

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LOCAL GOVERNMENT ELECTION PETITION NO.26 OF 2006
IN THE MATTER OF THE LOCAL GOVERNMENT ACT,
(CAP 243)

AND

IN THE MATTER OF ELECTORAL COMMISSION ACT (CAP 140)

AND

SEBYALA CHARLES SALONGO ::::::::::: PETITIONER

VERSUS

- 1. SEMPAGAMA MUSOKE KIZITO ::::::::::: 1ST RESPONDENT**
- 2. THE ELECTORAL COMMISSION ::::::::::: 2ND RESPONDENT**

JUDGMENT

This is an election petition filed by the Petitioner **SEBYALA CHARLES SALONGO** against the 1st Respondent Sempagama Musa Kizito and the 2nd Respondent, the electoral Commission, challenging the results of the Local Council 3 Chairperson Luwero Town Council elections held on Friday, March

10th 2006. The 2nd Respondent organised those elections and declared the 1st Respondent the winner. The Petitioner seeks this Court to declare that:

- a) The 1st Respondent was not validly elected and should immediately vacate his seat in favour of the Petitioner or the said results be set a side and a new election be held;
- b) Costs of the petition be granted to the Petitioner.

The Petitioner was brought under the Local Governments Act [Cap.243] as amended by the Local Governments (Amendment) Act, Act No.20/2005 (whose commencement date was 9th December 2005), the Parliamentary Elections (Election Petition) Rules, (S.I 141-2).

S.138(1) of the Local Governments Act provides that 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. Subsection (3) of S.138 provides that an election petition may be filed by a candidate who loses an election. Sub-section (4) of the same section provides that an election petition shall be filed within 14 days after the day on which the results of the election have been notified by the Electoral Commission in the Gazette.S.142(2) of the same Act requires this Court to hear and determine the matter within three months after the day on which the petition was filed. Under sub-section (3) of section 142 this Court, after due inquiry, may:

- a) Dismiss the petition;
- b) Declare a candidate other than the candidate declared elected earlier to have been validly elected; or

- c) Set aside the election and order a new election.

In the instant case the Electoral Commission notified the results of the elections of Local Governments Councils for Sub-County/Town/Municipal/Division Chairpersons in the Uganda Gazette Published on 11th May, 2006.(see General Notice No.175 of 2006). This petition was filed on 22nd May, 2006, within the time stipulated by the law. It was accompanied by an affidavit sworn by the Petitioner.

The following facts were agreed upon by the Advocates for all the Parties:

- a) The election was held on 10th March, 2006.
- b) Five candidates contested and these were:
 - i. The Petitioner;
 - ii. The 1st Respondent;
 - iii. Kasoma Hassan;
 - iv. Sekajuja Robert Junior;
 - v. Ssenungi Kasimaggwa Ali.
- c) The 1st Respondent was returned as the winner with 2763 votes; and the Petitioner was returned as runner-up with 2714 votes.
- d) The margin between the 1st Respondent and the Petitioner was 49 votes.
- e) The declared results for the other candidates were:

i. Kasoma Hassan	1687 votes.
ii. Sekajijja Robert Junior	78 votes.
iii. Sennungi Kasimaggwa	8 votes.

- f) The elections were conducted under a Multi-Party system where the Petitioner contested as an NRM candidate while the 1st Respondent contested as an Independent candidate.
- g) The elections were organised and conducted by the 2nd Respondent.

The particulars of the complaints against the 2nd Respondent are contained in paras 4 and 5 of the petition. They are:

- i. Failure to conduct the election in compliance with the provisions and principles laid out in the electoral laws of Uganda.
- ii. Failing to take steps to ensure that there was no multiple vote registration and/or registration of non-residents and other unqualified persons and the subsequent multiple voting in the elections.
- iii. Failing to take adequate measures and steps to ensure that the entire electoral process was fair and transparent.
- iv. That the said non-compliance and failure affected the result of the election in a substantial manner.

The particulars of the complaints against the 1st Respondent are contained in paras.4(c) and 5 of the petition. They are:

- i. That the 1st Respondent personally and by his known agents, before and during the said election engaged in the illegal practices such as:
 - a) acts of bribery, by giving gifts, monetary and other forms of consideration to induce the people qualified to vote in the elections to vote for the 1st Respondent;
 - b) Inducing and procuring persons to vote in the elections well knowing that they were prohibited by law;

- c) Being in possession of certificates of registration which he gave his various agents to use to vote.
- d) Using his agents and supporters to personate and vote in the names of other voters.
- e) Holding rallies on voting day to canvas for votes.

The petition was accompanied by an affidavit sworn by the petitioner himself.

The 2nd Respondent filed an answer to the petition accompanied by an affidavit sworn by its Ag. Head of the Legal Department, Oryem Alfred Okello.

The 2nd Respondent averred that the election was conducted in compliance with all the principles laid down in electoral laws of Uganda, and that the elections were transparent, free, and fair. It denied any knowledge of illegal practice and/or offences under the Act Committed in connection with the election by the candidate personally or with his knowledge and consent, or his approval. It contended that the results of the election reflected the true and free will of the majority of the voters in the Constituency. The 2nd Respondent averred, in the alternative, that if there were any irregularities or non-compliance with the electoral laws such non-compliance or irregularities did not affect the outcome of the election in a substantial manner.

In his answer to the petition, accompanied by an affidavit/affirmation sworn or solemnly affirmed by him, the 1st Respondent averred that the election was conducted in compliance with the provisions and principles laid out in the electoral laws of Uganda. He contended that no illegal acts of bribery were committed by him personally or through his agents as alleged in

paras.4 and 5 of the petition. In the alternative, the 1st Respondent averred that if there are any illegal acts of bribery by his agents, which is denied, the same were committed without his knowledge and consent or approval. He denied that there was any multiple vote registration and/or registration of non-residents and other unqualified persons by the 2nd Repondent. He averred that the principle of transparency was maintained and the election was conducted in environment of fairness and freedom. He denied having induced or procured unqualified people to vote in the election. He denied having been in possession of voters' certificates of registration or distributing them to any of his agents to use in voting as alleged. He denied his agents and supporters personating or voting as other voters. He averred that if there was any personation, unknown to him, no complaint was raised to the polling officials against it. He denied having held any rallies or canvassing for votes on voting day. He averred, in the alternative, that if there were any illegal acts or electoral malpractices in the election, which is denied, the same did not affect the result in a substantial manner. He averred that he was declared winner of the election in an electoral process which was free and fair, and which reflected the free will and consent of the majority of genuine voters of Luwero Town Council.

Four issues were framed by the Court in consultation with the Counsel for the Parties. These were as follows:

1. Whether the election of the 1st Respondent as Chairperson L.C III of Luwero Town Council was conducted in compliance with the provisions of the Local Government Act and other Electoral laws, and in accordance with the principles laid down in the said laws.
2. If the answer to issue No.1 above is in the negative whether the non compliance and failure affected the result of the election in a substantial manner.

3. Whether any illegal practice or offence under the Local Government Act was committed in connection with the election by the 1st Respondent personally or by his agents with his knowledge and consent or his approval.
4. Whether the parties are entitled to the remedies sought.

Learned Counsel for the Petitioner, Mr. Mugogo, submitted that the petition was brought under S.139(a) and (c) of the Local Governments Act (LGA). He submitted that the Petitioner squarely bears the burden to prove the grounds upon which he challenges the election. On the question of standard of proof, Counsel referred to S.172 of the Local Governments Act which made the Parliamentary Elections Act applicable in case of any issue not provided for under Part X of the former Act.

S.139 of the LGA provides:-

“The election of a candidate as a Chairperson or a member of a Council shall only be set 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”

It was the Parliamentary Elections Act [17 of 2005] which expressly what the standard of proof should be. S.61 (3) of the Parliamentary Elections Act provides:

“61. _____

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

Learned Counsel for the Petitioner chose to deal with issues Nos. 1 and 2 together. He submitted that the first issue constitutes a charge against the 2nd

Respondent. He submitted that the particulars of non-compliance were given in para.5 (b) of the petition. Counsel referred to paras. 6,7,8,9,21 and 22 of the affidavit of the Petitioner accompanying the petition.

Counsel dealt with the allegation of multiple registration of Non residents of Luwero Town Council and other unqualified persons. Counsel referred to S.19 of the Electoral Commission Act, which provides for registration of voters. Counsel submitted that non-residents were registered during an updating exercise of the voters roll. He submitted that the registration officers failed to verify the people they registered. He submitted that the registration officers had to ascertain that the people being registered were resident in the Parish or originated from there. (See S.19(1) and (3) of the ECA). Counsel submitted that the people who were registered had sworn affidavits and attached certificates of registration. He submitted that a certificate of registration has provision for ascertaining the origin or residence of the applicant. He submitted that the certificates of registration showed a general trend of registration of persons without ascertaining their origin or actual residence within Luwero Town Council. Counsel referred to the affidavits of Sanyu Justine, Namutebi Catherine, Nakiyingi Eva, Namatovu Alice and Matovu Ronald.

