THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
ELECTION PETITION APPEAL NO. 04 OF 2023
[Coram: Egonda-Ntende, Bamugemereire, Luswata JJA]

OMARA YUVENTINE :::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

ARIKO JOHNNY DE WEST :::::::::::::::::::::::::: RESPONDENT

JUDGMENT OF THE COURT

A brief background

1] On 28/9/2020, the appellant, was nominated by the Electoral Commission (hereinafter EC) and together with the respondent, contested for the position of LC. 5 Chairperson of Abim District. The elections were conducted by the EC on 20/1/2021 at the conclusion of which, the appellant of the NRM Party, was returned and gazatted as the duly elected LC. 5 Chairperson of Abim District with 14,417 votes, and the respondent (an independent candidate) garnered 4,809 votes. The respondent contested the result in Election Petition No.7/2021 filed in Soroti High Court, and with reasons, prayed that the election be set aside. He in addition prayed that that he be declared the duly elected LC.5 Chairperson of Abim District.

2] Judgment at the High Court was delivered on 9/3/2023 in favour of the respondent. The trial Judge agreed with the respondent that he had jurisdiction to entertain the petition brought under Sections 138 and 139 of the Local Governments Act (LGA). It was further held that the appellant who had at the time of his nomination not resigned from the Uganda People's Defence Forces (UPDF), did not qualify for nomination and that the EC failed or

refused, as required by statute, to determine the respondent's complaints regarding the validity of the appellant's nomination. The Judge then set aside the election with costs, and ordered for fresh elections.

3] The appellant being dissatisfied with the judgment and orders of the High Court, appealed to this court on the following grounds in his memorandum of appeal:

1. **The learned trial judge erred in law in holding that the court had jurisdiction to hear and entertain the petition on pre polling matters involving the nomination of the appellant, thereby reaching a wrong conclusion that the petition was competently before court.**

2. **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 wrong conclusion that:**

   a) **The appellant at the time of his nomination had not resigned from the UPDF.**

   b) **That the appellant was not qualified for nomination as a candidate to the position of District L.C.5 Chairperson of Abim District.**

3. **The learned trial Judge erred in law and in fact in holding that Electoral Commission did not resolve the pre polling complaints regarding the appellant's nomination raised by the respondent. (sic!)**

4] Counsel prayed that the appeal is allowed by setting aside the decision and all orders of the Soroti High Court, with costs of this court and the lower court being awarded to the appellant.

Based on the same facts and decision of the High Court, the respondent raised a cross appeal which the appellant contested and prayed for its dismissal with costs. We shall consider the merits of the cross appeal after our decision here.

Representation

5] At the hearing of this appeal on 13/11/2023, the appellant was represented by learned counsel, Evans Ocien while the respondent was represented by learned counsel, Mr. Jude Byamukama and Innocent Okong. All counsel indicated that they intended to adopt their conferencing notes and lists of authorities as their submissions in this appeal and cross appeal. They were so adopted and a summary of those submissions will be reproduced here. Both counsel chose to argue some grounds of appeal in clusters. The Court will similarly resolve the appeal in that manner.

Resolution by the Court

6] Being a first appellant court in the matter, under Rule 30(1) of the Judicature (Court of Appeal Rules) Directions (hereinafter COA Rules), this Court has the duty to re-appraise all the evidence adduced in the Court below and draw inferences of fact therefrom. The mandate of this Court was well stated by the Supreme Court in **Fr. Narsensio Begumisa versus Eric Tibebaga, SC Civil Appeal No. 17/2002** that:

> *"It is a well settled principle that on a first appeal, the parties are entitled to obtain from the appellate court its own decision on the issues of fact as well as of law. Although in a case of conflicting evidence the appellate court has to make due allowance for the fact that it has neither seen nor heard the witnesses."*

We will accordingly make our decision with those principles in mind.

Preliminary submissions

7] Appellant's counsel made a few preliminary submissions that we will summarise briefly. He mentioned the pertinent proceedings during the trial, in particular the issues raised for determination as well as the findings of the trial Court. He mentioned his client's intention to contest the cross appeal and then reminded the Court of its role on first appeal. He in addition traversed issues of burden of proof in an election petition and appeal, and concluded by inviting this Court to consider her powers under Section 11 of the Judicature Act (JA), to grant the prayers sought in the appeal.

Grounds one and three

Submissions of both counsel

8] Appellant's counsel submitted that two complaints by the respondent and Mr. Abang were on 9/11/2020 and 3/11/2020 (respectively), lodged with the EC against the appellant's nomination to contest the election. In both, the complaint was that the appellant was still a serving member of the UPDF. That the EC considered both complaints and found that the appellant was eligible to stand, as he had been rightly discharged from duties with the UPDF. As such, the EC proceeded to conduct the election on 20/1/2021, at the end of which the appellant was declared winner and gazetted on 12/4/2021, sworn in and begun executing his duties as the LC5 Chairperson of Abim District.

9] Counsel continued that it was an error for the respondent to have contested the decision of the EC by filing a petition under Section 139 of the LGA. Counsel argued that Article 61 confers original jurisdiction to the EC to settle all election related disputes arising before, or on polling day. Further that under Section 15 of the Electoral Commission Act (EC Act), the EC is empowered to take necessary remedial action to correct any irregularities and effects it may have caused. That decisions made by the EC under the

Constitution and EC Act are appealable to the High Court, as the Court conferred with the appellate jurisdiction by Article 61(1)(f) of the Constitution. Counsel emphasized that under Section 15(5) EC Act, Judges of the High Court must give high regard to the expeditious disposal of such appeals by suspending all other pending matters before them.

10] Mr. Ocien supported his arguments by quoting this Court's decision in **Kasirye Zzimula Fred versus Bazigatirawo Kibuuka Francis Amooti, EPA No. 01/2018,** where it was held that the purpose of section 15 was to ensure that all pre-election disputes are resolved with finality before the election date. Further that of **Komakech Christopher & EC versus Odongo Otto, Consolidated EP No. 02/2006 and No. 6/2006,** where this court pronounced the correct procedure to be followed by any person aggrieved with the nomination of a party to an election. Counsel then summarized that the petition in the trial court was in fact a disguised appeal against the decision of the EC which was filed out of time. That the respondent who failed to appeal the decision of the EC to the High Court, before the end of the elections, could not file a petition to the High Court which has no jurisdiction to hear and entertain a petition on pre polling matters involving the appellant's nomination.

11] Finally that had the Judge properly evaluated the evidence, on record, and properly taken into the account the burden of proof, he would not have come to the conclusion that the High Court had jurisdiction to entertain the petition filed by the respondent here.

