a repetition of the submissions in the lower court which we have referred to extensively for they form the record of appeal. However, we do refer to the submissions filed in this court in the determination of the appeal where it is appropriate.

We observed that grounds 1, 2, 3 and 5 are closely related to each other or intertwined. We therefore addressed them first, together. Thereafter we considered ground 4 separately.

Grounds 1, 2, 3 and 5

We note that the appellant brought his petition before the High Court under the provisions of Article 183 (2) (a), 180 (2) (a), 61 (a), (b) and (f) and 62 of the Constitution; section 15 of the Electoral Commission Act; sections **111-115, 138, 139, 141, 142, 143 and 172 of the Local Governments Act (LGA) as amended**; section 4 (4) (a) of the Parliamentary Elections Act, 2005 (sometimes referred to hereinafter as "the PEA"), as amended; and section 16 (2) of the Political Parties and Organisations Act (PPOA).

The respondent objected to the competence of the petition on the ground that the petitioner had no *locus* to bring it under section 4 (4) of the PEA because that provision could only have been invoked by a candidate who lost an election for the position of Member of Parliament (MP). Further that the provision did not apply to officers of the Uganda Peoples' Defence Forces (UPDF).

The respondent's counsel went on to argue his objection with regard to whether an officer of the UPDF is an employee within the meaning of section 4 of the PEA, and whether or not he/she is required to resign from office before he stands for political office. He referred the trial court to the case of **Darlington Sakwa & Another v. Electoral Commission & Others, Constitutional Petition No 8 of 2006**. He submitted that in that case, officers of the UPDF were held not to fall under the provisions of the law by the Constitutional Court, and prayed that the petition be dismissed.

Counsel for the 2nd respondent added that section 172 of the LGA referred to by the petitioner did not apply to the petition because it applies to issues not provided for by the LGA. That the issue of resignation was provided for by section 116 (5) of the LGA and it is the law under which the petition ought to have been filed.

For the 1st respondent, counsel argued that section 172 of the LGA was very clear and could only be resorted to where the LGA is silent. That the reference to the PEA was very wrong. That pursuing the petition under that provision when the LGA prescribes for the filing of petitions rendered the petition incurably defective. That it was wrong for the petition to be filed under section 4 of the PEA, disregarding the specific legislation governing the local government elections. That since the petition was based on non-compliance with section 4 of the PEA, and not the LGA, it ought to be dismissed with costs to the respondents. He prayed for the costs for 2 counsel.

For the petitioner, counsel submitted that section 116 (5) of the LGA does not apply to District Chairpersons and that the relevant provision was section 111 of the LGA. He advanced further arguments about the applicability of Article 183 (2) (a) of the Constitution and section 172 of the LGA, which we did not deemed it necessary to repeat.

He strenuously contended that since the respondent was a public officer, section 4 (4) of the PEA and the Article 80 of the Constitution apply to him. That it was clear from the response to the petition that the respondent did apply to resign from the UPDF. That if it was not necessary for him to do so, he should not have applied to resign at all.

Counsel went on to argue that petitions are not ordinary suits; therefore, there is no need for petitions to disclose a cause of action. That the petition was not brought under the wrong law because the petition was brought under several laws. That it was not under section 116 (LGA) as counsel for the respondent submitted and the laws under which the petition was presented were very clear.

Counsel for the appellant relied on the decision in the case of **Attorney General v Tinyefuza, SCCA No 1 of 1997**, which he said was on all fours with the case before court, in which it was held that the purported resignation by Major Tinyefuza was not effective. He prayed that the preliminary objections be dismissed with costs to the petitioner.

In rejoinder, the respondents' counsel emphasised their submissions on the Preliminary objection; relied heavily on the decision of the Constitutional Court in **Darlington Sakwa's case**; re-echoed the decision of this court in **Bandikubi Bonifacae Musisi & 3 Others v William Tom Serwanga & Electoral Commission**, **EPA 110 of 2016** and contended that the decision in **Tinyefuza's** case (supra) was not proper, though he did not explain what he meant by that. Further that it was not applicable because in that case court did not attempt to interpret the provisions of Article 80 (4) of the Constitution.

He further submitted that the petitioner's case was not brought under section 116 (5) LGA. That there are 2 different causes of action and if court found that section 116 (5) LGA was applicable, then the petitioner would have to bring a fresh case; but as it stood then, the omission not to bring the case under section 116 (5) LGA could not be cured. He emphasised that the PEA, the LGA and Article 80 of the Constitution did not apply to

UPDF officers. He prayed that the preliminary objection be sustained and the petition be dismissed with costs.