I have cross checked and perused the Certificates of Registration attached to the affidavits of Namatovu Alice, and Matovu Ronald and found that it was indicated that they were registered in their parishes of residence. A tick had been put on residence. I have ascertained that the failure to tick either origin or residence was in respect of Sanyu Justine, Namutebi Catherine and Nakiyingi Eva. Counsel referred to the affidavits of twenty people who had been registered in Luwero Town Council.

Learned Counsel for the 2nd Respondent Mr. Ddungu attached those affidavits for offending either the Commissioner for Oaths act or the Illiterates Act. Counsel referred to the cross-examination of several deponents, namely: Pross Nakibowa (PW5), Tereza Nabyonga (PW6), Mable Mbabazi (PW7), Nsamba George (PW10) and Harunah Mutyaba (PW II) who stated that they had signed the affidavits before Counsel Eric Byarugaba (the second Counsel for the Petitioner). Mr. Ddungu submitted that Counsel Eric Byarugaba had been identified by the people cross-examined as the one before whom they had signed the affidavits. Counsel pointed out that the affidavits show Augustine Semakula as the Commissioner for oaths. Counsel submitted that those deponents had, in cross-examination, showed that they were never taken to a Commissioner for Oaths.

Counsel referred to the Judgment of MULENGA, JSC at P.298 in Election Petition No.1 of 2001: Col. (Rtd.) Dr. Besigye Kizza Vs. Museveni Yoweri Kaguta and Electoral Commission.

Mulenga, JSC said:

“It becomes a matter of evidence whether the affidavit was sworn before a person empowered to take it.”

Counsel submitted that the Commissioner for Oaths should have sworn an affidavit to clarify this matter.

Counsel cited:

Bakunda Darlington Vs. Dr.Kinyatta Stanley and another, Civil Appeal No.27/96 (Court of Appeal).

Counsel also referred to Chitaley + Rao on The Code of Civil Procedure, Vol.3 (1908) pages 1-2. The learned authors wrote thus:

“The swearing or solemn affirmation of an affidavit is essential for its validity as an affidavit. An affidavit not sworn before a proper officer but simply attested by such an officer does not amount to an affidavit of the signatory.”

Counsel submitted that the evidence obtained upon cross-examination of deponents showed that they never took oaths or made solemn affirmations before a Commissioner for Oaths. Counsel referred to this as illegality.

Luwalira Anaset (PWI) was cross-examined. He admitted that he had signed some documents. When he was shown an affidavit he identified his signature. Then he stated that he had signed four sets of the affidavit at Kasana.

Kyolaba Nakakooza (PW4) was cross examined. She was shown an affidavit. She admitted having signed it at Kampala in the Chambers of Counsel Byarugaba.

Nakibowa Pross (PW5) was cross examined. She admitted having signed an affidavit at the Lawyer’s office. She pointed to Counsel Byarugaba as the lawyer she found in the office.

Nabyonga Tereza (PW6) was cross examined. She admitted having signed an affidavit at the lawyer’s place at Kampala. She pointed to Counsel Byarugaba as the lawyer.

Umaru Gitta Ssalongo (PW9) was cross-examined. He stated that he had formal education up to primary five. He could not read or write English. He told Court that he had made an affidavit which he signed before Court. He identified his signature on the affidavit. The affidavit was commissioned by

Augustine Ssemakula. Nabyonga Tereza (PW6) told Court that Counsel Byarugaba read her affidavit back in Luganda, and, thereafter, she signed. She said that she was in the company of her son, Gitta (PW9).

Nabyonga Tereza (PW6) also told Court that Nakibowa was Gitta's wife. Nakibowa Pross (PW5) told Court that she signed her affidavit at Counsel Byarugaba's place. She stated that she was in the company of Gitta and many other people.

Nsamba George (PW10) was cross examined. He told Court that he had thumb marked an affidavit in Kampala before a lawyer called Mr. Eric. Counsel Byarugaba uses the name Eric.

Mutyaba Harunah (PW11) was cross examined. He told Court that he had thumb marked his affidavit before a lawyer. He pointed to Counsel Byarugaba. He denied any knowledge of Augustine Ssemakula.

It is clear from the deponents who were cross examined that they never swore or solemnly affirmed before a Commissioner for Oaths before signing or thumb marking their affidavits. It would appear to me that Augustine Ssemakula simply attested the affidavits in the absence of the deponents. Unfortunately Mr. Augustine Ssemakula was not called to clarify this matter. For that reason I cannot condemn him unheard. However, I believe the deponents where they said that they signed or thumb marked the affidavits before Counsel Eric Byarugaba. Counsel Byarugaba was in Court and was physically identified by the witnesses. Mbabazi Mable (PW7) was cross examined. She pointed to Counsel Byarugaba and referred to him as a Magistrate.

The swearing or solemn affirmation of an affidavit or affirmation are essential for the validity of those documents. An affidavit not sworn before a

Commissioner for Oaths does not amount to an affidavit of the deponent. For that reason I hold that the affidavits of Luwalira Anaset (PWI), Kyolaba Nakakooza (PW4), Nakibowa Pross (PW5), Nabyonga Tereza (PW6), Umaru Gitta Ssalongo (PW9), Nsamba George (PW10) and Mutyaba Harunah (PW 11) are not valid affidavits. I accordingly Order that they be struck out.

Learned Counsel Mr. Ddungu submitted that the affidavits of all the deponents who were cross examined offend the illiterates Act. Counsel referred to the oral evidence of those deponents. They told Court that they did not understand English. Counsel pointed out that there were no certificates of translation attached to their affidavits. Counsel submitted that the fact of translation could not be assumed. He submitted that the absence of translation was fatal.

Where a deponent does not understand English the contents of an affidavit should be read to him/her in a language which he/she understands, and should be acknowledged by him/her to be correct.

Counsel Mr. Ddungu submitted that the affidavits of deponents who said that they did not understand English but which have no certificate of translation should be excluded from consideration.

Amongst the deponents were some unique ones like Mbabazi Mable (PW7). She was shown a document and she said:

“ I have never gone to school. I see white paper. I do not know the contents. Papers look alike. I cannot read.”

Kyolaba Nakakooza (PW4) told Court that she did not understand the contents of her affidavit before she signed it. She said that the contents of the affidavit were not explained to her.

Counsel Mr. Ddungu submitted that some deponents thumb printed their affidavits, and these were:

Sebaggala Nasser Lubwama, Mbabazi Mable, Serwambala Richard Kizito, Mutyaba Harunah, Nsamba George William and Kuhabwa Benon; Kuhabwa Benon was a student at Everest College. He was a senior Three student. He would be expected to know how to write his names. It is not known why he thumb printed his affidavit.

Nsamba George (PW10) told Court that he could not read or write English. He said he could write in Luganda. He told Court that he normally thumb printed documents instead of writing his name.

Mutyaba Harunah (PW 11) told Court that he cannot read or write English, and that he thumb marked his affidavit. He said that after thumb marking the affidavit the lawyer [Counsel Byarugaba] read it back to him.

In my view it is only the deponents who were cross examined who were asked whether or not they understood English. Invariably the deponents from PW1 to PW11 said that they did not understand English. However, some of them told Court that the affidavits had been read back to them and they understood their contents. In the circumstances, I would only exclude from consideration affidavits where the deponents stated that they did not understand English, and that the affidavits had not been translated into a language which they understood, and, indeed, the affidavits do not bear certificates of translation. An example is the affidavit of kyolaba Nakakooza (PW4).

Sebyala Simon (PW2) told Court that he knew the contents of the affidavit which he signed.

Nakibowa Pross (PW5) told Court that she had given information to Counsel Byarugaba who eventually read the affidavit back to her. She confirmed that what had been written was what she had said.

Nabyonga Tereza (PW6) told Court that Counsel Byarugaba read the affidavit back to her in Luganda before she signed.

Kabale Joseph (PW8) told Court that his affidavit was read back and explained to him. Then he signed it.

Umaru Gitta Salongo (PW9) told Court that he could not read or write English but he know the contents of his affidavit.

In my view, after getting confirmation from the deponents that they understood the contents of their affidavits, I would not exclude the affidavits from consideration merely because certificates of translation were omitted. This would be so where the affidavit was not invalid on other grounds.

