

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

**ELECTION PETITION APPEAL NO. 77 OF 2021**

5     *(Arising out of Election Petition 05 of 2021 on dated 29<sup>th</sup> October, 2021 delivered by the Hon. Mr. Justice Byaruhanga Jesse Ruyema)*

**MUJUNGU JENNIFER K=====APPELLANT**

**V**

10     **1) TUMWINE ANNE MARY**  
**2) THE ELECTORAL COMMISSION=====RESPONDENTS**

**CORAM**

**HON. MR. JUSTICE GEOFFREY KIRYABWIRE, J.A.**

15     **HON. MR. JUSTICE STEPHEN MUSOTA, J.A.**

**HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, J.A.**

## JUDGMENT OF THE COURT

### INTRODUCTION

The Appellant appealed to this court against the Judgment of Byaruhanga Jesse Ruggyema J rendered on 29<sup>th</sup> October 2021 where he found that the first Respondent was validly elected as the Woman Representative for Ntoroko District.

### BACKGROUND

The Appellant, the first Respondent and one Karungi Monica were the candidates in the Election for Woman Representative to Parliament for Ntoroko District held on 14<sup>th</sup> January 2021. From the Record of Appeal prior to the Parliamentary election, both the Appellant and the first Respondent contested for the National Resistance Movement (NRM) position for flag bearer for Woman Representative to Parliament for Ntoroko District. In this regard, the first Respondent was the successful flag bearer. The Appellant therefore decided to contest the election as an Independent candidate. On the national polling day, the first Respondent polled **9,787** votes while the Appellant polled **9,679** and the Karungi Monica polled **2,276** votes. The margin between the first Respondent and Appellant was **108** votes. The Appellant being dissatisfied with results of the Election filed Election Petition No. 05 of 2021 at the High Court of Uganda at Fort Portal to nullify the Election. The Petitioner (now Appellant) sought Orders to set aside the declared results of the Election for the following reasons; the

first Respondent was unlawfully nominated, secondly, that the election was conducted in non-compliance with the electoral laws and principles and finally, that the first Respondent had committed election offences personally and by his or her agents. The High Court at Fort Portal dismissed the Petition hence this Appeal.

The Appellant being dissatisfied with the Decision of the Trial Court filed this Appeal on the following grounds: -

**1. The learned Trial Judge erred in law and fact when he made a finding that the 17 impugned affidavits in support of the first Respondent's answer to the Petition complied with the provisions of sections 2 and 3 of the Illiterates Protection Act hence causing a miscarriage of Justice.**

**2. The learned trial Judge failed to properly evaluate the evidence and erred in law and fact and came to the wrong conclusion that the Appellant did not prove that elections were not carried out in compliance with the law and that the results were not affected in a substantial manner hence causing a miscarriage of Justice.**

**3. The learned trial Judge erred in law and fact when he failed to properly evaluate all the evidence before him thereby erroneously coming to the following conclusions that the Respondent had not committed electoral offences to wit: -**

**a) Distribution of food stuffs and second hand shoes and clothes at Kanara Seed Secondary School.**

Groom



b) Distributions of Tarpaulins and plates in the villages of Kyamutema and Nyabikungu I, II, III.

c) Contribution of Ugx 50,000/= to Agape Church in Kagaghiro village and donation of 4 bulls to soldiers in Kacwamba barracks.

4. The learned trial Judge erred in law and fact in holding that the first Respondent was at the time of her election qualified for election as a Member of Parliament hence leading to a miscarriage of Justice.

5. The learned trial Judge erred in law and fact in awarding a certificate to three counsel upon dismissing the Petition with costs thereby occasioning a miscarriage of Justice.

## REPRESENTATIONS

At the hearing of the Appeal, Mr. James Byamukama, Mr. Severino Twinobusingye and Mr. Jude Byamukama appeared for the Appellant, Mr. Thomas Ochaya and Mr. Esawo Isingoma appeared for the first Respondent and Mr. Sabiiti Erick appeared for the second Respondent.

The parties with the permission of the Court adopted their filed written submissions as their legal arguments.

## DUTY OF APPELLATE COURT ON APPEAL

This is a final Appellate Court in parliamentary election matters. Section 66 (3) of the Parliamentary Elections Act provides that;

*“(3) Notwithstanding S. 6 of The Judicature Act, the decisions*



of the Court of Appeal pertaining to parliamentary elections  
petitions shall be final”

The role of this court as a last appellate court in hearing appeals  
from the High Court is laid down under **Rule 30(1) of the**  
5 **Judicature (Court of Appeal Rules) Directions** which provides  
that;

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

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

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

This Court is therefore obliged to re-appraise the inferences of fact  
drawn by the trial court.

15 Furthermore, it is now settled procedural law and indeed this Court  
has held in a number of cases that in carrying out its duty in  
election appeals, the Court has to caution itself on the nature of  
evidence adduced at the trial Court by affidavit where cross  
examination may not have taken place to test the veracity of  
20 testimony. Equally, when evaluating the evidence at the trial Court  
regard must be had to the fact that in elections contests evidence  
may be partisan with witnesses having a tendency towards  
supporting their candidates. This may result in false or exaggerated

Crom

evidence which may be subjective. Therefore, this situation calls upon the Court to ensure that the veracity of the evidence is tested against independent and neutral sources as well.

### **Burden and Standard of proof**

5 The burden of proof is cast on the Petitioner to prove the assertions to the satisfaction of the court that the alleged irregularities or malpractices or non-compliance with the provisions and principles laid down in the relevant electoral laws were or is committed and that this affected the results of the election in a substantive manner  
10 in the election petition. Furthermore, the evidence must be cogent, strong, and credible. The standard of proof is on a balance of probabilities. In the matter of **Paul Mwiru v Hon. Igeme Nabeta & Others**-Election Petition No. 06 of 2011 this court held: -

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

Furthermore, in the **Masiko Winifred Komuhangi and Babihuga J. Winnie** Election Petition Appeal No. 09 of 2006 L. E. M. Mukasa Kikonyogo (Deputy Chief Justice as she then was) held: -



