

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-CS-0096-2010

NAOME KIBAAJU.....PLAINTIFF

VERSUS

1. NATIONAL REISTANCE MOVEMENT)
2. JOEL MUGISHA).....DEFENDANTS
3. ROSEMARY NYAKIKONGORO)

BEFORE: THE HON. MR. JUSTICE BASHAIJA K ANDREW

J U D G M E N T

National Resistance Movement Party (hereinafter called the ‘NRM’) primary elections for Woman Member of Parliament (MP) were held for Sheema District from 4th to 7th September, 2010. The Plaintiff, Naome Kibaaju, the 3rd Defendant Rosemary Nyakikongoro, Gubare Jane, Ainomugisha Eunice and Imelda Twongyeirwe all participated as candidates. The Rosemary Nyakikongoro the 3rd Defendant was declared the winner having polled the highest number of votes totaling to 29,555.

Dissatisfied with the results, the Plaintiff brought this action against NRM, the 1st Defendant, the 2nd defendant Mugisha Joel who was the 1st Defendant’s Returning Officer for Sheema District and the 3rd Defendant Rosemary Nyakikongoro. The Plaintiff claimed that the elections were flawed with material irregularities, rigging, intimidation, and hence null and void. She sought for this court’s orders and declaration that:

- a) The 3rd Defendant was not validly elected.
- b) The 1st Defendant conducts fresh elections.
- c) The Plaintiff be paid general damages.
- d) The exemplary damages; and

e) costs of the suit.

In bid to prove her case, the Plaintiff adduced evidence of twelve witnesses (hereinafter called “PW”). She also relied on several documents agreed upon with the Defendants at the Scheduling Conference. They need not be listed here but will be constantly referred to in this judgment.

For their part, the 2nd Defendant represented the 1st Defendant and together with the 3rd Defendant put in a joint Written Statement of Defence. They denied all the allegations contained in the plaint. They too adduced evidence of six witnesses (hereinafter called “DW”).

The following facts were agreed:-

1. The Plaintiff and 3rd Defendant were candidates in the NRM primary elections for Woman MP representative for Sheema District in September, 2010.
2. On 7/9/2010, the 2nd Defendant as the 1st Defendant’s Returning Officer, acting for the 1st Defendant declared the 3rd Defendant as winner of the elections.
3. The result were as follows –
 - i) Nyakikongoro Rosemary 29,555
 - ii) Nuwamanya Jane Gubare 23,001
 - iii) Kibaaju Naome 18,376
 - iv) Twongyeirwe Imelda 3,577
 - v) Ainomugisha Eunice 3,419

The following were the agreed issues:-

1. Whether the plaint discloses a cause of action.
2. Whether the election of the 3rd Defendant as Sheema District Woman MP representative for the NRM was flawed with material irregularities, rigging and intimidation.
3. Whether the said NRM primaries were free and fair.
4. Whether the 3rd Defendant was validly elected.

5. What are the remedies available to the parties?

The summaries of each party's case are reflected in the brief facts already stated above and need not be reproduced again in detail.

ISSUE 1 – Whether the plaint discloses a cause of action.

This issue though agreed upon by both sides was originated by the defence. It was sought to show that the plaint disclosed no cause of action for suing the 3rd Defendant, Joel Mugisha, in his name instead of his official capacity as the Returning Officer (hereinafter called "R.O") for NRM for Sheema District.

On her part, the Plaintiff did not specifically respond to this particular point, but only generally asserted that the plaint discloses a cause of action. She relied on a number of authorities to back her position. (See ***Auto Garage v Motokov [1971] EA 514; Kebirungi Justine v Roadtainers Ltd and 2 O'rs [2008] HCB 721; Spry, Civil Procedure In East Africa (Revised) 1993/94 at page 125; Order 6 Rule 1 and Order 7 Rule 1 Civil Procedure Rules***). The Plaintiff contended that as a registered voter No. 11913903 in the NRM party, and also as a candidate for Sheema District Woman MP NRM flag bearer, she has a right, which was violated and that the Defendants are responsible, hence she has a cause of action against all of them.

The law which articulates the principles regarding cause of action is settled. In the ***Auto Garage case*** (supra) the principles which underpin a cause of action are that:-

- (a) the plaintiff enjoyed the right;
- (b) the right has been violated;
- (c) the Defendant is liable.

These principles have been applied by courts in Uganda in various other cases such as ***Sempa Mbabali v Kiiza [1985] HCB 46*** at page 47; ***H. MB Kayondo v AG [1987] KALR, Prianut Enterprises Ltd v AG, Supreme Court Civil Appeal No. 1 of 2001***. It has also been held that if any of the essential principles above is lacking, then a plaint is a nullity and might be struck off. See ***Uganda Aluminum Ltd v***

Restitute Twinomugisha, Court of Appeal Civil Appeal No. 22 of 2000; Tororo Cement Company Ltd v. Fronkina International Ltd, Court of Appeal Civil Appeal No. 21 of 2000.

It is also settled that for court to determine whether or not a cause of action has been established, it looks at the plaint and its annexures, if any, and nowhere else. See ***Kapeeka Coffee Works Ltd and Anor v NPART, Court of Appeal Civil Appeal No. 3 of 2010; Al-Hajji Nasser Ssebagala v A.G and Ors, Constitutional Petition No. 01 of 1999; A.G. v Major General Tinyefuza, Supreme Court Constitutional Appeal No. 1 of 1997.*** These are the principles by which this court will be guided in the instant case to determine whether or not a cause of action has been established.