12] In their submissions in reply, respondent's counsel likewise gave a brief background of the case at the trial stage. They submitted that it was the respondent's case at trial that the appellant participated in the elections while still a serving officer of the UPDF. In particular, that the appellant first illegally participated in the NRM party primary elections and was then subsequently nominated by the EC to run alongside the respondent for the position of District Chairperson, Abim District. That in contest to

that nomination, the respondent and one Abang Roberts filed timely pre-polling complaints with the EC, but the latter did not determine them, and in contravention of Section 15 EP Act, proceeded to conduct the election. They re-emphasized that the appellant's nomination was invalid and *void ab initio* for he was still a serving officer of the UPDF, by the time of his nomination.

13] Respondent's counsel continued that the trial Judge declined to declare the respondent unopposed and hence, the duly elected candidate for the contested position and for that reason, he raised a cross appeal to that effect. They added that since the EC did not prefer an appeal against the decision of the trial Judge, his decision is final as against the EC in particular.

14] Respondent's counsel also raised a preliminary objection to dispute the inclusion of pages 11-16 into the appellant's Supplementary Record of Appeal (hereinafter SRA). We have already resolved the merit of that objection when resolving **Election Petition Application No. 016 of 2023, Ariko Johnny West versus Omara Yuventine.** In our decision there, we expunged pages 11-16 from the appellant's SRA. The impugned part of the record has no bearing on this appeal, and we shall not consider it.

15] In response to the first and third ground of appeal, respondent's counsel agreed that the EC is charged with determining a candidate's pre polling complaints to its finality before proceeding to conduct the election. As such, two complaints, and subsequently, a reminder was lodged with the EC against the appellant's nomination, but the EC abandoned their duty and left the respondent's grievances unresolved. As a result, those grievances could only be raised as grounds to challenge the general outcome of the election pursuant to Sections 138 and 139 LGA.

16] Counsel emphasized that the EC, as a quasi-judicial body could only render a decision on the two complaints in line with Section

8 EC Act, by forming a quorum, and then sitting to hear the complaint, and making a decision. Further that in the absence of a siting, proceedings or ruling of the EC, no decision was ever rendered in respect of the two pre-polling complaints. Therefore, the respondent could not be faulted for including those grievances in the original petition in the High Court, because they were unable to secure any remedy form the EC as required by law. Counsel concluded that the requirement to follow Section 8 EC Act did not arise because no complaint was ever determined, and the respondent's attempts at following Section 15 EP Act were frustrated. Counsel relied on this Court's decision in **Okabe Patrick versus Opio Joseph & EC, EPA No. 87/2016.**

17] In counsel's view, once the EC fails to hear pre polling complaints, the questions raised in the complaints automatically become issues to be answered in a petition filed by an aggrieved candidate under Sections 138 and 139 LGA. That in fact, under Sections 138(1) and 139(d) LGA, one of the grounds for which a petition may be filed and proved, is whether at the time of their election, the appellant was not qualified or was disqualified from the election. Accordingly, the trial Judge was correct to assume jurisdiction to hear the petition. That in fact in the decision of this Court in **Ariko Jonny De West versus Omara Yuventine & Anor EP, Appeal No. 41/2021** (before the matter was sent back for retrial), this Court held that the petition was properly filed under Sections 138 and 139 LGA and Section 16 Political Parties and Organisations Act 2005 (hereinafter PPO Act.)

18] Counsel continued that at the trial, once the EC failed to adduce evidence that they had rendered a ruling in respect of the respondent's complaints, that failure to act created an exception to the existing jurisprudence on pre-nomination complaints. In particular, that the respondent would have no audience before the High Court in its appellate capacity because there was no decision of the EC on which the appeal would be based. In conclusion then

that the High Court had the jurisdiction to hear the respondent's petition as a trial court.

Submissions of counsel for the appellant in rejoinder of grounds one and three

19] In brief rejoinder, it was submitted for the appellant that once the respondent lodged complaints to the EC (which they have admitted they did), they should have invoked Section 15 EC Act. It was contended that according to paragraph 9 of Ms. Achan Joyce Aleper's affidavit (in answer to the petition in the High Court), the EC did take a decision on the complaints. That the remedy open to the respondent was to appeal that decision. Counsel continued that if the EC had failed to make a decision as the respondent alleges, he still had a remedy in judicial review, to seek an order of mandamus to compel the EC to make a decision on the complaint. Counsel quoted the High Court decision of **Tumwebaze Kenneth versus EC & Mugabe Robert, Misc. Cause No. 396/2020,** in which the Court was successfully moved to order a similar writ to compel the EC to make a decision or ruling (within 5 days) in respect of a complaint filed by Tumwebaze.

20] In conclusion, counsel submitted that the High Court had no jurisdiction to hear a petition on pre polling matters, the petition disguised as an appeal was filed late, and the respondent also failed to exercise his judicially enforceable right of mandamus to compel the EC to issue a decision, if none was made. In counsel's view, by failing to appeal the decision, the respondent demonstrated that he agreed with the outcome of the election as the EC had rightly found that the petitioner was an eligible candidate.

Decision of the Court

21] In his decision at page 396 of the Record of Appeal, the Judge determined that the respondent's petition fell within the provisions of Sections 138(1) and 139(d) LGA because the

respondent sought to challenge the appellant's election on grounds that he was not qualified for nomination as District Chairperson for Abim District. For that reason, he was prepared to assume jurisdiction and proceeded to set aside the election. Likewise, on page 406 of the Record of Appeal, the trial Judge found that since the EC failed to adduce proof of its decision, it was the decision of the court that they had failed or refused to determine the petitioner's pre-polling complaints regarding the validity of the appellant's nomination, contrary to its statutory duty prescribed in the EC Act.

22] The appellant contested those two decisions contending that the EC properly executed its mandate of considering and rendering a decision on the complaints raised by the respondent. That having done so, the issues raised in those complaints was rested and being pre-polling matters, could not be raised in the petition contesting the election. Appellant's counsel argued that the respondent had the remedy of appealing the decision of the EC to the High Court, or if he considered that no decision was rendered by the EC, to compel them to do so, through a writ of mandamus. The respondent disagreed. His counsel submitted that the EC failed to render a decision on either complaint and that without a decision in place, the respondent could not lodge an appeal. Further that since the pre-polling complaints were never resolved, the respondent could raise them in a post polling petition, and the High Court had jurisdiction to consider, and make a decision on those complaints.