Crom



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  
66  
67  
68  
69  
70  
71  
72  
73  
74  
75  
76  
77  
78  
79  
80  
81  
82  
83  
84  
85  
86  
87  
88  
89  
90  
91  
92  
93  
94  
95  
96  
97  
98  
99  
100  
101  
102  
103  
104  
105  
106  
107  
108  
109  
110  
111  
112  
113  
114  
115  
116  
117  
118  
119  
120  
121  
122  
123  
124  
125  
126  
127  
128  
129  
130  
131  
132  
133  
134  
135  
136  
137  
138  
139  
140  
141  
142  
143  
144  
145  
146  
147  
148  
149  
150  
151  
152  
153  
154  
155  
156  
157  
158  
159  
160  
161  
162  
163  
164  
165  
166  
167  
168  
169  
170  
171  
172  
173  
174  
175  
176  
177  
178  
179  
180  
181  
182  
183  
184  
185  
186  
187  
188  
189  
190  
191  
192  
193  
194  
195  
196  
197  
198  
199  
200  
201  
202  
203  
204  
205  
206  
207  
208  
209  
210  
211  
212  
213  
214  
215  
216  
217  
218  
219  
220  
221  
222  
223  
224  
225  
226  
227  
228  
229  
230  
231  
232  
233  
234  
235  
236  
237  
238  
239  
240  
241  
242  
243  
244  
245  
246  
247  
248  
249  
250  
251  
252  
253  
254  
255  
256  
257  
258  
259  
260  
261  
262  
263  
264  
265  
266  
267  
268  
269  
270  
271  
272  
273  
274  
275  
276  
277  
278  
279  
280  
281  
282  
283  
284  
285  
286  
287  
288  
289  
290  
291  
292  
293  
294  
295  
296  
297  
298  
299  
300  
301  
302  
303  
304  
305  
306  
307  
308  
309  
310  
311  
312  
313  
314  
315  
316  
317  
318  
319  
320  
321  
322  
323  
324  
325  
326  
327  
328  
329  
330  
331  
332  
333  
334  
335  
336  
337  
338  
339  
340  
341  
342  
343  
344  
345  
346  
347  
348  
349  
350  
351  
352  
353  
354  
355  
356  
357  
358  
359  
360  
361  
362  
363  
364  
365  
366  
367  
368  
369  
370  
371  
372  
373  
374  
375  
376  
377  
378  
379  
380  
381  
382  
383  
384  
385  
386  
387  
388  
389  
390  
391  
392  
393  
394  
395  
396  
397  
398  
399  
400  
401  
402  
403  
404  
405  
406  
407  
408  
409  
410  
411  
412  
413  
414  
415  
416  
417  
418  
419  
420  
421  
422  
423  
424  
425  
426  
427  
428  
429  
430  
431  
432  
433  
434  
435  
436  
437  
438  
439  
440  
441  
442  
443  
444  
445  
446  
447  
448  
449  
450  
451  
452  
453  
454  
455  
456  
457  
458  
459  
460  
461  
462  
463  
464  
465  
466  
467  
468  
469  
470  
471  
472  
473  
474  
475  
476  
477  
478  
479  
480  
481  
482  
483  
484  
485  
486  
487  
488  
489  
490  
491  
492  
493  
494  
495  
496  
497  
498  
499  
500  
501  
502  
503  
504  
505  
506  
507  
508  
509  
510  
511  
512  
513  
514  
515  
516  
517  
518  
519  
520  
521  
522  
523  
524  
525  
526  
527  
528  
529  
530  
531  
532  
533  
534  
535  
536  
537  
538  
539  
540  
541  
542  
543  
544  
545  
546  
547  
548  
549  
550  
551  
552  
553  
554  
555  
556  
557  
558  
559  
560  
561  
562  
563  
564  
565  
566  
567  
568  
569  
570  
571  
572  
573  
574  
575  
576  
577  
578  
579  
580  
581  
582  
583  
584  
585  
586  
587  
588  
589  
590  
591  
592  
593  
594  
595  
596  
597  
598  
599  
600  
601  
602  
603  
604  
605  
606  
607  
608  
609  
610  
611  
612  
613  
614  
615  
616  
617  
618  
619  
620  
621  
622  
623  
624  
625  
626  
627  
628  
629  
630  
631  
632  
633  
634  
635  
636  
637  
638  
639  
640  
641  
642  
643  
644  
645  
646  
647  
648  
649  
650  
651  
652  
653  
654  
655  
656  
657  
658  
659  
660  
661  
662  
663  
664  
665  
666  
667  
668  
669  
670  
671  
672  
673  
674  
675  
676  
677  
678  
679  
680  
681  
682  
683  
684  
685  
686  
687  
688  
689  
690  
691  
692  
693  
694  
695  
696  
697  
698  
699  
700  
701  
702  
703  
704  
705  
706  
707  
708  
709  
710  
711  
712  
713  
714  
715  
716  
717  
718  
719  
720  
721  
722  
723  
724  
725  
726  
727  
728  
729  
730  
731  
732  
733  
734  
735  
736  
737  
738  
739  
740  
741  
742  
743  
744  
745  
746  
747  
748  
749  
750  
751  
752  
753  
754  
755  
756  
757  
758  
759  
760  
761  
762  
763  
764  
765  
766  
767  
768  
769  
770  
771  
772  
773  
774  
775  
776  
777  
778  
779  
780  
781  
782  
783  
784  
785  
786  
787  
788  
789  
790  
791  
792  
793  
794  
795  
796  
797  
798  
799  
800  
801  
802  
803  
804  
805  
806  
807  
808  
809  
810  
811  
812  
813  
814  
815  
816  
817  
818  
819  
820  
821  
822  
823  
824  
825  
826  
827  
828  
829  
830  
831  
832  
833  
834  
835  
836  
837  
838  
839  
840  
841  
842  
843  
844  
845  
846  
847  
848  
849  
850  
851  
852  
853  
854  
855  
856  
857  
858  
859  
860  
861  
862  
863  
864  
865  
866  
867  
868  
869  
870  
871  
872  
873  
874  
875  
876  
877  
878  
879  
880  
881  
882  
883  
884  
885  
886  
887  
888  
889  
890  
891  
892  
893  
894  
895  
896  
897  
898  
899  
900  
901  
902  
903  
904  
905  
906  
907  
908  
909  
910  
911  
912  
913  
914  
915  
916  
917  
918  
919  
920  
921  
922  
923  
924  
925  
926  
927  
928  
929  
930  
931  
932  
933  
934  
935  
936  
937  
938  
939  
940  
941  
942  
943  
944  
945  
946  
947  
948  
949  
950  
951  
952  
953  
954  
955  
956  
957  
958  
959  
960  
961  
962  
963  
964  
965  
966  
967  
968  
969  
970  
971  
972  
973  
974  
975  
976  
977  
978  
979  
980  
981  
982  
983  
984  
985  
986  
987  
988  
989  
990  
991  
992  
993  
994  
995  
996  
997  
998  
999  
1000

“...It is now well settled that the present legislative formulation of section 62 (3) Parliamentary Elections Act requires that **the court trying an election petition under the Act will be satisfied if the allegation/ground in the petition is proved on a balance of probabilities although higher than in ordinary civil cases. This is because an election petition is of great importance both to the individuals concerned and the nation at large.** An authority for that observation is the case of **Bater v Bater** (1950) 2 ALLER 458. See also **Sarah Bireete and Another v Bernadette Bigirwa** and Electoral Commission, Election Petition Appeal No. 13 of 2002 (unreported). A petitioner has a duty to adduce credible or cogent evidence to prove his allegation at the required standard of proof.” (Emphasis Ours)

With the above position of the law in mind, we shall proceed to resolve the grounds of Appeal in this Election Petition Appeal.

Counsel for the Appellant proposed to address the grounds of Appeal in the following order; Grounds four (and the application for its amendment), then Grounds one, two, three and five.

#### **Application for Amendment of Ground 4**

Counsel for the Appellant sought leave of court (under Rule 45 of the Rules of this court) to amend the memorandum of Appeal. He submitted that the copy of the memorandum was filed and served on counsel for the Respondent. The amended Memorandum of Appeal has a re-phrased ground four which reads: -



Crom



***The learned trial Judge erred in law and fact in holding that the first Respondent was at the time of her election qualified for election as a member of parliament hence leading to a miscarriage of justice.***

5 **First Respondent's Submissions on the Application**

Counsel for the first Respondent opposed the Appellant's Application to amend her memorandum of Appeal because the altered ground of Appeal sought to introduce an entirely new ground of Appeal.

10 He argued that the matter introduced by the ground of Appeal was not interrogated by the trial court and thus the first Respondent would be prejudiced by it.

**Second Respondent's submissions on the Application**

15 Counsel for the second Respondent also opposed the Appellant's Application to amend the fourth ground of the Memorandum of Appeal.

20 He submitted that the altered ground of Appeal sought to introduce a new ground of appeal which did not strictly conform to the matters that were before the trial court. He further argued that one can only amend grounds of Appeal within the time stipulated to file the Memorandum of Appeal.

## **Court's Findings**

The proposed amendment seeks to alter the fourth ground of the Memorandum of Appeal filed on 12<sup>th</sup> November which reads: -

5        *"...The learned trial Judge erred in law and fact in holding that the first Respondent was at the time of her election qualified for election as a Member of Parliament hence leading to a miscarriage of justice..."*

The proposed alteration reads: -

10        *"...The learned trial Judge erred in holding that the first Respondent was duly and validly nominated despite the anomalies on her nomination paper..."*

The first Prayer in the Memorandum of Appeal which previously read as follows: -

15        *"...The Judgment and decision of the learned trial Judge be set aside and be substituted with the prayers in the Petition..."*

is proposed to be altered to read as follows: -

20        *"...The election of the first Respondent be set aside, the Appellant be declared winner of the election for Woman MP Ntoroko District or in the alternative, a bye-election be ordered for Woman Member of Parliament for Ntoroko District..."*

This Court under Rule 45, of the Rules of this Court, has the power to hear and determine an Application for leave to amend a

CROM

document. These Applications may be made either formally or by way of an oral Application.