It was shown on evidence that the 2nd Defendant was the Returning Officer of the 1st Defendant. He was at all material times acting in the official capacity for the conduct of the election exercise. As such, it would have been desirable that he be joined as a defendant in the official capacity. It is, however, not the position of the law that failure or omission to name him in the official capacity automatically defeats the cause of action. It is settled that a plaintiff is *dominus litus* and can chose who to sue against, and from whom he can obtain reliefs. See ***Animal Feeds Ltd v AG, HCCS No. 788 of 1090; Batemuka v Anywar [1987] HCB 71.*** It is also my view that the Returning Officer in the NRM Party is unlike a statutory body or person capable of suing or being sued in its official name/capacity such that failure or omission to name the official or corporate personality would be fatal to the pleadings. It would appear that the instant case is one in which a plaintiff would certainly sue any person with whom she was aggrieved and could obtain reliefs from. Failure or omission to name the 2nd Defendant in his official capacity/name did not, and could not, render the plaint to fall within provisions of ***Order 7 Rule 11 (c)*** of the ***Civil Procedure Rules***. The first issue is accordingly answered in the affirmative.

ISSUE 2.

Whether the election of the 3rd Defendant as Sheema Woman MP was flawed with material irregularities, rigging and intimidation.

This issue is largely one of evidence. However, it has to be viewed in light of the well established general principles which underpin the elections. These were laid down in *Rtd. Col. Dr. Kiiza Besigye v Yoweri Kaguta Museveni & Electoral Commission Presidential Election Petition No. 1 of 2001* per Odoki CJ; and have since been applied in other election petitions or election-related cases. See *Byamukama K. James v Kaija William & Anor, High Court Election Petition No. 9 of 2006*; *The Electoral Commission & Margaret Komuhangi v Tibwita Grace Bagaya, Court of Appeal Election Petition Appeal No. 19 of 2002*; *Joy Kabatsi Kafura v Anifa Kawooya & Electoral Commission, Supreme Court Election Petition Appeal No. 25 of 2007*; and a number of others. The principles are as follows:-

- i)** The elections must be free and fair; and this is the guiding principle.
- ii)** The elections must be by universal adult suffrage which underpins the right to register and vote.
- iii)** The elections must be conducted in accordance with the law and procedure laid down by Parliament.
- iv)** There must be transparency in the conduct of elections.
- v)** The result must be based on the majority votes cast.
- vi)** To ensure that elections are free and fair, there should be sufficient time given for all stages of elections, nominations, campaigns, voting and counting of votes. Candidates should not be deprived of their right to stand for elections and citizens to vote for candidates of their choice through unfair manipulations of the process by electoral officials.
- vii)** The entire process should have an atmosphere free from intimidation, bribery, violence collusion or anything intended to subvert the will of the people.
- viii)** The election procedures should guarantee the secrecy of the ballot.
- ix)** Accuracy of counting and announcement of result in a timely manner.
- x)** Election laws and guidelines for those participating in elections should be made and published in good time.
- xi)** Fairness and transparency must be adhered to at all stages.

The above principles serve as a litmus test against which to gauge an election for *fairness* which is the overriding principle.

Apart from the above stated principles, **Article 15** of the **NRM Constitution** regarding the conduct of party elections enjoins the NRM/EC “*to adhere to the national electoral laws and to observe them*”. It follows logically that by necessary implications the NRM Party Constitution directly incorporates the principles espoused by the national electoral laws and the Constitution as they have been interpreted by the courts in the above cited cases. The NRM Party, though a private organization, plays by the same rules and election principles encapsulated in the national electoral laws when it comes to the party's electoral processes.

On page 141 in the case of **Rtd. Col. Dr. Kiiza Besigye** (supra) the rationale of the above principles was given as follows;

“An election is a mechanism whereby choices of a political culture are known. These choices should be expressed in ways which protect the rights of the individual and ensure that each vote cast is counted properly. An election process which fails to ensure fundamental rights of citizens before and after elections is flawed.”

The Plaintiff contends that all the principles of free and fair elections were grossly violated.

It also needs to be pointed out at this stage that this action was brought by way of an ordinary plaint under **Order 4 Rule 1** of the **Civil Procedure Rules**, but the matters raised touch and concern elections. A party who wishes to challenge the outcome of an election would, ordinarily, proceed by way of petition supported by affidavit evidence and not oral testimonies. However, it would seem to me that the position is different where the election challenged is a party primary election as opposed to a national election, the latter of which the mode of challenge is specified in the national electoral laws. The mode of challenging party primaries is not specified in or by any particular legislation. As such, it would be proper to proceed by ordinary plaint under **Order 4 Rule 1** of the **Civil Procedure Rules**. It would also seem true

that a party could as well proceed by Notice of Motion or even by petition since there is currently no specific legislation which prescribes the mode of challenging party primary elections. Such elections are usually regarded as party “in-house” matters. The foregone notwithstanding, since the plaint in the instant case relates to elections, the principles, the burden and standard of proof required in electoral disputes stated above do apply *mutatis mutandis*.

The burden of proof, therefore, lies on the Plaintiff to satisfy court on balance of probabilities that the non-compliance with the above stated principles in the electoral laws affected the result in a substantial manner. The standard of proof required in electoral matters is higher than in ordinary civil cases and similar to the standard of proof required to establish fraud but not as high as in criminal cases where proof beyond reasonable doubt is required. See ***Rtd. Col. Dr. Kiiza Besigye v Y. K. Museveni & The Electoral Commission, Presidential Election Petition No.1 of 2006***. The instant case being an election-related matter, I take the view that the standard of proof in the latter cited case equally applies.