In the disposition of the preliminary point of law, the trial judge considered two issues:

i) Whether the petition was brought under the correct law.

ii) Whether the law regarding resignation by public officers intending to run for political office applies to the 1st respondent, an officer of the UPDF.

The judge then laid down and discussed several provisions under which the petition was brought, and then with regard to section 138 LGA she stated thus:

> *"Section 138 (1) Local Governments Act generally provides the remedy for an aggrieved candidate for Chairperson to petition the High Court for an order that a candidate declared as Chairperson of a Local Government Council was not validly elected. I see no issue concerning that."*

She paid no attention at all to section 139 of the LGA, though it was clearly before her in the petition, the subject of the preliminary objection. The trial judge then went on to deal with the substance of the objection raised about citing section 4 (4) (a) of PEA, which provides for resignation of a person who wants to run for the position of Member of Parliament and section 172 of the LGA. The trial judge also considered the question whether the respondent here was required to resign before he could be nominated to stand for the position of District Chairperson. She then ruled at page 11 of her ruling (page 17 of the record of proceedings) as follows:

> *"In the light of the foregoing, I agree with the arguments of the 1st and 2nd respondent that section 116 (5) applies to the election of district Chairpersons.*

It follows therefore that the Local Governments Act has a provision requiring resignation of public officers and officers employed in government when they desire to seek election to a political office. ***I also find that section 116 (5) is the provision under which the petitioner ought to have brought this matter.***

Counsel for the petitioner's argument that this section does not apply to the election of District Chairpersons is an erroneous position not supported by law. I find that section 116 (1) (a) of the Local Governments Act is the only provision that excludes District Chairperson. It deals with the issue of qualifications of members of District Councils. This is understandable as the qualifications for District Chairperson are set out elsewhere in the Act.

I find section 111 (a) of the Local Governments Act not useful for the resolution of the issue before me.

The first issue is accordingly resolved in favour of the respondents. The law under which the petition is brought is not applicable. *The citing of many legislations in the heading of the petition are not central to the issue and cannot independently support the petition.*

Ground 1 of the appeal was that the trial judge erred in law when she struck out the petition on the ground that it was filed under the wrong law, section 4 (4) of the Parliamentary Elections Act, as amended.

Ground 2 was that she erred in law when she held that the petition was incurably defective and could not be cured under Article 126 (2) (e) of the Constitution.

In addressing ground 1, the crux of the appellant's submissions before this court was that the prohibition of citing a wrong law to support a petition is not a creature of statute and is therefore not a fundamental error, because the wrong law can easily be substituted by the right law. Besides the jurisdiction of the High Court to determine the case under section 138 (1) of the LGA would not be interfered with had the trial judge ordered the

insertion of the correct law. Further that the trial judge misunderstood the substance of the appellant's petition which was that the nomination of the 1st respondent was unlawfully done by the 2nd respondent. Her conversion of the substance of the petition to citing of wrong laws was therefore erroneous.

We considered the decision of the trial judge that the petition could not have been brought under section 116 (1) (a) of the LGA which provides for the qualifications of councillors. We found that while it is true that section 116 (1) (a) LGA provides that for a person to qualify for the office of councillor, other than the Chairperson, that person must be a citizen of Uganda and a registered voter, it goes further to provide in clause (5) that:

> **"(5) Under the multiparty political system, a public officer, a person employed in any Government department or agency of the Government, an employee of a local council or an employee of a body in which government has a controlling interest, who wishes to stand for election to a local council office shall resign his or her office at least thirty days before nomination day in accordance with the procedure of the service or employment to which he or she belongs;"**

It is this provision that the trial judge identified as the correct law under which the petition in dispute ought to have been filed. However, the provision above clearly does not provide for the filing of petitions in the High Court of Uganda to challenge the nomination or indeed the election of persons into any office in the local governments. Instead, section 138 of the LGA, under the subheading *"Election Petitions,"* provides as follows:

> **"138. Petition against a declared elected candidate.**
>
> **(1) <u>An aggrieved candidate for chairperson may petition the High Court for an order that a candidate declared elected as chairperson of a local government council was not validly elected</u>.**

(2) A person qualified to petition under subsection (3) who is aggrieved by a declaration of the results of a councillor may petition the chief magistrate's court having jurisdiction in the constituency.

(3) An election petition may be filed by any of the following persons—

(a) a candidate who loses an election; or

(b) a registered voter in the constituency concerned supported by the signatures of not less than five hundred voters registered in the constituency

(4) An election petition shall be filed within fourteen days after the day on which the results of the election has (sic) been notified by the Electoral Commission in the Gazette."

We therefore find that the trial judge misdirected herself on the law applicable when she found and held that section 116 (5) was the *only provision* in the LGA under which the petition ought to have been brought to the High Court.