A memorandum of Appeal is a pleading like any other and the principles that apply to the amendment of pleadings also apply to memoranda of Appeal. [See **Uhuru Highway Ltd v Central Bank of Kenya** (200)1EA 314(COA K)]

In the case of **Mulwooza and Brothers v N. Shah and Co. Ltd** Supreme Court Civil Appeal No. 26 of 2010 the Justices of the Supreme Court in the lead Judgment of Tumwesigye JSC Held: -

10 “...

*Order 6 Rule 19 of the Civil Procedure Rules states:*

***A court may, at any stage of the proceedings, allow either party to alter or amend his or her pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.”***

20 In the case of **Eastern Bakery v Castelino** (1958) E.A 461 Sir Kenneth O'Connor stated:

*Amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and ... there is no injustice if the other side can be compensated by costs ... the court will not refuse to allow an*



amendment simply because it introduces a new case.... but there is no power to enable one distinct cause of action to be substituted for another ... the court will refuse leave to amend where the amendment would change the action into one of a substantially different character... or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g. by depriving him of a defence of limitation...”

10 The Supreme Court further held: -

“...This is I think the correct statement of the law on amendments to pleadings. Amendments are allowed by courts so that the real question in controversy between the parties is determined and justice is administered without undue regard to technicalities in accordance with **Article 126(2) (e) of the Constitution**. Therefore, if a plaintiff applies for leave to amend his pleadings, courts should in the interest of promoting justice, freely allow him to do so unless this would cause an injustice to the opposite party which cannot be compensated for by an award of costs, or unless the amendment would introduce a distinct cause of action in place of the original cause.

The question in this case, therefore, is whether the Respondent's proposed amendment substitutes an entirely different new cause of action from the original or whether the amendment would cause injustice to the appellant.”

We find that ground 4 does not in substance change the cause of action since qualification for elections is one of the things that are considered if a candidate is to be validly nominated. Our conclusion is that the two Grounds of the Appeal are in fact similar and the Respondent will not be prejudiced in any way by the proposed amendment. Secondly, we also find that the change in the prayers of the Appellant equally does not prejudice the Respondents as it relates to reliefs which may or may not be granted.

We will therefore allow the Amendment.

**Ground 4: The learned Trial Judge erred in law and fact in holding that the first Respondent was duly nominated despite the anomalies on her nomination paper.**

**Appellant's submissions**

Counsel for the Appellant submitted that the nomination form of the first Respondent had signatures reflected against the names of Muthahinga Bahamwithi Ben and Asiimwe Patrick that allegedly did not belong to the two persons but rather belonged to other persons whose names had been crossed out on the form. These other persons are named as Kahuma James and Bonabana Vicky.

He further submitted that it was probable that Muthahinga Bahamwithi Ben and Asiimwe Patrick did not consent to their names being included on the first Respondent's nomination papers.





He also submitted that the first Respondent did not discharge her evidential burden of proving to whom the signatures belonged to of the two people. He submitted that it was the duty of the second Respondent to confirm the veracity and authenticity of the nomination paper.

Counsel for the Appellant submitted that the anomalies of the First Respondent's nomination violate Section 61(1) (a) of the Parliamentary Elections Act which provides that an election can be set aside where there is failure to comply with the law and principles of an election.

Counsel for the Appellant also faulted that the Second Respondent for not cross-checking the names and signatures of registered voters under item 7 and 8 as mandated under section 11(1) (c) of the Parliamentary Elections Act. He argued that the second Respondent's official ought to have countersigned against the crossed out names.

He further submitted that the Application for additional evidence shows that by the records held by the Electoral Commission and the National Identification and Registration Authority the signatures on the nomination papers did not belong to the new inserted nominees but rather to the original cancelled out names.

Counsel for Appellant submitted that the effect of an invalid nomination was to set aside the election. He relied on the case of **Kananura John Bosco v The Independent Electoral Commission**





**& Anor**; EPA No. 100 of 2016. He argued that the first Respondent's candidature was illegal and her purported win therefore had no legal effect. He submitted that once an illegality is brought to the attention of court, it should not be sanctioned by the court of law.

5 He relied on the case of **Makula International Ltd v Cardinal Emmanuel Nsubuga** (1982) [HCB]1.

### **First Respondent's Submissions**

In Reply, counsel for the First Respondent began his submissions by submitting that the Appellant had abandoned contesting the  
10 lower court's findings on the variation of names on the first Respondent's nomination forms and on her academic qualifications. He submitted that the Appellant's contestation was solely about the anomalies that were present on the first Respondent's nomination paper.

15 He nonetheless submitted that the trial Judge was correct to find that the Appellant did not present sufficient evidence regarding the contestation as to the persons who signed as the signatures of seventh and eighth nominees on the Nomination paper.

20 Secondly, counsel for the first Respondent submitted that the Appellant had filed an Application to admit new evidence which should be dismissed for the following reasons. First, that while the Appellant was aware of the said anomaly in the nomination paper he did not move court to verify the anomaly. Secondly, the



Crom

Appellant at the trial Court chose not to cross-examine the first Respondent in respect to the said signatures.

He further submitted that the new evidence was not of any probative value towards proving as to whose signatures appeared against the seventh and eighth nominees on the Nomination Paper or that they did not belong to the people whose names were substituted for those that were struck out.

### **Second Respondent's Submissions**

Counsel for the second Respondent submitted that the Appellant introduced a new Ground of Appeal which fundamentally amended her pleadings in the lower court. He argued that nowhere did the Appellant plead the existence of anomalies on the nomination paper for the first Respondent. He submitted that parties are supposed to be bound by their pleadings.

Secondly, counsel for the Second Respondent submitted that the issue offends Section 15 of the Parliamentary Elections Act and Article 61 (1) of the Constitution of the Republic of Uganda which provides that as pre-polling complaint which ought to have been dealt with before the election date. He relied on the case of **Kasirye Zzimula v Bazigatirwawo Kibuuka Francis Amooti & Anor** Election Petition Appeal No. 01 of 2018 for this proposition.

Thirdly, counsel for the second Respondent submitted that the evidence intended to be adduced by the Appellant deprived the Respondents an opportunity to have been rebutted.



COM



Counsel for the Respondent prayed that we find that this ground has no merit and dismiss the Appeal.

### **Court's findings and decision**

We have carefully considered the submissions of the various parties to this Appeal and the legal authorities provided to us for which we are grateful.

The issue for determination in this ground relates to alleged anomalies on the nomination paper of the first Respondent. The Appellant submitted that the said anomalies in the first Respondent's nomination papers amounted to non-compliance with the provisions of the Parliamentary Elections Act relating to elections which as a result can lead to setting aside the election.

On page 95 of the supplementary Record of Appeal is a list of the registered voters who are supporting the nomination of the candidate for parliamentary election by signing on the nomination form. Number 7 and Number 8 of the list has the names of Kahuma James and Bonebana Vicky. These names were subsequently crossed out and replaced with the names of Muthahinga Bahamwithi Ben and Asiimwe Patrick.

Counsel for the Appellant has submitted that the signatures against the new names belong to the people who originally signed the form but had their names crossed out. This was because there was no countersigning against the new names inserted on the form. Counsel for the Respondent submitted that the trial Judge correctly

Crom



concluded that the Appellant did not present sufficient evidence regarding the anomalies in the names.