An election would be regarded as flawed with material irregularities if it has deviated from the above stated principles of elections, not just in part but also in whole, and not just in one but all of them. It must also be demonstrated that the deviation has violated the set Guidelines and Regulations of fair play in so dear a degree and court can at once say with certainty that the violation has rendered untenable the principle of fairness and it has led to a sham electoral process and result. In the instant case, the applicable Standard Regulations are the “***NRM Electoral Guidelines 2010***” which constitute the independent variable against which to measure the party election for fairness and general compliance.

1. Voting time.

The voting exercise was supposed to commence on the 4/09/2010. It is stated in evidence of both sides that two factors precipitated the delay and voting could not proceed as scheduled in most parts of Sheema District. The first one was that it had been agreed by all the stakeholders that the ballot papers should be stamped at the

back to authenticate them. This exercise took some time from morning up to around 3.00 p.m. of the voting day and consumed much of the time for voting.

The second factor was the heavy down-pour, where it rained in most parts of the District. Voting did not take place in many of these parts save for a few near the District headquarters of Kibingo, who got the ballots and started to vote, albeit belatedly.

It was alleged by the Plaintiff that there was a postponement of the voting exercise agreed upon by all the stakeholders, but that the 1st and 2nd Defendants allowed voting to go on despite radio announcements postponing the elections. The Plaintiff argued that, as a result, in many parts near the District headquarters voting proceeded in absence of her agents and the result was in favour of the 3rd Defendant since only her agents and voters were available to vote, whereas all the parties had agreed to postpone the voting.

Firstly, the Plaintiff's claims of a radio announcement postponing elections to the following day are not supported nor proven. No evidence has been put across to support that view. If there was ever any such an announcement, it could not have been as the result of the meeting of the stakeholders because no such decision was arrived at. I have looked at the minutes of the said meeting and they do not show that such a decision was ever taken.

Secondly, the evidence on the Declaration of Results Forms (DRF) also indicates that agents of all candidates participated in signing them including those of the Plaintiff. Therefore, the alleged voting ahead of time, if it occurred at all, would not only affect the results of the Plaintiff but also of the other candidates. There is ample evidence that the Plaintiff actively participated in the 4/09/2010 elections as demonstrated by the signatures of her agents on the DRFs for the polling stations near Kibingo Headquarters. The Plaintiff neither claimed nor adduced evidence that her agents' signatures were forged. She did not call any evidence to deny the signatures of her agents on the DRFs. The claim by Plaintiff that voting on 4/9/2010 disadvantaged her lacks merit in as much as the allegation of postponement of elections remained unproven.

ii) Illegal elections.

This claim by the Plaintiff is related to (i) above in that she alleged that no elections were supposed to take place on 4/9/2010. The same reasons as in (i) above were repeated. At the risk of repetition, I have found that there were no illegal elections as a result of the alleged radio announcement and/or the decision of the meeting of the stakeholders to postpone the same. On the contrary, there is ample evidence that elections actually took place properly in areas such as Kibingo Town Council, Nyamufumura and Kyabandara, where the Plaintiff, invariably, participated on equal terms as other candidates. Therefore, she should not later be heard to claim that the elections were illegal merely because she lost in those areas where she expected to win. All the DRFs, except for only one which is not signed, show that elections were held and the Plaintiff duly participated. In the result, the Plaintiff's claims that she was denied a chance to be voted for in those areas because of the postponement and radio announcement are simply not true. The elections were not illegal.

iii) Voting Schedule.

The time to commence and end the voting exercise by the NRM Party was guided by ***“The NRM Primaries 2010 Guidelines for Voting, counting, Tallying and Transmission of Elections Results”*** (hereinafter called the *“Guidelines”*). **Part B 7(d)** in particular, stipulates that voting exercise shall commence at 8.30 a.m. and end at 4.00 p.m. **Item 7 (g)** provides that at 4.00 p.m., the Presiding Officer will declare the end of the voting exercise and sorting will commence, and in case there are still any voters in the queue at the closing time, they shall be allowed to vote. This court takes the view that the principal purpose of this particular item in the Guidelines was intended to regulate the manner and time within which voting should commence and end. To note is the fact that the item allows for extension of voting just in case the exercise is still on-going at the close of the fixed time, proof of which must be the existence of people still in the queue. I have, however, not found anything in the said Guidelines to suggest unlimited extension of voting time that would stretch into the night or after it had become dark. The exercise could only be extendable for a time after 4.00 p.m but not late into the night where darkness would not afford transparency in the exercise. Therefore, any voting exercise that proceeded after it was dark was in contravention of the spirit and letter of the ***Guidelines of the NRM Party***.

In the above latter regard, I have found ample evidence to prove that the elections in Sheema never complied with the election scheduled time as per the **Guidelines**. In a number of polling centres, voting ended long after 4.00 p.m. In others it went on into the night. Evidence adduced by the Plaintiff amply demonstrated the following pattern particularly in the following affected areas:

<u>Village</u>	<u>Time voting ended</u>
1. Rukanja	8.25 p.m.
2. Keijengye	9.44 p.m.
3. Rugarama	6.00 p.m.
4. Karushanga cell	8.25 p.m.
5. Rubare	9.30 p.m.
6. Nyakishambya	5.00 p.m.
7. Karindamuhoro	6.50 p.m.