Counsel Mr. Ddungu submitted on deponents who did not come for cross examination. He cited:

TRILOKNATH BHANDARI and Another

VR.

S.R. GAUTAMA [1964] E.A.606(CA).

At page 609 the Court of Appeal for East Africa said:

“No evidence affecting a Party is admissible against that Party unless the latter has had an opportunity of testing its truthfulness by cross-examination.”

Counsel submitted that they had indicated the deponents whom they wanted for cross examination but some were not produced. Counsel listed 21 names of people who had not been produced.

I have cross checked from the Court record. On 20.10.2006 cross examination of PW12 – Sebyala Charles Ssalongo, the Petitioner, was concluded. This is what Counsel Mr. Ddungu said:

“I am only interested in cross examining Mbabazi Mable. I can leave the others who swore affidavits.”

Counsel Mr. Abaine said: **“I am also only interested in cross examining Mbabazi Mable.”**

I therefore find no merit in the submission of Counsel Mr. Ddungu concerning deponents who did not turn up for cross examination.

Learned Counsel for the Petitioner Mr. Mugogo submitted that non-residents of Luwero Town Council were registered at the following Polling Stations:

(i)	Piida High School	7
(ii)	Kasana Kakokolo	7
(iii)	PWD Ears Centre	4
(iv)	Kasana Health Centre	1
(v)	Luwero Islamic School	1

Counsel submitted that there were other eight (8) people within the Town Council who were registered twice and issued with voter’s cards or certificate of registration. According to Counsel the residents who were registered twice were at the following Polling Stations:-

- (i) Mutyaba Haruna – at Kasana Health Centre and at Kasana Coffee factory.
- (ii) Sanyu Justine – at Ears Centre and at Kasana Kakokolo.

- (iii) Kabogoza Francis – at Ears Centre and at Kasana Kakokolo.
- (iv) Balyegisawa Sylvester – at Lubega Memorial and at Luwero Islamic Primary School.
- (v) Namatovu Alice – at Kakokolo Polling Station and at Kasana St. Jude Primary School.

Learned Counsel submitted that some voters voted twice, and he gave examples of:

- i. Nsamba George William - who claimed to have voted using a certificate of registration for Yiga Eric at Kasana Kakokolo; and
- ii. Serwambala Richard – who claimed to have voted using a certificate of registration for Zikusooka Robert at Luwero High Polling Station.

With regard to the alleged failure by the 2nd Respondent to ascertain that the people being registered were non-residents, and had already been registered elsewhere, learned Counsel Mr. Ddungu submitted that the Electoral Commission takes steps to find out errors made during the display exercise. Counsel referred to the affidavit in reply of Kanya Matovu, the District Registrar for Luwero District, and who was the Returning Officer for the Local Government Elections. In his affidavit Kanya Matovu stated as follows:

Para. 6 (i)

“Between the days of 29th September 2005 and 28th October 2005 there was a Country wide general update of the National Voters Register.”

Para. 6 (v)

“I am also aware that the registration officials also ensured that before a fresh applicant is issued with a Certificate of Registration, his/her particulars, namely age, place of origin or residence, parentage, etc are correctly recorded.”

Para.6(vi).

“During the update exercise of the registrar, residents of Luwero Town Council and all over the County were free to object to an inclusion of any person on the register, if that person was not a bonafide resident of that Parish.”

Para. 7 (c) .

“All persons were free to raise an objection if any person appearing on the National voters register was:

- i. Under age.
- ii. A Non resident
- iii. A Non Citizen
- iv. Not originating from the Parish.”

Learned Counsel Mr. Ddungu relied on the above evidence to submit that the 2nd Respondent took steps to ensure that there was no multiple voter registration and registration of non residents or other unqualified persons.

Kamya Matovu stated in Para. 9

“That there was no multiple voting in the elections for the Chairperson of Luwero Town Council and neither did I receive any reports of any reports of any multiple voting at any Polling Station.”

Counsel Ddungu submitted that possession of registration certificates was not proof that the people voted. The voters' Roll was not brought to Court. It remained in the ballot boxes. Counsel submitted that the National Voters' Roll could not be used to prove who had voted.

Regarding the claim that some people had voted twice Counsel Ddungu referred to the supplementary affidavit in reply of Kanya Matovu. Kanya Matovu stated:

Para: 15.

“That save for having two voter’s cards, the Voter’s Register does not have particulars of one person being registered twice on both Parish levels as this could be detected...”

Para. 16:

“That I know as a fact that a person only votes when his particulars appear on the Voter’s Register and having two cards does not entail any person to vote twice.”

Para. 17:

“That the allegations of voting twice are false because the indelible ink used could not be erased from the thumb for more than three days.”

Counsel Mr. Ddungu submitted that there was indelible ink to prevent people from voting twice; that a voter had to be identified; and that the voters' Roll which was used had voters' photographs. Counsel submitted that this was intended to detect wrongdoers.

On the question of alleged multiple registration of 20 people from Luwero Sub-County , Counsel submitted that no negligence could be attributed to the Electoral Commission. Counsel submitted that the said 20 people should not be believed. Counsel contended that the kind of evidence which Court should believe should be free of contradictions.

Under S.139 (a) of the Local Governments Act, the election of a candidate as a Chairperson of a Council can be set aside if it is proved to the satisfaction of the Court that there was failure to conduct the election in accordance with the provisions of Part X of the Act, and that the non-compliance and failure affected the result of the election in a substantial manner.

The Court must be satisfied that there has been failure to conduct the election in accordance with the principles laid down in those provisions. The grounds for annulling an election of a candidate as a Chairperson of a Council must be those contained in Part X of the local Governments Act. The Court is supposed to find out whether there was failure to conduct the election in accordance with the principles laid down in the Provisions of the Electoral Commission Act which contains the Principle relating to a free and fair election.

Non-Compliance with the Provisions of the Electoral Commission Act is not per se a ground as Chairperson of a Council. Such non-compliance can be a ground if it affects the Principles behind the Provisions of Part X of the Local Governments Act. Under S.139 (a) of the Act, the Court is supposed to consider:-

- i. Non compliance with the provisions of Part X of the Act relating to elections;

- ii. Whether there was failure to conduct the election in accordance with the Principles laid down in the Provisions contained in that part of the Act.

It is my view that the Court should concentrate on alleged non compliance with The Provisions of Part X of the Act. Non-compliance with the Provisions of the Commission Act will be considered where it is alleged to affect Principles laid down in the provisions of Part X of the Act.

In Election Petition No.1 of 2001 (Supra) ODOKI, Chief Justice, said that the overriding Principal is that the election must be free and fair. The Commission must ensure that the election is conducted under conditions of freedom and fairness. In order to do so the Commission must be independent and impartial in the conduct of elections.

Learned Counsel for the Petitioner Mr. Mugogo submitted that the 2nd Respondent failed to delete non-residents at coffee factory (a-M) polling Station during the display exercise. He submitted that as a result the non-deleted names were returned on the Voters' Register. Counsel submitted that the names were 58 in number. Counsel relied on Form CIN 9 which was annexed to the affidavit of Fred Mukiibi. Counsel submitted that this was evidence of Non-Compliance by the 2nd Respondent with the requirements of S.25 of the Commission Act.

Counsel submitted that the 2nd Respondent failed to comply with S.26 (1) of the Commissions Act when it failed to control the issue of voter's cards. Counsel submitted that Kamy Matovu the District Registrar/Returning Officer admitted that the Voters' Cards issued by the Electoral Commission.

Counsel submitted that the 2nd Respondent had failed to issue one Declaration of Results form for Luwero high School “B” (N-Z). He contended that the 2nd Respondent failed to issue the Declaration Form to the Polling agent for the Petitioner called Kiberu Cyrus. Counsel submitted that the Returning Officer failed to produce the Declaration Form for Luwero High School “B” (N-Z).

Kamya Matovu in a supplementary Affidavit in reply stated:

Para.4: That Mukiibi Fred was recruited for a general update of the National Voter’s Register only, and was never part of the group in charge of displaying the Voters’ Register.

Paras. 5 and 6: That deleting Voter’s names from the Register should be effected during display and the Parish Tribunal must endorse on all forms CLN 9 of those who are dead, or wish to be transferred, before changes are effected on those forms.

Para.7: That at the time of display of Voters’ Register, Fred and Kabale Joseph were never members of the Parish Tribunal, nor on the list of people to display the register. Under S.25 (3) of the Commissions Act during the period of the Voters roll any person may raise an objection against the inclusion in the voters’ roll of any name of a person. Under S.25(4) of the Act, an objection should be addressed to the Returning Officer through the Chairperson of the Parish Council of the person raising the objection. Under S.25 (5) of the Act the Returning Officer appoints a Tribunal comprising five members to determine objections received by him or her.