The second issue that the learned trial judge framed for disposal in her ruling was whether the appellant cited wrong provisions of the law. In order to establish whether wrong provisions were indeed cited by the petitioner/appellant, we must go back to the petition itself.

We observed that though it was erroneously stated therein that the petition was brought under section 4 (4) (a) of the PEA, it was also stated that it was, among others, brought under the provisions of sections 111-115, 138, 139, 141, 142, 143 and 172 of the Local Governments Act, as amended. It was further stated in the petition that it was brought under section 16 (2) of PPOA. Section 138 LGA has been laid out above, verbatim. Section 139 LGA goes on to provide for the grounds for setting aside elections as follows:

139. Grounds for setting aside election.

The election of a candidate as a chairperson or a member of a council shall only be set aside on any of the following grounds if proved to the satisfaction of the court—

(a) that there was failure to conduct the election in accordance with the provisions of this Part of the Act and that the noncompliance and failure affected the result of the election in a substantial manner;

(b) that a person other than the one elected purportedly won the election;

(c) that an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval; or

(d) that the candidate was at the time of his or her election not qualified or was disqualified from election.

{Emphasis supplied}

Sections 138 and 139 of the LGA were clearly the correct provisions for the petitioner to rely upon to bring the petition. Section 138 provides for the procedure to bring the petition, while section 139 provides for the grounds to bring such a petition. The latter is the origin of the causes of action that can be pursued to challenge an election under the LGA. The trial judge therefore erred when she did not consider the applicability of the provisions of the LGA that were clearly before her.

Nonetheless, the appellant also relied upon the provisions of the PEA and the PPOA. The effect of relying on the former must be considered in order to establish whether the decision of the trial judge to dismiss the whole petition was justified.

In paragraph 6 of the petition, it was stated that the facts giving rise to the petition were that the 1st respondent who was a serving army officer on nomination day was unlawfully and wrongly nominated by the 2nd respondent as a candidate for District Chairperson, Abim District. Further

that the said officer of the UPDF had not resigned his position as is required by section 4 (4) (a) of the Parliamentary Election Act, as amended. The appellant attached a copy of his Personal Particulars Report to the petition as **Annexure A**.

The appellant further alleged that at the time of nomination, the 1st respondent was at the rank of Captain and drawing a full monthly salary and allowances. Attached to the petition were copies of the 1st respondent's payslips, as well as his bank statement to show that he was paid as an officer of the UPDF.

In paragraph 6 (V) of the petition, the appellant referred to section 4 (4) of the Parliamentary Elections Act as the law that requires a public officer to resign from office, at least 90 days before the date of nomination. That was clearly an error on the part of counsel for the appellant because the correct provision, as the trial judge found, ought to have been section 116 (5) LGA.

However, the appellant also pleaded in paragraph 6 (VIII) of the petition as follows:

> *"VIII) That between the months of April and September, 2020, the 1st respondent, prior to the general elections, while being a member of the Uganda Peoples' Defence Forces (UPDF) participated in the NRM primary elections/party activities under the Multi-Party Political system, contravening s.16 of the Political Parties and Organisations Act, 2005."*

Section 16 of PPOA, 2005, provides that a member of the UPDF, Uganda Police Force, Uganda Prisons Services or a pubic officer or a traditional cultural leader or a person employed in a company wholly owned by the Government shall not be a founder or promoter or other member of a political party or organisation, hold office in such organisation, engage in

canvassing support for a political party or organisation or a candidate standing for public election sponsored by a political party or organisation. It is also provided that any person who contravenes this provision commits an offence and is liable on conviction to a fine, or imprisonment or both.

It is our well-considered opinion that this too was a valid complaint under section 139 (d) LGA, because if indeed it was proved to be true, the 1st respondent was liable to be disqualified from election as Chairperson of Abim District Local Government Council.

We therefore find that the learned trial judge erred in law when she found that the petition was filed under the wrong law, in spite of the many provisions that were cited at the head of the petition. Ground 1 of the appeal therefore succeeds.

As to whether the petition so filed was incurably defective, we observed that it was indicated at the bottom of the petition in this case that it was drawn and filed by Kob Advocates & Solicitors. The appellant claims no special knowledge of the law, for it is for that reason that he retained Kob Advocates & Solicitors to draft the pleadings in the case for him. It is also the position in this case that the petition was based on some correct provisions of the LGA and the PPOA, but it was also erroneously based on provisions of the PEA.