23] There appears to be no contest to the fact that two complaints were raised contesting the appellant's nomination as a candidate for the election. There was also no complaint at the trial that the EC did not receive both complaints. The first dated 3/11/2020 (at page 37 of the appellant's Record of Appeal) was by one Mr. Abang Roberts a registered voter, who complained that by the time the appellant was nominated as the NRM Party flag bearer, he was still a serving soldier at the rank of captain in the UPDF. Further

that the appellant's participation in the NRM primaries and being nominated as the flag bearer, contravened Article 208 of the Constitution and Section 16 of the (PPO Act) (as amended) that requires members of the UPDF to be nonpartisan. Further that as a public officer, by failing to resign from office before his nomination, the appellant had failed to comply with Section 4(4) of the PPO Act. Mr. Abang requested the EC to disqualify the appellant from contesting the election as his nomination was void *abinito.*

24] The second complaint dated 9/11/2020, was filed by the respondent and appears on page 39 of the appellant's Record of Appeal. He too complained that at the time of his nomination, the appellant was still a serving army officer in the UPDF and still drawing a monthly salary. That for the same reason, the appellant's participation in the NRM primary elections contravened Section 16 of the PPO Act and Section 4(4)(a) of the Parliamentary Election Act 2005 (as amended), because he did not first resign from public office. The appellant requested the EC to cancel the appellant's nomination for noncompliance with the law.

25] Having established as the trial Judge did that two complaints were lodged against the appellant's participation in the election, two questions would arise for determination:

a) Did the EC render a decision with respect to both complaints in accordance with the law?
b) If no decision was rendered, was it open to the respondent as one of the complainants, to file a post-election petition on the same issues raised in the complaints, and did the trial Court have jurisdiction in the matter?

26] Both counsel appeared to be in agreement that once a pre-trial grievance is raised and addressed by the EC, that matter is closed and cannot be the subject of any post-election litigation. It is a correct position because Article 61(1)(f) of the Constitution confers original jurisdiction to the EC to settle election related disputes

arising before and on polling day. Under Art 64(1) of the Constitution, jurisdiction is conferred upon the High Court to hear appeals in respect of decisions made by the EC under Article 61(1)(f) of the Constitution. The powers of the EC and the High Court in that regard were repeated in Section 15(1) and (2) of the EC Act which provide as follows:

> **15. Power of the commission to resolve complaints; appeals.**
>
> *(1) Any complaint submitted in writing alleging any irregularity with any aspect of the electoral process at any stage, if not satisfactorily resolved at a lower level of authority, shall be examined and decided by the Commission; and where the irregularity is confirmed, the commission shall take necessary action to correct the irregularity and any effects it may have caused.*
>
> *(2) An appeal shall lie to the High Court against a decision of the Commission confirming or rejecting the existence of an irregularity.*

The decision of the High Court is final.

27] This Court has in her decision of **Kasirye Zzimula Fred versus Bazigatilawo Kibuuko Francus Amooti, EPA No. 1/2018** explained that Section 15 EP Act was enacted to ensure that all post nomination and polling disputes are resolved with finality before the election date. That this would avoid undue expenses and inconveniences to the parties and the electorate. Subsequently, in **Komakech Christopher & E.C. versus Odongo Otto, Consolidated EPA No.2 and No.6/2021,** this Court pronounced the correct procedure to be followed for lodging such complaint. It was held that:

> *"The right procedure to be followed by any aggrieved party* is to *first file the complaint for non-qualification at the Commission under Articles* 61(1). *If not satisfied with the*

findings of the Commission, he/she can appeal to the High Court under Article 64, which is the final court in pre-election complaints." (Emphasis applied).

The Court held further that:

> *"The Electoral Commission is mandated to hear matters arising out of the elections before or during nomination, thereafter it becomes functus officio.....A petitioner on an election petition who did not bring complaints within the stipulated time at the time of nomination under section 15 of the Electoral Commission Act, he/she is estopped for doing so after the election because he/she is taken to have waived his/her right to complain within the stipulated period".*

28] It is clear in Section 15(1) of the EC Act that once the EC receives a complaint with respect to any aspect of the electoral process, they must examine such complaint and then make a decision on it. This Court has in her decision of **Okabe Patrick versus Opio J. Linos & EC (supra)** held that the correct procedure to determine all complaints is given in Section 8 EC Act. Under Section 8(1), (2) and (4), the EC can only make a decision in its formal meeting after achieving a quorum of five, and a consensus of decision is preferred. Where a consensus fails, then the majority decision by voting on any matter prevails. Under Section 8(6) and (7) EC Act, the Secretary is mandated to record minutes of all proceedings and have custody of them. Under Section 8(8), the EC may regulate its procedure.

29] The respondent admitted in his affidavit accompanying the petition that on 16/11/2020, the EC held a hearing to resolve the complaints, which he attended with Mr. Abang. It was submitted for the appellant that the EC rendered a decision in respect of the two complaints. Counsel pointed us to the affidavit of Ms. Achan

Joyce Aleper sworn on 14/5/2021 and filled in support of the answer to the petition. She deposed to certain facts in paragraphs 6 and 9 as follows:

> *6) That prior to polling, I know that the Petitioner herein lodged a complaint with the 2nd Respondent challenging nomination of the 1st Respondent, as a candidate for the Position of District Chairperson of Abim District.*
>
> *9) That despite the petitioner lodging a complaint with the 2nd respondent challenging validity of the 1st Respondent's nomination. The 2nd respondent heard the complaint inter-parties and resolved that the 1st Respondent was rightly discharged from employment, and as such was subsequently granted a discharge Certificate from his employers; Uganda Peoples Defence Forces as of 20/06/2020. (sic!)*

30] It is significant that Ms. Aleper gave no specifics of the decision of the EC and also did not provide a copy of the proceedings of the EC or its actual decision. Therefore, the appellant failed to discharge the burden of disputing the fact that no decision was ever rendered.

In this case, the EC Act required that there were recorded minutes and a clear decision. Such decision had to be communicated to the appellant and the two complainants. Only then would Section 15 EC Act apply for the respondent to lodge an appeal to the High Court. He could hardly lodge an appeal against a nonexistent decision, that alone would have rendered his appeal premature or a nonstarter.

31] We would accordingly agree with the submission that once the EC neglected or failed to render a decision, it had failed to carry out a pre polling duty, and deprived the complainant of the statutory remedy of an appeal to the High Court. In that case, the issues raised in the two complaints became questions that could be

raised in a petition filed by the respondent as an aggrieved candidate under Sections 138(1) and 139(d) of the LGA which provide as follows:

138) Petition against a declared elected candidate.

(1) 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.