Kamya Matovu was cross examined as DW10. He confirmed that Fred Mukiibi had been appointed a Registration Officer for updating the Voter’s register. He

stated that the exercise took place between September 29th 2005 and 28th October, 2005. He identified an appointment letter issued by him for Fred Mukiibi as a Registration Officer. He clarified that the display exercise started in late December, 2005 and ended in the 2nd week of January, 2006. He stated that the Display Officers were instructed to receive objections to inclusion of names on the register. Objections had to be made on Form CLN 9. Form CLN 9 is for cleaning the Register. He stated that they are filled by a Display Officer and submitted to the Parish Tribunal.

The witness was shown forms CLN 9 attached to the affidavit of Fred Mukiibi. He noted that the forms were dated 17.1.2006. He clarified that they could not have acted on those forms because:

- i. The Display Officer was the same person recommending deletion of names from the register which was wrong.
- ii. Before they act on form CLN 9 all the five members of the Parish tribunal must endorse it.

He stated that there had to be a bonafide resident objecting against the inclusion of a name and he/she had to sign the form.

Mukiibi Fred, in his affidavit, stated that he duly informed the Returning Officer, Mr. Erias Tiguhingwa and gave him the Forms CLN 9 with reasons why the said persons should be deleted from the register. He further stated that Erias Tiguhingwa told him that the report was not necessary and returned the forms to him. He stated that the names were never deleted from the register.

Kabale Joseph stated that he was the L.C.I Chairman Binyonyi Zone. He stated that Mukiibi Fred was the Display Officer in their area. He also stated that the existence on the register of names of persons which should not have been there

was brought to the attention of the Returning Officer Mr. Tigulingwa Erias, but the names were never removed.

During cross examination Kanya Matovu stated that Fred Mukiibi had been Sub-County Supervisor for Luwero Sub-County during the 2000 Referendum elections, and the general elections of 2001. He stated that Fred Mukiibi know the procedure very well, and if he submitted CLN 9 forms to the Town Council Supervisor that was wrong, and he knew it. He stated that the forms should have been submitted to a parish tribunal. He admitted that Erias Tugahiingwa was the Supervisor in Luwero Town Council.

Mr. Mugogo submitted that the Parish Tribunal was not a permanent feature; that it had to be constituted whenever there was an exercise for it to do.

In his Supplementary Affidavit, Kanya Matovu did not state that he appointed a Tribunal for Luwero West Parish. Nor did he name the members of the Parish Tribunal. He stated that Mr. Erias Tugahiingwa was only a Town Supervisor who was not mandated to receive any complaint. I do not agree with this.

Under S.25(4) of the Commission Act an objection has to be addressed to the returning officer through the Parish Council Chairperson. In my view if the law expected the later to be capable of forwarding an objection to the Returning Officer, what about a Town Council Supervisor? I think an official of the 2nd Respondent; of such rank and responsibility, would have quicker access to the Returning Officer, and would understand better the importance of an objection against the inclusion in the voters' roll of a Polling Station of 58 names.

Kanya Matovu (DW10) identified the National Voters' Register for Luwero Town Council. It was admitted in evidence and marked Exhibit PI. He

identified the Polling Stations for Luwero Town Council. However, he stated that it was not the register which was used for elections. He stated that the extract from the National Voters' Register had been produced on 30.10.2006.

Kamya Matovu (DW10) was given the originals of CLN 9 forms annexed to the affidavit of Fred Mukiibi. He compared them with the Voters' Register for Luwero West Parish, Coffee Factory (A-M) Polling Station. He conceded that the names on the CLN 9 forms still appeared in the National Voters' register. No affidavit in reply to the one sworn by Fred Mukiibi was availed by the Respondents to say that the alleged 58 names of Voters actually resided within the area covered by Coffee Factory (A-M) Polling Station. S.106 of the Local Governments Act provides for Voters registers and rolls.

Section (2) of S.106 provides:

“(2). A district Registrar designated under the Parliamentary elections law or under any other law relating to general elections in Uganda shall, on a continuous basis, maintain and update the different voters' registers or rolls for the District in relation to the elections under this Act.”

Subsection (4) of S.106 provides:

“(4). The Provisions of Part III of the Electoral Commission Act or any other law relating to the National Register of voters and voters' rolls shall apply to the registers and voters rolls maintained for purposes of elections under this Act with such modifications and adaptations as may be necessary.”

Part III of the Electoral Commission Act covers the National Register of voters and Voters Rolls. The Provisions of S.25 of the Commission Act [under Part III] were voters rolls maintained for purposes of elections under the Local Governments Act. In other words a contravention of the Provisions of S.25 of

the Commission Act is equally a contravention of the Provisions of S.106 of the Local Governments Act.

Kamya Matovu (DW10) told Court that people who had worked as Update Officers could have been recruited as Display Officers. He said that his supervisors went and issued appointment letters. He said that he gave to the Supervisors blank appointment letters. According to this witness Erias Tugahiingwa was the Supervisor of Luwero Town Council.

The CLN 9 forms attached to the affidavit of Fred Mukiibi show that he was a Display/Issuance Officer. Kabarole Joseph stated that Mukiibi Fred was the Display Officer in his area (Binyonyi Zone, Luwero Town Council). According to the affidavit of Fred Mukiibi (Para.2) Coffee factory (A-M) polling station was in Binyonyi Zone. He stated that his brief was to display the voter register. Erias Tugahiingwa, the Supervisor, who recruited the display officers did not swear an affidavit to say that Fred Mukiibi was not a Display Officer. What Kamya Matovu stated in his Supplementary Affidavit in Para. & that Mukiibi Fred and Kabale Joseph were not on the list of people to display the register was hearsay and unreliable. Kamya Matovu conceded during cross-examination that he did not draw the list of names of people to be recruited as Display Officers. Nor did he produce that list to Court. So, it is possible that Mukiibi Fred worked as a Display Officer, and actually filled CLN 9 forms in that capacity. However, what I take to be important is the fact that Fred Mukiibi informed Erias Tugahingwa, the Supervisor, that there were 58 names on the Voters' register for Coffee factor (A-M) Polling Station which needed to be deleted there from. What is equally important is the fact that Erias Tugahiingwa did nothing about it. In my view, he must have known that such cases had to be submitted to the Parish tribunal. If there was no existing parish tribunal Erias Tugahiingwa could contact Kamya Matovu, the Returning Officer, and request

him to appoint one. In my view the failure of Erias Tugahiingwa, the Supervisor, to act on Fred Mukiibi's information has not been explained. Kanya Matovu looked at the CLN 9 forms attached to Mukiibi's affidavit and attempted to offer some explanation. In my view there was a failure on the part of the officers of the 2nd Respondent to realise that there was a serious anomaly on the Voters' register of the Polling Station which needed rectification. It did not matter very much who signed where on the forms. Other forms could have been filled in correctly. I cannot imagine where the members of the Parish Tribunal could have found the CLN 9 forms to consider and endorse them when Erias Tugahiingwa never forwarded them to the Parish Tribunal. It was not clear whether the Parish tribunal had been appointed by Kanya Matovu, the Returning Officer.

The 2nd Respondent has a statutory duty to update and clean the Voters Register before any election is held. Up dating and cleaning the register promotes the Principle of Voter registration and transparency. It is my view that on the evidence on record the 2nd Respondent failed efficiently to update and clean the National Voters Register and the Voters roll for Coffee Factory (A-M) Polling Station, in Luwero West Parish, Luwero town Council. As a result the said Voters roll contained flaws. I find that the 2nd Respondent failed to comply with the Provisions of S.25 of the Commission Act which amounted to non-compliance with the Provisions of S.106 of the Local Governments Act. I further find that the 2nd Respondent violated the Principles of proper registration of voters, fairness and transparency behind S.106 of the local Governments Act.

On the complaint that the 2nd Respondent failed to comply with S.26(1) of the Commission Act because it failed to control the issue of Voters' cards. Counsel for the Petitioner relied on the following evidence:

Luwalira Anaset (PW1) told Court that he registered as a voter at Piida (PWD) at Kasana in Luwero Town Council.

Sebyala Simon (PW2) told Court that he registered at Kakokolo – Kavule Polling Station in Luwero Town Council.

Nakiyingi Eva (PW3) told Court that she registered at Ears Centre Polling Station.

Kyolaba Nakakooza (PW4) told Court that she was registered at Mpagi's home in Kavule.