The trial Judge held as follows with regard to the first Respondent's nomination paper: -

5 *“It is true that the names of Jamali, Kahuma James and Bonabana Vicky were crossed and replaced by or the correct names inserted with their corresponding signatures. No evidence was led by the petitioner that the owners of the correct names signed before the crossings or corrections were made as counsel for the petitioner*  
10 *wants this court to believe. My understanding is that wrong names had been written and were corrected by way of crossing and the correct names were inserted and their respective owners signed accordingly. Any correction on a form per se is not usually a critical issue. It simply means a mistake was made and the presiding officer*  
15 *corrected the error; **Ngoma Ngime v E.C & Anor**, E.P No. 11 of 2012”*

In our view, this ground raises an issue to do with pre-election issues. We have had the opportunity to address this issue in the matter of **Nandagire Christine Ndiwalana v Katushabe Ruth** EPP  
20 No.05 of 2021. For ease of Reference we shall restate our position on the matter as here under:-

*“That this court should make a distinction between Article 61(1) (f) and 64 (1) of the Constitution and section 1 of the Electoral Commission Act and section 15(a) and (b) of the Parliamentary*



Coom

Elections Act 2005 which governs the forum and determination of pre-elections complaint. After elections are held and results declared a reasonable complaint should be about conduct of the election not against an earlier segment of the process per **Ongole Michael v Electoral Commission and Anor**, Election Petition Appeal No.08 of 2006...”

We therefore found that the issue of eligibility of a candidate for nomination should be resolved before elections and any aggrieved party who fails to do so, should be estopped. This principle of estoppel is grounded in equity. It is also what the law provides for a more efficient and early management of the electoral process; before the electorate make their choice of a leader.

We are further fortified to make the above finding by reason of another Decision in the case of **Akol Ellen Odeke v Okodel Umar** EPA No 06 of 2020 where Court held that : -

“...unlimited original Jurisdiction” conferred upon the High court by Article 139(1) of the Constitution is first and foremost subject to Article 61(1) (f) of the Constitution. The import of this is that the mandate to hear and determine election complaints arising before and during polling as a “court” of first instance is vested in the Electoral Commission.”

We therefore conclude that the Appellant is estopped from bringing up issues of eligibility of a candidate after elections have been held. This Ground therefore fails.





1        |  
On the issue of the Application for additional evidence, since we  
have already found that the Appellant had an opportunity to  
challenge the nomination form under section 15 of the  
Parliamentary Elections Act but did not; this application stands  
5 moot. It is accordingly struck out.

**Ground one: The learned Trial Judge erred in law and fact when  
he made a finding that the 17 impugned affidavits in support of  
the 1<sup>st</sup> Respondent's answer to the Petition complied with the  
provisions of Sections 2 and 3 of the Illiterates Protection Act  
10 hence causing a miscarriage of Justice.**

### **Appellant's Submissions**

Counsel for the Appellant faulted the trial Judge for finding that  
even though there was noncompliance with sections 2 and 3 of the  
Illiterates' Protection Act the substance of the law was complied  
15 with. Counsel however submitted that Sections 2 and 3 of the  
Illiterate Protection Act were couched in Mandatory terms.

He argued that the seventeen affidavits did not comply with section  
2 and 3 of the Illiterates Protection Act. This was because matters  
required to be complied with must be evident on the face of the  
20 document. He submitted that the seventeen affidavits on their face  
did not portray the writer's name and his/her address and the  
certification that the writer had specific instructions from the  
Illiterate deponents.



1  
He further submitted that the compliance with the Illiterate's Protection Act was a matter of substance rather than form which could not be cured by Section 43 of the Interpretation Act. He referred us to the case of **Mugema Peter v Mudiobole Abedi**  
5 **Nasser** EPA No. 0016 of 2016. He argued that the wording "*drawn and filed by K & K Advocates*" did not fit within the import of Section 3 of the illiterates Protection Act.

He referred us to Ghanaian Authority (**Abed Nortey v African Institute of Journalism and communication & ors**) where the  
10 Supreme Court of Ghana held that without strict fulfillment of Section 4 of the Ghanaian Illiterates Protection Ordinance Cap 262 (which is in pari material with section 3 of the Ugandan Illiterates Protection Act) any document allegedly executed by an illiterate person had no probative value and was for all intents and purposes  
15 invalid.

Counsel for the Appellant distinguished the case of **Hon. Nakate Segujja Lilian Segujja v The Electoral Commission** EPA No.17 & 21 of 2016 that was relied upon by the trial Judge from the current case by submitting that the **Nakate case** (Supra) was only  
20 concerned with the form of certificate of an interpreter.

Counsel for the Appellant concluded his submissions by praying that this court finds that preparation and translation with regard to affidavits of Illiterates deponents are two different things and one cannot be held to suffice for the other.





### **First Respondent's submissions**

Counsel for the first Respondent submitted that the Appellant wrongly stated that the affidavit did not bear a jurat at all or the name of the writer of the document. He submitted that all the 17  
5 impugned affidavits bore the name of either, Chambange Hellen, Atuhaire Susan or Mutegeki Brain as the persons who were translating to the deponent from various local Languages to English.

He further submitted that the fact that the name of the drafting law  
10 firm K&K Advocates appears at the bottom of the document under the statement "*drawn and filed by*" followed by the law firm's address amounts to satisfaction of the requirement under S. 2 and S. 3 of the Illiterates Protection act.

In the alternative, counsel for the first Respondent submitted that  
15 the foregoing requirements speak to form rather than substance.

### **Second Respondent's Submissions**

Counsel for the second Respondent did not make any submission on this ground.

### **Court's findings and Decision.**

20 The complaint in this ground is that seventeen of the first Respondent's affidavits did not comply with the mandatory requirements of Section 2 and 3 of the Illiterates Protection Act. This was because the translators of the affidavits to the illiterates



CROW

1        1  
did not write their true and full address as mandated by the  
illiterates Protection Act. The Only address that was given was that  
of the law firm that drafted the document. It was submitted that  
this address did not fit within the import of Section 2 and 3 of the  
5 Illiterates Protection Act.

Section 3 of the Illiterates Protection Act provides as follows: -

**“3. Verification of documents written for illiterates**

10 *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  
15 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...”*

Section 3 of the Illiterate Protection Act, enjoins any person who  
writes a document for or at the request or on behalf of an illiterate  
person to write in the jurat of the said document his/her true and  
20 full address.

In our view this section requires that a person instructed to write  
the document by another person that what is so written fully and  
correctly represents his/her instructions and further states that the  
document so written was read over and explained to the person so



giving the instructions to translate and that he/she appeared to have understood it.

Section 1 of the Oaths Act [Cap] 19 further provides as follows: -

“... ”

5 **Oaths to be taken**

*The oaths which shall be taken as occasion shall demand shall be the oaths set out in the First Schedule to this Act.*

*Form B*

*Form of jurat (where a third person has read the affidavit to deponent)*

10

Sworn at \_\_\_\_\_ in the district of \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, before me, and I certify that this affidavit was read over in my presence to the deponent he (or she) being blind or illiterate and the nature and contents of the exhibits referred to in the affidavit explained to him (or her) in the \_\_\_\_\_ language. The deponent appeared perfectly to understand the same and made his (or her) mark (or signature) thereto in my presence.

15

*Commissioner for Oaths*

20

----- ...”

With reference to Section 3 of the Illiterate Protection Act, the impugned seventeen affidavits have the certification of translation at the end of each of affidavits which reads as follows: -

5 *“...I Atuhair Susan state that I understand the English language and Rutooro language well and that I have truly and distinctly and audibly read and translated the contents of this affidavit to Balikighamba James, In Rutooro Language and he clearly understood the contents of the said affidavit before she signed the same or affixed her right –hand thumb print...”*

10 The trial Judge in regard to this matter held as follows: -

15 *“...In this case, as I have already observed each of the impugned affidavits bear the full name and address of the drafting firm and the full name of the translator although not necessarily that they appear in the Jurat, but they appear on the document. One has to look at the document/affidavit. At the bottom, after the translator has made his/her affirmation, it bore the full name of the firm that drafted and filed the document. It is my view that this full name of the firm and address suffice for the requirements of section 2 and 3 of the IPA as the address thereon is also shared by the translator...”*

20 He concluded his findings by holding that while there may not have been full compliance with Sections 2 and 3 of the Illiterates Protection Act but the substance of the law was complied with. He relied on the case of **Nanjibhai Prabhudas & Co. Ltd v Standard Bank Ltd (1968) EA 670**, for the proposition that the courts





should not treat any incorrect act as a nullity, unless the incorrect act is of a fundamental nature.