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—

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

32] We conclude then that in the circumstances of this case, the respondent correctly filed the petition which included the pre-election complaints and the Judge had jurisdiction to hear it. The EC Act is exhaustive on the correct procedure to follow and there is no requirement under any other election laws that a party aggrieved as the respondent was at the time, should file an application for a writ of mandamus to compel the EC to fulfil its mandate. Further, there is no guarantee that such application would be heard and disposed of before the election date.

33] Accordingly ground one fails.

Ground Two

Submissions of both counsel

34] It was submitted for the appellant in ground two that contrary to the decision of the Judge, the appellant was before his nomination

discharged from the UPDF through retirement and a copy of his Certificate of Service (hereinafter COS) was admitted in evidence. Counsel advanced three issue to contest the decision of the Judge. Briefly that:

a) The decision was based on incredible, uncertified documents attached to the petition that were never admitted as exhibits nor referred to in affidavit evidence by the respondent/petitioner.

b) The decision was wrongly based on Section 66 UPDF Act which provides for resignation yet the appellant's evidence was that he was discharged from service through retirement and issued with a COS.

c) The Judge failed to appreciate the effect of issuance of a COS to the appellant under the law.

35] With regard to the contention in (a), counsel elaborated that in his judgment the Judge relied on Annexure A, B, C, and D, which were never attached to any affidavit, and their source or authenticity was never explained by the petitioner. He argued then that the Judge wrongly considered inadmissible documents as cogent evidence to support the petition. Counsel in particular cited pay slips, and bank statements adduced for the petitioner. Further in regard to (b), that since the appellant adduced evidence to show that he was discharged upon early retirement but not resignation from his employment, Section 66 UPDF Act did not apply to him. Counsel then drew the attention of court to various correspondence (between the appellant and the UPDF) which supported his assertion of retirement, but which the Judge erroneously interpreted as resignation from service.

36] Counsel in addition referred to Section 99 UPDF Act which permits any serving officer vying for political office to either first resign or retire from the UPDF. He in addition cited Regulation 31(3) of the UPDF (Conditions of Service) (Officers) Regulations S.I.

No. 307-2, (hereinafter UPDF Service Regulations) which provide for such retirement and issuance of a COS. Counsel also faulted the decision of the Judge to hold that the appellant's resignation was ineffective since he wrongly addressed his request for discharge to the Chief of Defence Forces (CDF) instead of the Board. In his view, since the CDF is the Chairperson of the Board, he was the correct entity to be so addressed. Counsel then argued that once the appellant received correspondence from the CDF (that his request for early retirement had been accepted) and a COS being issued to him as provided by the law, he ceased to be a serving officer of the UPDF. In his view, the COS is conclusive proof of retirement, since under regulation 31(3), it is issued only to a retired officer. That for that reason, it was wrong for the Judge to find that the appellant did not attach a discharge certificate, which for his case was unnecessary because he was seeking early retirement.

37] Counsel continued that since the retirement process is managed entirely by employers, purporting to evaluate that process without their input or clarification could have caused an injustice. That none the less, since the COS was issued to the appellant on 31/7/2020, and his nomination happened on 28/9/2020, it is deemed that he vacated office at least 30 days before nomination as set by section 116(5) LGA.

38] With regard to the trial Judge's finding that the appellant continued to draw a salary after retirement, appellant's counsel argued that the pay slips and bank statements were part of the inadmissible documents and should never have been relied on. He argued in the alternative that stopping a salary is an internal matter and under the employer's prerogative. Therefore, that a lawfully discharged employee could not be faulted for receiving a salary paid into his account, an act over which he had no control. Further that the mere receipt of a salary, with no further explanation, leaves doubt on whether the payment represented arrears, or salary for continued service.

39] It was submitted for the respondent in reply, that the appellant's participation in the NRM party primaries, his nomination to participate and announcement as the winner in the election, were all tainted with illegality. Counsel referred to Article 208(2) of the Constitution which prohibits members of the armed forces to participate in partisan activities. He also referred to Section 99 UPDF Act, and the Rules thereunder which specifically require a servicing officer or militant who wishes to participate in political office, to first resign or retire from the forces, and provide the procedure to follow in that regard. Similarly, that according to Section 16(a), (b) and (d) of the PPO Act, no member of the UPDF shall be a member of, or hold office in a political party or organization or converse support of any party or candidate standing for public election sponsored by a political party. That stemming from that law, the respondent's election as the NRM flag bearer on the NRM ticket violated the law for he was by then, still serving in the army.

40] Respondent's counsel submitted in particular that the unrebutted evidence is that on 28/9/2020 at the time he was nominated as a candidate, the appellant was still a serving army officer at the rank of Captain and still drawing a full monthly salary and allowances proved by his salary slips for the months of July, August and September 2020. In addition, in a Service Personnel Particulars Report (hereinafter the SPP Report), it indicated his date of entry into the army as 4/12/1996 and an end date of 6/10/2020, which is his official discharge date. It was then contested that the appellant was discharged on 20/6/2020 because the COS that he adduced into evidence did not contain all information (in particular no date of retirement) as stipulated in Regulation 31(3) of the UPDF Conditions of Service Regulation. In addition, that the internal memo adduced was merely correspondence between two senior officers of the UPDF communicating that the CDF allowed to discharge an undisclosed officer. Further that under Regulation 4(d) UPDF Conditions of Service Regulations, it was the

Commissions Board and not a Military Assistant of the CDF who had the mandate to handle the retirement of military personnel

41] That upon the above facts, the respondent established a *prima facie* case to the Court's satisfaction that the appellant had not been discharged from the UPDF before 28/9/2020, the date of his nomination, and the burden then fell upon the appellant to prove the converse. That he failed to rebut the respondent's evidence and instead smuggled (pages 11-16) onto the SRA containing a complete service/discharge certificate. Counsel continued that even with that inadmissible evidence, the appellant could not make a case for the five reasons that:

a) The retirement age in the COS mentions a discharge date of 31/7/2020 yet in his answer to the petition and submissions, the appellant pleaded 20/6/2020 as his discharge date.

b) The appellant mentioned that he was discharged under Serial Number 261 yet the COS in the SRA reflects a Serial No. 582.

c) The COS was at (p 10 SRA) certified by the Military Assistant to CDF on 30/4/2023. All other contents of the COS were not certified.

d) In the contested part of the COS, the Chairperson of the Commissions Board appended his signature on 29/9/2022 one day after the appellant's nomination as a candidate in the election. Beyond that signature, there is no indication that the appellant went through all formalities and procedures before being discharged from the army.

e) Under Regulation 4 of the UPDF Conditions of Service Regulations, the appellant was required to apply for retirement or resignation, after which his request would be considered, but not to retire himself. Therefore, the appellant could not have retired from the army on 31/7/2020 before the Commissions Board retired him on 29/9/2020.