In these and a number of other polling centres, voting time as per **NRM Party Guidelines** was grossly flaunted. In others, such as Nyamufumura there was no recorded time for the commencement and end of the voting exercise. As a consequence of voting after the closing time and particularly after it was dark, the evidence of the Plaintiff has amply demonstrated that there were clear instances of massive ballot stuffing which appears to have gone on unchecked in those particular areas. As will be shown later in this judgment, votes cast in same areas far exceeded the total number of registered voters there.

The phenomenon of late-night voting was not only limited to areas near Kibingo Headquarters, but was widespread. The unchallenged evidence of the Plaintiff had amply demonstrated that in Bugongi sub-county voting went on well beyond 10.00 p.m in a number of areas. This was worsened by lack of proper lighting. In some areas, voting proceeded with the aid of candle light. The affected areas according to the Plaintiff's evidence are Rugarama, Isingiro and Rutungu. In another instance at the home of one Kakooko am LC official, it was stated that voting went on beyond 10.00 p.m. using a candle light. In my opinion, this element of irregularity has been proved to the required standard.

iii) Ballot Stuffing.

Evidence as per **Exhibit P 7** is to the effect that voting materials were released well after 01.30 p.m. on 4/09/2010. According to the DRFs, voting did not commence even for some areas near Kibingo Headquarters until after 5.00 p.m. Based on his knowledge as the Returning Officer, (the 2nd Defendant) Joel Mugisha testified that it would take a voter about eight minutes on average to go through the entire voting process at any given polling centre. He, however, could not account for, or explain how over 106 people could finish casting their votes in a space of less than two hours. For instance, according to the Plaintiff's evidence on DRFs, it took an incredible less than two hours for 135 people to cast their vote at Kibingo Town Council where it would have ordinarily taken them more than 15 hours. At Karindamuhoro Polling centre, 105 votes had been cast by 6.50 p.m. Even in polling centres that flouted the guidelines and voted beyond 4.00 p.m. it is doubtful, that the total number of voters so indicated would have finished casting their votes from the time it started, which was late, to when it should have ended. This was particularly so given the difficulties enumerated in evidence of the Returning officer DW2 that the voting started late, *inter alia*, because of the late delivering of materials and problems of transportation, heavy rains and inadequate human resources. Therefore, the voting trends in the affected areas irresistibly point to no other logical conclusion than that of ballot stuffing. It is my opinion that it was more than just a coincidence that the polling centres which voted after it was dark were largely those that exhibited the above marked trend of ballot stuffing. No reasonable explanation could be assigned for too many ballots cast in too short a time other than that of ballot stuffing. It is also no wonder that in his evidence, DW2 stated that the total votes for Woman MP for Sheema was 77,932, yet in cross-examination he tendered in **Exhibit D9** showing a total of 76,901. The results which he had declared on 7/9/2010 as final results on **Exhibit P5** had a total of 79,653 votes for Woman MP for Sheema District. On **Exhibit P.13** and **Exhibit P.5** there was a variance of 11,360 votes. All this disparity could not be explained nor could the excess votes which appeared be clarified. In my view this was evidence of massive ballot stuffing where the total number of votes cast exceeded the total number of the known voters; even to the District Returning Officer. It is also my view that it does not matter who could have

taken advantage of the excess votes. It only points to the irregularities and malpractices in the electoral process which affected the results in a substantial manner.

(v) Dispatching process.

Evidence of DW1, one Ndeeba Isaac, the Administrative Officer for Sheema District is to the effect that they did not know the number of ballots dispatched to each Electoral Area of the District. As such, there was no record against which they could compare and ascertain the returns. DW2, the RO stated the same that he had no record of the excess material. He only gave the reason that no provision was made for recording such materials.

Apart from the above, it was stated by the RO that the envelopes would not be opened for the number of ballots to be cross-checked in full view of the stakeholders as required under Guidelines. What was done was for presiding officers of the respective sub-counties to simply sign for bags/sacs, take them and deposit them at the Police of the respective sub-counties or parish polling centres and after that it would be “to whom it may concern”. Again this, in the opinion of court was grossly irregular and ran counter the spirit and letter of **Regulation 6 (f)** of the **Guidelines** which states that;

“After opening the envelopes, the polling officials shall check the number of ballot papers in the full view of campaign agents and voters.”

The electoral officials ignored this provision, and as a result they could not clearly tell how many ballots were used, or left unused, or those spoilt or those returned. Without observing these basic requirements, the election lacked transparency and became suspect and could not be regarded as free and fair. It would, therefore, not be left to stand.

Vi) Retrieval of voting materials.

On basis of the evidence of mainly DW1, DW2 and PW2, court is satisfied that the process of retrieval of ballots and voting materials from the polling centres has been proved to have been grossly irregular and bordered on fraud. It has been demonstrated by evidence of DW1, the Administrative Officer, and from the record of the DRFs that voting ended much earlier than forty-eight hours after it had started in all polling centres. However, the returns could not be made within time. In several other instances, particularly where voting had ended at night, the ballots and DRFs stayed in people's homes or at Police Posts overnight and for all that time. A glance at the DRFs of several of the affected areas immediately reveals massive alterations, insertions, cancellations and superimpositions of figures. The areas particularly affected in this regard are mainly Kitagata sub-county, Kasana and some parts of Shuuku. Evidence of DW1 was to the effect that it took the intervention of Police to instruct for the retrieval of the voting materials from Kitagata and Kasana sub-counties in particular. This was long after a day or two since the voting exercise had ended. It is the stated principles of a free and fair election stated earlier that the results should be announced in timely and transparent manner. The evidence on this particular point proves that the voting exercise in Sheema District certainly violated this principle. Whether the violation affected the result in substantial manner depends on the cumulative effect it had along with other such related violations.