We shall take a moment to review what the courts have held with regard to affidavit evidence.

5 In **Kasala Growers Cooperative Society v Kakooza Jonathan and Kalemera Edson SCCA No.19 of 2010**, the court held as follows: -

“I do agree with what this court had stated in **Banco Arabe Espanal - vs - BOU, Civil Appeal No. 8 of 1998, that;**

10 “- - - - a general trend is 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 courts should administer substantive justice without undue regard to technicalities Rules of Procedure should be used as  
15 handmaiden of justice but not to defeat it.”

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

25 In **Ngoma Ngime v E.C and Hon. Winnie Byanyima Election Petition Appeal No.11 of 2002** the Appellant made affidavits in a manner where a third party commissioned them. The Court of

Appeal rejected those affidavits for not complying with the provisions of the illiterates Protection Act. The court had this to say with regard to the said affidavit evidence: -

*“...It is trite law that evidence in the petitions is by way of affidavits.*

5 *It is therefore very important that the affidavit evidence which is the examination in chief of the witness and which is read in open court should be properly taken or recorded with the seriousness it deserves in terms of earnest and sincerity just like the way oral evidence is recorded...”*

10 In the case of **Mugema Peter v Mudiobole Abedi Nasser** EPA No. 30 of 2011 the case involved affidavits of witnesses which among other things did not have a certificate of translation, yet the deponents according to the evidence, were not conversant with the English language in which the affidavits were drafted in. This court  
15 held: -

*“...The evidence of the Commissioner for Oaths, Oluge Richard, who handled the affidavits, was to the effect that .... though not bearing certificates of translation, the contents, in the affidavits were first translated into Lusoga before the deponent signed. He also  
20 administered an oath/ affirmation to each deponent before signing.”*

The Court further held;

*“The rest of the complaints such as lack of a jurat or certificates of translations are procedural transgressions and cannot prevent this court from administering substantive justice. I therefore find that the*



affidavits in question constituted valid evidence and the trial judge was right to rely on those affidavits that he chose to rely on to reach the conclusions that he arrived at.”

In the above case there was evidence that the Commissioner for Oaths who validated that the affidavits were first translated in Lusoga before the deponents who were illiterates signed them.

In **Mugema Peter v Mudiobole Abedi Nasser** Election Petition Appeal No. 016 of 2016. There were 23 affidavits alleged not to have been procured in accordance with the law.

The court held as follows: -

“... ”

*The law on the preparation of affidavit evidence is purposed to preserve the sanctity of this specie of evidence. As such, it is important that the law is strictly complied with to avoid defeating the spirit of that law. In the instant case, the impugned affidavits violated Section 3 of the Protection of illiterates Act. The 23 affidavits did not clearly show who drafted them but instead reflected that they were translated by one Lubaale Jimmy. It is our strong view that “preparation” and “translation are two different things and one cannot be held to suffice for the other.”*

The court further held that the law on affidavit evidence should be adhered to without hoping that he who violates it may find refuge under Article 126 (2) (e) of the Constitution. In the **Mugema Peter Case** (supra) the trial court acknowledged that the affidavits were

not drafted in the right manner. The distinction between the **Mugema case** and the case at hand is that in the **Mugema case** (Supra) there was no evidence to prove that the affidavits were drafted at the instruction of the deponents, whereas in this case the query is that the address of the translators was not given.

Our conclusion is that the failure to give the address of the translator makes the affidavits more of a defect than the failure to comply with the statutory laws. We take the view that the translator can be traced through the law firm that had instruction to draw and file pleadings on behalf of the first Respondent. In any event a look at the Appellants submissions, one would get the impression that the trial Judge did not scrutinize the seventeen impugned affidavits and apply them against the applicable law; which is not true. At page 17 of the Judgment (line 47 forward) the trial Judge struck out the three affidavits of Kobugabe Lilian, Biira Harriet and Kyomuhendo Cosbert as offending Section 5 and 6 of the Oaths Act.

We therefore do not find merit in ground I of the Appeal.

**Ground 2: The learned trial Judge failed to properly evaluate the evidence erred in law and fact and came to the wrong conclusion that the Appellant did not prove that elections were not carried out in compliance with the law and that the results were not affected in a substantial manner hence causing a miscarriage of Justice.**



1

**Appellant's submissions**

Counsel for the Appellant submitted that the trial Judge erred in law and fact when he held that the Appellant did not adduce sufficient evidence to show that unregistered military personnel  
5 voted at the polling station of Kacwamba.

He submitted that the Appellant produced a total of ten witnesses whose evidence was that there was ballot stuffing at Kacwamba polling station actuated by connivance between the first Respondent and her agents and the military personnel.

10 He argued that the evidence of the affidavits proved the fact that the first Respondent connived with the presiding officer under the shield of military personnel to facilitate ballot stuffing and multiple voting.

Counsel for the Appellant submitted that the trial Judge ignored the  
15 evidence of Asa Kimomi Tumwine. His evidence showed that the first Respondent had promised him money for facilitating ballot stuffing and multiple voting at Kacwamba Barracks polling station.

Counsel for the Appellant submitted that Appellant had adduced evidence of credible witnesses whereas the first Respondent  
20 adduced evidence of witnesses who were not credible because they merely denied the commission of the acts. He argued that mere denials were not sufficient defenses.

He specifically referred us to the affidavits of Rugamba Daniel Rwatooro Muhammad and Bisanga Emmanuel who deponed that

there were two voting lines one for the military and one for the other locals. He argued that this reinforced the averment that soldiers were ordered to execute mischievous acts.

Counsel for the Appellant prayed that this court finds that the voting at Kacwamba Mosque polling station was marred with irregularities and nullify the results in respect of that polling station for being qualitatively devoid of merit.

### **First Respondent's submissions**

Counsel for the first Respondent submitted that even though the Appellant did not submit on the allegations of inclusion of non – residents of Kacwamba /cell on the voters' Register he would submit on it.

He submitted that the Appellant's evidence was not probative nor relevant to the question of whether or not residents of Kacwamba Cell were included on the voter's register. He argued that the list that was provided by the deponents only indicated the name, date of birth and voter's number. It did not show how the persons were residents of another area. Secondly, he argued that the list of those people who were dead did not have death certificates to validate their claim of death.

In regard to the allegation that Kacwamba Mosque Polling Station was taken over by Military Personnel, counsel for the first Respondent submitted that the Appellant's evidence was not cogent because it was partisan evidence which required corroboration.



He argued that Biira Roset was an agent of the Appellant and therefore partisan. Secondly, he submitted that the evidence of Magezi Deogratus was also unreliable since he claimed to be illiterate yet he purported to write a letter in English without interpretation.

5 Furthermore, counsel for the first Respondent submitted that the allegations raised by the Appellant were rebutted by credible witnesses. He submitted that all the witnesses of the first respondent testified that the voting went on peacefully throughout the day with civilians and military voting in two distinct lines.

10 With regard to the allegations of Ballot stuffing and Multiple Voting at Kacwamba Mosque Polling Station counsel for the first Respondent submitted that the trial Judge rightly held that it had not been proved by the Appellant.

15 He submitted that to prove ballot stuffing and multiple voting it was important to show that the number of ballots cast at a particular polling station was not consistent with the number of ballots stated to have been issued to that polling station by the returning officer.

### **Second Respondent's Submissions**

20 Counsel for the second Respondent submitted that a petitioner in an election Petition must prove that there was non-compliance with the provisions of the act. He argued that the Petitioner must also show that the result of the election was affected in a substantial manner.



## **Court's findings and Decision**

The complaint in this ground is mainly that there was an invasion of Kacwamba Mosque polling station by military personnel who allegedly ordered the switching off the Biometric machines (BVVK) used to verify voters, intimidated voters, carried out ballot stuffing and multiple voting in favour of the first Respondent. It is therefore the case for the Appellant that the election *inter alia* should be set aside.