42] To support his reasons above, respondent's counsel insisted that only the issuance of a COS by the Commissions Board in line with Section 66 UPDF Act, signifies a conclusive discharge from the army, and it would not matter whether such discharge is by resignation or retirement. Therefore, that the Judge was correct to find that without a formal communication from the Board to the appellant that his application had been approved, he could not have been duly nominated to contest in the election. Counsel cited the Supreme Court decision of **Attorney General versus Major General David Tinyenfuza, Constitutional Appeal No.1 of 1997.** Counsel added that the evidence the appellant presented as proof of his discharge was merely an internal memo from the Military Assistant to the Joint Chief of Staff (JCOS) his superior but not a discharge certificate.

43] It was in addition submitted that Section 116(5) LGA requires that resignation before vying for political office must be conclusive for it is subject to the procedure of the service or employment to which the concerned officer belongs. It was therefore imperative that the appellant secured his discharge in line with the UPDF Conditions of Service Rules and the UPDF (Discharge) Regulations. That notwithstanding, that the appellant's evidence of the dates he was discharged were contradictory and thus unreliable. In particular, that:

a) In paragraph 7 of his answer to the petition, the appellant claimed he was discharged on 20/6/2020
b) In the Service Personnel Report (Annexure "G" to the respondent's affidavit in support of the petition) shows he left the army on 6/10/2020
c) The EC who received the appellant's discharge certificate prior to his nomination recorded his resignation date as 18/6/2020.
d) The appellant himself submitted that the Certificate indicates a discharge date of 31/7/2020.

44] In answer to the objection by the appellant that the Judge relied on Annexure A, B, C and D (of the respondent's affidavit in support of the petition), respondent's counsel argued that it is a matter that should have been raised and conversed at the trial. That raising it on appeal as a new matter is not permissible in law because this court cannot re-evaluate evidence that was not put to issue at the trial. Counsel cited the decision of **Bwino Fred Kyakulaga & Anor versus Bodogi Ismail Waguma, EP No. 15 and 20/2016,** in that regard. Counsel continued that the impugned documents were in fact attached to the petition and supporting affidavit and included in the list of documents contained in the respondent's summary of evidence and finally admitted with no contest on the record as his evidence.

45] In conclusion, respondent's counsel maintained that by the time the appellant participated in the primaries, he had not been discharged from the Army which automatically rendered all processes leading to his victory as illegal. He prayed that this Court upholds the findings in the judgment of the lower court to dismiss this appeal with costs here and below, being awarded to the respondent.

Appellant's rejoinder in respect of ground two

46] In rejoinder, it was submitted that the appellant by his actions did not violate the Constitution or any of the relevant electoral laws. That instead, respondent's counsel misconstrued the evidence that the appellant was discharged through early retirement and issued with a COS, evidence supported by several correspondence between the appellant and the UPDF, and the certificate itself. That the uncontroverted date of retirement reflected on the COS is 31/7/2020, and having been nominated on 28/9/2020, his nomination was in compliance with S.116(5) LGA.

47] Counsel further argued that the decision of **Attorney General versus Major General David Tinyenfuza (supra)** supports the

appellant's version of facts that an officer can lawfully exit the army when issued with a discharge certificate or certificate of service. Further that continuing to receive a salary cannot be used as a ground to nullify an election because such payments can result from failed internal processes and is recoverable from such employee's pension emoluments. Counsel referred us to this Court's decision in **Okeyoh Peter versus Abbot George Ouma, EPA No. 8/2011.**

48] Counsel submitted further that the date (of 6/10/2020) indicated in the Service Personnel Particulars (Annexure G to the petition), was the appellant's official retirement date. Since that date would fall after the nomination date, the appellant was compelled to seek early retirement a result of which the COS was issued to him indicating his retirement date to be 31/7/2020. Further to explain the alleged retirement date of 29/9/2020, appellant's counsel submitted that in the UPDF letters of 20/6/2020 and 18/6/2020, the appellant's request for early retirement was approved and there would be no confusion that he was effectively retired and left service on 31/7/2020. Finally, that, without showing his involvement in that regard, any delay to sign his discharge cannot be visited on him as was the case in **Kasibbo Joshua versus Mbogo Kezekia & EC, EP No. 4/2011** and **Kalemba Christopher & EC versus Lubega Drake Francis, EPA No. 32/2016.**

Decision of the Court on ground two

49] In ground two, the appellant contests the decision of the Judge that at the time of his nomination, he had not resigned from the UPDF and was therefore not qualified for nomination as a candidate to contest the election. He maintains in this appeal that he was properly discharged from the army through early retirement and issued with a Certificate of Service. The respondent here agreed with the decision of the High Court, and stated inter alia that the appellant's victory was null and void for his election

was tainted way back prior to his nomination, which he sought without first obtaining formal discharge from the army.

50] In brief, the Judge decided that the appellant's nomination to contest in the elections was unlawful. He gave several reasons for his decision. Firstly, he considered the appellant's resignation ineffective because his request for discharge was addressed to the wrong office and secondly, there was no formal communication from the UPDF Commissions Board notifying him of their decision on his application to resign. In addition, the Judge was not convinced with the evidence of the appellant's discharge because he failed to adduce a discharge certificate from the UPDF, and continued to draw a salary from them. He thereby concluded that the appellant was never duly nominated to contest for the position of LC.5 Chairperson of Abim District.

51] It is clear in their submissions that both counsel were in agreement that the appellant was in law mandated to secure a formal release from the UPDF before he could seek nomination for, and then participate in the elections. They were fully in agreement with the law providing for such release and the steps the appellant needed to follow before pursuing his candidacy. The point of departure appears to be the manner in which the appellant applied the law, and whether he was actually ever formerly released from service, either as one who sought outright resignation or early retirement. We shall accordingly consider the law first.

52] The UPDF is created under Article 208 (2) of the Constitution and shall be not be partisan. Additionally, Section 16 (a), (b), (c), (d) of the PPO Act 2005 prohibits a serving officer of the UPDF and public officers for being members or holding office of any political party or organisation, or to engage, in canvassing support of a political party or a candidate standing for public elections sponsored by a political or organisation. Most specify, a serving officer must seek formal discharge before participating in politics. According to the Supreme Court, members of the military can only

resign in accordance with military law. See **Major General David Tinyenfuza versus Attorney General Constitutional Petition No. 1 of 1996.**

Accordingly, Section 99 UPDF Act 2005 provides as follows:

> *A serving officer or militant who desires to seek political office shall first resign or retire from the Defence Forces according to regulations made by the minister.*

53] There are two instruments passed under the UPDF Act which were very well conversed by both counsel.