Regarding the question whether citing the provisions of the PEA made the petition defective, the Supreme Court in **Alcon International v. New Vision Printing & Publishing Co. Ltd & Another, SC Civil Application No. 04 of 2010**, which counsel for the appellant referred us to in his submissions, Okello, JSC sitting as a single justice, on an application for

an injunction in which it was contended that the application was brought under the wrong provision of the Rules of that Court had this to say:

> *"In this connection, while I accept that rule 31 of the Rules of this court gives this court wide general power when dealing with appeals, I am of the opinion that the proper rule to invoke in a case of this type is the inherent power under rule 2 (2) of the Rules of this court and not rule 31.*
>
> *Citing a wrong provision of the law or failure to cite a provision of the law under which a party seeks a redress before court is a technicality which should not obstruct the cause of justice. It can safely be ignored in terms of article 126 (2)(e) of the Constitution."*

The Supreme Court of India considered a similar situation in **J. Kumaradasan Nair & Another v. Iric Sohan & Others, (2009) AIR(SCW) 1921**, where the contention was that a wrong provision of the Limitation Act was cited in proceedings where it was argued that there was condonation of delay. In respect of a contention that the wrong provision of the Act was referred to and so the relief could not be availed, the court held thus:

> *"It is now a well settled principle of law that mentioning of a wrong provision or non-mentioning of any provision of the law would, by itself, not be sufficient to take away the jurisdiction of a court if it is otherwise vested in it in law. <u>While exercising its power, the court will merely consider whether it has the source to exercise such power or not. The court will not apply the beneficent provisions like section 5 and 14 of the Limitation Act in a pedantic manner.</u> When the provisions are meant to apply and in fact found to be applicable to the facts and circumstances of a case, in our opinion there is no reason why the court will refuse to apply the same only because a wrong provision has been mentioned. ..."*

In the case now before us, the trial judge clearly had the jurisdiction to entertain the petition which was brought under, among others, the correct provisions stated as sections 138 and 139 of the LGA and section 16 of the PPOA. There was no reason why the trial judge laid the provisions of

the LGA cited aside as having no issues and ignored the provisions of the PPOA, and went on to extensively consider the wrong provisions of the PEA after which she struck out the whole petition with costs.

In **Boyes v. Gathure [1969] EA 385**, the Court of Appeal for East Africa considered circumstances where wrong procedure was adopted by the trial court but where the application to strike out an application that was brought by chamber summons instead of originating summons, was refused by the trial court. On an appeal to nullify or set those proceedings aside on that account, Newbold, P observed and held, at page 389 B, C and D, as follows:

> *"This was clearly wrong, the error being emphasised by the fact that the summons purports to be in a miscellaneous civil suit which did not, in fact exist. Did this erroneous procedure result in the whole proceedings being a nullity as is urged by Mr Rose? In my view the concept of treating something which has been done or acted upon as a nullity is a concept which should be used with the greatest of caution. May I repeat some words I used in* ***Nanjibhai Prabhudas & Co. Ltd. v. The Standard Bank Ltd [1958] EA 670****. I said in that case (at p. 683 B):*
>
> > *The court should not treat any incorrect act as a nullity, with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature."*

In the case now before court, we find that the appellant's counsel's citing of many more provisions than he ought, especially section 4 (4) of the Parliamentary Elections Act, and arguing that it applied to the petition was a procedural error on his part. And in that regard, it is now a settled principle that the mistakes of counsel should not be visited on the client. The Supreme Court in **Banco Arabe Espanol v. Bank of Uganda, SCCA No. 8 of 1998,** relied on the decision of the Court of Appeal for Eastern Africa in **Shabir Din v. Ram Prakash Anand (1955) Vol. 12, 48** to support

that finding. In the latter decision the East African Court, in respect of an application to set aside an *ex parte* judgment for non-appearance of the plaintiff through the negligence of his advocate held that:

> *"The mistake or misunderstanding of the plaintiff's legal advisors, even though negligent, may be accepted as a proper ground for granting relief under Order 9 rule 20, aforesaid, the discretion of the court being perfectly free and the words 'sufficient cause' not being comparable or synonymous with 'special grounds.' Whether the grounds for granting relief will be accepted, depends on the facts of the particular case, it being neither possible nor desirable to indicate in detail the manner in which discretion should be exercised."*

The Supreme Court in **Banco Arabe Espanol** (supra) then found on the basis of this case, among others, in circumstances where the appellant's failure to pay a loan due to the mistaken belief of counsel that payment of cash in that case was not acceptable was sufficient ground to set aside the order of this court, when it held thus:

> *"On the basis of the authorities referred to above, I consider that the present case where the error (on the) part of counsel in the form of a mistaken belief that a bank guarantee would suffice, should not be visited on the appellant, especially in view of the fact that the appellant showed an intention to bring cash. In the circumstances the failure to deposit money within the prescribed time due to such error on the part of the appellant's counsel would amount to sufficient cause for purposes of setting aside the dismissal of the suit under Order 23 rule 2 (2) of the Civil Procedure Rules."*

We find that the principle above applies to the case at hand in equal measure where counsel for the appellant drafted pleadings in which he sated all the allegations that made up a wrong complained by the appellant, but relied on the provisions of section 4 (4) of the PEA, instead of section 116 (5) of the LGA to support his client's allegations against the 1st respondent.