Vii) Insufficient ballots and other voting materials.

There was no dispute from either side in this case that the voting materials, particularly the DRFs and ballots, were quite inadequate in some area while they were in excess in some others. This disparity was blamed on the NRM/EC by the Plaintiff's as well as the Defendants' witnesses. However, what could be perceived as arising from the above blame - game is that it vividly demonstrated lack of capacity by the 1st Defendant to conduct the election exercise in accordance with the laid down principles. On basis of the Plaintiff's and Defendants' evidence on this particular aspect, clearly the 1st Defendant was ill-prepared to carry out the exercise. This was amply demonstrated by the numerous postponements of the voting and the delivery of materials in different wrong places. For instance, DW1 testified that materials meant for Ruhinda in a different District altogether ended up at Kibingo

Headquarters, while those destined for Sheema District end up being delivered in Isingiro a different District altogether. To retrieve them, DW1 had to go to Isingiro only to be told that he should collect them from Mbarara District Headquarters. The net effect of all this confusion is that it demonstrated lack of sufficient capacity to conduct the exercise in accordance with principles of free and fair elections. In my view, there was ample evidence to prove the Plaintiff's claim that the 1st Defendant lacked sufficient capacity to conduct free and fair party primary elections.

viii). Irregular improvisation methods.

This would have been a positive attribute had it not given room for vices of rigging and ballot stuffing. Evidence of Mr. Ndeeba (DW1) was that the use of ordinary exercise books and papers from therein as registers and ballot papers respectively, was supposed to apply where excess voters beyond the shortage of the ballots did not exceed only three voters. The papers plucked out of exercise books would be authenticated with a stamp of the LC1 authorities of the area and the voter would be entered on a register in an exercise book which would be harmonized with the main register.

In the instant case, however, there exists large numbers of "improvised" ballot papers which were used beyond the allowed maximum three voters. The number of exercise books used as "substitute" registers exceeded the limits set by the NRM Electoral authorities for Sheema District. In my opinion this undoubtedly gave room for the manipulation of the total number of voters and the votes cast such that in areas that had the particular shortfall of official ballot papers the number of voters more than exceeded the total registered voters there. According to evidence of DW1 and PW2, and PWII, and as per **Exhibits P. 2B, P.14, D15, and D13** the affected areas in this regard were in Muhito, Kyarushakara, and Kashekuro. In other instances, the "improvising" was extended to use of the National Electoral Commission Voters Registers which bore photographs including non-NRM Party members. According to the unchallenged testimony of PW7, some registers of former Bushenyi District, from which Sheema District was carved out, showed the date of June 2010 while

other registers, presumably for the new Sheema District were flout with double or multiple registration with mixed up polling centres.

According to evidence adduced by DW2, **Exhibit P.7** was authored by him which revealed that several documents for some sub-counties were missing, and also missing were registers of seven out of eleven sub-counties. This scenario of missing names was so severe that even DW3, a woman MP candidate, testified that her name was missing from the voters' register to the extent that the register at the polling centre from where she voted had pages missing and her name was recorded in an "improvised register" (read exercise book) and that she was allowed to vote. In my opinion, the improvisation method paved way for the manipulation of total ballots and total number of voters, and went out of control and could not afford a free and fair result of the process. Evidence in totality showed that it was taken advantage of and the result could not be said to reflect the free will of the voters of Sheema District.

ix) Excessive Shortage of Declaration of Results

Forms.

According to the **NRM Guidelines, Regulations No. 9**, the DRFs are the unfailing requirement after the voting exercise has ended for the entry of the results of total voters obtained by each of the candidates. It is required under the Guidelines that DRFs should be signed by each candidate's agent who must be availed a copy thereof to cross-check the results with the final tally at the District headquarters tally centre. In event that a candidate's agent is absent or simply refuses to sign the DRRF, the presiding officer must write a report to explain the circumstances. This is evidence of DW1 and DW2 in accordance with Regulation No. 9 of the NRM Guidelines.

While on court record, there are quite a number of unsigned DRFs by candidates' agents, there is not a single report of any presiding officer to explain the anomaly. It could be that the omission by the presiding officers was an oversight or sheer incompetence. Whichever the case, it is a negative commentary on the competence

of the electoral officials most of whom actually returned the unsigned DRFs and made no reports as required. Apart from that, when the allegations of falsification of results at higher levels were made, there were no official “fall-back” DRFs with the candidates’ agents. There was, therefore, no proof against which to verify the results claimed. This failure, in my view, compromised the principle of transparency in the conduct of the exercise during and after the elections. It is not surprising that some of the DRFs on court record which were signed by candidates’ agents have altered figures while in others the totals do not add up at all.

x) Faulty Display Registers.

This issue has partly been resolved above. However, there is ample evidence of faulty registers which were used as display registers. Some voters’ names went missing at the last moment, including that of DW6 a candidate and others were duplicated. When she could not find her name, she got registered in the “improvised” exercise book and was allowed to vote. The duplicated names in the display registers were returned “uncleaned out” on the final voters registers. In other areas of Kitagata sub-county, Kagango and Kigarama and others, the same Display Registers turned out to be the final Voters’ Registers. Some few Voters Registers with cancelled duplicated names were exhibited in court, but the RO could neither confirm when the cancellations were made nor clarify whether they were not taken advantage of.