Regulation 2(f) of the Uganda Peoples Defence Forces (Discharge) Regulations SI 307-3 (hereinafter UPDF Discharge Regulations) provides that:

> *An officer or a man of each armed force may be discharged by the UPDF Council at any time during the currency of any term of engagement at his own request on compassionate grounds; or if for any reason his services no longer required.*

On the other hand, Regulation 31(3) of the UPDF Conditions of Service Regulations explains the procedure for retirement as follows:

> *(3) A retiring officer shall be given, on retirement, a certificate of service containing the following:*
> *(a) his army number;*
> *(b) his surname;*
> *(c) his forename;*
> *(d) his place and date of enlistment or commencement of service;*
> *(e) a description of the officer at the time of leaving the service;*
> *(f) a testimonial and signature of the officer making the testimonial;*
> *(g) his date of transfer to the reserve;*
> *(h) his rank and appointment on transfer to the reserve;*
> *(i) the causes of transfer to the reserve;*

(j) the unit from which transferred to the reserve;
(k) his date of retirement;
(l) his rank on retirement;
(m) the cause of retirement;
(n) his total service on retirement; and
(o) the signature of the issuing officer.

The appellant had to secure the above document before participating in the NRM primaries between April and September 2020. He therefore should have secured it before being nominated for the elections on 28/9/2021.

54] The appellant contends that he was discharged through retirement and not on resignation. That he sought retirement from the UPDF after which he was issued with the discharge certificate. He contends then that at the time of his nomination, and eventual election as a successful candidate, he had ceased to be a serving officer of the UPDF. The respondent contested the facts of that retirement on the following grounds:

i. The discharge certificate lacked information stipulated in regulation 31(3) of the UPDF Conditions of Service Regulations. In particular, it did not indicate the date of retirement thus the contention that he was discharged on 20/6/2020 before his nomination into the race, was false or unsubstantiated. That the internal memo attached to the certificate was merely correspondence between the Military Assistant, Chief of Defence Forces and the joint Chief of staff (JCOS) communicating that the Chief of Defence Forces (CDF) had permitted the discharge of un undisclosed officer.

ii. Under Regulation 4(d) of the UPDF Conditions of Service Regulations, the controlling authority is the Commissions Board and not the (CDF) and as such, the appellant's alleged application for retirement for resignation should have been addressed to the Board.

iii. At the time of his nomination, the appellant was still drawing full monthly salaries and allowances as an officer of the UPDF. Evidence of his pay slips for the months of July, August and September 2020 were attached to the respondent's affidavit in support of the petition.

iv. That the service personnel particulars' report (Annexure G to petitioners' affidavit) indicates the appellant's date of entry into the army (DOE) as 4/12 1996 and the end date as **6/10/2020** which would mean that the appellant actively engaged in the NRM party primaries and was nominated as a candidate for the elections, before his discharge from the UPDF.

v. The appellant presented three different dates of this retirement i.e. 20/6/2020, 31/7/2020 and 6/10/2020 which was a departure from his pleadings and contradictory.

vi. The appellant's testimony was that he was discharged under serial number **261** whereas the Discharge Certificate in his SRA reflects a different serial number **582.**

It was then contended for the respondent that a *prima facie* case was raised to prove that the appellant was at the material time, still a serving member of the UPDF, and that he failed to explain the shortcomings above in his evidence.

55] To counter those arguments, the appellant argued that the UPDF letters dated 6/6/2020, 8/6/2020, 10/6/2020, and 20/6/2020, as well as the certificate of service issued on 18/6/2020 signified that he sought and was granted early retirement, but not resignation as erroneously concluded by the Judge. That the uncontroverted evidence in the COS is a retirement date of 31/7/2020. He argued further, that receiving a salary could have been a failure of internal processes that cannot be visited on him. Further, that the date of 6/10/2020 indicated in the Service Personnel Particulars Report would have been his formal

retirement date, the reason why he sought for early retirement. Finally, that since the correct date of retirement of 20/6/2020 appears in the same memorandum of the UPDF, its late signature or endorsement could be explained by failed internal processes.

56] We accept the submission that the Judge erred when he found that the appellant resigned from his employment. We only saw evidence that he sought for early retirement. Even then, that finding would not affect the final decision because the law appears not to differentiate between the procedure for those who seek resignation, from those who opt for early retirement. It is provided in Regulation 28(1) of the UPDF Conditions of Service Regulations that:

> *"The Board may permit any officer to resign his commission in writing at any stage in his service or to retire on pension after a minimum of thirteen years of reckonable service". Emphasis applied.*

57] To discharge that burden, the appellant submitted a Certificate of Service of the UPDF, placed at page 60 of the Record of Appeal. It is a one-page document indicating that it was issued to Yuventino Omara C. Paul of Abim District who was enrolled on 27/4/1996 and commissioned on 13/6/2010. We are prepared to believe that it is the certificate that was issued to the appellant but as submitted for the respondent, it does not show the date of his discharge and falls far short of what is required of a CSO under Regulation 31(3) of the UPDF Conditions of Service Regulation. As stated for the respondent, it did not show the appellant's description, rank and unit at the time of his alleged discharge, the cause of his discharge or total service time. Most important it was not signed by the issuing officer.

58] The appellant therefore needed to adduce other evidence to confirm that he was on a specific date before his participation in the NRM primaries or nomination, discharged from the UPDF. He could only do so by showing that he sought and was discharged

by the appropriate authority. We therefore accept the respondent's submission that he could only seek his discharge from the UPDF Commissions Board. The Board is created under Section 20 of the UPDF Act, headed by the Army Commander as its Chairperson. One out of several Chief of Personnel and Administration of each Service act as its Secretary. Under Section 20(3)(f), one of the functions of the Board is to monitor the retirement of officers due for retirement, and to determine any termination of service. It is further provided in Section 22(1) and (2) that the Board can only discharge its functions through meetings chaired by the Chairperson, with a quorum of five members. Further, under Section 22(3) questions proposed at a meeting of the board shall be determined by consensus of the members present. Further, under Regulation 5(6) of the UPDF Conditions of Service Regulations, the minutes of every meeting of the board shall be recorded and kept by the Secretary.