Nakibowa Pross (PW5) told Court that she registered at Ears Centre Polling Station, Kasana.

Nabyonga Tereza (PW6) told Court that she registered as a voter at Kasana but did not know the particular Polling Station.

Some deponents were not cross-examined. This Court has no evidence suggesting that they never swore or solemnly affirmed before a Commissioner for oaths. Their affidavits indicate that they were commissioned by a Commissioner for Oaths. Those affidavits were not struck out on that ground.

The deponents who were not cross examined have not stated that they did not understand English. By merely looking at an affidavit the Court may not be able to say which one required a certificate of translation. There may be some deponents who would say that the affidavits had been read back and translated to them, and they understood the contents. So in the absence of evidence that a particular deponent did not understand English, and that the affidavit had not

been translated into a language which he/she understood, and where such affidavit does not bear a certificate of translation, this Court would be slow to condemn such an affidavit. So this Court will consider the affidavits which have not been struck out.

Nakayiza Annet attached to her affidavit a certificate of registration which showed that she registered in Luwero South East Parish at Luwero Islamic School Polling Station.

Ssendagire Jackson attached to his affidavit a photocopy of a voter's card which showed that he registered at Kasana PWD Parish at Ears Centre Polling Station.

Namuleme Oliva attached to her affidavit a photocopy of a voter's Card which showed that she registered at Kasana PWD Parish at Ears Centre Polling Station.

Semakalu Moses attached to his affidavit a photocopy of a voter's card which showed that he registered at Kavule Parish, at Kasana Kakokolo Polling Station.

Mulindwa Safulo attached to his affidavit a photocopy of a voter's card which showed that he registered at kavule Parish at Kasana Kakokolo Polling station.

Ndagire Hamiyati attached to her affidavit a photocopy of a voter's card which showed that she registered at Kavule Parish, at Kasana Kakokolo Polling station.

Sebyala Simon attached to his affidavit a photocopy of a voter's card which showed that he registered at Kavule Parish, Kasana Kakokolo Polling station.

Nakiyingi Eva attached to her affidavit a photocopy of a voter's card which showed that she registered at Kasana PWD parish at Ears Centre Polling Station.

Sempa Emmanuel attached to his affidavit a photocopy of a voter's card which showed that he registered at Kasana PWD Parish at Ears Centre polling Station.

Robert Ssemuwemba attached to his affidavit a photocopy of a voter's card which showed that he registered at Kiwogozi Parish at Kasana health Centre Polling Station.

Lutalo Bob attached to his affidavit a photocopy of a voter's card which showed that he registered at Kasana PWD Parish at Ears centre polling Station.

Mulindwa Yusuf attached to his affidavit a photocopy of a Voter's card which showed that he registered at Kasana PWD Parish at Ears Centre Polling Station.

Namutebi Cate attached to her affidavit a photocopy of a certificate of registration which showed that she registered at Kavule Parish at Kasana Kakokolo Polling Station.

Bukenya Siraje attached to his affidavit a photocopy of a voter's card which showed that he registered at Kasana PWD Parish at Ears Centre Polling Station.

Sentuga Yusuf attached to his affidavit a photocopy of a Voter's Card which showed that he registered at Kavule Parish at Kasana Kakokolo Polling Station.

Any person who was a citizen of Uganda and aged eighteen years or above was free to apply to be registered as a Voter in a Parish or Ward where he/she originated or resided. (see S.19(1) of the Commission Act).

Kamya Matovu in his affidavit in reply dated 25th August 2006 stated:

In Para. 6 (i): Between the days of 29th September 2005 and 28th October, 2005, there was a Country wide general update of the National Voters Register.

In Para. 6 (iii) (a): The persons who were recruited by the 2nd Respondent to update the voters' register were specifically mandated to – received valid applications for fresh registration and transfer of voters.

In Para.6 (v): Sam also aware that the registration officials also ensured that before a fresh applicant is issued with a certificate of registration his/her particulars, namely age, place of origin or residence, parentage etc are correctly recorded.

In para.8: That from the information I have provided – it is therefore false for the Petitioner to allege that the 2nd Respondent took no step to ensure that there was no multiple voter registration and registration of non residents and other unqualified persons.

A transfer of a voter can only be effected during the update of the Voters register. Also there could be fresh registration of voters who had turned eighteen years since the previous registration. In a case of transfer the voter could only go to the Parish or Ward where he/she originates from or resides. If the particulars of a voter have to be stated on an application form then the

Registration Officer would be able to note the age of the Applicant. The Registration Officer responsible in each case would note the following:

- 1) That Nakayiza Annet was born on 13.6.1981
- 2) That Ssendagire Jackson was born on 3.7.1977
- 3) That Namuleme Oliva was born on 23.2.1982.
- 4) That Semakula Moses was born on 4.8.1964.
- 5) That Mulindwa Satulo was born on 12.9.1946
- 6) That Ndagire Hamiyati was born on 14.12.1980
- 7) That Sebyala Simon was born on 29.10.1979
- 8) That Nakiyingi Eva was born on 3.2.1985
- 9) That Sempa Emmanuel was born on 13.8.1967
- 10) That Robert Semuwemba was born on 15.8.1974
- 11) That Lutalo Bob was born on 15.12.1984
- 12) That Mulindwa Yusuf was born on 1.1.1978
- 13) That Namutebi Cate was born on 14.8.1975
- 14) That Bukenya Siraje was born on 12.2.1979
- 15) That Sentuga Yusuf was born on 11.12.1983.

This Court can appreciate that in 2005 none of the above named voters had just turned eighteen years. Any competent Registration Officer would be expected to inquire from the Applicant whether or not he/she has never been registered anywhere. The Registration Officer would seek to know if the Applicant had never participated in any voting exercise previously. The Registration Officer would then consider the stated parentage of the Applicant, and where parents used to stay at the time of the Applicant's birth. This would assist the Officer establish the origin of the Applicant. The Registration Officer would then consider the stated residence of the Applicant. In the case of residence the Applicant would have to state the location of his/her residence, and his/her Landlord/lady, if any. In my view ordinary peasants being transported from

Luwero Sub-County, in village settings, would not easily answer questions relating to Luwero Town Council. Any reasonable and diligent Registration Officer would detect that there was something wrong with the Applicants.

In case an Applicant applied to transfer his/her registration to a Parish or Ward within Luwero Town Council he/she would similarly prove his/her origin or residence. Such Applicant would have to surrender the voters' Card issued to him or her previously. In the instant case the voters transported from Luwero Sub-County kept their old voters Cards, issued to them at Polling Stations within the Sub-County at which they were previously registered.

I agree with the submission of learned Counsel Mr. Mugogo that non-residents were registered during an updating exercise of the voters' rolls, and that the registration officers failed to verify that those people were either residents in the Parishes or originated from Parishes within Luwero Town Council. Section 23(4) (a) of the Commission Act provides:

“(4) In the performance of his or her duties under this Act, a District Registrar and an Update Officer may –

- (a) **demand from any Applicant any information necessary to enable him or her to ascertain whether the Applicant is qualified to be registered as a voter.”**

In my view the Registration Officers who registered the voters from Luwero Sub-County never made use of the above provision. Consequently, the voters were registered and issued with other registration/voters cards. This Court appreciates that some voters changed some names when they came to register in Luwero Town Council. However, where the applicants seeking registration had not recently turned eighteen years, and where they did not expressly apply for transfer, then the Registration Officers should have verified their identification

and names from documents previously issued such as graduated tax tickets, Local Council I residence identity cards and so on. Apparently the registration officers did not bother to do so. It is my considered view that the said registration officers were either grossly negligent or compromised. Because of this peasant voters drawn from Luwero Sub-County held more than one valid voters card. In my view the 2nd Respondent violated the Provisions of sections 19(1) and (4), 23 (4) (a) and 26(1) of the Commission Act. This amounted to a violation of the Provisions of S.106 of the Local Government Act, and the principle of proper registration of voters and fairness behind it.

On the complaint that there were some residents of Luwero Town Council who were registered twice, and issued with certificates of registration and/or voters cards, Kamyā Matovu, the District Registrar/Returning Officer, in his supplementary affidavit in reply dated 19th September 2006 stated:

In Para.14: “That Sam, aware that most of the people who allegedly voted twice applied to be transferred and the first voter’s card which was issued was never removed from them in spite of having been issued new voter’s card (sic).”

Nsamba George (PW10) was cross-examined. He stated that he voted twice: first, using the name Nsamba George William at Lubega Memorial Polling Station, and, secondly, at Kakokolo Polling Station, using the name Yiga Eric. He told Court that at Lubega Memorial no mark was put on his finger after voting. At Kakokolo Polling Station there was no gadget into which to dip a finger after casting his ballot. He told Court that there was a lady at the last table who used a marker pen to put ink on a finger nail.