Looking at the scope of the allegations in this Ground, we find that the arguments go further than just noncompliance with the electoral law but go further to cite the possible commission of electoral offences as well. The starting point to address this Ground would be to recall the relevant law relating to setting aside elections.

Section 61 of the Parliamentary Elections Act provides: -

“...

### **61. Grounds for setting aside election**

(1) The election of a candidate as a member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court—

(a) non-compliance with the provisions of this Act relating to elections, if the court is satisfied that there has been failure to conduct the election in accordance with the principles laid down in



those provisions and that the non-compliance and the failure affected the result of the election in a substantial manner;

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

(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 for election as a member of Parliament.

(2) Where an election is set aside, then, subject to section 63, a fresh election shall be held as if it were a by-election in accordance with section 3.

(3) Any ground specified in subsection (1) shall be proved on the basis of a balance of probabilities...”

In his Judgment, the trial Judge found that the claims of ballot stuffing and multiple voting were unreliable. He based his finding on the fact that declaration of results Forms (DRF) for Kacwamba Mosque were certified by endorsement of the Petitioner’s own agents. He also preferred the evidence of Bahemuka Moses (the Presiding Officer for the said polling station) who generally testified that the impugned elections were smooth and without incident to the testimonies of Baguma Kasirinji (the operator of the Biometric machines) and Magezi Degratius (the LC 1 Chairman for the area)

Cornu

that the elections were disrupted by some army officers. We will re-examine these affidavits and others in detail.

We will start with the affidavit accompanying the Answer to the Petition by the Second Respondent deponed by Mr Charles Joel Mugenyi the Returning Officer for Ntoroko Electoral District dated 5 24<sup>th</sup> March 2021. Mr Mugenyi (at para 10) deponed that there were no complaints and or reports of ballot stuffing, multiple voting that occurred at Kacwamba mosque polling station. He Further deponed (at para 13) that the military did not take over the polling station 10 and that such allegations were utterly false, ridiculous and an afterthought. He further deponed (at para 15) that the alleged letter of complaint of the 19<sup>th</sup> January 2021 by Hon. Rwemulikya Ibanda the MP elect (Independent) for Ntoroko County was: -

15 *“...an underhand and illicit work of the Petitioner assembled to fortify a seemingly vexatious and frivolous claim...”*

There is also the evidence of Bahemuka Moses who was the presiding officer of Kacwamba Mosque polling station. His testimony was that he was in full control of the polling station and military personnel did not take over the polling station, nor did they 20 intimidate voters. He also testified that the military personnel did not switch off the Biometric machine to allow multiple voting. He denied that he received a letter of complaint as to the conduct of the elections from one Biira Roset. He further denied the Petitioner’s agents were coerced to sign the declaration forms.



On the other hand, the evidence of Baguma Kasirinji who was appointed as a polling official to operate the biometric machine shows that military personnel from Kacwamba Barracks switched off the biometric machine.

5 We shall reproduce some averments in his affidavit for clarity: -

10 *“4. That later in the afternoon at about 1.00pm, the army officials, commanding officer Noel Muhwezi and political commissioner Dennis Kakuru came from the military Barracks located in Kacwamba and approached me and the presiding officer, ordering me to switch off the biometric machine.*

*5. That the candidates’ polling agents including those of the petitioner at the Kacwamba Mosque Polling station and I were ordered to keep to a distance from voting area, were intimidated and threatened and we had to do what they wanted us to do.*

15 *6. That the presiding officer was told to tick any voter in the register so that the soldiers can vote in any way they wanted. And I heard them commanding all the soldiers to vote Hon. Tumwine Anne.*

20 *7. That I witnessed and saw a number of military men, obtain more than one ballot paper and ticked them and continued to vote and cast ballot papers into the ballot boxes several times, without any interference and or intervention from the presiding officer, who at all times just kept watching...”*



He further testified that he also wrote a letter dated 15<sup>th</sup> January 2021 to the Chairman of the Electoral Commission to report these electoral malpractices. Paragraphs 2 and 3 of that letter are of particular interest when he wrote that:-

5     “...On the 14<sup>th</sup> January, 2021 during the Presidential/Parliamentary Elections, voting started well with the local residents using the Biometric Machine (BVVK), however, in the afternoon the army officials, commanding officer Noel Muhwezi and political commissar Dennis Kakuru came and approached me and the presiding officer,  
10     ordering me to switch off the BVVK Machine and told the presiding officer to tick any voter in the Register so that the soldiers can vote in any way they wanted. We were intimidated and we had to do what they wanted.

15     I therefore wish to distance myself from the results of that Polling Station and request the Electoral Commission to disregard those results because all the soldiers that voted were not in the Register and most of them did multiple voting that is why they refused to use the Biometric Machine (BVVK) yet it was well functioning...”

20     This was an attempt to contradict the evidence of Bahemuka Moses the Presiding officer.

We will now re-evaluate the evidence of Magezi Deogratus. He was the LC 1 chairperson of Kacwamba Mosque Polling station. He also testified that there was a “military takeover” at Kacwamba polling station.




There is a letter dated 19<sup>th</sup> January, 2021 written by Hon. Rwemulikya Ibanda the MP elect (Independent) for Ntoroko County to the Chairperson of the Electoral Commission. He started his letter by commending the Electoral Commission for the work that they did that enabled him to be elected as an MP for Ntoroko District. On the other hand, he also complains that the military personnel invaded the polling station. He wrote: -

*“...Sir however, I would like to register my complaint on how one polling station in Ntoroko District conducted the elections.*

*All went well in 82 polling stations apart from one station at Kacwamba mosque, Kacwamba ward, Karugulu town council.*

*Commanding Officer (OC) of the 2<sup>nd</sup> MTN one Maj. Noel Muhwezi and one Dennis Kakuru the political commissar took over polling station, forced the army to vote several times in favour of NRM flag bearers, they forced the presiding officer to switch off the machine and all civilians were chased from the polling station.*

*The army continued to vote beyond acceptable time of 5:00pm and were stopped by the GISO Karugulu Town Council.*

*Sir, its's from that background that I kindly ask your good office to investigate or even cancel all the results on that particular polling station for the fairness and credibility of our election in the District...”*

The evidence from Hon. Rwemulikya Ibanda who was not present at the polling station cannot any way be accepted as credible. It is just hearsay. This was an afterthought and is not independent. It is

com

therefore disregarded. The Affidavit of his polling agent who was present at the polling station signed the DR in total contradiction of the MPs letter. It is not imaginable that a GISO of Karugutu Town Council could stop the activities of the Army commanded by a one  
5 Major Noel Muhwezi and one Dennis Kakuru the political commissar who are alleged to have taken over the polling station!

The trial Judge (at page 17 of his Judgment) struck out the affidavits of Kobugabe Lillian, Biira Harriet and Kyomuhendo Cosbert. The trial Judge found that these affidavits were suspicious  
10 because their jurats were all not part of the continuous narrative of the affidavits but rather were drafted on separate pages.

There is also the evidence of Baguma Kasirinji alleges that the candidates polling agents including those of the petitioner at Kacwamba mosque polling station were asked to keep a distance  
15 from the voting area. From a distance, he heard the commandant telling the presiding officer to tick any voter in the register so that the soldiers can vote in any way they wanted. The army men if they were to vote for a particular candidate would have come to vote after being drilled on how/who to vote, but not on the polling  
20 station in the presence of several people who would easily notice and relate what transpired. The DR forms were all signed by the candidates agents and Electoral Commission officials after the conduct of the elections and unless is can be controverted , this is conclusive Evidence that the elections were free and fair and were  
25 carried out in accordance with the law. (See **Mbaghadi Fredrick**



**Nkayi and Electoral Commission vs. Dr. Nabwiso Frank Wilberforce B, Election Petition Appeals No. 14 and 16 of 2011).**

Mr. Rugamba Daniel the duly appointed agent for Hon. Rwewulikya Ibanda (MP elect) was present at the station. Rugamba Daniel's affidavit, as a person who was physically present to take care of the interests of Hon Ibanda at the polling station narrates clearly what transpired at the polling station contrary to the MPs (his principal) allegations. It is a total contradiction of what Hon. Ibanda alleges in his letter to the Electoral Commission. Hon. Ibanda did not disown him. His appointment letter is attached. Who do we believe? The agent's evidence is credible and cogent, if weighed against the MP elect's letter to the Electoral commission.