59] The appellant presented evidence to show that on 18/6/2020, he wrote to the CDF seeking permission for early retirement in order to participate in the 2021 elections under the NRM party. He was clear in that communication that the dead line set by the EC for public servants was 29/6/2020. It is expected then that once his application was received, the next step would have been to place it before the Board to sit and make a decision on it. The appellant did not present any minutes of the Board or its decision. Instead, he presented an internal memorandum dated 20/6/2020 from the MA-CDF of the UPDF to the Joint Chief of Staff (JCOS) stating as follows:

"REQUEST FOR EARLY RETIREMENT TO CONTEST FOR POLITICAL POSITION IN 2021

MEMORANDUM
UGANDA PEOPLES' DEFENCE FORCES
OFFICE OF THE CHIEF OF DEFENCE

To: *JCOS* *From.* *MA-CDF*
Date: *20 June 20* *Tel No. 5136*
Your Ref: *Our Ref. UPDF/CDF/505/A*
Info: *CPA, CLS*

SUBJECT: REQUEST FOR EARLY RETIREMENT TO CONTEST FOR POLITICAL POSITION IN 2021

1. *Sir, ref letter UPDF/KRTS/2A dated 18 Jun 20, herewith attached, the CDF allowed discharge. But that Officer should be informed that the UPDF doesn't sponsor candidates.*
2. *That, when you join politics, you are in your only resources*
3. *Forwarded*
4. *Point to Note: That you inform the officer.*

60] The above document could not be interpreted to be the decision of the Board on whether the respondent was officially discharged. It was not borne of the Board's meetings and was not signed off by its Chairperson or Secretary. Although clearly referring to the appellant's request for early retirement, the memo was not addressed to him, and he did not adduce evidence to show that a formal communication of the Board was subsequently addressed to him in that respect. We therefore cannot conclude that the appellant's application for early retirement was handled at all. The Supreme Court has in a previous decision been clear that:

> *"Therefore, for an officer to resign or leave the armed forces, the officer cannot do so at will or without the formalities and procedures as prescribed by law being complied with. It certainly would be a matter of great danger to the national security, if it were ever to be held by anyone or authority that members and officers of the Uganda people's Defence Forces*

could resign or be removed at will and anyhow outside the law."

Attorney General versus Major General David Tinyenfuza Constitutional Appeal No. 1 of 1997 quoting from **Queen versus Cumming and Anor, Ex-parte Hall (1887)19 QB 13.**

We would take it then that without being formerly discharged, the appellant was still a member of the UPDF who remained in service at least until 6/10/2020, the documented end date in the Service Personnel Particulars Report that he presented himself.

61] We are also prepared to accept the respondent's submission that by drawing a full salary and allowances for the months of July, August and September 2020, it can be assumed that the appellant was still conscripted in the UPDF. The appellant did not deny the fact that three salary pay slips presented by the respondent were in respect of his employment. He attempted to discredit that evidence by contesting its inclusion in the record of the lower Court and the Judge's reliance on it, because there is no proof that either receipt was attached to any affidavit or properly admitted into evidence. To the contrary, we note that the three pay slips were attached to the respondent's petition at the High Court. We agree that such evidence should have been better presented through affidavit evidence, but any irregularity if any, was cured by the fact that all the respondent's documentary evidence was admitted during the scheduling conference held on 14/11/ 2022, with no contest from the appellant. If the appellant considered that evidence inadmissible, he should have raised an objection early enough in the trial. Such evidence cannot be contested on appeal.

62] That said, the fact of receiving salary by itself would not result into annulling the election. See for example, **Okeyoh Peter Vs Abbot George Ouma EPA No. 8/2011.** What we consider more significant is that the appellant omitted to follow the correct

procedure to secure his discharge from the army, and as such, was wrongly nominated.

63] Our conclusion from the analysis of the evidence is that the trial Judge was correct to find that by the time of his nomination on 28/9/2021, the appellant had not yet been discharged from the UPDF and therefore, he was not qualified for nomination as a candidate to the position of District LC 5 Chairperson of Abim District.

THE CROSS APPEAL

64] The respondent/cross appellant raised two grounds in cross appeal and submitted on them together. It was contended that:

1. **The learned trial Judge erred in law when he did not declare the cross appellant the validly elected Chairperson of Abim District.**

2. **The learned trial Judge erred in law when he did not find the cross appellant unopposed on close of the nomination exercise.**

Submissions on Grounds One and Two of the cross appeal

65] Counsel for the cross appellant/respondent submitted that the trial Judge having correctly found that the nomination of the appellant was illegal, he ought to have exercised his discretion and declared the respondent as winner of the election since he was the only other contestant in the race. Counsel faulted the Judge for not advancing any reasons for his decision, especially when mindful of the importance of elections to a democratic State, and the need for elections to be conducted in accordance with the established electoral laws, in particular Section 142(5)(b)(ii) LGA. Counsel relied on this Courts' decision of **Wakayima Musoke Nsereko & EC versus Sebunya Robert, EPA No. 50 & 102/ 2016**

where after overturning the election of one of only two contestants, the Court declared the other, the unopposed winner of the same.

66] In response to those submissions, counsel for the appellant/respondent in cross appeal, first drew our attention to the provisions of Article 1(2) and 1(4) of the Constitution that emphatically state that the people of Uganda shall be governed through their will and consent, and that they shall express their will through regular, free and fair elections. Counsel further referred to the poll results of the two contesting candidates, as 14,417 votes for the appellant, and 4,809 votes for the respondent. He considered that his client posted a clear victory and therefore, an order that the respondent is declared the LC V Chairman, would result into the imposition of an unpopular candidate upon the people of Abim District, or denying them the right to choose a candidate of their choice, when clearly from the votes cast, the respondent was not the candidate of their choice. In conclusion that the respondent could not be deemed as unopposed for it was his adversary's contention that he was eligible for nomination and election, and was correctly chosen by the people as the preferred candidate. Counsel based his arguments on the High Court decision of **Komakech Christopher versus Otto Edward Makmot & EC, EP No. 06/2016** which followed the Supreme Court decision of **Amama Mbabazi versus Yoweri Kaguta Museveni & 2 Ors, EPA No. 01/2016.**

67] The appellant's counsel concluded with a prayer that we allow the appeal and dismiss the cross appeal with costs here and in the High Court being awarded to his client.

Cross appellant/respondent's submissions in rejoinder

68] The cross appellant/respondent's counsel dismissed the reference to the Constitution as misplaced, arguing that it could not apply to the appellant who was illegally nominated. Citing Article 1(1) of the Constitution, counsel argued further that nominations of candidates is part of the process of free and fair elections and

therefore, the outcome of an election where one candidate is illegally and unlawfully nominated, cannot be used to legalize an illegality.