It is my view that a bloated Voters’ Register is a recipe for rigging and a host of other imaginable malpractices which include multiple voting, “ghost” voting where non-voting persons would be assigned to duplicate names, and other vices. Evidence of duplicated or missing names was rampant in areas of Mabare, Kyarushakara, Kashekuro and Kyeibanga. On the whole, failure to clean up the Voters Registers was a serious omission whose effect alone could determine the outcome of the entire electoral process since voting depended largely on the Voters Register.

(xi) Tallying and Declaration of the results.

The ***NRM Guidelines, Regulations No. 11, 12, 13 and 14*** specify the manner in which DRFs and tally sheets must be handled. The reading of the Guidelines and the evidence of PWII, DW1 and DW2 easily reveals that the set Guidelines were either ignored or flouted with impunity. The 2nd Defendant as RO easily performed the worst. He failed to tell court from which tally sheets he had obtained the figures he posted as the final results. He clearly testified that he did not have the parish and sub-county tally sheets from which he would ordinarily have derived the correct and verified results of the sub-counties before he could tell with certainty that what he had been given was indeed the correct tally.

Regulations 11 of the Guidelines states that;

“Declaration forms from polling stations will be sent to parish tallying centre for tallying.”

Regulation 12 states:-

“At each level, results from the lower level will be tallied and sent to the higher level”

Regulation 13 states:-

“Returning officers at each level will be responsible for sending the tally sheets to the next level.”

Regulations 14 states:-

“The Tally sheet at every level shall be signed by each candidate’s agent, and each agent shall be availed a copy of the sheet.”

The Guidelines above presuppose that each level of tallying feeds into the next level till the final tally level at the District. As the RO for entire Sheema District, it was incredible that DW3 could give a final tally without evidence of the immediate preceding levels’ tally. Bearing in mind that it is a principle of elections that each vote cast must be carefully counted and tallying done in a transparent manner for all to see, failure to observe this principle would, in my view, render suspicious the result so announced. While bold letters and figures on a Manila paper like the one the RO used as tally sheet, and exhibited in court at trial, could be conspicuous for all to see, it did not translate into transparency. I have further taken note that ***Exhibit D17*** (final tally) when compared with ***Exhibit P.5***, a lot of doubt remain as to whether, in fact, all results of all the polling centres were ever received and tallied in arriving at

the final results. The 2nd Defendant vainly attempted to deny the “missing results” comment on the final District tally sheet, but court found his denial as too transparent even to be a white wash. It could not be accidental that when certain polling centres missing results were highlighted that is when similar comments of “missing results” appeared on the final tally sheet. It is also no coincidence that the final results were announced at between 8.00 a.m. and 9.00 a.m. on 7/9/2010 according to DW1 Mr. Ndeeba, yet there is evidence that some of the results were still being received on the same day at 10.30 a.m. Certainly what was announced as a final tally and results of the Sheema District election did not reflect the true and accurate result and the will of the voters.

xii) *Underage Voters.*

PW1 made the allegation that there was massive use of underage voters to her disadvantage as a candidate. To prove this allegation, however, she only enumerated one incident which was brought to her attention by one of her agents. The anonymous agent was never called to testify in court. Apart from this evidence being inadmissible as hearsay, the single instance could not pass the test for the rest of the voting elsewhere as having had underage voters. A single underage voter would not, in my view, affect the outcome in a substantial manner either quantitatively or qualitatively. The former simply goes to the number of votes while the latter as stated above is really hearsay evidence which is inadmissible and goes to the quality of the evidence. The other allegations of underage voting were too generalized to be specifically proved by the Plaintiff. They could not make a compelling case that they affected the result in a substantial manner.

xiii) *Intimidation.*

Evidence of PW1 and PW5 was to the effect that some voters, particularly students of some schools, were turned away by Police from voting. DW2 the RO denied ever giving instructions to Police to turn away students and that, in fact, some schools allowed students to vote. I take the view that absence of RO’s instructions to Police notwithstanding, there was no specific denial that some students were not turned

away from voting. It is a different thing to say that RO never instructed Police and that those particular students were indeed turned away. Court is satisfied on basis of the uncontroverted evidence of the Plaintiff that some students were turned away by Police from voting, irrespective of which candidate they would have voted for. This amounted to the disenfranchisement of voters by Police - a state actor – whether acting of their own or under some obscure instructions. This coupled with the evidence of PW1 that some other students in certain schools were allowed to vote has the cumulative qualitative effect on the final result in a substantial manner.

xiv) Computer and Manual Tallying of final results.

Under the *NRM Guidelines, Regulation No. 16* states that;

“All districts which received computers are required to prepare electronic tallies of the results.”

It is the evidence of PW1, PW11, DW1 and DW2 that Sheema District had computers and had, in fact, started to use them for tallying of the election results of up to five sub-counties. They were, however, stopped on orders of a one Kabuye Nickson, the Deputy Resident District Commissioner (D/RDC) of Bushenyi, who entered the tallying centre and took over the exercise. DW2 attempted to explain that the stoppage of use of computers had been agreed upon by all candidates and stakeholders. Resort had to be had to a manual process of tallying. I am, however, not persuaded that the parties could validly consent to violate the Regulations in the NRM Guidelines. Voting and tallying would be arbitrary if stakeholders consented to defeat the rules and later come up to claim that it was after all by consensus. I alive to the fact that free and fair NRM party elections could only be guided by principles laid down the party Guidelines, but not by the consensus of the candidates in the election. Therefore, intervention by the Deputy Resident District Commissioner compromised the principle of accuracy of results. This is the more reason the RO could not give proper account of the final tally and where he derived the results he announced from. It is also the more reason the final results are now being challenged.

xv) Stealing of votes/ballots.