The trial judge therefore erred when she did not consider the correct provisions cited and instead focused on the one wrong provision that was erroneously cited by counsel for the appellant. The decision, without any question in our minds, was prejudicial to the appellant's rights to pursue his complaints against the respondents.

With regard to Ground 2, the complaint that the trial judge erred when she held that the petition was *incurably defective* and could not be cured under Article 126 (2) (e) of the Constitution, it is imperative that we consider the reasoning of the trial judge on the applicability of Article 126 (2) (e) of the Constitution before she came to this conclusion.

At page 12-13 of her ruling (page 18-19 of the record of appeal) the trial judge stated and found thus:

> *"The 2nd respondent contends that section 4 (4) (a) of the Parliamentary Elections Act and section 116 (5) of the Local Governments Act raise two distinct causes of action. Whereas the first sets ninety (90) days as the least period within which a public officer standing for Member of Parliament would have to resign, the latter prescribes 30 days for those wishing to vie for local council offices.*
>
> *She submitted that failure of the petitioner to file under the right law was fatal as an amendment would not suffice to correct the error. The pleadings were all made in respect of the wrong law.*
>
> *Counsel for the petitioner did not submit in respect of this ground, neither did he make a request for amendment if court did not find in his favour regarding the first issue. He insisted that he had filed under the right law and invited court to overrule the preliminary objection.*
>
> ...
>
> *In this case, can the failure to bring the petition under the proper law be regarded as a mere matter of form or technicality remediable under Article 126 (2) (e) of the Constitution? I think not.*
>
> *I am convinced that quoting the wrong section of the law in this case cannot be cured simply by inserting the proper law as the character or substance*

of the petition before the court would be affected significantly. For comparison, I hereby reproduce the two sections.

...

In my considered view the two provisions are different. ***If it was the case that there were exactly the same, then the error in this case could have been cured through amendment.*** *Court may have been inclined to employ Article 126 (2) (e) of the Constitution to this matter. In this case, I am convinced the matter before court may have been substantially different if the requirement for resignation within 30 days was what was pleaded.*

...

In the circumstances of this case, I find it impossible to exercise my discretion in any other way than to find the petition ***incurably defective****. An election petition brought under the wrong law cannot stand.* ***Ikiror versus Orot, Election Petition 8/2016****."*

While it is true that the appellant's counsel referred to the wrong provision when they drafted the petition, the trial judge too referred to the wrong provision when she struck it out for having been filed under the wrong law. But in order to establish whether it was necessary to amend the petition to plead section 116 (5) LGA instead of section 4 (4) PEA in order to cure the error, as the trial judge proposed in her ruling, it is to the petition that we must go.

In paragraphs 3, 5 and 6 (II), (III), (IV), (V), (VII) and (VIII) of the petition, respectively, the appellant stated thus:

3. Your petitioner stated that the 1st respondent did not qualify to contest for the position of the District Chairperson when he was nominated by the 2nd respondent on the 28th September 2020 for noncompliance with the mandatory provisions of law that requires public officers to resign from public office ninety days before nomination day.

6. The facts giving rise to the petition are as follows:

...

II) That the 1st respondent who was a serving army officer on the day of nomination, was unlawfully and or wrongfully nominated on the 28th September 2020 by the 2nd respondent as a candidate for the District Chairperson for Abim District

III) That the said officer of the UPDF (1st respondent) **had not resigned his position as required by s. 4 (4) (a) of the Parliamentary Elections Act 2005 as amended (Attached is a copy of the Personal Particulars Report marked A).**

IV) That at the time of nomination the 1st respondent was a serving Army Officer at the rank of Captain and drawing a full salary and allowances (attached are copies of pay slips for the months of July, August, and September 2020 marked 'B', 'C', 'D' respectively and a bank statement marked 'E').

V) That the said nomination of the 1st respondent **contravenes s. 4 (4) (a) of the Parliamentary Elections Act, 2005 as amended which requires a public officer, in the case of a General Election to resign at least ninety days before nomination.**

...

VIII) That between the months of April and September, 2020, the 1st Respondent prior to the general elections, while being a member of the Uganda People's defence Forces (UPDF) participated in the NRM primary Election/Party Activities under Multi-Party Political system contravening s.16 of the Political Parties and Organisations Act.

...