Kabogoza Francis attached to his affidavit photocopies of certificates of registration which showed that on 25.3.2005 he registered at PWD Parish at Ears Centre Polling station, and on 10.10.2005 he registered at Kavule Parish at Kasana Kakokolo Polling Station. He stated that on 10.3.2005 he voted for the 1st Respondent at both places.

Namatovu Alice attached to her affidavit photocopies of a certificate of registration and a voter's card which showed that on 11.10.2005 she registered at Kavule Parish at Kakokolo Polling Station, and she registered at Kiwogozi Parish at Kasana St. Jude Primary School Polling Station.

Balyegisawa Sylvester, who was already registered as a voter in Wobulenzi Town Council, attached to his affidavit photocopies of voter's cards which showed that he registered at Luwero South East Parish at Lubega Memorial Primary School Polling Station, and again, in the same Parish at Luwero Islamic Primary School Polling station. He stated that on 10.3.2006 he voted for the 1st Respondent at both places.

Sanyu Justine attached to her affidavit photocopies of a certificate of registration and a voter's card which showed that on 30.3.2005 she was registered at Kavule Parish at Kasana Kakokolo Polling Station, and again at Kasana PWD Parish at Ears Centre Polling station. She stated that on 10.3.2006 she voted for the 1st Respondent at both places.

I find the explanation given by Mr. Kamy Matovu, the District Registrar, most unsatisfactory. First, it should have struck the registration officers to see a voter registered at one Parish within the Town Council trying to register again in another Parish within the same Town Council. Would such a voter be transferring his/her registration from a Parish of origin to a Parish of residence,

or would he/she do so for convenience, following a change of residence? The update Officers should have been aware of their duty to demand from such voters' information to enable him or her to ascertain whether the voter was qualified to be registered as a voter in the Parish. The Update Officers should have asked the transferring voters to surrender the voters cards issued to them at the polling Stations where they had been previously registered. This would have been followed by an update of the voters' rolls for the previous Polling Stations where the Voters had been registered. The Voters names would have been struck off the voters' rolls for those Polling Stations.

Kamya Matovu stated that he was aware that in the cases of voters who applied to be transferred, the first voter's card was never removed from them in spite of having been issued new voters cards. With due respect to Mr. Kamya Matovu such an explanation is simplistic. I find it insufficient to cover the incompetence and/or inefficiency of the Update Officers who were engaged in the exercise. In the alternative, in my view, such conduct on the part of the Update Officers smells compromise.

On the complaint that the 2nd Respondent failed to issue one DR form for Luwero high School "B" (N-Z) Polling Station Kamya Matovu, in his affidavit in reply stated:

In Para.12 (vi) – At the close of the Polling Station, all the Petitioner's Polling Agents appended their signatures to the declaration of result forms at the close of the polling exercise. Copies of the Declaration of Result forms are annexed and marked "Annexure Group B".

S.136 (1) of the Local Governments Act requires that each Presiding Officer completes four copies of Form EC9 for the declaration of results. One copy is

retained by the Presiding Officer. One copy is enclosed in an envelope and forwarded to the Returning Officer. One copy is delivered to a candidate's agent. The fourth copy is deposited and sealed in the ballot box.

Kiberu Cyrus was the agent of the Petitioner at Luwero High School B(N-Z). He swore an affidavit dated 25th August 2006. He did not state in his affidavit that he had been denied a copy of form EC9 for the declaration of the results of that Polling Station. The Petitioner has not adduced sufficient evidence to show that the said DR form for Luwero High School B (N-Z) did not exist at all. Nor has the Petitioner proved that he exhausted checking other places where a copy of that form could be, for example, he did not say that he caused the opening of the ballot box to retrieve the copy which should have been sealed therein.

Under S.137(3) of the Local Governments Act every official agent of a candidate has the right to send to the Commission a statement in writing containing any complaint concerning the conduct of the election. It has not been shown that Kiberu Cyrus, the Petitioner's agent for Luwero High School B(N-Z) ever filed such a complaint with the Returning Officer or the Commission. Kanya Matovu annexed to his affidavit in reply, marked A, Results Tally Sheets, which included the results for Luwero West Parish, Luwero High school (N-Z) Polling Station. I, therefore, find no merit in the complaint that the 2nd Respondent failed to issue the DR form for that Polling Station.

Learned Counsel Mr. Mugogo submitted that the election which was conducted by the 2nd Respondent in Local Council Three Luwero Town Council on 10.3.2006 was not in accordance with the Principles laid down in the electoral laws. Counsel stated the principles to be:

- i. free and fair

- ii. The election must be conducted in accordance with the law;
- iii. It must be transparent;
- iv. The results must be based on majority vote.

Counsel invited Court to apply both the quantitative test and the qualitative test in resolving the issue of substantial effect. Counsel contended that the allegations made by the Petitioner cut across board and were not restricted to the result of the election in terms of figures. He submitted that the allegations touched on the conduct of the entire election exercise and its quality.

In Election Petition No.1 of 2001: Col. (Rtd) Dr. Besigye Kizza Vs. Museveni Yoweri Kaguta and Another (Supra) and Morgan Vr. Simpson (Supra) attempted to define what the word substantial meant. I agree with the opinion of Grove, J. The effect must be calculated to really influence the result in a significant manner. In order to assess the effect the Court has to evaluate the whole process of election to determine how it affected the result, and then assess the degree of the effect. The crucial point is that there must be cogent evidence direct or circumstantial to establish not only the effect of non-compliance or irregularities but to satisfy the Court that the effect on the result was substantial.

In this petition, the Petitioner has proved that there was non-compliance with the Provisions and Principles of part X of the Act in a few instances.

It has been held that the 2nd Respondent failed efficiently to update and clean the voters roll for Coffee Factory (A-M) Polling Station, in Luwero West Parish. Kanya Matovu, the District Registrar/Returning Officer conceded that the alleged 58 names of voters and the CLN9 forms still appeared in the National Voters' Register. It is the view of this Court that the failure to efficiently update and clean the Voters Register resulted in ghost voters remaining on the Voters

Roll for the polling Station in question. The presence of ghost voters on the Roll could have facilitated rigging through impersonation or multiple voting.

Two questions arise here:

- i. Where is the proof that the 58 names were used to vote?
- ii. Where is the proof that those persons voted for the winning candidate?

I find that the Petitioner has not adduced any evidence to help in answering any of those questions.

I, therefore, find that there has been lack of cogent evidence or direct or circumstantial, to establish the effect on the results of the presence of 58 ghost voters on the Voters Roll for coffee factory (A-M) Polling Station.

From the Result Tally sheet annexed to the affidavit in Reply of Kanya Matovu it is shown that in Luwero West Parish, Coffee Factory (A-M) Polling station had 664 registered voters. Out of this number the total number of votes cast in the elections on 10th March, 2006 was only 319 (48.0%). By simple calculations it is clear that 345 voters did not turn up to vote.

This Court has found that Peasant Voters drawn from Luwero Sub-County held more than one valid Voters Card. The 2nd Respondent has been blamed for this.

There must be cogent evidence, direct or circumstantial to establish the effect of Multiple registration on the results.

Luwalira Anaset (PWI) told Court that he knows Sempagama and voted for him at Kasana Piida (PWD) Polling Station.

Sebyala Simon stated in his affidavit that he voted for the 1st Respondent.

Nakiyingi Eva stated in her affidavit that she voted for the 1st Respondent.

Kyolaba Nakakooza (PW4) told Court that she voted at Mpagi's place, where she had been registered. She stated that they were about 19 people who went to vote.

Nabyonga Tereza (PW6) told Court that Gitta told her to vote for Sempagama; that she voted at Kasana; that she cast her vote personally.

Nakayiza Annet stated in her affidavit that she voted for the 1st Respondent.

Sendagire Jackson, Namuleme Oliva, Semakalu Moses, Mulindwa Satulo, Ndagire Hamiyati, Sempa Emmanuel, Robert Ssemuwemba, Lutalo Bob, Mulindwa Yusuf, Namutebi Cate, Bukenya Siraje and Sentuga Yusuf all stated in their respective affidavits that they voted for the 1st Respondent.

Learned Counsel Mr. Ddungu submitted that it was necessary to look at the Voters Rolls for each Polling Station affected to find out who actually voted.

Counsel Cited:

MORGAN AND OTHERS VR. SIMPSON AND ANOR [1975] IQ.B.151 (CA) at P.160.