69] Counsel continued that the decision in **Komakech Christopher versus Otto Edward Makmot & EC (supra)** was distinguishable since in that case, the High Court did not find that the 1st respondent had been unlawfully nominated. Similarly, that the ratio in the decision in **Amama Mbabazi versus Yoweri Kaguta Museveni (supra),** is that where an election is illegitimate, it does not matter that the successful candidate had majority votes. Counsel repeated that the appellant should not have been a candidate in the first place, and that had he been disqualified by the EC during nominations, the respondent would have automatically been unopposed. Therefore, as the sole legally nominated candidate, he would have been elected, even without conducting an election.

70] Respondent's counsel argued further that the appellant should not be allowed to benefit from the outcome of an illegality by being allowed to participate in fresh elections at the expense of tax payers.

71] In conclusion, counsel prayed for the costs of the cross appeal.

Decision of the Court on the Cross appeal

72] There appears to be only one issue raised in the cross appeal. It was submitted for the appellant in cross appeal/respondent that since the trial Judge found for a fact that the nomination of the respondent in cross appeal/appellant to participate in the elections was illegal, and there being no other candidate save for the respondent, the Judge ought to have declared the latter the winner of the polls and thus, the validly elected candidate. In response, it was repeated that the appellant's election was valid and that having won the election by a wide margin, declaring the respondent as the successful candidate would amount to an

imposition on the people a candidate they did not vote, a decision that would be contrary to the Constitution.

73] We have when resolving the appeal agreed with the trial Judge that the nomination of the appellant was done contrary to the law. We have also set aside his election as the LC V Chairperson Abim District. The question then would be; did the facts and the law permit the Judge to make a finding that the respondent, being the only other candidate in the election, and also being unopposed at the close of the nomination exercise, he ought to have been declared the validly elected LC V Chairperson of Abim District?

74] The Constitution is clear that the people of Uganda can only express their will and consent on those who govern them through the conduct of valid elections. It is provided in Article 1(1) of the Constitution that:

> *(1) All power belongs to the people who shall exercise their sovereignty in accordance with this Constitution.*

It is also clear in Article 1(4) of the Constitution that:

> *(4) The people shall express their will and consent on who shall govern them and how they should be governed through regular, free and fair elections of their representatives or through referenda.*

75] It appears then that the spirit of the Constitution is that it is the people, through a valid election and not the Courts, that have the mandate to choose who shall govern them. That notwithstanding, it is provided in Section 142(5)(b)(i) and (ii) LGA) that:

> (5) At the conclusion of the trial of an election petition, the court shall determine whether the respondent was duly elected or whether any, and if so which, person other than the respondent was or is entitled to be declared duly elected, and if the court determines that—

(b) *the respondent was not duly elected but that some other person was or is entitled to be declared duly elected—*

(i) the respondent shall be ordered to vacate his or her seat; and

(ii) the court shall notify the Electoral Commission and the speaker or chairperson of the relevant council of its determination, and the Commission shall thereupon, by notice published in the Gazette, declare that other person duly elected with effect from the day of the determination by the court.

A similar provision is contained in Section 63(6)(b)(i) and (ii) Parliamentary Elections Act.

76] We do not perceive the above law to be inconsistent with the Constitution but in fact, the accepted process for both Local Government and Parliamentary elections. An election was held on 20/1/2021 to choose the LCV Chairperson Abim District. Only two candidates were nominated and only two participated in the elections. Only one contest was raised against the entire election process that Mr. Omara Yuventine was not validly nominated. We accepted the submission that had the EC done its work, Mr Omara should not have been on the ballot, and Mr. Ariko J. De West would have proceeded to contest in the election unopposed. Had that been the case, Section 163 (1) LGA would kick in and he would have been declared the winner of the elections unopposed.

77] We are therefore prepared to agree with the decision of this Court in **Wakayima Musoke Nsereko & EC versus Sebunya Robert (supra)**. The facts there are similar to the dispute before us. Mr. Wakayima and Mr. Nsereko were two of six candidates in an election for a Parliamentary seat. Mr. Wakayima won the election by a relatively small margin. Mr. Wakayima's victory was successfully contested on grounds that his nomination was

invalid because his name did not appear in the Voters' Register and he also lacked the requisite education qualifications. In addition to overturning the polls, the Judge declared Mr. Nsereko, the runner up, the validly elected candidate.

That decision was upheld on appeal on 15th September 2017. The Court of Appeal found that:

> *"From our reading of the above provisions, we deduce that the High Court can declare that a candidate other than that declared elected was validly elected. We do not accept the contention by counsel for the 1st appellant that by declaring the respondent the validly elected Member of Parliament for Nansana Municipality, the trial Judge disenfranchised the voters of the constituency.*
>
> *In the instant case, our finding under issue 1 is that the 1st appellant was nominated in error because he neither possessed the minimum academic qualifications of "A" level or its equivalent nor was he a registered voter. That means the 1st appellant should not have been among the candidates the voters of Nansana Municipality, Wakiso District voted for as their Member of Parliament. When he is removed from the scene, the respondent would be the person with the highest number of votes that the people of Nansana Municipality voted for as their Member of Parliament.*

78] The only difference here is that Mr. Omara won the polls with a very wide margin. We accept the submission that the poll result decidedly in Mr. Omara's favour, cannot sanitize his illegal participation in the primary elections of his party, his nomination and election. We also consider the fact that the elections were held and completed way back in January 2021. Mr. Omara technically lost his seat on 9/3/2023 the date of the judgment. If at all he has since acted as the LC V Chairperson, his tenure must now be halted.

79] We therefore find merit in the cross appeal and it is allowed with the following orders and declarations:

i. The appeal is dismissed.

ii. The Cross appeal is allowed.

iii. Mr. Omara Yuventine the appellant/respondent in cross appeal is ordered to vacate the seat of LC V Chairperson of Abim District, if he has not yet done so.

iv. Mr. Ariko Johnny De West the respondent/cross appellant is declared as the winner of the election for the seat of LCV Chairperson of Abim District, and shall take office with effect from the date of this Judgment.

v. The Electoral Commission and the Speaker of Abim District are hereby formerly notified that Mr. Omara Yuventine shall from the date of this judgment cease to be the Chairperson of Abim District Local Government Council.

vi. The appellant/respondent in cross petition shall pay to the respondent/cross appellant the costs of this appeal and cross appeal, and costs in the Court below.

DATED at Kampala this ...13TH.....day of .....FEB....., 2024.

.....

F.M.S Egonda-Ntende
JUSTICE OF APPEAL

.....

Catherine Bamugemereire
JUSTICE OF APPEAL

.....

Eva K. Luswata
JUSTICE OF APPEAL