The Plaintiff led evidence that a certain motor vehicle driven by a one “Naana” a known agent of the 3rd Defendant was driven off from the District Headquarters packed with sacs of ballot papers and envelopes to Nyamufumura polling centre. It never had Police escort as should have been the practice to secure the ballots. The complaints were raised with the RO that the 3rd Defendant’s motor vehicle had ferried the materials unescorted; a fact which she vehemently denied at trial. Police dispatched another vehicle which intercepted the earlier one at Nyamufumura trading centre with ballots and other voting materials. However, by this time, some envelopes had been torn and ballots removed. An eye-witness, PW8, corroborated the testimony of the two Police officers who testified that they had followed the said motor vehicle and intercepted it and brought it back to the Headquarters and handed the matter to the RO.

PW8 added that a certain pot-believed elderly man had run into the market at Nyamufumura taking with him some ballots. In as much as it was never proved that the said motor vehicle belonged to 3rd Defendant, it was been proved that such a motor vehicle existed and was, certainly, involved in the stealing of the votes. The said motor vehicle was never part of those hired by the 1st Defendant to ferry the voting materials according to the list which was brought to court by the 2nd Defendant (DW2). The fact that it was intercepted by police ferrying voting materials tells volumes about the level of stealing of votes in this election. Questions indeed abound as to where the ballots which were taken by the described pot-bellied man ended. The RO did just a bad job trying to deny the incident witnessed by Police officers and PW8 an eye-witness. The RO’s silence on what happened to the motor vehicle and materials after Police handed them over to him not only shows that he had actual knowledge of the whole vote stealing affair but could also prove that he actively participated in or condoned it as the RO. He failed to explain how the said motor vehicle came to be involved whereas the motor vehicles could only move after he had personally assigned them the materials and to the sub-county Registrars and police escort. The only reasonable inference of his actions is that he sanctioned and

or condoned the vote/ballot stealing. The RO was evidently partial in allowing a known agent of a particular candidate to ferry and distribute voting materials - some of which ultimately got stolen at Nyamufumura. The RO exhibited evident partiality in this instance and others; such as when he ignored complaints from one candidate's agent called Katooto (PW9) who raised issues of election malpractices with the RO. The RO had the tenacity to allow ballots to be stolen in broad day light and again did nothing about it. The RO proved a veritable liar when he denied the stealing of the materials recovered by Police and also denied that he ever knew or spoke to Katooto the Chief agent of the Plaintiff during, before or after the voting exercise. The RO demonstrated that he is untrustworthy and unbefitting of the calling of the office of the RO in the NRM Party. His personal mishandling of the election exercise, the tallying and announcement of results had a significant overall impact on the outcome of the entire process. As it were, he had become part of the problem rather than the solution.

xvi) Sectarianism.

The Plaintiff alleged that the election exercise was marred by sectarianism. PW1 gave an instance of one lady called Fundi a known supporter of the 3rd Defendant, who campaigned against the Plaintiff saying "do not vote a Muhima". Though the defence never denied this specifically, I am of the opinion that a single incident of one Fundi could not compel a reasonable voter to vote one way or the other. Fundi was just spewing bitterness which could not influence the result in a substantial manner. In any case, the Plaintiff did not demonstrate to the satisfaction of court what influence the said Fundi wielded over other people such that her sectarian remarks could be said to exert significant impact in the voting patterns of the people. While it may be true that sectarian remarks do indeed have a criminal impact, they could not exert a measurable impact on voters in this particular case. This alleged element has not been proved to the satisfaction of court by the Plaintiff.

xvii) Excess Votes than registered voters.

Evidence on this element appears to have been the last straw in the electoral process in Sheema District generally and for the Woman MP in particular. The evidence of PW11 was to the effect that the RO (DW1) had at the onset of the elections availed all the candidates' agents with what was termed "Expected Totals" based on the number of the registered voters as per the Voters' Register. Therefore, one could predict with a greater degree of certainty what the outcome would be in relation to the totals on the "Expected Totals". However, it was a shock the after the tallying and announcing of the final results – even with the phenomenon of the notorious exercise books – that the disparity between the results announced and "Expected totals" swelled out of proportion – with the variance of over 11,360 votes. This was besides the wrong additions on the DRFs and arithmetical errors in the tally sheets. I am of the opinion that the margin of error of what was announced as final results and the standard figures of the "Expected Totals" was too big and a little less than astonishing. The "Expected Totals" were based on the final Voters Register cleaned of "ghost" names, duplicated names and those of dead people. The final results announced therefore would logically be expected to be less and not more than those on the voters' Register.

The existence of excess voters than those registered by a wide margin affected the outcome in a substantial manner. It was qualitatively untenable and quantitatively unacceptable. The evidence of swelling results was witnessed in Kyangyenyi sub-county, Kabutsye, Kigarama sub-county and Masheruka.

xviii) The involvement of Deputy RDC.