Counsel submitted that the ballot boxes should have been opened and the actual votes analysed. Court has to look at a polling register to satisfy itself that the people who claim to have voted actually did so. Counsel submitted that there was no evidence to show that those people cast valid votes.

In election Petition No.1 of 2001: Col. (Rtd) Dr. Besigye Kizza case (Supra). ODER, JSC (RIP) said at P.456:

“I said that the entire election process had to be examined, not only what happened on election day. In the circumstances, it is my considered opinion that in deciding what effect the non-compliance with the provisions and principles of the Act had on the result of the election under consideration arithmetical numbers or figures are not the only determining factors in deciding whether non-compliance with the Provisions and Principles of the Act, did, or did not, affect the result of the election in a substantial manner. Figures in the main are the outcome of one day’s exercise, the Polling day. The indications of which candidate won and which one lost are the result of the margin between the figures obtained by the two. It is obtained at the end of the Polling day. Whether or not non-compliance with the provisions and principles of the Act, in the instant case, affected the result of the election in a substantial manner is, in my considered opinion, a value Judgment. Figures cannot tell the whole story.”

At P.457 ODER, JSC (RIP) said:

“In my considered opinion an accumulation, or sum total of the non-compliance with the Provisions and Principles of the Act, is the value yardstick for measuring the effect of non-compliance with the provisions of, and principles laid down in, the Act.”

In the same case at P.159 ODOKI, CJ. SAID:

“Elections must not be set aside on light or trivial grounds. It is a matter of great public interest. In the Hachney Case (Supra) Cited with approval in Morgan Vr. Simpson (Supra) grove, I emphasised that an election should not be annulled for minor errors or trivialities.”

The Judge is to look to the substance of the case to see whether the informality is of such a nature as to be fairly calculated in a rational mind to produce a substantial effect upon the election.

In the instant case it has been proved that there was multiple registration of 18 voters drawn from Luwero Sub-County and registered at polling Stations in Luwero Town Council. All these persons have stated either in Court or in their affidavits that they voted for the 1st Respondent. They have vividly explained how they were collected and ferried to Luwero Town Council on Polling day. I have no reason to doubt their claim that they were carried on one vehicle. I also believe their evidence that they voted for the 1st Respondent.

It has also been proved that some residents of Luwero Town Council were registered twice. Nsamba George (PW10), Kabogoza Francis, Namatovu Alice, Balyegisawa Sylvester and Sanyu Justine were registered twice.

It has also been proved that some voters actually voted twice. Nsamba George William, Kabogoza Francis, Matovu Ronald, Namatovu Alice, Balyegisawa Sylvester, Serwanbala Richard Kizito and Sanyu Justine voted twice for the 1st Respondent. By simple calculation this would have given the 1st Respondent fourteen (14) votes. It has been agreed that the margin between the 1st Respondent and the Petitioner was 49 votes. If the voters who voted twice had voted once the 1st Respondent would have obtained seven (7) votes. The allegation of multiple voting violated the principles of equality and fairness.

It has been established by evidence that the greatest numbers of voters drawn from Luwero Sub-County were registered in Kavule Parish at Kasana Kakokolo Polling Station, and in Kasana PWD Parish at Ears Centre Polling Station. Seven (7) people were registered at Kasana Kakokolo Polling Station. Nine (9)

people were registered at Ears Centre Polling Station. From the Results Tally Sheets attached to the affidavit in reply of Kanya Matovu it is shown as follows:-

At Kavule Parish, Kasana Kakokolo Polling Station there were 932 registered voters; the total votes cast were 483 (51.8%). Sebyala Charles (Petitioner) polled 265 votes. Sempagama Musa (1st Respondent) polled 90 votes. Between them there was a margin of 175 votes.

At Kasana PWD Parish, Ears Centre Polling Station, there were 461 registered voters; the total votes cast were 264 (57.3%). Sebyala Charles (Petitioner) Polled 144 votes. Sempagama Musa (1st Respondent) polled 59 votes. Between them there was a margin of 85 votes.

The Polling stations where multivoting took place were:

- i. Lubega Memorial polling Station in Luwero South East Parish.
- ii. Kasana Health Centre in Kiwogozi Parish.
- iii. Luwero Coffee factory "A" in Luwero West Parish.
- iv. Kasana St.Jude Primary school in Kiwogozi Parish.
- v. Luwero Islamic Primary School in Luwero South East Parish.
- vi. Luwero High School in Luwero West Parish.

The Results Tally Sheets showed:

At Lubega Memorial Primary School there were 551 registered voters; the total votes cast were 358. Sebyala Charles (Petitioner) polled 146 votes. Sempagama Musa (1st Respondent) polled 167 votes. There was a margin of 21 votes between the two candidates.

At Kasana Health Centre "A" (A-M) there were 544 registered voters; the total votes cast were 290 (53.3%). Sebyala Charles (Petitioner) polled 124 votes.

Sempagama Musa (1st Respondent) polled 89 votes. There was a margin of 35 votes between the two candidates.

At Luwero Coffee Factory (A-M) there were 664 registered voters; the total votes cast were 319 (48%). Sebyala Charles (Petitioner) polled 68 votes. Sempagama Musa polled 126 votes. There was a margin of 58 votes between the two candidates. At this Polling Station another candidate called Kasoma Hassan polled 118 votes.

At Kasana St. Jude Primary School B(N-Z) there were 503 registered voters; the total votes cast were 289 (57.5%). Sebyala Charles (Petitioner) polled 170 votes. Sempagama Musa (1st Respondent) polled 70 votes. There was a margin of 100 votes between the two candidates.

At Luwero Islamic Primary School “A” (A-M) there were 558 registered voters; the total votes cast were 292. Sebyala Charles (Petitioner) Polled 108 votes. Sempagama Musa (1st Respondent) polled 97 votes. There was a Margin of 11 votes between the two candidates.

At Luwero High School “B” (N-Z) there were 834 registered voters; the total votes cast were 498 (59.7%). Sebyala Charles (the Petitioner) polled 94 votes. Sempagama Musa (1st Respondent) polled 290 votes. There was a margin of 196 votes between the two candidates. At this polling station another candidate, Kasoma Hassan, polled 112 votes.

It has already been stated that the overriding principle is that the election must be free and fair. Other Principles are:

- i. That the election must be conducted in accordance with the law and procedure laid down by Parliament.
- ii. The election must be by universal adult suffrage.
- iii. The voting must be by secret ballot.
- iv. There must be transparency.
- v. The result of the election must be based on the majority of the votes cast.

It has been established by evidence that twenty five (25) votes (that is 18 plus 7) were wrongfully obtained. Looked at in light of the final margin between the 1st Respondent and the Petitioner (49 votes) it appears to constitute about half (50%). However, this Court has to examine the entire election process. Arithmetical numbers are not the only determining factor. This Court has to make a value judgment.

The question to pose here is:

Has it been proved that there was an accumulation of non-compliance with the provisions of Part X of the Local Governments Act and the Principles behind them.

My answer is No.

This Court has indeed examined the substance of the case to see if the instances of non-compliance can be said to have been fairly calculated in a rational mind to produce a substantial effect upon the result of the election. My answer is in the negative. I would therefore answer issue No.2 in the negative, that the non-compliance with the Provisions of, and the Principles behind them, part X of the Local Governments Act did not affect the result of the election in a substantial manner. This has been demonstrated by the results of the Polling Stations affected by the said non-compliance and failure. In my view, considering the results at those Polling Stations, and especially the margins between the

Petitioner and the 1st Respondent, I would consider the effect of any non-compliance or failure on the part of the 2nd Respondent negligible. There were twenty three (23) Polling Stations in all. The non-compliance or failure was connected with only eight (8) Polling stations. It was at Kasana Kakokolo and Ears Centre Polling Stations that seven and nine votes, respectively, were affected. I do not think that on that basis any rational ordinary person would condemn the election of the Chairperson L.C.III of Luwero Town Council as a sham. In my view a substantial proportion of registered and qualified voters freely, and in a transparent manner, cast their votes, and the result of the election was based on the majority of the votes counted.

The third issue is:

Whether any illegal practice or offence under the Local Governments Act was committed in connection with the election by the 1st Respondent personally or by his agents with his knowledge and consent or his approval.

The election of a candidate as a Chairperson of a Council can be set aside if it is proved on the basis of a balance of probabilities that an illegal practice or any other offence under the Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval. (S.139 (c)).

The Petitioner complained that the 1st Respondent was involved in bribery by giving gifts. Bribery is an offence under S.147 (1) of the Local Governments Act.