7. That your humble petitioner contends that the wrongful and unlawful nomination of the 1st respondent by the 2nd respondent was/is illegal as the 1st respondent was not qualified to be nominated since he had not resigned from the UPDF, ninety (90) days prior to his nomination as a candidate for the District Chairperson for Abim District.

{Emphasis was supplied}

The appellant then prayed for a declaration that 1st respondent was not qualified for nomination for the position of District Chairperson as he had not resigned from the UPDF within the time required under the law and therefore, the said nomination was invalid, null and void.

It has already been established that the petition was properly brought under section 138 and 139 of the LGA, as well as section 16 of the PPOA. It is also clear that the court had the jurisdiction to entertain the petition brought under those three provisions. What then remains to be established is whether it was necessary at all to amend paragraph 6 (III) to replace section s. 4 (4) of the PEA with section 116 (5) LGA, and whether such an amendment would change the nature of the petition substantially, since the PEA provides for 90 days before nomination, while the LGA provides for 30 days of resignation before the event.

The learned trial judge relied on the decision of this court in **Ikiror v. Orot** (supra) to support the conclusion that a petition filed under the wrong law is a nullity. However, the circumstances of that case can be distinguished from those in the instant case because in the former, the gist of the complaint was that while the PEA requires election petitions to be filed in the High Court under the provisions of sections 60 and 61 of the Act, the appellant in that case lodged her petition under Article 86 of the Constitution and section 86 of the PEA. With respect to such a petition, this court found and held thus:

> *"By contrast, under section 86 (3) and (4) PEA the Attorney General or a petitioner can pursue a petition involving a question as to membership of someone in Parliament on grounds other than those that one has to rely upon by lodging an election Petition under Part X (SS60 to 67) PEA.*
>
> *Our so holding is in conforming with the contextual interpretation and application of the Constitution, particularly Articles 80 and 86 of the Constitution and Part X (SS 60 to 67) as well as XIII (SS 84 to 101) PEA to the effect that an Election Petition challenging an election must be determined with speed so as to establish certainty in governance of the country. This is in contrast to a petition over a set question regarding membership to Parliament of an individual member that may arise when the rest or the whole Parliament is in place and actually most likely, when that concerned member is also still in Parliament until the question is determined*

by Court, with the right of appeal up to the Supreme Court. Thus in this latter case covered by section 86 (3) and (4) PEA time is less of essence compared to the determination of an Election Petition. Certainty of Parliament is also already established after the general elections and where thereafter, election petitions are expeditiously determined."

The court then concluded that the petition in issue, which was for a declaration, six (6) months after the declaration of the results that the respondent was the duly elected MP for Kanyum Constituency because he did not possess valid 'O' and 'A' Level qualifications, was incompetent because it was filed out of the time provided for by the PEA, and under the wrong provisions of the same law and the Constitution.

The circumstances of this case are different from those in **Kevin Ikiror's case** (supra) The petition was correctly filed in the High Court under sections 138 and 139 of the LGA, as well as section 16 of the PPOA. The petition was also filed within the time specified by the PEA. It sought to challenge the election on grounds under section 189 (d) LGA that the 1st respondent was at the time of his nomination not qualified or was disqualified from election to the office of District Chairperson. Unfortunately, instead of citing section 116 (5) of LGA in the body of the petition as the provision that he contravened, counsel for the appellant referred to section 4 (4) PEA.

Contrary to what the trial judge found and held, we are of the view that section 189 (d) established the cause of action upon which the petition was brought. It is also our well-considered opinion that a cause of action is not founded upon the law *per se*, though it may arise therefrom; rather it is founded on the facts that are pleaded in the suit/petition.

The Supreme Court in **Major General David Tinyefuza v. Attorney General, Constitutional Appeal No 1 of 1997**, per Wambuzi CJ, as he then was, relied on the following statement drawn from Mulla on the Code of Civil Procedure, Volume 1, 14th Edition for the definition of a cause of action. It is stated therein that:

> *"'A cause of action' means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support the right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some facts done by the defendant since in the absence of such an act, no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence needed to prove the facts but every fact necessary to the plaintiff to prove to enable the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. In other words, a bundle of facts which it is necessary for the plaintiff to prove in order to succeed in the suit. But it has no relation whatsoever to the defence which may be set up by the defendant, nor does it depend on the character of the relief prayed for by the plaintiff. It is a media upon which the plaintiff asks the court to arrive at a conclusion in his favour. The cause of action must be antecedent to the institution of the suit."*

Mulenga, JSC (RIP) in his rendition of the definition rendered a simpler definition at page 11 of his judgment which would better explain whether the appellant's pleading in this case put up a viable and therefore triable cause of action, as follows:

> *"A cause of action in simple language is a happening or circumstances which in law, give rise to a right to sue or take out action in court for redress or a remedy. Clause (3) of Article 137 sets out several happenings and circumstances which give rise to a right to petition the Constitutional Court for a declaration. The cause of action under that clause is therefore not constituted by an "allegation" made by the petition as Mr Lule submitted. Rather, it is constituted by the fact of such happening as for example under (3) (b) the commission of an act which contravened a provision of the*

constitution, or under clause (3) (a) the enactment or existence of an Act of Parliament whose provisions are inconsistent with any provision of the Constitution. ***If a petition to the Constitutional Court contains an allegation of the existence of any such happening or circumstance, then it discloses a cause of action which should be tried and determined by the Court****."*

{Emphasis supplied}

We find that the appellant established by his pleadings that there were causes of action for him to challenge the election of the 1st respondent into office. These were pleaded in paragraphs 6(II), (IV) and (VIII) and 7, as well as in his prayer for a declaration that illegal acts were done by the respondent prior to polling day.

We are also of the view that the most important paragraph of the petition that the trial judge ought to have considered before striking it out was paragraph 7 in which the appellant specifically stated that the facts that he alleged against the respondents amounted to illegalities. This is because it is trite law that illegality once brought to the attention of court overrides all questions of pleadings, including any admissions thereon; **Makula International Ltd. v. His Eminence Cardinal Nsubuga, Court of Appeal Civil Appeal No. 4 of 1998**. The court in that case relied on the decision in **Phillips v. Copping (1935)1 KB 15 CA, at 21,** in which Scrutton LJ stated thus:

> *"It is the duty of the court when asked to give judgment which is contrary to a statute to take the point, although the litigants may not take it."*

In the case now before us, the appellant stated facts alleging that actions were taken by the respondents that were contrary to the law. Though his advocates cited a wrong law in respect of one of them, it was incumbent upon the court to examine the facts that were raised, though the wrong

provisions for one of the acts alleged was cited in the pleadings. This is because though the wrong provision was referred to in the petition, the facts stated therein still remained. And as it was observed by the Supreme Court of India in **J. Kumaradasan Nair & Another (supra)** the court was not bound to apply the provisions of section 4 (4) of the PEA *"in a pedantic manner."* Rather, the court was duty bound to establish whether it had the source to exercise the power over the facts alleged in the petition, whether the correct laws were cited in the petition or not.

It is therefore our view that the court had to go on and hear the case in order to establish whether the illegal acts were indeed carried out by the appellant or not. This is most important because the allegation related to two statutes; if the court would not consider the breach of the PEA, or the relevant law under which the breach fell, at the very least it ought to have considered whether the respondent's actions were in breach of section 16 of the PPOA, which was clearly referred to in the petition.

The rational for the proposed decision was laid down in **Sitenda Sebalu v. Sam K. Njuba & Another, Supreme Court EPA 26 of 2007**, in which while concluding its determination of whether a petition in respect of which notice to bring a petition that was not served on the respondents in time was a nullity, and finding that it was not, the court observed that:

> *"It cannot be gainsaid that the purpose and intention of the legislature in setting up an elaborate system for judicial inquiry into alleged electoral malpractices, and for setting aside election results found from such inquiry to be flawed on defined grounds, was to ensure, equally in the public interest, that such allegations are subjected to fair trial and determined on merit.*
>
> *In our view, the only way the two complementary interests could be balanced, was to reserve discretion in ensuring that one purpose is not achieved at the expense or to the prejudice of the other."*

As to whether the trial judge ought to have cured the defect in the pleadings under Article 126 (2) (e) of the Constitution, it has been contended for the respondent that this is a new ground raised on appeal, because the appellant did not apply to amend the pleading. Instead, Counsel for the appellant insisted that the petition was brought under the correct provisions of the law.

The trial judge ruled that she could not exercise her discretion to employ Article 126 (2) (e) of the Constitution because the provisions under section 4 (4) PEA and section 116 (5) LGA, specified different periods of time of resignation before nomination, the former requiring 90 days while the latter required 30 days.

However, following submissions on the applicability of section 4 (4) PEA, and section 116 (5) LGA, the trial judge found that section 116 (5) was applicable to the 1st respondent in this case, not section 4 (4) PEA as was pleaded in the petition. Having found so, the trial judge confirmed that there was still indeed an illegality alleged against the respondent in the electoral process on the record before her. In the face of such allegations on the record, it was incumbent upon the trial judge to order the appellant's counsel to amend the pleadings, in the interests of justice and in the spirit of Article 126 (2) (e) of the Constitution, and then proceed to hear the petition on its merits.