The trial Judge on this allegation, found that the witnesses claim to have gathered cogent evidence of the army taking over the Kacwamba mosque polling station was not supported by the evidence of the other witnesses, who were present at the polling station. He wondered why this event was not captured on camera by available mobile phones but only opted to write a letter to the Chairperson of the Electoral Commission. He wondered why the Appellant's agents endorsed the Declaration Results Form (DRF) for that station when such an alleged blatant irregularity had taken place. The DRFs showed that there were a total of 850 ballots issued at that polling station of which 653 were valid; 9 invalid; 2 spoilt and 186 unused ballots remained. The trial Judge then concluded: -



“...I found (sic) therefore, the evidence of Bahemuka Moses more reliable compared with that of Baguma Kasirinji and Magezi Deogratus. It follows therefore; it has not been shown that there was any multiple voting or ballot stuffing at Kachwamba mosque polling station...”

Looking at the evidence on record as a whole, we agree with this finding of the trial Judge. The evidence of a military takeover of Kachwamba polling station is not cogent and is contradictory.

Furthermore, we are not convinced by the letter of MP Elect Hon. Rwemulikya Ibanda. It is not objective, not sober, nor independent given that he won his seat in the same constituency but was appalled by the conduct of the elections at the Kacwamba polling station where he was not. We are convinced by Mr. Charles Mugenyi the Returning Officer for Ntoroko Electoral District that the letter by MP Elect Hon. Rwemulikya Ibanda was an underhand and illicit work of the Appellant (then the Petitioner).

It is the statutory duty under Section 61 of the Parliamentary Elections Act for the second Respondent Commission to conduct the elections in accordance with the principles laid down in the provisions of the Act. In this case, there is no evidence to show that the second Respondent failed in this duty on polling day at Kacwamba polling station. The allegations that agents of the second Respondent lost control of the polling station to some elements of the military are not borne out by the witnesses. Nothing was done to investigate this allegation. We find that on a balance of



probability the Appellant has failed to prove these allegations to the satisfaction of the Court.

We are alive to the fact that the margin between the first Respondent and Appellant was only 108 votes and therefore could easily be upset. We are also convinced on the evidence before us that there was compliance with the provisions of the Act .

This ground fails.

**GROUND 3: The learned trial Judge erred in law and fact when he failed to properly evaluate all the evidence before him thereby erroneously coming to the following conclusions that the first Respondent had not committed electoral offences to wit: -**

- Distribution of food stuffs and second hand shoes and clothes at Kanara Seed Secondary School.
- Distributions of Tarpaulins and plates in the villages of Kyamutema and Nyabikungu I, II, III.
- Contribution of Ugx 50,000/= to Agape Church in Kagaghiro village and donation of 4 bulls to soldiers in Kacwamba barracks.

### **20 Appellants' Submissions**

Counsel for the Appellant submitted that the incident at Kanara Secondary school was a donation to the victims of floods at the internally displaced camp. He argued that there was no need for



proof that one is a registered voter in order to prove the illegal practice of donation.

Counsel for the Appellant submitted that the trial Judge erred in-law and fact when he held that the Appellant had not proved that  
5 the food stuffs in issue were donated by the first Respondent on 19<sup>th</sup> December 2020 as Covid 19 relief items.

He submitted that the items donated by the first Respondent were intended to serve as relief items to the flood victims and not Covid 19 relief items as portrayed by the first Respondent.

10 Counsel for the Appellant also criticized the trial Judge for relying on the evidence of Biryabarema Elijah, the Resident District Commissioner yet his evidence was not truthful. Secondly, his evidence was also contradicted by the rest of the first Respondent's witnesses on this incident.

15 Counsel for the Appellant also submitted that the trial Judge erred when he held that a voter's location slip could not be used to prove whether a person was a registered voter. He argued that a voter's location slip was technically an extract of the voter's register since it is produced by the Electoral Commission.

20 He submitted that the incident at Kanara Secondary School was a donation

He further submitted that the trial Judge erred in law and fact when he found that the evidence of Asiimwe Ashraf was not corroborated yet it was so corroborated by the forensic Report.



Crom



With regard to the distribution of tarpaulins and plates in the villages of Kyamutema and Nyabikungu I, II, III counsel for the Appellant reiterated his submission that the distribution of those goods was an illegal activity that did not require proving whether one was a registered voter.

Counsel for the Appellant further submitted that the trial Judge misapplied the elements of bribery with those of a donation.

He argued that the contribution of Ug Shs 50,000/= to Agape Church in Kagaghiro Village and donation of four bulls to soldiers in Kachwamba barracks were donations both in fact and in law therefore proof that a witness is a registered voter was not an ingredient to the said illegal practice.

### **First Respondent's submissions**

Counsel for the first Respondent submitted that the evidence of the Appellant at the trial court lacked cogency, relevance and substance therefore the trial Judge was correct to conclude that the Appellant had not proved the electoral offences to the required standard.

Counsel for the Respondent submitted that the trial Judge rightly concluded that the Appellant's witnesses were not registered voters since there was no evidence from the voter's register. He argued that a national ID could be issued to a person who is ineligible to vote and the voter location slips are not absolute and definite as to one's voting status.

In regard to second ingredient of bribery, that the gift given by a candidate or his agent counsel it was submitted that the names of the persons who effected the bribe were not given, secondly, that the photographs that were taken as evidence did not show the first Respondent participating in the distribution of food.

With regard to the third ingredient of bribery, counsel for the first Respondent submitted that the trial Judge was right to find that the first Respondent had donated the items on 30<sup>th</sup> April which was outside the campaign period.

With regard to the distribution of tarpaulins and plates in the villages of Kyamutema and Nyabikungu I, II, III counsel for the first Respondent submitted that the dates on which the goods were received were dates which were outside the election period being the 11<sup>th</sup> July 2020 and not on 5<sup>th</sup> December 2020.

### **Second Respondent's submissions**

Counsel for second Respondent associated himself with the submissions of counsel for the first Respondent on the analysis of law in respect of the allegations of Bribery incidents and the evaluation of evidence.

### **Court's findings and Decision.**

The issue for determination in this ground is whether or not the first Respondent committed the electoral offence of bribery. This is in regard to three activities that were mentioned by the Appellant. These are;





- Distribution of food stuffs and second hand shoes and clothes at Kanara Seed Secondary School.
- Distributions of Tarpaulins and plates in the villages of Kyamutema and Nyabikungu I, II, III.
- 5 - Contribution of Ugx 50,000/= to Agape Church in Kagaghiro village and donation of 4 bulls to soldiers in Kacwamba barracks.

For the Appellant it is argued that the first Respondent committed an illegal practice of bribery disguised as a donation which is  
10 contrary to Section 68 of The Parliamentary Elections Act which criminalizes bribery and provides that: -

*“...A person who either before or during an election with intent, either directly or indirectly to influence another person to vote or to refrain from voting for any candidate, gives or provides or causes to be given  
15 or provided any money, gift or other consideration to that other person, commits the offence of bribery...”*

In order to prove the offence of bribery in an election Petition, one ought to establish three ingredients, these are: -

- a) A gift was given to a voter;
- 20 b) The gift was given by a candidate or his agent; and
- c) That the gift was given with the intention of inducing the person to vote.

(see **Isodo Apolot Stella v Amongin Jacqueline** EPA No 60 of 2016).

Furthermore, Section 61 (1) (c) of the Parliamentary Elections Act provides that an election shall only be set aside if it is proved to the satisfaction of the Court: -

5 *“...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 knowledge and consent or approval...”*

Given the gravity of the offence of bribery in elections, it is necessary that the details or the particulars of that offence which includes persons said to have committed the offence and those said  
10 to have been bribed are identified clearly and such evidence is corroborated.