Mulindwa Satulo, Ndagire Hamiyati, Sebyala Simon, Nakiyingi Eva, Sempa Emmanuel, Robert Ssemuwemba, Lutalo Bob, Mulindwa Yusuf, Namutebi Cate and Bukenya Siraje all swore affidavits which contained a standard allegation

that the 1st Respondent gave each one Shs.1,000/= for lunch and promised to give them Shs.10,000/= through Gitta Umar. The alleged promises were made long before the nomination of candidates for Chairperson L.C.III of Luwero Town Council. At that time the 1st Respondent was not yet a candidate. Even the sum of Shs.1,000/= given to those persons for lunch after registration was a transaction long before the 1st Respondent became a candidate. In my view such activities should not affect the 1st Respondent as a candidate.

Bushara Moses, Kuhabwa Benon, Kalema Alex, Katende Julius and Omwoonyi James swore affidavits in which they stated that their Deputy Principal Asimwe Dennis informed them that the 1st Respondent had sent to them a bull. The fact that the 1st Respondent gave a bull to Everest College cannot be proved by such hearsay information.

Asimwe Dennis swore an affidavit in rebuttal where he stated that it was not true that the 1st Respondent brought meat to the school.

Those students alleged in their affidavits that on 9th February 2006 Ssempagama came personally and confirmed that he was the one who had given them meat. This was denied by Asimwe Dennis.

Nakintu Rachael, Mwesigwa Samuel, Tashobya Kenneth, Nakimuli.S, Kyesige Harriet, Sewanyana Rogers, Katongole John Bosco, Serunjogi Dirisa, Mayengo Nasser and Musoke Brian, all students of Everest College, have sworn affidavits in which they stated that it was not true that the 1st Respondent campaigned at their school on 9th March, 2006.

Bushara Moses, Kuhabwa Benon, Kalema Alex, Katende Julius and Omwoonyi James did not turn up for cross-examination.

Asiimwe Dennis was cross-examined. He stated that the 1st Respondent did not go to Everest College on either 9th or 10th March 2006. He stated that the 1st Respondent did not bring any meat to the school.

Mbabazi Fred, a Warden at Everest College was cross-examined. He stated that they did not eat meat on 8th or 9th March 2006.

Tashobya Kenneth (DW6) was cross-examined. He stated that on 9.3.06 there was an Assembly and the Deputy Principal, Asiimwe Dennis, advised them to go and vote if they had been registered. He stated that there was no school attendance on voting day.

Ssewanyana Rogers (DW7) was cross-examined. He told Court that the 1st Respondent used to go to their school because he was working with the Director of the school Ndaula Ronald in Luwero Town Council. The 1st Respondent was the Speaker of the Council. This witness told Court that Asiimwe told them at an assembly held on 9.3.06 at 5:00 p.m that they could go and vote. He disclosed that Katende and Bushara were campaigning for Sebyala (the Petitioner).

Mayengo Nasser (DW8) was cross-examined. He stated that he was a Campaign Agent for the 1st Respondent. He told Court that the 1st Respondent like other candidates came to campaign at the school. However, it was not on 8th, 9th or 10th of March 2006. He stated that Bushara Moses was a Campaign Agent of the Petitioner. He told Court that Bushara, Bukenya Hassan, and Omwoonyi told lies about the Deputy Principal and the Warden.

In light of the evidence on record, I find that the Petitioner failed to prove on the balance of probabilities. The illegal practice of bribery by giving gifts to Everest College alleged against the 1st Respondent.

Matovu Ronald stated that on voting day, 10th March, 2006, the 1st Respondent came to his home and gave him a voter's certificate of registration No.10623466 in the names of Semakula Richard, a voter registered at Luwero Coffee factory. The 1st Respondent in his affidavit in rebuttal, denied giving a voter's card to Matovu Ronald.

Nsamba George William (PW10) was cross-examined. He told Court that he got a card in the names of Yiga Eric from the 1st Respondent. He stated that he got the card on 10.3.2006 at around 6.00 a.m. He stated that the 1st Respondent gave him Shs.10,000/=. He was alone at home. He confirmed that he voted for Sempagama using Yiga Eric's voter's card. He said that Matovu Ronald was the next voter in line. He stated that after voting, he and Matovu Ronald jubilated. He confirmed that he was with Matovu Ronald; that they voted at Kasana Kakokolo. The witness was referred to the affidavit of Matovu Ronald.

It was read out to him that Matovu Ronald had stated that he voted at Luwero Coffee factory and at Kasana Health Centre Polling Stations. Nsamba George William insisted that he had stated the truth. He stated that he had been working with Matovu Ronald as Campaign Agents for the 1st Respondent. It is obvious from the above evidence that Nsamba George William was a liar.

The 1st Respondent stated in his affidavit in rebuttal that Matovu Ronald was not his supporter, and that he used to drive a vehicle belonging to the Petitioner during the campaigns.

Serwambala Richard Kizito stated in his affidavit that on Polling day, 10th March 2006, the 1st Respondent gave him a certificate of registration No.1276166 in the names of Zikusooka Robert, a registered voter at Luwero High School “B”. The 1st Respondent stated in his affidavit in rebuttal that Serwambala Richard was not known to him. He explained that some people got his appointment letters and filled in their names but they never campaigned for him.

The Petitioner was cross-examined. He stated that he did not personally see any illegal practices in the elections of Luwero Town Council.

Serwambala Richard Kizito claimed in his affidavit to have been appointed Campaign Agent for the 1st Respondent in Kasana and Kiwogozi. If this was true, then his candidate won the election. Naturally, he would be expected to be happy about this success. He was not cross-examined. The Court has no explanation for his sudden switch of sides after the elections.

Namatovu Alice stated in her affidavit that in March 2005 the 1st Respondent asked him to register again, and she did so. In my view that was long before the 1st Respondent was nominated to become a candidate.

Balyegisawa Sylvester stated in his affidavit that the 1st Respondent sent him to register in Luwero Town Council, and he promised to pay fees for his daughter Joy Mwebaza. I hold the view that this took place before the 1st Respondent was nominated as a candidate.

Sanyu Justine in her affidavit also claimed to have had dealings with the 1st Respondent; that the latter asked her to register again in another place; that he promised to pay her Shs.10,000/=. In my view, the 1st Respondent was not a candidate at that time.

The same applies to Mutyaba Harunah. The 1st Representative in his affidavit in rebuttal stated that Mutyaba Haruna was a member of the NRM who even contested in NRM .

This witness in Court The contents of Para. 7 are obviously not her words. She just could not tell one piece of paper from another. I, therefore, put no reliance on what she was made to state in her affidavit.

On the evidence before Court I find that the charges levelled against the 1st Respondent of giving certificates of registration to various agents to use to vote, or using his agents and supporters to impersonate and vote as other voters have not been proved on a balance of probabilities.

The 1st Respondent was accused of holding rallies on voting day at Everest College. I have considered the evidence of Bushara Moses, Kuhabwa Benon and Omwoonyi James adduced to prove the accusation. I have also considered the evidence of Asiimwe Dennis, Mbabazi Fred, Nakintu Rachael, Mwesigwa Samuel, Tashobya Kenneth, Nakimuli.S., Kyesige Harriet, Sewanyana Rogers, Katongole John Bosco, Serunjogi Dirisa, Mayengo Nasser and Musoke Brian, all members of Everest College. They all stated that it was not true that the 1st Respondent campaigned at their school on voting day. I particularly noted from the evidence of Ssewanyana Rogers that the 1st Respondent used to go to that school whenever he wanted because he was working with the Director, Ndaula Ronald. I believe the evidence adduced on behalf of the 1st Respondent so, I find that the Petitioner has failed to prove on the balance of Probabilities that the 1st Respondent held rallies on voting day to canvas for votes contrary to S.155(1) (b) of the Local Governments Act.

In answer to issue No.3 I hold that it has not been proved on a balance of Probabilities that the 1st Respondent personally or by his agents committed any illegal Practices or offences under the Act in connection with the election. So, this ground also fails.

In answer to the forth issue I hold that the Petitioner is not entitled to the declarations prayed for in the Petition. The Petition therefore fails. It is hereby dismissed with costs to both the 1st and 2nd Respondents. Orders accordingly.

Hon. Justice Moses Mukiibi

17.4.2007.

17.4.2007 at 4.30 p.m.

Mr. Byarugaba Eric - for Petitioner.

Petitioner is in Court.

Mr. Ddungu Henry for 2nd Respondent

Mr. Abaine Jonathan – for 1st Respondent

1st Respondent is in Court.

Ngobi: Court Clerk/Interpreter.

Court:- Judgment is delivered in open Court.

Hon. Justice Moses Mukiibi

17.4.2007