That she did not do so, the trial judge sacrificed substantive justice at the altar of technicalities in the pleadings. She chose to decide the petition on the basis of a technicality in the pleadings, and not the substance of the appellant's allegations that illegalities were committed by the 1st and 2nd respondents now before this court.

We say so because it was also stated in the petition, paragraphs X to XIV that the appellant lodged a complaint to the 2nd respondent about absence of qualification, or disqualification of the 1st respondent to stand for the office, copy of which he attached to his petition. He further complained that no decision was communicated to him by the 2nd appellant about his complaint. All he had to show was an invitation to attend a hearing. In his rejoinder, he goes on to allege that the respondent did not produce a discharge certificate to prove that he was indeed discharged and so he did not qualify to be nominated and to stand for the office.

We then conclude, that in the face of the alleged illegalities, the trial judge had no option but to dispose of the petition on its merits. She erred when she did not apply the provisions of Article 126 (2) of the Constitution to facilitate the disposal of the petition before he on its merits. Ground 3 and 5 of the appeal are thereby also disposed of in favour of the appellant.

Ground 4

This was the complaint that the trial judge erred when she misinterpreted the provisions of section 172 of the Local Governments Act. In her resolution of the applicability of this provision, the trial judge cautiously reproduced the provision which provides as follows:

> **172. Applications of laws relating to parliamentary elections.**
>
> **For any issue not provided for under this Part of the Act, the parliamentary elections law in force for the time being shall apply with such modifications as are deemed necessary.**

At page 9 of the ruling (page 15 of the record of proceedings) after laying down the provision above the learned trial judge stated thus:

"Local Council elections are governed by Part X of thereof titled "LOCAL GOVERNMENT COUNCIL ELECTIONS" and provides for the powers of the Electoral Commission to conduct these elections, matters relating to returning officers, the voters' register, demarcation of electoral areas, qualifications of candidates, communication of results, polling and voting procedures etc. It also covers the nomination of candidates for local government elections.

The wording of section 172 is clear and unambiguous. I am convinced that the power to apply the Presidential Elections Act or the Parliamentary Elections Act to Local Council elections is restricted to scenarios where there is a lacuna in the latter. It is also a preserve of the Electoral Commission."

The trial judge then relied upon the decision of this court in the case of **Bandikubi & 3 Others** (supra) where it was held that:

*"**<u>On the ordinary reading of the provisions of section 172</u>** it is clear that they are only empowering the Electoral Commission and not any other body to use the Presidential Elections Act and the Parliamentary Elections Act in force to fill any lacunae in the election of local Councils with such modifications as the Electoral Commission may deem necessary. Clearly these provisions only assist the Electoral Commission as it is managing elections for local councils and cannot be used as authority for imposing fees imposed by the Parliamentary Elections Act.*

{Emphasis supplied}

While it is true that section 172 LGA did not apply to the case at hand for there were specific provisions that applied to the situation, we are unable to agree with the interpretation of the provision that was advanced by the trial judge though it was based on a decision of this court. We find it necessary to distinguish the circumstances in which section 172 of the Local Government's Act was interpreted by this court in **Bandikubi's case**

(supra) because it was an interpretation that was limited to specific provisions that were considered in that case.

We agree with the trial judge that section 172 LGA falls under Part X of the LGA which provides for various aspects of Local Government Council Elections. We also observed that the provision falls under the heading under that part which provides for *"General provisions for elections."* Included under Part X, which is referred to in section 172 LGA, are sections 138 and 139 LGA which provide for challenging elections in court once they are concluded.

It is therefore our view that though this court held in **Bandikubi's case** that the application of section 172 LGA is the preserve of the Electoral Commission, its reach seems to be wider than that. This is because not all circumstances that arise under Part X LGA could have been envisaged by the legislature so that each and every one of them is provided for. It is for that reason that it was deemed appropriate to provide that where there is no applicable provision in Part X of the LGA, the party or organ requiring to fill in the gap in the law has recourse to the Parliamentary Elections Act or the Presidential Elections Act.

Remedies

The petitioner prayed that this court sets aside the decision and orders of the trial judge and orders that **Soroti EP No 007 of 2021** be returned to the High Court for it to be tried on its merits, with orders as to costs in this appeal and the court below on the preliminary objections.

The conclusion in this petition is that it succeeds and we make the following orders:

1. The order of the trial judge dismissing the petition with costs is hereby set aside.
2. Election Petition No 007 of 2021 shall be returned to the High Court for hearing on its merits before a different judge.
3. The costs of the appeal shall be borne by the respondents.

It is so ordered.

Dated at Kampala this 14th day of July 2022.

Richard Buteera
DEPUTY CHIEF JUSTICE

Catherine Bamugemereire
JUSTICE OF APPEAL

Irene Mulyagonja
JUSTICE OF APPEAL