Evidence of the Bushenyi District D/RDC's involvement was led by PW1 and corroborated by a number of other witnesses. The D/RDC one Kabuye Dickson is said to have hijacked the tallying process, stopped the use of computers and ordered a manual tally. This piece of evidence was, however, denied by the DW1 who stated that the D/RDC got involved only to restore a situation that had degenerated into near chaos. All this took place in the tally centre at the Headquarters. ***Exhibit P.4***, a Report written by the NRM Chairman Sheema District one Dr. Elioda Tumwesigye to the Chairman NRM, puts blame for the disruption of tallying exercise squarely on

the said D/RDC. This evidence is well corroborated by that of Toskins Byaruhanga (PW 12) who was the tallying agent of the Plaintiff at the said tally centre. The role of the D/RDC in the NRM electoral process was never explained by the electoral officials, particularly when it was viewed as partisan by the Plaintiff. If it is true that the D/RDC intervened to calm the volatile situation, then it gives credence to the allegations that, indeed, there was chaos in the tallying exercise which could not afford an accurate outcome. If, on the other hand, there was no chaos but only “political anxiety” as Mr. Ndeeba (PW2) put it in his testimony, then the D/RDCs presence brandishing an automatic rifle was unnecessary. One does not need an SMG Rifle to calm political anxiety. I have found the evidence credible that the D/RDC hijacked the tallying process, stopped the electronic tallying and ordered the manual one. He redirected the tallying process as he fancied regardless of the NRM Guidelines. The presence of his seniors and other security officers appears to have been of no consequence to the D/RDC since nothing much is said about their involvement but only that of the D/RDC. He should not have got involved at any stage of the process, and should have, perhaps, restricted himself to his legal and constitutional mandate as D/RDC. On the whole, Exhibit P.4 which was authored by Dr. Elioda Tumwesigye way back on 18/9/2010 before even this case was filed in court, is a glaring indictment on the general conduct of elections in Sheema District generally, and on the matter before court now in particular. The 1st and 2nd Defendants would have done well to heed the wise counsel of their District NRM Chairman. The involvement of the D/RDC caused chaos in the tallying process and had a significant impact on the final result.

xix) Bribery.

PW1 and her witnesses alleged that a one Mawanda an agent of the 3rd Defendant was arrested with envelopes containing money suspected to be bribes for voters. However, (DW6) the 3rd Defendant told court that the money was facilitation for her agents, and that police who had arrested the said Mawanda refunded the money to the 3rd Defendant after satisfying themselves that it was not for bribery purposes. Apart from the said Mawanda's case, no evidence of other instance of bribery was adduced by the Plaintiff. The issue of the money was, in my opinion, satisfactorily explained by the 3rd Defendant. The allegations of bribery therefore fail. On the

whole, issue No. 2 is answered in the affirmative. The irregularities and malpractices proved had a substantial effect on the outcome of the electoral process.

ISSUE No.3

Whether the said NRM primaries in Sheema District were free and fair.

This court is of the view that the findings on this particular issue are directly the outcome of the findings in Issue No. 2 above. Suffice it to note that fairness is the overriding principle in an election and its violation or non-observance will render an election to be nullified. See ***Bakaluba Peter Mukasa v Namboze Betty Bakireke, S.C. Election Petition Appeal No. 4/2010.***

An election based upon the above stated irregularities and malpractices cannot by any stretch of imagination be called free and fair. It does not represent or reflect the people's free choice. Intervening factors acted to subvert the people's will and democratic choice. The only question that remains to be answered is to what effect? Courts have held that the degree of non-compliance which would justify setting aside an election must be substantial. It must be one calculated really to affect the result of the election. A substantial effect was defined in ***Rtd. Col Kiiza Besigye and Museveni*** (supra) quoting the case of ***Hackney***, where Odoki CJ. Stated as follows;

“What is substantial effect? This has not been defined in the statute or judicial decision. But the case of Hackney (supra) attempted to define what the word substantial means. I agree with grove J. The effect must be calculated to really influence the result in a significant manner.”

The test for substantial effect is both qualitative and quantitative depending on the facts of each case. The qualitative test usually looks at the total and the difference between the loser and the winner. Quantitative test examines the manner and conditions under which an election was conducted. See ***Katuntu Abdu v Kirunda Kiveijinja and Electoral Commission, Election Petition No. 7of2006; Byamukama K James v Kaija William & A'nor, Election Petition 09 of2006.***

In the instant case, the Plaintiff does not seek orders of this court to be declared the winner with the most votes, which would call for the quantitative test. She is only

contesting the general manner in which the elections were conducted, which calls for the application of the qualitative test. Issue No. 2 above has already been answered in the affirmative. It follows then that Issue No. 3 is also answered in the affirmative that the elections were not free and fair.

ISSUE No. 4:

Whether the 3rd Defendant was validly elected.

This issue is taken care of by the findings in Issues No.2 and 3 above. It is answered in the negative. The 3rd Defendant's declaration as winner was based on an election that was not free and fair. As already stated, an election that violates the principles of elections spelt out earlier cannot be left to stand.

ISSUE No. 5.

What are the remedies available?

- (a) Court declares that the election conducted on the 5th September, 2010 in Sheema District for Woman MP NRM Party primaries was flawed with material irregularities, rigging, and hence null and void.
- (b) Court declares that the 3rd Defendant was not validly elected.
- (c) Court orders that new elections be organized and conducted by electoral officials other than those who were in-charge of the previous election, who did not live up to the task of overseeing a democratic elections.
- (d) No exemplary damages are awarded as prayed because the circumstances of the case do not merit the same.
- (e) Court awards general damages of Shs. 30,000,000/= (Thirty Million shillings) to the Plaintiff to be borne by the 1st and 2nd Defendants. The 3rd Defendant was a mere beneficiary under the machinery of the 1st and 2nd Defendants.
- (f) Court awards costs of the suit to the Plaintiff.

J u d g e
24/11/2010

Parties present as before.

Mr. Byamugisha for the Defendants in court.

Mr. Nangumya for Plaintiff in court.

Judgment read in open court before all parties.

Court clerk. Mr. Tumwikirize present.

Bashaija K Andrew
J u d g e
24/11/2010