The trial Judge found that the voter location slips which were attached to the Appellants witnesses were not sufficient proof to show that they voters. He faulted them for being photocopies and  
15 for having no certification to show their authenticity.

Section 1(1) of the Parliamentary Elections Act defines a registered voter as a person whose name is entered on the voter’s “register”

The same section defines registered to mean; “Registered” in relation to a voter means registered for the purpose of voting at an  
20 election.

In **Lanyero Sarah Ochieng vs Lanyero Molly**, Election Petition Appeal No.32 of 2011, it was held that;



“The conclusive proof of a registered voter, therefore, is by evidence of a person’s name and other relevant data having been entered on the National Voter Register. It is not the voter’s card or any other election document but the national voter’s Register.”

5 Furthermore, this court has held in the case of **Kasirye Zzimula Fred v Bazigatirawa Kibuuka** Election Petition Appeal No. 01 of 2018 that:

10 *The definition of a registered voter is clear. Having a national identity card was not sufficient to qualify a person as a registered voter. A registered voter must have registered as such and his or her name must appear clearly on the national voter’s register.*

In the case of **Gadaffi v Sekabira** and Another Election Appeal 56 of 2021, this court held;

15 *“As noted above, the burden of proof in Election Petitions lies on the petitioner. The Appellant should have applied to court seeking orders to compel respondent No. 2 to produce the voter’s register in court but he did not take that step. In any case, section 24 of the Electoral Commission Act allows the public to access rolls at the office the returning officer in the constituency for purposes of inspection and of*  
20 *making photocopies of the registers...”*

In our view therefore, the learned trial Judge was justified to find that the Appellant had not proved to the satisfaction of court that there was any registered voter who was bribed.

4 1  
Before we leave this Ground, there is need to address ourselves to the distribution of food stuffs and second hand shoes and clothes at Kanara Seed Secondary School.

5 The affidavit of Biryabarema Elijah in support of the petition was to the effect that the first Respondent did not distribute food and second hand shoes to residents at Kanara Seed Secondary school because that task was to be done by the covid 19 taskforce. There is also the affidavit of Balikighamba James a Resident of Kanara Town Council, who deponed that he invited members of Parliament,  
10 including the first Respondent who were in the area to witness the handover of food and other relief items given by Reach the World for Christ on 23<sup>rd</sup> December 2020. Kitembo Geoffrey's affidavit was also similar to that of the Balikighamba James. It would therefore appear to us that this allegation too was not proved to the  
15 satisfaction of the Court because there is evidence that such distribution of food and other items was done by the Covid 19 Task Force.

This Ground of Appeal also fails.

20 **Ground 5: The learned trial Judge erred in law and fact in awarding a certificate to three counsel upon dismissing the Petition with costs thereby occasioning a miscarriage of Justice.**

### **Appellants Submissions**



Counsel for the Appellant faulted the trial Judge for granting a certificate of more than one counsel without any justification.

He argued that the court can only award a certificate of two counsel for Justifiable reasons. He argued that the Respondent's Counsel only made two appearances in the High Court, secondly there was nothing complex about the case, there was no witness who was cross-examined and even its accompanying documentation was not voluminous.

It was submitted for the Appellant that election petitions touch important matters of Constitutionalism as well as advance democratic principles in society so winning an election Petition should not be translated into winning a lottery or hitting a jackpot.

**First Respondent's Submissions**

Counsel for the first Respondent submitted that the trial Judge was correct to award a certificate of three counsel.

He argued that the matter before the lower court was a complex matter that required preparation for multiple witnesses; perusal of over thirty affidavits relied on by the Appellant and involved very lengthy submissions.

**Second Respondent's Submissions**

Counsel for the second Respondent submitted that the matter before the trial court was complex and required preparation for multiple witnesses; perusal of 30 affidavits relied on by the

Appellant and involved very lengthy submissions which spanned over 35 pages. He further argued that the matter did not amount to an ordinary election petition and so the trial Judge was correct to issue a certificate of three counsel.

5 Counsel for the Second Respondent submitted that award of costs in an election petition is a discretionary act of the court that an appellate court can only interfere with when it has been shown that such discretion was exercised in an injudicious manner.

He referred us to the case of **Mutembuli Yusuf v Nagwomu Moses**  
10 **Musumba and the Electoral Commission** Court of Appeal Election Petition Appeal No. 43 of 2016 for the proposition that the voluminous nature of a Record of Appeal gives a clue on the involvement of counsel in the lower court and the attendant research related thereto.

15 **Court's findings and Decision.**

We note that the trial court certified costs for three counsel but it did not give reasons for this Order.

Rule 41 of the Advocates (Remuneration and Taxation of costs) Rules S.I. 267-4 provides that: -

20 *"...The costs of more than one advocate may be allowed on the basis hereafter provided in causes or matters in which the Judge at the trial or on delivery of judgment shall have certified under his or her hand that more than one advocate was reasonable and proper, having regard, in the case of a plaintiff, to the amount recovered or*



paid in settlement or the relief awarded or the nature, importance or difficulty of the case and, in the case of a defendant, having regard to the amount sued for or the relief claimed or the nature, importance or difficulty of the case.”

5 Costs in Petitions are governed by Rule 27 of the Parliamentary Elections (Interim Provisions) Rules S.I. 142 -2 which states as follows: -

10 “...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...”

In the case of **Gole Nicholas Davis v Loi Kageni Kiryapawo Election Petition Appeal No. 19 of 2007** (SC) Tsekooko JSC held as follows in regard to the award of a certificate of two counsel.

15 “...In my view, a certificate of costs for more than one counsel must be supported by sound reasons such as the complexity or difficulty of the case. One rationale for this, to my mind, is to ensure that losing parties in litigation only meet reasonable costs of the winning parties. Costs are awarded upon exercise of judicial discretion based on  
20 sound reasons.”

We do not find this Appeal any more complex than any other electoral appeals that we have handled. It is also not that voluminous as alleged to warrant employing certificate of three counsel in this Appeal. We are therefore unable to agree that the

trial Judge properly exercised his discretion to award a certificate of three counsel.

This ground 5 is up held.

Grounds 1, 2, 3 and 4 are dismissed.

5 **COSTS**

This court in **Akuguzibwe Lawrence v. Muhumuza David and 02 others, Election Petition Appeal No.22 of 2016**, held that,

10 “Election litigation is a matter of great national importance in which courts should carefully consider the question of awarding costs so as not to unjustifiably deter aggrieved parties from seeking court redress”

This court further persuasively cited the authority of **Mwogezaddembe v. Gagawala Wambuzi, High Court Election Petition No.2 of 2001**, where it was held that;

15 “There is another dimension to such petitions; the quest for better conduct of elections in future..... Keeping quiet over weaknesses in the electoral process for fear of heavy penalties by way of costs in the event of losing the petition...would serve to undermine the very foundation  
20 and spirit of good governance”

Considering the above authorities and taking into account the earlier concessions of the parties to progress this appeal we find it just and equitable that the Parties meet their costs here and at the trial Court.



**Conclusion**

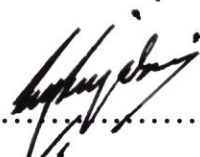
This Appeal fails.


We accordingly order: -


1. The election for Woman Representative to Parliament for Ntoroko District held on the 14<sup>th</sup> day of January 2021 is hereby confirmed. Tumwine Anne is the rightly elected Member of Parliament.
2. Each party shall bear their costs.

**We so Order**

Dated at Kampala this 28<sup>th</sup> day of July 2022

  
.....  
**GEOFFREY KIRYABWIRE**  
**JUSTICE OF APPEAL**

  
.....  
**STEPHEN MUSOTA**  
**JUSTICE OF APPEAL**

  
.....  
**CHRISTOPHER GASHIRABAKE**  
**JUSTICE OF APPEAL**